



# Corporations Act 2001

No. 50, 2001

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This compilation is in 6 volumes

Volume 1: sections 1–260E  
**Volume 2: sections 283AA–601DJ**  
Volume 3: sections 601EA–742  
Volume 4: sections 760A–993D  
Volume 5: sections 1010A–1369A  
Volume 6: sections 1370–1637  
Schedules  
Endnotes

Each volume has its own contents

**This compilation includes commenced amendments made by Act No. 45, 2017**

Prepared by the Office of Parliamentary Counsel, Canberra

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## About this compilation

### **This compilation**

This is a compilation of the *Corporations Act 2001* that shows the text of the law as amended and in force on 1 July 2017 (the *compilation date*).

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

### **Uncommenced amendments**

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

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

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

### **Editorial changes**

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

### **Modifications**

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

### **Self-repealing provisions**

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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## Chapter 2L—Debentures

### Part 2L.1—Requirement for trust deed and trustee

#### 283AA Requirement for trust deed and trustee

- (1) Before a body:
- (a) makes an offer of debentures in this jurisdiction that needs disclosure to investors under Chapter 6D, or does not need disclosure to investors under Chapter 6D because of subsection 708(14) (disclosure document exclusion for debenture roll overs) or section 708A (sale offers that do not need disclosure); or
  - (b) makes an offer of debentures in this jurisdiction or elsewhere as consideration for the acquisition of securities under an off-market takeover bid; or
  - (c) issues debentures in this jurisdiction or elsewhere under a compromise or arrangement under Part 5.1 approved at a meeting held as a result of an order under subsection 411(1) or (1A);

regardless of where any resulting issue, sale or transfer occurs, the body must enter into a trust deed that complies with section 283AB and appoint a trustee that complies with section 283AC.

Note: For rules about when an offer of debentures will need disclosure to investors under Chapter 6D, see sections 706, 707, 708, 708AA and 708A.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The body may revoke the trust deed after it has repaid all amounts payable under the debentures in accordance with the debentures' terms and the trust deed.
- (3) The body must comply with this Chapter.

## Chapter 2L Debentures

### Part 2L.1 Requirement for trust deed and trustee

#### Section 283AB

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Note: Sections 168 and 601CZB require a register of debenture holders to be set up and kept.

- (4) The regulations may exempt a specified offer of debentures, or a specified class of offers of debentures, from subsection (1).

#### 283AB Trust deed

- (1) The trust deed must provide that the following are held in trust by the trustee for the benefit of the debenture holders:
- (a) the right to enforce the borrower's duty to repay;
  - (b) any charge or security for repayment;
  - (c) the right to enforce any other duties that the borrower and any guarantor have under:
    - (i) the terms of the debentures; or
    - (ii) the provisions of the trust deed or this Chapter.

Note: For information about the duties that the borrower and any guarantor body have under this Chapter, see sections 283BB to 283CE.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

#### 283AC Who can be a trustee

##### *Who can be trustee*

- (1) The trustee must be:
- (a) the Public Trustee of any State or Territory; or
  - (aa) a licensed trustee company (within the meaning of Chapter 5D); or
  - (b) a body corporate authorised by a law of any State or Territory to take in its own name a grant of probate of the will, or letters of administration of the estate, of a deceased person; or
  - (c) a body corporate registered under section 21 of the *Life Insurance Act 1995*; or
  - (d) an Australian ADI; or

Section 283AD

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- (e) a body corporate, all of whose shares are held beneficially by a body corporate or bodies corporate of the kind referred to in paragraph (b), (c) or (d) if that body or those bodies:
  - (i) are liable for all of the liabilities incurred, or to be incurred, by the trustee as trustee; or
  - (ii) have subscribed for and beneficially hold shares in the trustee and there is an uncalled liability of at least \$500,000 in respect of those shares that can only be called up if the trustee becomes a Chapter 5 body corporate (see section 254N); or
- (f) a body corporate approved by ASIC (see section 283GB).

Note: Section 283BD provides that if the borrower becomes aware that the trustee cannot be a trustee, the trustee must be replaced.

*Circumstances in which a person cannot be trustee*

- (2) A person may only be appointed or act as trustee (except to the extent provided for by section 283AD) if the appointment or acting will not result in a conflict of interest or duty. This subsection is not intended to affect any rule of law or equity.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**283AD Existing trustee continues to act until new trustee takes office**

An existing trustee continues to act as the trustee until a new trustee is appointed and has taken office as trustee, despite any rule of law or equity to the contrary.

Note: This section applies even if the existing trustee resigns.

**283AE Replacement of trustee**

*Related party of existing trustee may be appointed as a new trustee*

- (1) In addition to any other powers of appointment under the terms of the debentures or provisions of the trust deed, the borrower may

Section 283AE

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appoint a body corporate that is related to the existing trustee as trustee in place of the existing trustee if:

- (a) the body corporate can be a trustee under section 283AC; and
- (b) the existing trustee consents in writing to the appointment.

The appointment has effect despite any terms of the debentures or provisions of the trust deed.

*Appointment by Court*

(2) The Court may:

- (a) appoint a person who may be a trustee under section 283AC as trustee on the application of the borrower, a debenture holder or ASIC if:
  - (i) a trustee has not been validly appointed; or
  - (ii) the trustee has ceased to exist; or
- (b) terminate the existing trustee's appointment and appoint a person who may be a trustee under section 283AC as trustee in the existing trustee's place on the application of the borrower, the existing trustee, a debenture holder or ASIC if:
  - (i) the existing trustee cannot be trustee under section 283AC; or
  - (ii) the existing trustee fails, or refuses, to act.

## **Part 2L.2—Duties of borrower**

### **283BA Duties of borrower**

A borrower that is required to enter into a trust deed under section 283AA has the duties imposed by this Part.

### **283BB General duties**

The borrower must:

- (a) carry on and conduct its business in a proper and efficient manner; and
- (b) provide a copy of the trust deed to:
  - (i) a debenture holder; or
  - (ii) the trustee;if they request a copy; and
- (c) make all of its financial and other records available for inspection by:
  - (i) the trustee; or
  - (ii) an officer or employee of the trustee authorised by the trustee to carry out the inspection; or
  - (iii) a registered company auditor appointed by the trustee to carry out the inspection;and give them any information, explanations or other assistance that they require about matters relating to those records.

Note: The borrower also has a duty to call a meeting of debenture holders in certain circumstances (see section 283EA).

### **283BC Duty to notify ASIC of information related to trustee**

- (1) Within 14 days after the trustee is appointed, the borrower must lodge with ASIC a notice containing the following information:
  - (a) the name of the trustee;

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- (b) any other information related to the trustee or the debentures that is prescribed by the regulations.
- (2) If there is any change to the information, the borrower must, within 14 days of the change, lodge with ASIC a notice containing the changed information.
- (3) A notice under subsection (1) or (2) must be in the prescribed form.

### **283BCA Register relating to trustees for debenture holders**

#### *The register*

- (1) ASIC must establish and maintain a register relating to trustees for debenture holders.
- (2) The regulations may prescribe the way in which the register must be established or maintained, including the details that ASIC must enter in the register.

#### *Inspection of register*

- (3) A person may inspect the register, and may make copies of, or take extracts from, the register.
- (4) The regulations may prescribe the fees that a person must pay ASIC to do the things mentioned in subsection (3).
- (5) Any disclosure necessary for the purposes of this section is authorised by this section.

### **283BD Duty to replace trustee**

The borrower must take all reasonable steps to replace the trustee under section 283AE as soon as practicable after the borrower becomes aware that the trustee:

- (a) has ceased to exist; or
- (b) has not been validly appointed; or
- (c) cannot be a trustee under section 283AC; or

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(d) has failed or refused to act as trustee.

**283BE Duty to inform trustee about security interests**

If the borrower creates a security interest, it must:

- (a) give the trustee written details of the security interest within 21 days after it is created; and
- (b) if the total amount to be advanced on the security of the security interest is indeterminate and the advances are not merged in a current account with bankers, trade creditors or anyone else—give the trustee written details of the amount of each advance within 7 days after it is made.

Note: If the advances are merged in a current account the borrower must give the trustee the details in the quarterly report (see subsection 283BF(4)).

**283BF Duty to give trustee and ASIC quarterly reports**

*Quarterly reports*

- (1) Within 1 month after the end of each quarter, the borrower must:
  - (a) give the trustee a quarterly report that sets out the information required by subsections (4), (5) and (6); and
  - (b) lodge a copy of the report with ASIC (see section 351).

*First quarter*

- (2) The first quarter is the period of 3 months ending on a day fixed by the borrower, by written notice to the trustee. The day must be less than 6 months after the first issue of a debenture under the trust deed.

*Subsequent quarters*

- (3) Each of the subsequent quarters are periods of 3 months. The trustee may allow a particular quarter to be a period of less than 3 months if the trustee is satisfied that special circumstances justify doing so.

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*Content of quarterly report*

- (4) The report for a quarter must include details of:
- (a) any failure by the borrower and each guarantor to comply with the terms of the debentures or the provisions of the trust deed or this Chapter during the quarter; and
  - (b) any event that has happened during the quarter that has caused, or could cause, 1 or more of the following:
    - (i) any amount deposited or lent under the debentures to become immediately payable;
    - (ii) the debentures to become immediately enforceable;
    - (iii) any other right or remedy under the terms of the debenture or provisions of the trust deed to become immediately enforceable; and
  - (c) any circumstances that have occurred during the quarter that materially prejudice:
    - (i) the borrower, any of its subsidiaries, or any of the guarantors; or
    - (ii) any security interest included in or created by the debentures or the trust deed; and
  - (d) any substantial change in the nature of the business of the borrower, any of its subsidiaries, or any of the guarantors that has occurred during the quarter; and
  - (e) any of the following events that happened in the quarter:
    - (i) the appointment of a guarantor;
    - (ii) the cessation of liability of a guarantor body for the payment of the whole or part of the money for which it was liable under the guarantee;
    - (iii) a change of name of a guarantor (if this happens, the report must also disclose the guarantor's new name); and
  - (f) the net amount outstanding on any advances at the end of the quarter if the borrower has created a security interest where:
    - (i) the total amount to be advanced on the security of the security interest is indeterminate; and



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- (ii) the advances are merged in a current account with bankers, trade creditors or anyone else; and
- (g) any other matters that may materially prejudice any security interests or other interests of the debenture holders.

Note: Paragraph (f)—the borrower has a duty to inform the trustee about security interests as they are created (see section 283BE).

- (5) If the borrower has deposited money with, or lent money to, a related body corporate during the quarter, the report must also include details of:
  - (a) the total of the money deposited with, or lent to, the related body corporate during the quarter (see subsection (7)); and
  - (b) the total amount of money owing to the borrower at the end of the quarter in respect of the deposits or loans to the related body corporate.Disregard any amount that the borrower deposits with an ADI in the normal course of the borrower's business.
- (6) If the borrower has assumed a liability of a related body corporate during the quarter, the report must also include details of the extent of the liability assumed during the quarter and the extent of the liability as at the end of the quarter.
- (7) For the purposes of subsections (5) and (6), the report:
  - (a) must distinguish between deposits, loans and assumptions of liability that are secured and those that are unsecured; and
  - (b) may exclude any deposit, loan or assumption of liability on behalf of the related body corporate if it has:
    - (i) guaranteed the repayment of the debentures of the borrower; and
    - (ii) secured the guarantee by a security interest over all of its property in favour of the trustee.

*Formalities*

- (8) The report must:
    - (a) be made in accordance with a resolution of the directors; and
    - (b) specify the date on which the report is made.
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**283BG Exceptions to borrower's duty to report to trustee and ASIC**

Section 283BF does not apply in respect of:

- (a) a borrower, while:
  - (i) it is under external administration; or
  - (ii) a receiver, or a receiver and manager, of property of the borrower has been appointed and has not ceased to act under that appointment; or
- (b) a security interest in PPSA retention of title property.

**283BH How debentures may be described**

- (1) The borrower may describe or refer to the debentures in:
  - (a) any disclosure in relation to the offer of the debentures; or
  - (b) any other document constituting or relating to the offer of the debentures; or
  - (c) the debentures themselves;only in accordance with the following table:

<b>How debentures may be described</b>		
<b>Item</b>	<b>Description</b>	<b>When description may be used</b>
1	mortgage debenture	only if the circumstances set out in subsection (2) are satisfied
2	debenture	only if the circumstances set out in subsection (2) or (3) are satisfied
3	unsecured note or unsecured deposit note	in any other case

- (1A) The borrower commits an offence if it intentionally or recklessly contravenes subsection (1).

*When debentures can be called mortgage debentures or debentures*

- (2) The borrower may describe or refer to the debentures as:
  - (a) mortgage debentures; or
  - (b) debentures;

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if:

- (c) the repayment of all money that has been, or may be, deposited or lent under the debentures is secured by a first mortgage given to the trustee over land vested in the borrower or in any of the guarantors; and
- (d) the mortgage has been registered, or is a registrable mortgage that has been lodged for registration, in accordance with the law relating to the registration of mortgages of land in the place where the land is situated; and
- (e) the total amount of that money and of all other liabilities (if any) secured by the mortgage of that land ranking equally with the liability to repay that money does not exceed 60% of the value of the borrower's or guarantor's interest in that land as shown in the valuation included in the disclosure document for the debentures.

*When debentures can be called debentures*

- (3) The borrower may describe or refer to the debentures as debentures if:
  - (a) the repayment of all money that has been, or may be, deposited or lent under the debentures has been secured by a security interest in favour of the trustee over the whole or any part of the tangible property of the borrower or of any of the guarantors; and
  - (b) the tangible property that constitutes the security for the security interest is sufficient and is reasonably likely to be sufficient to meet the liability for the repayment of all such money and all other liabilities that:
    - (i) have been or may be incurred; and
    - (ii) rank in priority to, or equally with, that liability.

**283BI Offences for failure to comply with statutory duties**

The borrower commits an offence if it intentionally or recklessly contravenes section 283BB, 283BC, 283BD, 283BE, 283BF or 283EA.

## Part 2L.3—Duties of guarantor

### 283CA Duties of guarantor

If a borrower is required to enter into a trust deed under section 283AA in relation to debentures, a guarantor in respect of the debentures has the duties imposed by this Part.

### 283CB General duties

The guarantor must:

- (a) carry on and conduct its business in a proper and efficient manner; and
- (b) make all of its financial and other records available for inspection by:
  - (i) the trustee; or
  - (ii) an officer or employee of the trustee authorised by the trustee to carry out the inspection; or
  - (iii) a registered company auditor appointed by the trustee to carry out the inspection;and give them any information, explanations or other assistance that they require about matters relating to those records.

### 283CC Duty to inform trustee about security interests

If the guarantor creates a security interest, it must:

- (a) give the trustee written details of the security interest within 21 days after it is created; and
- (b) if the total amount to be advanced on the security of the security interest is indeterminate, give the trustee written details of:
  - (i) the amount of each advance made within 7 days after it is made; or

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- (ii) where the advances are merged in a current account with bankers, trade creditors or anyone else—the net amount outstanding on the advances at the end of every 3 months.

**283CD Exceptions to guarantor’s duty to inform trustee**

Section 283CC does not apply in respect of:

- (a) the guarantor, while:
  - (i) it is under external administration; or
  - (ii) a receiver, or a receiver and manager, of property of the guarantor has been appointed and has not ceased to act under that appointment; or
- (b) a security interest in PPSA retention of title property.

**283CE Offences for failure to comply with statutory duties**

The guarantor commits an offence if it intentionally or recklessly contravenes paragraph 283CB(b) or section 283CC.

## Part 2L.4—Trustee

### 283DA Trustee's duties

The trustee of a trust deed entered into under section 283AA must:

- (a) exercise reasonable diligence to ascertain whether the property of the borrower and of each guarantor that is or should be available (whether by way of security or otherwise) will be sufficient to repay the amount deposited or lent when it becomes due; and
- (b) exercise reasonable diligence to ascertain whether the borrower or any guarantor has committed any breach of:
  - (i) the terms of the debentures; or
  - (ii) the provisions of the trust deed or this Chapter; and
- (c) do everything in its power to ensure that the borrower or a guarantor remedies any breach known to the trustee of:
  - (i) any term of the debentures; or
  - (ii) any provision of the trust deed or this Chapter;unless the trustee is satisfied that the breach will not materially prejudice the debenture holders' interests or any security for the debentures; and
- (e) notify ASIC as soon as practicable if:
  - (i) the borrower has not complied with section 283BE, 283BF or subsection 318(1) or (4); or
  - (ii) a guarantor has not complied with section 283CC; and
- (f) notify ASIC and the borrower as soon as practicable if the trustee discovers that it cannot be a trustee under section 283AC; and
- (g) give the debenture holders a statement explaining the effect of any proposal that the borrower submits to the debenture holders before any meeting that:
  - (i) the Court calls in relation to a scheme under subsection 411(1) or (1A); or
  - (ii) the trustee calls under subsection 283EB(1); and

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- (h) comply with any directions given to it at a debenture holders' meeting referred to in section 283EA, 283EB or 283EC unless:
- (i) the trustee is of the opinion that the direction is inconsistent with the terms of the debentures or the provisions of the trust deed or this Act or is otherwise objectionable; and
  - (ii) has either obtained, or is in the process of obtaining, an order from the Court under section 283HA setting aside or varying the direction; and
- (i) apply to the Court for an order under section 283HB if the borrower requests it to do so.

Note 1: Paragraph (g)—Section 411 relates to compromises and arrangements.

Note 2: Section 283DC deals with indemnification in respect of a trustee's liability to the debenture holders.

**283DB Exemptions and indemnifications of trustee from liability**

- (1) A term of a debenture, provision of a trust deed or a term of a contract with holders of debentures secured by a trust deed, is void in so far as the term or provision would have the effect of:
- (a) exempting a trustee from liability for breach of section 283DA for failure to show the degree of care and diligence required of it as trustee; or
  - (b) indemnifying the trustee against that liability;
- unless the term or provision:
- (c) releases the trustee from liability for something done or omitted to be done before the release is given; or
  - (d) enables a meeting of debenture holders to approve the release of the trustee from liability for something done or omitted to be done before the release is given.
- (2) For the purposes of paragraph (1)(d):
- (a) a release is approved if the debenture holders who vote for the resolution hold 75% of the nominal value of the debentures held by all the debenture holders who attend the meeting and vote on the resolution; and

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- (b) a debenture holder attends the meeting and votes on the resolution if:
  - (i) they attend the meeting in person and vote on the resolution; or
  - (ii) if proxies are permitted—they are represented at the meeting by a proxy and the proxy votes on the resolution.

**283DC Indemnity**

The trustee is not liable for anything done or omitted to be done in accordance with a direction given to it by the debenture holders at any meeting called under section 283EA, 283EB or 283EC.



## **Part 2L.5—Meetings of debenture holders**

### **283EA Borrower's duty to call meeting**

#### *Duty to call meeting*

- (1) The borrower must call a meeting of debenture holders if:
  - (a) debenture holders who together hold 10% or more of the nominal value of the issued debentures to which the trust relates direct the borrower to do so; and
  - (b) the direction is given to the borrower in writing at its registered office; and
  - (c) the purpose of the meeting is to:
    - (i) consider the financial statements that were laid before the last AGM of the borrower; or
    - (ii) give the trustee directions in relation to the exercise of any of its powers.

Note: The trustee usually must comply with any directions given to it by the debenture holders at the meeting (see paragraph 283DA(h)).

#### *Duty to give notification of meeting*

- (2) If the borrower is required to call a meeting, it must give notice of the time and place of the meeting to:
  - (a) the trustee; and
  - (b) the borrower's auditor; and
  - (c) each of the debenture holders whose names are entered on the register of debenture holders.Notice to joint holders of a debenture must be given to the joint holder named first in the register of debenture holders.
- (3) The borrower may give the notice to a debenture holder:
  - (a) personally; or
  - (b) by sending it by post to the address for the debenture holder in the register of debenture holders; or

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- (c) by sending it to the fax number or electronic address (if any) nominated by the debenture holder; or
- (d) by any other means that the trust deed or the terms of the debentures permit.

Note: A defect in the notice may not invalidate a meeting (see section 1322).

*When notice by post or fax is given*

- (4) A notice of meeting sent to a debenture holder is taken to be given:
  - (a) 3 days after it is posted, if it is posted; or
  - (b) on the business day after it is sent, if it is sent by fax or other electronic means;unless the trust deed or the terms of the debentures provide otherwise.

**283EB Trustee's power to call meeting**

*Trustee may call meeting in event of breach*

- (1) If the borrower or a guarantor fails to remedy any breach of the terms of the debentures or provisions of the trust deed or this Chapter when required by the trustee, the trustee may:
  - (a) call a meeting of debenture holders; and
  - (b) inform the debenture holders of the failure at the meeting; and
  - (c) submit proposals for protection of the debenture holders' interests to the meeting; and
  - (d) ask for directions from the debenture holders in relation to the matter.

*Trustee may appoint person to chair meeting*

- (2) The trustee may appoint a person to chair a meeting of debenture holders called under subsection (1). If the trustee does not exercise this power, the debenture holders present at the meeting may appoint a person to chair the meeting.

**283EC Court may order meeting**

- (1) Without limiting section 283HA or 283HB, the Court may make an order under either of those sections for a meeting of all or any of the debenture holders to be held to give directions to the trustee. The order may direct the trustee to:
  - (a) place before the debenture holders any information concerning their interests; and
  - (b) place before the debenture holders any proposals to protect their interests that the Court directs or the trustee considers appropriate; and
  - (c) obtain the debenture holders' directions concerning the protection of their interests.
- (2) The meeting is to be held and conducted in the manner the Court directs. The trustee may appoint a person to chair the meeting. If the trustee does not exercise this power, the debenture holders present at the meeting may appoint a person to chair the meeting.

## Part 2L.6—Civil liability

### 283F Civil liability for contravening this Chapter

- (1) A person who suffers loss or damage because a person contravenes a provision of this Chapter may recover the amount of the loss or damage from:
  - (a) the person who contravened the provision; or
  - (b) a person involved in the contravention.This is so even if the person did not commit, and was not involved in, the contravention.
- (2) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.
- (3) This Part does not affect any liability that a person has under any other law.

## Part 2L.7—ASIC powers

### 283GA ASIC's power to exempt and modify

- (1) ASIC may:
  - (a) exempt a person from a provision of this Chapter; or
  - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may do all or any of the following:
  - (a) apply to all or specified provisions of this Chapter;
  - (b) apply to all persons, specified persons, or a specified class of persons;
  - (c) relate to all debentures, specified debentures or a specified class of debentures;
  - (d) relate to any other matter generally or as specified.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
  - (a) regulations made for the purposes of this Chapter; and
  - (b) definitions in this Act or the regulations as they apply to references in:
    - (i) this Chapter; or
    - (ii) regulations made for the purposes of this Chapter; and
  - (c) the old Division 12 of Part 11.2 transitionals.

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**283GB ASIC may approve body corporate to be trustee**

- (1) ASIC may approve a body corporate in writing to be a trustee for the purposes of paragraph 283AC(1)(f). The approval may allow the body corporate to act as trustee:
  - (a) in any circumstances; or
  - (b) in relation to a particular borrower or particular class of borrower; or
  - (c) in relation to a particular trust deed;and may be given subject to conditions.
- (2) ASIC must publish notice of the approval in the *Gazette*.

## **Part 2L.8—Court**

### **283HA General Court power to give directions and determine questions**

If the trustee applies to the Court for any direction in relation to the performance of the trustee's functions or to determine any question in relation to the interests of the debenture holders, the Court may give any direction and make any declaration or determination in relation to the matter that the Court considers appropriate. The Court may also make ancillary or consequential orders.

Note: Under this section, the Court may order a meeting of debenture holders to be held, see section 283EC.

### **283HB Specific Court powers**

- (1) If the trustee or ASIC applies to the Court, the Court may make any or all of the following orders:
  - (a) an order staying an action or other civil proceedings before a court by or against the borrower or a guarantor body;
  - (b) an order restraining the borrower from paying any money to the debenture holders or any holders of any other class of debentures;
  - (c) an order that any security for the debentures be enforceable immediately or at the time the Court directs (even if the debentures are irredeemable or redeemable only on the happening of a contingency);
  - (d) an order appointing a receiver of any property constituting security for the debentures;
  - (e) an order restricting advertising by the borrower for deposits or loans;
  - (f) an order restricting borrowing by the borrower;
  - (g) any other order that the Court considers appropriate to protect the interests of existing or prospective debenture holders.

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- (2) In deciding whether to make an order under subsection (1), the Court must have regard to:
- (a) the ability of the borrower and each guarantor to repay the amount deposited or lent as and when it becomes due; and
  - (b) any contravention of section 283GA by the borrower; and
  - (c) the interests of the borrower's members and creditors; and
  - (d) the interests of the members of each of the guarantors.

Note: The Court may order a meeting of debenture holders to be held (see section 283EC).



## **Part 2L.9—Location of other debenture provisions**

### **283I Signpost to other debenture provisions**

There are other rules relating to debentures in paragraph 124(1)(b) and section 563AAA.

## Chapter 2M—Financial reports and audit

### Part 2M.1—Overview

#### 285 Overview of obligations under this Chapter

*Obligations under this Chapter*

- (1) Under this Chapter, all companies, registered schemes and disclosing entities must keep financial records (see sections 286-291)—and some must prepare financial reports (see sections 292-323D). All those that have to prepare financial reports have to prepare them annually; disclosing entities have to prepare half-year financial reports as well. The following table sets out what is involved in annual financial reporting:

Annual financial reporting		
steps	sections	comments
1 prepare financial report	s. 295	The financial report includes: <ul style="list-style-type: none"><li>• financial statements</li><li>• disclosures and notes</li><li>• directors' declaration.</li></ul>
2 prepare directors' report	s. 298	Unless the report relates to a company limited by guarantee, it has a general component (sections 299 and 299A), a specific component (section 300) and a special component for listed companies (section 300A). See section 285A for an overview of the obligations of companies limited by guarantee.

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<b>Annual financial reporting</b>			
<b>steps</b>	<b>sections</b>	<b>comments</b>	
3	have the financial report audited and obtain auditor's report	s. 301, 307, 308	<p>A small proprietary company preparing a financial report in response to a shareholder direction under s. 293 only has to have an audit if the direction asks for it.</p> <p>There are similar rules for companies limited by guarantee (see section 285A for an overview).</p> <p>Under s. 312, officers must assist the auditor in the conduct of the audit.</p> <p>ASIC may use its exemption powers under s. 340 and 341 to relieve large proprietary companies from the audit requirements in appropriate cases (s. 342(2) and (3)).</p>
4	provide the financial report, directors' report and auditor's report to members	s. 314	<p>Unless the report relates to a company limited by guarantee, a concise financial report may be provided to members instead of the full financial statements (subsections 314(1) and (2)).</p> <p>For deadline, see subsections 315(1) to (4).</p> <p>See section 285A for an overview of the obligations of companies limited by guarantee.</p>

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<b>Annual financial reporting</b>		
<b>steps</b>	<b>sections</b>	<b>comments</b>
5 lodge the financial report, directors' report and auditor's report with ASIC	s. 319	For deadline see s. 319(3). Companies that have the benefit of the grandfathering in the relevant Part 10.1 transitionals do not have to lodge.
6 [public companies only] lay financial report, directors' report and auditor's report before AGM	s. 317	For the AGM deadline see s. 250N.

*Application to disclosing entities*

- (2) This Chapter covers all disclosing entities:
- (a) incorporated or formed in Australia; and
  - (b) whether or not they are companies or registered schemes.

*Application to registered schemes*

- (3) For the purposes of applying this Chapter to a registered scheme:
- (a) the scheme's responsible entity is responsible for the performance of obligations in respect of the scheme; and
  - (b) the directors and officers of the responsible entity are taken to be the directors and officers of the scheme; and
  - (c) the debts incurred in operating the scheme are taken to be the debts of the scheme.

**285A Overview of obligations of companies limited by guarantee**

The following table sets out what is involved in annual financial reporting for companies limited by guarantee:

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**Annual financial reporting for companies limited by guarantee**

<b>Item</b>	<b>Nature of company</b>	<b>Obligations</b>	<b>Sections</b>
1	Small company limited by guarantee.	No obligation to do any of the following unless required to do so under a member direction or ASIC direction: <ul style="list-style-type: none"> <li>• prepare a financial report;</li> <li>• prepare a directors' report;</li> <li>• have financial report audited;</li> <li>• notify members of reports.</li> </ul>	Sections 292, 301 and 316A
2	Company limited by guarantee with annual revenue or, if part of a consolidated entity, annual consolidated revenue of less than \$1 million.	Must prepare a financial report. Must prepare a directors' report, although less detailed than that required of other companies. Need not have financial report audited unless a Commonwealth company, or a subsidiary of a Commonwealth company or Commonwealth authority. If the company does not have financial report audited, it must have financial report reviewed. Must give reports to any member who elects to receive them.	Sections 292, 298, 300B, 301, 316A
3	Company limited by guarantee with annual revenue or, if part of a consolidated entity, annual consolidated revenue of \$1 million or more.	Must prepare a financial report. Must prepare a directors' report, although less detailed than that required of other companies.	Sections 292, 298, 300B, 301, 316A

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**Annual financial reporting for companies limited by guarantee**

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<b>Item</b>	<b>Nature of company</b>	<b>Obligations</b>	<b>Sections</b>
		Must have financial report audited. Must give reports to any member who elects to receive them.	

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## Part 2M.2—Financial records

### 286 Obligation to keep financial records

- (1) A company, registered scheme or disclosing entity must keep written financial records that:
  - (a) correctly record and explain its transactions and financial position and performance; and
  - (b) would enable true and fair financial statements to be prepared and audited.

The obligation to keep financial records of transactions extends to transactions undertaken as trustee.

Note: Section 9 defines *financial records*.

#### *Period for which records must be retained*

- (2) The financial records must be retained for 7 years after the transactions covered by the records are completed.

#### *Strict liability offences*

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### 287 Language requirements

- (1) The financial records may be kept in any language.
- (2) An English translation of financial records not kept in English must be made available within a reasonable time to a person who:
  - (a) is entitled to inspect the records; and
  - (b) asks for the English translation.
- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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**288 Physical format**

- (1) If financial records are kept in electronic form, they must be convertible into hard copy. Hard copy must be made available within a reasonable time to a person who is entitled to inspect the records.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**289 Place where records are kept**

- (1) A company, registered scheme or disclosing entity may decide where to keep the financial records.

*Records kept outside this jurisdiction*

- (2) If financial records about particular matters are kept outside this jurisdiction, sufficient written information about those matters must be kept in this jurisdiction to enable true and fair financial statements to be prepared. The company, registered scheme or disclosing entity must give ASIC written notice in the prescribed form of the place where the information is kept.
- (2A) An offence based on subsection (2) is an offence of strict liability.  
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (3) ASIC may direct a company, registered scheme or disclosing entity to produce specified financial records that are kept outside this jurisdiction.
- (4) The direction must:
  - (a) be in writing; and
  - (b) specify a place in this jurisdiction where the records are to be produced (the place must be reasonable in the circumstances); and
  - (c) specify a day (at least 14 days after the direction is given) by which the records are to be produced.



## 290 Director access

### *Personal access*

- (1) A director of a company, registered scheme or disclosing entity has a right of access to the financial records at all reasonable times.

### *Court order for inspection on director's behalf*

- (2) On application by a director, the Court may authorise a person to inspect the financial records on the director's behalf.
- (3) A person authorised to inspect records may make copies of the records unless the Court orders otherwise.
- (4) The Court may make any other orders it consider appropriate, including either or both of the following:
  - (a) an order limiting the use that a person who inspects the records may make of information obtained during the inspection;
  - (b) an order limiting the right of a person who inspects the records to make copies in accordance with subsection (3).

## 291 Signposts to other relevant provisions

The following table sets out other provisions that are relevant to access to financial records.

<b>Other provisions relevant to access to financial records</b>		
		<b>members</b>
1	section 247A	A member may apply to the Court for an order to inspect the records.
		<b>auditor</b>
2	section 310	The auditor has a right of access to the records.

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**Other provisions relevant to access to financial records**

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		<b>controllers</b>
3	section 431	A controller of a corporation's property (for example, a receiver or receiver and manager) has a right of access to the records.
		<b>ASIC</b>
4	sections 28 to 39 of the ASIC Act	ASIC has power to inspect the records. It also has power under subsection 289(3) of this Act to call for the production of financial records kept outside this jurisdiction.

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## **Part 2M.3—Financial reporting**

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

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

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

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

#### *Small proprietary companies*

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

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

#### *Small companies limited by guarantee*

- (3) Despite subsection (1), a small company limited by guarantee has to prepare the financial report and directors' report only if it is directed to do so under section 294A or 294B. The rest of this Part does not apply to any other small company limited by guarantee.

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**293 Small proprietary company—shareholder direction**

- (1) Shareholders with at least 5% of the votes in a small proprietary company may give the company a direction to:
  - (a) prepare a financial report and directors' report for a financial year; and
  - (b) send them to all shareholders.
- (2) The direction must be:
  - (a) signed by the shareholders giving the direction; and
  - (b) made no later than 12 months after the end of the financial year concerned.
- (3) The direction may specify all or any of the following:
  - (a) that the financial report does not have to comply with some or all of the accounting standards;
  - (b) that a directors' report or a part of that report need not be prepared;
  - (c) that the financial report is to be audited.

**294 Small proprietary company—ASIC direction**

- (1) ASIC may give a small proprietary company a direction to comply with requirements of this Division and Divisions 3, 4, 5 and 6 for a financial year.
- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) The direction may be general or may specify the particular requirements that the company is to comply with.
- (3) The direction must specify the date by which the documents have to be prepared, sent or lodged. The date must be a reasonable one in view of the nature of the direction.
- (4) The direction must:
  - (a) be made in writing; and

- (b) specify the financial year concerned; and
- (c) be made no later than 6 years after the end of that financial year.

**294A Small company limited by guarantee—member direction**

- (1) Members with at least 5% of the votes in a small company limited by guarantee may give the company a direction to:
  - (a) prepare a financial report and directors' report for a financial year; and
  - (b) send them to members who have elected to receive them under section 316A.
- (2) The direction must be:
  - (a) signed by the members giving the direction; and
  - (b) made no later than 12 months after the end of the financial year concerned.
- (3) The direction may specify all or any of the following:
  - (a) that the financial report does not have to comply with some or all of the accounting standards;
  - (b) that a directors' report or a part of that report need not be prepared;
  - (c) that the financial report is to be audited or reviewed.

**294B Small company limited by guarantee—ASIC direction**

- (1) ASIC may give a small company limited by guarantee a direction to comply with the requirements of this Division and Divisions 3, 4, 5 and 6 for a financial year.
- (2) An offence based on subsection (1) is an offence of strict liability.  
Note: For strict liability, see section 6.1 of the *Criminal Code*.
- (3) The direction may be general or may specify the particular requirements that the company is to comply with.

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- (4) The direction must specify the date by which the documents have to be prepared, sent or lodged. The date must be a reasonable one in view of the nature of the direction.
- (5) The direction must:
  - (a) be made in writing; and
  - (b) specify the financial year concerned; and
  - (c) be made no later than 6 years after the end of that financial year.
- (6) A direction given under subsection (1) is not a legislative instrument.

**295 Contents of annual financial report**

*Basic contents*

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

*Financial statements*

- (2) The financial statements for the year are:
  - (a) unless paragraph (b) applies—the financial statements in relation to the company, registered scheme or disclosing entity required by the accounting standards; or
  - (b) if the accounting standards require the company, registered scheme or disclosing entity to prepare financial statements in relation to a consolidated entity—the financial statements in relation to the consolidated entity required by the accounting standards.

*Notes to financial statements*

- (3) The notes to the financial statements are:
  - (a) disclosures required by the regulations; and

- (b) notes required by the accounting standards; and
- (c) any other information necessary to give a true and fair view (see section 297).

*Directors' declaration*

- (4) The directors' declaration is a declaration by the directors:
  - (c) whether, in the directors' opinion, there are reasonable grounds to believe that the company, registered scheme or disclosing entity will be able to pay its debts as and when they become due and payable; and
  - (ca) if the company, registered scheme or disclosing entity has included in the notes to the financial statements, in compliance with the accounting standards, an explicit and unreserved statement of compliance with international financial reporting standards—that this statement has been included in the notes to the financial statements; and
  - (d) whether, in the directors' opinion, the financial statement and notes are in accordance with this Act, including:
    - (i) section 296 (compliance with accounting standards); and
    - (ii) section 297 (true and fair view); and
  - (e) if the company, disclosing entity or registered scheme is listed—that the directors have been given the declarations required by section 295A.

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

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

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**295A Declaration in relation to listed entity's financial statements by chief executive officer and chief financial officer**

- (1) If the company, disclosing entity or registered scheme is listed, the directors' declaration under subsection 295(4) must be made only after each person who performs:
  - (a) a chief executive function; or
  - (b) a chief financial officer function;in relation to the company, disclosing entity or registered scheme has given the directors a declaration under subsection (2) of this section.
- (2) The declaration is a declaration whether, in the person's opinion:
  - (a) the financial records of the company, disclosing entity or registered scheme for the financial year have been properly maintained in accordance with section 286; and
  - (b) the financial statements, and the notes referred to in paragraph 295(3)(b), for the financial year comply with the accounting standards; and
  - (c) the financial statements and notes for the financial year give a true and fair view (see section 297); and
  - (d) any other matters that are prescribed by the regulations for the purposes of this paragraph in relation to the financial statements and the notes for the financial year are satisfied.
- (3) The declaration must:
  - (a) be made in writing; and
  - (b) specify the date on which the declaration is made; and
  - (c) specify the capacity in which the person is making the declaration; and
  - (d) be signed by the person making the declaration.A person who performs both a chief executive function and a chief financial officer function may make a single declaration in both capacities.
- (4) A person performs a **chief executive function** in relation to the company, disclosing entity or registered scheme if the person is the



person who is primarily and directly responsible to the directors for the general and overall management of the company, disclosing entity or registered scheme.

- (5) If there is no one person who performs a chief executive function in relation to the company, disclosing entity or registered scheme under subsection (4), a person performs a **chief executive function** in relation to the company, disclosing entity or registered scheme if the person is one of a number of people who together are primarily and directly responsible to the directors for the general and overall management of the company, disclosing entity or registered scheme.
- (6) A person performs a **chief financial officer function** in relation to the company, disclosing entity or registered scheme if that person is the person who is:
- (a) primarily responsible for financial matters in relation to the company, disclosing entity or registered scheme; and
  - (b) directly responsible for those matters to either:
    - (i) the directors; or
    - (ii) the person or persons who perform the chief executive function in relation to the company.
- (7) If there is no one person who performs a chief financial officer function in relation to the company, disclosing entity or registered scheme under subsection (6), a person performs a **chief financial officer function** in relation to the company, disclosing entity or registered scheme if the person is one of a number of people who together are:
- (a) primarily responsible for financial matters in relation to the company, disclosing entity or registered scheme; and
  - (b) directly responsible for those matters to either:
    - (i) the directors; or
    - (ii) the person or persons who perform the chief executive function in relation to the company.

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- (8) Nothing in this section derogates from the responsibility that a director has for ensuring that financial statements comply with this Act.

**296 Compliance with accounting standards and regulations**

- (1) The financial report for a financial year must comply with the accounting standards.

*Small proprietary companies*

- (1A) Despite subsection (1), the financial report of a small proprietary company does not have to comply with particular accounting standards if:
- (a) the report is prepared in response to a shareholder direction under section 293; and
  - (b) the direction specifies that the report does not have to comply with those standards.

*Small companies limited by guarantee*

- (1B) Despite subsection (1), the financial report of a small company limited by guarantee does not have to comply with particular accounting standards if:
- (a) the report is prepared in response to a member direction under section 294A; and
  - (b) the direction specifies that the report does not have to comply with those standards.

*Further requirements*

- (2) The financial report must comply with any further requirements in the regulations.

**297 True and fair view**

The financial statements and notes for a financial year must give a true and fair view of:

- (a) the financial position and performance of the company, registered scheme or disclosing entity; and
- (b) if consolidated financial statements are required—the financial position and performance of the consolidated entity.

This section does not affect the obligation under section 296 for a financial report to comply with accounting standards.

Note: If the financial statements and notes prepared in compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements under paragraph 295(3)(c).

## **298 Annual directors' report**

- (1) The company, registered scheme or disclosing entity must prepare a directors' report for each financial year.
- (1AA) Except in the case of a company limited by guarantee, the report must include:
  - (a) the general information required by sections 299 (all entities) and 299A (additional requirements for listed entities); and
  - (b) the specific information required by sections 300 and 300A; and
  - (c) a copy of the auditor's declaration under section 307C in relation to the audit for the financial year.
- (1AB) In the case of a company limited by guarantee, the report must include:
  - (a) the general information required by section 300B; and
  - (b) a copy of the auditor's declaration under section 307C in relation to the audit or review for the financial year.
- (1A) If the financial report for a financial year includes additional information under paragraph 295(3)(c) (information included to give true and fair view of financial position and performance), the directors' report for the financial year must also:
  - (a) set out the directors' reasons for forming the opinion that the inclusion of that additional information was necessary to give the true and fair view required by section 297; and

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- (b) specify where that additional information can be found in the financial report.
- (2) The report must:
  - (a) be made in accordance with a resolution of the directors; and
  - (b) specify the date on which the report is made; and
  - (c) be signed by a director.

*Small proprietary companies*

- (3) A small proprietary company does not have to comply with subsection (1) for a financial year if:
  - (a) it is preparing financial statements for that year in response to a shareholder direction under section 293; and
  - (b) the direction specified that a directors' report need not be prepared.

*Small companies limited by guarantee*

- (4) A small company limited by guarantee does not have to comply with subsection (1) for a financial year if:
  - (a) it is preparing the financial statements for that year in response to a member direction under section 294A; and
  - (b) the direction specified that a directors' report need not be prepared.

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

*General information about operations and activities*

- (1) The directors' report for a financial year must:
  - (a) contain a review of operations during the year of the entity reported on and the results of those operations; and
  - (b) give details of any significant changes in the entity's state of affairs during the year; and
  - (c) state the entity's principal activities during the year and any significant changes in the nature of those activities during the year; and

- (d) give details of any matter or circumstance that has arisen since the end of the year that has significantly affected, or may significantly affect:
    - (i) the entity's operations in future financial years; or
    - (ii) the results of those operations in future financial years; or
    - or
    - (iii) the entity's state of affairs in future financial years; and
  - (e) refer to likely developments in the entity's operations in future financial years and the expected results of those operations; and
  - (f) if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory—give details of the entity's performance in relation to environmental regulation.
- (2) The entity reported on is:
- (a) the company, registered scheme or disclosing entity (if consolidated financial statements are not required); or
  - (b) the consolidated entity (if consolidated financial statements are required).

*Prejudicial information need not be disclosed*

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

If material is omitted, the report must say so.

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**299A Annual directors' report—additional general requirements for listed entities**

- (1) The directors' report for a financial year for a company, registered scheme or disclosing entity that is listed must also contain information that members of the listed entity would reasonably require to make an informed assessment of:
  - (a) the operations of the entity reported on; and
  - (b) the financial position of the entity reported on; and
  - (c) the business strategies, and prospects for future financial years, of the entity reported on.
- (2) The entity reported on is:
  - (a) the company, registered scheme or disclosing entity that is listed (if consolidated financial statements are not required); or
  - (b) the consolidated entity (if consolidated financial statements are required).
- (3) The report may omit material that would otherwise be included under paragraph (1)(c) if it is likely to result in unreasonable prejudice to:
  - (a) the company, registered scheme or disclosing entity; or
  - (b) if consolidated financial statements are required—the consolidated entity or any entity (including the company, registered scheme or disclosing entity) that is part of the consolidated entity.

If material is omitted, the report must say so.

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

- (1) The directors' report for a financial year must include details of:
  - (a) dividends or distributions paid to members during the year; and
  - (b) dividends or distributions recommended or declared for payment to members, but not paid, during the year; and

- (c) the name of each person who has been a director of the company, registered scheme or disclosing entity at any time during or since the end of the year and the period for which they were a director; and
- (ca) the name of each person who:
  - (i) is an officer of the company, registered scheme or disclosing entity at any time during the year; and
  - (ii) was a partner in an audit firm, or a director of an audit company, that is an auditor of the company, disclosing entity or registered scheme for the year; and
  - (iii) was such a partner or director at a time when the audit firm or the audit company undertook an audit of the company, disclosing entity or registered scheme; and
- (d) options that are:
  - (i) granted over unissued shares or unissued interests during or since the end of the year; and
  - (ii) granted to any of the directors or any of the 5 most highly remunerated officers of the company (other than the directors); and
  - (iii) granted to them as part of their remuneration; (see subsections (3), (4) and (5)); and
- (e) unissued shares or interests under option as at the day the report is made (see subsections (3) and (6)); and
- (f) shares or interests issued during or since the end of the year as a result of the exercise of an option over unissued shares or interests (see subsections (3) and (7)); and
- (g) indemnities given and insurance premiums paid during or since the end of the year for a person who is or has been an officer or auditor (see subsections (8) and (9)).

Public companies, listed companies and registered schemes must include additional information under subsections (10), (11), (11AA), (11A), (11B), (12) and (13) of this section and section 300A.

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- (2) Details do not have to be included in the directors' report under this section if they are included in the company's financial report for the financial year.
- (2A) If subsection (2) is relied on to not include in the directors' report for a financial year details that would otherwise be required to be included in that report under paragraph (11B)(a) or (11C)(b), that report must specify, in the section headed "Non-audit services", where those details may be found in the company's financial report for that financial year.
- (3) Paragraphs (1)(d), (e) and (f) cover:
- (a) options over unissued shares and interests of the company, registered scheme or disclosing entity; and
  - (b) if consolidated financial statements are required—options over unissued shares and interests of any controlled entity that is a company, registered scheme or disclosing entity.

*Options details*

- (5) The details of an option granted are:
- (a) the company, registered scheme or disclosing entity granting the option; and
  - (b) the name of the person to whom the option is granted; and
  - (c) the number and class of shares or interests over which the option is granted.
- (6) The details of unissued shares or interests under option are:
- (a) the company, registered scheme or disclosing entity that will issue shares or interests when the options are exercised; and
  - (b) the number and classes of those shares or interests; and
  - (c) the issue price, or the method of determining the issue price, of those shares or interests; and
  - (d) the expiry date of the options; and
  - (e) any rights that option holders have under the options to participate in any share issue or interest issue of the company, registered scheme or disclosing entity or of any other body corporate or registered scheme.



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

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

*Indemnities and insurance premiums for officers or auditors*

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

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

- (9) The details required under subsection (8) are:
- (a) for an officer—their name or the class of officer to which they belong or belonged; and
  - (b) for an auditor—their name; and
  - (c) the nature of the liability; and

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- (d) for an indemnity given—the amount the company paid and any other action the company took to indemnify the officer or auditor; and
- (e) for an agreement to indemnify—the amount that the relevant agreement requires the company to pay and any other action the relevant agreement requires the company to take to indemnify the officer or auditor; and
- (f) for an insurance premium—the amount of the premium.

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

*Special rules for public companies*

- (10) The report for a public company that is not a wholly-owned subsidiary of another company must also include details of:
  - (a) each director's qualifications, experience and special responsibilities; and
  - (b) the number of meetings of the board of directors held during the year and each director's attendance at those meetings; and
  - (c) the number of meetings of each board committee held during the year and each director's attendance at those meetings; and
  - (d) the qualifications and experience of each person who is a company secretary of the company as at the end of the year.

*Special rules for listed companies and schemes*

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

- (c) their rights or options over shares in, debentures of or interests in a registered scheme made available by, the company or a related body corporate;
- (d) contracts:
  - (i) to which the director is a party or under which the director is entitled to a benefit; and
  - (ii) that confer a right to call for or deliver shares in, or debentures of or interests in a registered scheme made available by the company or a related body corporate;
- (e) all directorships of other listed companies held by the director at any time in the 3 years immediately before the end of the financial year and the period for which each directorship has been held.

Note: Directors must also disclose interests of these kinds to a relevant market operator under section 205G as they are acquired.

- (11AA) If an individual plays a significant role in the audit of a listed company or listed registered scheme for the financial year in reliance on an approval granted under section 324DAA, the report for the company or scheme must also include details of, and reasons for, the approval.
- (11A) If a registered company auditor plays a significant role in the audit of a listed company for the financial year in reliance on a declaration made under section 342A, the report for the company must also include details of the declaration.

*Listed companies—non-audit services and auditor independence*

- (11B) The report for a listed company must also include the following in relation to each auditor:
  - (a) details of the amounts paid or payable to the auditor for non-audit services provided, during the year, by the auditor (or by another person or firm on the auditor's behalf);
  - (b) a statement whether the directors are satisfied that the provision of non-audit services, during the year, by the auditor (or by another person or firm on the auditor's behalf)

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is compatible with the general standard of independence for auditors imposed by this Act;

- (c) a statement of the directors' reasons for being satisfied that the provision of those non-audit services, during the year, by the auditor (or by another person or firm on the auditor's behalf) did not compromise the auditor independence requirements of this Act.

These details and statements must be included in the directors' report under the heading "Non-audit services". If consolidated financial statements are required, the details and statements must relate to amounts paid or payable to the auditor by, and non-audit services provided to, any entity (including the company, registered scheme or disclosing entity) that is part of the consolidated entity.

- (11C) For the purposes of paragraph (11B)(a), the details of amounts paid or payable to an auditor for non-audit services provided, during the year, by the auditor (or by another person or firm on the auditor's behalf) are:
  - (a) the name of the auditor; and
  - (b) the dollar amount that:
    - (i) the listed company; or
    - (ii) if consolidated financial statements are required—any entity that is part of the consolidated entity;paid, or is liable to pay, for each of those non-audit services.
- (11D) The statements under paragraphs (11B)(b) and (c) must be made in accordance with:
  - (a) advice provided by the listed company's audit committee if the company has an audit committee; or
  - (b) a resolution of the directors of the listed company if paragraph (a) does not apply.
- (11E) For the purposes of subsection (11D), a statement is taken to be made in accordance with advice provided by the company's audit committee only if:

- (a) the statement is consistent with that advice and does not contain any material omission of material included in that advice; and
- (b) the advice is endorsed by a resolution passed by the members of the audit committee; and
- (c) the advice is written advice signed by a member of the audit committee on behalf of the audit committee and given to the directors.

*Special rules for listed registered schemes*

- (12) The report for a registered scheme whose interests are quoted on a prescribed financial market must also include the following details for each director of the company that is the responsible entity for the scheme:
  - (a) their relevant interests in interests in the scheme;
  - (b) their rights or options over interests in the scheme;
  - (c) contracts to which the director is a party or under which the director is entitled to a benefit and that confer a right to call for or deliver interests in the scheme.

*Special rules for registered schemes*

- (13) The report for a registered scheme must also include details of:
  - (a) the fees paid to the responsible entity and its associates out of scheme property during the financial year; and
  - (b) the number of interests in the scheme held by the responsible entity or its associates as at the end of the financial year; and
  - (c) interests in the scheme issued during the financial year; and
  - (d) withdrawals from the scheme during the financial year; and
  - (e) the value of the scheme's assets as at the end of the financial year, and the basis for the valuation; and
  - (f) the number of interests in the scheme as at the end of the financial year.

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*Proceedings on behalf of a company*

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

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

- (1) The directors' report for a financial year for a company must also include (in a separate and clearly identified section of the report):
- (a) discussion of board policy for determining, or in relation to, the nature and amount (or value, as appropriate) of remuneration of the key management personnel for:
    - (i) the company, if consolidated financial statements are not required; or
    - (ii) the consolidated entity, if consolidated financial statements are required; and
  - (b) discussion of the relationship between such policy and the company's performance; and
  - (ba) if an element of the remuneration of a member of the key management personnel for the company, or if consolidated financial statements are required, for the consolidated entity is dependent on the satisfaction of a performance condition:
    - (i) a detailed summary of the performance condition; and

- (ii) an explanation of why the performance condition was chosen; and
- (iii) a summary of the methods used in assessing whether the performance condition is satisfied and an explanation of why those methods were chosen; and
- (iv) if the performance condition involves a comparison with factors external to the company:
  - (A) a summary of the factors to be used in making the comparison; and
  - (B) if any of the factors relates to the performance of another company, of 2 or more other companies or of an index in which the securities of a company or companies are included—the identity of that company, of each of those companies or of the index; and
- (c) the prescribed details in relation to the remuneration of:
  - (i) if consolidated financial statements are required—each member of the key management personnel for the consolidated entity; or
  - (ii) if consolidated financial statements are not required—each member of the key management personnel for the company; and
- (d) if an element of the remuneration of a person referred to in paragraph (c) consists of securities of a body and that element is not dependent on the satisfaction of a performance condition—an explanation of why that element of the remuneration is not dependent on the satisfaction of a performance condition; and
- (e) for each person referred to in paragraph (c):
  - (i) an explanation of the relative proportions of those elements of the person's remuneration that are related to performance and those elements of the person's remuneration that are not; and
  - (ii) the value (worked out as at the time they are granted and in accordance with any applicable accounting

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- standards) of options that are granted to the person during the year as part of their remuneration; and
- (iii) the value (worked out as at the time they are exercised) of options that were granted to the person as part of their remuneration and that are exercised by the person during the year; and
  - (iv) if options granted to the person as part of their remuneration lapse during the financial year—the number of those options, and the financial year in which those options were granted; and
  - (vii) if the person is employed by the company under a contract—the duration of the contract, the periods of notice required to terminate the contract and the termination payments provided for under the contract; and
- (f) such other matters related to the policy or policies referred to in paragraph (a) as are prescribed by the regulations; and
- (g) if:
- (i) at the company's most recent AGM, comments were made on the remuneration report that was considered at that AGM; and
  - (ii) when a resolution that the remuneration report for the last financial year be adopted was put to the vote at the company's most recent AGM, at least 25% of the votes cast were against adoption of that report;
- an explanation of the board's proposed action in response or, if the board does not propose any action, the board's reasons for inaction; and
- (h) if a remuneration consultant made a remuneration recommendation in relation to any of the key management personnel for the company or, if consolidated financial statements are required, for the consolidated entity, for the financial year:
- (i) the name of the consultant; and
  - (ii) a statement that the consultant made such a recommendation; and



- (iii) if the consultant provided any other kind of advice to the company or entity for the financial year—a statement that the consultant provided that other kind or those other kinds of advice; and
  - (iv) the amount and nature of the consideration payable for the remuneration recommendation; and
  - (v) the amount and nature of the consideration payable for any other kind of advice referred to in subparagraph (iii); and
  - (vi) information about the arrangements the company made to ensure that the making of the remuneration recommendation would be free from undue influence by the member or members of the key management personnel to whom the recommendation relates; and
  - (vii) a statement about whether the board is satisfied that the remuneration recommendation was made free from undue influence by the member or members of the key management personnel to whom the recommendation relates; and
  - (viii) if the board is satisfied that the remuneration recommendation was made free from undue influence by the member or members of the key management personnel to whom the recommendation relates—the board's reasons for being satisfied of this.
- (1AA) Without limiting paragraph (1)(b), the discussion under that paragraph of the company's performance must specifically deal with:
- (a) the company's earnings; and
  - (b) the consequences of the company's performance on shareholder wealth;
- in the financial year to which the report relates and in the previous 4 financial years.
- (1AB) In determining, for the purposes of subsection (1AA), the consequences of the company's performance on shareholder wealth in a financial year, have regard to:

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- (a) dividends paid by the company to its shareholders during that year; and
  - (b) changes in the price at which shares in the company are traded between the beginning and the end of that year; and
  - (c) any return of capital by the company to its shareholders during that year that involves:
    - (i) the cancellation of shares in the company; and
    - (ii) a payment to the holders of those shares that exceeds the price at which shares in that class are being traded at the time when the shares are cancelled; and
  - (d) any other relevant matter.
- (1A) The material referred to in subsection (1) must be included in the directors' report under the heading "Remuneration report".
- (1C) Without limiting paragraph (1)(c), the regulations may:
- (a) provide that the value of an element of remuneration is to be determined, for the purposes of this section, in a particular way or by reference to a particular standard; and
  - (b) provide that details to be given of an element of remuneration must relate to the remuneration provided in:
    - (i) the financial year to which the directors' report relates; and
    - (ii) the earlier financial years specified in the regulations.
- (2) This section applies to any listed disclosing entity that is a company.
- (3) This section applies despite anything in the company's constitution.
- (4) For the purposes of this section, if:
- (a) consolidated financial statements are required; and
  - (b) a person is a group executive who is a group executive of 2 or more entities within the consolidated entity;
- the person's remuneration is taken to include all of the person's remuneration from those entities (regardless of the capacity in which the person received the remuneration).
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**300B Annual directors' report—companies limited by guarantee**

- (1) The directors' report for a financial year for a company limited by guarantee must:
  - (a) contain a description of the short and long term objectives of the entity reported on; and
  - (b) set out the entity's strategy for achieving those objectives; and
  - (c) state the entity's principal activities during the year; and
  - (d) state how those activities assisted in achieving the entity's objectives; and
  - (e) state how the entity measures its performance, including any key performance indicators used by the entity.
- (2) The entity reported on is:
  - (a) the company (if consolidated financial statements are not required); or
  - (b) the consolidated entity (if consolidated financial statements are required).
- (3) The directors' report for a financial year for a company limited by guarantee must also include details of:
  - (a) the name of each person who has been a director of the company at any time during or since the end of the year and the period for which the person was a director; and
  - (b) each director's qualifications, experience and special responsibilities; and
  - (c) the number of meetings of the board of directors held during the year and each director's attendance at those meetings; and
  - (d) for each class of membership in the company—the amount which a member of that class is liable to contribute if the company is wound up; and
  - (e) the total amount that members of the company are liable to contribute if the company is wound up.

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**301 Audit of annual financial report**

- (1) A company, registered scheme or disclosing entity must have the financial report for a financial year audited in accordance with Division 3 and obtain an auditor's report.

*Small proprietary companies*

- (2) A small proprietary company's financial report for a financial year does not have to be audited if:
- (a) the report is prepared in response to a direction under section 293; and
  - (b) the direction did not ask for the financial report to be audited.

*Companies limited by guarantee*

- (3) A company limited by guarantee may have its financial report for a financial year reviewed, rather than audited, if:
- (a) the company is not one of the following:
    - (i) a Commonwealth company for the purposes of the *Public Governance, Performance and Accountability Act 2013*;
    - (ii) a subsidiary of a Commonwealth company for the purposes of that Act;
    - (iii) a subsidiary of a corporate Commonwealth entity for the purposes of that Act; and
  - (b) one of the following is true:
    - (i) the company is not required by the accounting standards to be included in consolidated financial statements and the revenue of the company for the financial year is less than \$1 million;
    - (ii) the company is required by the accounting standards to be included in consolidated financial statements and the consolidated revenue of the consolidated entity for the financial year is less than \$1 million.
- (4) A small company limited by guarantee's financial report for a financial year does not have to be audited or reviewed if:

- (a) the report is prepared in response to a member direction under section 294A; and
- (b) the direction does not ask for the audit or review.

## **Division 2—Half-year financial report and directors' report**

### **302 Disclosing entity must prepare half-year financial report and directors' report**

A disclosing entity must:

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

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

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

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

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

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

#### *Basic contents*

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

#### *Financial statements*

- (2) The financial statements for the half-year are:

- (a) unless paragraph (b) applies—the financial statements in relation to the disclosing entity required by the accounting standards; or
- (b) if the accounting standards require the disclosing entity to prepare financial statements in relation to a consolidated entity—the financial statements in relation to the consolidated entity required by the accounting standards.

*Notes to financial statements*

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

*Directors' declaration*

- (4) The directors' declaration is a declaration by the directors:
  - (c) whether, in the directors' opinion, there are reasonable grounds to believe that the disclosing entity will be able to pay its debts as and when they become due and payable; and
  - (d) whether, in the directors' opinion, the financial statement and notes are in accordance with this Act, including:
    - (i) section 304 (compliance with accounting standards); and
    - (ii) section 305 (true and fair view).

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

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

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**304 Compliance with accounting standards and regulations**

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

**305 True and fair view**

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

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

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

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

**306 Half-year directors' report**

- (1) The directors of the disclosing entity must prepare a directors' report for each half-year that consists of:
  - (a) a review of the entity's operations during the half-year and the results of those operations; and
  - (b) the name of each person who has been a director of the disclosing entity at any time during or since the end of the half-year and the period for which they were a director.

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

- (1A) The directors' report must include a copy of the auditor's declaration under section 307C in relation to the audit or review for the half-year.



- (2) If the financial report for a half-year includes additional information under paragraph 303(3)(c) (information included to give true and fair view of financial position and performance), the directors' report for the half-year must also:
- (a) set out the directors' reasons for forming the opinion that the inclusion of that additional information was necessary to give the true and fair view required by section 305; and
  - (b) specify where that information can be found in the financial report.
- (3) The report must:
- (a) be made in accordance with a resolution of the directors; and
  - (b) specify the date on which the report is made; and
  - (c) be signed by a director.

## Division 3—Audit and auditor's report

### 307 Audit

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

- (a) whether the financial report is in accordance with this Act, including:
  - (i) section 296 or 304 (compliance with accounting standards); and
  - (ii) section 297 or 305 (true and fair view); and
- (aa) if the financial report includes additional information under paragraph 295(3)(c) or 303(3)(c) (information included to give true and fair view of financial position and performance)—whether the inclusion of that additional information was necessary to give the true and fair view required by section 297 or 305; and
- (b) whether the auditor has been given all information, explanation and assistance necessary for the conduct of the audit; and
- (c) whether the company, registered scheme or disclosing entity has kept financial records sufficient to enable a financial report to be prepared and audited; and
- (d) whether the company, registered scheme or disclosing entity has kept other records and registers as required by this Act.

### 307A Audit to be conducted in accordance with auditing standards

- (1) If an individual auditor, or an audit company, conducts:
  - (a) an audit or review of the financial report for a financial year; or
  - (b) an audit or review of the financial report for a half-year;the individual auditor or audit company must conduct the audit or review in accordance with the auditing standards.
- (2) If an audit firm, or an audit company, conducts:

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- (a) an audit or review of the financial report for a financial year;  
or
  - (b) an audit or review of the financial report for a half-year;  
the lead auditor for the audit or review must ensure that the audit or review is conducted in accordance with the auditing standards.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

### **307B Audit working papers to be retained for 7 years**

#### *Contravention by individual auditor or audit company*

- (1) An auditor contravenes this subsection if:
- (a) the auditor is an individual auditor or an audit company; and
  - (b) the auditor conducts:
    - (i) an audit or review of the financial report for a financial year; or
    - (ii) an audit or review of the financial report for a half-year; and
  - (c) the auditor does not retain all audit working papers prepared by or for, or considered or used by, the auditor in accordance with the requirements of the auditing standards until:
    - (i) the end of 7 years after the date of the audit report prepared in relation to the audit or review to which the audit working papers relate; or
    - (ii) an earlier date determined for the audit working papers by ASIC under subsection (6).
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

#### *Contravention by member of audit firm*

- (3) A person (the *defendant*) contravenes this subsection if:
- (a) an audit firm conducts:

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- (i) an audit or review of the financial report for a financial year; or
- (ii) an audit or review of the financial report for a half-year; and
- (b) the audit firm fails, at a particular time, to retain all audit working papers prepared by or for, or considered or used by, the audit firm in accordance with the requirements of the auditing standards until:
  - (i) the end of 7 years after the date of the audit report prepared in relation to the audit or review to which the documents relate; or
  - (ii) the earlier date determined by ASIC for the audit working papers under subsection (6); and
- (c) the defendant is a member of the firm at that time.

- (4) An offence based on subsection (3) is an offence of strict liability.

Note 1: For *strict liability* see section 6.1 of the *Criminal Code*.

Note 2: Subsection (5) provides a defence.

- (5) A member of an audit firm does not commit an offence at a particular time because of a contravention of subsection (3) if the member either:
- (a) does not know at that time of the circumstances that constitute the contravention of subsection (3); or
  - (b) knows of those circumstances at that time but takes all reasonable steps to correct the contravention as soon as possible after the member becomes aware of those circumstances.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

*Earlier retention date for audit working papers*

- (6) ASIC may, on application by a person, determine, in writing, an earlier date for the audit working papers for the purposes of paragraphs (1)(c) and (3)(b) if:
- (a) the auditor is an individual auditor and the auditor:

- (i) dies; or
    - (ii) ceases to be a registered company auditor; or
  - (b) the auditor is an audit firm and the firm is dissolved (otherwise than simply as part of a reconstitution of the firm because of the death, retirement or withdrawal of a member or members or because of the admission of a new member or members); or
  - (c) the auditor is an audit company and the company:
    - (i) is wound up; or
    - (ii) ceases to be an authorised audit company.
- (7) In deciding whether to make a determination under subsection (6), ASIC must have regard to:
- (a) whether ASIC is inquiring into or investigating any matters in respect of:
    - (i) the auditor; or
    - (ii) the audited body for the audit to which the documents relate; and
  - (b) whether the professional accounting bodies have any investigations or disciplinary action pending in relation to the auditor; and
  - (c) whether civil or criminal proceedings in relation to:
    - (i) the conduct of the audit; or
    - (ii) the contents of the financial report to which the audit working papers relate;have been, or are about to be, commenced; and
  - (d) any other relevant matter.

*Audit working papers kept in electronic form*

- (8) For the purposes of this section, if audit working papers are in electronic form they are taken to be retained only if they are convertible into hard copy.

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**307C Auditor's independence declaration**

*Contravention by individual auditor*

- (1) If an individual auditor conducts:
- (a) an audit or review of the financial report for a financial year;  
or
  - (b) an audit or review of the financial report for a half-year;  
the individual auditor must give the directors of the company,  
registered scheme or disclosing entity:
  - (c) a written declaration that, to the best of the individual  
auditor's knowledge and belief, there have been:
    - (i) no contraventions of the auditor independence  
requirements of this Act in relation to the audit or  
review; and
    - (ii) no contraventions of any applicable code of professional  
conduct in relation to the audit or review; or
  - (d) a written declaration that, to the best of the individual  
auditor's knowledge and belief, the only contraventions of:
    - (i) the auditor independence requirements of this Act in  
relation to the audit or review; or
    - (ii) any applicable code of professional conduct in relation  
to the audit or review;are those contraventions details of which are set out in the  
declaration.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

*Contravention by lead auditor*

- (3) If an audit firm or audit company conducts:
- (a) an audit or review of the financial report for a financial year;  
or
  - (b) an audit or review of the financial report for a half-year;  
the lead auditor for the audit must give the directors of the  
company, registered scheme or disclosing entity:
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- (c) a written declaration that, to the best of the lead auditor's knowledge and belief, there have been:
    - (i) no contraventions of the auditor independence requirements of this Act in relation to the audit or review; and
    - (ii) no contraventions of any applicable code of professional conduct in relation to the audit or review; or
  - (d) a written declaration that, to the best of the lead auditor's knowledge and belief, the only contraventions of:
    - (i) the auditor independence requirements of this Act in relation to the audit or review; or
    - (ii) any applicable code of professional conduct in relation to the audit or review;are those contraventions details of which are set out in the declaration.
- (4) An offence based on subsection (3) is an offence of strict liability.
- Note: For *strict liability* see section 6.1 of the *Criminal Code*.
- (5) The declaration under subsection (1) or (3):
- (a) either:
    - (i) must be given when the audit report is given to the directors of the company, registered scheme or disclosing entity; or
    - (ii) must satisfy the conditions in subsection (5A); and
  - (b) must be signed by the person making the declaration.
- (5A) A declaration under subsection (1) or (3) in relation to a financial report for a financial year or half-year satisfies the conditions in this subsection if:
- (a) the declaration is given to the directors of the company, registered scheme or disclosing entity before the directors pass a resolution under subsection 298(2) or 306(3) (as the case requires) in relation to the directors' report for the financial year or half-year; and
  - (b) a director signs the directors' report within 7 days after the declaration is given to the directors; and

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- (c) the auditor's report on the financial report is made within 7 days after the directors' report is signed; and
  - (d) the auditor's report includes either of the following statements:
    - (i) a statement to the effect that the declaration would be in the same terms if it had been given to the directors at the time the auditor's report was made;
    - (ii) a statement to the effect that circumstances have changed since the declaration was given to the directors, and setting out how the declaration would differ if it had been given to the directors at the time the auditor's report was made.
- (5B) An individual auditor or a lead auditor is not required to give a declaration under subsection (1) or (3) in respect of a contravention if:
- (a) the contravention was a contravention by a person of subsection 324CE(2), 324CF(2) or 324CG(2); and
  - (b) the person does not commit an offence because of subsection 324CE(4), 324CF(4) or 324CG(4).

*Self-incrimination*

- (6) An individual is not excused from giving a declaration under subsection (1) or (3) on the ground that giving the declaration might tend to incriminate the individual or expose the individual to a penalty.

*Use/derivative use indemnity*

- (7) However, neither:
- (a) the information included in the declaration; nor
  - (b) any information, document or thing obtained as a direct or indirect consequence of including the information in the declaration;
- is admissible in evidence against the individual in any criminal proceedings, or in any proceedings that would expose the person to a penalty, other than:



- (c) proceedings for an offence against section 1308 or 1309 in relation to the declaration; or
- (d) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* (false or misleading information or documents) in relation to the declaration.

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

- (1) An auditor who audits the financial report for a financial year must report to members on whether the auditor is of the opinion that the financial report is in accordance with this Act, including:
  - (a) section 296 (compliance with accounting standards); and
  - (b) section 297 (true and fair view).

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

- (2) If the auditor is of the opinion that the financial report does not comply with an accounting standard, the auditor's report must, to the extent it is practicable to do so, quantify the effect that non-compliance has on the financial report. If it is not practicable to quantify the effect fully, the report must say why.
- (3) The auditor's report must describe:
  - (a) any defect or irregularity in the financial report; and
  - (b) any deficiency, failure or shortcoming in respect of the matters referred to in paragraph 307(b), (c) or (d).

(3AA) An auditor who reviews the financial report for a company limited by guarantee must report to members on whether the auditor became aware of any matter in the course of the review that makes the auditor believe that the financial report does not comply with Division 1.

- (3AB) A report under subsection (3AA) must:
  - (a) describe any matter referred to in subsection (3AA); and
  - (b) say why that matter makes the auditor believe that the financial report does not comply with Division 1.

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- (3A) The auditor's report must include any statements or disclosures required by the auditing standards.
- (3B) If the financial report includes additional information under paragraph 295(3)(c) (information included to give true and fair view of financial position and performance), the auditor's report must also include a statement of the auditor's opinion on whether the inclusion of that additional information was necessary to give the true and fair view required by section 297.
- (3C) If the directors' report for the financial year includes a remuneration report, the auditor must also report to members on whether the auditor is of the opinion that the remuneration report complies with section 300A. If not of that opinion, the auditor's report must say why.
- (4) A report under subsection (1) or (3AA) must specify the date on which it is made.
- (5) An offence based on subsection (1), (3), (3AA), (3AB), (3A), (3C) or (4) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

### 309 Auditor's report on half-year financial report

#### *Audit of financial report*

- (1) An auditor who audits the financial report for a half-year must report to members on whether the auditor is of the opinion that the financial report is in accordance with this Act, including:
- (a) section 304 (compliance with accounting standards); and
  - (b) section 305 (true and fair view).
- If not of that opinion, the auditor's report must say why.
- (2) If the auditor is of the opinion that the financial report does not comply with an accounting standard, the auditor's report must, to the extent that it is practicable to do so, quantify the effect that non-compliance has on the financial report. If it is not practicable to quantify the effect fully, the report must say why.

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

*Review of financial report*

- (4) An auditor who reviews the financial report for a half-year must report to members on whether the auditor became aware of any matter in the course of the review that makes the auditor believe that the financial report does not comply with Division 2.
- (5) A report under subsection (4) must:
- (a) describe any matter referred to in subsection (4); and
  - (b) say why that matter makes the auditor believe that the financial report does not comply with Division 2.
- (5A) The auditor's report must include any statements or disclosures required by the auditing standards.
- (5B) If the financial report includes additional information under paragraph 303(3)(c) (information included to give true and fair view of financial position and performance), the auditor's report must also include a statement of the auditor's opinion on whether the inclusion of that additional information was necessary to give the true and fair view required by section 305.

*Report to specify day made*

- (6) A report under subsection (1) or (4) must specify the date on which it is made.
- (7) An offence based on subsection (1), (3), (4), (5), (5A) or (6) is an offence of strict liability.

Note: For **strict liability** see section 6.1 of the *Criminal Code*.

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

The auditor:

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

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

**311 Reporting to ASIC**

*Contravention by individual auditor*

- (1) An individual auditor conducting an audit contravenes this subsection if:
  - (a) the auditor is aware of circumstances that:
    - (i) the auditor has reasonable grounds to suspect amount to a contravention of this Act; or
    - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (6)); or
    - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
  - (b) if subparagraph (a)(i) applies:
    - (i) the contravention is a significant one; or
    - (ii) the contravention is not a significant one and the auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
  - (c) the auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the auditor becomes aware of those circumstances.

*Contravention by audit company*

- (2) An audit company conducting an audit contravenes this subsection if:
- (a) the lead auditor for the audit is aware of circumstances that:
    - (i) the lead auditor has reasonable grounds to suspect amount to a contravention of this Act; or
    - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (6)); or
    - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
  - (b) if subparagraph (a)(i) applies:
    - (i) the contravention is a significant one; or
    - (ii) the contravention is not a significant one and the lead auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
  - (c) the lead auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the lead auditor becomes aware of those circumstances.

*Contravention by lead auditor*

- (3) A person contravenes this subsection if:
- (a) the person is the lead auditor for an audit; and
  - (b) the person is aware of circumstances that:
    - (i) the person has reasonable grounds to suspect amount to a contravention of this Act; or
    - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (6)); or

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- (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
- (c) if subparagraph (b)(i) applies:
  - (i) the contravention is a significant one; or
  - (ii) the contravention is not a significant one and the person believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
- (d) the person does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the person becomes aware of those circumstances.

*Significant contraventions*

- (4) In determining for the purposes of this section whether a contravention of this Act is a significant one, have regard to:
  - (a) the level of penalty provided for in relation to the contravention; and
  - (b) the effect that the contravention has, or may have, on:
    - (i) the overall financial position of the company, registered scheme or disclosing entity; or
    - (ii) the adequacy of the information available about the overall financial position of the company, registered scheme or disclosing entity; and
  - (c) any other relevant matter.
- (5) Without limiting paragraph (4)(a), a penalty provided for in relation to a contravention of a provision of Part 2M.2 or 2M.3, or section 324DAA, 324DAB or 324DAC, includes a penalty imposed on a director, because of the operation of section 344, for failing to take reasonable steps to comply with, or to secure compliance with, that provision.

*Person involved in an audit*

- (6) In this section:
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***person involved in the conduct of an audit*** means:

- (a) the auditor; or
- (b) the lead auditor for the audit; or
- (c) the review auditor for the audit; or
- (d) a professional member of the audit team for the audit; or
- (e) any other person involved in the conduct of the audit.

### **312 Assisting auditor**

- (1) An officer of a company, registered scheme or disclosing entity must:
  - (a) allow the auditor access to the books of the company, scheme or entity; and
  - (b) give the auditor any information, explanation or assistance required under section 310.

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

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

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

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

- (1) The auditor of a borrower in relation to debentures must give the trustee for debenture holders:
  - (a) a copy of any report, certificate or other document that the auditor must give the borrower or its members under this Act, the debentures or the trust deed; and
  - (b) a copy of any document that accompanies it.

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

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

- (2) The auditor of a borrower, or guarantor, in relation to debentures must give the borrower or guarantor a written report about any matter that:
- (a) the auditor became aware of in conducting the audit or review; and
  - (b) in the auditor's opinion, is or is likely to be prejudicial to the interests of debenture holders; and
  - (c) in the auditor's opinion, is relevant to the exercise of the powers of the trustee for debenture holders, or the performance of the trustee's duties, under this Act or the trust deed.

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

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.



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

### **314 Annual financial reporting to members**

(1) A company, registered scheme or disclosing entity must report to members for a financial year by providing either of the following in accordance with subsection (1AA) or (1AE):

- (a) all of the following reports:
  - (i) the financial report for the year;
  - (ii) the directors' report for the year (see sections 298 to 300A);
  - (iii) the auditor's report on the financial report;
- (b) a concise report for the year that complies with subsection (2).

(1AAA) This section does not apply to a company limited by guarantee.

Note: The requirement for annual financial reporting to members for those companies is in section 316A.

(1AA) A company, registered scheme or disclosing entity may provide the reports, or the concise report, for a financial year by doing all of the following:

- (a) sending, to each member who has made the election referred to in paragraph (1AB)(a):
  - (i) a hard copy of the reports, or the concise report; or
  - (ii) if the member has elected to receive the reports, or the concise report, as an electronic copy in accordance paragraph (1AB)(c)—an electronic copy of the reports, or the concise reports;
- (b) making a copy of the reports, or the concise report, readily accessible on a website;
- (c) directly notifying, in writing, all members who did not make the election referred to in paragraph (1AB)(a) that the copy is accessible on the website, and specifying the direct address on the website where the reports, or the concise report, may be accessed.

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Note: A direct address may be specified, for example, by specifying the URL of the reports or the concise report.

(1AB) For the purposes of paragraph (1AA)(a), a company, registered scheme or disclosing entity must, on at least one occasion, directly notify in writing each member that:

- (a) the member may elect to receive, free of charge, a copy of the reports for each financial year, or a copy of the concise report for each financial year; and
- (b) if the member does not so elect—the member may access the reports, or the concise report, on a specified website; and
- (c) if the member does so elect and the company, scheme or entity offers to send the report either as a hard copy or an electronic copy—the member may elect to receive the copy as either a hard copy or an electronic copy.

(1AC) An election made under subsection (1AB) is a standing election for each later financial year until the member changes his, her or its election.

Note: The member may request, under section 316, the company, registered scheme or disclosing entity not to send them material under this section.

(1AD) A member may, for the purposes of paragraph (1AA)(c) or subsection (1AB), be notified by electronic means only if the member has previously nominated that means as one by which the member may be notified.

(1AE) A company, registered scheme or disclosing entity may provide the reports, or the concise report, by sending each member:

- (a) a hard copy of the reports, or the concise report; or
- (b) an electronic copy of the reports, or the concise report, if the member has nominated that means as one by which the member may be sent the reports or the concise report.

(1A) An offence based on subsection (1) or (1AB) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

*Concise report*

- (2) A concise report for a financial year consists of:
- (a) a concise financial report for the year drawn up in accordance with accounting standards made for the purposes of this paragraph; and
  - (b) the directors' report for the year (see sections 298-300A); and
  - (c) a statement by the auditor:
    - (i) that the financial report has been audited; and
    - (ii) whether, in the auditor's opinion, the concise financial report complies with the accounting standards made for the purposes of paragraph (a); and
  - (d) a copy of any qualification in, and of any statements included in the emphasis of matter section of, the auditor's report on the financial report; and
  - (e) a statement that the report is a concise report and that the full financial report and auditor's report will be sent to the member free of charge if the member asks for them.
- (3) If the accounting standards made for the purposes of paragraph (2)(a) require a discussion and analysis to be included in a concise financial report:
- (a) the auditor must report on whether the discussion and analysis complies with the requirements that the accounting standards lay down for the discussion and analysis; and
  - (b) the auditor does not otherwise need to audit the statements made in the discussion and analysis.

### **315 Deadline for reporting to members**

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

- (1) A public company, or a disclosing entity that is not a registered scheme, must report to members under section 314 by the earlier of:

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- (a) 21 days before the next AGM after the end of the financial year; or
- (b) 4 months after the end of the financial year.

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

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

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

*Registered schemes*

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

*Other proprietary companies*

- (4) A proprietary company that is not covered by subsection (1) or (2) must report to members under section 314 within 4 months after the end of the financial year.
- (5) For the purposes of this section, a company, registered scheme or disclosing entity that reports in accordance with subsection 314(1AA) is taken to report at the time that the company, scheme or entity has fully complied with the requirements of that subsection.

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

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

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

- (2) The time for complying with a request under paragraph (1)(b) is:
  - (a) 7 days after the request is received; or
  - (b) the deadline for reporting under section 315;whichever is later.
- (3) A full financial report, directors' report and auditor's report are to be sent free of charge unless the member has already received a copy of them free of charge.
- (4) An offence based on subsection (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (5) This section does not apply in relation to a company limited by guarantee.

### **316A Annual financial reporting to members of companies limited by guarantee**

- (1) A member of a company limited by guarantee may, by notice in writing to the company, elect to receive a hard copy or an electronic copy of the following reports:
  - (a) the financial reports;
  - (b) the directors' reports;
  - (c) the auditor's reports.
- (2) If a member makes an election in a financial year, the election:
  - (a) is made by the member for that financial year; and
  - (b) is a standing election made by the member for each later financial year until the member changes the election.
- (3) If the company prepares a financial report or a directors' report for a financial year, or obtains an auditor's report on the financial

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report, the company must send a copy of the report, free of charge, to each member who has made an election for that financial year, in accordance with the election, by the earlier of:

- (a) 21 days before the next AGM after the end of the financial year; and
- (b) 4 months after the end of the financial year.

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

- (4) If a member direction is given to a small company limited by guarantee under section 294A after the end of a financial year, subsection (3) does not apply and the company must send a copy of the reports that the company prepares or obtains as a result of the direction to each member who has made an election for that financial year, in accordance with the election, by the later of:
  - (a) 2 months after the date on which the direction was given; and
  - (b) 4 months after the end of the financial year.
- (5) An offence based on subsection (3) or (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

### **317 Consideration of reports at AGM**

- (1) The directors of a public company that is required to hold an AGM must lay before the AGM:
  - (a) the financial report; and
  - (b) the directors' report; and
  - (c) the auditor's report;for the last financial year that ended before the AGM.

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

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

Note 3: Section 250RA imposes on the auditor of a listed public company an obligation to attend or be represented at the AGM.

- (1A) Subsection (1) does not apply to a small company limited by guarantee in relation to a report if the company is not required under a member direction made under section 294A or an ASIC direction made under section 294B to prepare or obtain the report.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **318 Additional reporting by debenture issuers**

- (1) A company or disclosing entity that was a borrower in relation to debentures at the end of a financial year must give a copy of the annual financial report, directors' report and auditor's report to the trustee for debenture holders by the deadline for the financial year set by section 315.
- (2) A debenture holder may ask the company or disclosing entity that issued the debenture for copies of:
- (a) the last reports provided to members under section 314; or
  - (b) the full financial report and the directors' report and auditor's report for the last financial year.
- (3) The company or entity must give the debenture holder the copies as soon as practicable after the request and free of charge.
- (4) A disclosing entity that was a borrower in relation to debentures at the end of a half-year must give a copy of the half-year financial report, directors' report and auditor's report to the trustee for debenture holders within 75 days after the end of the half-year.
- (5) An offence based on subsection (1), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## Division 5—Lodging reports with ASIC

### 319 Lodgment of annual reports with ASIC

- (1) A company, registered scheme or disclosing entity that has to prepare or obtain a report for a financial year under Division 1 must lodge the report with ASIC. This obligation extends to a concise report provided to members under section 314.
- (1A) An offence based on subsection (1) is an offence of strict liability.  
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) Subsection (1) does not apply to:
  - (a) a small proprietary company that prepares a report in response to a shareholder direction under section 293 or an ASIC direction under section 294; and
  - (b) a small company limited by guarantee that prepares a report in response to a member direction under section 294A or an ASIC direction under section 294B.
- (3) The time for lodgment is:
  - (a) within 3 months after the end of the financial year for a disclosing entity or registered scheme; and
  - (b) within 4 months after the end of the financial year for anyone else.

### 320 Lodgment of half-year reports with ASIC

- (1) A disclosing entity that has to prepare or obtain a report for a half-year under Division 2 must lodge the report with ASIC within 75 days after the end of the half-year.
- (2) An offence based on subsection (1) is an offence of strict liability.  
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.



### **321 ASIC power to require lodgment**

- (1) ASIC may give a company, registered scheme or disclosing entity a direction to lodge with ASIC a copy of reports prepared or obtained by it under Division 1 or 2.
- (1A) An offence based on subsection (1) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) The direction must:
- (a) be made in writing; and
  - (b) specify the period or periods concerned; and
  - (c) be made no later than 6 years after the end of the period or periods; and
  - (d) specify the date by which the documents have to be lodged.
- The date specified under paragraph (d) must be at least 14 days after the date on which the direction is given.

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

- (1) If a financial report or directors' report is amended after it is lodged with ASIC, the company, registered scheme or disclosing entity must:
- (a) lodge the amended report with ASIC within 14 days after the amendment; and
  - (b) give a copy of the amended report free of charge to any member who asks for it.
- (2) If the amendment is a material one, the company, registered scheme or disclosing entity must also notify members as soon as practicable of:
- (a) the nature of the amendment; and
  - (b) their right to obtain a copy of the amended report under subsection (1).
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

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**Part 2M.3** Financial reporting

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Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## **Division 6—Special provisions about consolidated financial statements**

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

- (1) If a company, registered scheme or disclosing entity has to prepare consolidated financial statements, a director or officer of a controlled entity must give the company, registered scheme or disclosing entity all information requested that is necessary to prepare the consolidated financial statements and the notes to those statements.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **323A Auditor's power to obtain information from controlled entity**

- (1) An auditor who audits or reviews a financial report that includes consolidated financial statements:
  - (a) has a right of access at all reasonable times to the books of any controlled entity; and
  - (b) may require any officer of the entity to give the auditor information, explanations or other assistance for the purposes of the audit or review.A request under paragraph (b) must be a reasonable one.
- (2) The information, explanations or other assistance required under paragraph (1)(b) is to be given at the expense of the company, registered scheme or disclosing entity whose financial report is being audited or reviewed.

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

- (1) If a company, registered scheme or disclosing entity has to prepare a financial report that includes consolidated financial statements, an officer or auditor of a controlled entity must:

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- (a) allow the auditor for the company, scheme or entity access to the controlled entity's books; and
  - (b) give the auditor any information, explanation or assistance required under section 323A.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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

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

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

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

#### *First financial year*

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

#### *Financial years after first year*

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

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

- (2A) A subsequent financial year may last for a period of less than 12 months determined by the directors if:
- (a) the subsequent financial year starts at the end of the previous financial year; and
  - (b) there has not been a period during the previous 5 financial years in which there was a financial year of less than 12 months in reliance on this subsection; and
  - (c) the change to the subsequent financial year is made in good faith in the best interests of the company, registered scheme or disclosing entity.

Note: For the purposes of paragraph (b), financial years that, in reliance on subsection (2) or (4), were less than 12 months are disregarded.

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

- (3) A company, registered scheme or disclosing entity that has to prepare consolidated financial statements must do whatever is necessary to ensure that the financial years of the consolidated entities are synchronised with its own financial years. It must achieve this synchronisation by the end of 12 months after the situation that calls for consolidation arises.
- (3A) An offence based on subsection (3) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (4) To facilitate this synchronisation, the financial year for a controlled entity may be extended or shortened. The extended financial year cannot be longer than 18 months.

*Half-years*

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

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

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

- (1) A company that discloses information to, or as required by:
  - (a) the Securities and Exchange Commission of the United States of America; or
  - (b) the New York Stock Exchange; or
  - (c) a financial market in a foreign country if that financial market is prescribed by regulations made for the purposes of this paragraph;must disclose that information in English to each relevant market operator, if the company is listed on the next business day after doing so.
- (3) This section applies despite anything in the company's constitution.

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

### **Division 1—Entities that may be appointed as an auditor for a company or registered scheme**

#### **324AA Individual auditors, audit firms and authorised audit companies**

Subject to this Part, the following may be appointed as auditor for a company or a registered scheme for the purposes of this Act:

- (a) an individual;
- (b) a firm;
- (c) a company.

The company or registered scheme may have more than one auditor.

#### **324AB Effect of appointing firm as auditor—general**

- (1) The appointment of a firm as auditor of a company or registered scheme is taken to be an appointment of all persons who, at the date of the appointment, are:
  - (a) members of the firm; and
  - (b) registered company auditors.This is so whether or not those persons are resident in Australia.
- (2) The appointment of the members of a firm as auditors of a company or registered scheme that is taken by subsection (1) to have been made because of the appointment of the firm as auditor of the company or scheme is not affected by the dissolution of the firm. This subsection has effect subject to section 324AC.
- (3) A report or notice that purports to be made or given by a firm appointed as auditor of a company or registered scheme is not taken to be duly made or given unless it is signed by a member of the firm who is a registered company auditor both:



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- (a) in the firm name; and
  - (b) in his or her own name.
- (4) A notice required or permitted to be given to an audit firm under the Corporations legislation may be given to the firm by giving the notice to a member of the firm.
- (5) For the purposes of criminal proceedings under this Act against a member of an audit firm, an act or omission by:
- (a) a member of the firm; or
  - (b) an employee or agent of the audit firm;
- acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is also to be attributed to the audit firm.

**324AC Effect of appointing firm as auditor—reconstitution of firm**

*Reconstitution of firm*

- (1) This section deals with the situation in which:
- (a) a firm is appointed as auditor of a company or registered scheme; and
  - (b) the firm is reconstituted because of either or both of the following:
    - (i) the death, retirement or withdrawal of a member or members; or
    - (ii) the admission of a new member or new members.

*Retiring or withdrawing member*

- (2) A person who:
- (a) is taken under subsection 324AB(1) to be an auditor of the company; and
  - (b) retires or withdraws from the firm as previously constituted as mentioned in subparagraph (1)(b)(i) of this section;
- is taken to resign as auditor of the company as from the day of his or her retirement or withdrawal.

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

**Division 1** Entities that may be appointed as an auditor for a company or registered scheme

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- (3) Section 329 does not apply to the resignation that is taken to occur under subsection (2) unless:
- (a) the person who is taken to have resigned was the only member of the firm who was a registered company auditor; and
  - (b) there is no member of the firm who is a registered company auditor after that person retires or withdraws from the firm.

*New member*

- (4) A person who:
- (a) is a registered company auditor; and
  - (b) is admitted to the firm as mentioned in subparagraph (1)(b)(ii);
- is taken to have been appointed as an auditor of the company or registered scheme as from the day of his or her admission to the firm.

*Appointments of continuing members not affected*

- (5) The reconstitution of the firm does not affect the appointment of the continuing members of the firm who are registered company auditors as auditors of the company or registered scheme.
- (6) Nothing in this section affects the operation of section 324BB.

**324AD Effect of appointing company as auditor**

- (1) A report or notice that purports to be made or given by an audit company appointed as auditor of a company or registered scheme is not taken to be duly made or given unless it is signed by a director of the audit company (or the lead auditor or review auditor for the audit) both:
- (a) in the audit company's name; and
  - (b) in his or her own name.
- (2) For the purposes of criminal proceedings under this Act against a director of an audit company, an act or omission by:

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- (a) an officer of the audit company; or
  - (b) an employee or agent of the audit company;
- acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is also to be attributed to the audit company.

**324AE Professional members of the audit team**

If an individual auditor, audit firm or audit company conducts an audit of a company or registered scheme, the *professional members of the audit team* are:

- (a) any registered company auditor who participates in the conduct of the audit; and
- (b) any other person who participates in the conduct of the audit and, in the course of doing so, exercises professional judgment in relation to the application of or compliance with:
  - (i) accounting standards; or
  - (ii) auditing standards; or
  - (iii) the provisions of this Act dealing with financial reporting and the conduct of audits; and
- (c) any other person who is in a position to directly influence the outcome of the audit because of the role they play in the design, planning, management, supervision or oversight of the audit; and
- (d) any person who recommends or decides what the lead auditor is to be paid in connection with the performance of the audit; and
- (e) any person who provides, or takes part in providing, quality control for the audit.

**324AF Lead and review auditors**

*Lead auditor*

- (1) If an audit firm or audit company conducts an audit of a company or registered scheme, the *lead auditor* for the audit is the registered

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company auditor who is primarily responsible to the audit firm or the audit company for the conduct of the audit.

*Review auditor*

- (2) If an individual auditor, audit firm or audit company conducts an audit of a company or registered scheme, the **review auditor** for the audit is the registered company auditor (if any) who is primarily responsible to the individual auditor, the audit firm or the audit company for reviewing the conduct of the audit.

## **Division 2—Registration requirements**

### **324BA Registration requirements for appointment of individual as auditor**

Subject to section 324BD, an individual contravenes this section if:

- (a) the individual:
  - (i) consents to be appointed as auditor of a company or registered scheme; or
  - (ii) acts as auditor of a company or registered scheme; or
  - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
- (b) the person is not a registered company auditor.

### **324BB Registration requirements for appointment of firm as auditor**

*Contraventions by members of firm*

- (1) A person (the *defendant*) contravenes this subsection if:
  - (a) at a particular time, a firm:
    - (i) consents to be appointed as auditor of a company or registered scheme; or
    - (ii) acts as auditor of a company or registered scheme; or
    - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
  - (b) at that time, the firm:
    - (i) does not satisfy subsection (5); or
    - (ii) does not satisfy subsection (6); and
  - (c) the defendant is a member of the firm at that time; and
  - (d) the defendant is aware of the circumstances referred to in paragraphs (a) and (b) at that time.

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- (2) A person (the *defendant*) contravenes this subsection if:
- (a) at a particular time, a firm:
    - (i) consents to be appointed as auditor of a company or registered scheme; or
    - (ii) acts as auditor of a company or registered scheme; or
    - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
  - (b) at that time, the firm:
    - (i) does not satisfy subsection (5); or
    - (ii) does not satisfy subsection (6); and
  - (c) the defendant is a member of the firm at that time.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a) and (b).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (4) provides a defence.

- (4) A member of an audit firm does not commit an offence at a particular time because of a contravention of subsection (2) if the member either:
- (a) does not know at that time of the circumstances that constitute the contravention of subsection (2); or
  - (b) does know of those circumstances at that time but takes all reasonable steps to correct the contravention as soon as possible after the member becomes aware of those circumstances.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

*Registered company auditor requirement*

- (5) The firm satisfies this subsection if at least 1 member of the firm is a registered company auditor who is ordinarily resident in Australia.

*Business name or members names requirement*

- (6) The firm satisfies this subsection if:
- (a) the business name under which the firm is carrying on business is registered on the Business Names Register; or
  - (b) a return in the prescribed form has been lodged showing, in relation to each member of the firm, the member's full name and address as at the time when the firm so consents, acts or prepares a report.

**324BC Registration requirements for appointment of company as auditor**

*Contravention by company*

- (1) A company contravenes this subsection if:
- (a) the company:
    - (i) consents to be appointed as auditor of a company or registered scheme; or
    - (ii) acts as auditor of a company or registered scheme; or
    - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
  - (b) the company is not an authorised audit company.

*Contraventions by directors of company*

- (2) A person (the **defendant**) contravenes this subsection if:
- (a) at a particular time, a company:
    - (i) consents to be appointed as auditor of a company or registered scheme; or
    - (ii) acts as auditor of a company or registered scheme; or
    - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
  - (b) at that time, the company is not an authorised audit company; and

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- (c) the defendant is a director of the company at that time; and
  - (d) the defendant is aware of the circumstances referred to in paragraphs (a) and (b) at that time.
- (3) A person (the *defendant*) contravenes this subsection if:
- (a) at a particular time, a company:
    - (i) consents to be appointed as auditor of a company or registered scheme; or
    - (ii) acts as auditor of a company or registered scheme; or
    - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
  - (b) at that time, the company is not an authorised audit company; and
  - (c) the defendant is a director of the company at that time.
- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical elements of the offence specified in paragraphs (3)(a) and (b).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (5) provides a defence.

- (5) A director of a company does not commit an offence at a particular time because of a contravention of subsection (3) if the director either:
- (a) does not know at that time of the circumstances that constitute the contravention of subsection (3); or
  - (b) knows of those circumstances at that time but takes all reasonable steps to correct the contravention of subsection (3) as soon as possible after the director becomes aware of those circumstances.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.



**324BD Exception from registration requirement for proprietary company**

- (1) An individual who is not a registered company auditor may be appointed as auditor of a proprietary company if:
- (a) ASIC is satisfied that it is impracticable for a proprietary company to obtain the services of:
    - (i) an individual who could be appointed as auditor consistently with section 324BA; or
    - (ii) a firm that could be appointed as auditor consistently with section 324BB; or
    - (iii) a company that could be appointed consistently with section 324BC;because of the place where the company carries on business; and
  - (b) ASIC is satisfied that the individual is suitably qualified or experienced; and
  - (c) ASIC approves the individual for the purposes of this Act in relation to the audit of the company's financial reports.
- The appointment is subject to such terms and conditions as are specified in the approval under paragraph (c).

- (2) If an individual is appointed in accordance with subsection (1):
- (a) the individual is taken to be a registered company auditor in relation to the auditing of any of the company's financial reports; and
  - (b) the provisions of this Act apply, with the necessary modifications, in relation to the individual accordingly.

Paragraph (a) has effect subject to the terms and conditions of the approval under subsection (1).

- (3) If an individual approved by ASIC under subsection (1) is acting as auditor of a company, ASIC may at any time, by notice in writing given to the company:
- (a) amend, revoke or vary the terms and conditions of its approval; or

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- (b) terminate the appointment of that individual as auditor of the company.
- (4) A notice under subsection (3) terminating the appointment of an individual as auditor of a company takes effect as if, on the date on which the notice is received by the company, the company had received from the individual notice of the individual's resignation as auditor taking effect from that date.

**324BE Exception from registration requirement—reviewing financial reports of companies limited by guarantee**

- (1) An individual is taken to be a registered company auditor for the purposes of a review of a financial report of a company limited by guarantee if the individual:
  - (a) is a member of a professional accounting body; and
  - (b) has a designation, in respect of that membership, prescribed by the regulations for the purposes of this paragraph.
- (2) The provisions of this Act apply, with the necessary modifications, in relation to the individual accordingly.

## **Division 3—Auditor independence**

### **Subdivision A—General requirement**

#### **324CA General requirement for auditor independence—auditors**

*Contravention by individual auditor or audit company*

- (1) An individual auditor or audit company contravenes this subsection if:
- (a) the individual auditor or audit company engages in audit activity in relation to an audited body at a particular time; and
  - (b) a conflict of interest situation exists in relation to the audited body at that time; and
  - (c) at that time:
    - (i) in the case of an individual auditor—the individual auditor is aware that the conflict of interest situation exists; or
    - (ii) in the case of an audit company—the audit company is aware that the conflict of interest situation exists; and
  - (d) the individual auditor or audit company does not, as soon as possible after the individual auditor or the audit company becomes aware that the conflict of interest situation exists, take all reasonable steps to ensure that the conflict of interest situation ceases to exist.

Note: For *conflict of interest situation*, see section 324CD.

*Individual auditor or audit company to notify ASIC*

- (1A) An individual auditor or audit company contravenes this subsection if:
- (a) the individual auditor or audit company is the auditor of an audited body; and

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- (b) a conflict of interest situation exists in relation to the audited body while the individual auditor or audit company is the auditor of the audited body; and
- (c) on a particular day (the *start day*):
  - (i) in the case of an individual auditor—the individual auditor becomes aware that the conflict of interest situation exists; or
  - (ii) in the case of an audit company—the audit company becomes aware that the conflict of interest situation exists; and
- (d) at the end of the period of 7 days from the start day:
  - (i) the conflict of interest situation remains in existence; and
  - (ii) the individual auditor or audit company has not informed ASIC in writing that the conflict of interest situation exists.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2A) or (2C) (public company) or 331AAA(2A) or (2C) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) A person is not excused from informing ASIC under subsection (1A) that a conflict of interest situation exists on the ground that the information might tend to incriminate the person or expose the person to a penalty.
- (1C) However, if the person is a natural person:
  - (a) the information; and
  - (b) the giving of the information;are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.

- (1D) If the individual auditor or audit company gives ASIC a notice under paragraph (1A)(d), ASIC must, as soon as practicable after the notice has been received, give a copy of the notice to the audited body.

*Conflict of interest situation of which individual auditor or audit company is not aware*

- (2) An individual auditor or audit company contravenes this subsection if:
- (a) the individual auditor or audit company engages in audit activity in relation to an audited body at a particular time; and
  - (b) a conflict of interest situation exists in relation to the audited body at the time; and
  - (c) at that time:
    - (i) in the case of an individual auditor—the individual auditor is not aware that the conflict of interest situation exists; or
    - (ii) in the case of an audit company—the audit company is not aware that the conflict of interest situation exists; and
  - (d) the individual auditor or the audit company would have been aware of the existence of the conflict of interest situation at that time if the individual auditor or audit company had had in place a quality control system reasonably capable of making the individual auditor or audit company aware of the existence of such a conflict of interest situation.

Note: For *conflict of interest situation*, see section 324CD.

- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical element of the offence specified in paragraph (2)(b).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsections (4) and (5) provide defences.

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- (4) An individual auditor does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by the auditor at a particular time if the individual auditor has reasonable grounds to believe that the individual auditor had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the individual auditor) that the individual auditor and the individual auditor's employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

- (5) An audit company does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by the audit company at a particular time if the audit company has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit company) that the audit company and the audit company's employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

*Relationship between obligations under this section and other obligations*

- (6) The obligations imposed by this section are in addition to, and do not derogate from, any obligation imposed by:
- (a) another provision of this Act; or
  - (b) a code of professional conduct.

Note: Paragraph (a)—see, for example, the specific obligations imposed by Subdivision B.

**324CB General requirement for auditor independence—member of audit firm**

*Contravention by member of audit firm*

- (1) A person (the **defendant**) contravenes this subsection if:
- (a) an audit firm engages in audit activity in relation to an audited body at a particular time; and
  - (b) a conflict of interest situation exists in relation to the audited body at that time; and
  - (c) the defendant is a member of the audit firm at that time; and
  - (d) the defendant is or becomes aware of the circumstances referred to in paragraphs (a) and (b); and
  - (e) the defendant does not, as soon as possible after the defendant becomes aware of those circumstances, take reasonable steps to ensure that the conflict of interest situation ceases to exist.

Note: For **conflict of interest situation**, see section 324CD.

*Member of audit firm to notify ASIC*

- (1A) A person (the **defendant**) contravenes this subsection if:
- (a) an audit firm is the auditor of an audited body; and
  - (b) a conflict of interest situation exists in relation to the audited body while the audit firm is the auditor of the audited body; and
  - (c) the defendant is a member of the audit firm at a time when the conflict of interest situation exists; and
  - (d) on a particular day (the **start day**), the defendant becomes aware of the circumstances referred to in paragraphs (a) and (b); and
  - (e) at the end of the period of 7 days from the start day:
    - (i) the conflict of interest situation remains in existence; and
    - (ii) ASIC has not been informed in writing by the defendant, by another member of the audit firm or by

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someone else on behalf of the audit firm that the conflict of interest situation exists.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2B) (public company) or 331AAA(2B) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

(1B) A person is not excused from informing ASIC under subsection (1A) that a conflict of interest situation exists on the ground that the information might tend to incriminate the person or expose the person to a penalty.

(1C) However:

- (a) the information; and
- (b) the giving of the information;

are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.

(1D) If ASIC is given a notice under paragraph (1A)(e), ASIC must, as soon as practicable after the notice is received, give a copy of the notice to the audited body.

*Conflict of interest situation of which another member of audit firm is aware*

(2) A person contravenes this subsection if:

- (a) an audit firm engages in audit activity in relation to an audited body at a particular time; and
- (b) a conflict of interest situation exists in relation to the audited body at the time; and
- (c) the person is a member of the audit firm at that time; and
- (d) at that time, another member of the audit firm is aware that the conflict of interest situation exists; and



- (e) the audit firm does not, as soon as possible after the member referred to in paragraph (d) becomes aware that the conflict of interest situation exists, take all reasonable steps to ensure that the conflict of interest situation ceases to exist.

Note: For *conflict of interest situation*, see section 324CD.

- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a), (b), (d) and (e).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (6) provides a defence.

*Conflict of interest situation of which members are not aware*

- (4) A person contravenes this subsection if:
  - (a) an audit firm engages in audit activity in relation to an audited body at a particular time; and
  - (b) a conflict of interest situation exists in relation to the audited body at the time; and
  - (c) the person is a member of the audit firm at that time; and
  - (d) at that time none of the members of the audit firm is aware that the conflict of interest situation exists; and
  - (e) a member of the audit firm would have been aware of the existence of the conflict of interest situation if the audit firm had in place a quality control system reasonably capable of making the audit firm aware of the existence of such a conflict of interest situation.

Note: For *conflict of interest situation*, see section 324CD.

- (5) For the purposes of an offence based on subsection (4), strict liability applies to the physical elements of the offence specified in paragraphs (4)(a), (b), (d) and (e).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (6) provides a defence.

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*Defence*

- (6) A person does not commit an offence because of a contravention of subsection (2) or (4) in relation to audit activity engaged in by an audit firm at a particular time if the person has reasonable grounds to believe that the audit firm had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit firm) that the audit firm and its employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

*Relationship between obligations under this section and other obligations*

- (7) The obligations imposed by this section are in addition to, and do not derogate from, any obligation imposed by:
- (a) another provision of this Act; or
  - (b) a code of professional conduct.

Note: Paragraph (a)—see, for example, the specific obligations imposed by Subdivision B.

**324CC General requirement for auditor independence—director of audit company**

*Contravention by director of audit company*

- (1) A person (the *defendant*) contravenes this subsection if:
- (a) an audit company engages in audit activity in relation to an audited body at a particular time; and
  - (b) a conflict of interest situation exists in relation to the audited body at that time; and
  - (c) the defendant is a director of the audit company at that time; and
  - (d) the defendant is or becomes aware of the circumstances referred to in paragraphs (a) and (b); and

- (e) the defendant does not, as soon as possible after the defendant becomes aware of those circumstances, take reasonable steps to ensure that the conflict of interest situation ceases to exist.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: The audit company itself will commit an offence based on the contravention of subsection 324AA(1).

*Director of audit company to notify ASIC*

- (1A) A person (the *defendant*) contravenes this subsection if:
- (a) an audit company is the auditor of an audited body; and
  - (b) a conflict of interest situation exists in relation to the audited body while the audit company is the auditor of the audited body; and
  - (c) the defendant is a director of the audit company at a time when the conflict of interest situation exists; and
  - (d) on a particular day (the *start day*), the defendant becomes aware of the circumstances referred to in paragraphs (a) and (b); and
  - (e) at the end of the period of 7 days from the start day:
    - (i) the conflict of interest situation remains in existence; and
    - (ii) ASIC has not been informed in writing by the defendant, by another director of the audit company or by the audit company that the conflict of interest situation exists.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2C) (public company) or 331AAA(2C) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) A person is not excused from informing ASIC under subsection (1A) that a conflict of interest situation exists on the

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ground that the information might tend to incriminate the person or expose the person to a penalty.

- (1C) However, if the person is a natural person:
- (a) the information; and
  - (b) the giving of the information;
- are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.
- (1D) If ASIC is given a notice under paragraph (1A)(e), ASIC must, as soon as practicable after the notice is received, give a copy of the notice to the audited body.

*Conflict of interest situation of which another director of audit company aware*

- (2) A person contravenes this subsection if:
- (a) an audit company engages in audit activity in relation to an audited body at a particular time; and
  - (b) a conflict of interest situation exists in relation to the audited body at the time; and
  - (c) the person is a director of the audit company at that time; and
  - (d) at that time, another director of the audit company is aware that the conflict of interest situation exists; and
  - (e) the audit company does not, as soon as possible after the director referred to in paragraph (d) becomes aware that the conflict of interest situation exists, take all reasonable steps to ensure that the conflict of interest situation ceases to exist.
- Note 1: For **conflict of interest situation**, see section 324CD.
- Note 2: The company itself will commit an offence based on the contravention of subsection 324AA(1).
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a), (b), (d) and (e).

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Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (6) provides a defence.

*Conflict of interest situation of which directors of audit company not aware*

- (4) A person contravenes this subsection if:
- (a) an audit company engages in audit activity in relation to an audited body at a particular time; and
  - (b) a conflict of interest situation exists in relation to the audited body at the time; and
  - (c) the person is a director of the audit company at that time; and
  - (d) at that time none of the directors of the audit company is aware that the conflict of interest situation exists; and
  - (e) a director of the audit company would have been aware of the existence of the conflict of interest situation if the audit company had in place a quality control system reasonably capable of making the audit company aware of the existence of such a conflict of interest situation.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: The company itself will commit an offence based on the contravention of subsection 324AA(2).

- (5) For the purposes of an offence based on subsection (4), strict liability applies to the physical elements of the offence specified in paragraphs (4)(a), (b), (d) and (e).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (6) provides a defence.

*Defence*

- (6) A person does not commit an offence because of a contravention of subsection (2) or (4) in relation to audit activity engaged in by an audit company at a particular time if the person has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit

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company) that the audit company and its employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

*Relationship between obligations under this section and other obligations*

- (7) The obligations imposed by this section are in addition to, and do not derogate from, any obligation imposed by:
- (a) another provision of this Act; or
  - (b) a code of professional conduct.

Note: Paragraph (a)—see, for example, the specific obligations imposed by Subdivision B.

**324CD Conflict of interest situation**

- (1) For the purposes of sections 324CA, 324CB and 324CC, a ***conflict of interest situation*** exists in relation to an audited body at a particular time if, because of circumstances that exist at that time:
- (a) the auditor, or a professional member of the audit team, is not capable of exercising objective and impartial judgment in relation to the conduct of the audit of the audited body; or
  - (b) a reasonable person, with full knowledge of all relevant facts and circumstances, would conclude that the auditor, or a professional member of the audit team, is not capable of exercising objective and impartial judgment in relation to the conduct of the audit of the audited body.
- (2) Without limiting subsection (1), have regard to circumstances arising from any relationship that exists, has existed, or is likely to exist, between:
- (a) the individual auditor; or
  - (b) the audit firm or any current or former member of the firm;  
or

(c) the audit company, any current or former director of the audit company or any person currently or formerly involved in the management of the audit company;  
and any of the persons and bodies set out in the following table:

<b>Relevant relationships</b>		
<b>Item</b>	<b>If the audited body is...</b>	<b>have regard to any relationship with...</b>
1	a company	the company; or a current or former director of the company; or a person currently or formerly involved in the management of the company.
2	a disclosing entity	the entity; or a current or former director of the entity; or a person currently or formerly involved in the management of the entity.
3	a registered scheme	the responsible entity for the registered scheme; or a current or former director of the responsible entity; or a person currently or formerly involved in the management of the scheme; or a person currently or formerly involved in the management of the responsible entity.

### Subdivision B—Specific requirements

#### 324CE Auditor independence—specific requirements for individual auditor

*Specific independence requirements for individual auditor*

- (1) An individual auditor contravenes this subsection if:
- (a) the individual auditor engages in audit activity at a particular time; and
  - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (5) of this section; and
  - (c) the individual auditor is or becomes aware of the circumstances referred to in paragraph (b); and
  - (d) the individual auditor does not, as soon as possible after the individual auditor becomes aware of those circumstances, take all reasonable steps to ensure that the individual auditor does not continue to engage in audit activity in those circumstances.

*Individual auditor to notify ASIC*

- (1A) An individual auditor contravenes this subsection if:
- (a) the individual auditor is the auditor of an audited body; and
  - (b) a relevant item of the table in subsection 324CH(1) applies to a person or entity covered by subsection (5) of this section while the individual auditor is the auditor of the audited body; and
  - (c) on a particular day (the *start day*), the individual auditor becomes aware of the circumstances referred to in paragraph (b); and
  - (d) at the end of the period of 7 days from the start day:
    - (i) those circumstances remain in existence; and
    - (ii) the individual auditor has not informed ASIC in writing of those circumstances.



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Note: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2A) (public company) or 331AAA(2A) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) A person is not excused from informing ASIC under subsection (1A) that the circumstances referred to in paragraph (1A)(b) exist on the ground that the information might tend to incriminate the person or expose the person to a penalty.
- (1C) However:
- (a) the information; and
  - (b) the giving of the information;
- are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.
- (1D) If the individual auditor gives ASIC a notice under paragraph (1A)(d), ASIC must, as soon as practicable after the notice has been received, give a copy of the notice to the audited body.

*Strict liability contravention of specific independence requirements by individual auditor*

- (2) An individual auditor contravenes this subsection if:
- (a) the individual auditor engages in audit activity at a particular time; and
  - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (5) of this section.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraph (2)(b).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

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Note 2: Subsection (4) provides a defence.

- (4) An individual auditor does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by the individual auditor at a particular time if the individual auditor has reasonable grounds to believe that the individual auditor had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the individual auditor) that the individual auditor and the individual auditor's employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

*People and entities covered*

- (5) The following table sets out:
- (a) the persons and entities covered by this subsection in relation to audit activity engaged in by an individual auditor; and
  - (b) the items of the table in subsection 324CH(1) that are the relevant items for each of those persons and entities:

<b>Individual auditor</b>		
<b>Item</b>	<b>For this person or entity...</b>	<b>the relevant items of the table in subsection 324CH (1) are...</b>
1	the individual auditor	1 to 19
2	a service company or trust acting for, or on behalf of, the individual auditor, or another entity performing a similar function	1 to 19
3	a professional member of the audit team conducting the audit of the audited body	1 to 6 8 to 19
4	an immediate family member of a professional member of the audit team conducting the audit of the audited body	1 and 2 10 to 19

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<b>Individual auditor</b>		
<b>Item</b>	<b>For this person or entity...</b>	<b>the relevant items of the table in subsection 324CH (1) are...</b>
5	a person who is a non-audit services provider and who does not satisfy the maximum hours test in subsection (6)	10 to 12
6	an immediate family member of a person who is a non-audit services provider and who does not satisfy the maximum hours test in subsection (6)	10 to 12
7	an entity that the auditor (or a service company or trust acting for, or on behalf of, the individual auditor, or another entity performing a similar function) controls	15
8	a body corporate in which the auditor (or a service company or trust acting for, or on behalf of, the individual auditor, or another entity performing a similar function) has a substantial holding	15
9	a person who: (a) is a former professional employee of the auditor; and (b) does not satisfy the independence test in subsection (7)	1 and 2
10	an individual who: (a) is the former owner of the individual auditor's business; and (b) does not satisfy the independence test in subsection (7)	1 and 2

*Maximum hours test*

- (6) A non-audit services provider satisfies the maximum hours test in this subsection if:

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- (a) the number of hours for which the person provides services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the period to which the audit relates does not exceed 10 hours; and
- (b) the number of hours for which the person provides services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the 12 months immediately before the beginning of the period to which the audit relates does not exceed 10 hours.

In a prosecution for an offence based on subsection (1) or (2), the prosecution must prove that the non-audit services provider did not satisfy the maximum hours test in this subsection.

*Independence test*

- (7) A person satisfies the independence test in this subsection in relation to an individual auditor if the person:
  - (a) does not influence the operations or financial policies of the accounting and audit practice conducted by the auditor; and
  - (b) does not participate, or appear to participate, in the business or professional activities of the accounting and audit practice conducted by the auditor; and
  - (c) does not have any rights against the auditor in relation to the accounting and audit practice conducted by the auditor in relation to the termination of the person's former employment by the auditor; and
  - (d) has no financial arrangements with the auditor in relation to the accounting and audit practice conducted by the auditor, other than:
    - (i) an arrangement providing for regular payments of a fixed pre-determined dollar amount which is not dependent, directly or indirectly, on the revenues, profits or earnings of the auditor; or
    - (ii) an arrangement providing for regular payments of a dollar amount where the method of calculating the dollar amount is fixed and is not dependent, directly or

indirectly, on the revenues, profits or earnings of the auditor; and

- (e) without limiting paragraph (d), has no financial arrangement with the auditor to receive a commission or similar payment in relation to business generated by the person for the accounting and audit practice conducted by the auditor.

In a prosecution for an offence based on subsection (1) or (2), the prosecution must prove that the person did not satisfy the independence test in this subsection in relation to the individual auditor.

- (8) In applying subsection (7), disregard any rights that the person has against the auditor by way of an indemnity for, or contribution in relation to, liabilities incurred by the person when the person was an employee of the auditor or the owner of the auditor's business.

### **324CF Auditor independence—specific requirements for audit firm**

#### *Contraventions by members of audit firm*

- (1) A person (the **defendant**) contravenes this subsection if:
  - (a) an audit firm engages in audit activity at a particular time; and
  - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (5) of this section; and
  - (c) the defendant is a member of the audit firm at that time; and
  - (d) the defendant is or becomes aware of the circumstances referred to in paragraphs (a) and (b); and
  - (e) the defendant does not, as soon as possible after the defendant becomes aware of those circumstances, take all reasonable steps to ensure that the audit firm does not continue to engage in audit activity in those circumstances.

#### *Member of audit firm to notify ASIC*

- (1A) A person (the **defendant**) contravenes this subsection if:
    - (a) an audit firm is the auditor of an audited body; and
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- (b) a relevant item of the table in subsection 324CH(1) applies to a person or entity covered by subsection (5) of this section while the audit firm is the auditor of the audited body; and
- (c) the defendant is a member of the audit firm at a time when the circumstances referred to in paragraph (b) exist; and
- (d) on a particular day (the *start day*), the defendant becomes aware of the circumstances referred to in paragraphs (a) and (b); and
- (e) at the end of the period of 7 days from the start day:
  - (i) the circumstances referred to in paragraph (b) remain in existence; and
  - (ii) ASIC has not been informed in writing of those circumstances by the defendant, by another member of the audit firm or by someone else on behalf of the audit firm.

Note: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2B) (public company) or 331AAA(2B) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

(1B) A person is not excused from informing ASIC under subsection (1A) that the circumstances referred to in paragraph (1A)(b) exist on the ground that the information might tend to incriminate the person or expose the person to a penalty.

(1C) However:

- (a) the information; and
- (b) the giving of the information;

are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.

- (1D) If ASIC is given a notice under paragraph (1A)(e), ASIC must, as soon as practicable after the notice is received, give a copy of the notice to the audited body.

*Contravention of independence requirements by members of audit firm*

- (2) A person (the **defendant**) contravenes this subsection if:
- (a) an audit firm engages in audit activity at a particular time; and
  - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (5) of this section; and
  - (c) the defendant is a member of the audit firm at that time.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a) and (b).

Note 1: For **strict liability**, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (4) provides a defence.

- (4) A person does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by an audit firm at a particular time if the person has reasonable grounds to believe that the audit firm had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit firm) that the audit firm and its employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

*People and entities covered*

- (5) The following table sets out:
- (a) the persons and entities covered by this subsection in relation to audit activity engaged in by an audit firm; and

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(b) the items of the table in subsection 324CH(1) that are the relevant items for each of those persons and entities:

<b>Audit firm</b>		
<b>Item</b>	<b>For this person or entity...</b>	<b>the relevant items of the table in subsection 324CH (1) are...</b>
1	the firm	4 7 10 to 19
2	a service company or trust acting for, or on behalf of, the firm, or another entity performing a similar function	4 7 10 to 19
3	a member of the firm	1 to 7 9 15
4	a professional member of the audit team conducting the audit of the audited body	1 to 6 8 to 19
5	an immediate family member of a professional member of the audit team conducting the audit of the audited body	1 and 2 10 to 19
6	a person who: (a) is a non-audit services provider; and (b) does not satisfy the maximum hours test in subsection (6)	10 to 12
7	an immediate family member of a person who: (a) is a non-audit services provider; and (b) does not satisfy the maximum hours test in subsection (6)	10 to 12



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<b>Audit firm</b>		
<b>Item</b>	<b>For this person or entity...</b>	<b>the relevant items of the table in subsection 324CH (1) are...</b>
8	an entity that the firm (or a service company or trust acting for, or on behalf of, the firm, or another entity performing a similar function) controls	15
9	a body corporate in which the firm (or a service company or trust acting for, or on behalf of, the firm, or another entity performing a similar function) has a substantial holding	15
10	an entity that a member of the firm controls or a body corporate in which a member of the firm has a substantial holding	15
11	a person who: (a) is a former member of the firm; and (b) does not satisfy the independence test in subsection (7)	1 and 2
12	a person who: (a) is a former professional employee of the firm; and (b) does not satisfy the independence test in subsection (7)	1 and 2

*Maximum hours test*

- (6) A non-audit services provider satisfies the maximum hours test in this subsection if:
- (a) the number of hours for which the person provides services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the period to which the audit relates does not exceed 10 hours; and

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- (b) the number of hours for which the person provided services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the 12 months immediately before the beginning of the period to which the audit relates does not exceed 10 hours.

In a prosecution for an offence based on subsection (1) or (2), the prosecution must prove that the non-audit services provider did not satisfy the maximum hours test in this subsection.

*Independence test*

- (7) A person satisfies the independence test in this subsection in relation to a firm if the person:
  - (a) does not influence the operations or financial policies of the accounting and audit practice conducted by the firm; and
  - (b) does not participate, or appear to participate, in the business or professional activities of the accounting and audit practice conducted by the firm; and
  - (c) does not have any rights against the firm, or the members of the firm, in relation to the accounting and audit practice conducted by the firm in relation to the termination of, or the value of, the person's former partnership interest in the firm; and
  - (d) has no financial arrangements with the firm in relation to the accounting and audit practice conducted by the firm, other than:
    - (i) an arrangement providing for regular payments of a fixed pre-determined dollar amount which is not dependent, directly or indirectly, on the revenues, profits or earnings of the firm; or
    - (ii) an arrangement providing for regular payments of a dollar amount where the method of calculating the dollar amount is fixed and is not dependent, directly or indirectly, on the revenues, profits or earnings of the firm; and
  - (e) without limiting paragraph (d), has no financial arrangement with the firm to receive a commission or similar payment in

relation to business generated by the person for the accounting and audit practice conducted by the firm.

In a prosecution for an offence based on subsection (1) or (2), the prosecution must prove that the person did not satisfy the independence test in this subsection in relation to the firm.

- (8) In applying subsection (7), disregard any rights that the person has against the firm, or the members of the firm, by way of an indemnity for, or contribution in relation to, liabilities incurred by the person when the person was a member or employee of the firm.

*Meaning of holding by firm in body corporate*

- (9) For the purposes of item 9 in the table in subsection (5), a firm is taken to have a holding in a body corporate if the holding is one of the firm's partnership assets.

### **324CG Auditor independence—specific requirements for audit company**

*Specific independence requirements for audit company*

- (1) An audit company contravenes this subsection if:
- (a) the audit company engages in audit activity at a particular time; and
  - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (9) of this section; and
  - (c) the audit company is or becomes aware of the circumstances referred to in paragraph (b); and
  - (d) the audit company does not, as soon as possible after the audit company becomes aware of those circumstances, take all reasonable steps to ensure that the audit company does not continue to engage in audit activity in those circumstances.

*Audit company to notify ASIC*

- (1A) An audit company contravenes this subsection if:

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- (a) the audit company is the auditor of an audited body; and
- (b) a relevant item of the table in subsection 324CH(1) applies to a person or entity covered by subsection (9) of this section while the audit company is the auditor of the audited body; and
- (c) on a particular day (the *start day*), the audit company becomes aware of the circumstances referred to in paragraph (b); and
- (d) at the end of the period of 7 days from the start day:
  - (i) those circumstances remain in existence; and
  - (ii) the audit company has not informed ASIC in writing of those circumstances.

Note: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2C) (public company) or 331AAA(2C) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) If the audit company gives ASIC a notice under paragraph (1A)(d), ASIC must, as soon as practicable after the notice has been received, give a copy of the notice to the audited body.

*Strict liability contravention of specific independence requirements by audit company*

- (2) An audit company contravenes this subsection if:
  - (a) the audit company engages in audit activity at a particular time; and
  - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (9) of this section.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraph (2)(b).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (4) provides a defence.

- (4) An audit company does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by the audit company at a particular time if the audit company has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit company) that the audit company and the audit company's employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

*Contraventions by directors of audit company*

- (5) A person (the **defendant**) contravenes this subsection if:
- (a) an audit company engages in audit activity at a particular time; and
  - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (9) of this section; and
  - (c) the defendant is a director of the audit company at that time; and
  - (d) the defendant is or becomes aware of the circumstances referred to in paragraphs (a) and (b); and
  - (e) the defendant does not, as soon as possible after the defendant becomes aware of those circumstances, take all reasonable steps to ensure that the audit company does not continue to engage in audit activity in those circumstances.

*Director of audit company to notify ASIC*

- (5A) A person (the **defendant**) contravenes this subsection if:
- (a) an audit company is the auditor of an audited body; and
  - (b) a relevant item of the table in subsection 324CH(1) applies to a person or entity covered by subsection (9) of this section

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while the audit company is the auditor of the audited body;  
and

- (c) the defendant is a director of the audit company at a time when the circumstances referred to in paragraph (b) exist;  
and
- (d) on a particular day (the *start day*), the defendant becomes aware of the circumstances referred to in paragraphs (a) and (b); and
- (e) at the end of the period of 7 days from the start day:
  - (i) the circumstances referred to in paragraph (b) remain in existence; and
  - (ii) ASIC has not been informed in writing of those circumstances by the defendant, by another director of the company or by the audit company.

Note: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2C) (public company) or 331AAA(2C) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

(5B) A person is not excused from informing ASIC under subsection (5A) that the circumstances referred to in paragraph (5A)(b) exist on the ground that the information might tend to incriminate the person or expose the person to a penalty.

(5C) However, if the person is a natural person:

- (a) the information; and
- (b) the giving of the information;

are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.

(5D) If ASIC is given a notice under paragraph (5A)(e), ASIC must, as soon as practicable after the notice is received, give a copy of the notice to the audited body.

*Strict liability contravention of specific independence requirements  
by director of audit company*

- (6) A person (the **defendant**) contravenes this subsection if:
- (a) an audit company engages in audit activity at a particular time; and
  - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (9) of this section; and
  - (c) the defendant is a director of the audit company at that time.

- (7) For the purposes of an offence based on subsection (6), strict liability applies to the physical elements of the offence specified in paragraphs (6)(a) and (b).

Note 1: For **strict liability**, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (8) provides a defence.

- (8) A person does not commit an offence because of a contravention of subsection (6) in relation to audit activity engaged in by an audit company at a particular time if the person has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit company) that the audit company and its employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

*People and entities covered*

- (9) The following table sets out:
- (a) the persons and entities covered by this subsection in relation to audit activity engaged in by an audit company; and
  - (b) the items of the table in subsection 324CH(1) that are the relevant items for each of those persons and entities:

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<b>Audit company</b>		
<b>Item</b>	<b>For this person or entity...</b>	<b>the relevant items of the table in subsection 324CH(1) are...</b>
1	the audit company	4 7 10 to 19
2	a service company or trust acting for, or on behalf of, the audit company, or another entity performing a similar function	4 7 10 to 19
3	a director or senior manager of the audit company	1 to 7 9 15
4	a professional member of the audit team conducting the audit of the audited body	1 to 6 8 to 19
5	an immediate family member of a professional member of the audit team conducting the audit of the audited body	1 and 2 10 to 19
6	a person who: (a) is a non-audit services provider; and (b) does not satisfy the maximum hours test in subsection (10)	10 to 12
7	an immediate family member of a person who: (a) is a non-audit services provider; and (b) does not satisfy the maximum hours test in	10 to 12



<b>Audit company</b>		
<b>Item</b>	<b>For this person or entity...</b>	<b>the relevant items of the table in subsection 324CH(1) are...</b>
subsection (10)		
8	an entity that the audit company (or a service company or trust acting for, or on behalf of, the audit company, or another entity performing a similar function) controls	15
9	a body corporate in which the audit company (or a service company or trust acting for, or on behalf of, the audit company, or another entity performing a similar function) has a substantial holding	15
10	an entity that an officer of the audit company controls or a body corporate in which an officer of the audit company has a substantial holding	16
11	a person who: (a) is a former officer of the audit company; and (b) does not satisfy the independence test in subsection (11)	1 and 2
12	a person who: (a) is a former professional employee of the audit company; and (b) does not satisfy the independence test in subsection (11)	1 and 2

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*Maximum hours test*

- (10) A non-audit services provider satisfies the maximum hours test in this subsection if:
- (a) the number of hours for which the person provides services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the period to which the audit relates does not exceed 10 hours; and
  - (b) the number of hours for which the person provided services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the 12 months immediately before the beginning of the period to which the audit relates does not exceed 10 hours.

In a prosecution for an offence based on subsection (1), (2), (5) or (6), the prosecution must prove that the non-audit services provider did not satisfy the maximum hours test in this subsection.

*Independence test*

- (11) A person satisfies the independence test in this subsection in relation to an audit company if the person:
- (a) does not influence the operations or financial policies of the accounting and audit practice conducted by the audit company; and
  - (b) does not participate, or appear to participate, in the business or professional activities of the accounting and audit practice conducted by the audit company; and
  - (c) does not have any rights against the audit company in relation to the accounting and audit practice conducted by the audit company in relation to the termination of the person's former position as an officer of the audit company; and
  - (d) has no financial arrangements with the audit company in relation to the accounting and audit practice conducted by the audit company, other than:
    - (i) an arrangement providing for regular payments of a fixed pre-determined dollar amount which is not

dependent, directly or indirectly, on the revenues, profits or earnings of the audit company; or

- (ii) an arrangement providing for regular payments of a dollar amount where the method of calculating the dollar amount is fixed and is not dependent, directly or indirectly, on the revenues, profits or earnings of the audit company; and
- (e) without limiting paragraph (d), has no financial arrangement with the audit company to receive a commission or similar payment in relation to business generated by the person for the accounting and audit practice conducted by the audit company.

In a prosecution for an offence based on subsection (1), (2), (5) or (6), the prosecution must prove that the person did not satisfy the independence test in this subsection in relation to the audit company.

- (12) In applying subsection (11), disregard any rights that the person has against the audit company by way of an indemnity for, or contribution in relation to, liabilities incurred by the person when the person was an officer or employee of the audit company.

### **324CH Relevant relationships**

#### *Table of relevant relationships*

- (1) The following table lists the relationships between:
  - (a) a person or a firm; and
  - (b) the audited body for an audit;that are relevant for the purposes of sections 324CE, 324CF and 324CG:

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<b>Relevant relationships</b>	
<b>Item</b>	<b>This item applies to a person (or, if applicable, to a firm) at a particular time if at that time the person (or firm)...</b>
1	is an officer of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
2	is an audit-critical employee of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
3	is a partner of: (a) an officer of the audited body; or (b) an audit-critical employee of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
4	is an employer of: (a) an officer of the audited body; or (b) an audit-critical employee of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
5	is an employee of: (a) an officer of the audited body; or (b) an audit-critical employee of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
6	is a partner or employee of an employee of: (a) an officer of the company; or (b) an audit-critical employee of the company This item does not apply if the audited body is a small proprietary company for the relevant financial year.
7	provides remuneration to: (a) an officer of the audited body; or (b) an audit-critical employee of the audited body;

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**Relevant relationships**

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**Item This item applies to a person (or, if applicable, to a firm) at a particular time if at that time the person (or firm)...**

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- for acting as a consultant to the person  
This item does not apply if the audited body is a small proprietary company for the relevant financial year.
- 
- 8 was an officer of the audited body at any time during:  
(a) the period to which the audit relates; or  
(b) the 12 months immediately preceding the beginning of the period to which the audit relates; or  
(c) the period during which the audit is being conducted or the audit report is being prepared  
This item does not apply if the audited body is a small proprietary company for the relevant financial year.
- 
- 9 was an audit-critical employee of the audited body at any time during:  
(a) the period to which the audit relates; or  
(b) the 12 months immediately preceding the beginning of the period to which the audit relates; or  
(c) the period during which the audit is being conducted or the audit report is being prepared  
This item does not apply if the audited body is a small proprietary company for the relevant financial year.
- 
- 10 has an asset that is an investment in the audited body
- 
- 11 has an asset that is a beneficial interest in an investment in the audited body and has control over that asset
- 
- 12 has an asset that is a beneficial interest in an investment in the audited body that is a material interest
- 
- 13 has an asset that is a material investment in an entity that has a controlling interest in the audited body
- 
- 14 has an asset that is a material beneficial interest in an investment in an entity that has a controlling interest in the audited body
-

Section 324CH

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<b>Relevant relationships</b>	
<b>Item</b>	<b>This item applies to a person (or, if applicable, to a firm) at a particular time if at that time the person (or firm)...</b>
15	owes an amount to: (a) the audited body; or (b) a related body corporate; or (c) an entity that the audited body controls; unless the debt is disregarded under subsection (5), (5A) or (5B)
16	is owed an amount by: (a) the audited body; or (b) a related body corporate; or (c) an entity that the audited body controls; under a loan that is not disregarded under subsection (6) or (6A)
17	is liable under a guarantee of a loan made to: (a) the audited body; or (b) a related body corporate; or (c) an entity that the audited body controls
19	is entitled to the benefit of a guarantee given by: (a) the audited body; or (b) a related body corporate; or (c) an entity that the audited body controls in relation to a loan unless the guarantee is disregarded under subsection (8)

*Applying table if audited body is registered scheme*

- (2) If the audited body is a registered scheme, apply the table in subsection (1) as if:
- (a) references to the audited body in items 1 to 9, and items 15 to 19, in the table were references to the responsible entity for the registered scheme; and
  - (b) references to an interest in the audited body in items 10 to 12 in the table were references to an interest in either:

- (i) the registered scheme; or
- (ii) the responsible entity for the registered scheme; and
- (c) references to an investment in an entity that has a controlling interest in the audited body in items 13 and 14 of the table were references to an investment in an entity that has a controlling interest in the responsible entity for the registered scheme.

*Applying table if audited body is listed entity (other than registered scheme)*

- (3) If the audited body is a listed entity (other than a registered scheme), apply the table in subsection (1) as if references in the table to the audited body included references to an associated entity of the audited body.

Note: See section 50AAA for the definition of *associated entity*.

*Firm assets*

- (4) For the purpose of applying items 10 to 14 in the table in subsection (1) to an audit firm, the firm is taken to have a particular asset if the asset is one of the firm's partnership assets.

*Housing loan exception*

- (5) For the purposes of item 15 of the table in subsection (1), disregard a debt owed by an individual to a body corporate or entity if:
  - (a) the body corporate or entity is:
    - (i) an Australian ADI; or
    - (ii) a body corporate registered under section 21 of the *Life Insurance Act 1995*; and
  - (b) the debt arose because of a loan that the body corporate or entity made to the person in the ordinary course of its ordinary business; and
  - (c) the person used the amount of the loan to pay the whole or part of the purchase price of premises that the person uses as their principal place of residence.

**Section 324CH**

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*Goods and services exception*

- (5A) For the purposes of item 15 of the table in subsection (1), disregard a debt owed by a person or firm to a body corporate or entity if:
- (a) the debt arises from the acquisition of goods or services from:
    - (i) the audited body; or
    - (ii) an entity that the audited body controls; or
    - (iii) a related body corporate; and
  - (b) the acquisition of goods and services was on the terms and conditions that would normally apply to goods or services acquired from the body, entity or related body corporate; and
  - (c) the debt is owed on the terms and conditions that would normally apply to a debt owing to the body, entity or related body corporate; and
  - (d) the goods or services will be used by the person or firm:
    - (i) for the personal use of the person or firm; or
    - (ii) in the ordinary course of business of the person or firm.

*Ordinary commercial loan exception*

- (5B) For the purposes of item 15 of the table in subsection (1), disregard a debt owed under a loan that:
- (a) is made or given in the ordinary course of business of:
    - (i) the audited body; or
    - (ii) the related body corporate; or
    - (iii) the controlled entity; and
  - (b) is made or given on the terms and conditions that would normally apply to a loan made or given by the audited body, the related body corporate or the controlled entity.

*Loans by immediate family members in ordinary business dealing with client*

- (6) For the purposes of item 16 of the table in subsection (1), disregard a debt owed to a person by a body corporate or entity if:



- (a) the item applies to the person because the person is an immediate family member of:
    - (i) a professional member of the audit team conducting the audit of the audited body; or
    - (ii) a non-audit services provider; and
  - (b) the debt is incurred in the ordinary course of business of the body corporate or entity.
- (6A) For the purposes of item 16 in the table in subsection (1), disregard an amount owed under a loan to a person or firm by the audited body, a related body corporate or an entity that the audited body controls if:
- (a) the body, body corporate or entity is an Australian ADI; and
  - (b) the amount is deposited in a basic deposit product (within the meaning of section 761A) provided by the body, body corporate or entity; and
  - (c) the amount was deposited, in the ordinary course of business of the audited body, body corporate or entity, on the terms and conditions that would normally apply to a basic deposit product provided by the body, body corporate or entity.

*Ordinary commercial guarantee exception*

- (8) For the purposes of item 19 of the table in subsection (1), disregard any guarantee that:
- (a) is made or given in the ordinary course of the business of:
    - (i) the audited body; or
    - (ii) the related body corporate; or
    - (iii) the controlled entity; and
  - (b) is made or given on the terms and conditions that would normally apply to a guarantee made or given by the audited body, the related body corporate or the controlled entity.

Section 324CI

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*Future debts and liabilities*

(8A) In this section:

- (a) a reference to a debt or amount that is owed by one entity to another entity includes a reference to a debt or amount that will (or may) be owed by the first entity to the other entity under an existing agreement between the entities; and
- (b) a reference to a liability under a guarantee of a loan includes a reference to a liability that will arise under the guarantee if the loan is not repaid.

*Relevant financial year*

(9) In this section:

***relevant financial year***, in relation to audit activities undertaken in relation to an audit or review of a financial report for a financial year or an audit or review of a financial report for a half-year in a financial year, means the financial year immediately before that financial year.

**324CI Special rule for retiring partners of audit firms and retiring directors of authorised audit companies**

A person contravenes this section if:

- (a) the person ceases to be:
  - (i) a member of an audit firm; or
  - (ii) a director of an audit company;at a particular time (the ***departure time***); and
- (b) at any time before the departure time, the audit firm or audit company has engaged in an audit of an audited body; and
- (c) the person was a professional member of the audit team for the audit; and
- (d) within the period of 2 years starting on the date the report under section 308 or 309 was made on the latest audit to which paragraphs (b) and (c) apply, the person becomes, or continues to be, an officer of the audited body; and

- (e) the audited body is not a small proprietary company for the most recently ended financial year.

If the audited body is a listed entity (other than a registered scheme), apply paragraph (d) as if references in that paragraph to the audited body included references to a related body corporate of the audited body.

### **324CJ Special rule for retiring professional member of audit company**

A person contravenes this section if:

- (a) the person who is not a director of an audit company ceases to be a professional employee of the audit company at a particular time (the *departure time*); and
- (b) at any time before the departure time, the audit company has engaged in an audit of an audited body; and
- (c) the person was a lead auditor or review auditor for the audit; and
- (d) within the period of 2 years starting on the date the report under section 308 or 309 was made on the latest audit to which paragraphs (b) and (c) apply, the person becomes, or continues to be, an officer of the audited body; and
- (e) the audited body is not a small proprietary company for the most recently ended financial year.

If the audited body is a listed entity (other than a registered scheme), apply paragraph (d) as if references in that paragraph to the audited body included references to a related body corporate of the audited body.

### **324CK Multiple former audit firm partners or audit company directors**

A person contravenes this section if:

- (a) an audit firm, or audit company, is an auditor of an audited body for a financial year; and
- (b) the person has at any time been a member of the audit firm or a director of the audit company; and

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- (c) the person becomes an officer of the audited body within a period of 5 years after the person ceased (or last ceased) to be a member of the audit firm or a director of the audit company (as the case may be); and
- (d) at the time when paragraph (c) is satisfied another person who is or who also has at any time been a member of the audit firm, or a director of the audit company, at a time when the audit firm, or audit company, undertook an audit of the audited body is also an officer of the audited body; and
- (e) the audited body is not a small proprietary company for the most recently ended financial year.

If the audited body is a listed entity (other than a registered scheme), apply paragraphs (c) and (d) as if references in those paragraphs to the audited body included references to a related body corporate of the audited body.

**Subdivision C—Common provisions**

**324CL People who are regarded as officers of a company for the purposes of this Division**

- (1) For the purposes of this Division, a person is taken to be an officer of a company if:
  - (a) the person is an officer of:
    - (i) a related body corporate; or
    - (ii) an entity that the company controls; or
  - (b) the person has, at any time within the immediately preceding period of 12 months, been an officer or promoter of:
    - (i) the company; or
    - (ii) a related body corporate; or
    - (iii) an entity that the company controlled at that time.
- (2) Paragraph (b) does not apply if ASIC directs that it does not apply in relation to the person in relation to the company. ASIC may give the direction only if ASIC thinks that it is appropriate to do so in the circumstances of the case.

- (3) For the purposes of this Division, a person is not taken to be an officer of a company by reason only of being, or having been, the liquidator of:
- (a) the company; or
  - (b) a related body corporate; or
  - (c) an entity that the company controls or has controlled.
- (4) For the purposes of this Division, a person is not taken to be an officer of a company merely because of one or more of the following:
- (a) having been appointed as auditor of:
    - (i) the company; or
    - (ii) a related body corporate; or
    - (iii) an entity that the company controls or has controlled;
  - (b) having been appointed, for any purpose relating to taxation, as public officer of:
    - (i) a body corporate; or
    - (ii) an unincorporated body; or
    - (iii) a trust estate;
  - (c) being or having been authorised to accept service of process or notices on behalf of:
    - (i) the company; or
    - (ii) a related body corporate; or
    - (iii) an entity that the company controls or has controlled.

## **Division 4—Deliberately disqualifying auditor**

### **324CM Deliberately disqualifying auditor**

#### *Individual auditor*

- (1) An individual contravenes this subsection if:
- (a) the individual is appointed auditor of a company or registered scheme; and
  - (b) while the appointment continues, the individual brings about a state of affairs; and
  - (c) the individual cannot, while that state of affairs continues, act as auditor of the company or scheme without contravening Division 2 or 3.

#### *Audit firm*

- (2) A member of a firm contravenes this subsection if:
- (a) the firm is appointed auditor of a company or a registered scheme; and
  - (b) while the appointment continues, the member brings about a state of affairs; and
  - (c) the firm cannot, while that state of affairs continues, act as auditor of the company or scheme without a person contravening Division 2 or 3.

#### *Audit company*

- (3) A person who is:
- (a) a member of a company; or
  - (b) a director of a company; or
  - (c) a lead auditor in relation to an audit conducted by a company;
- contravenes this subsection if:
- (d) the company is appointed auditor of a company or a registered scheme; and

- (e) while the appointment continues, the person brings about a state of affairs; and
- (f) the company cannot, while that state of affairs continues, act as auditor of the company or scheme without contravening Division 2 or 3.

## Division 5—Auditor rotation for listed companies

### 324DA Limited term for eligibility to play significant role in audit of a listed company or listed registered scheme

- (1) If an individual plays a significant role in the audit of a listed company or listed registered scheme for 5 successive financial years (the *extended audit involvement period*), the individual is not eligible to play a significant role in the audit of the company or the scheme for a later financial year (the *subsequent financial year*) unless:
  - (a) the individual has not played a significant role in the audit of the company or the scheme for at least 2 successive financial years (the *intervening financial years*); and
  - (b) the intervening financial years:
    - (i) commence after the end of the extended audit involvement period; and
    - (ii) end before the beginning of the subsequent financial year.

Note: *Play a significant role* in an audit is defined in section 9.

- (2) An individual is not eligible to play a significant role in the audit of a listed company or listed registered scheme for a financial year if, were the individual to do so, the individual would play a significant role in the audit of the company or scheme for more than 5 out of 7 successive financial years.
- (3) For the purposes of subsection (2), disregard an individual's playing of a significant role in the audit of a company or scheme for a financial year if:
  - (a) either:
    - (i) the directors of the company or scheme grant an approval under section 324DAA in relation to the individual; or
    - (ii) ASIC makes a declaration under paragraph 342A(1)(a) in relation to the individual; and



- (b) because of the approval or the declaration, subsection (1) of this section does not operate to make the individual not eligible to play a significant role in the audit of the company or scheme for that financial year.

### **324DAA Directors may extend eligibility term**

- (1) Subject to section 324DAB, the directors of a listed company, or of a listed registered scheme, may, by resolution, grant an approval for an individual to play a significant role in the audit of the company or scheme for not more than 2 successive financial years in addition to the 5 successive financial years mentioned in subsection 324DA(1).
- (2) The approval must be granted before the end of those 5 successive financial years.
- (3) If the directors grant the approval, subsection 324DA(1) applies to the individual, in relation to the audit of the company or scheme, as if the references in that subsection to 5 successive financial years were references to:
  - (a) if the approval is for one additional successive financial year—6 successive financial years; or
  - (b) if the approval is for an additional 2 successive financial years—7 successive financial years.
- (4) If the directors grant the approval for one successive financial year, the directors may, by resolution before the end of that year, grant an approval for an additional successive year.
- (5) If the directors grant the approval for the additional successive year, subsection 324DA(1) applies to the individual, in relation to the audit of the company or scheme, as if the references in that subsection to 5 successive financial years were references to 7 successive financial years.

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**324DAB Requirements for directors to approve extension of eligibility term**

*Requirements if company or scheme has audit committee*

- (1) If a listed company, or the responsible entity of a listed registered scheme, has an audit committee:
  - (a) an approval under section 324DAA must not be granted unless it is in accordance with a recommendation provided by the audit committee; and
  - (b) the resolution granting the approval must set out the reasons why the audit committee is satisfied as mentioned in paragraph (2)(d) of this section.

Note: Directors are not required to grant an approval merely because the audit committee has recommended that an approval be granted.

- (2) An approval is taken to be made in accordance with a recommendation provided by the audit committee only if:
  - (a) the approval is consistent with the audit committee's recommendation; and
  - (b) the recommendation is endorsed by a resolution passed by the members of the audit committee; and
  - (c) the recommendation is in writing signed by a member of the audit committee on behalf of the audit committee and given to the directors of the company or scheme; and
  - (d) the recommendation states that the audit committee is satisfied that the approval:
    - (i) is consistent with maintaining the quality of the audit provided to the company or scheme; and
    - (ii) would not give rise to a conflict of interest situation (as defined in section 324CD);and sets out the reasons why the committee is so satisfied.

*Requirements if company or scheme does not have audit committee*

- (3) If a listed company, or the responsible entity of a listed registered scheme, does not have an audit committee:

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- (a) an approval under section 324DAA must not be granted unless the directors of the company or scheme are satisfied that the approval:
  - (i) is consistent with maintaining the quality of the audit provided to the company or scheme; and
  - (ii) would not give rise to a conflict of interest situation (as defined in section 324CD); and
- (b) the resolution granting the approval must set out the reasons why the directors are so satisfied.

*Auditor must have agreed to extension*

- (4) The directors of a listed company, or of a listed registered scheme, must not grant an approval under section 324DAA unless:
  - (a) if the individual to whom the approval relates does not act on behalf of an audit firm or company—the individual agrees, in writing, to the approval being granted; or
  - (b) if the individual to whom the approval relates acts on behalf of an audit firm or company—the audit firm or company on whose behalf the individual acts agrees, in writing, to the approval being granted.

**324DAC Notifications about approval to extend eligibility term**

If the directors of a listed company, or of a listed registered scheme, grant an approval under section 324DAA, the directors must, within 14 days of granting the approval:

- (a) lodge a copy of the resolution granting the approval with ASIC; and
- (b) give a copy of the resolution to:
  - (i) if the individual to whom the approval relates does not act on behalf of an audit firm or company—the individual; and
  - (ii) if the individual to whom the approval relates acts on behalf of an audit firm or company—the audit firm or company on whose behalf the individual acts.

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Note: Details of the approval, and the reasons for the approval, must be included in the directors' report under section 300.

**324DAD Approval ineffective unless it complies with requirements**

A purported grant of approval under section 324DAA is ineffective unless the requirements of sections 324DAA, 324DAB and 324DAC are complied with in relation to the approval.

**324DB Individual's rotation obligation**

An individual contravenes this section if the individual:

- (a) plays a significant role in the audit of a listed company or listed registered scheme for a financial year; and
- (b) is not eligible to play that role.

**324DC Audit firm's rotation obligation**

*Contraventions by members of audit firm*

- (1) A person (the *defendant*) contravenes this subsection if:
  - (a) an audit firm consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
  - (b) an individual acts, on behalf of the firm, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
  - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year; and
  - (d) the defendant is a member of the firm; and
  - (e) the defendant is not the individual and is or becomes aware that the individual is not eligible to play that role; and
  - (f) the defendant fails to take the necessary steps, as soon as possible after the defendant becomes aware that the individual is not eligible to play that role, either:
    - (i) to ensure that the audit firm resigns as auditor of the company or scheme; or

- (ii) to ensure that the individual ceases to act, on behalf of the audit firm, as a lead or review auditor in relation to the audit of the company or scheme for that financial year.
- (2) A person (the *defendant*) contravenes this subsection if:
- (a) an audit firm consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
  - (b) an individual acts, on behalf of the firm, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
  - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year:
    - (i) because of section 324DAD; or
    - (ii) for any other reason; and
  - (d) the defendant is a member of the firm.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a) and (b) and subparagraph (2)(c)(ii).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (4) provides a defence.

- (4) A person does not commit an offence because of a contravention of subsection (2) in relation to an individual acting as lead or review auditor on behalf of an audit firm at a particular time if the person has reasonable grounds to believe that the audit firm had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit firm) that the audit firm and its employees complied with the requirements of this Division.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

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**324DD Audit company's rotation obligation**

*Contravention by audit company*

- (1) An audit company contravenes this subsection if:
- (a) the audit company consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
  - (b) an individual acts, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
  - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year; and
  - (d) a director of the audit company (other than the individual) is aware that the individual is not eligible to play that role; and
  - (e) the audit company fails to take the necessary steps, as soon as possible after the director becomes aware that the individual is not eligible to play that role, either:
    - (i) to resign as auditor of the company or scheme; or
    - (ii) to ensure that the individual ceases to act, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company or scheme for that financial year.

*Contraventions by directors of audit company*

- (2) A person (the **defendant**) contravenes this subsection if:
- (a) an audit company consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
  - (b) an individual acts, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
  - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year; and
  - (d) the defendant is a director of the audit company; and
  - (e) the defendant is not the individual and is or becomes aware that the individual is not eligible to play that role; and

- (f) the defendant fails to take the necessary steps, as soon as possible after the defendant becomes aware that the individual is not eligible to play that role, either:
- (i) to ensure that the audit company resigns as auditor of the company or scheme; or
  - (ii) to ensure that the individual ceases to act, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company or scheme for that financial year.
- (3) A person (the *defendant*) contravenes this subsection if:
- (a) an audit company consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
  - (b) an individual acts, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
  - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year:
    - (i) because of section 324DAD; or
    - (ii) for any other reason; and
  - (d) the defendant is a director of the audit company.
- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical elements of the offence specified in paragraphs (3)(a) and (b) and subparagraph (3)(c)(ii).
- Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.
- Note 2: Subsection (5) provides a defence.
- (5) A person does not commit an offence because of a contravention of subsection (3) in relation to an individual acting as lead or review auditor on behalf of an audit company at a particular time if the person has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit company) that the audit company and its employees complied with the requirements of this Division.

**Chapter 2M** Financial reports and audit  
**Part 2M.4** Appointment and removal of auditors  
**Division 5** Auditor rotation for listed companies

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Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.



## **Division 6—Appointment, removal and fees of auditors for companies**

### **Subdivision A—Appointment of company auditors**

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

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

#### **327A Public company auditor (initial appointment of auditor)**

- (1) The directors of a public company must appoint an auditor of the company within 1 month after the day on which a company is registered as a company unless the company at a general meeting has appointed an auditor.
- (1A) Subsection (1) does not apply in relation to a company if:
  - (a) the directors reasonably believe that subsection 301(3) will apply to the company's financial reports; or
  - (b) the company is a small company limited by guarantee.
- (2) Subject to this Part, an auditor appointed under subsection (1) holds office until the company's first AGM.
- (3) A director of a company must take all reasonable steps to comply with, or to secure compliance with, subsection (1).

#### **327B Public company auditor (annual appointments at AGMs to fill vacancies)**

- (1) A public company must:
  - (a) appoint an auditor of the company at its first AGM; and
  - (b) appoint an auditor of the company to fill any vacancy in the office of auditor at each subsequent AGM.

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- (1A) Subsection (1) does not apply in relation to a company if:
- (a) subsection 301(3) applies to the company's financial reports; or
  - (b) the company is a small company limited by guarantee.
- (2) An auditor appointed under subsection (1) holds office until the auditor:
- (a) dies; or
  - (b) is removed, or resigns, from office in accordance with section 329; or
  - (c) ceases to be capable of acting as auditor because of Division 2 of this Part; or
  - (d) ceases to be auditor under subsection (2A), (2B) or (2C).
- (2A) An individual auditor ceases to be auditor of a company under this subsection if:
- (a) on a particular day (the *start day*), the individual auditor:
    - (i) informs ASIC of a conflict of interest situation in relation to the company under subsection 324CA(1A); or
    - (ii) informs ASIC of particular circumstances in relation to the company under subsection 324CE(1A); and
  - (b) the individual auditor does not give ASIC a notice, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the *remedial period*) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2B) An audit firm ceases to be auditor of a company under this subsection if:
- (a) on a particular day (the *start day*), ASIC is:
    - (i) informed of a conflict of interest situation in relation to the company under subsection 324CB(1A); or
    - (ii) informed of particular circumstances in relation to the company under subsection 324CF(1A); and

- (b) ASIC has not been given a notice on behalf of the audit firm, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the **remedial period**) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2C) An audit company ceases to be auditor of a company under this subsection if:
- (a) on a particular day (the **start day**), ASIC is:
    - (i) informed of a conflict of interest situation in relation to the company under subsection 324CB(1A) or 324CC(1A); or
    - (ii) informed of particular circumstances in relation to the company under subsection 324CF(1A) or 324CG(1A) or (5A); and
  - (b) ASIC has not been given a notice on behalf of the audit company, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the **remedial period**) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2D) The **notification day** is:
- (a) the last day of the remedial period; or
  - (b) such later day as ASIC approves in writing (whether before or after the remedial period ends).
- (3) A director of a company must take all reasonable steps to comply with, or to secure compliance with, subsection (1).
- (4) If an audit firm ceases to be the auditor of a company under subsection (2) at a particular time, each member of the firm who:
- (a) is taken to have been appointed as an auditor of the company under subsection 324AB(1) or 324AC(4); and
  - (b) is an auditor of the company immediately before that time; ceases to be an auditor of the company at that time.

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**327C Public company auditor (appointment to fill casual vacancy)**

- (1) If:
- (a) a vacancy occurs in the office of auditor of a public company; and
  - (b) the vacancy is not caused by the removal of an auditor from office; and
  - (c) there is no surviving or continuing auditor of the company; the directors must, within 1 month after the vacancy occurs, appoint an auditor to fill the vacancy unless the company at a general meeting has appointed an auditor to fill the vacancy.
- Note: Certain public companies are not required to appoint an auditor: see subsections 327A(1A) and 327B(1A).
- (2) An auditor appointed under subsection (1) holds office, subject to this Part, until the company's next AGM.
- (3) A director of a public company must take all reasonable steps to comply with, or to secure compliance with, subsection (1).

**327D Appointment to replace auditor removed from office**

- (1) This section deals with the situation in which an auditor of a company is removed from office at a general meeting in accordance with section 329.
- (2) The company may at that general meeting (without adjournment), by special resolution immediately appoint an individual, firm or company as auditor of the company if a copy of the notice of nomination has been sent to the individual, firm or company under subsection 328B(3).
- (3) If a special resolution under subsection (2):
- (a) is not passed; or
  - (b) could not be passed merely because a copy of the notice of nomination has not been sent to an individual, firm or company under subsection 328B(3);

the general meeting may be adjourned and the company may, at the adjourned meeting, by ordinary resolution appoint an individual, firm or company as auditor of the company if:

- (c) a member of the company gives the company notice of the nomination of the individual, firm or company for appointment as auditor; and
  - (d) the company receives the notice at least 14 clear days before the day to which the meeting is adjourned.
- (4) The day to which the meeting is adjourned must be:
- (a) not earlier than 20 days after the day of the meeting; and
  - (b) not later than 30 days after the day of the meeting.
- (5) Subject to this Part, an auditor appointed under subsection (2) or (3) holds office until the company's next AGM.

**327E ASIC may appoint public company auditor if auditor removed but not replaced**

- (1) This section deals with the situation in which a public company fails to appoint an auditor under subsection 327D(2) or (3). The failure is referred to as the *auditor replacement failure*.
- (2) The company must give ASIC written notice of the auditor replacement failure within the period of 7 days commencing on the day of the auditor replacement failure (the *notification period*).
- (3) If the company gives ASIC the notice required by subsection (2), ASIC must appoint an auditor of the company as soon as practicable after receiving the notice. This subsection has effect subject to section 327G.
- (4) If the company does not give ASIC the notice required by subsection (2), ASIC may appoint an auditor of the company at any time:
  - (a) after the end of the notification period; and
  - (b) before ASIC receives notice of the auditor replacement failure from the company.

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This subsection has effect subject to section 327G.

- (5) If the company:
- (a) does not give ASIC the notice required by subsection (2); and
  - (b) gives ASIC notice of the auditor replacement failure after the end of the notification period;
- ASIC must appoint an auditor of the company as soon as practicable after receiving the notice. This subsection has effect subject to section 327G.
- (6) Subject to this Part, an auditor appointed under this section holds office until the company's next AGM.

**327F ASIC's general power to appoint public company auditor**

- (1) ASIC may appoint an auditor of a public company if:
- (a) the company does not appoint an auditor when required by this Act to do so; and
  - (b) a member of the company applies to ASIC in writing for the appointment of an auditor under this section.
- This subsection has effect subject to section 327G.
- (2) An individual, firm or company appointed as auditor of a company under subsection (1) holds office, subject to this Part, until the next AGM of the company.

**327G Restrictions on ASIC's powers to appoint public company auditor**

- (1) ASIC may appoint an individual, firm or company as auditor of a company under section 327E or 327F only if the individual, firm or company consents to being appointed.
- (2) ASIC must not appoint an auditor of a company under section 327E or 327F if:
- (a) there is another auditor of the company (the *continuing auditor*); and

- (b) ASIC is satisfied that the continuing auditor is able to carry out the responsibilities of auditor alone; and
  - (c) the continuing auditor agrees to continue as auditor.
- (3) ASIC must not appoint an auditor of a company under section 327E or 327F if:
- (a) the company does not give ASIC the notice required by subsection 327E(2) before the end of the notification period; and
  - (b) ASIC has already appointed an auditor of the company under section 327E after the end of the notification period.

### **327H Effect on appointment of public company auditor of company beginning to be controlled by a corporation**

An auditor of a public company that begins to be controlled by a corporation:

- (a) must retire at the AGM of the company next held after the company begins to be controlled by the corporation unless the auditor vacates that office before then; and
- (b) is, subject to this Part, eligible for re-appointment.

This section has effect notwithstanding subsection 327B(2).

### **327I Remaining auditors may act during vacancy**

While a vacancy in the office of auditor of a company continues, the surviving or continuing auditor or auditors (if any) may act as auditors of the company.

### **328A Auditor's consent to appointment**

- (1) A company, the directors of a company or the responsible entity of a registered scheme must not appoint an individual, firm or company as auditor of the company unless that individual, firm or company:
  - (a) has consented, before the appointment, to act as auditor; and

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(b) has not withdrawn that consent before the appointment is made.

For the purposes of this section, a consent, or the withdrawal of a consent, must be given by written notice to the company, the directors or the responsible entity of the scheme.

- (2) A notice under subsection (1) given by a firm must be signed by a member of the firm who is a registered company auditor both:
- (a) in the firm name; and
  - (b) in his or her own name.
- (3) A notice under subsection (1) given by a company must be signed by a director or senior manager of the company both:
- (a) in the company's name; and
  - (b) in his or her own name.
- (4) If a company, the directors of a company or the responsible entity of a registered scheme appoints an individual, firm or company as auditor of a company in contravention of subsection (1):
- (a) the purported appointment does not have any effect; and
  - (b) the company or responsible entity, and any officer of the company or responsible entity who is in default, are each guilty of an offence.

Note: An officer of a company, or of a responsible entity, is in default if the officer is involved in the contravention of subsection (1) by the company, the company's directors or the entity (see section 83). Section 79 defines *involved*.

**328B Nomination of auditor**

- (1) Subject to this section, a company may appoint an individual, firm or company as auditor of the company at its AGM only if a member of the company gives the company written notice of the nomination of the individual, firm or company for appointment as auditor:
- (a) before the meeting was convened; or
  - (b) not less than 21 days before the meeting.



This subsection does not apply if an auditor is removed from office at the AGM.

- (2) If a company purports to appoint an individual, firm or company as auditor of the company in contravention of subsection (1):
- (a) the purported appointment is of no effect; and
  - (b) the company and any officer of the company who is in default are each guilty of an offence.

Note: An officer of a company is in default if the officer is involved in the company's contravention of subsection (1) (see section 83). Section 79 defines *involved*.

- (3) If a member gives a company notice of the nomination of an individual, firm or company for appointment as auditor of the company, the company must send a copy of the notice to:
- (a) each individual, firm or company nominated; and
  - (b) each auditor of the company; and
  - (c) each person entitled to receive notice of general meetings of the company.

This is so whether the appointment is to be made at a meeting or an adjourned meeting referred to in section 327D or at an AGM.

- (4) The copy of the notice of nomination must be sent:
- (a) not less than 7 days before the meeting; or
  - (b) at the time notice of the meeting is given.

## **Subdivision B—Removal and resignation of company auditors**

### **329 Removal and resignation of auditors**

- (1) An auditor of a company may be removed from office by resolution of the company at a general meeting of which notice under subsection (1A) has been given, but not otherwise.
- (1A) Notice of intention to move the resolution must be given to the company at least 2 months before the meeting is to be held. However, if the company calls a meeting after the notice of intention is given under this subsection, the meeting may pass the

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resolution even though the meeting is held less than 2 months after the notice of intention is given.

Note: Short notice of the meeting cannot be given for this resolution (see subsection 249H(4)).

- (2) Where notice under subsection (1A) of a resolution to remove an auditor is received by a company, it must as soon as possible send a copy of the notice to the auditor and lodge a copy of the notice.
- (3) Within 7 days after receiving a copy of the notice, the auditor may make representations in writing, not exceeding a reasonable length, to the company and request that, before the meeting at which the resolution is to be considered, a copy of the representations be sent by the company at its expense to every member of the company to whom notice of the meeting is sent.
- (4) Unless ASIC on the application of the company otherwise orders, the company must send a copy of the representations in accordance with the auditor's request, and the auditor may, without prejudice to his or her right to be heard orally or, where a firm is the auditor, to have a member of the firm heard orally on its behalf, require that the representations be read out at the meeting.
- (5) An auditor of a company may, by notice in writing given to the company, resign as auditor of the company if:
  - (a) the auditor has, by notice in writing given to ASIC, applied for consent to the resignation and stated the reasons for the application and, at or about the same time as the notice was given to ASIC, notified the company in writing of the application to ASIC; and
  - (b) the consent of ASIC has been given.
- (6) ASIC must, as soon as practicable after receiving a notice from an auditor under subsection (5), notify the auditor and the company whether it consents to the resignation of the auditor.
- (7) A statement made by an auditor in an application to ASIC under subsection (5) or in answer to an inquiry by ASIC relating to the reasons for the application:

- (a) is not admissible in evidence in any civil or criminal proceedings against the auditor; and
- (b) may not be made the ground of a prosecution, action or suit against the auditor;
- and a certificate by ASIC that the statement was made in the application or in the answer to the inquiry by ASIC is conclusive evidence that the statement was so made.
- (8) Subject to subsection (9), the resignation of an auditor takes effect:
- (a) on the day (if any) specified for the purpose in the notice of resignation; or
- (b) on the day on which ASIC gives its consent to the resignation; or
- (c) on the day (if any) fixed by ASIC for the purpose;
- whichever last occurs.
- (9) The resignation of an auditor of a proprietary company or a small company limited by guarantee does not require the consent of ASIC under subsection (5), and takes effect:
- (a) on the day (if any) specified for the purpose in the notice of resignation; or
- (b) on the day on which the notice is received by the company;
- whichever is the later.
- (10) Where on the retirement or withdrawal from a firm of a member the firm will no longer be capable, by reason of the provisions of subparagraph 324BB(1)(b)(i) or (2)(b)(i) of acting as auditor of a company, the member so retiring or withdrawing is (if not disqualified from acting as auditor of the company) taken to be the auditor of the company until he or she obtains the consent of ASIC to his or her retirement or withdrawal.
- (11) Within 14 days after:
- (a) the removal from office of an auditor of a company; or
- (b) the receipt of a notice of resignation from an auditor of a company;
- the company must:

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

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

An auditor of a company ceases to hold office if:

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

**Subdivision C—Company auditors' fees and expenses**

**331 Fees and expenses of auditors**

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

## **Division 7—Appointment, removal and fees of auditors for registered schemes**

### **Subdivision A—Appointment of registered scheme auditors**

#### **331AAA Registered scheme auditor (initial appointment of auditor)**

- (1) The responsible entity of a registered scheme must appoint an auditor of the registered scheme within 1 month after the day on which the scheme is registered.
- (2) An auditor appointed under subsection (1) holds office until the auditor:
  - (a) dies; or
  - (b) is removed, or resigns, from office in accordance with section 331AC; or
  - (c) ceases to be capable of acting as an auditor because of Division 2 of this Part; or
  - (d) ceases to be auditor under subsection (2A), (2B) or (2C).
- (2A) An individual auditor ceases to be auditor of a registered scheme under this subsection if:
  - (a) on a particular day (the *start day*), the individual auditor:
    - (i) informs ASIC of a conflict of interest situation in relation to the scheme under subsection 324CA(1A); or
    - (ii) informs ASIC of particular circumstances in relation to the scheme under subsection 324CE(1A); and
  - (b) the individual auditor does not give ASIC a notice, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the *remedial period*) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2B) An audit firm ceases to be auditor of a registered scheme under this subsection if:

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- (a) on a particular day (the **start day**), ASIC is:
    - (i) informed of a conflict of interest situation in relation to the scheme under subsection 324CB(1A); or
    - (ii) informed of particular circumstances in relation to the scheme under subsection 324CF(1A); and
  - (b) ASIC has not been given a notice on behalf of the audit firm, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the **remedial period**) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2C) An audit company ceases to be auditor of a registered scheme under this subsection if:
- (a) on a particular day (the **start day**), ASIC is:
    - (i) informed of a conflict of interest situation in relation to the scheme under subsection 324CB(1A) or 324CC(1A); or
    - (ii) informed of particular circumstances in relation to the scheme under subsection 324CF(1A) or 324CG(1A) or (5A); and
  - (b) ASIC has not been given a notice on behalf of the audit company, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the **remedial period**) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2D) The **notification day** is:
- (a) the last day of the remedial period; or
  - (b) such later day as ASIC approves in writing (whether before or after the remedial period ends).
- (3) A director of the responsible entity of a registered scheme must take all reasonable steps to secure compliance with subsection (1).

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- (4) If an audit firm ceases to be the auditor of a registered scheme under subsection (2) at a particular time, each member of the firm who:
- (a) is taken to have been appointed as an auditor of the scheme under subsection 324AB(1) or 324AC(4); and
  - (b) is an auditor of the scheme immediately before that time; ceases to be an auditor of the scheme at that time.

**331AAB Registered scheme auditor (appointment to fill vacancy)**

- (1) If:
- (a) a vacancy occurs in the office of auditor of a registered scheme; and
  - (b) there is no surviving or continuing auditor of the scheme; the responsible entity must, within 1 month after the vacancy occurs, appoint an auditor to fill the vacancy.
- (2) A director of the responsible entity of a registered scheme must take all reasonable steps to secure compliance with subsection (1).

**331AAC ASIC's power to appoint registered scheme auditor**

- (1) ASIC may appoint an auditor of a registered scheme if:
- (a) the responsible entity of the scheme does not appoint an auditor when required by this Act to do so; and
  - (b) a member of the scheme applies to ASIC in writing for the appointment of an auditor under this section.
- (2) ASIC may only appoint an individual, firm or company as auditor under subsection (1) if the individual, firm or company consents to being appointed.

**331AAD Remaining auditors may act during vacancy**

While a vacancy in the office of auditor of a registered scheme continues, the surviving or continuing auditor or auditors (if any) may act as auditors of the company.

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**Subdivision B—Removal and resignation of registered scheme auditors**

**331AC Removal and resignation of auditors**

- (1) The responsible entity of a registered scheme may, with ASIC's consent, remove the auditor of the scheme from office.
- (2) An auditor of a registered scheme may, by notice in writing given to the responsible entity, resign as auditor of the scheme if:
  - (a) the auditor:
    - (i) has, by notice in writing given to ASIC, applied for consent to the resignation and stated the reasons for the application; and
    - (ii) has, at or about the same time as giving the notice to ASIC, given the responsible entity notice in writing of the application to ASIC; and
  - (b) ASIC has given its consent.
- (3) As soon as practicable after ASIC receives a notice from an auditor under subsection (2), ASIC must notify the auditor, and the responsible entity of the registered scheme, whether it consents to the resignation.
- (4) A statement made by an auditor in an application to ASIC under subsection (2) or in answer to an inquiry by ASIC relating to the reasons for the application:
  - (a) is not admissible in evidence in any civil or criminal proceedings against the auditor; and
  - (b) must not be made the ground of a prosecution, action or suit against the auditor.

A certificate by the ASIC that the statement was made in the application or in answer to the inquiry by ASIC is conclusive evidence that the statement was so made.
- (5) The resignation of an auditor takes effect:
  - (a) on the day (if any) specified for the purpose in the notice of resignation; or



- (b) on the day on which ASIC gives its consent to the resignation; or
  - (c) on the day (if any) fixed by ASIC for the purpose; whichever occurs last.
- (6) If, on the retirement or withdrawal of a member of a firm, the firm will no longer be capable of acting as auditor of a registered scheme because of subparagraph 324BB(1)(b)(i) or (2)(b)(i), the member is (if not disqualified from acting as auditor of the scheme) taken to be the auditor of the scheme until he or she obtains the consent of ASIC to his or her retirement or withdrawal.
- (7) Within 14 days after:
- (a) the removal from office of an auditor of a registered scheme; or
  - (b) the receipt of a notice of resignation from an auditor of a registered scheme;
- the responsible entity must lodge with ASIC a notice of the removal or resignation in the prescribed form.

### **331AD Effect of winding up on office of auditor**

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

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

**Chapter 2M** Financial reports and audit

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

**Division 7** Appointment, removal and fees of auditors for registered schemes

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### **Subdivision C—Fees and expenses of auditors**

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

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

## **Part 2M.4A—Annual transparency reports for auditors**

### **332 Meaning of *transparency reporting auditor* and *transparency reporting year***

- (1) A *transparency reporting auditor* is:
  - (a) an individual auditor; or
  - (b) an audit firm; or
  - (c) an authorised audit company.
- (2) A *transparency reporting year* is a period of 12 months starting on 1 July.

### **332A Transparency reporting auditors must publish annual transparency reports**

- (1) This section applies if, during a transparency reporting year, a transparency reporting auditor conducts audits, under Division 3 of Part 2M.3, of 10 or more bodies of any of the following kinds:
  - (a) listed companies;
  - (b) listed registered schemes;
  - (c) ADIs (authorised deposit-taking institutions) within the meaning of the *Banking Act 1959*;
  - (d) bodies mentioned in paragraph (c) or (e) of the definition of ***body regulated by APRA*** in subsection 3(2) of the *Australian Prudential Regulation Authority Act 1998*;
  - (e) bodies prescribed by the regulations for the purposes of this paragraph.

Note: The 10 or more bodies do not all have to be of the same kind. This section applies (for example) if, during the year, the transparency reporting auditor conducts audits of 6 listed companies and 4 listed registered schemes.

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- (2) The auditor must publish an **annual transparency report** for the transparency reporting year, containing the information required by section 332B, on the auditor's website within the period of 4 months after the end of the year (or that period as extended under section 332C).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) The auditor must lodge a copy of the report with ASIC on or before the day it is first published on the auditor's website.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) An offence based on subsection (2) or (3) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

### **332B Content of annual transparency report**

- (1) Subject to subsection (2), an annual transparency report must contain the information prescribed by the regulations.
- (2) The report may omit information that would otherwise be included under subsection (1) if the inclusion of the information is likely to result in unreasonable prejudice to the transparency reporting auditor. If material is omitted, the report must say so.

### **332C Extension of period for publication of annual transparency report**

- (1) On an application made by a transparency reporting auditor in accordance with subsection (3), ASIC may make an order extending the period within which the auditor must publish an annual transparency report.
- (2) The order may be expressed to be subject to conditions.
- (3) The application must be:
- (a) in writing; and

- (b) lodged with ASIC before the end of the period within which the auditor would otherwise be required to publish the report; and
  - (c) if the auditor is an individual auditor—signed by the auditor; and
  - (d) if the auditor is an audit firm—signed by a member of the firm who is a registered company auditor both:
    - (i) in the firm name; and
    - (ii) in the member's own name; and
  - (e) if the auditor is an audit company:
    - (i) authorised by a resolution of the directors; and
    - (ii) signed by a director.
- (4) ASIC must give the auditor written notice of the making of the order.

### **332D Exemption orders—applications by transparency reporting auditors**

- (1) On an application made by a transparency reporting auditor in accordance with subsection (3), ASIC may make an order in writing relieving the auditor from compliance with all or specified requirements of sections 332A and 332B.

Note: For the criteria for making orders under this section, see section 332F.

- (2) The order may:
- (a) be expressed to be subject to conditions; and
  - (b) be indefinite or limited to a specified period.
- (3) The application must be:
- (a) in writing; and
  - (b) lodged with ASIC; and
  - (c) if the auditor is an individual auditor—signed by the auditor; and
  - (d) if the auditor is an audit firm—signed by a member of the firm who is a registered company auditor both:

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- (i) in the firm name; and
- (ii) in the member's own name; and
- (e) if the auditor is an audit company:
  - (i) authorised by a resolution of the directors; and
  - (ii) signed by a director.
- (4) ASIC must give the auditor written notice of the making or revocation of the order.

**332E Exemption orders—class orders for transparency reporting auditors**

- (1) ASIC may, by legislative instrument, make an order in respect of a specified class of transparency reporting auditors relieving the auditors from all or specified requirements of sections 332A and 332B.

Note: For the criteria for making orders under this section, see section 332F.

- (2) The order may:
  - (a) be expressed to be subject to conditions; and
  - (b) be indefinite or limited to a specified period.

**332F Exemption orders—criteria for orders**

- (1) To make an order under section 332D or 332E exempting a transparency reporting auditor, or class of transparency reporting auditors, from one or more requirements of sections 332A and 332B, ASIC must be satisfied that complying with the requirements would:
  - (a) be inappropriate in the circumstances; or
  - (b) impose unreasonable burdens.
- (2) In deciding for the purposes of subsection (1) whether complying with the requirements would impose an unreasonable burden on the auditor or class of auditors, ASIC is to have regard to:
  - (a) the expected costs of complying with the requirements; and

- (b) the expected benefits of having the auditor or class of auditors comply with the requirements; and
- (c) any practical difficulties that the auditor or class of auditors faces in complying effectively with the requirements; and
- (d) any unusual aspects of the operations of the auditor or class of auditors; and
- (e) any other matters that ASIC considers relevant.

### **332G Offences by members of audit firm**

- (1) This Part applies to an audit firm as if it were a person, but with the changes set out in this section.
- (2) An obligation that would otherwise be imposed on the firm by a provision of this Part is imposed on each member of the firm instead, but may be discharged by any of the members.
- (3) An offence based on a provision of this Part that would otherwise be committed by the audit firm is taken to have been committed by each member of the firm.
- (4) A member of the firm does not commit an offence because of subsection (3) if the member:
  - (a) does not know of the circumstances that constitute the contravention of the provision concerned; or
  - (b) knows of those circumstances but takes all reasonable steps to correct the contravention as soon as possible after the member becomes aware of those circumstances.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4)—see subsection 13.3(3) of the *Criminal Code*.

## Part 2M.5—Accounting and auditing standards

### 334 Accounting standards

*AASB's power to make accounting standards*

- (1) The AASB may, by legislative instrument, make accounting standards for the purposes of this Act. The standards must not be inconsistent with this Act or the regulations.
- (4) An accounting standard applies to:
  - (a) periods ending after the commencement of the standard; or
  - (b) periods ending, or starting, on or after a later date specified in the standard.
- (5) A company, registered scheme or disclosing entity may elect to apply the accounting standard to an earlier period unless the standard says otherwise. The election must be made in writing by the directors.

### 335 Equity accounting

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

### 336 Auditing standards

*AUASB's power to make auditing standards*

- (1) The AUASB may, by legislative instrument, make auditing standards for the purposes of this Act. The standards must not be inconsistent with this Act or the regulations.
- (3) An auditing standard applies to financial reports in relation to:
  - (a) periods ending after the commencement of the standard; or



- (b) periods ending, or starting, on or after a later date specified in the standard.
- (4) If:
- (a) the AUASB makes an auditing standard; and
  - (b) the standard applies to financial reports in relation to particular periods under subsection (3); and
  - (c) an auditor is conducting an audit of a financial report in relation to a period that occurs before the start of the earliest of those periods;
- the auditor may elect to apply the auditing standard to that audit unless the standard says otherwise. The election must be recorded in the audit report.

### **337 Interpretation of accounting and auditing standards**

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

- (a) expressions used in the standard have the same meanings as they have in this Chapter; and
- (b) the provisions of Part 1.2 apply as if the standard's provisions were provisions of this Chapter.

### **338 Evidence of text of accounting standard or auditing standard**

- (1) This section applies to a document that purports to be published by, or on behalf of, the AASB or the AUASB and to set out the text of:
  - (a) a specified standard as in force at a specified time under section 334 or 336; or
  - (b) a specified provision of a standard of that kind.It also applies to a copy of a document of that kind.
- (2) In the absence of evidence to the contrary, a document to which this section applies is proof in proceedings under this Act that:
  - (a) the specified standard was in force at that time under that section; and

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- (b) the text set out in the document is the text of the standard referred to in paragraph (1)(a) or the provision referred to in paragraph (1)(b).

## **Part 2M.6—Exemptions and modifications**

### **340 Exemption orders—companies, registered schemes and disclosing entities**

- (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 (other than Division 4):
  - (a) the directors;
  - (b) the company, scheme or entity;
  - (c) the auditor.

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

- (2) The order may:
  - (a) be expressed to be subject to conditions; and
  - (b) be indefinite or limited to a specified period.
- (3) The application must be:
  - (a) authorised by a resolution of the directors; and
  - (b) in writing and signed by a director; and
  - (c) lodged with ASIC.
- (4) ASIC must give the applicant written notice of the making, revocation or suspension of the order.

### **341 Exemption orders—class orders for companies, registered schemes and disclosing entities**

- (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 (other than Division 4):
  - (a) directors;

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- (b) the companies, registered schemes or disclosing entities themselves;
- (c) auditors of the companies, registered schemes or disclosing entities.

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

- (2) The order may:
  - (a) be expressed to be subject to conditions; and
  - (b) be indefinite or limited to a specified period.
- (3) Notice of the making, revocation or suspension of the order must be published in the *Gazette*.

**342 Exemption orders—criteria for orders for companies, registered schemes and disclosing entities**

- (1) To make an order under section 340 or 341, ASIC must be satisfied that complying with the relevant requirements of Parts 2M.2, 2M.3 and 2M.4 would:
  - (a) make the financial report or other reports misleading; or
  - (b) be inappropriate in the circumstances; or
  - (c) impose unreasonable burdens.
- (2) In deciding for the purposes of subsection (1) whether the audit requirements for a proprietary company, or a class of proprietary companies, would impose an unreasonable burden on the company or companies, ASIC is to have regard to:
  - (a) the expected costs of complying with the audit requirements; and
  - (b) the expected benefits of having the company or companies comply with the audit requirements; and
  - (c) any practical difficulties that the company or companies face in complying effectively with the audit requirements (in particular, any difficulties that arise because a financial year is the first one for which the audit requirements apply or because the company or companies are likely to move

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- frequently between the small and large proprietary company categories from one financial year to another); and
- (d) any unusual aspects of the operation of the company or companies during the financial year concerned; and
  - (e) any other matters that ASIC considers relevant.
- (3) In assessing expected benefits under subsection (2), ASIC is to take account of:
- (a) the number of creditors and potential creditors; and
  - (b) the position of creditors and potential creditors (in particular, their ability to independently obtain financial information about the company or companies); and
  - (c) the nature and extent of the liabilities of the company or companies.

**342AA Exemption orders—non-auditor members and former members of audit firms; former employees of audit companies**

- (1) On an application made in accordance with subsection (3) by any of the following, ASIC may make an order in writing relieving the applicant from all or specified requirements of Division 3 of Part 2M.4 (auditor independence):
- (a) a member of the firm who is not a registered company auditor;
  - (b) a person who has ceased to be:
    - (i) a member of an audit firm; or
    - (ii) a director of an audit company; or
    - (iii) a professional employee of an audit company.

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

- (2) The order may:
- (a) be expressed to be subject to conditions; and
  - (b) be indefinite or limited to a specified period.
- (3) The application must be:

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- (a) in writing and signed by the applicant; and
  - (b) lodged with ASIC.
- (4) ASIC must give the applicant written notice of the making, revocation or suspension of the order.
- (5) An order under subsection (1) is not a legislative instrument.

**342AB Exemption orders—class orders for non-auditor members etc.**

- (1) ASIC may make an order in writing in respect of a specified class of audit firms or audit companies, relieving any of the following from all or specified requirements of Division 3 of Part 2M.4 (auditor independence):
- (a) members of firms who are not registered company auditors;
  - (b) persons who have ceased to be:
    - (i) members of audit firms; or
    - (ii) directors of audit companies; or
    - (iii) professional employees of audit companies.

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

- (2) The order may:
- (a) be expressed to be subject to conditions; and
  - (b) be indefinite or limited to a specified period.
- (3) An order under subsection (1) is a legislative instrument.

**342AC Exemption orders—criteria for orders for non-auditor members etc.**

To make an order under section 342AA or 342AB, ASIC must be satisfied that complying with the relevant requirements of Division 3 of Part 2M.4 would:

- (a) make the financial report or other reports misleading; or
- (b) be inappropriate in the circumstances; or

- (c) impose unreasonable burdens.

### **342A ASIC's power to modify the operation of section 324DA**

- (1) On an application made in accordance with this section, ASIC may:
  - (a) declare that subsection 324DA(1) applies to a registered company auditor, in relation to the audit of an audited body or a class of audited bodies, as if the references in that subsection to 5 successive financial years were references to:
    - (i) 6 successive financial years; or
    - (ii) 7 successive financial years; or
  - (b) declare that subsection 324DA(2) applies to a registered company auditor, in relation to the audit of an audited body or a class of audited bodies during a particular period of 7 successive financial years, as if the reference in that subsection to 5 out of 7 successive financial years were a reference to 6 out of 7 successive financial years.
- (2) The following persons may apply for the declaration:
  - (a) the registered company auditor;
  - (b) a firm or company on whose behalf the registered company auditor acts or would act in relation to the audit or audits.

If the application is made by a firm or company, the declaration has effect only in relation to activities undertaken by the registered company auditor on behalf of that firm or company.
- (3) The application must be:
  - (a) in writing; and
  - (b) signed by the applicant; and
  - (c) lodged with ASIC.
- (4) If the application is made by a registered company auditor who engages, or is to engage, in audit activities on behalf of a firm or company, the application must include the firm's or company's written consent to the application.

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- (5) If the application is made by a firm or company in relation to a registered company auditor, the application must include the registered company auditor's written consent to the application.
- (6) To make a declaration under subsection (1), ASIC must be satisfied that, without the modification, Division 4 of Part 2M.4 would impose an unreasonable burden on:
  - (a) a registered company auditor; or
  - (b) a firm or company that is applying for the declaration; or
  - (c) the audited body or bodies in relation to which the application was made.
- (7) In deciding for the purposes of subsection (6) whether, without the modification, Division 4 of Part 2M.4 would impose an unreasonable burden on a person referred to in that subsection, ASIC is to have regard to:
  - (a) the nature of the audited body or bodies, including whether the activity in which the audited body or bodies engage is such that specialist knowledge about that activity is necessary to carry out the audit properly; and
  - (b) the availability of other registered company auditors capable of providing satisfactory audit services for the audited body or bodies; and
  - (c) any other matters which ASIC considers relevant.
- (8) ASIC must give the applicant written notice of the making, revocation or suspension of the declaration.

**342B Auditor to notify company or registered scheme of section 342A declaration**

- (1) If a registered company auditor plays a significant role in the audit of a company or registered scheme in reliance on a declaration by ASIC under section 342A, the auditor must give the company or the responsible entity for the registered scheme written notice of the declaration.
- (2) The notice must specify:



- (a) the name of the registered company auditor; and
  - (b) the additional financial years for which the registered company auditor is, because of the declaration under section 342A, eligible to play a significant role in the audit of the company or registered scheme.
- (3) The notice must be given:
- (a) as soon as practicable after the declaration is made if the auditor has been appointed before the declaration is made; or
  - (b) before the auditor is appointed if the declaration is made before the auditor is appointed.

### **343 Modification by regulations**

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

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

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

### **344 Contravention of Part 2M.2 or 2M.3, or of certain provisions of Part 2M.4**

- (1) A director of a company, registered scheme or disclosing entity contravenes this section if they fail to take all reasonable steps to comply with, or to secure compliance with, Part 2M.2 or 2M.3, or section 324DAA, 324DAB or 324DAC.

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

- (2) A person commits an offence if they contravene subsection (1) and the contravention is dishonest.
- (3) Subsection (1) does not apply to section 310, 312, 323A or 323B.
- (4) This section does not affect the application of the provisions of Part 2M.2 or 2M.3 to a director as an officer.

## **Chapter 2N—Updating ASIC information about companies and registered schemes**

### **Part 2N.1—Review date**

#### **345A Review date**

- (1) The *review date* for a company is:
  - (a) either:
    - (i) if the company became registered as a company after the commencement of this Act—the anniversary of the company’s registration as a company under this Act; or
    - (ii) otherwise—the date of the company’s incorporation or registration as a company, as recorded in a register maintained by ASIC under section 1274; or
  - (b) if a choice of a different date has effect under section 345C—that different date.
- (1A) If:
  - (a) a company was incorporated as a company or became registered as a company before the commencement of this Act; and
  - (b) there is no date of incorporation of the company as a company or registration of the company as a company recorded in a register maintained by ASIC under section 1274; and
  - (c) paragraph (1)(b) does not apply to the company;the *review date* for the company is the date determined by ASIC and notified to the company.
- (1B) If, apart from this subsection, the review date for a company would be February 29, the *review date* for the company is February 28.

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- (2) The **review date** for a registered scheme is:
- (a) the anniversary of the scheme's registration as a registered scheme; or
  - (b) if a choice of a different date has effect under section 345C—that different date.

### **345B Company or responsible entity may change review date**

- (1) With ASIC's approval, a company may choose as its review date a date that is different from the anniversary of its registration.
- (2) With ASIC's approval, the responsible entity of a registered scheme may choose as the review date for the scheme a date that is different from the anniversary of its registration.
- (3) If ASIC approves the choice, ASIC must notify the company or responsible entity in writing.

### **345C When choice has effect**

If ASIC notifies the company or responsible entity of its approval under section 345B, the choice has effect:

- (a) if the different date occurs before the next review date for the company or scheme—at the time that ASIC notifies its approval; or
- (b) otherwise—immediately after the next review date for the company or scheme.

## **Part 2N.2—Extract of particulars**

### **346A ASIC must give an extract of particulars each year**

- (1) ASIC must, within 2 weeks after each review date for a company or a registered scheme, give to the company or responsible entity of the scheme an extract of particulars for the company or scheme.
- (2) If an agreement or approval under subsection 352(1) covers the lodgment of a response to an extract of particulars for a company, ASIC may satisfy subsection (1) by making the extract available to the company or its agent by electronic means.
- (3) An extract of particulars must specify the date of issue.

### **346B ASIC may ask questions**

ASIC may include, in an extract of particulars for a company or a registered scheme, a requirement that the company or responsible entity of the scheme provide a particular prescribed by the regulations for the purposes of this section.

### **346C Requirements in relation to an extract of particulars**

#### *Respond if a particular is incorrect*

- (1) A company, or responsible entity of a registered scheme, must respond to an extract of particulars that it receives if any particular set out in the extract is not correct as at the date of receipt. The response must comply with subsection (3).

#### *Respond if required to provide a particular*

- (2) A company, or responsible entity of a registered scheme, must respond to an extract of particulars that it receives if the extract includes a requirement to provide a particular under section 346B. The response must comply with subsection (3).

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*Contents of response*

- (3) The response to an extract of particulars by a company, or by the responsible entity of a registered scheme:
- (a) must be lodged within 28 days after the date of issue of the extract; and
  - (b) must be in the prescribed form; and
  - (c) must be signed or authenticated; and
  - (d) if subsection (1) applies—must be such that the particulars set out in the extract, taken together with the response, are correct as at the date the response is signed or authenticated; and
  - (e) if subsection (2) applies—must provide the required particular, correct as at the date the response is signed or authenticated.

*Response satisfies other requirements to notify*

- (4) If a company responds to an extract of particulars:
- (a) correcting a particular; or
  - (b) providing a particular;
- in accordance with subsection (3), any requirement elsewhere in this Act to lodge a prescribed form in relation to the particular is satisfied by the response.
- (5) Subsection (4) does not affect the company's liability for late lodgment fees incurred before the response to the extract of particulars is lodged or continuing offences committed before that time.

*Strict liability offences*

- (6) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## Part 2N.3—Solvency resolution

### 347A Directors must pass a solvency resolution after each review date

- (1) The directors of a company must pass a solvency resolution within 2 months after each review date for the company.
- (2) Subsection (1) does not apply to the directors of a company that has lodged a financial report with ASIC under Chapter 2M within the period of 12 months before the review date.

Note: The defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

- (3) An offence based on this section is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### 347B Notice to ASIC

- (1) If the directors of a company pass a negative solvency resolution under section 347A, the company must notify ASIC of that fact, in the prescribed form, within 7 days after the resolution is passed.
- (2) If:
  - (a) subsection 347A(1) applies to the directors of a company; and
  - (b) the directors have not passed a solvency resolution under section 347A within 2 months after a review date;the company must notify ASIC of that fact, in the prescribed form, within 7 days after the end of the 2 month period following the review date.
- (3) An offence based on this section is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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**347C Payment of review fee is taken to be a representation by the directors that the company is solvent**

- (1) If:
- (a) a company has paid its review fee in respect of a review date; and
  - (b) the company has not lodged a notice under section 347B within 7 days after the end of the 2 month period following the review date; and
  - (c) the company has not lodged a financial report with ASIC under Chapter 2M within the period of 12 months before the review date;

the directors of the company are taken to have represented to ASIC, as at the end of the 2 month period following the company's review date, 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.

Note: Directors are not taken to have passed a solvency resolution for the purposes of section 347A merely because they are taken, under this subsection, to have made a representation to ASIC.

- (2) Subsection (1) does not apply if the directors prove that they made a positive solvency resolution under section 347A within 2 months after the end of the review date.



## **Part 2N.4—Return of particulars**

### **348A ASIC may give a return of particulars**

- (1) ASIC may give to a company or responsible entity of a registered scheme a return of particulars for the company or scheme if ASIC suspects or believes that particulars recorded in relation to the company or scheme in a register maintained by ASIC under subsection 1274(1) are not correct.
- (2) If an agreement or approval under subsection 352(1) covers the lodgment of a response to a return of particulars for a company, ASIC may satisfy subsection (1) by making the return available to the company or its agent by electronic means.
- (3) A return of particulars must specify the date of issue.

### **348B ASIC may ask questions**

ASIC may include, in a return of particulars for a company or a registered scheme, a requirement that the company or responsible entity of the scheme provide a particular prescribed by the regulations for the purposes of this section.

### **348C ASIC may require a solvency resolution and statement**

- (1) ASIC may include, in a return of particulars for a company, a requirement that the company comply with subsection (2) or subsection (3). The company may choose which subsection to comply with.
- (2) The company complies with this subsection if:
  - (a) before the company lodges a response to the return of particulars, the directors of the company pass a solvency resolution; and

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- (b) the response to the return of particulars states whether the resolution passed was a positive solvency resolution or a negative solvency resolution.
- (3) The company complies with this subsection if the response to the return of particulars states the date on which the directors passed a positive solvency resolution under section 347A in respect of the company's most recent review date.

### **348D General requirements in relation to a return of particulars**

#### *Response is required*

- (1) A company, or responsible entity of a registered scheme, must respond to a return of particulars that it receives. The response must comply with subsection (2).

#### *Contents of response*

- (2) The response to a return of particulars by a company, or by the responsible entity of a registered scheme:
  - (a) must be lodged with ASIC within 2 months after the date of issue of the return; and
  - (b) must be in the prescribed form; and
  - (c) must be signed or authenticated; and
  - (d) if, as at the date that the response is signed or authenticated, any particular set out in the return is not correct—must be such that the particulars set out in the return, taken together with the response, are correct as at the date the response is signed or authenticated; and
  - (e) if the return includes a requirement that the company or responsible entity of the scheme provide a particular under section 348B—must provide the required particular, correct as at the date the response is signed or authenticated; and
  - (f) if the return includes a requirement to comply with a subsection of section 348C—must include the statement required by the subsection that the company chooses to comply with.

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*Response satisfies other requirements to notify*

- (3) If a company responds to a return of particulars:
- (a) correcting a particular; or
  - (b) providing a particular;
- in accordance with subsection (2), any requirement elsewhere in this Act to lodge a prescribed form in relation to the particular is satisfied by the response.
- (4) Subsection (3) does not affect the company's liability for late lodgment fees incurred before the response to the return of particulars is lodged or continuing offences committed before that time.

*Strict liability offences*

- (5) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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## Part 2N.5—Notice by proprietary companies of changes to ultimate holding company

### 349A Proprietary companies must notify ASIC of changes to ultimate holding company

- (1) If an event mentioned in section 349B, 349C or 349D happens in relation to a proprietary company, the proprietary company must notify ASIC, in the prescribed form and within 28 days after the event, of the details required by that section.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### 349B Another company becomes an ultimate holding company

If another company becomes an ultimate holding company in relation to a proprietary company, the proprietary company must notify ASIC of:

- (a) the other company's name; and
- (b) either:
  - (i) if the other company is registered in Australia—its ABN, ACN or ARBN; or
  - (ii) if the other company is not registered in Australia—the place at which it was incorporated or formed; and
- (c) the date on which the other company became an ultimate holding company in relation to the proprietary company.

### 349C A company ceases to be an ultimate holding company

If a company ceases to be an ultimate holding company in relation to a proprietary company, the proprietary company must notify ASIC of:

- (a) the name of the company that ceased to be an ultimate holding company in relation to the proprietary company; and

(b) the date the cessation occurred.

**349D Ultimate holding company changes its name**

If an ultimate holding company in relation to a proprietary company changes its name, the proprietary company must notify ASIC of the new name of the ultimate holding company.

## Chapter 2P—Lodgments with ASIC

### 350 Forms for documents to be lodged with ASIC

- (1) A document that this Act requires to be lodged with ASIC in a prescribed form must:
  - (a) if a form for the document is prescribed in the regulations:
    - (i) be in the prescribed form; and
    - (ii) include the information, statements, explanations or other matters required by the form; and
    - (iii) be accompanied by any other material required by the form; or
  - (b) if a form for the document is not prescribed in the regulations but ASIC has approved a form for the document:
    - (i) be in the approved form; and
    - (ii) include the information, statements, explanations or other matters required by the form; and
    - (iii) be accompanied by any other material required by the form.
- (2) A reference in this Act to a document that has been lodged (being a document to which subsection (1) applies), includes, unless a contrary intention appears, a reference to any other material lodged with the document as required by the relevant form.
- (3) If:
  - (a) this Act requires a document to be lodged with ASIC in a prescribed form; and
  - (b) a provision of this Act either specifies, or provides for regulations to specify, information, statements, explanations or other matters that must be included in the document, or other material that must accompany the document;that other provision is not taken to exclude or limit the operation of subsection (1) in relation to the prescribed form (and so the

prescribed form may also require information etc. to be included in the form or material to accompany the form).

### **351 Signing documents lodged with ASIC**

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

### **352 Documents lodged with ASIC electronically**

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

The document is taken to be lodged with ASIC if it is lodged in accordance with the agreement or approval (including any requirements of the agreement or approval as to authentication).

- (1A) For the purposes of paragraph (1)(b), ASIC may approve:
  - (a) a particular kind of document; or
  - (b) documents in a particular class of documents.
- (2) Subsection (1) does not apply to a document covered by section 353 or a notice lodged under subsection 1015D(2).

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**353 Electronic lodgment of certain documents**

- (1) ASIC may determine conditions in relation to the electronic lodgment of documents:
  - (a) that must be given to a relevant market operator under section 205G; or
  - (b) that must be given to ASIC under section 792C.
- (2) The electronic lodgment of a document covered by a determination under subsection (1) is only effective if the lodgment complies with the conditions determined.
- (3) ASIC must publish in the *Gazette* a copy of any determination under subsection (1).

**354 Telephone notice of certain changes**

- (1) ASIC may, in its discretion, accept telephone notice of a change to a particular in relation to a company or a registered scheme if:
  - (a) either:
    - (i) the change relates to a misspelling or other minor typographical error; or
    - (ii) the change is to a particular included on a list published by ASIC on the internet for the purposes of this section; and
  - (b) the notice satisfies the authentication requirements published by ASIC on the internet for the purposes of this section.
- (2) If ASIC accepts telephone notice of a change to a particular under subsection (1), any obligation elsewhere in this Act to lodge a prescribed form in relation to the change is satisfied by the telephone notice. However, this does not affect the company's liability for late lodgment fees incurred before the notice is given or continuing offences committed before that time.



## **Chapter 5—External administration**

### **Part 5.1—Arrangements and reconstructions**

#### **410 Interpretation**

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

#### **411 Administration of compromises etc.**

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

(1A) Where:

- (a) a compromise or arrangement is proposed:
- (i) between 30 or more Part 5.1 bodies that are wholly-owned subsidiaries of a holding company and the creditors or a class of the creditors of each of those subsidiaries; and
  - (ii) between the holding company and the creditors or a class of the creditors of the holding company; and
- (b) the proposed compromise or arrangement in relation to each subsidiary includes a term that orders will be sought under section 413 transferring the whole of the undertaking and of

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the property and liabilities of the subsidiary to the holding company; and

- (c) the Court is satisfied, on the application in a summary way:
- (i) of the holding company or of a creditor of the holding company; or
  - (ii) if the holding company is being wound up—of the liquidator;

that the number of meetings that would be required between creditors in order to consider the proposed compromises or arrangements would be so great as to result in a significant impediment to the timely and effective consideration by those creditors of the terms of the compromises or arrangements;

the Court may order a meeting or meetings, on a consolidated basis, of the creditors of the holding company and of each of the subsidiaries or of such class or classes of those creditors as the Court determines and, where the Court makes such an order, the Court may approve the explanatory statement required by paragraph 412(1)(a) to accompany notices of the meeting or meetings.

(1B) Where:

- (a) there are fewer than 30 wholly-owned subsidiaries of the holding company but the matters referred to in paragraphs (1A)(b) and (c) are satisfied; and
- (b) the Court considers that circumstances exist that would justify its doing so;

the Court may make an order under subsection (1A) in relation to the proposed compromise or arrangement.

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

- (a) references in this Part to a company included references to all of the Part 5.1 bodies to which the order relates; and

- (b) references in this Part to creditors of a company included references to the creditors of all the Part 5.1 bodies to which the order relates; and
  - (c) references in this Part to a class of the creditors of a company were references to the relevant class of creditors of all of the Part 5.1 bodies to which the order relates.
- (2) The Court must not make an order pursuant to an application under subsection (1) or (1A) unless:
- (a) 14 days notice of the hearing of the application, or such lesser period of notice as the Court or ASIC permits, has been given to ASIC; and
  - (b) the Court is satisfied that ASIC has had a reasonable opportunity:
    - (i) to examine the terms of the proposed compromise or arrangement to which the application relates and a draft explanatory statement relating to the proposed compromise or arrangement; and
    - (ii) to make submissions to the Court in relation to the proposed compromise or arrangement and the draft explanatory statement.
- (3) In subsection (2), ***draft explanatory statement***, in relation to a proposed compromise or arrangement between a body and its creditors or any class of them or between a body and its members or any class of them, means a statement:
- (a) explaining the effect of the proposed compromise or arrangement and, in particular, stating any material interests of the directors of the body, whether as directors, as members or creditors of the body or otherwise, and the effect on those interests of the proposed compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons; and
  - (b) setting out such information as is prescribed and any other information that is material to the making of a decision by a creditor or member of the body whether or not to agree to the proposed compromise or arrangement, being information that is within the knowledge of the directors of the body and has

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not previously been disclosed to the creditors or members of the body.

- (3A) In considering whether to make an order under subsection (1) or (1A) for a meeting to be held outside this jurisdiction, the Court must have regard to where the creditors or members, or the creditors or members included in the class concerned, as the case requires, reside.
- (4) A compromise or arrangement is binding on the creditors, or on a class of creditors, or on the members, or on a class of members, as the case may be, of the body and on the body or, if the body is in the course of being wound up, on the liquidator and contributories of the body, if, and only if:
- (a) at a meeting convened in accordance with an order of the Court under subsection (1) or (1A):
    - (i) in the case of a compromise or arrangement between a body and its creditors or a class of creditors—the compromise or arrangement is agreed to by a majority in number of the creditors, or of the creditors included in that class of creditors, present and voting, either in person or by proxy, being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting in person or by proxy, or of the creditors included in that class present and voting in person or by proxy, as the case may be; and
    - (ii) in the case of a compromise or arrangement between a body and its members or a class of members—a resolution in favour of the compromise or arrangement is:
      - (A) unless the Court orders otherwise—passed by a majority in number of the members, or members in that class, present and voting (either in person or by proxy); and
      - (B) if the body has a share capital—passed by 75% of the votes cast on the resolution; and
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- (b) it is approved by order of the Court.
- (5) Where the Court orders 2 or more meetings of creditors or of a class of creditors, or 2 or more meetings of members or of a class of members, to be held in relation to the proposed compromise or arrangement:
- (a) in the case of meetings of creditors—the meetings are, for the purposes of subsection (4), taken together to constitute a single meeting and the votes in favour of the proposed compromise or arrangement cast at each of the meetings are to be aggregated, and the votes against the proposed compromise or arrangement cast at each of the meetings are to be aggregated, accordingly; or
  - (b) in the case of meetings of members—the meetings are, for the purposes of subsection (4), taken together to constitute a single meeting and the votes in favour of the proposed compromise or arrangement cast at each of the meetings is to be aggregated, and the votes against the proposed compromise or arrangement cast at each of the meetings is to be aggregated, accordingly.
- (5A) If the compromise or arrangement:
- (a) involves creditors of the Part 5.1 body with subordinate claims (within the meaning of subsection 563A(2)); and
  - (b) is approved by the Court;
- those creditors are also bound by the compromise or arrangement despite the fact that a meeting of those creditors has not been ordered by the Court under subsection (1) or (1A).
- (6) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.
- (6A) If:
- (a) the Court has granted its approval to a compromise or arrangement subject to an alteration or condition; and
  - (b) the body concerned contravenes:

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- (i) in the case of an alteration—the provision or provisions of the compromise or arrangement to which the alteration relates; or
    - (ii) in the case of a condition—the condition; and
  - (c) the Court is satisfied that a person suffered loss or damage as a result of the contravention;
- the Court may make such order as it thinks just.
- (6B) The Court may make either or both of the following orders under subsection (6A):
- (a) an order that the body concerned pay compensation to the person of such amount as the order specifies;
  - (b) an order directing the body concerned to comply with:
    - (i) in the case of an alteration—the provision or provisions of the compromise or arrangement to which the alteration relates; or
    - (ii) in the case of a condition—the condition.
- (6C) Subsection (6B) does not limit subsection (6A).
- (7) Except with the leave of the Court, a person must not be appointed to administer, and must not administer, a compromise or arrangement approved under this Act between a body and its creditors or any class of them or between a body and its members or any class of them, whether by the terms of that compromise or arrangement or pursuant to a power given by the terms of a compromise or arrangement, if the person:
- (a) is a secured party in relation to any property (including PPSA retention of title property) of the body; or
  - (b) is an auditor of the body; or
  - (ba) is a director, secretary, senior manager or employee of the body; or
  - (c) is a director, secretary, senior manager or employee of a body corporate that is a secured party in relation to any property (including PPSA retention of title property) of the body; or
  - (d) is not a registered liquidator; or

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- (e) is a director, secretary, senior manager or employee of a body corporate related to the body; or
  - (f) unless ASIC directs in writing that this paragraph does not apply in relation to the person in relation to the body—has at any time within the last 12 months been an officer or promoter of the body or of a related body corporate.
- (8) Paragraph (7)(d) does not apply in relation to a body corporate authorised by or under a law of a State or Territory in this jurisdiction to administer the compromise or arrangement concerned.
- (8A) Subsection (7) does not disqualify a person from administering a compromise or arrangement under an appointment validly made before 1 January 1991.
- (9) Where a person is or persons are appointed by, or under a power given by, the terms of a compromise or arrangement, to administer the compromise or arrangement:
- (a) sections 422A, 422B and 425, subsections 427(2) and (4) and sections 428, 432 and 434 apply in relation to that person or those persons as if:
    - (i) the appointment of the person or persons to administer the compromise or arrangement were an appointment of the person or persons as a receiver and manager, or as receivers and managers, of property of the body; and
    - (ii) a reference in any of those sections or subsections to a receiver, or to a receiver of property, of a corporation were a reference to that person or to those persons; and
  - (b) Subdivision B (court powers to inquire and make orders) of Division 90 of Schedule 2 applies in relation to that person or those persons as if:
    - (i) the appointment of the person or persons to administer the compromise or arrangement were an appointment of the person or persons as an external administrator of the body; and

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- (ii) a reference in that Subdivision to an external administration were a reference to the administration of the compromise or arrangement; and
  - (iii) a reference in that Subdivision to an external administrator were a reference to that person or to those persons.
- (10) An order of the Court made for the purposes of paragraph (4)(b) does not have any effect until an office copy of the order is lodged with ASIC, and upon being so lodged, the order takes effect, or is taken to have taken effect, on and from the date of lodgment or such earlier date as the Court determines and specifies in the order.
- (11) Subject to subsection (12), a copy of every order of the Court made for the purposes of paragraph (4)(b) must be annexed to every copy of the constitution of the body issued after the order has been made.
- (12) The Court may, by order, exempt a body from compliance with subsection (11) or determine the period during which the body must comply with that subsection.
- (13) Where a compromise or arrangement referred to in subsection (1) or (1A) (whether or not for the purposes of or in connection with a scheme for the reconstruction of a body or bodies or the amalgamation of any 2 or more bodies) has been proposed, the directors of the body must:
  - (a) if a meeting of the members of the body by resolution so directs—instruct such accountants or solicitors or both as are named in the resolution to report on the proposals and send their report or reports to the directors as soon as practicable; and
  - (b) if a report or reports is or are obtained pursuant to paragraph (a)—make the report or reports available at the registered office of the body for inspection by the shareholders and creditors of the body at least 7 days before the day of the meeting ordered by the Court to be convened as provided in subsection (1) or (1A), as the case may be.



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- (14) If default is made in complying with subsection (11), the body contravenes this subsection.
- (15) If default is made in complying with subsection (13), each director of the body contravenes this subsection.
- (16) Where no order has been made or resolution passed for the winding up of a Part 5.1 body and a compromise or arrangement has been proposed between the body and its creditors or any class of them, the Court may, in addition to exercising any of its other powers, on the application in a summary way of the body or of any member or creditor of the body, restrain further proceedings in any action or other civil proceeding against the body except by leave of the Court and subject to such terms as the Court imposes.
- (17) The Court must not approve a compromise or arrangement under this section unless:
- (a) it is satisfied that the compromise or arrangement has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Chapter 6; or
  - (b) there is produced to the Court a statement in writing by ASIC stating that ASIC has no objection to the compromise or arrangement;
- but the Court need not approve a compromise or arrangement merely because a statement by ASIC stating that ASIC has no objection to the compromise or arrangement has been produced to the Court as mentioned in paragraph (b).

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

- (1) Where a meeting is convened under section 411, the body must:
- (a) with every notice convening the meeting that is sent to a creditor or member, send a statement (in this section called the *explanatory statement*):
    - (i) explaining the effect of the compromise or arrangement and, in particular, stating any material interests of the directors, whether as directors, as members or creditors of the body or otherwise, and the effect on those

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- interests of the compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons; and
- (ii) setting out such information as is prescribed and any other information that is material to the making of a decision by a creditor or member whether or not to agree to the compromise or arrangement, being information that is within the knowledge of the directors and has not previously been disclosed to the creditors or members; and
- (b) in every notice convening the meeting that is given by advertisement or that is published in the prescribed manner, include either a copy of the explanatory statement or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of the explanatory statement.
- (2) In the case of a creditor whose debt does not exceed \$200, paragraph (1)(a) does not apply unless the Court otherwise orders but the notice convening the meeting that is sent to such a creditor must specify a place at which a copy of the explanatory statement can be obtained on request and, where the creditor makes such a request, the body must as soon as practicable comply with the request.
- (3) Where the compromise or arrangement affects the rights of debenture holders, the explanatory statement must specify any material interests of the trustees for the debenture holders, whether as such trustees, as members or creditors of the body or otherwise, and the effect on those interests of the compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons.
- (4) Where a notice given by advertisement, or published in the prescribed manner, includes a notification that copies of the explanatory statement can be obtained in a particular manner, every creditor or member entitled to attend the meeting must, on making application in that matter, be furnished by the body free of charge with a copy of the explanatory statement.
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- (5) Each person who is a director or trustee for debenture holders must give notice to the body of such matters relating to the person as are required to be included in the explanatory statement.
- (6) In the case of a compromise or arrangement that is not, or does not include, a compromise or arrangement between a Part 5.1 body and its creditors or any class of them, the body must not send out an explanatory statement pursuant to subsection (1) unless a copy of that statement has been registered by ASIC.
- (7) Where an explanatory statement sent out under subsection (1) is not required by subsection (6) to be registered by ASIC, the Court must not make an order approving the compromise or arrangement unless it is satisfied that ASIC has had a reasonable opportunity to examine the explanatory statement and to make submissions to the Court in relation to that statement.
- (8) Where a copy of an explanatory statement is lodged with ASIC for registration under subsection (6), ASIC must not register the copy of the statement unless the statement appears to comply with this Act and ASIC is of the opinion that the statement does not contain any matter that is false in a material particular or materially misleading in the form or context in which it appears.
- (9) Where a body contravenes this section, a person involved in the contravention contravenes this subsection.
- (10) It is a defence to a prosecution for a contravention of this section if it is proved that the contravention was due to the failure of a person (other than the defendant), being a director of the body or a trustee for debenture holders of the body, to supply for the purposes of the explanatory statement particulars of the person's interests.

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

- (1) Where an application is made to the Court under this Part for the approval of a compromise or arrangement and it is shown to the Court that the compromise or arrangement has been proposed for

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the purposes of, or in connection with, a scheme for the reconstruction of a Part 5.1 body or Part 5.1 bodies or the amalgamation of 2 or more Part 5.1 bodies and that, under the scheme, the whole or any part of the undertaking or of the property of a body concerned in the scheme (in this section called the *transferor body*) is to be transferred to a company (in this section called the *transferee company*), the Court may, either by the order approving the compromise or arrangement or by a later order, provide for all or any of the following matters:

- (a) the transfer to the transferee company of the whole or a part of the undertaking and of the property or liabilities of the transferor body;
  - (b) the allotting or appropriation by the transferee company of shares, debentures, policies or other interests in that company that, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;
  - (c) the continuation by or against the transferee company of any legal proceedings pending by or against the transferor body;
  - (d) if the transferor body is a company—the deregistration by ASIC, without winding up, of the transferor body;
  - (e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement;
  - (f) the transfer or allotment of any interest in property to any person concerned in the compromise or arrangement;
  - (g) such incidental, consequential and supplemental matters as are necessary to ensure that the reconstruction or amalgamation is fully and effectively carried out.
- (2) Where an order made under this section provides for the transfer of property or liabilities, then, by virtue of the order, that property is transferred to and vests in, and those liabilities are transferred to and become the liabilities of, the transferee company, free, in the case of any particular property if the order so directs, from any security interest that is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Where an order is made under this section, each body to which the order relates must, within 14 days after the making of the order, lodge with ASIC an office copy of the order.

(4) In this section:

*liabilities* includes duties of any description, including duties that are of a personal character or are incapable under the general law of being assigned or performed vicariously.

*property* includes rights and powers of any description, including rights and powers that are of a personal character and are incapable under the general law of being assigned or performed vicariously.

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

(1) In this section:

*dissenting shareholder*, in relation to a scheme or contract, means a shareholder who has not assented to the scheme or contract or who has failed to transfer his, her or its shares in accordance with the scheme or contract.

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

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

(2) Where a scheme or contract (not being a scheme or contract arising out of the making of offers under a takeover bid) involving a transfer of shares in a class of shares in a company (in this section called the *transferor company*) to a person (in this section called the *transferee*) has, within 4 months after the making of the offer relating to the scheme or contract by the transferee, been approved by members holding shares in that class carrying at least 90% of the votes attached to shares in that class (other than excluded

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shares), the transferee may, within 2 months after the offer has been so approved, give notice as prescribed to a dissenting shareholder that the transferee wishes to acquire the shares held by that shareholder.

- (3) Where such a notice is given, then, unless the Court orders otherwise on an application by a dissenting shareholder made within one month after the day on which the notice was given or within 14 days after a statement is supplied under subsection (7) to a dissenting shareholder, whichever is the later, the transferee is entitled and bound, subject to this section, to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee.
- (4) Where alternative terms were offered to the approving shareholders, the dissenting shareholder is entitled to elect not later than the end of one month after the date on which the notice is given under subsection (2) or 14 days after a statement is supplied under subsection (7), whichever is the later, which of those terms he, she or it prefers and, if he, she or it fails to make the election within the time allowed by this subsection, the transferee may, unless the Court otherwise orders, determine which of those terms is to apply to the acquisition of the shares of the dissenting shareholder.
- (5) Despite subsections (3) and (4), if the number of votes attached to the excluded shares is more than 10% of the votes attached to the excluded shares and the shares (other than excluded shares) to be transferred under the scheme or contract, those subsections do not apply unless:
  - (a) the transferee offers the same terms to all holders of the shares (other than excluded shares) to be transferred under the scheme or contract; and
  - (b) the holders who approve the scheme or contract hold shares to which are attached at least 90% of the votes attached to the shares (other than excluded shares) to be transferred under the scheme or contract and are also at least 75% in number of the holders of those shares.

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- (6) For the purposes of paragraph (5)(b), 2 or more persons registered as holding shares jointly are to be counted as one person.
- (7) When a notice is given under subsection (2), the dissenting shareholder may, by written notice given to the transferee within one month after the day on which the notice was given under subsection (2), ask for a statement in writing of the names and addresses of all other dissenting shareholders as shown in the register of members.
- (8) Where a notice is given under subsection (7), the transferee must comply with it.
- (9) Where, under a scheme or contract referred to in subsection (2), the transferee becomes beneficially entitled to shares in the transferor company which, together with any other shares in the transferor company to which the transferee or, where the transferee is a body corporate, a body corporate related to the transferee is beneficially entitled, have attached to them at least 90% of the votes attached to the shares included in the class of shares concerned, then:
- (a) the transferee must, within one month after the date on which he, she or it becomes beneficially entitled to those shares (unless in relation to the scheme or contract he, she or it has already complied with this requirement), give notice of the fact as prescribed to the holders of the remaining shares included in that class who, when the notice was given, had not assented to the scheme or contract or been given notice by the transferee under subsection (2); and
  - (b) such a holder may, within 3 months after the giving of the notice to him, her or it by notice to the transferee, require the transferee to acquire his, her or its share and, where alternative terms were offered to the approving shareholders, elect which of those terms he, she or it will accept.
- (10) Where a shareholder gives notice under paragraph (9)(b) with respect to his, her or its shares, the transferee is entitled and bound to acquire those shares:
- (a) on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to him,

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- her or it and, where alternative terms were offered to those shareholders, on the terms for which the shareholder has elected, or where he, she or it has not so elected, for whichever of the terms the transferee determines; or
- (b) on such other terms as are agreed or as the Court, on the application of the transferee or of the shareholder, thinks fit to order.
- (11) Subsections (12) and (13) apply where a notice has been given under subsection (1) unless the Court, on an application made by the dissenting shareholder, orders to the contrary.
- (12) The transferee must, within 14 days after:
- (a) the end of one month after the day on which the notice was given; or
  - (b) the end of 14 days after a statement under subsection (7) is supplied; or
  - (c) if an application has been made to the Court by a dissenting shareholder—the application is disposed of;
- whichever last happens:
- (d) send a copy of the notice to the transferor company together with an instrument of transfer that relates to the shares that the transferee is entitled to acquire under this section and is executed, on the shareholder's behalf, by a person appointed by the transferee and, on the transferee's own behalf, by the transferee; and
  - (e) pay, allot or transfer to the transferor company the consideration for the shares.
- (13) When the transferee has complied with subsection (12), the transferor company must register the transferee as the holder of the shares.
- (14) All sums received by the transferor company under this section must be paid into a separate bank account and those sums, and any other consideration so received, must be held by that company in trust for the several persons entitled to the shares in respect of which they were respectively received.



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- (15) Where a sum or other property received by a company under this section has been held in trust by the company for a person for at least 2 years (whether or not that period began before the commencement of this Act), the company must, before the end of 10 years after the day on which the sum was paid, or the consideration was allotted or transferred, to the company, pay the sum or transfer the consideration, and any accretions to it and any property that may become substituted for it or for part of it, to ASIC to be dealt with under Part 9.7.

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

- (1) Within 14 days after being appointed to administer a compromise or arrangement approved under this Part, a person must lodge a notice in writing of the appointment.
- (2) Where an application is made to the Court under this Part in relation to a proposed compromise or arrangement, the Court may:
- (a) before making any order on the application, require ASIC or another person specified by the Court to give to the Court a report as to the terms of the compromise or arrangement or of the scheme for the purposes of or in connection with which the compromise or arrangement has been proposed, the conduct of the officers of the body or bodies concerned and any other matters that, in the opinion of ASIC or that person, ought to be brought to the attention of the Court;
  - (b) in deciding the application, have regard to anything contained in the report; and
  - (c) make such order or orders as to the payment of the costs of preparing and giving the report as the Court thinks fit.

**415A Outcome of voting at creditors' meeting determined by related entity—Court powers**

- (1) Subsection (3) applies if, on the application of a creditor of a Part 5.1 body, the Court is satisfied of the following matters:

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- (a) a proposed resolution has been voted on at a meeting of creditors, or of a class of creditors, of the body held under this Part;
  - (b) that, if the vote or votes that a particular related creditor, or particular related creditors, of the 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;
  - (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 the matters in subsection (2).
- (2) The matters are:
- (a) the benefits resulting to the related creditor, or to some or all of the related creditors, from the resolution, or from the failure to pass the proposed resolution, as the case may be; and
  - (b) the nature of the relationship between the related creditor and the body, or of the respective relationships between the related creditors and the body; and
  - (c) any other relevant matter.
- (3) The Court may make one or more of the following:
- (a) if the proposed resolution was passed—an order setting aside the resolution;

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- (b) an order that the proposed resolution be considered and voted on at a meeting of the creditors of the body, or of that class of creditors, as the case may be, convened and held as specified in the order;
  - (c) an order directing that the related creditor is not, or such of the related creditors as the order specifies are not, entitled to vote on:
    - (i) the proposed resolution; or
    - (ii) a resolution to amend or vary the proposed resolution;
  - (d) such other orders as the Court thinks necessary.
- (4) In this section:

*related creditor*, in relation to a Part 5.1 body, in relation to a vote, means a person who, when the vote was cast, was a related entity, and a creditor, of the body.

**415B Interim order on application under section 415A**

- (1) If:
- (a) an application under subsection 415A(1) has not yet been determined; and
  - (b) the Court is of the opinion that it is desirable to do so;
- the Court may make such interim orders as it thinks appropriate.
- (2) An interim order must be expressed to apply until the application is determined, but may be varied or discharged.

**415C Order under section 415A does not affect act already done pursuant to resolution**

An act done pursuant to a resolution as in force before the making, under section 415A, of an order setting aside or varying the resolution, is as valid and binding on and after the making of the order as if the order had not been made.

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## Part 5.2—Receivers, and other controllers, of property of corporations

### 416 Definitions

In this Part, unless the contrary intention appears:

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

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

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

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

### 417 Application of Part

- (1) Except so far as the contrary intention appears in this Part or Part 11.2, this Part applies in relation to a receiver of property of a corporation who is appointed after 1 January 1991, even if the appointment arose out of a transaction entered into, or an act or thing done, before 1 January 1991.
- (2) To avoid doubt, this Part does not apply, of its own force, to the property of a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note 1: The definition of **property** in section 416 does not define that term in relation to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note 2: Section 516-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* applies this Part to a corporation that is an Aboriginal and Torres Strait Islander corporation with the modifications provided for in that section.

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

- (1) A person is not qualified to be appointed, and must not act, as receiver of property of a corporation if the person:
  - (a) is a secured party in relation to any property (including PPSA retention of title property) of the corporation; or
  - (b) is an auditor or a director, secretary, senior manager or employee of the corporation; or
  - (c) is a director, secretary, senior manager or employee of a body corporate that is a secured party in relation to any property (including PPSA retention of title property) of the corporation; or
  - (d) is not a registered liquidator; or
  - (e) is a director, secretary, senior manager or employee of a body corporate related to the corporation; or
  - (f) unless ASIC directs in writing that this paragraph does not apply in relation to the person in relation to the corporation—has at any time within the last 12 months been a director, secretary, senior manager, employee or promoter of the corporation or of a related body corporate.
- (3) Paragraph (1)(d) does not apply in relation to a body corporate authorised by or under a law of the Commonwealth, of a State or of a Territory to act as receiver of property of the corporation concerned.
- (4) In this section:  
*senior manager* does not include a receiver and manager.

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

- (1) Where there is doubt, on a specific ground, about:

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- (a) whether a purported appointment of a person, after 23 June 1993, as receiver of property of a corporation is valid; or
  - (b) whether a person who has entered into possession, or assumed control, of property of a corporation after 23 June 1993 did so validly under the terms of a security interest in that property;
- the person, the corporation or any of the corporation's creditors may apply to the Court for an order under subsection (2).
- (2) On an application, the Court may make an order declaring whether or not:
    - (a) the purported appointment was valid; or
    - (b) the person entered into possession, or assumed control, validly under the terms of the security interest;as the case may be, on the ground specified in the application or on some other ground.

**419 Liability of controller**

- (1) A receiver, or any other authorised person, who, whether as agent for the corporation concerned or not, enters into possession or assumes control of any property of a corporation for the purpose of enforcing any security interest is, notwithstanding any agreement to the contrary, but without prejudice to the person's rights against the corporation or any other person, liable for debts incurred by the person in the course of the receivership, possession or control for services rendered, goods purchased or property hired, leased (including a lease of goods that gives rise to a PPSA security interest in the goods), used or occupied.
- (2) Subsection (1) does not constitute the person entitled to the security interest a mortgagee in possession.
- (3) Where:
  - (a) a person (in this subsection called the *controller*) enters into possession or assumes control of property of a corporation; and

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- (b) the controller purports to have been properly appointed as a receiver in respect of that property under a power contained in an instrument, but has not been properly so appointed; and
- (c) civil proceedings in an Australian court arise out of an act alleged to have been done by the controller;

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

- (d) the controller be relieved in whole or in part of a liability that the controller has incurred but would not have incurred if the controller had been properly so appointed; and
- (e) a person who purported to appoint the controller as receiver be liable in respect of an act, matter or thing in so far as the controller has been relieved under paragraph (d) of liability in respect of that act, matter or thing.

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

- (1) This section applies if:
  - (a) under an agreement made before the control day in relation to a controller of property of a corporation, the corporation continues after that day to use or occupy, or to be in possession of, property (*the third party property*) of which someone else is the owner or lessor; and
  - (b) the controller is controller of the third party property.
- (2) Subject to subsections (4) and (7), the controller is liable for so much of the rent or other amounts payable by the corporation under the agreement as is attributable to a period:
  - (a) that begins more than 7 days after the control day; and
  - (b) throughout which:
    - (i) the corporation continues to use or occupy, or to be in possession of, the third party property; and
    - (ii) the controller is controller of the third party property.

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- (3) Within 7 days after the control day, the controller may give to the owner or lessor a notice that specifies the third party property and states that the controller does not propose to exercise rights in relation to that property as controller of the property, whether on behalf of the corporation or anyone else.
- (4) Despite subsection (2), the controller is not liable for so much of the rent or other amounts payable by the corporation under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the corporation.
- (5) A notice under subsection (3) ceases to have effect if:
  - (a) the controller revokes it by writing given to the owner or lessor; or
  - (b) the controller exercises, or purports to exercise, a right in relation to the third party property as controller of the property, whether on behalf of the corporation or anyone else.
- (6) For the purposes of subsection (5), the controller does not exercise, or purport to exercise, a right as mentioned in paragraph (5)(b) merely because the controller continues to be in possession, or to have control, of the third party property, unless the controller:
  - (a) also uses the property; or
  - (b) asserts a right, as against the owner or lessor, so to continue.
- (7) Subsection (2) does not apply in so far as a court, by order, excuses the controller from liability, but an order does not affect a liability of the corporation.
- (8) The controller is not taken because of subsection (2):
  - (a) to have adopted the agreement; or
  - (b) to be liable under the agreement otherwise than as mentioned in subsection (2).



#### **420 Powers of receiver**

- (1) Subject to this section, a receiver of property of a corporation has power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed.
- (2) Without limiting the generality of subsection (1), but subject to any provision of the court order by which, or the instrument under which, the receiver was appointed, being a provision that limits the receiver's powers in any way, a receiver of property of a corporation has, in addition to any powers conferred by that order or instrument, as the case may be, or by any other law, power, for the purpose of attaining the objectives for which the receiver was appointed:
  - (a) to enter into possession and take control of property of the corporation in accordance with the terms of that order or instrument; and
  - (b) to lease, let on hire or dispose of property of the corporation; and
  - (c) to grant options over property of the corporation on such conditions as the receiver thinks fit; and
  - (d) to borrow money on the security of property of the corporation; and
  - (e) to insure property of the corporation; and
  - (f) to repair, renew or enlarge property of the corporation; and
  - (g) to convert property of the corporation into money; and
  - (h) to carry on any business of the corporation; and
  - (j) to take on lease or on hire, or to acquire, any property necessary or convenient in connection with the carrying on of a business of the corporation; and
  - (k) to execute any document, bring or defend any proceedings or do any other act or thing in the name of and on behalf of the corporation; and
  - (m) to draw, accept, make and indorse a bill of exchange or promissory note; and

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- (n) to use a seal of the corporation; and
  - (o) to engage or discharge employees on behalf of the corporation; and
  - (p) to appoint a solicitor, accountant or other professionally qualified person to assist the receiver; and
  - (q) to appoint an agent to do any business that the receiver is unable to do, or that it is unreasonable to expect the receiver to do, in person; and
  - (r) where a debt or liability is owed to the corporation—to prove the debt or liability in a bankruptcy, insolvency or winding up and, in connection therewith, to receive dividends and to assent to a proposal for a composition or a scheme of arrangement; and
  - (s) if the receiver was appointed under an instrument that created a security interest in uncalled share capital of the corporation:
    - (i) to make a call in the name of the corporation for the payment of money unpaid on the corporation's shares; or
    - (ii) on giving a proper indemnity to a liquidator of the corporation—to make a call in the liquidator's name for the payment of money unpaid on the corporation's shares; and
  - (t) to enforce payment of any call that is due and unpaid, whether the calls were made by the receiver or otherwise; and
  - (u) to make or defend an application for the winding up of the corporation; and
  - (w) to refer to arbitration any question affecting the corporation.
- (3) The conferring by this section on a receiver of powers in relation to property of a corporation does not affect any rights in relation to that property of any other person other than the corporation.
- (4) In this section, a reference, in relation to a receiver, to property of a corporation is, unless the contrary intention appears, a reference to the property of the corporation in relation to which the receiver was appointed.

(5) In this section:

*lease* includes a lease of goods that gives rise to a PPSA security interest in the goods.

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

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

#### **420B Court may authorise managing controller to dispose of property despite prior security interest**

- (1) On the application of a managing controller of property of a corporation, the Court may by order authorise the controller to sell, or to dispose of in some other specified way, specified property of the corporation, even though it is subject to a security interest (the *prior security interest*) that has priority over a security interest (the *controller's security interest*) in that property that the controller is enforcing.
- (2) However, the Court may only make an order if satisfied that:
  - (a) apart from the existence of the prior security interest, the controller would have power to sell, or to so dispose of, the property; and
  - (b) the controller has taken all reasonable steps to obtain the consent of the secured party in relation to the prior security interest to the sale or disposal, but has not obtained that consent; and

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- (c) sale or disposal of the property under the order is in the best interests of the corporation's creditors and of the corporation; and
  - (d) sale or disposal of the property under the order will not unreasonably prejudice the rights or interests of the secured party in relation to the prior security interest.
- (3) The Court is to have regard to the need to protect adequately the rights and interests of the secured party in relation to the prior security interest.
- (4) If the property would be sold or disposed of together with other property that is subject to the controller's security interest, the Court may have regard to:
  - (a) the amount (if any) by which it is reasonable to expect that the net proceeds of selling or disposing of that other property otherwise than together with the first-mentioned property would be less than so much of the net proceeds of selling or disposing of all the property together as would be attributable to that other property; and
  - (b) the amount (if any) by which it is reasonable to expect that the net proceeds of selling or disposing of the first-mentioned property otherwise than together with the other property would be greater than so much of the net proceeds of selling or disposing of all the property together as would be attributable to the first-mentioned property.
- (5) Nothing in subsection (3) or (4) limits the matters to which the Court may have regard for the purposes of subsection (2).
- (6) An order may be made subject to conditions, for example (but without limitation):
  - (a) a condition that:
    - (i) the net proceeds of the sale or disposal; and

- (ii) the net proceeds of the sale or disposal of such other property (if any) as is specified in the condition and is subject to the controller's security interest;  
or a specified part of those net proceeds, be applied in payment of specified amounts secured by the prior security interest; or
- (b) a condition that the controller apply a specified amount in payment of specified amounts secured by the prior security interest.

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

- (1) A receiver of property of a corporation that is being wound up may:
  - (a) with the written approval of the corporation's liquidator or with the approval of the Court, carry on the corporation's business either generally or as otherwise specified in the approval; and
  - (b) do whatever is necessarily incidental to carrying on that business under paragraph (a).
- (2) Subsection (1) does not:
  - (a) affect a power that the receiver has otherwise than under that subsection; or
  - (b) empower the receiver to do an act that he or she would not have power to do if the corporation were not being wound up.
- (3) A receiver of property of a corporation who carries on the corporation's business under subsection (1) does so:
  - (a) as agent for the corporation; and
  - (b) in his or her capacity as receiver of property of the corporation.
- (4) The consequences of subsection (3) include, but are not limited to, the following:

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- (a) for the purposes of subsection 419(1), a debt that the receiver incurs in carrying on the business as mentioned in subsection (3) of this section is incurred in the course of the receivership;
- (b) a debt or liability that the receiver incurs in so carrying on the business is not a cost, charge or expense of the winding up.

**421 Managing controller’s duties in relation to bank accounts and financial records**

- (1) A managing controller of property of a corporation must:
  - (a) open and maintain an account, with an Australian ADI, bearing:
    - (i) the managing controller’s own name; and
    - (ii) in the case of a receiver of the property—the title “receiver”; and
    - (iii) otherwise—the title “managing controller”; and
    - (iv) the corporation’s name;or 2 or more such accounts; and
  - (b) within 3 business days after money of the corporation comes under the control of the managing controller, pay that money into such an account that the managing controller maintains; and
  - (c) ensure that no such account that the managing controller maintains contains money other than money of the corporation that comes under the control of the managing controller; and
  - (d) keep such financial records as correctly record and explain all transactions that the managing controller enters into as the managing controller.
- (2) Any director, creditor or member of a corporation may, unless the Court otherwise orders, personally or by an agent, inspect records kept by a managing controller of property of the corporation for the purposes of paragraph (1)(d).

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

- (1) A managing controller of property of a corporation must prepare a report about the corporation's affairs that is in the prescribed form and is made up to a day not later than 30 days before the day when it is prepared.
- (2) The managing controller must prepare and lodge the report within 2 months after the control day.
- (4) If, in the managing controller's opinion, it would seriously prejudice:
  - (a) the corporation's interests; or
  - (b) the achievement of the objectives for which the controller was appointed, or entered into possession or assumed control of property of the corporation, as the case requires;if particular information that the controller would otherwise include in the report were made available to the public, the controller need not include the information in the report.
- (5) If the managing controller omits information from the report as permitted by subsection (4), the controller must include instead a notice:
  - (a) stating that certain information has been omitted from the report; and
  - (b) summarising what the information is about, but without disclosing the information itself.

**422 Reports by receiver or managing controller**

- (1) If it appears to the receiver or managing controller of property of a corporation that:
  - (a) a past or present officer or employee, or a member, of the corporation may have been guilty of an offence in relation to the corporation; or

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- (b) a person who has taken part in the formation, promotion, administration, management or winding up of the corporation:
  - (i) may have misapplied or retained, or may have become liable or accountable for, any money or property (whether the property is in Australia or elsewhere) of the corporation; or
  - (ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the corporation;the receiver or managing controller must:
  - (c) lodge as soon as practicable a report about the matter; and
  - (d) give to ASIC such information, and such access to and facilities for inspecting and taking copies of any documents, as ASIC requires.
- (2) The receiver or managing controller may also lodge further reports specifying any other matter that, in the opinion of the receiver or managing controller, it is desirable to bring to the notice of ASIC.
- (3) If it appears to the Court:
  - (a) that a past or present officer or employee, or a member, of a corporation in respect of property of which a receiver has been appointed has been guilty of an offence in relation to the corporation; or
  - (b) that a person who has taken part in the formation, promotion, administration, management or winding up of a corporation in respect of property of which a receiver has been appointed has engaged in conduct referred to in paragraph (1)(b) in relation to the corporation;and that the receiver has not lodged a report about the matter, the Court may, on the application of a person interested in the appointment of the receiver, direct the receiver to lodge such a report.
- (4) If:
  - (a) there is a managing controller in relation to property of a corporation; and



- (b) it appears to the Court that:
- (i) a past or present officer or employee, or a member, of the corporation has been guilty of an offence in relation to the corporation; or
  - (ii) a person who has taken part in the formation, promotion, administration, management or winding up of the corporation has engaged in conduct referred to in paragraph (1)(b) in relation to the corporation; and
- (c) it appears to the Court that the managing controller has not lodged a report about the matter;
- the Court may, on the application of a person interested in the appointment of the managing controller, direct the managing controller to lodge such a report.

#### **422A Annual return by controller**

- (1) This section applies if a person is the controller of property of a corporation during all or part of a control return year for the controller for the corporation.
- (2) However, this section does not apply if:
- (a) the control of the property ends during the control return year; and
  - (b) the person is the controller of the property when the control of the property ends.
- Note: If a person is the controller of property of the corporation when the control of the property ends, the person must instead lodge a return under section 422B.
- (3) The person must lodge a return in relation to the control of the property of the corporation.
- (4) The return must:
- (a) be in the approved form; and
  - (b) be lodged with ASIC within 3 months after the end of the control return year.

Note: Fees for lodging documents and late lodgement fees may be imposed under the *Corporations (Fees) Act 2001*.

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- (5) Each of the following is a **control return year** for a controller for a corporation:
- (a) the period of 12 months beginning on the day on which the person first began to be a controller of the property of the corporation;
  - (b) each subsequent period of 12 months.

**422B End of control return**

*Application of this section*

- (1) This section applies if the control of the property of a corporation ends.

*End of receivership return to be lodged*

- (2) The person who is the controller of the property of the corporation when the control of the property of the corporation ends (the **last controller**) must lodge a return in relation to the control of the property of the corporation.
- (3) The return must:
- (a) be in the approved form; and
  - (b) be lodged with ASIC within 1 month after the control of the property of the corporation ends.

Note: Fees for lodging documents and late lodgement fees may be imposed under the *Corporations (Fees) Act 2001*.

*Notice of lodgement to be given*

- (4) The last controller must give notice that the return has been lodged to a person mentioned in subsection (5), if that person requests in writing that the last controller give the person such a notice.

Note: For notification, see section 600G.

- (5) The persons who may request such a notice are:
- (a) the members of the corporation; and
  - (b) the creditors; and

- (c) the corporation; and
- (d) if the corporation is a company under external administration—the external administrator of the company.

#### **422C Transfer of books to new controller**

##### *Application of this section*

- (1) This section applies if:
  - (a) a person (the **former controller**) ceases to act as a controller of property of a corporation; and
  - (b) ASIC has not issued a notice to the former controller under section 422D; and
  - (c) a registered liquidator (the **new controller**) is appointed instead as:
    - (i) the controller of that property of the corporation; or
    - (ii) if the corporation is a company under external administration—the external administrator of the company.

##### *Transfer of books to new controller*

- (2) The former controller must transfer to the new controller, within 5 business days after the new controller is appointed, possession or control of any books relating to the control of the property that are in the former controller's possession or control.
- (3) The former controller may take a copy of any part of the books before transferring possession or control of them to the new controller.

##### *New controller must allow inspection etc.*

- (4) After possession or control of the books is transferred, the new controller must allow the former controller to inspect them at any reasonable time and take a copy of any part of the books.

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*Offence*

- (5) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (2) or (4); and
  - (b) the person intentionally or recklessly fails to comply with the requirement.

Penalty: 50 penalty units.

*Lien against books not prejudiced*

- (6) If the new controller is entitled to take possession or control of the books under this section:
- (a) a person is not entitled, as against the new controller, to claim a lien on the books; and
  - (b) such a lien is not otherwise prejudiced.

**422D Transfer of books to ASIC etc.**

*Transfer of books to ASIC*

- (1) If a person ceases to act as a controller of property of a corporation, ASIC may, by written notice given to the person, require the person to:
- (a) if the person has possession or control of books relating to the control of that property of the corporation in his or her possession or control—transfer possession or control of those books to ASIC within the period specified in the notice; or
  - (b) otherwise—notify ASIC, within the period and in the manner specified in the notice, that the person does not have books relating to the control of that property of the corporation in the person's possession or control.

*Offence*

- (2) A person commits an offence if:

- (a) the person is subject to a requirement under subsection (1);  
and
- (b) the person intentionally or recklessly fails to comply with the requirement.

Penalty: 50 penalty units.

*ASIC must transfer books to new controller*

- (3) If:
  - (a) possession or control of books relating to the control of property of a corporation is transferred to ASIC under this section; and
  - (b) the books are in ASIC's possession or control; and
  - (c) a person (the **new controller**) is or becomes:
    - (i) the controller of that property of the corporation; or
    - (ii) if the corporation is a company under external administration—the external administrator of the company;

ASIC must, as soon as practicable, transfer possession or control of those books to the new controller.

*ASIC must transfer books to company*

- (4) If:
  - (a) possession or control of books relating to the control of property of a corporation is transferred to ASIC under this section; and
  - (b) the books are in ASIC's possession or control; and
  - (c) it is unlikely that another person will be appointed as:
    - (i) the controller of that property of the corporation; or
    - (ii) if the corporation is a company under external administration—the external administrator of the company;

ASIC must, as soon as practicable, transfer possession or control of those books to the relevant corporation.

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*Lien against books not prejudiced*

- (5) If ASIC is entitled to take possession or control of the books under this section:
- (a) a person is not entitled, as against ASIC, to claim a lien on the books; and
  - (b) such a lien is not otherwise prejudiced.
- (6) If ASIC is required to give possession or control of the books to the new controller under this section:
- (a) a person is not entitled, as against the new controller, to claim a lien on the books; and
  - (b) such a lien is not otherwise prejudiced.

*Notice is not a legislative instrument*

- (7) A notice under subsection (1) is not a legislative instrument.

*Retention period for books*

- (8) ASIC must retain all books:
- (a) that are relevant to the control of property of the corporation; and
  - (b) possession or control of which is transferred to ASIC under this section; and
  - (c) possession or control of which is not transferred to another entity under this section, or under any other law;
- for a period (the ***retention period***) of 2 years after the day on which ASIC takes possession or control of the books.

*Destruction of books at end of retention period*

- (9) ASIC may destroy the books at the end of the retention period.

*Relationship with other laws*

- (10) Subsections (8) and (9) do not apply to the extent that ASIC is under an obligation to retain the books, or a part of the books, under another provision of this Act or under any other law.

### **423 Supervision of controller**

- (1) If:
- (a) it appears to the Court or to ASIC that a controller of property of a corporation has not faithfully performed, or is not faithfully performing, the controller's functions or has not observed, or is not observing, a requirement of:
    - (i) in the case of a receiver—the order by which, or the instrument under which, the receiver was appointed; or
    - (ii) otherwise—an instrument under which the controller entered into possession, or took control, of that property; or
    - (iii) in any case—the Court; or
    - (iv) in any case—this Act, the regulations or the rules; or
  - (b) a person complains to the Court or to ASIC about an act or omission of a controller of property of a corporation in connection with performing or exercising any of the controller's functions and powers;
- the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.
- (2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of a controller of property of a corporation and the Court may order the controller to make good any loss that the estate of the corporation has sustained thereby and may make such other order or orders as it thinks fit.
- (3) The Court may at any time:
- (a) require a controller of property of a corporation to answer questions about the performance or exercise of any of the controller's functions and powers as controller; or
  - (b) examine a person about the performance or exercise by such a controller of any of the controller's functions and powers as controller; or
  - (c) direct an investigation to be made of such a controller's books.

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**424 Controller may apply to Court**

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

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

- (1) The Court may by order fix the amount to be paid by way of remuneration to any person who, under a power contained in an instrument, has been appointed as receiver of property of a corporation.
- (2) The power of the Court to make an order under this section:
  - (a) extends to fixing the remuneration for any period before the making of the order or the application for the order; and
  - (b) is exercisable even if the receiver has died, or ceased to act, before the making of the order or the application for the order; and
  - (c) if the receiver has been paid or has retained for the receiver's remuneration for any period before the making of the order any amount in excess of that fixed for that period—extends to requiring the receiver or the receiver's personal representatives to account for the excess or such part of the excess as is specified in the order.
- (3) The power conferred by paragraph (2)(c) must not be exercised in respect of any period before the making of the application for the order unless, in the opinion of the Court, there are special circumstances making it proper for the power to be so exercised.
- (4) The Court may from time to time vary or amend an order under this section.



- (5) An order under this section may be made, varied or amended on the application of:
- (a) a liquidator of the corporation; or
  - (b) an administrator of the corporation; or
  - (c) an administrator of a deed of company arrangement executed by the corporation; or
  - (d) ASIC.
- (6) An order under this section may be varied or amended on the application of the receiver concerned.
- (7) An order under this section may be made, varied or amended only as provided in subsections (5) and (6).
- (8) In exercising its powers under this section, the Court must have regard to whether the remuneration is reasonable, taking into account any or all of the following matters:
- (a) the extent to which the work performed by the receiver was reasonably necessary;
  - (b) the extent to which the work likely to be performed by the receiver is likely to be reasonably necessary;
  - (c) the period during which the work was, or is likely to be, performed by the receiver;
  - (d) the quality of the work performed, or likely to be performed, by the receiver;
  - (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the receiver;
  - (f) the extent (if any) to which the receiver was, or is likely to be, required to deal with extraordinary issues;
  - (g) the extent (if any) to which the receiver was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
  - (h) the value and nature of any property dealt with, or likely to be dealt with, by the receiver;
  - (i) whether the receiver was, or is likely to be, required to deal with:
    - (i) one or more other receivers; or

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- (ii) one or more receivers and managers; or
- (iii) one or more liquidators; or
- (iv) one or more administrators; or
- (v) one or more administrators of deeds of company arrangement;
- (j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors;
- (k) if the remuneration is ascertained, in whole or in part, on a time basis:
  - (i) the time properly taken, or likely to be properly taken, by the receiver in performing the work; and
  - (ii) whether the total remuneration payable to the receiver is capped;
- (l) any other relevant matters.

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

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

- (a) a matter contained in a report or return that the controller lodges under section 421A, 422, 422A or 422B; or
- (b) a comment that the controller makes under paragraph 429(2)(c).

**427 Notification of matters relating to controller**

- (1) A person who:
  - (a) obtains an order for the appointment of a receiver of property of a corporation; or
  - (b) appoints such a receiver under a power contained in an instrument;

must, within 7 days after obtaining the order or making the appointment, lodge notice that the order has been obtained, or that the appointment has been made, as the case may be.

- (1A) A person who appoints another person to enter into possession, or take control, of property of a corporation (whether or not as agent for the corporation) for the purpose of enforcing a security interest otherwise than as receiver of that property must, within 7 days after making the appointment, lodge notice of the appointment.
- (1B) A person who enters into possession, or takes control, as mentioned in subsection (1A) must, within 7 days after entering into possession or taking control, lodge notice that the person has done so, unless another person:
- (a) appointed the first-mentioned person so to enter into possession or take control; and
  - (b) complies with subsection (1A) in relation to the appointment.
- (2) Within 14 days after becoming a controller of property of a corporation, a person must lodge notice in the prescribed form of the address of the person's office.
- (3) A controller of property of a corporation must, within 14 days after a change in the situation of the controller's office, lodge notice in the prescribed form of the change.
- (4) A person who ceases to be a controller of property of a corporation must, within 7 days after so ceasing, lodge notice that the person has so ceased.

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

- (1) Where a receiver of property (whether in or outside this jurisdiction or in or outside Australia) of a corporation has been appointed, the corporation must set out, in every public document, and in every negotiable instrument, of the corporation, after the name of the corporation where it first appears, a statement that a receiver, or a receiver and manager, as the case requires, has been appointed.
- (2) Where there is a controller (other than a receiver) of property (whether in Australia or elsewhere) of a corporation, the corporation must set out, in every public document, and in every

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negotiable instrument, of the corporation, after the corporation's name where it first appears, a statement that a controller is acting.

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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

- (1) In this section:

*reporting officer*, in relation to a corporation in respect of property of which a person is controller, means a person who was:

- (a) in the case of a company or registrable Australian body—a director or secretary of the company or registrable Australian body; or
- (b) in the case of a foreign company—a local agent of the foreign company;

on the control day.

- (2) Where a person becomes a controller of property of a corporation:

- (a) the person must serve on the corporation as soon as practicable notice that the person is a controller of property of the corporation; and
- (b) within 10 business days after the corporation receives the notice, the reporting officers must make out and submit to the person a report in the prescribed form about the affairs of the corporation as at the control day; and
- (c) the person must, within one month after receipt of the report:
  - (i) lodge a copy of the report and a notice setting out any comments the person sees fit to make relating to the report or, if the person does not see fit to make any comment, a notice stating that the person does not see fit to make any comment; and
  - (ii) send to the corporation a copy of the notice lodged in accordance with subparagraph (i); and
  - (iii) if the person became a controller of the property:

- (A) because of an appointment as receiver of the property that was made by or on behalf of the holder of debentures of the corporation; or
- (B) by entering into possession, or taking control, of the property for the purpose of enforcing a security interest securing such debentures;
- and there are trustees for the holders of those debentures—send to those trustees a copy of the report and a copy of the notice lodged under subparagraph (i).
- (3) Where notice has been served on a corporation under paragraph (2)(a), the reporting officers may apply to the controller or to the Court to extend the period within which the report is to be submitted and:
- (a) if application is made to the controller—if the controller believes that there are special reasons for so doing, the controller may, by notice in writing given to the reporting officers, extend that period until a specified day; and
- (b) if application is made to the Court—if the Court believes that there are special reasons for so doing, the Court may, by order, extend that period until a specified day.
- (4) As soon as practicable after granting an extension under paragraph (3)(a), the controller must lodge a copy of the notice.
- (5) As soon as practicable after the Court grants an extension under paragraph (3)(b), the reporting officers must lodge a copy of the order.
- (6) Subsections (2), (3) and (4) do not apply in a case where a person becomes a controller of property of a corporation:
- (a) to act with an existing controller of property of the corporation; or
- (b) in place of a controller of such property who has died or ceased to be a controller of such property.
- (6A) However, if subsection (2) applies in a case where a controller of property of a corporation dies, or ceases to be a controller of

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property of the corporation, before subsection (2) is fully complied with, then:

- (a) the references in paragraphs (2)(b) and (c) to the person; and
  - (b) the references in subsections (3) and (4) to the controller;
- include references to the controller's successor and to any continuing controller.
- (7) Where a corporation is being wound up, this section (including subsection (6A)) and section 430 apply even if the controller and the liquidator are the same person, but with any necessary modifications arising from that fact.

**430 Controller may require reports**

- (1) A controller of property of a corporation may, by notice given to the person or persons, require one or more persons included in one or more of the following classes of persons to make out as required by the notice, verify by a statement in writing in the prescribed form, and submit to the controller, a report, containing such information as is specified in the notice as to the affairs of the corporation or as to such of those affairs as are specified in the notice, as at a date specified in the notice:
- (a) persons who are or have been officers of the corporation;
  - (b) where the corporation was incorporated within one year before the control day—persons who have taken part in the formation of the corporation;
  - (c) persons who are employed by the corporation or have been so employed within one year before the control day and are, in the opinion of the controller, capable of giving the information required;
  - (d) persons who are, or have been within one year before the control day, officers of, or employed by, a corporation that is, or within that year was, an officer of the corporation.
- (2) Without limiting the generality of subsection (1), a notice under that subsection may specify the information that the controller requires as to affairs of the corporation by reference to information

that this Act requires to be included in any other report, statement or notice under this Act.

- (3) A person making a report and verifying it as required by subsection (1) must, subject to the regulations, be allowed, and must be paid by the controller (or the controller's successor) out of the controller's receipts, such costs and expenses incurred in and about the preparation and making of the report and the verification of the report as the controller (or the controller's successor) considers reasonable.
- (4) A person must comply with a requirement made under subsection (1).
- (5) A reference in this section to the controller's successor includes a reference to a continuing controller.

#### **431 Controller may inspect books**

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

#### **432 Auditing returns by controllers**

- (2) ASIC may, of its own motion or on the application of the corporation or a creditor of the corporation, cause the returns lodged in accordance with sections 422A and 422B to be audited by a registered company auditor appointed by ASIC and, for the purpose of the audit, the controller must furnish the auditor with such books and information as the auditor requires.
- (3) Where ASIC causes the returns to be audited on the request of the corporation or a creditor, ASIC may require the corporation or creditor, as the case may be, to give security for the payment of the cost of the audit.
- (4) The costs of an audit under subsection (2) must be fixed by ASIC and ASIC may if it thinks fit make an order declaring that, for the

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purposes of subsection 419(1), those costs are taken to be a debt incurred by the controller as mentioned in subsection 419(1) and, where such an order is made, the controller is liable accordingly.

- (5) A person must comply with a requirement made under this section.

**433 Property subject to circulating security interest—payment of certain debts to have priority**

- (2) This section applies where:
- (a) a receiver is appointed on behalf of the holders of any debentures of a company or registered body that are secured by a circulating security interest, or possession is taken or control is assumed, by or on behalf of the holders of any debentures of a company or registered body, of any property comprised in or subject to a circulating security interest; and
  - (b) at the date of the appointment or of the taking of possession or assumption of control (in this section called the *relevant date*):
    - (i) the company or registered body has not commenced to be wound up voluntarily; and
    - (ii) the company or registered body has not been ordered to be wound up by the Court.
- (3) In the case of a company, the receiver or other person taking possession or assuming control of property of the company must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:
- (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
  - (b) next, if an auditor of the company had applied to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and ASIC had refused that consent before the relevant date—the reasonable fees and expenses of the auditor incurred during the period beginning on the day of the refusal and ending on the relevant date;



- (c) subject to subsections (6) and (7), next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.
- (4) In the case of a registered body, the receiver or other person taking possession or assuming control of property of the registered body must pay, out of the property of the registered body coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:
- (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
  - (b) next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.
- (5) The receiver or other person taking possession or assuming control of property must pay debts and amounts payable pursuant to paragraph (3)(c) or (4)(b) in the same order of priority as is prescribed by Division 6 of Part 5.6 in respect of those debts and amounts.
- (6) In the case of a company, if an auditor of the company had applied to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and ASIC had, before the relevant date, refused that consent, a receiver must, when property comes to the receiver's hands, before paying any debt or amount referred to in paragraph (3)(c), make provision out of that property for the reasonable fees and expenses of the auditor incurred after the relevant date but before the date on which the property comes into the receiver's hands, being fees and expenses in respect of which provision has not already been made under this subsection.
- (7) If an auditor of the company applies to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and, after the relevant date, ASIC refuses that consent, the receiver must, in relation to property that comes into the receiver's hands after the refusal, before paying any debt or amount referred to in paragraph (3)(c), make provision out of that property for the

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reasonable fees and expenses of the auditor incurred after the refusal and before the date on which the property comes into the receiver's hands, being fees and expenses in respect of which provision has not already been made under this subsection.

- (8) A receiver must make provision in respect of reasonable fees and expenses of an auditor in respect of a particular period as required by subsection (6) or (7) whether or not the auditor has made a claim for fees and expenses for that period, but where the auditor has not made a claim, the receiver may estimate the reasonable fees and expenses of the auditor for that period and make provision in accordance with the estimate.
- (9) For the purposes of this section, the references in Division 6 of Part 5.6 to the relevant date are to be read as references to the date of the appointment of the receiver, or of possession being taken or control being assumed, as the case may be.

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

- (1) If a controller of property of a corporation:
  - (a) who has made default in making or lodging any return, account or other document or in giving any notice required by law fails to make good the default within 14 days after the service on the controller, by any member or creditor of the corporation or trustee for debenture holders, of a notice requiring the controller to do so; or
  - (b) who has become a controller of property of the corporation otherwise than by being appointed a receiver of such property by a court and who has, after being required at any time by the liquidator of the corporation so to do, failed to render proper accounts of, and to vouch, the controller's receipts and payments and to pay over to the liquidator the amount properly payable to the liquidator;

the Court may make an order directing the controller to make good the default within such time as is specified in the order.

- (2) An application under subsection (1) may be made:

- (a) if paragraph (1)(a) applies—by a member or creditor of the corporation or by a trustee for debenture holders; and
- (b) if paragraph (1)(b) applies—by the liquidator of the corporation.

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

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

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

- (1) The Court may order that, on and after a specified day, a controller of property of a corporation:
  - (a) cease to act as receiver, or give up possession or control, as the case requires, of property of the corporation; or
  - (b) act as receiver, or continue in possession or control, as the case requires, only of specified property of the corporation.
- (2) However, the Court may only make an order under subsection (1) if satisfied that the objectives for which the controller was appointed, or entered into possession or took control of property of the corporation, as the case requires, have been achieved, so far as is reasonably practicable, except in relation to any property specified in the order under paragraph (1)(b).
- (3) For the purposes of subsection (2), the Court must have regard to:
  - (a) the corporation's interests; and
  - (b) the interests of the secured party in relation to the security interest that the controller is enforcing; and
  - (c) the interests of the corporation's other creditors; and
  - (d) any other relevant matter.

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- (4) The Court may only make an order under subsection (1) on the application of a liquidator appointed for the purposes of winding up the corporation in insolvency.
- (5) An order under subsection (1) may also prohibit the secured party from doing any or all of the following, except with the leave of the Court:
  - (a) appointing a person as receiver of property of the corporation under a power contained in an instrument relating to the security interest;
  - (b) entering into possession, or taking control, of such property for the purpose of enforcing the security interest;
  - (c) appointing a person so to enter into possession or take control (whether as agent for the secured party or for the corporation).

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

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

**434D Appointment of 2 or more receivers of property of a corporation**

If 2 or more persons have been appointed as receivers of property of a corporation:

- (a) a function or power of a receiver of property of the corporation may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or instrument appointing them otherwise provides; and
- (b) a reference in this Act to a receiver, or to the receiver, of property of a corporation is, in the case of the first-mentioned

corporation, a reference to whichever one or more of those receivers the case requires.

**434E Appointment of 2 or more receivers and managers of property of a corporation**

If 2 or more persons have been appointed as receivers and managers of property of a corporation:

- (a) a function or power of a receiver and manager of property of the corporation may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or instrument appointing them otherwise provides; and
- (b) a reference in this Act to a receiver and manager, or to the receiver and manager, of property of a corporation is, in the case of the first-mentioned corporation, a reference to whichever one or more of those receivers and managers the case requires.

**434F Appointment of 2 or more controllers of property of a corporation**

If 2 or more persons have been appointed as controllers of property of a corporation:

- (a) a function or power of a controller of property of the corporation may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or instrument appointing them otherwise provides; and
- (b) a reference in this Act to a controller, or to the controller, of property of a corporation is, in the case of the first-mentioned corporation, a reference to whichever one or more of those controllers the case requires.

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**434G Appointment of 2 or more managing controllers of property of a corporation**

If 2 or more persons have been appointed as managing controllers of property of a corporation:

- (a) a function or power of a managing controller of property of the corporation may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or instrument appointing them otherwise provides; and
- (b) a reference in this Act to a managing controller, or to the managing controller, of property of a corporation is, in the case of the first-mentioned corporation, a reference to whichever one or more of those managing controllers the case requires.

**434H Regulations may provide for reporting to ASIC**

- (1) The regulations may provide for and in relation to the obligations of a controller, or a managing controller, of the property of a corporation:
  - (a) to give information; and
  - (b) to provide reports; and
  - (c) to produce documents;to ASIC.
- (2) Without limiting subsection (1), the regulations may provide for and in relation to:
  - (a) the manner and form in which information is to be given, a report provided or a document produced; and
  - (b) the timeframes in which information is to be given, a report provided or a document produced; and
  - (c) who is to bear the cost of giving information, providing a report or producing a document.

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

### **Division 1—Preliminary**

#### **435A Object of Part**

The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

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

Note: Schedule 2 contains additional rules about companies under external administration.

#### **435B Definitions**

In this Part, unless the contrary intention appears:

*property* of a company includes any PPSA retention of title property of the company.

Note: See sections 9 (definition of *property*) and 51F (PPSA retention of title property). An extended definition of *property* applies in subsection 444E(3) (see subsection 444E(4)).

*receiver* includes a receiver and manager.

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**435C When administration begins and ends**

- (1) The administration of a company:
  - (a) begins when an administrator of the company is appointed under section 436A, 436B or 436C; and
  - (b) ends on the happening of whichever event of a kind referred to in subsection (2) or (3) happens first after the administration begins.
- (2) The normal outcome of the administration of a company is that:
  - (a) a deed of company arrangement is executed by both the company and the deed's administrator; or
  - (b) the company's creditors resolve under paragraph 439C(b) that the administration should end; or
  - (c) the company's creditors resolve under paragraph 439C(c) that the company be wound up.
- (3) However, the administration of a company may also end because:
  - (a) the Court orders, under section 447A or otherwise, that the administration is to end, for example, because the Court is satisfied that the company is solvent; or
  - (b) the convening period, as fixed by subsection 439A(5), for a meeting of the company's creditors ends:
    - (i) without the meeting being convened in accordance with section 439A; and
    - (ii) without an application being made for the Court to extend under subsection 439A(6) the convening period for the meeting; or
  - (c) an application for the Court to extend under subsection 439A(6) the convening period for such a meeting is finally determined or otherwise disposed of otherwise than by the Court extending the convening period; or
  - (d) the convening period, as extended under subsection 439A(6), for such a meeting ends without the meeting being convened in accordance with section 439A; or



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- (e) such a meeting convened under section 439A ends (whether or not it was earlier adjourned) without a resolution under section 439C being passed at the meeting; or
  - (f) the company contravenes subsection 444B(2) by failing to execute a proposed deed of company arrangement; or
  - (g) the Court appoints a provisional liquidator of the company, or orders that the company be wound up; or
  - (h) if the company is a general insurer (within the meaning of the *Insurance Act 1973*)—management of the general insurer vests in a judicial manager of the company appointed by the Federal Court under Part VB of the *Insurance Act 1973*; or
  - (i) if the company is a life company (within the meaning of the *Life Insurance Act 1995*)—management of the life company vests in a judicial manager of the life company appointed by the Federal Court under Part 8 of the *Life Insurance Act 1995*.
- (4) During the administration of a company, the company is taken to be under administration.

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

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

- (1) A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that:
  - (a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and
  - (b) an administrator of the company should be appointed.
- (2) Subsection (1) does not apply to a company if a person holds an appointment as liquidator, or provisional liquidator, of the company.

### **436B Liquidator may appoint administrator**

- (1) A liquidator or provisional liquidator of a company may by writing appoint an administrator of the company if he or she thinks that the company is insolvent, or is likely to become insolvent at some future time.
- (2) A liquidator or provisional liquidator of a company must not appoint any of the following persons under subsection (1):
  - (a) himself or herself;
  - (b) if he or she is a partner of a partnership—a partner or employee of the partnership;
  - (c) if he or she is an employee—his or her employer;
  - (d) if he or she is an employer—his or her employee;
  - (e) if he or she is a director, secretary, employee or senior manager of a corporation—a director, secretary, employee or senior manager of the corporation;unless:

- (f) at a meeting of the company's creditors, the company's creditors pass a resolution approving the appointment; or
- (g) the appointment is made with the leave of the Court.

#### **436C Secured party may appoint administrator**

- (1) A person who is entitled to enforce a security interest in the whole, or substantially the whole, of a company's property may by writing appoint an administrator of the company if the security interest has become, and is still, enforceable.
- (1A) Subsection (1) applies in relation to a PPSA security interest only if the security interest is perfected within the meaning of the *Personal Property Securities Act 2009*.
- (2) Subsection (1) does not apply to a company if a person holds an appointment as liquidator, or provisional liquidator, of the company.

#### **436D Company already under administration**

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

#### **436DA Declarations by administrator—indemnities and relevant relationships**

##### *Scope*

- (1) This section applies to an administrator appointed under section 436A, 436B or 436C.

##### *Declaration of relationships and indemnities*

- (2) As soon as practicable after being appointed, the administrator must make:
  - (a) a declaration of relevant relationships; and
  - (b) a declaration of indemnities.

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Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

*Notification of creditors*

- (3) The administrator must:
- (a) give a copy of each declaration under subsection (2) to as many of the company's creditors as reasonably practicable; and
  - (b) do so at the same time as the administrator gives those creditors notice of the meeting referred to in section 436E.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The administrator must table a copy of each declaration under subsection (2) at the meeting referred to in section 436E.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4A) As soon as practicable after making a declaration under subsection (2), the administrator must lodge a copy of the declaration with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

*Updating of declaration*

- (5) If:
- (a) at a particular time, the administrator makes:
    - (i) a declaration of relevant relationships; or
    - (ii) a declaration of indemnities;under subsection (2) or this subsection; and
  - (b) at a later time:
    - (i) the declaration has become out-of-date; or
    - (ii) the administrator becomes aware of an error in the declaration;

the administrator must, as soon as practicable, make:

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- (c) if subparagraph (a)(i) applies—a replacement declaration of relevant relationships; or
- (d) if subparagraph (a)(ii) applies—a replacement declaration of indemnities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) The administrator must table a copy of a replacement declaration under subsection (5):
  - (a) if:
    - (i) there is a committee of inspection; and
    - (ii) the next meeting of the committee of inspection occurs before the next meeting of the company's creditors; at the next meeting of the committee of inspection; or
  - (b) in any other case—at the next meeting of the company's creditors.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6A) As soon as practicable after making a replacement declaration under subsection (5), the administrator must lodge a copy of the replacement declaration with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

*Defence*

- (7) In a prosecution for an offence constituted by a failure to include a particular matter in a declaration under this section, it is a defence if the defendant proves that:
  - (a) the defendant made reasonable enquiries; and
  - (b) after making these enquiries, the defendant had no reasonable grounds for believing that the matter should have been included in the declaration.

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

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

- (1) The administrator of a company under administration must convene a meeting of the company's creditors in order to determine:
  - (a) whether to appoint a committee of inspection; and
  - (b) if so, who are to be the committee's members.
- (2) The meeting must be held within 8 business days after the administration begins.
- (3) The administrator must convene the meeting by:
  - (a) giving written notice of the meeting to as many of the company's creditors as reasonably practicable; and
  - (b) causing a notice setting out the prescribed information about the meeting to be published in the prescribed manner;at least 5 business days before the meeting.

Note: For electronic notification under paragraph (a), see section 600G.

- (3A) A notice under paragraph (3)(b) that relates to a company may be combined with a notice under paragraph 450A(1)(b) that relates to the company.
- (4) At the meeting, the company's creditors may also pass a resolution:
  - (a) removing the administrator from office; and
  - (b) appointing someone else as administrator of the company.

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

#### **437A Role of administrator**

- (1) While a company is under administration, the administrator:
  - (a) has control of the company's business, property and affairs; and
  - (b) may carry on that business and manage that property and those affairs; and
  - (c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and
  - (d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.
- (2) Nothing in subsection (1) limits the generality of anything else in it.

Note: A PPSA security interest in property of a company that is unperfected (within the meaning of the *Personal Property Securities Act 2009*) immediately before an administrator of the company is appointed vests in the company at the time of appointment, subject to certain exceptions (see section 267 of that Act).

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

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

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

- (1) This section applies where:
  - (a) a company under administration purports to enter into; or

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- (b) a person purports to enter into, on behalf of a company under administration;  
a transaction or dealing affecting property of the company.
- (2) The transaction or dealing is void unless:
  - (a) the administrator entered into it on the company's behalf; or
  - (b) the administrator consented to it in writing before it was entered into; or
  - (c) it was entered into under an order of the Court.
- (3) Subsection (2) does not apply to a payment made:
  - (a) by an Australian ADI out of an account kept by the company with the ADI; and
  - (b) in good faith and in the ordinary course of the ADI's banking business; and
  - (c) after the administration began and on or before the day on which:
    - (i) the administrator gives to the ADI (under subsection 450A(3) or otherwise) written notice of the appointment that began the administration; or
    - (ii) the administrator complies with paragraph 450A(1)(b) in relation to that appointment;whichever happens first.
- (4) Subsection (2) has effect subject to an order that the Court makes after the purported transaction or dealing.
- (5) If, because of subsection (2), the transaction or dealing is void, or would be void apart from subsection (4), an officer or employee of the company who:
  - (a) purported to enter into the transaction or dealing on the company's behalf; or
  - (b) was in any other way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the transaction or dealing;contravenes this subsection.



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

- (1) Where:
- (a) a court finds a person guilty of an offence constituted by a contravention of subsection 437D(5) (including such an offence that is taken to have been committed because of section 5 of the *Crimes Act 1914*); and
  - (b) the court is satisfied that the company or another person has suffered loss or damage because of the act or omission constituting the offence;

the court may (whether or not it imposes a penalty) order the first-mentioned person to pay compensation to the company or other person, as the case may be, of such amount as the order specifies.

Note: Section 73A defines when a court is taken to find a person guilty of an offence.

- (2) An order under subsection (1) may be enforced as if it were a judgment of the court.
- (3) The power of a court under section 1318 to relieve a person from liability as mentioned in that section extends to relieving a person from liability to be ordered under this section to pay compensation.

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

*Transfer of shares*

- (1) A transfer of shares in a company that is made during the administration of the company is void except if:
- (a) both:
    - (i) the administrator gives written consent to the transfer; and
    - (ii) that consent is unconditional; or
  - (b) all of the following subparagraphs apply:
    - (i) the administrator gives written consent to the transfer;

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- (ii) that consent is subject to one or more specified conditions;
    - (iii) those conditions have been satisfied; or
  - (c) the Court makes an order under subsection (4) authorising the transfer.
- (2) The administrator may only give consent under paragraph (1)(a) or (b) if he or she is satisfied that the transfer is in the best interests of the company's creditors as a whole.
- (3) If the administrator refuses to give consent under paragraph (1)(a) or (b) to a transfer of shares in the company:
- (a) the prospective transferor; or
  - (b) the prospective transferee; or
  - (c) a creditor of the company;
- may apply to the Court for an order authorising the transfer.
- (4) If the Court is satisfied, on an application under subsection (3), that the transfer is in the best interests of the company's creditors as a whole, the Court may, by order, authorise the transfer.
- (5) If the administrator gives consent under paragraph (1)(b) to a transfer of shares in the company:
- (a) the prospective transferor; or
  - (b) the prospective transferee; or
  - (c) a creditor of the company;
- may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.
- (6) If the Court is satisfied, on an application under subsection (5), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (7) The administrator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (3) or (5).

*Alteration in the status of members*

- (8) An alteration in the status of members of a company that is made during the administration of the company is void except if:
- (a) both:
    - (i) the administrator gives written consent to the alteration;  
and
    - (ii) that consent is unconditional; or
  - (b) all of the following subparagraphs apply:
    - (i) the administrator gives written consent to the alteration;
    - (ii) that consent is subject to one or more specified conditions;
    - (iii) those conditions have been satisfied; or
  - (c) the Court makes an order under subsection (12) authorising the alteration.
- (9) The administrator may only give consent under paragraph (8)(a) or (b) if he or she is satisfied that the alteration is in the best interests of the company's creditors as a whole.
- (10) The administrator must refuse to give consent under paragraph (8)(a) or (b) if the alteration would contravene Part 2F.2.
- (11) If the administrator refuses to give consent under paragraph (8)(a) or (b) to an alteration in the status of members of a company:
- (a) a member of the company; or
  - (b) a creditor of the company;
- may apply to the Court for an order authorising the alteration.
- (12) If the Court is satisfied, on an application under subsection (11), that:
- (a) the alteration is in the best interests of the company's creditors as a whole; and
  - (b) the alteration does not contravene Part 2F.2;
- the Court may, by order, authorise the alteration.

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- (13) If the administrator gives consent under paragraph (8)(b) to an alteration in the status of members of a company:
- (a) a member of the company; or
  - (b) a creditor of the company;
- may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.
- (14) If the Court is satisfied, on an application under subsection (13), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (15) The administrator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (11) or (13).

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

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

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

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

### **438B Directors to help administrator**

- (1) As soon as practicable after the administration of a company begins, each director must:
  - (a) deliver to the administrator all books in the director's possession that relate to the company, other than books that the director is entitled, as against the company and the administrator, to retain; and
  - (b) if the director knows where other books relating to the company are—tell the administrator where those books are.
- (2) Within 5 business days after the administration of a company begins or such longer period as the administrator allows, the directors must give to the administrator a report in the prescribed form about the company's business, property, affairs and financial circumstances.

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- (2A) The administrator must, within 5 business days after receiving a report under subsection (2), lodge a copy of the report.
- (3) A director of a company under administration must:
- (a) attend on the administrator at such times; and
  - (b) give the administrator such information about the company's business, property, affairs and financial circumstances; as the administrator reasonably requires.
- (4) A person must not fail to comply with subsection (1), (2), (2A) or (3).
- (5) An offence based on subsection (4) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (6) Subsection (4) does not apply to the extent that the person has a reasonable excuse.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.

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

- (1) A person is not entitled, as against the administrator of a company under administration:
- (a) to retain possession of books of the company; or
  - (b) to claim or enforce a lien on such books; but such a lien is not otherwise prejudiced.
- (2) Paragraph (1)(a) does not apply in relation to books of which a secured creditor of the company is entitled to possession otherwise than because of a lien, but the administrator is entitled to inspect, and make copies of, such books at any reasonable time.
- (3) The administrator of a company under administration may give to a person a written notice requiring the person to deliver to the administrator, as specified in the notice, books so specified that are in the person's possession.

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- (4) A notice under subsection (3) must specify a period of at least 3 business days as the period within which the notice must be complied with.
- (5) A person must comply with a notice under subsection (3).
- (6) Subsection (5) does not apply to the extent that the person is entitled, as against the company and the administrator, to retain possession of the books.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.
- (7) An offence based on subsection (5) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### 438D Reports by administrator

- (1) If it appears to the administrator of a company under administration that:
- (a) a past or present officer or employee, or a member, of the company may have been guilty of an offence in relation to the company; or
  - (b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:
    - (i) may have misapplied or retained, or may have become liable or accountable for, money or property (in Australia or elsewhere) of the company; or
    - (ii) may have been guilty of negligence, default, breach of duty or breach of trust in relation to the company;
- the administrator must:
- (c) lodge a report about the matter as soon as practicable; and
  - (d) give ASIC such information, and such access to and facilities for inspecting and taking copies of documents, as ASIC requires.

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- (2) The administrator may also lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to ASIC's notice.
- (3) If it appears to the Court:
- (a) that a past or present officer or employee, or a member, of a company under administration has been guilty of an offence in relation to the company; or
  - (b) that a person who has taken part in the formation, promotion, administration, management or winding up of a company under administration has engaged in conduct of a kind referred to in paragraph (1)(b) in relation to the company;
- and that the administrator has not lodged a report about the matter, the Court may, on the application of an interested person, direct the administrator to lodge such a report.



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

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

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

Note: For body corporate representatives' powers at a meeting of the company's creditors, see section 250D.
- (2) The meeting must be held within 5 business days before, or within 5 business days after, the end of the convening period.
- (5) The convening period is:
  - (a) if the day after the administration begins is in December, or is less than 25 business days before Good Friday—the period of 25 business days beginning on:
    - (i) that day; or
    - (ii) if that day is not a business day—the next business day; or
  - (b) otherwise—the period of 20 business days beginning on:
    - (i) the day after the administration begins; or
    - (ii) if that day is not a business day—the next business day.
- (6) The Court may extend the convening period on an application made during or after the period referred to in paragraph (5)(a) or (b), as the case requires.
- (7) If an application is made under subsection (6) after the period referred to in paragraph (5)(a) or (b), as the case may be, the Court may only extend the convening period if the Court is satisfied that it would be in the best interests of the creditors if the convening period were extended in accordance with the application.
- (8) If an application is made under subsection (6) after the period referred to in paragraph (5)(a) or (b), as the case may be, then, in

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making an order about the costs of the application, the Court must have regard to:

- (a) the fact that the application was made after that period; and
- (b) any other conduct engaged in by the administrator; and
- (c) any other relevant matters.

**439C What creditors may decide**

At a meeting convened under section 439A, the creditors may resolve:

- (a) that the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any) details of which accompanied any notice of meeting); or
- (b) that the administration should end; or
- (c) that the company be wound up.

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

### **440A Winding up company**

- (1) A company under administration cannot be wound up voluntarily, except as provided by section 446A or 446AA.
- (2) The Court is to adjourn the hearing of an application for an order to wind up a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up.
- (3) The Court is not to appoint a provisional liquidator of a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than have a provisional liquidator appointed.

### **440B Restrictions on exercise of third party property rights**

#### *General rule*

- (1) During the administration of a company, the restrictions set out in the table at the end of this section apply in relation to the exercise of the rights of a person (the *third party*) in property of the company, or other property used or occupied by, or in the possession of, the company, as set out in the table.

Note: The property of the company includes any PPSA retention of title property of the company (see section 435B).

#### *Exception—consent of administrator or leave of court*

- (2) The restrictions set out in the table at the end of this section do not apply in relation to the exercise of a third party's rights in property if the rights are exercised:

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- (a) with the administrator's written consent; or
- (b) with the leave of the Court.

*Possessory security interests—continued possession*

- (3) If a company's property is subject to a possessory security interest, and the property is in the lawful possession of the secured party, the secured party may continue to possess the property during the administration of the company.

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**Restrictions on exercise of third party rights**

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<b>Item</b>	<b>If the third party is ...</b>	<b>then ...</b>
1	a secured party in relation to property of the company, and is not otherwise covered by this table	the third party cannot enforce the security interest.
2	a secured party in relation to a possessory security interest in the property of the company	the third party cannot sell the property, or otherwise enforce the security interest.
3	a lessor of property used or occupied by, or in the possession of, the company, including a secured party (a <b>PPSA secured party</b> ) in relation to a PPSA security interest in goods arising out of a lease of the goods	the following restrictions apply: (a) distress for rent must not be carried out against the property; (b) the third party cannot take possession of the property or otherwise recover it; (c) if the third party is a PPSA secured party—the third party cannot otherwise enforce the security interest.
4	an owner (other than a lessor) of property used or occupied by, or in the possession of, the company, including a secured party (a <b>PPSA secured party</b> ) in relation to a PPSA security interest in the property	the following restrictions apply: (a) the third party cannot take possession of the property or otherwise recover it; (b) if the third party is a PPSA secured party—the third party cannot otherwise enforce the security interest.

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#### **440D Stay of proceedings**

- (1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:
  - (a) with the administrator's written consent; or
  - (b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- (2) Subsection (1) does not apply to:
  - (a) a criminal proceeding; or
  - (b) a prescribed proceeding.

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

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

#### **440F Suspension of enforcement process**

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

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

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

- (1) This section applies where an officer of a court (in this section called the *court officer*), being:
  - (a) a sheriff; or
  - (b) the registrar or other appropriate officer of the court;receives written notice of the fact that a company is under administration.
- (2) During the administration, the court officer cannot:

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- (a) take action to sell property of the company under a process of execution; or
  - (b) pay to a person (other than the administrator):
    - (i) proceeds of selling property of the company (at any time) under a process of execution; or
    - (ii) money of the company seized (at any time) under a process of execution; or
    - (iii) money paid (at any time) to avoid seizure or sale of property of the company under a process of execution; or
  - (c) take action in relation to the attachment of a debt due to the company; or
  - (d) pay to a person (other than the administrator) money received because of the attachment of such a debt.
- (3) The court officer must deliver to the administrator any property of the company that is in the court officer's possession under a process of execution (whenever begun).
- (4) The court officer must pay to the administrator all proceeds or money of a kind referred to in paragraph (2)(b) or (d) that:
- (a) are in the court officer's possession; or
  - (b) have been paid into the court and have not since been paid out.
- (5) The costs of the execution or attachment are a first charge on property delivered under subsection (3) or proceeds or money paid under subsection (4).
- (6) In order to give effect to a charge under subsection (5) on proceeds or money, the court officer may retain, on behalf of the person entitled to the charge, so much of the proceeds or money as the court officer thinks necessary.
- (7) The Court may, if it is satisfied that it is appropriate to do so, permit the court officer to take action, or to make a payment, that subsection (2) would otherwise prevent.

- (8) A person who buys property in good faith under a sale under a process of execution gets a good title to the property as against the company and the administrator, despite anything else in this section.

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

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

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

- (1) During the administration of a company:
- (a) a guarantee of a liability of the company cannot be enforced, as against:
- (i) a director of the company who is a natural person; or
  - (ii) a spouse or relative of such a director; and
- (b) without limiting paragraph (a), a proceeding in relation to such a guarantee cannot be begun against such a director, spouse or relative;
- except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- (2) While subsection (1) prevents a person (*the creditor*) from:
- (a) enforcing as against another person (*the guarantor*) a guarantee of a liability of a company; or
- (b) beginning a proceeding against another person (*the guarantor*) in relation to such a guarantee;
- section 1323 applies in relation to the creditor and the guarantor as if:

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- (c) a civil proceeding against the guarantor had begun under this Act; and
- (d) the creditor were the only person of a kind referred to in that section as an aggrieved person.

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

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

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

*liability* means a debt, liability or other obligation.

**440JA Property subject to a banker's lien—exemption from this Division**

If:

- (a) a company is under administration; and
- (b) property of the company consists of:
  - (i) cash in the form of notes or coins; or
  - (ii) a negotiable instrument; or
  - (iii) a security (as defined by subsection 92(1)); or
  - (iv) a derivative (as defined in Chapter 7); and
- (c) the property is subject to a possessory security interest; and
- (d) the secured party is:
  - (i) an ADI (within the meaning of the *Banking Act 1959*); or
  - (ii) the operator of a clearing and settlement facility (within the meaning of section 768A);



this Division does not apply to the property.

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**Division 7—Rights of secured party, owner or lessor**

**Subdivision A—General**

**441 Application of Division**

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

**Subdivision B—Property subject to security interests**

**441AA Application of Subdivision—PPSA security interests**

This Subdivision only applies in relation to the enforcement of a PPSA security interest if the security interest is perfected, within the meaning of the *Personal Property Securities Act 2009*, at the time the enforcement starts.

**441A Secured party acts before or during decision period**

*Scope*

- (1) This section applies if:
  - (a) the whole, or substantially the whole, of the property of a company under administration is subject to a security interest; and
  - (b) before or during the decision period, the secured party enforced the security interest in relation to all property (including any PPSA retention of title property) of the company subject to the security interest, whether or not the security interest was enforced in the same way in relation to all that property.
- (2) This section also applies if:
  - (a) a company is under administration; and

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- (b) the same person is the secured party in relation to each of 2 or more security interests in property (including PPSA retention of title property) of the company; and
- (c) the property of the company (the *secured property*) subject to the respective security interests together constitutes the whole, or substantially the whole, of the company's property; and
- (d) before or during the decision period, the secured party enforced the security interests in relation to all the secured property:
  - (i) whether or not the security interests were enforced in the same way in relation to all the secured property; and
  - (ii) whether or not any of the security interests was enforced in the same way in relation to all the property of the company subject to that security interest; and
  - (iii) in so far as the security interests were enforced in relation to property of the company by a receiver or controller appointed for the purposes of Part 5.2 (whether under an instrument relating to the security interest or a court order)—whether or not the same person was appointed in respect of all of the last-mentioned property.

*Power of enforcement by secured party, receiver or controller*

- (3) Nothing in section 198G, 440B, 440F or 440G, or in an order under subsection 444F(2), prevents any of the following from enforcing the security interest, or any of the security interests:
  - (a) the secured party;
  - (b) a receiver or controller appointed for the purposes of Part 5.2 (whether under an instrument relating to the security interest or a court order, and even if appointed after the decision period).
- (4) Section 437D does not apply in relation to a transaction or dealing that affects property of the company and is entered into by:

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- (a) the secured party in the performance or exercise of a function or power as secured party; or
- (b) a receiver or controller mentioned in paragraph (3)(b) of this section, in the performance or exercise of a function or power as such a receiver or controller.

**441B Where enforcement of security interest begins before administration**

- (1) This section applies if, before the beginning of the administration of a company, a secured party, receiver or other person:
  - (a) entered into possession, or assumed control, of property of the company; or
  - (b) entered into an agreement to sell such property; or
  - (c) made arrangements for such property to be offered for sale by public auction; or
  - (d) publicly invited tenders for the purchase of such property; or
  - (e) exercised any other power in relation to such property;for the purpose of enforcing a security interest in that property.
- (2) Nothing in section 198G, 440B, 440F or 440G prevents the secured party, receiver or other person from enforcing the security interest in relation to that property.
- (3) Section 437D does not apply in relation to a transaction or dealing that affects that property and is entered into:
  - (a) in the exercise of a power of the secured party as secured party; or
  - (b) in the performance or exercise of a function or power of the receiver or other person;as the case may be.

### **441C Security interest in perishable property**

#### *Scope*

- (1) This section applies if perishable property of a company under administration is subject to a security interest.

#### *Power of enforcement by secured party, receiver or controller*

- (2) Nothing in section 198G or 440B prevents any of the following from enforcing the security interest, so far as it is a security interest in perishable property:
- (a) the secured party;
  - (b) a receiver or controller appointed for the purposes of Part 5.2 (whether under an instrument relating to the security interest or a court order, and even if appointed after the decision period).
- (3) Section 437D does not apply in relation to a transaction or dealing that affects perishable property of the company and is entered into by:
- (a) the secured party in the performance or exercise of a function or power as secured party; or
  - (b) a receiver or controller mentioned in paragraph (2)(b) of this section, in the performance or exercise of a function or power as such a receiver or controller.

### **441D Court may limit powers of secured party etc. in relation to secured property**

- (1) This section applies if:
- (a) for the purpose of enforcing a security interest in property of a company, the secured party, or a receiver or other person, does or proposes to do an act of a kind referred to in a paragraph of subsection 441B(1); and

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- (b) the company is under administration when the secured party, receiver or other person does or proposes to do the act, or the company later begins to be under administration;  
but does not apply in a case where section 441A applies.
- (2) On application by the administrator, the Court may order the secured party, receiver or other person not to perform specified functions, or exercise specified powers, except as permitted by the order.
- (3) The Court may only make an order if satisfied that what the administrator proposes to do during the administration will adequately protect the secured party's interests.
- (4) An order may only be made, and only has effect, during the administration.
- (5) An order has effect despite sections 441B and 441C.

**441E Giving a notice under a security agreement etc.**

Nothing in section 198G or 440B prevents a person from giving a notice under the provisions of an agreement or instrument under which a security interest is created or arises.

**441EA Sale of property subject to a possessory security interest**

*Scope*

- (1) This section applies if:
- (a) a company is under administration; and
  - (b) property of the company is subject to a possessory security interest; and
  - (c) the property is in the possession of the secured party; and
  - (ca) either:
    - (i) there is no other security interest in the property; or
    - (ii) there are one or more other security interests in the property, but none of the debts secured by those other

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security interests has a priority that is equal to or higher than the priority of the debt secured by the possessory security interest; and

- (d) the secured party sells the property.

*Distribution of proceeds of sale*

- (2) The secured party is entitled to retain proceeds of the sale as follows:
- (a) if the net proceeds of sale equals the debt secured by the possessory security interest—the secured party is entitled to retain the net proceeds;
  - (b) if the net proceeds of sale exceeds the debt secured by the possessory security interest—the secured party is entitled to retain so much of the net proceeds as equals the amount of the debt secured by the security interest, but must pay the excess to the administrator on behalf of the company;
  - (c) if the net proceeds of sale fall short of the debt secured by the possessory security interest—the secured party is entitled to retain the net proceeds.

### **Subdivision C—Property not subject to security interests**

#### **441EB Scope of Subdivision**

This Subdivision does not apply in relation to the enforcement of a right, or the performance or exercise of a function or power, if the enforcement, performance or exercise is authorised by (or because of) a transaction or dealing that gives rise to a security interest in the property concerned.

**Example:** An example of a transaction or dealing in relation to which this Subdivision does not apply because of this section is a commercial consignment of personal property. Such a transaction gives rise to a PPSA security interest because of section 12 of the *Personal Property Securities Act 2009*. The consigned property is PPSA retention of title property of the company (see sections 51F and 435B).

**Note:** Subdivision B (property subject to security interests) may apply in relation to transactions or dealings to which this Subdivision does not

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apply because of this section. For example, Subdivision B would apply in relation to a commercial consignment of personal property, because such a transaction gives rise to a PPSA security interest.

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

- (1) This section applies if, before the beginning of the administration of a company, a receiver or other person:
  - (a) entered into possession, or assumed control, of property used or occupied by, or in the possession of, the company; or
  - (b) exercised any other power in relation to such property; for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it.
- (2) Nothing in section 198G or 440B prevents the receiver or other person from performing a function, or exercising a power, in relation to the property.
- (3) Section 437D does not apply in relation to a transaction or dealing that affects the property and is entered into in the performance or exercise of a function or power of the receiver or other person.

**441G Recovering perishable property**

- (1) Nothing in section 198G or 440B prevents a person from taking possession of, or otherwise recovering, perishable property.
- (2) Section 437D does not apply in relation to a transaction or dealing that affects perishable property and is entered into for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it.

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

- (1) This section applies if:
  - (a) for the purpose of enforcing a right of the owner or lessor of property used or occupied by, or in the possession of, a



company to take possession of the property or otherwise recover it, a person:

- (i) enters into possession, or assumes control, of the property; or
  - (ii) exercises any other power in relation to the property; and
- (b) the company is under administration when the person does so, or the company later begins to be under administration.
- (2) On application by the administrator, the Court may order the person not to perform specified functions, or exercise specified powers, in relation to the property, except as permitted by the order.
- (3) The Court may only make an order if satisfied that what the administrator proposes to do during the administration will adequately protect the interests of the owner or lessor.
- (4) An order may only be made, and only has effect, during the administration.
- (5) An order has effect despite sections 441F and 441G.

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

Nothing in section 198G or 440C prevents a person from giving a notice to a company under an agreement relating to property that is used or occupied by, or is in the possession of, the company.

## Division 8—Powers of administrator

### 442A Additional powers of administrator

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

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

### 442B Dealing with property subject to circulating security interests

#### *Scope*

- (1) This section applies if a security interest in property (the ***secured property***) of a company under administration was a circulating security interest when the interest arose, but has stopped being a circulating security interest because:
  - (a) in the case of a PPSA security interest—the property has stopped being a circulating asset (within the meaning of the *Personal Property Securities Act 2009*); or
  - (b) in the case of a security interest that was a floating charge when it arose—the floating charge has since become a fixed or specific charge.

Note 1: A ***circulating security interest*** can be either a PPSA security interest to which a circulating asset has attached, or a floating charge, in the circumstances set out in section 51C.

Note 2: For the meaning of ***circulating asset***, see section 340 of the *Personal Property Securities Act 2009*.

*Security interest in circulating asset*

- (2) Subject to sections 442C and 442D, in the case of a PPSA security interest, the administrator may deal with any of the secured property in any way the company could deal with the secured property immediately before it stopped being a circulating asset.

*Floating charge*

- (3) Subject to sections 442C and 442D, in the case of a security interest that was a floating charge when it arose, the administrator may deal with any of the secured property as if the security interest were still a floating charge.

Note: Section 442C deals with the disposal of encumbered property by an administrator. Section 442D makes the administrator's functions and powers subject to those of a secured party, receiver or controller.

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

- (1) The administrator of a company under administration or of a deed of company arrangement must not dispose of:
- (a) property of the company that is subject to a security interest; or
  - (b) property (other than PPSA retention of title property) that is used or occupied by, or is in the possession of, the company but of which someone else is the owner or lessor.

Note: PPSA retention of title property is subject to a PPSA security interest, and so is covered by paragraph (a) (see definition of **PPSA retention of title property** in section 51F).

- (2) Subsection (1) does not prevent a disposal:
- (a) in the ordinary course of the company's business; or
  - (b) with the written consent of the secured party, owner or lessor, as the case may be; or
  - (c) with the leave of the Court.

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- (3) The Court may only give leave under paragraph (2)(c) if satisfied that arrangements have been made to protect adequately the interests of the secured party, owner or lessor, as the case may be.
- (4) If the administrator proposes to dispose of property under paragraph (2)(a), the Court may, by order, direct the administrator not to carry out that proposal.
- (5) The Court may only make an order under subsection (4) on the application of:
  - (a) if paragraph (1)(a) applies—the secured party; or
  - (b) if paragraph (1)(b) applies—the owner or lessor, as the case may be.
- (6) The Court may only make an order under subsection (4) if it is not satisfied that arrangements have been made to protect adequately the interests of the applicant for the order.
- (7) If:
  - (a) a company is under administration or is subject to a deed of company arrangement; and
  - (b) property of the company is subject to a security interest; and
  - (c) the administrator disposes of the property;the disposal extinguishes the security interest.
- (8) For the purposes of paragraph (2)(a), if:
  - (a) property is used or occupied by, or is in the possession of, a company; and
  - (b) another person is the owner of the property; and
  - (c) either:
    - (i) the property is PPSA retention of title property; or
    - (ii) the property is subject to a retention of title clause under a contract; and
  - (d) the owner demands the return of the property;a disposal of the property that occurs after the demand is made does not mean that the disposal is not in the ordinary course of the company's business.

**442CA Property subject to a possessory security interest—  
inspection or examination by potential purchasers etc.**

- (1) If:
- (a) a company is under administration; and
  - (b) property of the company is subject to a possessory security interest; and
  - (c) the administrator is entitled to dispose of the property by way of sale;
- the secured party must, if requested to do so by the administrator, give potential purchasers a reasonable opportunity to inspect or examine the property.
- (2) If:
- (a) a company is under administration; and
  - (b) property of the company is subject to a possessory security interest; and
  - (c) the administrator disposes of the property by way of sale;
- the administrator is entitled to obtain possession of the property in order to effect the sale.

**442CB Property subject to a security interest or to a retention of  
title clause—administrator's duty of care in exercising  
power of sale**

- (1) If the administrator of a company is entitled to dispose of property of the company by way of sale, and the property is subject to a security interest, the administrator must act reasonably in exercising a power of sale in respect of the property.
- Note: A company's property includes its PPSA retention of title property (see the definition of *property* applying to Part 5.3A, in section 435B).
- (2) If:
- (a) a company is under administration; and
  - (b) property is used or occupied by, or is in the possession of, the company; and

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- (c) another person is the owner of the property; and
- (d) the property is subject to a retention of title clause under a contract; and
- (e) the administrator is entitled to dispose of the property by way of sale;

then, in exercising a power of sale in respect of the property, the administrator must act reasonably.

- (3) Subsections (1) and (2) do not limit section 180, 181, 182, 183 or 184.

**442CC Proceeds of sale of property**

*Property subject to a possessory security interest*

- (1) If:
  - (a) a company is under administration; and
  - (b) property of the company is subject to a possessory security interest; and
  - (c) the administrator disposes of the property by way of sale;then:
  - (d) if the net proceeds of sale equals or exceeds the total of the debts secured by:
    - (i) the possessory security interest; and
    - (ii) any other security interest in the property, where the debt secured by the security interest has a priority that is equal to or higher than the priority of the debt secured by the possessory security interest;the administrator must:
    - (iii) set aside so much of the net proceeds as equals the total of those debts; and
    - (iv) apply the amount so set aside in paying those debts; or
  - (e) if the net proceeds of sale fall short of the total of the debts secured by:
    - (i) the possessory security interest; and

- (ii) any other security interest in the property, where the debt secured by the security interest has a priority that is equal to or higher than the priority of the debt secured by the possessory security interest;

then:

- (iii) the administrator must set aside the net proceeds; and
- (iv) the administrator must apply the amount so set aside in paying those debts in order of priority, on the basis that if the amount is insufficient to fully pay debts of the same priority, they must be paid proportionately; and
- (v) if any of those debts is not fully paid—so much of the debt as remains unpaid may be recovered from the company as an unsecured debt.

*PPSA retention of title property*

- (1A) If the administrator of a company disposes of PPSA retention of title property of the company by way of sale, then the administrator must apply the net proceeds of the sale in the same way as a secured party is required, under section 140 of the *Personal Property Securities Act 2009*, to apply an amount, personal property or proceeds of collateral received by the secured party as a result of enforcing a security interest in the property.

Note: PPSA retention of title property does not include property that is subject to a retention of title clause (see section 9, definitions of ***PPSA retention of title property*** and ***retention of title clause***). Subsection (2) deals with property that is subject to a retention of title clause.

*Property subject to a retention of title clause*

- (2) If:
  - (a) a company is under administration; and
  - (b) property is used or occupied by, or is in the possession of, the company; and
  - (c) another person is the owner of the property; and
  - (d) the property is subject to a retention of title clause under a contract (the ***original contract***); and

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- (e) the administrator disposes of the property by way of sale; then:
- (f) if the net proceeds of sale equals or exceeds the total of:
  - (i) so much of the purchase price, or other amount, under the original contract as remains unpaid; and
  - (ii) if there are one or more securities over the property—the debts secured by the securities;the administrator must:
  - (iii) set aside so much of the net proceeds as equals that total; and
  - (iv) apply the amount so set aside in paying that total; or
- (g) if the net proceeds of sale fall short of the total of:
  - (i) so much of the purchase price, or other amount, under the original contract as remains unpaid; and
  - (ii) if there are one or more securities over the property—the debts secured by the securities;then:
  - (iii) the administrator must set aside the net proceeds; and
  - (iv) the administrator must apply the amount so set aside in paying those debts in order of priority, on the basis that if the amount is insufficient to fully pay debts of the same priority, they must be paid proportionately; and
  - (v) if any of those debts is not fully paid—so much of the debt as remains unpaid may be recovered from the company as an unsecured debt.

Note: Property that is subject to a retention of title clause does not include PPSA retention of title property (see section 9, definitions of ***PPSA retention of title property*** and ***retention of title clause***). Subsection (1A) deals with PPSA retention of title property.

**442D Administrator's powers subject to powers of secured party, receiver or controller**

- (1) Where section 441A applies, the administrator's functions and powers are subject to the functions and powers of a person as:
    - (a) the secured party; or
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- (b) a receiver or controller appointed under Part 5.2 (whether under an instrument relating to the security interest or a court order, and even if appointed after the decision period).
- (2) Where section 441C applies, then, so far as concerns perishable property of the company, the administrator's functions and powers are subject to the functions and powers of a person as:
  - (a) the secured party; or
  - (b) a receiver or controller appointed under Part 5.2 (whether under an instrument relating to the security interest or a court order, and even if appointed after the decision period).
- (3) Where section 441B, 441F or 441G applies, then, so far as concerns the property referred to in subsection 441B(1), 441F(1) or 441G(1), the administrator's functions and powers are subject to the functions and powers of the secured party, receiver or controller.

#### **442E Administrator has qualified privilege**

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

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

- (1) Sections 128 and 129 apply in relation to a company under administration as if:
  - (a) a reference in those sections to the company, or to an officer of the company, included a reference to the administrator; and
  - (b) a reference in those sections to an assumption referred to in section 129 included a reference to an assumption that the administrator is:
    - (i) acting within his or her functions and powers as administrator; and

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(ii) in particular, is complying with this Act.

- (2) The effect that sections 128 and 129 have because of subsection (1) of this section is additional to, and does not prejudice, the effect that sections 128 and 129 otherwise have in relation to a company under administration.

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

### **Subdivision A—Liability**

#### **443A General debts**

- (1) The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for:
  - (a) services rendered; or
  - (b) goods bought; or
  - (c) property hired, leased, used or occupied, including property consisting of goods that is subject to a lease that gives rise to a PPSA security interest in the goods; or
  - (d) the repayment of money borrowed; or
  - (e) interest in respect of money borrowed; or
  - (f) borrowing costs.
- (2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator's rights against the company or anyone else.

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

##### *Scope*

- (1) This section applies if, under an agreement made before the administration of a company began, the company continues to use or occupy, or to be in possession of, property of which someone else is the owner or lessor, including property consisting of goods that is subject to a lease that gives rise to a PPSA security interest in the goods.

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*General rule*

- (2) Subject to this section, the administrator is liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period:
  - (a) that begins more than 5 business days after the administration began; and
  - (b) throughout which:
    - (i) the company continues to use or occupy, or to be in possession of, the property; and
    - (ii) the administration continues.
- (3) Within 5 business days after the beginning of the administration, the administrator may give to the owner or lessor a notice that:
  - (a) specifies the property; and
  - (b) states that the company does not propose to exercise rights in relation to the property; and
  - (c) if the administrator:
    - (i) knows the location of the property; or
    - (ii) could, by the exercise of reasonable diligence, know the location of the property;specifies the location of the property.
- (4) Despite subsection (2), the administrator is not liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the company.
- (5) A notice under subsection (3) ceases to have effect if:
  - (a) the administrator revokes it by writing given to the owner or lessor; or
  - (b) the company exercises, or purports to exercise, a right in relation to the property.
- (6) For the purposes of subsection (5), the company does not exercise, or purport to exercise, a right in relation to the property merely

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because the company continues to occupy, or to be in possession of, the property, unless the company:

- (a) also uses the property; or
- (b) asserts a right, as against the owner or lessor, so to continue.

*Restrictions on general rule*

- (7) Subsection (2) does not apply in relation to so much of a period as elapses after:
  - (a) a receiver of the property is appointed; or
  - (b) under an agreement or instrument under which a security interest in the property is created or arises:
    - (i) the secured party appoints an agent to enter into possession, or to assume control, of the property; or
    - (ii) the secured party takes possession, or assumes control, of the property;but this subsection does not affect a liability of the company.
- (8) Subsection (2) does not apply in so far as a court, by order, excuses the administrator from liability, but an order does not affect a liability of the company.
- (9) The administrator is not taken because of subsection (2):
  - (a) to have adopted the agreement; or
  - (b) to be liable under the agreement otherwise than as mentioned in subsection (2).

**443BA Certain taxation liabilities**

- (1) The administrator of a company is liable to pay to the Commissioner of Taxation:
  - (a) each amount payable under a remittance provision because of a deduction made by the administrator; and
  - (b) without limiting paragraph (a), so much of each amount payable under a remittance provision because of a deduction made by the company during the administration as equals so

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much of the deduction as is attributable to a period throughout which the administration continued; even if the amount became payable after the end of the administration.

(2) In this section:

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

(aa) section 220AAE, 220AAM or 220AAR;

(a) section 221F (except subsection 221F(12)) or section 221G (except subsection 221G(4A));

(b) subsection 221YHDC(2);

(c) subsection 221YHZD(1) or (1A);

(d) subsection 221YN(1);

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

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

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

**Subdivision B—Indemnity**

**443D Right of indemnity**

The administrator of a company under administration is entitled to be indemnified out of the company's property (other than any PPSA retention of title property subject to a PPSA security interest that is perfected within the meaning of the *Personal Property Securities Act 2009*) for:

(a) debts for which the administrator is liable under Subdivision A or a remittance provision as defined in subsection 443BA(2); and

(aa) any other debts or liabilities incurred, or damages or losses sustained, in good faith and without negligence, by the

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- administrator in the performance or exercise, or purported performance or exercise, of any of his or her functions or powers as administrator; and
- (b) the remuneration to which he or she is entitled under Division 60 of Schedule 2 (external administrator's remuneration).

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

*General rule*

- (1) Subject to section 556, a right of indemnity under section 443D has priority over:
- (a) all the company's unsecured debts; and
  - (b) any debts of the company secured by a PPSA security interest in property of the company if, when the administration of the company begins, the security interest is vested in the company because of the operation of any of the following provisions:
    - (i) section 267 or 267A of the *Personal Property Securities Act 2009* (property subject to unperfected security interests);
    - (ii) section 588FL of this Act (collateral not registered within time); and
  - (c) subject otherwise to this section—debts of the company secured by a circulating security interest in property of the company.

*Debts secured by circulating security interests—receiver appointed before the beginning of administration etc.*

- (2) A right of indemnity under section 443D does not have priority over debts of the company under administration that are secured by a circulating security interest in property of the company, except so far as the secured party agrees, if:
- (a) before the beginning of the administration, the secured party:

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- (i) appointed a receiver of property of the company under a power contained in an instrument relating to the security interest; or
  - (ii) obtained an order for the appointment of a receiver of property of the company for the purpose of enforcing the security interest; or
  - (iii) entered into possession, or assumed control, of property of the company for that purpose; or
  - (iv) appointed a person so to enter into possession or assume control (whether as agent for the secured party or for the company); and
- (b) the receiver or person is still in office, or the secured party is still in possession or control of the property.

*Debts secured by circulating security interests—receiver appointed during administration etc.*

- (3) Subsection (4) applies if:
- (a) debts of a company under administration are secured by a circulating security interest in property of the company; and
  - (b) during the administration, the secured party, consistently with this Part:
    - (i) appoints a receiver of property of the company under a power contained in an instrument relating to the security interest; or
    - (ii) obtains an order for the appointment of a receiver of property of the company for the purpose of enforcing the security interest; or
    - (iii) enters into possession, or assumes control, of property of the company for that purpose; or
    - (iv) appoints a person so to enter into possession or assume control (whether as agent for the secured party or for the company).
- (4) A right of indemnity of the administrator under section 443D has priority over those debts only in so far as it is a right of indemnity for debts incurred, or remuneration accruing, before written notice



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of the appointment, or of the entering into possession or assuming of control, as the case may be, was given to the administrator.

*Debts secured by circulating security interests—priority over right of indemnity in relation to repayment of money borrowed etc.*

- (5) A right of indemnity under section 443D does not have priority over debts of the company under administration that are secured by a circulating security interest in property of the company, except so far as the secured party consents in writing, to the extent that the right of indemnity relates to debts incurred for:
- (a) the repayment of money borrowed; or
  - (b) interest in respect of money borrowed; or
  - (c) borrowing costs.

**443F Lien to secure indemnity**

- (1) To secure a right of indemnity under section 443D, the administrator has a lien on the company's property.
- (2) A lien under subsection (1) has priority over another security interest only in so far as the right of indemnity under section 443D has priority over debts secured by the other security interest.

## **Division 10—Execution and effect of deed of company arrangement**

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

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

#### **444B Execution of deed**

- (1) This section applies where an instrument is prepared under section 444A.
- (2) The company must execute the instrument within:
  - (a) 15 business days after the end of the meeting of creditors; or
  - (b) such further period as the Court allows on an application made within those 15 business days.
- (3) The board of the company may, by resolution, authorise the instrument to be executed by or on behalf of the company.
- (4) Subsection (3) has effect despite section 198G, but does not limit the functions and powers of the administrator of the company.
- (5) The proposed administrator of the deed must execute the instrument before, or as soon as practicable after, the company executes it.
- (6) When executed by both the company and the deed's proposed administrator, the instrument becomes a deed of company arrangement.
- (7) Division 12 provides for consequences of the company contravening subsection (2).

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

- (1) Where, at a meeting convened under section 439A, a company's creditors resolve that the company execute a deed of company arrangement, this section applies until:
  - (a) the deed is executed by both the company and the deed's administrator; or
  - (b) the period within which subsection 444B(2) requires the company to execute the deed ends;whichever happens sooner.

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- (2) In so far as a person would be bound by the deed if it had already been so executed, the person:
- (a) must not do anything inconsistent with the deed, except with the leave of the Court; and
  - (b) is subject to section 444E.

**444D Effect of deed on creditors**

- (1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i).
- (2) Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security interest, except so far as:
- (a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the company executed the deed; or
  - (b) the Court orders under subsection 444F(2).
- (3) Subsection (1) does not affect a right that an owner or lessor of property has in relation to that property, except so far as:
- (a) the deed so provides in relation to an owner or lessor of property who voted in favour of the resolution of creditors because of which the company executed the deed; or
  - (b) the Court orders under subsection 444F(4).
- (3A) Subsection (3) does not apply in relation to an owner or lessor of PPSA retention of title property of the company.
- Note: Subsection (2) applies in relation to an owner or lessor of PPSA retention of title property of the company. Such an owner or lessor is a secured creditor of the company (see section 51F (meaning of **PPSA retention of title property**)).
- (4) Section 231 does not prevent a creditor of the company from becoming a member of the company as a result of the deed requiring the creditor to accept an offer of shares in the company.

**444DA Giving priority to eligible employee creditors**

- (1) A deed of company arrangement must contain a provision to the effect that, for the purposes of the application by the administrator of the property of the company coming under his or her control under the deed, any eligible employee creditors will be entitled to a priority at least equal to what they would have been entitled if the property were applied in accordance with sections 556, 560 and 561.
- (2) However, the rule in subsection (1) does not apply if:
  - (a) at a meeting of eligible employee creditors held before the meeting convened under section 439A, the eligible employee creditors pass a resolution agreeing to the non-inclusion of such a provision; or
  - (b) the Court makes an order under subsection (5) approving the non-inclusion of such a provision.

*Meeting of eligible employee creditors*

- (3) The administrator of the company must convene a meeting under paragraph (2)(a) by giving written notice of the meeting to as many of the eligible employee creditors as reasonably practicable at least 5 business days before the meeting.
- (4) A notice under subsection (3) must be accompanied by a copy of a statement setting out:
  - (a) the administrator's opinion whether the non-inclusion of such a provision would be likely to result in the same or a better outcome for eligible employee creditors as a whole than would result from an immediate winding up of the company; and
  - (b) his or her reasons for that opinion; and
  - (c) such other information known to the administrator as will enable the eligible employee creditors to make an informed decision about the matter covered by paragraph (a).

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*Court approval*

- (5) The Court may approve the non-inclusion of such a provision if the Court is satisfied that the non-inclusion of the provision would be likely to result in the same or a better outcome for eligible employee creditors as a whole than would result from an immediate winding up of the company.
- (6) The Court may only make an order under subsection (5) on the application of:
  - (a) the administrator, or proposed administrator, of the deed; or
  - (b) an eligible employee creditor; or
  - (c) any interested person.
- (7) The Court may make an order under subsection (5) before or after the meeting convened under section 439A.

**444DB Superannuation contribution debts not admissible to proof**

*Whole of superannuation contribution debt*

- (1) A deed of company arrangement must contain a provision to the effect that the administrator of the deed must determine that the whole of a debt by way of a superannuation contribution is not admissible to proof against the company if:
  - (a) a debt by way of superannuation guarantee charge:
    - (i) has been paid; or
    - (ii) is, or is to be, admissible to proof against the company; and
  - (b) the administrator of the deed is satisfied that the superannuation guarantee charge is attributable to the whole of the first-mentioned debt.
- (2) If the administrator of a deed of company arrangement determines, under a provision covered by subsection (1), that the whole of a debt is not admissible to proof against the company, the whole of the debt is extinguished.

*Part of superannuation contribution debt*

- (3) A deed of company arrangement must contain a provision to the effect that the administrator of the deed must determine that a particular part of a debt by way of a superannuation contribution is not admissible to proof against the company if:
- (a) a debt by way of superannuation guarantee charge:
    - (i) has been paid; or
    - (ii) is, or is to be, admissible to proof against the company; and
  - (b) the administrator of the deed is satisfied that the superannuation guarantee charge is attributable to that part of the first-mentioned debt.
- (4) If the administrator of a deed of company arrangement determines, under a provision covered by subsection (3), that a part of a debt is not admissible to proof against the company, that part of the debt is extinguished.

*Definition*

- (5) In this section:
- superannuation contribution* has the same meaning as in section 556.

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

- (1) Until a deed of company arrangement terminates, this section applies to a person bound by the deed.
- (2) The person cannot:
- (a) make an application for an order to wind up the company; or
  - (b) proceed with such an application made before the deed became binding on the person.
- (3) The person cannot:

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- (a) begin or proceed with a proceeding against the company or in relation to any of its property; or
  - (b) begin or proceed with enforcement process in relation to property of the company;
- except:
- (c) with the leave of the Court; and
  - (d) in accordance with such terms (if any) as the Court imposes.

- (4) In subsection (3):

*property* of a company includes:

- (a) any PPSA retention of title property of the company; and
- (b) any other property used or occupied by, or in the possession of, the company.

Note: See sections 9 (definition of *property*) and 51F (PPSA retention of title property).

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

- (1) This section applies where:
  - (a) at a meeting convened under section 439A, a company's creditors have resolved that the company execute a deed of company arrangement; or
  - (b) a company has executed such a deed.
- (2) Subject to subsection 441A(3), the Court may order a secured creditor of the company not to realise or otherwise deal with the security interest, except as permitted by the order.
- (3) The Court may only make an order under subsection (2) if satisfied that:
  - (a) for the creditor to realise or otherwise deal with the security interest would have a material adverse effect on achieving the purposes of the deed; and
  - (b) having regard to:
    - (i) the terms of the deed; and
    - (ii) the terms of the order; and



- (iii) any other relevant matter;  
the creditor's interests will be adequately protected.
- (4) The Court may order the owner or lessor of property that is used or occupied by, or is in the possession of, the company not to take possession of the property or otherwise recover it.
- (4A) Subsection (4) does not apply in relation to PPSA retention of title property of the company.
- (5) The Court may only make an order under subsection (4) if satisfied that:
  - (a) for the owner or lessor to take possession of the property or otherwise recover it would have a material adverse effect on achieving the purposes of the deed; and
  - (b) having regard to:
    - (i) the terms of the deed; and
    - (ii) the terms of the order; and
    - (iii) any other relevant matter;the interests of the owner or lessor will be adequately protected.
- (6) An order under this section may be made subject to conditions.
- (7) An order under this section may only be made on the application of:
  - (a) if paragraph (1)(a) applies—the administrator of the company; or
  - (b) if paragraph (1)(b) applies—the deed's administrator.

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

A deed of company arrangement also binds:

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

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**444GA Transfer of shares**

- (1) The administrator of a deed of company arrangement may transfer shares in the company if the administrator has obtained:
  - (a) the written consent of the owner of the shares; or
  - (b) the leave of the Court.
- (2) A person is not entitled to oppose an application for leave under subsection (1) unless the person is:
  - (a) a member of the company; or
  - (b) a creditor of the company; or
  - (c) any other interested person; or
  - (d) ASIC.
- (3) The Court may only give leave under subsection (1) if it is satisfied that the transfer would not unfairly prejudice the interests of members of the company.

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

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

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

**444J Guarantees and indemnities**

Section 444H does not affect a creditor's rights under a guarantee or indemnity.

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

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

A deed of company arrangement may be varied by a resolution passed at a meeting of the company's creditors, but only if the variation is not materially different from a proposed variation set out in the notice of the meeting.

### **445B Court may cancel variation**

- (1) Where a deed of company arrangement is varied under section 445A, a creditor of the company may apply to the Court for an order cancelling the variation.
- (2) On an application, the Court:
  - (a) may make an order cancelling the variation, or confirming it, either wholly or in part, on such conditions (if any) as the order specifies; and
  - (b) may make such other orders as it thinks appropriate.

### **445C When deed terminates**

A deed of company arrangement terminates when:

- (a) the Court makes under section 445D an order terminating the deed; or
  - (b) the company's creditors pass a resolution terminating the deed at a meeting; or
  - (c) if the deed specifies circumstances in which it is to terminate—those circumstances exist; or
  - (d) the administrator of the deed executes a notice of termination of the deed in accordance with section 445FA;
- whichever happens first.

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**445CA When creditors may terminate deed**

The creditors are not entitled to pass a resolution under paragraph 445C(b) unless:

- (a) there has been a breach of the deed; and
- (b) the breach has not been rectified before the resolution is passed.

**445D When Court may terminate deed**

- (1) The Court may make an order terminating a deed of company arrangement if satisfied that:
  - (a) information about the company's business, property, affairs or financial circumstances that:
    - (i) was false or misleading; and
    - (ii) can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed;  
was given to the administrator of the company or to such creditors; or
  - (b) such information was contained in a document that accompanied a notice of the meeting at which the resolution was passed; or
  - (c) there was an omission from such a document and the omission can reasonably be expected to have been material to such creditors in so deciding; or
  - (d) there has been a material contravention of the deed by a person bound by the deed; or
  - (e) effect cannot be given to the deed without injustice or undue delay; or
  - (f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:
    - (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or

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- (ii) contrary to the interests of the creditors of the company as a whole; or
  - (g) the deed should be terminated for some other reason.
- (2) An order may be made on the application of:
- (a) a creditor of the company; or
  - (b) the company; or
  - (ba) ASIC; or
  - (c) any other interested person.

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

Where:

- (a) the company's creditors pass a resolution at a meeting terminating the deed; and
- (b) the notice of the meeting set out a proposed resolution that the company be wound up;

the creditors may also resolve at the meeting that the company be wound up.

**445FA Notice of termination of deed**

- (1) If a company is subject to a deed of company arrangement, and:
- (a) the administrator of the deed has applied all of the proceeds of the realisation of the assets available for the payment of creditors; or
  - (b) the administrator of the deed has paid to the creditors:
    - (i) the sum of 100 cents in the dollar; or
    - (ii) any lesser sum determined by the creditors at a general meeting; or
  - (c) all of the following conditions are satisfied:
    - (i) the company's obligations under the deed have been fulfilled;
    - (ii) the obligations of any other party to the deed have been fulfilled;

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- (iii) creditors' claims under the deed have been dealt with in accordance with the deed;
- the administrator of the deed must:
- (d) certify to that effect in writing; and
  - (e) within 28 days, lodge with ASIC a notice of termination of the deed.
- (2) The notice of termination must be in the prescribed form.

Note: For termination of the deed, see section 445C.

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

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

**445H Effect of termination or avoidance**

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

## Division 11AA—Notification of contravention of deed

### 445HA Notification of contravention of deed of company arrangement

#### *Director to notify administrator*

- (1) If a director of a company that is subject to a deed of company arrangement becomes aware that:
- (a) there has been a material contravention of the deed by a person bound by the deed (who may be the director); or
  - (b) there is likely to be a material contravention of the deed by a person bound by the deed (who may be the director);
- the director must, as soon as practicable after becoming aware of the contravention or likely contravention, give notice of the contravention or likely contravention to the administrator of the deed of company arrangement. The notice must be in the prescribed form.

#### *Administrator to notify company's creditors*

- (2) If the administrator of a deed of company arrangement becomes aware that:
- (a) there has been a material contravention of the deed by a person bound by the deed (who may be the administrator); or
  - (b) there is likely to be a material contravention of the deed by a person bound by the deed (who may be the administrator);
- the administrator must, as soon as practicable after becoming aware of the contravention or likely contravention, give notice of the contravention or likely contravention to as many of the company's creditors as reasonably practicable. The notice must be in the prescribed form.



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

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

- (1) This section applies if:
  - (a) the creditors of a company under administration resolve at a particular time under paragraph 439C(c) that the company be wound up; or
  - (b) a company under administration contravenes subsection 444B(2) at a particular time; or
  - (c) the company's creditors:
    - (i) pass a resolution terminating a deed of company arrangement executed by the company; and
    - (ii) also resolve at a particular time under section 445E that the company be wound up.
- (2) The company is taken:
  - (a) to have passed, at the time referred to in paragraph (1)(a) or (b) or subparagraph (1)(c)(ii), as the case may be, a special resolution under section 491 that the company be wound up voluntarily; and
  - (b) to have done so without a declaration having been made and lodged under section 494.
- (3) Section 497 is taken to have been complied with in relation to the winding up.
- (5) The liquidator must:
  - (a) within 5 business days after the day on which the company is taken to have passed the resolution, lodge a written notice stating that the company is taken because of this section to have passed such a resolution and specifying that day; and
  - (b) cause the notice to be published, within the period ascertained in accordance with the regulations, in the prescribed manner.

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- (6) Section 482 applies in relation to the winding up as if it were a winding up in insolvency or by the Court.

Note: Section 482 empowers the Court to stay or terminate a winding up and give consequential directions.

- (7) An application under section 482 as applying because of subsection (6) may be made:
- (a) despite section 198G (exercise of powers while company under external administration), by the company pursuant to a resolution of the board; or
  - (b) by the liquidator; or
  - (c) by a creditor; or
  - (d) by a contributory.

Note: See also section 499 (appointment of liquidator).

**446AA Administrator becomes liquidator—additional cases**

*Scope*

- (1) This section applies if a company has executed a deed of company arrangement and:
- (a) the Court, at a particular time, makes an order under section 445D terminating the deed of company arrangement; or
  - (b) both:
    - (i) the deed of company arrangement specifies circumstances in which the deed is to terminate and the company is to be wound up; and
    - (ii) those circumstances exist at a particular time.

*Resolution that company be wound up voluntarily*

- (2) The company is taken:
- (a) to have passed, at the time referred to in paragraph (1)(a) or subparagraph (1)(b)(ii), as the case may be, a special resolution under section 491 that the company be wound up voluntarily; and

- (b) to have done so without a declaration having been made and lodged under section 494.

*Information about company's affairs*

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

*Notice of resolution*

- (4) The liquidator must:
  - (a) within 5 business days after the day on which the company is taken to have passed the resolution, lodge with ASIC a written notice in the prescribed form:
    - (i) stating that the company is taken because of this section to have passed such a resolution; and
    - (ii) specifying that day; and
  - (b) cause the notice to be published, within 5 business days after that day, in the prescribed manner.

*Power to stay or terminate winding up*

- (5) Section 482 applies in relation to the winding up as if it were a winding up in insolvency or by the Court.

Note: Section 482 empowers the Court to stay or terminate a winding up and give consequential directions.

- (6) An application under section 482 as applying because of subsection (5) may be made:
  - (a) despite section 198G (exercise of directors' powers while company under external administration), by the company pursuant to a resolution of the board; or
  - (b) by the liquidator; or
  - (c) by a creditor; or
  - (d) by a contributory.

Note: See also section 499 (appointment of liquidator).

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

- (1) The regulations may prescribe cases where:
  - (a) a company under administration; or
  - (b) a company that has executed a deed of company arrangement (even if the deed has terminated);is taken to have passed a special resolution under section 491 that the company be wound up voluntarily.
- (2) The regulations may provide for Part 5.5 or Schedule 2 to apply with prescribed modifications in cases prescribed for the purposes of subsection (1).
- (3) Without limiting subsection (2), the regulations may provide, in relation to such cases, for matters of a kind provided for by any of subsections 446A(2) to (7) and 446AA(2) to (6), inclusive.
- (4) Regulations in force for the purposes of this section have effect accordingly.

**446C Liquidator may require submission of a report about the company's affairs**

*Scope*

- (1) This section applies if:
  - (a) at a particular time (the *liquidation time*), a company resolves by special resolution that it be wound up voluntarily; and
  - (b) immediately before the liquidation time:
    - (i) the company was under administration; or
    - (ii) the company was subject to a deed of company arrangement.

*Report*

- (2) The liquidator may, by written notice given to a person who is or has been an officer of the company, require the person to:

- (a) give the liquidator a report containing such information as is specified in the notice about:
    - (i) the affairs of the company, as at a date specified in the notice; or
    - (ii) if one or more of the affairs of the company are specified in the notice—those affairs, as at a date specified in the notice; and
  - (b) verify the report by a statement in writing in the prescribed form.
- (3) The following provisions have effect:
- (a) if subparagraph (1)(b)(i) applies—the date specified in the subsection (2) notice must not be earlier than the beginning of the administration;
  - (b) if subparagraph (1)(b)(ii) applies—the date specified in the subsection (2) notice must not be earlier than the beginning of the administration that ended when the deed was executed.

*Deadline for giving report to liquidator*

- (4) If a person is given a notice under subsection (2), the person must give the liquidator the report required by the notice:
- (a) within 14 days after the notice was given; or
  - (b) if the liquidator, by written notice given to the person, allows a longer period—within that longer period.
- (5) The liquidator may allow a longer period under paragraph (4)(b) only on written application made within the period of 14 days mentioned in paragraph (4)(a).
- (6) The liquidator may allow a longer period under paragraph (4)(b) only if the liquidator believes there are special reasons for doing so.

*Report to be lodged with ASIC*

- (7) The liquidator must, within 7 days after receiving a report under subsection (2), lodge a copy of the report with ASIC.

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*Cost of preparation of report*

- (8) If:
- (a) a person is required to give a report under subsection (2); and
  - (b) the person incurs costs or expenses in relation to the preparation or giving of the report;
- the person is entitled to be paid by the liquidator out of the property of the company (other than its PPSA retention of title property), so much of those costs and expenses as the liquidator considers reasonable.

*Reasonable excuse*

- (9) Subsection (4) does not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (9), see subsection 13.3(3) of the *Criminal Code*.

*Strict liability*

- (10) An offence against subsection 1311(1) that relates to subsection (4) of this section is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## **Division 13—Powers of Court**

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

- (1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.
- (2) For example, if the Court is satisfied that the administration of a company should end:
  - (a) because the company is solvent; or
  - (b) because provisions of this Part are being abused; or
  - (c) for some other reason;the Court may order under subsection (1) that the administration is to end.
- (3) An order may be made subject to conditions.
- (4) An order may be made on the application of:
  - (a) the company; or
  - (b) a creditor of the company; or
  - (c) in the case of a company under administration—the administrator of the company; or
  - (d) in the case of a company that has executed a deed of company arrangement—the deed's administrator; or
  - (e) ASIC; or
  - (f) any other interested person.

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

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

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

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

- (1) If there is doubt, on a specific ground, about whether a purported appointment of a person as administrator of a company, or of a deed of company arrangement, is valid, the person, the company or any of the company's creditors may apply to the Court for an order under subsection (2).
- (2) On an application, the Court may make an order declaring whether or not the purported appointment was valid on the ground specified in the application or on some other ground.

**447F Effect of Division**

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



## **Division 14—Qualifications of administrators**

### **448A Appointee must consent**

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

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

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

- (1) A person must not consent to be appointed, and must not act, as administrator of a company or of a deed of company arrangement.
- (2) Subsection (1) does not apply if the person is a registered liquidator.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2), see subsection 13.3(3) of the *Criminal Code*.

- (3) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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

- (1) Subject to this section, a person must not, except with the leave of the Court, seek or consent to be appointed as, or act as, administrator of a company or of a deed of company arrangement if:
  - (a) the person, or a body corporate in which the person has a substantial holding, is indebted in an amount exceeding \$5,000 to the company or to a body corporate related to the company; or
  - (b) the person is, otherwise than in a capacity as administrator or liquidator of, or as administrator of a deed of company arrangement executed by, the company or a related body

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corporate, a creditor of the company or of a related body corporate in an amount exceeding \$5,000; or

- (c) the person is a director, secretary, senior manager or employee of the company; or
- (d) the person is a director, secretary, senior manager or employee of a body corporate that is a secured party in relation to property of the company; or
- (e) the person is an auditor of the company; or
- (f) the person is a partner or employee of an auditor of the company; or
- (g) the person is a partner, employer or employee of an officer of the company; or
- (h) the person is a partner or employee of an employee of an officer of the company.

(1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

(2) For the purposes of paragraph (1)(a), disregard a debt owed by a natural person to a body corporate if:

- (a) the body corporate is:
  - (i) an Australian ADI; or
  - (ii) a body corporate registered under section 21 of the *Life Insurance Act 1995*; and
- (b) the debt arose because of a loan that the body corporate or entity made to the person in the ordinary course of its ordinary business; and
- (c) the person used the amount of the loan to pay the whole or part of the purchase price of premises that the person uses as their principal place of residence.

(3) For the purposes of this section, a person is taken to be a director, secretary, senior manager, employee or auditor of a company if:

- (a) the person is or has, within the last 2 years, been a director, secretary, senior manager, employee, auditor or promoter of the company or a related body corporate; and

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(b) ASIC has not directed that the person not be taken to be a director, secretary, senior manager, employee or auditor for the purposes of this section.

ASIC may give a direction under paragraph (b) only if it thinks fit in the circumstances of the case.

(4) For the purposes of paragraphs (1)(g) and (h), *officer* does not include liquidator.

## Division 15—Removal and replacement of administrator

### 449A Appointment of administrator cannot be revoked

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

### 449C Vacancy in office of administrator of company

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

- (a) dies; or
- (b) becomes prohibited from acting as administrator of the company; or
- (c) resigns by notice in writing given to his or her appointer and to the company;

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

(2) In subsection (1):

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

- (a) if the administrator was appointed by the Court under Division 90 of Schedule 2 (review of the external administration of a company) or subsection (6) of this section—the Court; or
- (b) otherwise:
  - (i) if the administration began because of an appointment under section 436A—the company; or
  - (ii) if the administration began because of an appointment under section 436B—a liquidator or provisional liquidator of the company; or
  - (iii) if the administration began because of an appointment under section 436C—a person who is entitled, or would apart from section 440B or 441D be entitled, to enforce the security interest.

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- (3) An appointment under subsection (1) by the company under administration must be made pursuant to a resolution of the board.
- (4) Within 5 business days after being appointed under subsection (1) as administrator of a company otherwise than by the Court, a person must convene a meeting of the company's creditors so that they may:
  - (a) determine whether to remove the person from office; and
  - (b) if so, appoint someone else as administrator of the company.
- (6) Where a company is under administration, but for some reason no administrator is acting, the Court may appoint a person as administrator on the application of ASIC or of an officer, member or creditor of the company.
- (7) Subsections (3) and (6) have effect despite section 198G.

**449CA Declarations by administrator—indemnities and relevant relationships**

*Scope*

- (1) This section applies to an administrator appointed under subsection 449C(1) otherwise than by the Court.

*Declaration of relationships and indemnities*

- (2) As soon as practicable after being appointed, the administrator must make:
  - (a) a declaration of relevant relationships; and
  - (b) a declaration of indemnities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

*Notification of creditors*

- (3) The administrator must:

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- (a) give a copy of each declaration under subsection (2) to as many of the company's creditors as reasonably practicable; and
- (b) do so at the same time as the administrator gives those creditors notice of the meeting convened under subsection 449C(4).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The administrator must table a copy of each declaration under subsection (2) at the meeting convened under subsection 449C(4).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4A) As soon as practicable after making a declaration under subsection (2), the administrator must lodge a copy of the declaration with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

*Updating of declaration*

- (5) If:
  - (a) at a particular time, the administrator makes:
    - (i) a declaration of relevant relationships; or
    - (ii) a declaration of indemnities;under subsection (2) or this subsection; and
  - (b) at a later time:
    - (i) the declaration has become out-of-date; or
    - (ii) the administrator becomes aware of an error in the declaration;the administrator must, as soon as practicable, make:
  - (c) if subparagraph (a)(i) applies—a replacement declaration of relevant relationships; or
  - (d) if subparagraph (a)(ii) applies—a replacement declaration of indemnities.

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Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) The administrator must table a copy of a replacement declaration under subsection (5):
- (a) if:
    - (i) there is a committee of inspection; and
    - (ii) the next meeting of the committee of inspection occurs before the next meeting of the company's creditors; at the next meeting of the committee of inspection; or
  - (b) in any other case—at the next meeting of the company's creditors.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6A) As soon as practicable after making a replacement declaration under subsection (5), the administrator must lodge a copy of the replacement declaration with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

*Defence*

- (7) In a prosecution for an offence constituted by a failure to include a particular matter in a declaration under this section, it is a defence if the defendant proves that:
- (a) the defendant made reasonable enquiries; and
  - (b) after making these enquiries, the defendant had no reasonable grounds for believing that the matter should have been included in the declaration.

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

### **450A Appointment of administrator**

- (1) Where an administrator of a company is appointed under section 436A, 436B or 436C, the administrator must:
    - (a) lodge a notice of the appointment before the end of the next business day after the appointment; and
    - (b) cause a notice setting out the prescribed information about the appointment to be published, within the period ascertained in accordance with the regulations, in the prescribed manner.
  - (1A) A notice under paragraph (1)(b) that relates to a company may be combined with a notice under paragraph 436E(3)(b) that relates to the company.
  - (2) As soon as practicable, and in any event before the end of the next business day, after appointing an administrator of a company under section 436C, a person must give to the company a written notice of the appointment.
  - (3) As soon as practicable, and in any event before the end of the next business day, after an administrator of a company is appointed under section 436A, 436B or 436C, he or she must give a written notice of the appointment to:
    - (a) each person who holds a security interest in the whole, or substantially the whole, of the company's property; and
    - (b) each person who holds 2 or more security interests in property of the company where the property of the company subject to the respective security interests together constitutes the whole, or substantially the whole, of the company's property.
- Note: For electronic notification, see section 600G.
- (4) An administrator need not give a notice under subsection (3) to the person who appointed the administrator.



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

As soon as practicable after a deed of company arrangement is executed, the deed's administrator must:

- (a) send to each creditor of the company a written notice of the execution of the deed; and
- (b) lodge notice in the prescribed form with ASIC of the execution of the deed.

Note: For electronic notification under paragraph (a), see section 600G.

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

As soon as practicable after a company contravenes subsection 444B(2), the deed's administrator must:

- (a) lodge a notice that the company has failed to execute the instrument within the required period; and
- (b) send such a notice to each of the company's creditors.

Note: For electronic notification under paragraph (b), see section 600G.

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

Where a deed of company arrangement terminates because of paragraph 445C(b), the deed's administrator must:

- (a) lodge a notice of the termination; and
- (b) send such a notice to each of the company's creditors.

Note: For electronic notification under paragraph (b), see section 600G.

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

- (1) A company under administration must set out, in every public document, and in every negotiable instrument, of the company, after the company's name where it first appears, the expression ("administrator appointed").
- (2) Except with the leave of the Court, until a deed of company arrangement terminates, the company must set out, in every public document, and in every negotiable instrument, of the company,

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after the company's name where it first appears, the expression ("subject to deed of company arrangement").

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (4) The Court may only grant leave under subsection (2) on the application of:

- (a) the administrator of the deed of company arrangement; or  
(b) any interested person.

- (5) The Court may only grant leave under subsection (2) if it is satisfied that the granting of leave will not result in any significant risk to the interests of the company's creditors (including contingent or prospective creditors) as a whole.

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

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

## **Division 17—Miscellaneous**

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

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

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

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

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

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

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

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

Where:

- (a) for any purpose (for example, the purposes of a law, agreement or instrument) an act must or may be done within a particular period or before a particular time; and
- (b) this Part prevents the act from being done within that period or before that time;

the period is extended, or the time is deferred, because of this section, according to how long this Part prevented the act from being done.

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

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

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

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

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

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

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

- (1) This section has effect for the purposes of:
  - (a) an application under section 234, 459P, 462 or 464; or
  - (b) an application for leave to make an application under section 459P.
- (2) The Court must presume that the company is insolvent if, during or after the 3 months ending on the day when the application was made:
  - (a) the company failed (as defined by section 459F) to comply with a statutory demand; or
  - (b) execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of the company was returned wholly or partly unsatisfied; or
  - (c) a receiver, or receiver and manager, of property of the company was appointed under a power contained in an instrument relating to a circulating security interest in such property; or

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- (d) an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such a security interest; or
  - (e) a person entered into possession, or assumed control, of such property for such a purpose; or
  - (f) a person was appointed so to enter into possession or assume control (whether as agent for the secured party or for the company).
- (3) A presumption for which this section provides operates except so far as the contrary is proved for the purposes of the application.

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

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

## **Division 2—Statutory demand**

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

- (1) A person may serve on a company a demand relating to:
  - (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or
  - (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.
- (2) The demand:
  - (a) if it relates to a single debt—must specify the debt and its amount; and
  - (b) if it relates to 2 or more debts—must specify the total of the amounts of the debts; and
  - (c) must require the company to pay the amount of the debt, or the total of the amounts of the debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within 21 days after the demand is served on the company; and
  - (d) must be in writing; and
  - (e) must be in the prescribed form (if any); and
  - (f) must be signed by or on behalf of the creditor.
- (3) Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:
  - (a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and
  - (b) complies with the rules.
- (4) A person may make a demand under this section relating to a debt even if the debt is owed to the person as assignee.

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- (5) A demand under this section may relate to a liability under any of the following provisions of the *Income Tax Assessment Act 1936*:
- (aa) former section 220AAE, 220AAM or 220AAR;
  - (a) former section 221F (except subsection 221F(12)), former section 221G (except subsection 221G(4A)) or former section 221P;
  - (b) former subsection 221YHDC(2);
  - (c) former subsection 221YHZD(1) or (1A);
  - (d) former subsection 221YN(1);
  - (e) section 222AHA;
- and any of the provisions of Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*, even if the liability arose before 1 January 1991.
- (6) Subsection (5) is to avoid doubt and is not intended to limit the generality of a reference in this Act to a debt.

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

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



(b) otherwise—21 days after the demand is served.

## Division 3—Application to set aside statutory demand

### 459G Company may apply

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

### 459H Determination of application where there is a dispute or offsetting claim

- (1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:
  - (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
  - (b) that the company has an offsetting claim.
- (2) The Court must calculate the substantiated amount of the demand in accordance with the formula:

Admitted total – Offsetting total

where:

**admitted total** means:

- (a) the admitted amount of the debt; or

(b) the total of the respective admitted amounts of the debts;  
as the case requires, to which the demand relates.

**offsetting total** means:

- (a) if the Court is satisfied that the company has only one offsetting claim—the amount of that claim; or
  - (b) if the Court is satisfied that the company has 2 or more offsetting claims—the total of the amounts of those claims;  
or
  - (c) otherwise—a nil amount.
- (3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.
- (4) If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:
- (a) varying the demand as specified in the order; and
  - (b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.
- (5) In this section:

**admitted amount**, in relation to a debt, means:

- (a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt—a nil amount; or
- (b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt—so much of that amount as the Court is satisfied is not the subject of such a dispute; or
- (c) otherwise—the amount of the debt.

**offsetting claim** means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).

**respondent** means the person who served the demand on the company.

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- (6) This section has effect subject to section 459J.

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

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

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

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

**459L Dismissal of application**

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

**459M Order subject to conditions**

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

**459N Costs where company successful**

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

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

### **459P Who may apply for order under section 459A**

- (1) Any one or more of the following may apply to the Court for a company to be wound up in insolvency:
  - (a) the company;
  - (b) a creditor (even if the creditor is a secured creditor or is only a contingent or prospective creditor);
  - (c) a contributory;
  - (d) a director;
  - (e) a liquidator or provisional liquidator of the company;
  - (f) ASIC;
  - (g) a prescribed agency.
- (2) An application by any of the following, or by persons including any of the following, may only be made with the leave of the Court:
  - (a) a person who is a creditor only because of a contingent or prospective debt;
  - (b) a contributory;
  - (c) a director;
  - (d) ASIC.
- (3) The Court may give leave if satisfied that there is a prima facie case that the company is insolvent, but not otherwise.
- (4) The Court may give leave subject to conditions.
- (5) Except as permitted by this section, a person cannot apply for a company to be wound up in insolvency.

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**459Q Application relying on failure to comply with statutory demand**

If an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the application:

- (a) must set out particulars of service of the demand on the company and of the failure to comply with the demand; and
- (b) must have attached to it:
  - (i) a copy of the demand; and
  - (ii) if the demand has been varied by an order under subsection 459H(4)—a copy of the order; and
- (c) unless the debt, or each of the debts, to which the demand relates is a judgment debt—must be accompanied by an affidavit that:
  - (i) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and
  - (ii) complies with the rules.

**459R Period within which application must be determined**

- (1) An application for a company to be wound up in insolvency is to be determined within 6 months after it is made.
- (2) The Court may by order extend the period within which an application must be determined, but only if:
  - (a) the Court is satisfied that special circumstances justify the extension; and
  - (b) the order is made within that period as prescribed by subsection (1), or as last extended under this subsection, as the case requires.
- (3) An application is, because of this subsection, dismissed if it is not determined as required by this section.
- (4) An order under subsection (2) may be made subject to conditions.

**459S Company may not oppose application on certain grounds**

- (1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground:
  - (a) that the company relied on for the purposes of an application by it for the demand to be set aside; or
  - (b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).
- (2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent.

**459T Application to wind up joint debtors in insolvency**

- (1) A single application may be made for 2 or more companies to be wound up in insolvency if they are joint debtors, whether partners or not.
- (2) On such an application, the Court may order that one or more of the companies be wound up in insolvency, even if it dismisses the application in so far as it relates to another or others.

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## Part 5.4A—Winding up by the Court on other grounds

### 461 General grounds on which company may be wound up by Court

- (1) The Court may order the winding up of a company if:
- (a) the company has by special resolution resolved that it be wound up by the Court; or
  - (c) the company does not commence business within one year from its incorporation or suspends its business for a whole year; or
  - (d) the company has no members; or
  - (e) directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members; or
  - (f) affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole; or
  - (g) an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole; or
  - (h) ASIC has stated in a report prepared under Division 1 of Part 3 of the ASIC Act that, in its opinion:
    - (i) the company cannot pay its debts and should be wound up; or
    - (ii) it is in the interests of the public, of the members, or of the creditors, that the company should be wound up; or



- (k) the Court is of opinion that it is just and equitable that the company be wound up.
- (2) A company must lodge a copy of a special resolution referred to in paragraph (1)(a) with ASIC within 14 days after the resolution is passed.

#### **462 Standing to apply for winding up**

- (1) A reference in this section to an order to wind up a company is a reference to an order to wind up the company on a ground provided for by section 461.
- (2) Subject to this section, any one or more of the following may apply for an order to wind up a company:
  - (a) the company; or
  - (b) a creditor (including a contingent or prospective creditor) of the company; or
  - (c) a contributory; or
  - (d) the liquidator of the company; or
  - (e) ASIC pursuant to section 464; or
  - (f) ASIC (in the circumstances set out in subsection (2A)); or
  - (h) APRA.
- (2A) ASIC may apply for an order to wind up a company under paragraph (2)(f) only if:
  - (a) the company has no members; and
  - (b) ASIC has given the company at least 1 month's written notice of its intention to apply for the order.
- (4) The Court must not hear an application by a person being, or persons including, a contingent or prospective creditor of a company for an order to wind up the company unless and until:
  - (a) such security for costs has been given as the Court thinks reasonable; and
  - (b) a prima facie case for winding up the company has been established to the Court's satisfaction.

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- (5) Except as permitted by this section, a person is not entitled to apply for an order to wind up a company.

**464 Application for winding up in connection with investigation under ASIC Act**

- (1) Where ASIC is investigating, or has investigated, under Division 1 of Part 3 of the ASIC Act:
- (a) matters being, or connected with, affairs of a company; or
  - (b) matters including such matters;
- ASIC may apply to the Court for the winding up of the company.
- (2) For the purposes of an application under subsection (1), this Act applies, with such modifications as the circumstances require, as if a winding up application had been made by the company.
- (3) ASIC must give a copy of an application made under subsection (1) to the company.

## **Part 5.4B—Winding up in insolvency or by the Court**

### **Division 1A—Preliminary**

#### **465 Definitions**

In this Part:

*property* of a company includes PPSA retention of title property, if the security interest in the property is vested in the company because of the operation of any of the following provisions:

- (a) section 267 or 267A of the *Personal Property Securities Act 2009* (property subject to unperfected security interests);
- (b) section 588FL of this Act (collateral not registered within time).

Note: See sections 9 (definition of *property*) and 51F (PPSA retention of title property).

## **Division 1—General**

### **465A Notice of application**

- (1) A person who applies under section 459P, 462 or 464 for a company to be wound up must:
  - (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) cause a notice setting out the prescribed information about the application to be published in the prescribed manner.
- (2) If the Court orders the winding up of a company as a result of an application under section 459P, 462 or 464, the liquidator (or provisional liquidator) must cause notice setting out prescribed information about the order to be published in the prescribed manner.

### **465B Substitution of applicants**

- (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.
- (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.
- (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.

- (4) After an order is made, the application may proceed as if the substituted applicant or applicants had been the original applicant or applicants.

**465C Applicant to be given notice of grounds for opposing application**

On the hearing of an application under section 459P, 462 or 464, a person may not, without the leave of the Court, oppose the application unless, within the period prescribed by the rules, the person has filed, and served on the applicant:

- (a) notice of the grounds on which the person opposes the application; and  
(b) an affidavit verifying the matters stated in the notice.

**466 Payment of preliminary costs etc.**

- (1) The persons, other than the company itself or the liquidator of the company, on whose application any winding up order is made must, at their own cost, prosecute all proceedings in the winding up until a liquidator has been appointed under this Part.
- (2) The liquidator must, unless the Court orders otherwise, reimburse the applicant out of the property of the company the taxed costs incurred by the applicant in any such proceedings.
- (3) Where the company has no property or does not have sufficient property and, in the opinion of ASIC, a fraud has been committed by any person in the promotion or formation of the company or by any officer or employee of the company in relation to the company since its formation, the taxed costs or so much of them as is not reimbursed under subsection (2) may be reimbursed by ASIC to an amount not exceeding \$1,000.
- (4) Where any winding up order is made upon the application of the company or a liquidator of the company, the costs incurred must, subject to any order of the Court, be paid out of the property of the company in like manner as if they were the costs of any other applicant.

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**467 Court's powers on hearing application**

- (1) Subject to subsection (2) and section 467A, on hearing a winding up application the Court may:
  - (a) dismiss the application with or without costs, even if a ground has been proved on which the Court may order the company to be wound up on the application; or
  - (b) adjourn the hearing conditionally or unconditionally; or
  - (c) make any interim or other order that it thinks fit.
- (2) The Court must not refuse to make a winding up order merely because:
  - (a) the total amount secured by one or more security interests in the property of the company is equal to or greater than the value of the property subject to the interest (or interests); or
  - (b) the company has no property.
- (3) The Court may, on the application coming on for hearing or at any time at the request of the applicant, the company or any person who has given notice of intention to appear on the hearing of the application:
  - (a) direct that any notices be given or any steps be taken before or after the hearing of the application; and
  - (b) dispense with any notices being given or steps being taken that are required by this Act, or by the rules, or by any prior order of the Court; and
  - (c) direct that oral evidence be taken on the application or any matter relating to the application; and
  - (d) direct a speedy hearing or trial of the application or of any issue or matter; and
  - (e) allow the application to be amended or withdrawn; and
  - (f) give such directions as to the proceedings as the Court thinks fit.
- (4) Where the application is made by members as contributories on the ground that it is just and equitable that the company should be wound up or that the directors have acted in a manner that appears

to be unfair or unjust to other members, the Court, if it is of the opinion that:

- (a) the applicants are entitled to relief either by winding up the company or by some other means; and
- (b) in the absence of any other remedy it would be just and equitable that the company should be wound up;

must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

- (5) Notwithstanding any rule of law to the contrary, the Court must not refuse to make an order for winding up on the application of a contributory on the ground that, if the order were made, no property of the company would be available for distribution among the contributories.
- (7) At any time after the filing of a winding up application and before a winding up order has been made, the company or any creditor or contributory may, where any action or other civil proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

#### **467A Effect of defect or irregularity on application under Part 5.4 or 5.4A**

An application under Part 5.4 or 5.4A must not be dismissed merely because of one or more of the following:

- (a) in any case—a defect or irregularity in connection with the application;
- (b) in the case of an application for a company to be wound up in insolvency—a defect in a statutory demand;

unless the Court is satisfied that substantial injustice has been caused that cannot otherwise be remedied (for example, by an adjournment or an order for costs).

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**467B Court may order winding up of company that is being wound up voluntarily**

The Court may make an order under section 233, 459A, 459B or 461 even if the company is already being wound up voluntarily.

**468 Avoidance of dispositions of property, attachments etc.**

- (1) Any disposition of property of the company, other than an exempt disposition, made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void.
- (2) In subsection (1), *exempt disposition*, in relation to a company that has commenced to be wound up by the Court, means:
  - (a) a disposition made by the liquidator, or by a provisional liquidator, of the company pursuant to a power conferred on him or her by:
    - (i) this Act; or
    - (ii) rules of the Court that appointed him or her; or
    - (iii) an order of the Court; or
  - (aa) a disposition made in good faith by, or with the consent of, an administrator of the company; or
  - (ab) a disposition under a deed of company arrangement executed by the company; or
  - (b) a payment of money by an Australian ADI out of an account maintained by the company with the Australian ADI, being a payment made by the Australian ADI:
    - (i) on or before the day on which the Court makes the order for the winding up of the company; and
    - (ii) in good faith and in the ordinary course of the banking business of the Australian ADI.
- (3) Notwithstanding subsection (1), the Court may, where an application for winding up has been filed but a winding up order has not been made, by order:
  - (a) validate the making, after the filing of the application, of a disposition of property of the company; or



- (b) permit the business of the company or a portion of the business of the company to be carried on, and such acts as are incidental to the carrying on of the business or portion of the business to be done, during the period before a winding up order (if any) is made;  
on such terms as it thinks fit.
- (4) Any attachment, sequestration, distress or execution put in force against the property of the company after the commencement of the winding up by the Court is void.

#### **468A Effect of winding up on company's members**

##### *Transfer of shares*

- (1) A transfer of shares in a company that is made after the commencement of the winding up by the Court is void except if:
  - (a) both:
    - (i) the liquidator gives written consent to the transfer; and
    - (ii) that consent is unconditional; or
  - (b) all of the following subparagraphs apply:
    - (i) the liquidator gives written consent to the transfer;
    - (ii) that consent is subject to one or more specified conditions;
    - (iii) those conditions have been satisfied; or
  - (c) the Court makes an order under subsection (4) authorising the transfer.
- (2) The liquidator may only give consent under paragraph (1)(a) or (b) if he or she is satisfied that the transfer is in the best interests of the company's creditors as a whole.
- (3) If the liquidator refuses to give consent under paragraph (1)(a) or (b) to a transfer of shares in the company:
  - (a) the prospective transferor; or
  - (b) the prospective transferee; or
  - (c) a creditor of the company;

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may apply to the Court for an order authorising the transfer.

- (4) If the Court is satisfied, on an application under subsection (3), that the transfer is in the best interests of the company's creditors as a whole, the Court may, by order, authorise the transfer.
- (5) If the liquidator gives consent under paragraph (1)(b) to a transfer of shares in the company:
  - (a) the prospective transferor; or
  - (b) the prospective transferee; or
  - (c) a creditor of the company;may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.
- (6) If the Court is satisfied, on an application under subsection (5), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (7) The liquidator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (3) or (5).

*Alteration in the status of members*

- (8) An alteration in the status of members of a company that is made after the commencement of the winding up by the Court is void except if:
  - (a) both:
    - (i) the liquidator gives written consent to the alteration; and
    - (ii) that consent is unconditional; or
  - (b) all of the following subparagraphs apply:
    - (i) the liquidator gives written consent to the alteration;
    - (ii) that consent is subject to one or more specified conditions;
    - (iii) those conditions have been satisfied; or
  - (c) the Court makes an order under subsection (12) authorising the alteration.

- (9) The liquidator may only give consent under paragraph (8)(a) or (b) if he or she is satisfied that the alteration is in the best interests of the company's creditors as a whole.
- (10) The liquidator must refuse to give consent under paragraph (8)(a) or (b) if the alteration would contravene Part 2F.2.
- (11) If the liquidator refuses to give consent under paragraph (8)(a) or (b) to an alteration in the status of members of a company:
- (a) a member of the company; or
  - (b) a creditor of the company;
- may apply to the Court for an order authorising the alteration.
- (12) If the Court is satisfied, on an application under subsection (11), that:
- (a) the alteration is in the best interests of the company's creditors as a whole; and
  - (b) the alteration does not contravene Part 2F.2;
- the Court may, by order, authorise the alteration.
- (13) If the liquidator gives consent under paragraph (8)(b) to an alteration in the status of members of a company:
- (a) a member of the company; or
  - (b) a creditor of the company;
- may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.
- (14) If the Court is satisfied, on an application under subsection (13), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (15) The liquidator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (11) or (13).

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**469 Application to be lis pendens**

An application for winding up a company constitutes a lis pendens for the purposes of any law relating to the effect of a lis pendens upon purchasers or mortgagees.

**470 Certain notices to be lodged**

- (1) An applicant (other than ASIC) for the winding up of a company must:
  - (a) lodge, not later than 10.30 am on the next business day after the filing of the application, notice of the filing of the application and of the date on which the application was filed; and
  - (b) after an order for winding up is made—lodge, within 2 business days after the making of the order, notice of the making of the order, of the date on which the order was made and of the name and address of the liquidator; and
  - (c) if the application is withdrawn or dismissed—lodge, within 2 business days after the withdrawal or dismissal of the application, notice of the withdrawal or dismissal of the application and of the date on which the application was withdrawn or dismissed.
- (2) The applicant must, within 7 days after the passing and entering of a winding up order:
  - (a) except where the applicant is ASIC—lodge an office copy of the order; and
  - (b) serve an office copy of the order on the company or such other person as the Court directs; and
  - (c) deliver to the liquidator an office copy of the order together with a statement that the order has been served as mentioned in paragraph (b).
- (3) Where ASIC applies for the winding up of a company, ASIC must enter in its records particulars of the application and, after the passing and entering of a winding up order, an office copy of the order, and subsection 1274(2) applies in relation to the document

containing those particulars and to the office copy as if they were documents lodged with ASIC.

## **Division 1A—Effect of winding up order**

### **471 Effect on creditors and contributories**

An order for winding up a company operates in favour of all the creditors and contributories of the company as if it had been made on the joint application of all the creditors and contributories.

### **471B Stay of proceedings and suspension of enforcement process**

While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

- (a) a proceeding in a court against the company or in relation to property of the company; or
  - (b) enforcement process in relation to such property;
- except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

### **471C Secured creditor's rights not affected**

Nothing in section 471B affects a secured creditor's right to realise or otherwise deal with the security interest.

## **Division 2—Court-appointed liquidators**

### **472 Court to appoint registered liquidator**

- (1) On an order being made for the winding up of a company, the Court may appoint a registered liquidator to be liquidator of the company.
- (2) The Court may appoint a registered liquidator provisionally at any time after the filing of a winding up application and before the making of a winding up order or, if there is an appeal against a winding up order, before a decision in the appeal is made.
- (3) A liquidator appointed provisionally has or may exercise such functions and powers:
  - (a) as are conferred on him or her by this Act or by rules of the Court that appointed him or her; or
  - (b) as the Court specifies in the order appointing him or her.
- (4) A liquidator of a company appointed provisionally also has:
  - (a) power to carry on the company's business; and
  - (b) the powers that a liquidator of the company would have under paragraph 477(1)(d), subsection 477(2) (except paragraph 477(2)(m)) and subsection 477(3) if the company were being wound up in insolvency or by the Court.
- (5) Subsections 477(2A) and (2B) apply in relation to a company's provisional liquidator, with such modifications (if any) as the circumstances require, as if he or she were a liquidator appointed for the purposes of a winding up in insolvency or by the Court.
- (6) If more than one liquidator is appointed by the Court, the Court must declare whether anything that is required or authorised by this Act to be done by the liquidator is to be done by all or any one or more of the persons appointed.

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**473 Resignation of liquidators**

A liquidator appointed by the Court may resign.

**473A Vacancies in office of court-appointed liquidator**

- (1) A vacancy in the office of a liquidator appointed by the Court may be filled by:
  - (a) the Court; or
  - (b) ASIC.
- (2) If ASIC fills a vacancy in the office of a liquidator under subsection (1), ASIC must:
  - (a) publish notice of the filling of the vacancy; and
  - (b) publish the notice in the prescribed manner.
- (3) If ASIC fills a vacancy in the office of a liquidator under subsection (1), the liquidator is taken, for the purposes of this Act, to be appointed by the Court.
- (4) If more than one liquidator is appointed under this section, the Court or ASIC (as the case may be) must declare whether anything that is required or authorised by this Act to be done by the liquidator is to be done by all or any one or more of the persons appointed.
- (5) If a declaration made by ASIC under subsection (4) is inconsistent with a declaration of the Court made under that subsection, the declaration of the Court prevails to the extent of any inconsistency.

**474 Custody and vesting of company's property**

- (1) If a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company has been appointed:
  - (a) in a case in which a liquidator or provisional liquidator has been appointed—the liquidator or provisional liquidator must take into his or her custody, or under his or her control, all the property which is, or which appears to be, property of the company; or



- (b) in a case in which there is no liquidator—all the property of the company is to be in the custody of the Court.

Note: Section 465 extends the meaning of the *property* of the company to include PPSA retention of title property, if the security interest in the property has vested in the company in certain situations.

- (2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of the company vests in the liquidator and thereupon the property to which the order relates vests accordingly and the liquidator may, after giving such indemnity (if any) as the Court directs, bring, or may defend, any action or other legal proceeding that relates to that property or that it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.
- (3) Where an order is made under this section, the liquidator of the company to which the order relates must, within 14 days after the making of the order, lodge with ASIC an office copy of the order.

#### **475 Report as to company's affairs to be submitted to liquidator**

- (1A) In this section:

*liquidator* includes a provisional liquidator.

- (1) There must be made out and verified by a statement in writing in the prescribed form, and submitted to the liquidator, by the persons who were, at the date of the winding up order or, if the liquidator specifies an earlier date, that earlier date, the directors and secretary of the company a report in the prescribed form as to the affairs of the company as at the date concerned.
- (2) The liquidator may, by notice in writing served personally or by post addressed to the last known address of the person, require one or more persons included in one or more of the following classes of persons to make out as required by the notice, verify by a statement in writing in the prescribed form, and submit to him or her, a report, containing such information as is specified in the notice as to the affairs of the company or as to such of those affairs as are specified in the notice, as at a date specified in the notice:

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- (a) persons who are or have been officers of the company;
  - (b) where the company was formed within one year before the date of the winding up order—persons who have taken part in the formation of the company;
  - (c) persons who are employed by the company or have been employed by the company within one year before the date of the winding up order and are, in the opinion of the liquidator, capable of giving the information required;
  - (d) persons who are, or have been within one year before the date of the winding up order, officers of, or employed by, a body corporate that is, or within that year was, an officer of the company to the affairs of which the report relates;
  - (e) a person who was a provisional liquidator of the company.
- (3) The liquidator may, in a notice under subsection (2), specify the information that he or she requires as to affairs of the company by reference to information required by this Act or the regulations to be included in any other report, statement or notice under this Act.
- (4) A report referred to in subsection (1) must, subject to subsection (6), be submitted to the liquidator not later than 10 business days after the making of the winding up order.
- (5) A person required to submit a report referred to in subsection (2) must, subject to subsection (6), submit it not later than 10 business days after the liquidator serves notice of the requirement.
- (6) Where the liquidator believes there are special reasons for so doing, he or she may, on an application in writing made to him or her before the end of the time limited by subsection (4) or (5) for the submission by the applicant of a report under subsection (1) or (2), grant, by notice in writing, an extension of that time.
- (7) A liquidator:
- (a) must, within 5 business days after receiving a report under subsection (1) or (2), cause a copy of the report to be filed with the Court and a copy to be lodged; and
  - (b) must, where he or she gives a notice under subsection (6), as soon as practicable lodge a copy of the notice.

- (8) A person making or concurring in making a report required by this section and verifying it as required by this section must, subject to the rules, be allowed, and must be paid by the liquidator out of the property of the company, such costs and expenses incurred in and about the preparation and making of the report and the verification of that report as the liquidator considers reasonable.
- (9) A person must not contravene a provision of this section.
- (10) An offence based on subsection (9) is an offence of strict liability.  
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (11) Subsection (9) does not apply to the extent that the person has a reasonable excuse.  
Note: A defendant bears an evidential burden in relation to the matter in subsection (11), see subsection 13.3(3) of the *Criminal Code*.

#### **477 Powers of liquidator**

- (1) Subject to this section, a liquidator of a company may:
- (a) carry on the business of the company so far as is, in the opinion of the liquidator, required for the beneficial disposal or winding up of that business; and
  - (b) subject to the provisions of section 556, pay any class of creditors in full; and
  - (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging that they have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or whereby the company may be rendered liable; and
  - (d) compromise any calls, liabilities to calls, debts, liabilities capable of resulting in debts and any claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the property or the winding

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up of the company, on such terms as are agreed, and take any security for the discharge of, and give a complete discharge in respect of, any such call, debt, liability or claim.

- (2) Subject to this section, a liquidator of a company may:
- (a) bring or defend any legal proceeding in the name and on behalf of the company; and
  - (b) appoint a solicitor to assist him or her in his or her duties; and
  - (c) sell or otherwise dispose of, in any manner, all or any part of the property of the company; and
  - (ca) exercise the Court's powers under subsection 483(3) (except paragraph 483(3)(b)) in relation to calls on contributories; and
  - (d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary a seal of the company; and
  - (e) subject to the *Bankruptcy Act 1966*, prove in the bankruptcy of any contributory or debtor of the company or under any deed executed under that Act; and
  - (f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company; and
  - (g) obtain credit, whether on the security of the property of the company or otherwise; and
  - (h) take out letters of administration of the estate of a deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor, or his or her estate, that cannot be conveniently done in the name of the company; and
  - (k) appoint an agent to do any business that the liquidator is unable to do, or that it is unreasonable to expect the liquidator to do, in person; and
  - (m) do all such other things as are necessary for winding up the affairs of the company and distributing its property.

- (2A) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not compromise a debt to the company if the amount claimed by the company is more than:
- (a) if an amount greater than \$20,000 is prescribed—the prescribed amount; or
  - (b) otherwise—\$20,000.
- (2B) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf (for example, but without limitation, a lease or an agreement under which a security interest arises or is created) if:
- (a) without limiting paragraph (b), the term of the agreement may end; or
  - (b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance; more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.
- (2C) Subsection (2B) does not apply to an agreement if the costs and expenses of the company under the agreement are to be paid out of money paid to the liquidator:
- (a) by ASIC on behalf of the Commonwealth; and
  - (b) for the purpose of paying the costs and expenses.
- (3) A liquidator of a company is entitled to inspect at any reasonable time any books of the company and a person who refuses or fails to allow the liquidator to inspect such books at such a time is guilty of an offence.
- (5) For the purpose of enabling the liquidator to take out letters of administration or recover money as mentioned in paragraph (2)(h), the money due is taken to be due to the liquidator.

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- (6) Subject to this Part, the liquidator must use his or her own discretion in the management of affairs and property of the company and the distribution of its property.
- (7) This section does not apply to calls on shares in a no liability company.

**478 Application of property; list of contributories**

- (1) As soon as practicable after the Court orders that a company be wound up, the liquidator must:
  - (a) cause the company's property to be collected and applied in discharging the company's liabilities; and
  - (b) consider whether subsection (1A) requires him or her to settle a list of contributories.
- (1A) A liquidator of a company that is being wound up in insolvency or by the Court must settle a list of contributories if it appears to him or her likely that:
  - (a) either:
    - (i) there are persons liable as members or past members to contribute to the company's property on the winding up; or
    - (ii) there will be a surplus available for distribution; and
  - (b) it will be necessary:
    - (i) to make calls on contributories; or
    - (ii) to adjust the rights of the contributories among themselves.
- (1B) A liquidator of such a company may rectify the register of members so far as required under this Part.
- (3) In settling the list of contributories the liquidator must distinguish between persons who are contributories in their own right and persons who are contributories by virtue of representing, or being liable for the debts of, other persons.

- (4) The list of contributories, when settled in accordance with the regulations, is prima facie evidence of the liabilities of the persons named in the list as contributories.
- (5) Paragraph (1)(b) and subsections (1A), (1B), (3) and (4) do not apply to a no liability company.

#### **480 Release of liquidator and deregistration of company**

When the liquidator:

- (a) has realised all the property of the company or so much of that property as can in his or her opinion be realised without needlessly protracting the winding up, and has distributed a final dividend (if any) to the creditors and adjusted the rights of the contributories among themselves and made a final return (if any) to the contributories; or
- (b) has resigned or has been removed from office;

he or she may apply to the Court:

- (c) for an order that he or she be released; or
- (d) for an order that he or she be released and that ASIC deregister the company.

#### **481 Orders for release or deregistration**

- (1) The Court:
  - (a) may cause a report on the accounts of the liquidator to be prepared by the auditor appointed by ASIC under section 70-15 of Schedule 2 (audit of administration books) or by some other registered company auditor appointed by the Court; and
  - (b) on the liquidator complying with all the requirements of the Court—must take into consideration the report and any objection against the release of the liquidator that is made by the auditor or by any creditor, contributory or other person interested; and
  - (c) must either grant or withhold the release accordingly.

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- (2) Where the release of a liquidator is withheld and the Court is satisfied that the liquidator has been guilty of default, negligence, breach of trust or breach of duty, the Court may order the liquidator to make good any loss that the company has sustained by reason of the default, negligence, breach of trust or breach of duty and may make such other order as it thinks fit.
- (3) An order of the Court releasing the liquidator discharges him or her from all liability in respect of any act done or default made by him or her in the administration of the affairs of the company or otherwise in relation to his or her conduct as liquidator, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.
- (4) Where the liquidator has not previously resigned or been removed, his or her release operates as a removal from office.
- (5) Where the Court has made:
  - (a) an order that the liquidator be released; or
  - (b) an order that the liquidator be released and that ASIC deregister the company;the liquidator must, within 14 days after the making of the order, lodge an office copy of the order.



## **Division 3—General powers of Court**

### **Subdivision A—General powers**

#### **482 Power to stay or terminate winding up**

- (1) At any time during the winding up of a company, the Court may, on application, make an order staying the winding up either indefinitely or for a limited time or terminating the winding up on a day specified in the order.
- (1A) An application may be made by:
  - (a) in any case—the liquidator, or a creditor or contributory, of the company; or
  - (b) in the case of a company registered under section 21 of the *Life Insurance Act 1995*—APRA; or
  - (c) in the case of a company subject to a deed of company arrangement—the administrator of the deed.
- (2) On such an application, the Court may, before making an order, direct the liquidator to give a report with respect to a relevant fact or matter.
- (2A) If such an application is made in relation to a company subject to a deed of company arrangement, then, in determining the application, the Court must have regard to all of the following matters:
  - (a) any report that has been given to the Court by:
    - (i) the administrator, or a former administrator, of the company; or
    - (ii) the liquidator, or a former liquidator, of the company; or
    - (iii) ASIC;and that contains an allegation that an officer of the company has engaged in misconduct;
  - (b) any report that has been lodged with ASIC by:

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- (i) the administrator, or a former administrator, of the company; or
  - (ii) the liquidator, or a former liquidator, of the company; and that contains an allegation that an officer of the company has engaged in misconduct;
  - (c) the decision of the company's creditors to resolve that the company execute a deed of company arrangement;
  - (d) any document that accompanied a notice of the meeting under section 439A when the company was under administration;
  - (da) any notice that has been given to the administrator of the deed of company arrangement or the company's creditors under section 445HA (notification of contravention of deed of company arrangement);
  - (e) whether the deed of company arrangement is likely to result in the company becoming or remaining insolvent;
  - (f) any other relevant matters.
- (3) Where the Court has made an order terminating the winding up, the Court may give such directions as it thinks fit for the resumption of the management and control of the company by its officers, including directions for the convening of a general meeting of members of the company to elect directors of the company to take office upon the termination of the winding up.
- (4) The costs of proceedings before the Court under this section and the costs incurred in convening a meeting of members of the company in accordance with an order of the Court under this section, if the Court so directs, forms part of the costs, charges and expenses of the winding up.
- (5) Where an order is made under this section, the company must lodge an office copy of the order within 14 days after the making of the order.

### **483 Delivery of property to liquidator**

- (1) The Court may require a person who is a contributory, trustee, receiver, banker, agent, officer or employee of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator, as soon as practicable or within a specified period, any money, property of the company or books in the person's hands to which the company is prima facie entitled.
- (2) The Court may make an order directing any contributory for the time being on the list of contributories to pay to the company in the manner directed by the order any money due from the contributory or from the estate of the person whom the contributory represents, exclusive of any money payable by the contributory or the estate by virtue of any call pursuant to this Act, and may:
  - (a) in the case of an unlimited company—allow to the contributory by way of set-off any money due to the contributory or to the estate that the contributory represents from the company on any independent dealing or contract but not any money due to the contributory as a member of the company in respect of any dividend or profit; and
  - (b) in the case of a limited company—make to any director whose liability is unlimited or to such a director's estate the like allowance;and, in the case of any company whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him, her or it by way of set-off against any subsequent call.
- (3) The Court may, either before or after it has ascertained the sufficiency of the property of the company:
  - (a) make calls on all or any of the contributories for the time being on the list of contributories, to the extent of their liability, for payment of any money that the Court considers necessary to satisfy the debts and liabilities of the company and the costs, charges and expenses of winding up and for the

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adjustment of the rights of the contributories among themselves; and

(b) make an order for payment of any calls made by the Court or the company's liquidator;

and, in making a call, may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

- (3A) Subsection (3) does not apply to a no liability company.
- (4) The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the amount due into a bank named in the order to the account of the liquidator instead of to the liquidator, and any such order may be enforced in the same manner as if it had directed payment to the liquidator.
- (5) All money and securities paid or delivered into any bank under this Division are subject in all respects to orders of the Court.
- (6) An order made by the Court under this section is, subject to any right of appeal, conclusive evidence that the money (if any) thereby appearing to be due or ordered to be paid is due, and all other pertinent matters stated in the order are taken to be truly stated as against all persons and in all proceedings.

**484 Appointment of special manager**

- (1) The liquidator may, if satisfied that the nature of the property or business of the company, or the interests of the creditors or contributories generally, requires or require the appointment of a special manager of the property or business of the company other than himself or herself, apply to the Court, and the Court may appoint a special manager of the property or business to act during such time as the Court directs with such powers, including any of the powers of a receiver or manager, as are entrusted to him or her by the Court.
- (2) The special manager:

- (a) must give such security and account in such manner as the Court directs; and
- (b) must receive such remuneration as is fixed by the Court; and
- (c) may at any time resign by notice in writing addressed to the liquidator or may, on cause shown, be removed by the Court.

#### **485 Claims of creditors and distribution of property**

- (1) The Court may fix a day on or before which creditors are to prove their debts or claims or after which they will be excluded from the benefit of any distribution made before those debts are proved.
- (2) The Court must adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled to it.
- (3) The Court may, in the event of the property being insufficient to satisfy the liabilities, make an order as to the payment out of the property of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.

#### **486 Inspection of books by creditors and contributories**

The Court may make such order for inspection of the books of the company by creditors and contributories as the Court thinks just, and any books in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

#### **486A Court may make order to prevent officer or related entity from avoiding liability to company**

- (1) The Court may make one or more of the following:
  - (a) an order prohibiting, either absolutely or subject to conditions, an officer, employee or related entity of a company from taking or sending out of this jurisdiction, or out of Australia, money or other property of the company or of the officer, employee or related entity;

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- (b) an order appointing:
    - (i) a receiver or trustee, with specified powers, of property of an officer or employee of a company, or of property of a related entity of a company that is a natural person; or
    - (ii) a receiver, or a receiver and manager, with specified powers, of property of a related entity of a company that is not a natural person;
  - (c) an order requiring an officer or employee of a company, or a related entity of a company that is a natural person, to surrender to the Court his or her passport and any other specified documents;
  - (d) an order prohibiting an officer or employee of a company, or a related entity of a company that is a natural person, from leaving this jurisdiction, or Australia, without the Court's consent.
- (2) The Court may only make an order under subsection (1) if:
- (a) the company is being wound up in insolvency or by the Court, or an application has been made for the company to be so wound up; and
  - (b) the Court is satisfied that there is at least a prima facie case that the officer, employee or related entity is or will become liable:
    - (i) to pay money to the company, whether in respect of a debt, by way of damages or compensation or otherwise; or
    - (ii) to account for property of the company; and
  - (c) the Court is also satisfied that there is substantial evidence that the officer, employee or related entity:
    - (i) has concealed or removed money or other property, has tried to do so, or intends to do so; or
    - (ii) has tried to leave this jurisdiction or Australia, or intends to do so;in order to avoid that liability or its consequences; and

- (d) the Court thinks it necessary or desirable to make the order in order to protect the company's rights against the officer, employee or related entity.
- (2A) An order under subsection (1) may only be made on the application of:
- (a) a liquidator or provisional liquidator of the company; or
  - (b) ASIC.
- (3) On hearing an application for an order under subsection (1), the Court must have regard to any relevant application under section 1323.
- (4) Before considering an application for an order under subsection (1), the Court may, if in the Court's opinion it is desirable to do so, grant an interim order of the kind applied for that is expressed to have effect until the application is determined.
- (5) The Court must not require an applicant for an order under subsection (1) or any other person, as a condition of granting an interim order under subsection (4), to give an undertaking as to damages.
- (6) On the application of a person who applied for, or is affected by, an order under this section, the Court may make a further order discharging or varying the first-mentioned order.
- (7) An order under subsection (1) may be expressed to operate for a specified period or until it is discharged by a further order.
- (8) A person must not intentionally or recklessly contravene an order under this section that is applicable to the person.
- (9) This section has effect subject to the *Bankruptcy Act 1966*.
- (10) Nothing in this section affects any other powers of the Court.

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**486B Warrant to arrest person who is absconding, or who has dealt with property or books, in order to avoid obligations in connection with winding up**

- (1) The Court may issue a warrant for a person to be arrested and brought before the Court if:
- (a) a company is being wound up in insolvency or by the Court, or an application has been made for a company to be so wound up; and
  - (b) the Court is satisfied that the person:
    - (i) is about to leave this jurisdiction, or Australia, in order to avoid:
      - (A) paying money payable to the company; or
      - (B) being examined about the company's affairs; or
      - (C) complying with an order of the Court, or some other obligation, under this Chapter in connection with the winding up; or
    - (ii) has concealed or removed property of the company in order to prevent or delay the taking of the property into the liquidator's custody or control; or
    - (iii) has destroyed, concealed or removed books of the company or is about to do so.
- Note: For procedures relating to such a warrant, see Subdivision B.
- (2) A warrant under subsection (1) may also provide for property or books of the company in the person's possession to be seized and delivered into the custody of a specified person.
- (3) A warrant under subsection (1) may only be issued on the application of:
- (a) a liquidator or provisional liquidator of the company; or
  - (b) ASIC.

**487 Power to arrest absconding contributory**

The Court, at any time before or after making a winding up order, on proof of probable cause for believing that a contributory is

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about to leave this jurisdiction, or Australia, or otherwise to abscond or to remove or conceal any of his or her property for the purpose of evading payment of calls or of avoiding examination respecting affairs of the company, may cause the contributory to be arrested and held in custody and the books and movable personal property of the contributory to be seized and safely kept until such time as the Court orders.

#### **488 Delegation to liquidator of certain powers of Court**

- (1) Provision may be made by rules or regulations for enabling or requiring all or any of the powers and duties conferred and imposed on the Court by this Part or Schedule 2 in respect of:
  - (a) the holding and conducting of meetings to ascertain the wishes of creditors and contributories; and
  - (b) the paying, delivery, conveyance, surrender or transfer of money, property or books to the liquidator; and
  - (c) the adjusting of the rights of contributories among themselves and the distribution of any surplus among the persons entitled to it; and
  - (d) the fixing of a time within which debts and claims must be proved;to be exercised or performed by the liquidator as an officer of the Court and subject to the control of the Court.
- (2) Despite anything in rules or regulations made for the purposes of subsection (1), a liquidator may distribute a surplus only with the Court's special leave.

#### **489 Powers of Court cumulative**

Any powers conferred on the Court by this Act are in addition to, and not in derogation of, any existing powers of instituting proceedings against any contributory or debtor of the company or the property of any contributory or debtor for the recovery of any call or other sums.

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**Subdivision B—Procedures relating to section 486B warrants**

**489A Arrest of person subject to warrant**

If:

- (a) the Court issues a section 486B warrant for a person to be arrested and brought before the Court; and
  - (b) the person is not in prison;
- the person named in the section 486B warrant may be arrested by:
- (c) an officer of the police force of the State or Territory in which the person is found; or
  - (d) the Sheriff of that State or Territory, or any of the Sheriff's officers; or
  - (e) a member or special member of the Australian Federal Police.

**489B Procedure after arrest**

- (1) As soon as practicable after being arrested, the person is to be taken before the Court that issued the section 486B warrant.
- (2) The Court must order:
  - (a) that the person be remanded on bail on condition that the person appear at the Court at such time and place as the Court specifies; or
  - (b) that the person be remanded in such custody or otherwise as the Court specifies, pending the person's appearance at the Court at such time and place as the Court specifies; or
  - (c) that the person be released.
- (3) An order under this section may be subject to other specified conditions.

**489C Procedure on remand on bail**

- (1) If the Court has made an order under section 489B remanding the person (the *warrant person*) on bail, the Court must prepare, or

cause to be prepared, an instrument setting out the conditions to which the grant of bail is subject.

- (2) The instrument must be signed by:
  - (a) a judge of the Court, or the person who prepared the instrument; and
  - (b) the warrant person.
- (3) The warrant person must be given a copy of the instrument.
- (4) The Court must revoke the order, and make an order remanding the warrant person in custody, if that person:
  - (a) refuses to sign the instrument; or
  - (b) does not comply with a condition to which the grant of bail is subject and that condition is a condition precedent to that person's release on bail.

#### **489D Court's power to make orders under other provisions**

- (1) To avoid doubt, the Court may make an order under section 486A, 598 or 1323, or section 45-1 or 90-15 of Schedule 2 in relation to a person appearing before the Court under:
  - (a) a section 486B warrant; or
  - (b) section 489B.
- (2) Subsection (1) does not limit section 486A, 598 or 1323, or section 45-1 or 90-15 of Schedule 2.

#### **489E Jurisdiction under this Subdivision**

To avoid doubt, a matter arising under this Subdivision is a civil matter for the purposes of Part 9.6A.

## **Part 5.4C—Winding up by ASIC**

### **489EA ASIC may order the winding up of a company**

- (1) ASIC may order the winding up of a company if:
  - (a) the response to a return of particulars given to the company is at least 6 months late; and
  - (b) the company has not lodged any other documents under this Act in the last 18 months; and
  - (c) ASIC has reason to believe that the company is not carrying on business; and
  - (d) ASIC has reason to believe that making the order is in the public interest.
- (2) ASIC may order the winding up of a company if the company's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment.
- (3) ASIC may order the winding up of a company if:
  - (a) ASIC has reinstated the registration of the company under subsection 601AH(1) in the last 6 months; and
  - (b) ASIC has reason to believe that making the order is in the public interest.
- (4) ASIC may order the winding up of a company if:
  - (a) ASIC has reason to believe that the company is not carrying on business; and
  - (b) at least 20 business days before making the order, ASIC gives to:
    - (i) the company; and
    - (ii) each director of the company;a notice:
    - (iii) stating ASIC's intention to make the order; and
    - (iv) informing the company or the director, as the case may be, that the company or the director may, within 10

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- business days after the receipt of the notice, give ASIC a written objection to the making of the order; and
- (c) neither the company, nor any of its directors, has given ASIC such an objection within the time limit specified in the notice.
- (5) Paragraphs (4)(b) and (c) do not apply to a person if ASIC does not have the necessary information about the person's identity or address.
- (6) Before making an order under subsection (1), (2), (3) or (4), ASIC must:
- (a) give notice of its intention to make the order on ASIC database; and
  - (b) both:
    - (i) publish notice of its intention to make the order; and
    - (ii) do so in the prescribed manner.
- (7) ASIC must not order the winding up of a company under subsection (1), (2), (3) or (4) if an application is before the Court for the winding up of the company.
- (8) Paragraph (b) of the definition of *director* in section 9 does not apply to subsection (4) of this section.
- (9) To avoid doubt, subsections (1), (2), (3) and (4):
- (a) have effect independently of each other; and
  - (b) do not limit each other.

**489EB Deemed resolution that company be wound up voluntarily**

If ASIC orders under section 489EA that a company be wound up:

- (a) the company is taken to have passed a special resolution under section 491 that the company be wound up voluntarily; and
- (b) the company is taken to have passed the special resolution:
  - (i) at the time when ASIC made the order under section 489EA; and

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- (ii) without a declaration having been made and lodged under section 494; and
- (c) section 496 has effect as if:
  - (i) a declaration had been made under section 494; and
  - (ii) the reference in subsection 496(1) to the period stated in the declaration were a reference to the 12-month period beginning when ASIC made the order under section 489EA; and
- (d) section 497 is taken to have been complied with in relation to the winding up.

**489EC Appointment of liquidator**

- (1) If ASIC orders under section 489EA that a company be wound up, ASIC may appoint a liquidator for the purpose of winding up the affairs and distributing the property of the company.

Note: For the remuneration of liquidators appointed under this section, see Subdivision D of Division 60 of Schedule 2.

- (2) An appointment of a liquidator by ASIC must not be made without the written consent of the liquidator.
- (3) A vacancy in the office of a liquidator appointed by ASIC is to be filled by the appointment of a liquidator by ASIC.

## **Part 5.5—Voluntary winding up**

### **Division 1A—Preliminary**

#### **489F Definitions**

In this Part:

*property* of a company includes PPSA retention of title property, if the security interest in the property is vested in the company because of the operation of any of the following provisions:

- (a) section 267 or 267A of the *Personal Property Securities Act 2009* (property subject to unperfected security interests);
- (b) section 588FL of this Act (collateral not registered within time).

Note: See sections 9 (definition of *property*) and 51F (PPSA retention of title property).

## **Division 1—Resolution for winding up**

### **490 When company cannot wind up voluntarily**

- (1) Except with the leave of the Court, a company cannot resolve that it be wound up voluntarily if:
  - (a) an application for the company to be wound up in insolvency has been filed; or
  - (b) the Court has ordered that the company be wound up in insolvency, whether or not the order was made on such an application; or
  - (c) the company is a trustee company (within the meaning of Chapter 5D) that is in the course of administering or managing one or more estates.
- (2) A person with a proper interest (within the meaning of Chapter 5D) in the estate referred to in paragraph (1)(c), or who has any claim in respect of the estate, is entitled to be heard in a proceeding before the Court for leave under subsection (1).

### **491 Circumstances in which company may be wound up voluntarily**

- (1) Subject to section 490, a company may be wound up voluntarily if the company so resolves by special resolution.
- (2) A company must:
  - (a) within 7 days after the passing of a resolution for voluntary winding up, lodge with ASIC, in the prescribed form, a notice setting out the text of the resolution; and
  - (b) within the period ascertained in accordance with the regulations, cause a notice setting out the prescribed information about the resolution to be published in the prescribed manner.



### **493 Effect of voluntary winding up**

The company must, from the passing of the resolution, cease to carry on its business except so far as is in the opinion of the liquidator required for the beneficial disposal or winding up of that business, but the corporate state and corporate powers of the company, notwithstanding anything to the contrary in its constitution, continue until it is deregistered.

### **493A Effect of voluntary winding up on company's members**

#### *Transfer of shares*

- (1) A transfer of shares in a company that is made after the passing of the resolution is void except if:
  - (a) both:
    - (i) the liquidator gives written consent to the transfer; and
    - (ii) that consent is unconditional; or
  - (b) all of the following subparagraphs apply:
    - (i) the liquidator gives written consent to the transfer;
    - (ii) that consent is subject to one or more specified conditions;
    - (iii) those conditions have been satisfied; or
  - (c) the Court makes an order under subsection (4) authorising the transfer.
- (2) The liquidator may only give consent under paragraph (1)(a) or (b) if he or she is satisfied that the transfer is in the best interests of the company's creditors as a whole.
- (3) If the liquidator refuses to give consent under paragraph (1)(a) or (b) to a transfer of shares in the company:
  - (a) the prospective transferor; or
  - (b) the prospective transferee; or
  - (c) a creditor of the company;may apply to the Court for an order authorising the transfer.

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- (4) If the Court is satisfied, on an application under subsection (3), that the transfer is in the best interests of the company's creditors as a whole, the Court may, by order, authorise the transfer.
- (5) If the liquidator gives consent under paragraph (1)(b) to a transfer of shares in the company:
  - (a) the prospective transferor; or
  - (b) the prospective transferee; or
  - (c) a creditor of the company;may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.
- (6) If the Court is satisfied, on an application under subsection (5), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (7) The liquidator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (3) or (5).

*Alteration in the status of members*

- (8) An alteration in the status of members of a company that is made after the passing of the resolution is void except if:
  - (a) both:
    - (i) the liquidator gives written consent to the alteration; and
    - (ii) that consent is unconditional; or
  - (b) all of the following subparagraphs apply:
    - (i) the liquidator gives written consent to the alteration;
    - (ii) that consent is subject to one or more specified conditions;
    - (iii) those conditions have been satisfied; or
  - (c) the Court makes an order under subsection (12) authorising the alteration.
- (9) The liquidator may only give consent under paragraph (8)(a) or (b) if he or she is satisfied that the alteration is in the best interests of the company's creditors as a whole.

- (10) The liquidator must refuse to give consent under paragraph (8)(a) or (b) if the alteration would contravene Part 2F.2.
- (11) If the liquidator refuses to give consent under paragraph (8)(a) or (b) to an alteration in the status of members of a company:
- (a) a member of the company; or
  - (b) a creditor of the company;
- may apply to the Court for an order authorising the alteration.
- (12) If the Court is satisfied, on an application under subsection (11), that:
- (a) the alteration is in the best interests of the company's creditors as a whole; and
  - (b) the alteration does not contravene Part 2F.2;
- the Court may, by order, authorise the alteration.
- (13) If the liquidator gives consent under paragraph (8)(b) to an alteration in the status of members of a company:
- (a) a member of the company; or
  - (b) a creditor of the company;
- may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.
- (14) If the Court is satisfied, on an application under subsection (13), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (15) The liquidator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (11) or (13).

#### **494 Declaration of solvency**

- (1) Where it is proposed to wind up a company voluntarily, a majority of the directors may, before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a written declaration to the effect that they have made an inquiry into the affairs of the

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company and that, at a meeting of directors, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.

- (2) There must be attached to the declaration a statement of affairs of the company showing, in the prescribed form:
  - (a) the property of the company, and the total amount expected to be realised from that property; and
  - (b) the liabilities of the company; and
  - (c) the estimated expenses of winding up;made up to the latest practicable date before the making of the declaration.
- (3) A declaration so made has no effect for the purposes of this Act unless:
  - (a) the declaration is made at the meeting of directors referred to in subsection (1); and
  - (b) the declaration is lodged before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out or such later date as ASIC, whether before, on or after the first-mentioned date, allows; and
  - (c) the resolution for voluntary winding up is passed within the period of 5 weeks after the making of the declaration or within such further period after the making of that declaration as ASIC, whether before or after the end of that period of 5 weeks, allows.
- (4) A director who makes a declaration under this section (including a declaration that has no effect for the purposes of this Act by reason of subsection (3)) without having reasonable grounds for his or her opinion that the company will be able to pay its debts in full within the period stated in the declaration is guilty of an offence.
- (5) If the company is wound up pursuant to a resolution for voluntary winding up passed within the period of 5 weeks after the making of the declaration or, if pursuant to paragraph (3)(c) ASIC has

allowed a further period after the end of that period of 5 weeks, within that further period, but its debts are not paid or provided for in full within the period stated in the declaration, it is to be presumed, unless the contrary is shown, that a director who made the declaration did not have reasonable grounds for his or her opinion.

## **Division 2—Members' voluntary winding up**

### **495 Appointment of liquidator etc.**

- (1) The company in general meeting must appoint a liquidator or liquidators for the purpose of winding up the affairs and distributing the property of the company.

Note: For rules about the liquidator's remuneration, see Division 60 of Part 3 of Schedule 2. For rules about convening meetings, see Division 75 of Part 3 of Schedule 2.

- (2) If a vacancy occurs in the office of a liquidator (whether by death, resignation or otherwise), the company in general meeting may fill the vacancy by the appointment of a liquidator.
- (3) A general meeting may be convened for the purposes of subsection (2) by any contributory or, if there were 2 or more liquidators, by the continuing liquidators.
- (4) The meeting must be held in the manner provided by this Act or by the company's constitution or in such manner as is, on application by any contributory or by the continuing liquidators, determined by the Court.

### **496 Duty of liquidator where company turns out to be insolvent**

- (1) Where a declaration has been made under section 494 and the liquidator is at any time of the opinion that the company will not be able to pay or provide for the payment of its debts in full within the period stated in the declaration, he or she must do one of the following as soon as practicable:
  - (a) apply under section 459P for the company to be wound up in insolvency;
  - (b) appoint an administrator of the company under section 436B;
  - (c) convene a meeting of the company's creditors;and if he or she convenes such a meeting, the following subsections apply.

- (4) The liquidator must lay before the meeting a statement of the assets and liabilities of the company and the notice convening the meeting must draw the attention of the creditors to the right conferred upon them by subsection (5).
- (5) The creditors may, at the meeting convened under subsection (1), appoint some other person to be liquidator for the purpose of winding up the affairs and distributing the property of the company instead of the liquidator appointed by the company.
- (6) If the creditors appoint some other person under subsection (5), the winding up must thereafter proceed as if the winding up were a creditors' voluntary winding up.
- (7) The liquidator or, if another person is appointed by the creditors to be liquidator, the person so appointed must, within 7 days after a meeting has been held pursuant to subsection (1), lodge a notice in the prescribed form.
- (8) After the meeting the winding up must proceed as if it were a creditors' voluntary winding up.
- (9) An offence based on subsection (4), (5), (6), (7) or (8) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## **Division 3—Creditors' voluntary winding up**

### **497 Information about the company's affairs**

- (1) The liquidator of the company must, within 10 business days after the day of the meeting of the company at which the resolution for voluntary winding up is passed:
  - (a) send to each creditor:
    - (i) a summary of the affairs of the company in the prescribed form; and
    - (ii) a list setting out the names of all creditors, the addresses of those creditors and the estimated amounts of their claims, as shown in the records of the company; and
  - (b) lodge a copy of the documents sent in accordance with paragraph (a).

Note: For electronic notification under paragraph (a), see section 600G.

- (2) The list referred to in subparagraph (1)(a)(ii) must identify any creditors that are related entities of the company.
- (3) Unless the Court orders otherwise, nothing in subsection (1) requires the liquidator to send the list referred to in subparagraph (1)(a)(ii) to a creditor whose debt does not exceed \$1,000.
- (4) Within 5 business days after the day of the meeting of the company at which the resolution for voluntary winding up is passed or such longer period as the liquidator allows, the directors of the company must give the liquidator a report, in the prescribed form, about the company's business, property, affairs and financial circumstances.
- (5) An offence based on subsection (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.
- (6) The liquidator must, within 10 business days after receiving a report under subsection (4), lodge a copy of the report.



- (7) A person must not contravene subsection (6).
- (8) An offence based on subsection (7) is an offence of strict liability.  
Note: For strict liability, see section 6.1 of the *Criminal Code*.
- (9) Subsection (7) does not apply to the extent that the person has a reasonable excuse.  
Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the *Criminal Code*.

#### **499 Liquidators**

- (1) The company in general meeting must appoint a liquidator for the purpose of winding up the affairs and distributing the property of the company.
- (2) However, subsection (1) does not apply to the company if:
- (a) section 446A or 446AA applies in relation to the company;
  - or
  - (b) regulations made for the purposes of section 446B have the effect that the company is taken to have passed a special resolution under section 491 that the company be wound up voluntarily.
- (2A) If section 446A applies in relation to the company because of paragraph 446A(1)(a):
- (a) the company's creditors may, at the meeting at which the resolution referred to in that paragraph is passed, appoint a person to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and
  - (b) if an appointment is not made under paragraph (a) of this subsection before the end of the meeting at which the resolution referred to in paragraph 446A(1)(a) is passed:
    - (i) the company's creditors are taken to have appointed the administrator of the company to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and

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- (ii) the appointment under subparagraph (i) of this paragraph takes effect at the end of that meeting.
- (2B) If section 446A applies in relation to the company because of paragraph 446A(1)(b):
  - (a) the company's creditors are taken to have appointed the administrator of the company to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and
  - (b) the appointment takes effect at the time referred to in that paragraph.
- (2C) If section 446A applies in relation to the company because of paragraph 446A(1)(c):
  - (a) the company's creditors may, at the meeting at which the resolution referred to in subparagraph 446A(1)(c)(ii) is passed, appoint a person to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and
  - (b) if an appointment is not made under paragraph (a) of this subsection before the end of the meeting at which the resolution referred to in subparagraph 446A(1)(c)(ii) is passed:
    - (i) the company's creditors are taken to have appointed the administrator of the deed to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and
    - (ii) the appointment under subparagraph (i) of this paragraph takes effect at the end of that meeting.
- (2D) If section 446AA applies in relation to the company because of paragraph 446AA(1)(a):
  - (a) the Court may, immediately after it makes the order referred to in that paragraph, appoint a person to be the liquidator for the purpose of winding up the affairs and distributing the property of the company; and
  - (b) if no appointment is made under paragraph (a) of this subsection:

- (i) the company is taken to have appointed the administrator of the deed of company arrangement referred to in section 446AA to be the liquidator for the purpose of winding up the affairs and distributing the property of the company; and
  - (ii) the appointment takes effect at the time referred to in paragraph 446AA(1)(a).
- (2E) If section 446AA applies in relation to the company because of paragraph 446AA(1)(b):
- (a) the company is taken to have appointed the administrator of the deed of company arrangement referred to in section 446AA to be the liquidator for the purpose of winding up the affairs and distributing the property of the company; and
  - (b) the appointment takes effect at the time referred to in subparagraph 446AA(1)(b)(ii).
- (2F) If regulations made for the purposes of section 446B have the effect that a company under administration is taken to have passed a special resolution under section 491 that the company be wound up voluntarily:
- (a) the company is taken to have appointed the administrator of the company to be the liquidator for the purpose of winding up the affairs and distributing the property of the company; and
  - (b) the appointment takes effect when the resolution is taken to have been passed.
- (2G) If regulations made for the purposes of section 446B have the effect that a company subject to a deed of company arrangement is taken to have passed a special resolution under section 491 that the company be wound up voluntarily:
- (a) the company is taken to have appointed the administrator of the deed to be the liquidator for the purpose of winding up the affairs and distributing the property of the company; and
  - (b) the appointment takes effect when the resolution is taken to have been passed.

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- (3) If a liquidator, other than a liquidator appointed by, or by the direction of, the Court resigns:
- (a) the Court; or
  - (b) ASIC; or
  - (c) the creditors;
- may fill the vacancy by the appointment of a liquidator.

Note: If the registration of a liquidator is suspended or cancelled, ASIC must fill the vacancy: see section 40-111 of Schedule 2.

- (4) If ASIC fills a vacancy in the office of a liquidator under subsection (3), ASIC must:
- (a) publish notice of the filling of the vacancy; and
  - (b) publish the notice in the prescribed manner.
- (5) If ASIC or the Court fills a vacancy in the office of a liquidator under subsection (3), the liquidator is taken, for the purposes of this Act, to be appointed by the creditors.

**500 Execution and civil proceedings**

- (1) Any attachment, sequestration, distress or execution put in force against the property of the company after the passing of the resolution for voluntary winding up is void.
- (2) After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.
- (3) The Court may require any contributory, trustee, receiver, banker, agent, officer or employee of the company to pay, deliver, convey, surrender or transfer forthwith or within such time as the Court directs to the liquidator any money, property of the company or books in his, her or its hands to which the company is prima facie entitled.

## **Division 4—Voluntary winding up generally**

### **501 Distribution of property of company**

Subject to the provisions of this Act as to preferential payments, the property of a company must, on its winding up, be applied in satisfaction of its liabilities equally and, subject to that application, must, unless the company's constitution otherwise provides, be distributed among the members according to their rights and interests in the company.

### **506 Powers and duties of liquidator**

- (1) The liquidator may:
- (b) exercise any of the powers that this Act confers on a liquidator in a winding up in insolvency or by the Court; or
  - (c) exercise the power under section 478 of a liquidator appointed by the Court to settle a list of contributors; or
  - (d) exercise the Court's powers under subsection 483(3) (except paragraph 483(3)(b)) in relation to calls on contributories; or
  - (e) exercise the power of the Court of fixing a time within which debts and claims must be proved.
- (1A) Subsections 477(2A) and (2B) apply in relation to the liquidator as if:
- (a) he or she were a liquidator in a winding up in insolvency or by the Court; and
  - (b) in the case of a members' voluntary winding up—a reference in those subsections to an approval were a reference to the approval of a special resolution of the company.
- (1B) The company must lodge a copy of a special resolution referred to in paragraph (1A)(b) with ASIC within 14 days after the resolution is passed.

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- (2) A list of contributories settled in accordance with paragraph (1)(c) is prima facie evidence of the liability of the persons named in the list to be contributories.
- (3) The liquidator must pay the debts of the company and adjust the rights of the contributories among themselves.

**506A Declarations by liquidator—relevant relationships and indemnities**

*Scope*

- (1) This section applies to a liquidator appointed in relation to a creditors' voluntary winding up.

*Declaration and notification of relevant relationships and indemnities*

- (2) Within 10 business days after the day of the meeting of the company at which the resolution for voluntary winding up is passed, the liquidator must:
  - (a) make:
    - (i) a declaration of relevant relationships; and
    - (ii) a declaration of indemnities; and
  - (b) give a copy of each declaration to as many of the company's creditors as reasonably practicable.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) As soon as practicable after making a declaration under subsection (2), the administrator must lodge a copy of the declaration with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

*Replacement declarations*

- (4) If:

- (a) at a particular time, the liquidator makes:
  - (i) a declaration of relevant relationships; or
  - (ii) a declaration of indemnities;under subsection (2) of this section; and
- (b) at a later time:
  - (i) the declaration has become out-of-date; or
  - (ii) the liquidator becomes aware of an error in the declaration;

the liquidator must, as soon as practicable, make:

- (c) if subparagraph (a)(i) applies—a replacement declaration of relevant relationships; or
- (d) if subparagraph (a)(ii) applies—a replacement declaration of indemnities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (5) The liquidator must table a copy of a replacement declaration under subsection (4):

- (a) if:
  - (i) there is a committee of inspection; and
  - (ii) the next meeting of the committee of inspection occurs before the next meeting of the company's creditors; orat the next meeting of the committee of inspection; or
- (b) in any other case—at the next meeting of the company's creditors.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) As soon as practicable after making a replacement declaration under subsection (4), the administrator must lodge a copy of the replacement declaration with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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- (7) In a prosecution for an offence constituted by a failure to include a matter in a declaration under this section, it is a defence if the defendant proves that:
- (a) the defendant made reasonable enquiries; and
  - (b) after making these enquiries, the defendant had no reasonable grounds for believing that the matter should have been included in the declaration.

**507 Power of liquidator to accept shares etc. as consideration for sale of property of company**

- (1) This section applies where it is proposed to transfer or sell to a body corporate the whole or a part of the business or property of a company.
- (2) The liquidator of the company may, with the sanction of a special resolution of the company conferring on the liquidator either a general authority or an authority in respect of a particular arrangement, enter into an arrangement under which, in compensation or part compensation for the transfer or sale:
- (a) the liquidator is to receive shares, debentures, policies or other like interests in the body corporate for distribution among the members of the company; or
  - (b) the members of the company may, instead of, or as well as, receiving cash, shares, debentures, policies or other like interests in the body corporate, participate in the profits of, or receive any other benefit from, the body corporate.
- (3) A transfer, sale or arrangement under this section is binding on the members of the company.
- (4) If a member of the company who did not vote in favour of a special resolution expresses dissent from the resolution in writing addressed to the liquidator and left at the office of the liquidator within 7 days after the passing of the resolution, the member may require the liquidator either to abstain from carrying the resolution into effect or to purchase the member's interest at a price to be determined by agreement or by arbitration under this section.



- (5) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is deregistered and be raised by the liquidator in such manner as is determined by special resolution.
- (6) A special resolution is not invalid for the purposes of this section because it is passed before, or concurrently with, a resolution for voluntary winding up or for appointing liquidators but, if an order for winding up the company by the Court is made within 1 year after the passing of the resolution, the resolution is not valid unless sanctioned by the Court.
- (7) For the purposes of an arbitration under this section, the agreed arbitration law applies as if there were a submission for reference to 2 arbitrators, one to be appointed by each party.
- (7A) Parties to the arbitration may agree on the State or Territory in this jurisdiction whose law is to govern the arbitration. The ***agreed arbitration law*** is the law of that State or Territory relating to commercial arbitration.
- (8) The appointment of an arbitrator may be made in writing signed by:
  - (a) if there is only one liquidator—the liquidator; or
  - (b) if there is more than one liquidator—any 2 or more of the liquidators.
- (9) The Court may give any directions necessary for the initiation and conduct of the arbitration and any such direction is binding on the parties.
- (10) In the case of a creditors' voluntary winding up, the powers of the liquidator under this section must not be exercised except with the approval of the Court or the committee of inspection.
- (11) The company must lodge a copy of a special resolution referred to in subsection (2) or (5) with ASIC within 14 days after the resolution is passed.

### **509 Deregistration**

*ASIC must deregister at the end of 3 month period*

- (1) If an end of administration return for a company is lodged with ASIC on the basis that the affairs of the company are fully wound up, ASIC must deregister the company at the end of the period of 3 months beginning on the day after the return is lodged (the **deregistration period**).

*ASIC must deregister on a day specified by the Court*

- (2) On application by the liquidator or any other interested party, the Court may make an order that ASIC deregister the company on a specified day. The Court must make the order before the end of the deregistration period.
- (3) The person on whose application an order under subsection (2) is made must, within 10 business days after the making of the order, lodge a copy of the order.

### **510 Arrangement: when binding on creditors**

- (1) An arrangement entered into between a company about to be, or in the course of being, wound up and its creditors is, subject to subsection (4):
  - (a) binding on the company if sanctioned by a special resolution; and
  - (b) binding on the creditors if sanctioned by a resolution of the creditors.
- (1A) The company must lodge a copy of a special resolution referred to in paragraph (1)(a) with ASIC within 14 days after the resolution is passed.
- (2) A creditor must be accounted a creditor for value for such sum as upon an account fairly stated, after allowing the value of any security interests held by the creditor and the amount of any debt or

set-off owing by the creditor to the company, appears to be the balance due to the creditor.

- (3) A dispute about the value of any such security interest or the amount of any such debt or set-off may be settled by the Court on the application of the company, the liquidator or the creditor.
- (4) A creditor or contributory may, within 3 weeks after the completion of the arrangement, appeal to the Court in respect of the arrangement, and the Court may confirm, set aside or modify the arrangement and make such further order as it thinks just.

## Part 5.6—Winding up generally

### Division 1—Preliminary

#### 513 Application of Part

Except so far as the contrary intention appears, the provisions of this Act about winding up apply in relation to the winding up of a company whether in insolvency, by the Court or voluntarily.

#### 513AA Definitions

In this Part:

**property** of a company includes PPSA retention of title property, if the security interest in the property is vested in the company because of the operation of any of the following provisions:

- (a) section 267 or 267A of the *Personal Property Securities Act 2009* (property subject to unperfected security interests);
- (b) section 588FL of this Act (collateral not registered within time).

Note: See sections 9 (definition of **property**) and 51F (PPSA retention of title property).

## **Division 1A—When winding up taken to begin**

### **513A Winding up ordered by the Court**

If the Court orders under section 233, 459A, 459B or 461 that a company be wound up, the winding up is taken to have begun or commenced:

- (a) if, when the order was made, a winding up of the company was already in progress—when the last-mentioned winding up is taken because of this Division to have begun or commenced; or
- (b) if, immediately before the order was made, the company was under administration—on the section 513C day in relation to the administration; or
- (c) if:
  - (i) when the order was made, a provisional liquidator of the company was acting; and
  - (ii) immediately before the provisional liquidator was appointed, the company was under administration; on the section 513C day in relation to the administration; or
- (d) if, immediately before the order was made, a deed of company arrangement had been executed by the company and had not yet terminated—on the section 513C day in relation to the administration that ended when the deed was executed; or
- (e) otherwise—on the day when the order was made.

### **513B Voluntary winding up**

Where a company resolves by special resolution that it be wound up voluntarily, the winding up is taken to have begun or commenced:

- (a) if, when the resolution was passed, a winding up of the company was already in progress—when the last-mentioned winding up is taken because of this Division to have begun or commenced; or

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- (b) if, immediately before the resolution was passed, the company was under administration—on the section 513C day in relation to the administration; or
- (c) if, immediately before the resolution was passed, a deed of company arrangement had been executed by the company but had not yet terminated—on the section 513C day in relation to the administration that ended when the deed was executed; or
- (d) if the resolution is taken to have been passed because the company’s creditors:
  - (i) passed a resolution terminating a deed of company arrangement executed by the company; and
  - (ii) also resolved under section 445E that the company be wound up;on the section 513C day in relation to the administration that ended when the deed was executed; or
- (da) if the resolution is taken to have been passed under section 446AA because of:
  - (i) the making of an order under section 445D by the Court terminating a deed of company arrangement executed by the company; or
  - (ii) the existence of circumstances that are specified in a deed of company arrangement executed by the company to be circumstances in which the deed is to terminate and the company is to be wound up;on the section 513C day in relation to the administration that ended when the deed was executed; or
- (e) otherwise—on the day on which the resolution was passed.

**513C Section 513C day in relation to an administration under Part 5.3A**

The section 513C day in relation to the administration of a company is:

- (a) if, when the administration began, a winding up of the company was in progress—the day on which the winding up is taken because of this Division to have begun; or
- (b) otherwise—the day on which the administration began.

### **513D Validity of proceedings in earlier winding up**

Where, at the time when:

- (a) the Court orders under section 233, 459A, 459B or 461 that a company be wound up; or
- (b) a company resolves by special resolution that it be wound up voluntarily;

a winding up of the company is already in progress, all proceedings in the last-mentioned winding up are taken to have been valid, except so far as the Court otherwise orders because fraud or mistake has been proved.

## **Division 2—Contributories**

### **514 Where Division applies**

- (1) This Division applies where a company is wound up.
- (2) This Division does not apply to the winding up of a no liability company.

### **515 General liability of contributory**

Subject to this Division, a present or past member is liable to contribute to the company's property to an amount sufficient:

- (a) to pay the company's debts and liabilities and the costs, charges and expenses of the winding up; and
- (b) to adjust the rights of the contributories among themselves.

### **516 Company limited by shares**

Subject to sections 518 and 519, if the company is a company limited by shares, a member need not contribute more than the amount (if any) unpaid on the shares in respect of which the member is liable as a present or past member.

### **517 Company limited by guarantee**

Subject to sections 518 and 519, if the company is a company limited by guarantee, a member need not contribute more than the amount the member has undertaken to contribute to the company's property if the company is wound up.

### **518 Company limited both by shares and by guarantee**

Subject to section 519, if the company is a company limited both by shares and by guarantee, neither of sections 516 and 517 applies but the member need not contribute more than the aggregate of the following:



- (a) the amount (if any) unpaid on shares in respect of which the member is liable as a present or past member;
- (b) the amount that the member has undertaken to contribute to the company's property if the company is wound up.

### **519 Exceptions for former unlimited company**

Despite sections 516, 517 and 518, if the company is a limited company and became a limited company by virtue of a change of status, the amount that a member at the time of the change of status, or a person who at that time was a past member, is liable to contribute in respect of the company's debts and liabilities contracted before that time is unlimited.

### **520 Past member: later debts**

A past member need not contribute in respect of a debt or liability of the company contracted after the past member ceased to be a member.

### **521 Person ceasing to be a member a year or more before winding up**

Subject to section 523, a past member need not contribute if he, she or it was a member at no time during the year ending on the day of the commencement of the winding up.

### **522 Present members to contribute first**

Subject to paragraph 523(b), a past member need not contribute unless it appears to the Court that the existing members are unable to satisfy the contributions they are liable to make under this Act.

### **523 Past member of former unlimited company**

If an unlimited company changes to a limited company under section 164, a past member who was a member at the time of the change is liable:

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- (a) despite section 521; and
- (b) if no person who was a member at that time is a member at the commencement of the winding up—despite section 522; to contribute in respect of the company's debts and liabilities contracted before that time.

**524 Past member of former limited company**

If a limited company changes to an unlimited company under section 164, a person who, at the time when the company applied for the change, was a past member and did not again become a member after that time need not contribute more than they would have been liable to contribute if the company had not changed type.

**526 Liability on certain contracts**

Nothing in this Act invalidates a provision, in a policy of insurance or other contract, whereby the liability of individual members on the policy or contract is restricted or whereby the funds of the company are alone made liable in respect of the policy or contract.

**527 Nature of contributory's liability**

A contributory's liability is of the nature of a specialty debt according to the law of the Capital Territory accruing due from the contributory when the contributory's liability commenced but payable at the times when calls are made for enforcing the liability.

**528 Death of contributory**

If a contributory dies, whether before or after being placed on the list of contributories:

- (a) his or her personal representatives are liable in due course of administration to contribute to the company's property in discharge of his or her liability to contribute and are contributories accordingly; and

- (b) if his or her personal representatives default in paying any money that they are ordered to pay—proceedings may be taken for administering his or her estate and for compelling payment, out of the assets of that estate, of the money due.

### **529 Bankruptcy of contributory**

If a contributory becomes an insolvent under administration, or assigns his or her estate for the benefit of his or her creditors, whether before or after being placed on the list of contributories:

- (a) his or her trustee is to represent him or her for the purposes of the winding up and is to be a contributory accordingly; and
- (b) calls already made, and the estimated value of his or her liability to future calls, may be proved against his or her estate.

## Division 3—Liquidators

### 530 Appointment of 2 or more liquidators of a company

If 2 or more persons have been appointed as liquidators of a company:

- (a) a function or power of a liquidator of the company may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or resolution appointing them otherwise provides; and
- (b) a reference in this Act to a liquidator, or to the liquidator, of a company is, in the case of the first-mentioned company, a reference to whichever one or more of those liquidators the case requires.

### 530AA Appointment of 2 or more provisional liquidators of a company

If 2 or more persons have been appointed as provisional liquidators of a company:

- (a) a function or power of a provisional liquidator of the company may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order appointing them otherwise provides; and
- (b) a reference in this Act to a provisional liquidator, or to the provisional liquidator, of a company is, in the case of the first-mentioned company, a reference to whichever one or more of those provisional liquidators the case requires.

### 530A Officers to help liquidator

- (1) As soon as practicable after the Court orders that a company be wound up or appoints a provisional liquidator of a company, or a company resolves that it be wound up, each officer of the company must:

- (a) deliver to the liquidator appointed for the purposes of the winding up, or to the provisional liquidator, as the case may be, all books in the officer's possession that relate to the company, other than books possession of which the officer is entitled, as against the company and the liquidator or provisional liquidator, to retain; and
  - (b) if the officer knows where other books relating to the company are—tell the liquidator or provisional liquidator where those books are.
- (2) Where a company is being wound up, or a provisional liquidator of a company is acting, an officer of the company must:
  - (a) attend on the liquidator or provisional liquidator at such times; and
  - (b) give the liquidator or provisional liquidator such information about the company's business, property, affairs and financial circumstances; and
  - (c) attend such meetings of the company's creditors or members; as the liquidator or provisional liquidator reasonably requires.
- (3) An officer of a company that is being wound up must do whatever the liquidator reasonably requires the officer to do to help in the winding up.
- (4) An officer of a company must do whatever a provisional liquidator of the company reasonably requires the officer to do to help in the performance or exercise of any of the provisional liquidator's functions and powers.
- (5) The liquidator or provisional liquidator of a company may require an officer of the company:
  - (a) to tell the liquidator the officer's residential address and work or business address; or
  - (b) to keep the liquidator informed of any change in either of those addresses that happens during the winding up.
- (6) A person must not fail to comply with subsection (1), (2), (3) or (4), or with a requirement under subsection (5).

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(6A) An offence based on subsection (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

(6B) Subsection (6) does not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6B), see subsection 13.3(3) of the *Criminal Code*.

(7) For the purposes of this section, *officer* includes a former officer.

(9) Nothing in this section limits the generality of anything else in it.

**530B Liquidator's rights to company's books**

(1) A person is not entitled, as against the liquidator of a company:

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

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

but such a lien is not otherwise prejudiced.

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

(3) A person must not engage in conduct that results in the hindering or obstruction of a liquidator of a company in obtaining possession of books of the company.

(3A) Subsection (3) does not apply if the person is entitled, as against the company and the liquidator, to retain possession of the books.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3A), see subsection 13.3(3) of the *Criminal Code*.

(4) The liquidator of a company may give to a person a written notice requiring the person to deliver to the liquidator, as specified in the notice, books so specified that are in the person's possession.

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

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(6) A person must comply with a notice under subsection (4).

(6A) Subsection (6) does not apply to the extent that the person is entitled, as against the company and the liquidator, to retain possession of the books.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6A), see subsection 13.3(3) of the *Criminal Code*.

(6B) An offence based on subsection (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

(7) In this section:

*liquidator* includes a provisional liquidator.

**530C Warrant to search for, and seize, company's property or books**

(1) The Court may issue a warrant under subsection (2) if:

(a) a company is being wound up or a provisional liquidator of a company is acting; and

(b) on application by the liquidator or provisional liquidator, as the case may be, or by ASIC, the Court is satisfied that a person:

(i) has concealed or removed property of the company with the result that the taking of the property into the custody or control of the liquidator or provisional liquidator will be prevented or delayed; or

(ii) has concealed, destroyed or removed books of the company or is about to do so.

(2) The warrant may authorise a specified person, with such help as is reasonably necessary:

(a) to search for and seize property or books of the company in the possession of the person referred to in subsection (1); and

(b) to deliver, as specified in the warrant, property or books seized under it.

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- (3) In order to seize property or books under the warrant, the specified person may break open a building, room or receptacle where the property is or the books are, or where the person reasonably believes the property or books to be.
- (4) A person who has custody of property or a book because of the execution of the warrant must retain it until the Court makes an order for its disposal.

**532 Disqualification of liquidator**

(1A) In this section:

*liquidator* includes a provisional liquidator.

- (1) Subject to this section, a person must not consent to be appointed, and must not act, as liquidator of a company unless he or she is a registered liquidator.
- (2) Subject to this section, a person must not, except with the leave of the Court, seek to be appointed, or act, as liquidator of a company:
  - (a) if the person, or a body corporate in which the person has a substantial holding, is indebted in an amount exceeding \$5,000 to the company or a body corporate related to the company; or
  - (b) if the person is, otherwise than in his or her capacity as liquidator, a creditor of the company or of a related body corporate in an amount exceeding \$5,000; or
  - (c) if:
    - (i) the person is an officer or employee of the company (otherwise than by reason of being a liquidator of the company or of a related body corporate); or
    - (ii) the person is an officer or employee of any body corporate that is a secured party in relation to property of the company; or
    - (iii) the person is an auditor of the company; or
    - (iv) the person is a partner or employee of an auditor of the company; or



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- (v) the person is a partner, employer or employee of an officer of the company; or
  - (vi) the person is a partner or employee of an employee of an officer of the company.
- (3) For the purposes of paragraph (2)(a), disregard a debt owed by a natural person to a body corporate if:
- (a) the body corporate is:
    - (i) an Australian ADI; or
    - (ii) a body corporate registered under section 21 of the *Life Insurance Act 1995*; and
  - (b) the debt arose because of a loan that the body corporate or entity made to the person in the ordinary course of its ordinary business; and
  - (c) the person used the amount of the loan to pay the whole or part of the purchase price of premises that the person uses as their principal place of residence.
- (4) Subsection (1) and paragraph (2)(c) do not apply to a members' voluntary winding up of a proprietary company.
- (5) Paragraph (2)(c) does not apply to a creditors' voluntary winding up if, by a resolution of the creditors passed at a meeting of the creditors of which 7 days notice has been given to every creditor stating the purpose of the meeting, it is determined that that paragraph does not so apply.
- (6) For the purposes of subsection (2), a person is taken to be an officer, employee or auditor of a company if:
- (a) the person is an officer, employee or auditor of a related body corporate; or
  - (b) except where ASIC, if it thinks fit in the circumstances of the case, directs that this paragraph does not apply in relation to the person—the person has, at any time within the immediately preceding period of 2 years, been an officer, employee, auditor or promoter of the company or of a related body corporate.

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- (8) A person must not consent to be appointed, and must not act, as liquidator of a company that is being wound up by order of the Court if the person is not entitled to act as such a liquidator in accordance with the current conditions (if any) imposed on the person.
- (9) A person must not be appointed as liquidator of a company unless the person has, before his or her appointment, consented in writing to act as liquidator of the company.
- (10) An offence based on subsection (1), (2), (8) or (9) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### 533 Reports by liquidator

- (1) If it appears to the liquidator of a company, in the course of a winding up of the company, that:
  - (a) a past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or
  - (b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:
    - (i) may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or
    - (ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company; or
  - (c) the company may be unable to pay its unsecured creditors more than 50 cents in the dollar;

the liquidator must:

- (d) as soon as practicable, and in any event within 6 months, after it so appears to him or her, lodge a report with respect to the matter and state in the report whether he or she proposes to make an application for an examination or order under section 597; and

- (e) give ASIC such information, and give to it such access to and facilities for inspecting and taking copies of any documents, as ASIC requires.
- (2) The liquidator may also, if he or she thinks fit, lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to the notice of ASIC.
- (3) If it appears to the Court, in the course of winding up a company:
  - (a) that a past or present officer or employee, or a contributory or member, of the company has been guilty of an offence under a law referred to in paragraph (1)(a) in relation to the company; or
  - (b) that a person who has taken part in the formation, promotion, administration, management or winding up of the company has engaged in conduct referred to in paragraph (1)(b) in relation to the company;and that the liquidator has not lodged with ASIC a report with respect to the matter, the Court may, on the application of a person interested in the winding up, direct the liquidator so to lodge such a report.

#### **534 Prosecution by liquidator of delinquent officers and members**

- (1) Where:
  - (a) a report has been lodged under section 533; and
  - (b) it appears to ASIC that the matter is not one in respect of which a prosecution ought to be begun;it must inform the liquidator accordingly, and the liquidator may begin a prosecution for any offence referred to in the report.
- (2) ASIC may direct that the whole or a specified part of the costs and expenses properly incurred by a liquidator in proceedings under this section must be paid out of money of ASIC.
- (3) Subject to a direction under subsection (2), to any security interests in the property of the company and to any debts to which this Act

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gives priority, all such costs and expenses are payable out of that property as part of the costs of the winding up.

**535 When liquidator has qualified privilege**

- (1) A liquidator has qualified privilege in respect of a statement that he or she makes, whether orally or in writing, in the course of his or her duties as liquidator.
- (2) In this section:

*liquidator* includes a provisional liquidator.

**537 Notice of appointment and address of liquidator**

- (1A) In this section:

*liquidator* includes a provisional liquidator.

- (1) A liquidator must, within 14 days after his or her appointment, lodge notice in the prescribed form of his or her appointment and of the address of his or her office and, in the event of any change in the situation of his or her office, must, within 14 days after the change, lodge notice in the prescribed form of the change.
- (2) A liquidator must, within 14 days after his or her resignation or removal from office, lodge notice of the resignation or removal in the prescribed form.

## **Division 4—General**

### **541 Notification that company is in liquidation**

- (1) A company that is being wound up must set out, in every public document, and in every negotiable instrument, of the company, after the name of the company where it first appears, the expression *in liquidation*.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **543 Investment of surplus funds on general account**

- (1) Whenever the cash balance standing to the credit of a company that is in the course of being wound up is in excess of the amount that, in the opinion of the committee of inspection, or, if there is no committee of inspection, of the liquidator, is required for the time being to answer demands in respect of the property of the company, the liquidator, if so directed in writing by the committee of inspection, or, if there is not committee of inspection, the liquidator himself or herself, may, unless the Court on application by any creditor thinks fit to order otherwise and so orders, invest the sum or any part of the sum:
  - (a) in any manner in which trustees are for the time being authorised by law to invest trust funds; or
  - (b) on deposit with an eligible money market dealer; or
  - (c) on deposit at interest with any bank;and any interest received in respect of that money so invested forms part of the property of the company.
- (2) Whenever any part of the money so invested is, in the opinion of the committee of inspection, or, if there is no committee of inspection, of the liquidator, required to answer any demands in respect of the property of the company, the committee of inspection may direct, or, if there is no committee of inspection,

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the liquidator may arrange for, the sale or realisation of such part of the securities as is necessary.

**544 Unclaimed money to be paid to ASIC**

- (1) Where a liquidator of a company has in his or her hands or under his or her control:
  - (a) any amount being a dividend or other money that has remained unclaimed for more than 6 months after the day when the dividend or other money became payable; or
  - (b) after making a final distribution, any unclaimed or undistributed amount of money arising from the property of the company;he or she must forthwith pay that money to ASIC to be dealt with under Part 9.7.
- (1A) If a liquidator has, or has control of, the money of a company that has no members, the liquidator must pay it to ASIC as soon as practicable for it to be dealt with under Part 9.7.
- (2) The Court may at any time, on the application of ASIC:
  - (a) order a liquidator of a company to submit to it an account, verified by affidavit, of any unclaimed or undistributed funds, dividends or other money in his or her hands or under his or her control; and
  - (b) direct an audit of accounts submitted to it in accordance with paragraph (a); and
  - (c) direct a liquidator of a company to pay any money referred to in paragraph (a) to ASIC to be dealt with under Part 9.7.
- (3) Where a liquidator of a company pays money to ASIC pursuant to subsection (1) or (1A) or an order of the Court made under paragraph (2)(c), the liquidator is entitled to a receipt for the money so paid and the giving of that receipt discharges the liquidator from any liability in respect of the money.
- (4) For the purposes of this section the Court may exercise all the powers conferred by this Act with respect to the discovery and

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realisation of the property of a company and the provisions of this Act with respect to the exercise of those powers apply, with such adaptations as are prescribed, to proceedings under this section.

- (5) The provisions of this section do not, except as expressly declared in this Act, deprive a person of any other right or remedy to which the person is entitled against the liquidator or another person.

**545 Expenses of winding up where property insufficient**

- (1) Subject to this section, a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property.
- (2) The Court or ASIC may, on the application of a creditor or a contributory, direct a liquidator to incur a particular expense on condition that the creditor or contributory indemnifies the liquidator in respect of the recovery of the amount expended and, if the Court or ASIC so directs, gives such security to secure the amount of the indemnity as the Court or ASIC thinks reasonable.
- (3) Nothing in this section is taken to relieve a liquidator of any obligation to lodge a document (including a report) with ASIC under any provision of this Act by reason only that he or she would be required to incur expense in order to perform that obligation.

## Division 6—Proof and ranking of claims

### Subdivision A—Admission to proof of debts and claims

#### 553 Debts or claims that are provable in winding up

- (1) Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.
- (1A) Even though the circumstances giving rise to a debt payable by the company, or a claim against the company, occur on or after the relevant date, the debt or claim is admissible to proof against the company in the winding up if:
- (a) the circumstances occur at a time when the company is under a deed of company arrangement; and
  - (b) the company is under the deed immediately before the resolution or court order that the company be wound up.

This subsection has effect subject to the other sections in this Division.

Note 1: See Division 10 of Part 5.3A (sections 444A-444H) for the provisions dealing with deeds of company arrangement.

Note 2: See paragraph 513A(d) for deeds that are followed immediately by court ordered winding up. See paragraphs 513B(c), (d) and (da) for deeds that are followed immediately by voluntary winding up. Subsections 446A(2) and 446AA(2) and section 446B provide that companies are taken in certain circumstances to have passed resolutions that they be wound up.

Note 3: A debt or claim admissible to proof under subsection (1A) will only be covered by paragraph 556(1)(a) if the administrator of the deed is personally liable for the debt or claim (see subsection 556(1AA)).

- (1B) For the purpose of applying the other sections of this Division to a debt or claim that is admissible to proof under subsection (1A), the



relevant date for the debt or claim is the date on which the deed terminates.

- (2) Where, after the relevant date, an order is made under section 91 of the ASIC Act against a company that is being wound up, the amount that, pursuant to the order, the company is liable to pay is admissible to proof against the company.

### **553A Member cannot prove debt unless contributions paid**

A debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is not admissible to proof against the company unless the person has paid to the company or the liquidator all amounts that the person is liable to pay as a member of the company.

### **553AA Selling shareholder cannot prove debt unless documents given**

The selling shareholder in a share buy-back may claim in a winding up of the company but is not entitled to a distribution of money or property unless the shareholder has discharged the shareholder's obligations to give documents in connection with the buy-back.

Note: The selling shareholder's claim ranks after those of non-member creditors and before those of other member creditors (see section 563AA).

### **553AB Superannuation contribution debts not admissible to proof**

*Whole of superannuation contribution debt*

- (1) In a winding up, the liquidator must determine that the whole of a debt by way of a superannuation contribution is not admissible to proof against the company if:
- (a) a debt by way of superannuation guarantee charge, or by way of a liability to pay the amount of an estimate under

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Division 268 in Schedule 1 to the *Taxation Administration Act 1953*:

- (i) has been paid; or
  - (ii) is, or is to be, admissible to proof against the company; and
- (b) the liquidator is satisfied that the superannuation guarantee charge or estimate liability is attributable to the whole of the first-mentioned debt.
- (2) If the liquidator determines, under subsection (1), that the whole of a debt is not admissible to proof against the company, the whole of the debt is extinguished.

*Part of superannuation contribution debt*

- (3) In a winding up, the liquidator must determine that a particular part of a debt by way of a superannuation contribution is not admissible to proof against the company if:
- (a) a debt by way of superannuation guarantee charge, or by way of a liability to pay the amount of an estimate under Division 268 in Schedule 1 to the *Taxation Administration Act 1953*:
    - (i) has been paid; or
    - (ii) is, or is to be, admissible to proof against the company; and
  - (b) the liquidator is satisfied that the superannuation guarantee charge or estimate liability is attributable to that part of the first-mentioned debt.
- (4) If the liquidator determines, under subsection (3), that a part of a debt is not admissible to proof against the company, that part of the debt is extinguished.

*Definition*

- (5) In this section:

*superannuation contribution* has the same meaning as in section 556.

**553B Insolvent companies—penalties and fines not generally provable**

- (1) Subject to subsection (2), penalties or fines imposed by a court in respect of an offence against a law are not admissible to proof against an insolvent company.
- (2) An amount payable under a pecuniary penalty order, or an interstate pecuniary penalty order, within the meaning of the *Proceeds of Crime Act 1987*, is admissible to proof against an insolvent company.

**553C Insolvent companies—mutual credit and set-off**

- (1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:
  - (a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and
  - (b) the sum due from the one party is to be set off against any sum due from the other party; and
  - (c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.
- (2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

**553D Debts or claims may be proved formally or informally**

- (1) A debt or claim must be proved formally if the liquidator, in accordance with the regulations, requires it to be proved formally.

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- (2) A debt or claim that is not required to be proved formally:
  - (a) may be proved formally; or
  - (b) may be proved in some other way, subject to compliance with the requirements of the regulations (if any) relating to the informal proof of debts and claims.
- (3) A debt or claim is proved formally if it satisfies the requirements of the regulations relating to the formal proof of debts and claims.

**553E Application of Bankruptcy Act to winding up of insolvent company**

Subject to this Division, in the winding up of an insolvent company the same rules are to prevail and be observed with regard to debts provable as are in force for the time being under the *Bankruptcy Act 1966* in relation to the estates of bankrupt persons (except the rules in sections 82 to 94 (inclusive) and 96 of that Act), and all persons who in any such case would be entitled to prove for and receive dividends out of the property of the company may come in under the winding up and make such claims against the company as they respectively are entitled to because of this section.

**Subdivision B—Computation of debts and claims**

**554 General rule—compute amount as at relevant date**

- (1) The amount of a debt or claim of a company (including a debt or claim that is for or includes interest) is to be computed for the purposes of the winding up as at the relevant date.
- (2) Subsection (1) does not apply to an amount admissible to proof under subsection 553(2).

**554A Determination of value of debts and claims of uncertain value**

- (1) This section applies where, in the winding up of a company, the liquidator admits a debt or claim that, as at the relevant date, did not bear a certain value.

- (2) The liquidator must:
- (a) make an estimate of the value of the debt or claim as at the relevant date; or
  - (b) refer the question of the value of the debt or claim to the Court.
- (3) A person who is aggrieved by the liquidator's estimate of the value of the debt or claim may, in accordance with the regulations, appeal to the Court against the liquidator's estimate.
- (4) If:
- (a) the liquidator refers the question of the value of the debt or claim to the Court; or
  - (b) a person appeals to the Court against the liquidator's estimate of the value of the debt or claim;
- the Court must:
- (c) make an estimate of the value of the debt or claim as at the relevant date; or
  - (d) determine a method to be applied by the liquidator in working out the value of the debt or claim as at the relevant date.
- (5) If the Court determines a method to be applied by the liquidator in working out the value of the debt or claim, the liquidator must work out the value of the debt or claim as at the relevant date in accordance with that method.
- (6) If:
- (a) the Court has determined a method to be applied by the liquidator in working out the value of the debt or claim as at the relevant date; and
  - (b) a person is aggrieved by the way in which that method has been applied by the liquidator in working out that value;
- the person may, in accordance with the regulations, appeal to the Court against the way in which the method was applied.
- (7) If:

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- (a) a person appeals to the Court against the way in which the liquidator, in working out the value of the debt or claim, applied a method determined by the court; and
  - (b) the Court is satisfied that the liquidator did not correctly apply that method;
- the Court must work out the value of the debt or claim as at the relevant date in accordance with that method.
- (8) For the purposes of this Division, the amount of the debt or claim that is admissible to proof is the value as estimated or worked out under this section.

**554B Discounting of debts payable after relevant date**

The amount of a debt that is admissible to proof but that, as at the relevant date, was not payable by the company until an ascertained or ascertainable date (the *future date*) after the relevant date is the amount payable on the future date reduced by the amount of the discount worked out in accordance with the regulations.

**554C Conversion into Australian currency of foreign currency debts or claims**

- (1) This section applies if the amount of a debt or claim admissible to proof against a company would, apart from this section, be an amount of foreign currency.
- (2) If the company and the creditor or claimant have, in an instrument created before the relevant date, agreed on a method to be applied for the purpose of converting the company's liability in respect of the debt or claim into Australian currency, the amount of the debt or claim that is admissible to proof is the equivalent in Australian currency of the amount of foreign currency, worked out as at the relevant date and in accordance with the agreed method.
- (3) If subsection (2) does not apply, the amount of the debt or claim that is admissible to proof is the equivalent in Australian currency of the amount of foreign currency, worked out by reference to the

opening carded on demand airmail buying rate in relation to the foreign currency available at the Commonwealth Bank of Australia on the relevant date.

### **Subdivision C—Special provisions relating to secured creditors of insolvent companies**

#### **554D Application of Subdivision**

- (1) This Subdivision applies in relation to the proof of a secured debt in the winding up of an insolvent company.
- (2) For the purposes of the application of this Subdivision in relation to a secured debt of an insolvent company that is being wound up, the amount of the debt is taken to be the amount of the debt as at the relevant date (as worked out in accordance with Subdivision B).

#### **554E Proof of debt by secured creditor**

- (1) In the winding up of an insolvent company, a secured creditor is not entitled to prove the whole or a part of the secured debt otherwise than in accordance with this section and with any other provisions of this Act or the regulations that are applicable to proving the debt.
- (2) The creditor's proof of debt must be in writing.
- (3) If the creditor surrenders the security interest to the liquidator for the benefit of creditors generally, the creditor may prove for the whole of the amount of the secured debt.
- (4) If the creditor realises the security interest, the creditor may prove for any balance due after deducting the net amount realised, unless the liquidator is not satisfied that the realisation has been effected in good faith and in a proper manner.
- (5) If the creditor has not realised or surrendered the security interest, the creditor may:

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- (a) estimate its value; and
  - (b) prove for the balance due after deducting the value so estimated.
- (6) If subsection (5) applies, the proof of debt must include particulars of the security interest and the creditor's estimate of its value.

**554F Redemption of security interest by liquidator**

- (1) This section applies where a secured creditor's proof of debt is in respect of the balance due after deducting the creditor's estimate of the value of the security interest.
- (2) The liquidator may, at any time, redeem the security interest on payment to the creditor of the amount of the creditor's estimate of its value.
- (3) If the liquidator is dissatisfied with the amount of the creditor's estimate of the value of the security interest, the liquidator may require the property comprised in the security interest to be offered for sale at such times and on such terms and conditions as are agreed on by the creditor and the liquidator or, in default of agreement, as the Court determines.
- (4) If the property is offered for sale by public auction, both the creditor and the liquidator are entitled to bid for, and purchase, the property.
- (5) The creditor may at any time, by notice in writing, require the liquidator to elect whether to exercise the power to redeem the security interest or to require it to be sold and, if the liquidator does not, within 3 months after receiving the notice, notify the creditor, in writing, that the liquidator elects to exercise the power:
  - (a) the liquidator is not entitled to exercise it; and



- (b) subject to subsection (6), any equity of redemption or other interest in the property comprised in the security interest that is vested in the company or the liquidator vests in the creditor; and
  - (c) the amount of the creditor's debt is, for the purposes of this Division, taken to be reduced by the amount of the creditor's estimate of the value of the security interest.
- (6) The vesting of an equity of redemption or other interest in property because of paragraph (5)(b) is subject to compliance with any law requiring the transmission of such interests in property to be registered.

### **554G Amendment of valuation**

- (1) If a secured creditor's proof of debt is in respect of the balance due after deducting the creditor's estimate of the value of the security interest, the creditor may, at any time, apply to the liquidator or the Court for permission to amend the proof of debt by altering the estimated value.
- (2) If the liquidator or the Court is satisfied:
  - (a) that the estimate of the value of the security interest was made in good faith on a mistaken basis; or
  - (b) that the value of the security interest has changed since the estimate was made;the liquidator or the Court may permit the creditor to amend the proof of debt accordingly.
- (3) If the Court permits the creditor to amend the proof of debt, it may do so on such terms as it thinks just and equitable.

### **554H Repayment of excess**

- (1) Where a creditor who has amended a proof of debt under section 554G has received, in the winding up of the debtor company, an amount in excess of the amount to which the creditor would have been entitled under the amended proof of debt, the

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creditor must, without delay, repay the amount of the excess to the liquidator.

- (2) Where a creditor who has so amended a proof of debt has received, in the winding up of the debtor company, less than the amount to which the creditor would have been entitled under the amended proof of debt, the creditor is entitled to be paid, out of the money remaining for distribution in the winding up, the amount of the deficiency before any of that money is applied in the payment of future distributions, but the creditor is not entitled to affect a distribution made before the amendment of the proof of debt.

**554J Subsequent realisation of security interest**

Where:

- (a) a secured creditor's proof of debt is in respect of the balance due after deducting the creditor's estimate of the value of the security interest; and
- (b) subsequently:
- (i) the creditor realises the security interest; or
  - (ii) the security interest is realised under section 554F;

the net amount realised is to be substituted for the estimated value of the security interest and section 554H applies as if the proof of debt had been amended accordingly under section 554G.

**Subdivision D—Priorities**

**555 Debts and claims proved to rank equally except as otherwise provided**

Except as otherwise provided by this Act, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately.

### 556 Priority payments

- (1) Subject to this Division, in the winding up of a company the following debts and claims must be paid in priority to all other unsecured debts and claims:
- (a) first, expenses (except deferred expenses) properly incurred by a relevant authority in preserving, realising or getting in property of the company, or in carrying on the company's business;
  - (b) if the Court ordered the winding up—next, the costs in respect of the application for the order (including the applicant's taxed costs payable under section 466);
  - (ba) if:
    - (i) during the period of 12 months ending when the winding up commenced, an application (the *first application*) was made under section 459P for the company to be wound up in insolvency; and
    - (ii) when the first application was made, the company was not under administration; and
    - (iii) the company began to be under administration at a time after the first application was made; and
    - (iv) the first application was not withdrawn or dismissed before the administration began; and
    - (v) the Court did not, in response to the first application, make an order under section 459A that the company be wound up in insolvency;next, the costs in respect of the first application;
  - (c) next, the debts for which paragraph 443D(a) or (aa) entitles an administrator of the company to be indemnified (even if the administration ended before the relevant date), except expenses covered by paragraph (a) of this subsection and deferred expenses;
  - (da) if the Court ordered the winding up—next, costs and expenses that are payable under subsection 475(8) out of the company's property;

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- (daa) if the company resolved by special resolution that it be wound up voluntarily—next, costs and expenses that are payable under subsection 446C(8) out of the company’s property;
- (db) next, costs that form part of the expenses of the winding up because of subsection 539(6), or subsection 70-15(5) (audit of administration books by ASIC) or section 90-27 (review by another registered liquidator) of Schedule 2;
- (dd) next, any other expenses (except deferred expenses) properly incurred by a relevant authority;
- (de) next, the deferred expenses;
- (df) if a committee of inspection has been appointed for the purposes of the winding up—next, expenses incurred by a person as a member of the committee;
- (e) subject to subsection (1A)—next:
  - (i) wages, superannuation contributions and superannuation guarantee charge payable by the company in respect of services rendered to the company by employees before the relevant date; or
  - (ii) liabilities to pay the amounts of estimates under Division 268 in Schedule 1 to the *Taxation Administration Act 1953* of superannuation guarantee charge mentioned in subparagraph (i);
- (f) next, amounts due in respect of injury compensation, being compensation the liability for which arose before the relevant date;
- (g) subject to subsection (1B)—next, all amounts due:
  - (i) on or before the relevant date; and
  - (ii) because of an industrial instrument; and
  - (iii) to, or in respect of, employees of the company; and
  - (iv) in respect of leave of absence;
- (h) subject to subsection (1C)—next, retrenchment payments payable to employees of the company.

(1AA) Paragraph (1)(a) does not apply to expenses:

- (a) incurred by the administrator of a deed of company arrangement; and
  - (b) relating to a debt or claim admissible to proof under subsection 553(1A);
- unless the administrator is personally liable for the expenses.

*Superannuation guarantee charge*

- (1A) The amount or total paid under paragraph (1)(e) to, or in respect of, an excluded employee of the company must be such that so much (if any) of it as is attributable to non-priority days does not exceed \$2,000.
- (1AB) For the purposes of paragraph (1)(e), if:
- (a) the company has a superannuation guarantee shortfall for a quarter; and
  - (b) the shortfall relates to one or more employees; and
  - (c) the quarter ends before the relevant date;
- superannuation guarantee charge in respect of the quarter is taken to be payable by the company in respect of services rendered to the company by those employees before the relevant date.
- (1AC) If:
- (a) the company has a superannuation guarantee shortfall for a quarter; and
  - (b) the shortfall relates to one or more employees; and
  - (c) the relevant date occurs during the quarter; and
  - (d) the relevant date is not the first day of the quarter;
- then:
- (e) for the purposes of paragraph (1)(e), so much of the superannuation guarantee charge in respect of the quarter as is attributable to the period before the relevant date is taken to be payable by the company in respect of services rendered to the company by those employees before the relevant date; and
  - (f) the remainder of the superannuation guarantee charge in respect of the quarter is taken:

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- (i) to be an expense referred to in paragraph (1)(a); and
- (ii) not to be an amount of superannuation guarantee charge referred in paragraph (1)(e).

(1AD) If:

- (a) the company has a superannuation guarantee shortfall for a quarter; and
  - (b) the shortfall relates to one or more employees; and
  - (c) the relevant date is the first day of the quarter;
- the superannuation guarantee charge in respect of the quarter is taken:
- (d) to be an expense referred to in paragraph (1)(a); and
  - (e) not to be an amount of superannuation guarantee charge referred in paragraph (1)(e).

(1AE) For the purposes of paragraph (1)(e), if:

- (a) the company has a superannuation guarantee shortfall for a quarter; and
- (b) the shortfall relates to one or more employees; and
- (c) the quarter begins after the relevant date; and
- (d) one or more payments were made by the company during the quarter on account of wages payable to those employees in respect of services rendered to the company by those employees before the relevant date; and
- (e) those payments were made as a result of an advance of money by a person after the relevant date for the purpose of making those payments;

then:

- (f) for the purposes of paragraph (1)(e), so much of the superannuation guarantee charge in respect of the quarter as is attributable to those payments is taken to be payable by the company in respect of services rendered to the company by those employees before the relevant date; and
- (g) the remainder of the superannuation guarantee charge in respect of the quarter is taken:
  - (i) to be an expense referred to in paragraph (1)(a); and

- (ii) not to be an amount of superannuation guarantee charge referred in paragraph (1)(e).

(1AF) If:

- (a) the company has a superannuation guarantee shortfall for a quarter; and
- (b) the shortfall relates to one or more employees; and
- (c) the relevant date occurs during the quarter; and
- (d) one or more payments were made by the company during the quarter on account of wages payable to those employees in respect of services rendered to the company by those employees before the relevant date; and
- (e) those payments were made as a result of an advance of money by a person after the relevant date for the purpose of making those payments;

then:

- (f) for the purposes of paragraph (1)(e), so much of the superannuation guarantee charge in respect of the quarter as is attributable to either or both of the following:
  - (i) those payments;
  - (ii) the period before the relevant date;is taken to be payable by the company in respect of services rendered to the company by those employees before the relevant date; and
- (g) the remainder of the superannuation guarantee charge in respect of the quarter is taken:
  - (i) to be an expense referred to in paragraph (1)(a); and
  - (ii) not to be an amount of superannuation guarantee charge referred in paragraph (1)(e); and
- (h) subsections (1AC) and (1AD) do not apply to the superannuation guarantee charge in respect of the quarter.

(1AG) Subsections (1AC) to (1AF) apply to a liability to pay the amount of an estimate of superannuation guarantee charge for a quarter in the same way as they apply to superannuation guarantee charge payable for the quarter.

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*Leave amounts*

- (1B) The amount or total paid under paragraph (1)(g) to, or in respect of, an excluded employee of the company must be such that so much (if any) of it as is attributable to non-priority days does not exceed \$1,500.

*Retrenchment payments*

- (1C) A payment under paragraph (1)(h) to an excluded employee of the company must not include an amount attributable to non-priority days.

*Definitions*

- (2) In this section:

**company** means a company that is being wound up.

**deferred expenses**, in relation to a company, means expenses properly incurred by a relevant authority, in so far as they consist of:

- (a) remuneration, or fees for services, payable to the relevant authority; or
- (b) expenses incurred by the relevant authority in respect of the supply of services to the relevant authority by:
  - (i) a partnership of which the relevant authority is a member; or
  - (ii) an employee of the relevant authority; or
  - (iii) a member or employee of such a partnership; or
- (c) expenses incurred by the relevant authority in respect of the supply to the relevant authority of services that it is reasonable to expect could have instead been supplied by:
  - (i) the relevant authority; or
  - (ii) a partnership of which the relevant authority is a member; or
  - (iii) an employee of the relevant authority; or
  - (iv) a member or employee of such a partnership.



**employee**, in relation to a company, means a person:

- (a) who has been or is an employee of the company, whether remunerated by salary, wages, commission or otherwise; and
- (b) whose employment by the company commenced before the relevant date.

**excluded employee**, in relation to a company, means:

- (a) an employee of the company who has been:
  - (i) at any time during the period of 12 months ending on the relevant date; or
  - (ii) at any time since the relevant date;or who is, a director of the company;
- (b) an employee of the company who has been:
  - (i) at any time during the period of 12 months ending on the relevant date; or
  - (ii) at any time since the relevant date;or who is, the spouse of an employee of the kind referred to in paragraph (a); or
- (c) an employee of the company who is a relative (other than a spouse) of an employee of the kind referred to in paragraph (a).

**non-priority day**, in relation to an excluded employee of a company, means a day on which the employee was:

- (a) if paragraph (a) of the definition of **excluded employee** applies—a director of the company; or
- (b) if paragraph (b) of that definition applies—a spouse of an employee of the kind referred to in paragraph (a) of that definition; or
- (c) if paragraph (c) of that definition applies—a relative (other than a spouse) of an employee of the kind referred to in paragraph (a) of that definition;

even if the day was more than 12 months before the relevant date.

**quarter** has the same meaning as in the *Superannuation Guarantee (Administration) Act 1992*.

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**relevant authority**, in relation to a company, means any of the following:

- (a) in any case—a liquidator or provisional liquidator of the company;
- (c) in any case—an administrator of the company, even if the administration ended before the winding up began;
- (d) in any case—an administrator of a deed of company arrangement executed by the company, even if the deed terminated before the winding up began.

**retrenchment payment**, in relation to an employee of a company, means an amount payable by the company to the employee, by virtue of an industrial instrument, in respect of the termination of the employee's employment by the company, whether the amount becomes payable before, on or after the relevant date.

**superannuation contribution**, in relation to a company, means a contribution by the company to a fund or scheme for the purposes of making provision for, or obtaining, superannuation benefits (including defined benefits) for an employee of the company, or for dependants of such an employee.

### **558 Debts due to employees**

- (1) Where a contract of employment with a company being wound up was subsisting immediately before the relevant date, the employee under the contract is, whether or not he or she is a person referred to in subsection (2), entitled to payment under section 556 as if his or her services with the company had been terminated by the company on the relevant date.
- (2) Where, for the purposes of the winding up of a company, a liquidator employs a person whose services with the company had been terminated by reason of the winding up, that person is, for the purpose of calculating any entitlement to payment for leave of absence, or any entitlement to a retrenchment amount in respect of employment, taken, while the liquidator employs him or her for those purposes, to be employed by the company.

- (3) Subject to subsection (4), where, after the relevant date, an amount in respect of long service leave or extended leave, or a retrenchment amount, becomes payable to a person referred to in subsection (2) in respect of the employment so referred to, the amount is a cost of the winding up.
- (4) Where, at the relevant date, the length of qualifying service of a person employed by a company that is being wound up is insufficient to entitle him or her to any amount in respect of long service leave or extended leave, or to any retrenchment amount in respect of employment by the company, but, by the operation of subsection (2) he or she becomes entitled to such an amount after that date, that amount:
- (a) is a cost of the winding up to the extent of an amount that bears to that amount the same proportion as the length of his or her qualifying service after that relevant date bears to the total length of his or her qualifying service; and
  - (b) is, to the extent of the balance of that amount, taken, for the purposes of section 556, to be an amount referred to in paragraph 556(1)(g), or a retrenchment payment payable to the person, as the case may be.
- (5) In this section, **retrenchment amount**, in relation to employment of a person, means an amount payable to the person, by virtue of an industrial instrument, in respect of termination of the employment.

### **559 Debts of a class to rank equally**

The debts of a class referred to in each of the paragraphs of subsection 556(1) rank equally between themselves and must be paid in full, unless the property of the company is insufficient to meet them, in which case they must be paid proportionately.

### **560 Advances for company to make priority payments in relation to employees**

If:

- (a) a payment has been made by a company:

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- (i) on account of wages; or
  - (ii) on account of superannuation contributions (within the meaning of section 556); or
  - (iii) in respect of leave of absence, or termination of employment, under an industrial instrument; and
- (b) the payment was made as a result of an advance of money by a person (whether before, on or after the relevant date) for the purpose of making the payment;
- then:
- (c) the person by whom the money was advanced has the same rights under this Chapter as a creditor of the company; and
  - (d) subject to paragraph (e), the person by whom the money was advanced has, in the winding up of the company, the same right of priority of payment in respect of the money so advanced and paid as the person who received the payment would have had if the payment had not been made; and
  - (e) the right of priority conferred by paragraph (d) is not to exceed the amount by which the sum in respect of which the person who received the payment would have been entitled to priority in the winding up has been diminished by reason of the payment.

**561 Priority of employees' claims over circulating security interests**

So far as the property of a company available for payment of creditors other than secured creditors is insufficient to meet payment of:

- (a) any debt referred to in paragraph 556(1)(e), (g) or (h); and
- (b) any amount that pursuant to subsection 558(3) or (4) is a cost of the winding up, being an amount that, if it had been payable on or before the relevant date, would have been a debt referred to in paragraph 556(1)(e), (g) or (h); and
- (c) any amount in respect of which a right of priority is given by section 560;

payment of that debt or amount must be made in priority over the claims of a secured party in relation to a circulating security

interest created by the company and may be made accordingly out of any property comprised in or subject to the circulating security interest.

### **562 Application of proceeds of contracts of insurance**

- (1) Where a company is, under a contract of insurance (not being a contract of reinsurance) entered into before the relevant date, insured against liability to third parties, then, if such a liability is incurred by the company (whether before or after the relevant date) and an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, the amount must, after deducting any expenses of or incidental to getting in that amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability, or any part of that liability remaining undischarged, in priority to all payments in respect of the debts mentioned in section 556.
- (2) If the liability of the insurer to the company is less than the liability of the company to the third party, subsection (1) does not limit the rights of the third party in respect of the balance.
- (3) This section has effect notwithstanding any agreement to the contrary.

### **562A Application of proceeds of contracts of reinsurance**

- (1) This section applies where:
  - (a) a company is insured, under a contract of reinsurance entered into before the relevant date, against liability to pay amounts in respect of a relevant contract of insurance or relevant contracts of insurance; and
  - (b) an amount in respect of that liability has been or is received by the company or the liquidator under the contract of reinsurance.
- (2) Subject to subsection (4), if the amount received, after deducting expenses of or incidental to getting in that amount, equals or

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exceeds the total of all the amounts that are payable by the company under relevant contracts of insurance, the liquidator must, out of the amount received and in priority to all payments in respect of the debts mentioned in section 556, pay the amounts that are so payable under those contracts of insurance.

- (3) Subject to subsection (4), if subsection (2) does not apply, the liquidator must, out of the amount received and in priority to all payments in respect of the debts mentioned in section 556, pay to each person to whom an amount is payable by the company under a relevant contract of insurance an amount calculated in accordance with the formula:

$$\frac{\text{Particular amount owed}}{\text{Total amount owed}} \times \text{Reinsurance payment}$$

where:

**particular amount owed** means the amount payable to the person under the relevant contract of insurance.

**reinsurance payment** means the amount received under the contract of reinsurance, less any expenses of or incidental to getting in that amount.

**total amount owed** means the total of all the amounts payable by the company under relevant contracts of insurance.

- (4) The Court may, on application by a person to whom an amount is payable under a relevant contract of insurance, make an order to the effect that subsections (2) and (3) do not apply to the amount received under the contract of reinsurance and that that amount must, instead, be applied by the liquidator in the manner specified in the order, being a manner that the Court considers just and equitable in the circumstances.
- (5) The matters that the Court may take into account in considering whether to make an order under subsection (4) include, but are not limited to:

- (a) whether it is possible to identify particular relevant contracts of insurance as being the contracts in respect of which the contract of reinsurance was entered into; and
  - (b) whether it is possible to identify persons who can be said to have paid extra in order to have particular relevant contracts of insurance protected by reinsurance; and
  - (c) whether particular relevant contracts of insurance include statements to the effect that the contracts are to be protected by reinsurance; and
  - (d) whether a person to whom an amount is payable under a relevant contract of insurance would be severely prejudiced if subsections (2) and (3) applied to the amount received under the contract of reinsurance.
- (6) If receipt of a payment under this section only partially discharges a liability of the company to a person, nothing in this section affects the rights of the person in respect of the balance of the liability.
- (7) This section has effect despite any agreement to the contrary.
- (8) In this section:

*relevant contract of insurance* means a contract of insurance entered into by the company, as insurer, before the relevant date.

### **563 Provisions relating to injury compensation**

- (1) Notwithstanding anything in section 556, paragraph 556(1)(f) does not apply in relation to the winding up of a company in any case where:
- (a) the company is being wound up voluntarily merely for the purpose of reconstruction or of amalgamation with another company and the right to the injury compensation has, on the reconstruction or amalgamation, been preserved to the person entitled to it; or
  - (b) the company has entered into a contract with an insurer in respect of any liability for injury compensation.

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- (2) Where injury compensation is payable by way of periodical payments, the amount of that compensation is, for the purposes of paragraph 556(1)(f), taken to be the lump sum for which those periodical payments could, if redeemable, be redeemed under the law under which the periodical payments are made.

**563AA Seller under a buy-back agreement**

- (1) The selling shareholder's claim under a buy-back agreement is postponed until all debts owed to people otherwise than as members of the company have been satisfied.
- (2) The shareholder's claim is not a debt owed by the company to the seller in the shareholder's capacity as a member of the company for the purposes of section 563A.

**563A Postponing subordinate claims**

- (1) The payment of a subordinate claim against a company is to be postponed until all other debts payable by, and claims against, the company are satisfied.
- (2) In this section:

*claim* means a claim that is admissible to proof against the company (within the meaning of section 553).

*debt* means a debt that is admissible to proof against the company (within the meaning of section 553).

*subordinate claim* means:

- (a) a claim for a debt owed by the company to a person in the person's capacity as a member of the company (whether by way of dividends, profits or otherwise); or
- (b) any other claim that arises from buying, holding, selling or otherwise dealing in shares in the company.



## **563AAA Redemption of debentures**

### *Priorities*

- (1) Debentures of a company under a trust deed that are issued in place of debentures under that deed that have been redeemed have the priority that the redeemed debentures would have had if they had never been redeemed.

### *Deposit of debentures to secure advance*

- (2) Debentures of a company are not to be taken to be redeemed merely because:
  - (a) the debentures secure advances on current account or otherwise; and
  - (b) the company's account ceases to be in debit while those debentures remain available.

## **Subdivision E—Miscellaneous**

### **563B Interest on debts and claims from relevant date to date of payment**

- (1) If, in the winding up of a company, the liquidator pays an amount in respect of an admitted debt or claim, there is also payable to the debtor or claimant, as a debt payable in the winding up, interest, at the prescribed rate, on the amount of the payment in respect of the period starting on the relevant date and ending on the day on which the payment is made.
- (2) Subject to subsection (3), payment of the interest is to be postponed until all other debts and claims in the winding up have been satisfied, other than subordinate claims (within the meaning of section 563A).
- (3) If the admitted debt or claim is a debt to which section 554B applied, subsection (2) does not apply to postpone payment of so much of the interest as is attributable to the period starting at the relevant date and ending on the earlier of:

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- (a) the day on which the payment is made; and
- (b) the future date, within the meaning of section 554B.

**563C Debt subordination**

- (1) Nothing in this Division renders a debt subordination by a creditor of a company unlawful or unenforceable, except so far as the debt subordination would disadvantage any creditor of the company who was not a party to, or otherwise concerned in, the debt subordination.
- (2) In this section:

*debt subordination* means an agreement or declaration by a creditor of a company, however expressed, to the effect that, in specified circumstances:

- (a) a specified debt that the company owes the creditor; or
  - (b) a specified part of such a debt;
- will not be repaid until other specified debts that the company owes are repaid to a specified extent.

**564 Power of Court to make orders in favour of certain creditors**

Where in any winding up:

- (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or
- (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;

the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

## **Division 7—Effect on certain transactions**

### **565 Undue preference**

- (1) A settlement, a conveyance or transfer of property, a charge on property, a payment made, or an obligation incurred, before 23 June 1993, by a company that, if it had been made or incurred by a natural person, would, in the event of his or her becoming a bankrupt, be void as against the trustee in the bankruptcy, is, in the event of the company being wound up, void as against the liquidator.
- (2) For the purposes of subsection (1), the date that corresponds with the date of presentation of the petition in bankruptcy in the case of a natural person is the relation-back day.
- (3) For the purposes of this section, the date that corresponds with the date on which a person becomes a bankrupt is the relation-back day.
- (4) Subject to Part 5.3A, a transfer or assignment by a company of all its property to trustees for the benefit of all its creditors is void.

### **566 Effect of floating charge**

A floating charge on the undertaking or property of the company created before 23 June 1993 and within 6 months before the relation-back day is, unless it is proved that the company immediately after the creation of the charge was solvent, invalid except to the amount of any money paid to the company at the time of or subsequently to the creation of and in consideration for the charge together with interest on that amount at the rate of 8% per annum or at such other rate as is prescribed.

### **567 Liquidator's right to recover in respect of certain transactions**

- (1) Where any property, business or undertaking has been acquired by a company for a cash consideration before 23 June 1993 and within

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4 years before the relation-back day in relation to a winding up of the company:

- (a) from a promoter of the company or a spouse of such a promoter, or from a relative of such a promoter or spouse; or
- (b) from a person who was, at the time of the acquisition, a director of the company, from a spouse of such a director, or from a relative of such a person or spouse; or
- (c) from a body corporate that was, at the time of the acquisition, related to the company; or
- (d) from a person who was, at the time of the acquisition, a director of a body corporate that was related to the company, from a spouse of such a person, or from a relative of such a person or spouse;

the liquidator may recover from the person or body corporate from which the property, business or undertaking was acquired any amount by which the cash consideration for the acquisition exceeded the value of the property, business or undertaking at the time of its acquisition.

- (2) Where any property, business or undertaking has been sold by a company for a cash consideration before 23 June 1993 and within 4 years before the relation-back day in relation to a winding up of the company:

- (a) to a promoter of the company or a spouse of such a promoter, or to a relative of such a promoter or spouse; or
- (b) to a person who was, at the time of the sale, a director of the company, to a spouse of such a director, or to a relative of such a person or spouse; or
- (c) to a body corporate that was, at the time of the sale, related to the company; or
- (d) to a person who was, at the time of the sale, a director of a body corporate that was related to the company, to a spouse of such a director, or to a relative of such a person or spouse;

the liquidator may recover from the person or body corporate to which the property, business or undertaking was sold any amount by which the value of the property, business or undertaking at the time of the sale exceeded the cash consideration.

- (3) For the purposes of this section, the value of the property, business or undertaking includes the value of any goodwill, profits or gain that might have been made from the property, business or undertaking.
- (4) In this section, *cash consideration* means any consideration payable otherwise than by the issue of shares in the company.
- (5) Where:
- (a) a disposition of property is made by a company before 23 June 1993 and within 6 months before the relation-back day in relation to a winding up of the company; and
  - (b) the disposition of property confers a preference upon a creditor of the company; and
  - (c) the disposition of property has the effect of discharging an officer of the company from a liability (whether under a guarantee or otherwise and whether contingent or otherwise);
- the liquidator:
- (d) in a case to which paragraph (e) does not apply—may recover from that officer an amount equal to the value of the relevant property, as the case may be; or
  - (e) where the liquidator has recovered from the creditor in respect of the disposition of the relevant property:
    - (i) an amount equal to part of the value of the relevant property; or
    - (ii) part of the relevant property;may recover from that officer an amount equal to the amount by which the value of the relevant property exceeds the sum of any amounts recovered as mentioned in subparagraph (i) and the amount of the value of any property recovered as mentioned in subparagraph (ii).
- (6) Where:
- (a) a liquidator recovers an amount of money from an officer of a company in respect of a disposition of property to a creditor as mentioned in subsection (5); and

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- (b) the liquidator subsequently recovers from that creditor an amount equal to the whole or part of the value of the property disposed of;  
the officer may recover from the liquidator an amount equal to the amount so recovered or the value of the property so recovered.

## **Division 7A—Disclaimer of onerous property**

### **568 Disclaimer by liquidator; application to Court by party to contract**

- (1) Subject to this section, a liquidator of a company may at any time, on the company's behalf, by signed writing disclaim property of the company that consists of:
- (a) land burdened with onerous covenants; or
  - (b) shares; or
  - (c) property that is unsaleable or is not readily saleable; or
  - (d) property that may give rise to a liability to pay money or some other onerous obligation; or
  - (e) property where it is reasonable to expect that the costs, charges and expenses that would be incurred in realising the property would exceed the proceeds of realising the property; or
  - (f) a contract;
- whether or not:
- (g) except in the case of a contract—the liquidator has tried to sell the property, has taken possession of it or exercised an act of ownership in relation to it; or
  - (h) in the case of a contract—the company or the liquidator has tried to assign, or has exercised rights in relation to, the contract or any property to which it relates.

(1AA) This section does not apply to:

- (a) an agreement by the company to buy back its own shares; or
- (b) PPSA retention of title property that is taken to form part of the property of the company because of the definition of ***property*** in section 513AA.

Note: The definition of ***property*** in section 513AA includes PPSA retention of title property of the company, if the security interest in the property has vested in the company in certain situations.

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- (1A) A liquidator cannot disclaim a contract (other than an unprofitable contract or a lease of land) except with the leave of the Court.
- (1B) On an application for leave under subsection (1A), the Court may:
- (a) grant leave subject to such conditions; and
  - (b) make such orders in connection with matters arising under, or relating to, the contract;
- as the Court considers just and equitable.
- (8) Where:
- (a) an application in writing has been made to the liquidator by a person interested in property requiring the liquidator to decide whether he or she will disclaim the property; and
  - (b) the liquidator has, for the period of 28 days after the receipt of the application, or for such extended period as is allowed by the Court, declined or neglected to disclaim the property;
- the liquidator is not entitled to disclaim the property under this section and, in the case of a contract, he or she is taken to have adopted it.
- (9) The Court may, on the application of a person who is, as against the company, entitled to the benefit or subject to the burden of a contract made with the company, make an order:
- (a) discharging the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as the Court thinks proper; or
  - (b) rescinding the contract on such terms as to restitution by or to either party, or otherwise, as the Court thinks proper.
- (10) Amounts payable pursuant to an order under subsection (9) may be proved as a debt in the winding up.
- (13) For the purpose of determining whether property of a company is of a kind to which subsection (1) applies, the liquidator may, by notice served on a person claiming to have an interest in the property, require the person to give to the liquidator within such period, not being less than 14 days, as is specified in the notice, a



statement of the interest claimed by the person and the person must comply with the requirement.

### **568A Liquidator must give notice of disclaimer**

- (1) As soon as practicable after disclaiming property, a liquidator must:
  - (a) lodge a written notice of the disclaimer; and
  - (b) give written notice of the disclaimer to each person who appears to the liquidator to have, or to claim to have, an interest in the property; and
  - (c) if the liquidator has reason to suspect that some person or persons may have, or may claim to have, an interest or interests in the property, but either does not know who, or does not know where, the person is or the persons are—comply with subsection (2); and
  - (d) if a law of the Commonwealth or of a State or Territory requires the transfer or transmission of the property to be registered—give written notice of the disclaimer to the registrar or other person who has the function under that law of registering the transfer or transmission of the property.

Note: For electronic notification under paragraph (b), see section 600G.

- (2) If paragraph (1)(c) applies, the liquidator must cause a notice setting out the prescribed information about the disclaimer to be published in the prescribed manner.

### **568B Application to set aside disclaimer before it takes effect**

- (1) A person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer before it takes effect, but may only do so within 14 days after:
  - (a) if the liquidator gives to the person notice of the disclaimer, because of paragraph 568A(1)(b), before the end of 14 days after the liquidator lodges such notice—the liquidator gives such notice to the person; or

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- (b) if paragraph (a) does not apply but notice of the disclaimer is published under subsection 568A(2) before the end of the 14 days referred to in that paragraph—the last such notice to be so published is so published; or
  - (c) otherwise—the liquidator lodges notice of the disclaimer.
- (2) On an application under subsection (1), the Court:
- (a) may by order set aside the disclaimer; and
  - (b) if it does so—may make such further orders as it thinks appropriate.
- (3) However, the Court may set aside a disclaimer under this section only if satisfied that the disclaimer would cause, to persons who have, or claim to have, interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the company's creditors.

**568C When disclaimer takes effect**

- (1) A disclaimer takes effect if, and only if:
- (a) in a case where only one application under section 568B for an order setting aside the disclaimer, or each of 2 or more such applications, is made within the period that that section prescribes for making the application—the application, or each of the applications, is unsuccessful; or
  - (b) no such application is so made.
- (2) For the purposes of subsection (1), an application under section 568B is successful if, and only if, the result of the application, and all appeals (if any) arising out of the application, being finally determined or otherwise disposed of is an order setting aside the disclaimer (whether or not further orders are also made).
- (3) A disclaimer that takes effect because of subsection (1) is taken to have taken effect on the day after:
- (a) if:

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- (i) the liquidator gave to a person notice of the disclaimer because of paragraph 568A(1)(b); or
  - (ii) notice of the disclaimer was published under subsection 568A(2);
- before the end of 14 days after the liquidator lodged notice of the disclaimer—the last day when the liquidator so gave such notice or such notice was so published; or
- (b) otherwise—the day when the liquidator lodged notice of the disclaimer.

**568D Effect of disclaimer**

- (1) A disclaimer is taken to have terminated, as from the day on which it is taken because of subsection 568C(3) to take effect, the company's rights, interests, liabilities and property in or in respect of the disclaimer property, but does not affect any other person's rights or liabilities except so far as necessary in order to release the company and its property from liability.
- (2) A person aggrieved by the operation of a disclaimer is taken to be a creditor of the company to the extent of any loss suffered by the person because of the disclaimer and may prove such a loss as a debt in the winding up.

**568E Application to set aside disclaimer after it has taken effect**

- (1) With the leave of the Court, a person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer after it has taken effect.
- (2) The Court may give leave only if it is satisfied that it is unreasonable in all the circumstances to expect the person to have applied for an order setting aside the disclaimer before it took effect.
- (3) The Court may give leave subject to conditions.
- (4) On an application under subsection (1), the Court:
  - (a) may by order set aside the disclaimer; and

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- (b) if it does so—may make such further orders as it thinks appropriate, including orders necessary to put the company, the liquidator or anyone else in the same position, as nearly as practicable, as if the disclaimer had never taken effect.
- (5) However, the Court may set aside a disclaimer only if satisfied that the disclaimer has caused, or would cause, to persons who have, or claim to have, interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer (and making any further orders) would cause to:
  - (a) the company's creditors; and
  - (b) persons who have changed their position in reliance on the disclaimer taking effect.

**568F Court may dispose of disclaimed property**

- (1) The Court may order that disclaimed property vest in, or be delivered to:
  - (a) a person entitled to the property; or
  - (b) a person in or to whom it seems to the Court appropriate that the property be vested or delivered; or
  - (c) a person as trustee for a person of a kind referred to in paragraph (a) or (b).
- (2) The Court may make an order under subsection (1):
  - (a) on the application of a person who claims an interest in the property, or is under a liability in respect of the property that this Act has not discharged; and
  - (b) after hearing such persons as it thinks appropriate.
- (3) Subject to subsection (4), where an order is made under subsection (1) vesting property, the property vests immediately, for the purposes of the order, without any conveyance, transfer or assignment.
- (4) Where:

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- (a) a law of the Commonwealth or of a State or Territory requires the transfer of property vested by an order under subsection (1) to be registered; and
  - (b) that law enables the order to be registered;
- the property vests in equity because of the order but does not vest at law until that law has been complied with.

## **Division 7B—Effect on enforcement process against company's property**

### **569 Executions, attachments etc. before winding up**

(1) Where:

- (a) a creditor has issued execution against property of a company, or instituted proceedings to attach a debt due to a company or to enforce a charge or a charging order against property of a company, within 6 months immediately before the commencement of the winding up; and
- (b) the company commences to be wound up;

the creditor must pay to the liquidator an amount equal to the amount (if any) received by the creditor as a result of the execution, attachment or enforcement of the charge or the charging order, less an amount in respect of the costs of the execution, attachment or enforcement of the charge or the charging order, being an amount agreed between the creditor and the liquidator or, if no agreement is reached, an amount equal to the taxed cost of that execution, attachment or enforcement.

(2) Where the creditor has paid to the liquidator an amount in accordance with subsection (1), the creditor may prove in the winding up for the creditor's debt as an unsecured creditor as if the execution or attachment or the enforcement of the charge or the charging order, as the case may be, had not taken place.

(3) Subject to subsections (4) and (5), where a creditor of a company receives:

- (a) notice in writing of an application to the Court for the winding up of the company; or
- (b) notice in writing of the convening of a meeting of the company to consider a resolution that the company be wound up voluntarily;

it is not competent for the creditor to take any action, or any further action, as the case may be, to attach a debt due to the company or

to enforce a charge or a charging order against property of the company.

- (4) Subsection (3) does not affect the right of a creditor to take action or further action if:
- (a) in a case to which paragraph (3)(a) applies—the application has been withdrawn or dismissed; or
  - (b) in a case to which paragraph (3)(b) applies—the meeting of the company has refused to pass the resolution.
- (5) Subsection (3) does not prevent a creditor from performing a binding contract for the sale of property entered into before the creditor received a notice referred to in that subsection.
- (6) Notwithstanding anything contained in this Division, a person who purchases property in good faith:
- (a) under a sale by the sheriff in consequence of the issue of execution against property of a company that, after the sale, commences to be wound up; or
  - (b) under a sale in consequence of the enforcement by a creditor of a charge or a charging order against property of a company that, after the sale, commences to be wound up;
- acquires a good title to it as against the liquidator and the company.
- (7) In this section:

**charge** means a charge created by a law upon registration of a judgment in a registry.

**charging order** means a charging order made by a court in respect of a judgment.

### **570 Duties of sheriff after receiving notice of application**

- (1) Subject to this section, where a sheriff:
- (a) receives notice in writing of an application to the Court for the winding up of a company; or

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- (b) receives notice in writing of the convening of a meeting of a company to consider a resolution that the company be wound up voluntarily;
- it is not competent for the sheriff to:
- (c) take any action to sell property of the company pursuant to any process of execution issued by or on behalf of a creditor; or
  - (d) pay to the creditor by whom or on whose behalf the process of execution was issued or to any person on the creditor's behalf the proceeds of the sale of property of the company that has been sold pursuant to such a process or any money seized, or paid to avoid seizure or sale of property of the company, under such a process.
- (2) Subsection (1) does not affect the power of the sheriff to take any action or make any payment if:
- (a) in a case to which paragraph (1)(a) applies—the application has been withdrawn or dismissed; or
  - (b) in a case to which paragraph (1)(b) applies—the meeting of the company has refused to pass the resolution.
- (3) Subject to this section, where the registrar or other appropriate officer of a court to which proceeds of the sale of property of a company or other money has been paid by a sheriff pursuant to a process of execution issued by or on behalf of a creditor of the company:
- (a) receives notice in writing of an application to the Court for the winding up of the company; or
  - (b) receives notice in writing of the convening of a meeting of the company to consider a resolution that the company be wound up voluntarily;
- any of those proceeds or money not paid out of court must not be paid to the creditor or to any person on behalf of the creditor.
- (4) Subsection (3) does not prevent the making of a payment if:
- (a) in a case to which paragraph (3)(a) applies—the application has been withdrawn or dismissed; or



- (b) in a case to which paragraph (3)(b) applies—the meeting of the company has refused to pass the resolution.
- (5) Where a company is being wound up, the liquidator may serve notice in writing of that fact on a sheriff or the registrar or other appropriate officer of a court.
- (6) Upon such a notice being so served:
- (a) the sheriff must deliver or pay to the liquidator:
    - (i) any property of the company in the sheriff's possession under a process of execution issued by or on behalf of a creditor; and
    - (ii) any proceeds of the sale of property of the company or other money in the sheriff's possession, being proceeds of the sale of property sold, whether before or after the commencement of the winding up, pursuant to such a process or money seized, or paid to avoid seizure or sale of property of the company, whether before or after the commencement of the winding up, under such a process; or
  - (b) the registrar or other officer of the court must pay to the liquidator any proceeds of the sale of property of the company or other money in court, being proceeds of sale or other money paid into court, whether before or after the commencement of the winding up, by a sheriff pursuant to a process of execution issued by or on behalf of a creditor; as the case requires.
- (7) Where:
- (a) property is, or proceeds of the sale of property or other money are, required by subsection (6) to be delivered or paid to a liquidator; or
  - (b) a sheriff has, pursuant to subsection (1), refrained from taking action to sell property of a company, being land, and that company is being wound up under an order made on the application referred to in that subsection;
- the costs of the execution are a first charge on that property or on those proceeds of sale or other money.
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- (8) For the purpose of giving effect to the charge referred to in subsection (7), the sheriff, registrar or other officer may retain, on behalf of the creditor entitled to the benefit of the charge, such amount from the proceeds of sale or other money referred to in that subsection as he or she thinks necessary for the purpose.
- (9) The Court may, if in a particular case it considers it is proper to do so:
  - (a) permit a sheriff to take action to sell property or make a payment that the sheriff could not, by reason of subsection (1), otherwise validly take; or
  - (b) permit the making of a payment the making of which would, by reason of subsection (3), otherwise be prohibited.

## **Division 8—Pooling**

### **Subdivision A—Pooling determinations**

#### **571 Pooling determination**

*Making of pooling determination*

- (1) If the following conditions are satisfied in relation to a group of 2 or more companies:
- (a) each company in the group is being wound up;
  - (b) any of the following subparagraphs applies:
    - (i) each company in the group is a related body corporate of each other company in the group;
    - (ii) apart from this section, the companies in the group are jointly liable for one or more debts or claims;
    - (iii) the companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;
    - (iv) one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;
- the liquidator or liquidators of the companies may, by writing:
- (c) determine that the group is a pooled group for the purposes of this section; and
  - (d) if the liquidator or liquidators consider that it is just and equitable, as between the various creditors of the companies in the group, to do so—determine that any or all of the following provisions:
    - (i) subsection (2);
    - (ii) subsection (3);

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(iii) subsection (4);

(iv) subsection (5);

(v) subsection (6);

(vi) subsection (7);

are modified, as set out in the determination, in their application to the companies in the group.

Note 1: Section 9 provides that *pooling determination* means a determination under subsection (1) of this section.

Note 2: A pooling determination comes into force when it is approved by the eligible unsecured creditors of each of the companies in the group—see section 578.

*Consequences of pooling determination*

- (2) If a determination under paragraph (1)(c) comes into force in relation to a group of 2 or more companies:
  - (a) each company in the group is taken to be jointly and severally liable for each debt payable by, and each claim against, each other company in the group; and
  - (b) each debt payable by a company or companies in the group to any other company or companies in the group is extinguished; and
  - (c) each claim that a company or companies in the group has against any other company or companies in the group is extinguished.
- (3) Subsection (2) applies to a debt or claim:
  - (a) whether present or future; and
  - (b) whether certain or contingent; and
  - (c) whether ascertained or sounding only in damages.
- (4) Subsection (2) does not apply to a debt payable by, or a claim against, a company in the group unless the debt or claim is admissible to proof against the company.
- (5) If a determination under paragraph (1)(c) comes into force in relation to a group of 2 or more companies, the order of priority

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applicable under sections 556, 560 and 561 is not altered for a company in the group.

(6) If:

- (a) a determination under paragraph (1)(c) comes into force in relation to a group of 2 or more companies; and
- (b) a secured creditor of a company in the group surrenders the relevant security interest to the liquidator of the company for the benefit of creditors of the companies in the group generally;

the debt may be recovered as a debt that is jointly and severally payable by the companies in the group.

(7) If:

- (a) a determination under paragraph (1)(c) comes into force in relation to a group of 2 or more companies; and
- (b) a secured creditor of a company in the group realises the security interest;

so much of the debt as remains after deducting the net amount realised may be recovered as a debt that is jointly and severally payable by the companies in the group.

(8) The following provisions have effect subject to any modifications under paragraph (1)(d):

- (a) subsection (2);
- (b) subsection (3);
- (c) subsection (4);
- (d) subsection (5);
- (e) subsection (6);
- (f) subsection (7).

(9) Subsection (2) does not apply in relation to a secured creditor unless the relevant debt is payable by a company or companies in the group to any other company or companies in the group.

(10) If:

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(a) a pooling determination comes into force in relation to a group of 2 or more companies; and

(b) there are one or more eligible employee creditors of a company in the group;

those eligible employee creditors are entitled to a priority at least equal to what they would have been entitled if the determination had not been made.

*Section 477 not limited*

(11) This section does not limit section 477.

**572 Variation of pooling determination**

If a pooling determination is in force in relation to a group of 2 or more companies, the liquidator or liquidators of the companies may, by writing, vary the determination.

Note: A variation of a pooling determination comes into force when it is approved by the creditors of the companies in the group—see section 578.

**573 Lodgment of copy of pooling determination etc.**

*Pooling determination*

(1) Within 7 days after a pooling determination comes into force in relation to a group of 2 or more companies, the liquidator or liquidators of the companies in the group must lodge a copy of the determination with ASIC.

Note: A pooling determination comes into force when it is approved by the eligible unsecured creditors of each of the companies in the group—see section 578.

*Variation of pooling determination*

(2) Within 7 days after a variation of a pooling determination comes into force in relation to a group of 2 or more companies, the liquidator or liquidators of the companies in the group must lodge a copy of the variation with ASIC.

Note: A variation of a pooling determination comes into force when it is approved by the eligible unsecured creditors of each of the companies in the group—see section 578.

### **577 Eligible unsecured creditors may decide to approve the determination or variation**

- (1A) Within 5 business days after the liquidator or liquidators of a group of 2 or more companies:
- (a) make a pooling determination in relation to the group; or
  - (b) vary a pooling determination in force in relation to the group;
- the liquidator or liquidators must convene separate meetings of the eligible unsecured creditors of each of the companies in the group.

Note: For *eligible unsecured creditor*, see section 579Q.

- (1) At a meeting convened under subsection (1A), the eligible unsecured creditors may resolve to approve the making of the determination or variation.
- (3) If, at a meeting convened under subsection (1A), the eligible unsecured creditors do not resolve to approve the making of the determination or variation:
  - (a) the determination or variation is cancelled at the end of the meeting; and
  - (b) if, as at the end of the meeting, a corresponding resolution has not been considered at another meeting convened under subsection (1A) of the eligible unsecured creditors of another company in the group—that other meeting is cancelled.

### **578 When pooling determination comes into force etc.**

#### *Pooling determination*

- (1) If:
  - (a) a pooling determination is made in relation to a group of 2 or more companies; and

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- (b) meetings are convened under subsection 577(1A) of the eligible unsecured creditors of each company in the group; and
- (c) at each meeting, the eligible unsecured creditors pass a resolution, as referred to in section 577, approving the making of the determination;

then:

- (d) if all the resolutions were passed at the same time—the determination comes into force immediately after the resolutions were passed; or
- (e) if the resolutions were passed at different times—the determination comes into force immediately after the last of those times.

Note: For *eligible unsecured creditor*, see section 579Q.

*Variation of pooling determination*

(2) If:

- (a) a pooling determination is in force in relation to a group of 2 or more companies; and
- (b) the pooling determination is varied; and
- (c) meetings are convened under subsection 577(1A) of the eligible unsecured creditors of each company in the group; and
- (d) at each meeting, the eligible unsecured creditors pass a resolution, as referred to in section 577, approving the making of the variation;

then:

- (e) if all the resolutions were passed at the same time—the variation comes into force immediately after the resolutions were passed; or
- (f) if the resolutions were passed at different times—the variation comes into force immediately after the last of those times.

Note: For *eligible unsecured creditor*, see section 579Q.



**579 Duties of liquidator**

- (1) This section applies if:
  - (a) the liquidator or liquidators of a group of 2 or more companies exercise a power conferred by section 571 or subsection 577(1A); and
  - (b) the liquidator or liquidators, in the exercise of that power, acted:
    - (i) with due care; and
    - (ii) in good faith; and
    - (iii) for the benefit of the creditors of the companies in the group, considered as a whole.
- (2) The liquidator or liquidators are taken not to be in breach of:
  - (a) any duty to a company in the group concerned (whether under section 180, 181, 182, 183 or 184 or otherwise and whether of a fiduciary nature or not); or
  - (b) any duty to the creditors of a company in the group concerned (whether of a fiduciary nature or not);in connection with the exercise of that power.

**579A Court may vary or terminate pooling determination**

- (1) If a pooling determination is in force in relation to a group of 2 or more companies, the Court may make an order varying or terminating the pooling determination if the Court is satisfied that:
  - (a) information that was about the business, property, affairs or financial circumstances of a company in the group, and that:
    - (i) was false or misleading; and
    - (ii) can reasonably be expected to have been material to eligible unsecured creditors of a company in the group in deciding whether to vote in favour of a resolution to approve the making of the pooling determination;was given to:
    - (iii) the liquidator of a company in the group; or

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- (iv) eligible unsecured creditors of a company in the group;  
or
- (b) information that was about the business, property, affairs or financial circumstances of a company in the group, and that:
  - (i) was false or misleading; and
  - (ii) can reasonably be expected to have been material to eligible unsecured creditors of a company in the group in deciding whether to vote in favour of a resolution to approve the making of the pooling determination;was contained in a document that accompanied a notice of the meeting at which the resolution was passed; or
- (c) there was an omission from such a document, and the omission can reasonably be expected to have been material to any of those eligible unsecured creditors in deciding whether to vote in favour of a resolution to approve the making of the pooling determination; or
- (d) effect cannot be given to the pooling determination without injustice or undue delay; or
- (e) the pooling determination would materially disadvantage an eligible unsecured creditor who is an applicant for the order; or
- (f) the pooling determination would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, an applicant for the order who is an eligible unsecured creditor of a company in the group; or
- (g) the pooling determination would be contrary to the interests of the creditors of the companies in the group, considered as a whole; or
- (h) in a case where a company in the group is being wound up under a members' voluntary winding up:
  - (i) the pooling determination would materially disadvantage a member of the company who is an applicant for the order; or
  - (ii) the pooling determination would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such members; or

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- (iii) the pooling determination would be contrary to the interests of the members of the company as a whole; or
- (i) the pooling determination should be varied or terminated for some other reason.

Note: For *eligible unsecured creditor*, see section 579Q.

- (2) An order may only be made on the application of:
  - (a) a creditor of a company in the group; or
  - (b) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group; or
  - (c) any other interested person.
- (3) If the Court makes an order under subsection (1), the applicant for the order must:
  - (a) lodge with ASIC a notice setting out the text of the order; and
  - (b) do so within 2 business days after the making of the order.

The notice must be in the prescribed form.

**579B Court may cancel or confirm variation**

- (1) If:
  - (a) a pooling determination is in force in relation to a group of 2 or more companies; and
  - (b) the determination is varied; and
  - (c) the variation has come into force;either of the following persons may apply to the Court for an order cancelling the variation:
  - (d) a creditor of a company in the group;
  - (e) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.
- (2) On an application, the Court:

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- (a) may make an order cancelling the variation, or confirming it, either wholly or in part, on such conditions (if any) as the order specifies; and
  - (b) may make such other orders as it thinks appropriate.
- (3) If the Court makes an order under subsection (2), the applicant for the order must:
- (a) lodge with ASIC a notice setting out the text of the order; and
  - (b) do so within 2 business days after the making of the order.
- The notice must be in the prescribed form.

**579C When Court may void or validate pooling determination**

- (1) If there is doubt, on a specific ground, whether a pooling determination that relates to a group of 2 or more companies:
- (a) was made, varied or approved in accordance with this Division; or
  - (b) complies with this Division;
- any of the following persons may apply to the Court for an order under this section:
- (c) the liquidator of a company in the group;
  - (d) a creditor of a company in the group;
  - (e) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group;
  - (f) ASIC.
- (2) On an application, the Court may make an order declaring the pooling determination, or a provision of it, to be void or not to be void, as the case requires, on the ground specified in the application or some other ground.
- (3) On an application, the Court may declare the pooling determination, or a provision of it, to be valid, despite a contravention of a provision of this Division, if the Court is satisfied that:

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- (a) the provision was substantially complied with; and
  - (b) no injustice will result for anyone affected by the pooling determination if the contravention is disregarded.
- (4) If the Court declares a provision of a pooling determination to be void, the Court may, by order, vary the pooling determination.
- (5) If the Court makes an order under subsection (2), the applicant for the order must:
- (a) lodge with ASIC a notice setting out the text of the order; and
  - (b) do so within 2 business days after the making of the order.
- The notice must be in the prescribed form.
- (6) If the Court makes a declaration under subsection (3), the applicant for the declaration must:
- (a) lodge with ASIC a notice setting out the text of the declaration; and
  - (b) do so within 2 business days after the making of the declaration.
- The notice must be in the prescribed form.
- (7) If the Court makes an order under subsection (4) on the application of a person, the applicant for the order must:
- (a) lodge with ASIC a notice setting out the text of the order; and
  - (b) do so within 2 business days after the making of the order.
- The notice must be in the prescribed form.

**579D Effect of termination or avoidance**

The termination or avoidance, in whole or in part, of a pooling determination does not affect the previous operation of:

- (a) the pooling determination; or
- (b) this Division in so far as it relates to the pooling determination.

## Subdivision B—Pooling orders

### 579E Pooling orders

#### *Making of pooling order*

- (1) If it appears to the Court that the following conditions are satisfied in relation to a group of 2 or more companies:
- (a) each company in the group is being wound up;
  - (b) any of the following subparagraphs applies:
    - (i) each company in the group is a related body corporate of each other company in the group;
    - (ii) apart from this section, the companies in the group are jointly liable for one or more debts or claims;
    - (iii) the companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;
    - (iv) one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;

the Court may, if the Court is satisfied that it is just and equitable to do so, by order, determine that the group is a pooled group for the purposes of this section.

Note 1: Section 9 provides that **pooling order** means an order under subsection (1) of this section.

Note 2: See also subsection (12) (just and equitable criteria).

#### *Consequences of pooling order*

- (2) If a pooling order comes into force in relation to a group of 2 or more companies:

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- (a) each company in the group is taken to be jointly and severally liable for each debt payable by, and each claim against, each other company in the group; and
- (b) each debt payable by a company or companies in the group to any other company or companies in the group is extinguished; and
- (c) each claim that a company or companies in the group has against any other company or companies in the group is extinguished.

Note: For exemptions, see paragraph 579G(1)(a).

- (3) Subsection (2) applies to a debt or claim:
  - (a) whether present or future; and
  - (b) whether certain or contingent; and
  - (c) whether ascertained or sounding only in damages.
- (4) Subsection (2) does not apply to a debt payable by, or a claim against, a company in the group unless the debt or claim is admissible to proof against the company.
- (5) If a pooling order comes into force in relation to a group of 2 or more companies, the order of priority applicable under sections 556, 560 and 561 is not altered for a company in the group.
- (6) If:
  - (a) a pooling order comes into force in relation to a group of 2 or more companies; and
  - (b) a secured creditor of a company in the group surrenders the relevant security interest to the liquidator of the company for the benefit of creditors of the companies in the group generally;the debt may be recovered as a debt that is jointly and severally payable by the companies in the group.
- (7) If:
  - (a) a pooling order comes into force in relation to a group of 2 or more companies; and

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- (b) a secured creditor of a company in the group realises the security interest;  
so much of the debt as remains after deducting the net amount realised may be recovered as a debt that is jointly and severally payable by the companies in the group.
- (8) The following provisions have effect subject to any modifications under paragraph 579G(1)(d):
- (a) subsection (2);
  - (b) subsection (3);
  - (c) subsection (4);
  - (d) subsection (5);
  - (e) subsection (6);
  - (f) subsection (7).
- (9) Subsection (2) does not apply in relation to a secured creditor unless the relevant debt is payable by a company or companies in the group to any other company or companies in the group.
- (10) The Court must not make a pooling order in relation to a group of 2 or more companies if:
- (a) both:
    - (i) the Court is satisfied the order would materially disadvantage an eligible unsecured creditor of a company in the group; and
    - (ii) the eligible unsecured creditor has not consented to the making of the order; or
  - (b) all of the following conditions are satisfied:
    - (i) a company in the group is being wound up under a members' voluntary winding up;
    - (ii) the Court is satisfied that the order would materially disadvantage a member of that company;
    - (iii) the member is not a company in the group;
    - (iv) the member has not consented to the making of the order.

Note: For *eligible unsecured creditor*, see section 579Q.



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*Standing*

- (11) The Court may only make a pooling order on the application of the liquidator or liquidators of the companies in the group.

*Just and equitable criteria*

- (12) In determining whether it is just and equitable to make a pooling order, the Court must have regard to all of the following matters:
- (a) the extent to which:
    - (i) a company in the group; and
    - (ii) the officers or employees of a company in the group; were involved in the management or operations of any of the other companies in the group;
  - (b) the conduct of:
    - (i) a company in the group; and
    - (ii) the officers or employees of a company in the group; towards the creditors of any of the other companies in the group;
  - (c) the extent to which the circumstances that gave rise to the winding up of any of the companies in the group are directly or indirectly attributable to the acts or omissions of:
    - (i) any of the other companies in the group; or
    - (ii) the officers or employees of any of the other companies in the group;
  - (d) the extent to which the activities and business of the companies in the group have been intermingled;
  - (e) the extent to which creditors of any of the companies in the group may be advantaged or disadvantaged by the making of the order;
  - (f) any other relevant matters.

*Lodgment of pooling order*

- (13) A pooling order must be lodged with ASIC.

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**579F Variation of pooling orders**

- (1) The Court may, by order, vary a pooling order if the Court is of the opinion that it is just and equitable to do so.
- (2) A pooling order may only be varied on the application of:
  - (a) the liquidator of a company in the group; or
  - (b) a creditor of a company in the group; or
  - (c) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.

*Lodgment of order*

- (3) An order under subsection (1) must be lodged with ASIC.

**579G Court may make ancillary orders etc.**

- (1) If the Court makes a pooling order in relation to a group of 2 or more companies, the Court may, if the Court is of the opinion that it is just and equitable to do so, do any or all of the following things:
  - (a) by order, exempt:
    - (i) a specified debt or claim; or
    - (ii) a specified class of debts or claims;from the application of subsection 579E(2) to the group;
  - (b) by order, transfer, or direct the transfer, of:
    - (i) specified property; or
    - (ii) a specified class of property;from a company in the group to another company in the group;
  - (c) by order, transfer, or direct the transfer, of liability for:
    - (i) a specified debt or claim; or
    - (ii) a specified class of debts or claims;from a company in the group to another company in the group;

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- (d) by order, modify the application of this Act in relation to the winding up of the companies in the group;
- (e) make such other orders, and give such directions, in relation to the winding up of the companies in the group, as the Court thinks fit.

*Standing*

- (2) An order or direction under subsection (1) may only be made or given on the application of:
  - (a) the liquidator of a company in the group; or
  - (b) a creditor of a company in the group; or
  - (c) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.

*Conditional orders etc.*

- (3) An order or direction under subsection (1) may be made or given subject to conditions.
- (4) An order or direction under subsection (1) may provide for different returns for different creditors or classes of creditors.
- (5) An order or direction under subsection (1) may provide for the subordination of the debts and claims of specified creditors or classes of creditors to those of other creditors.
- (6) Subsections (4) and (5) do not limit subsection (1) or (3).

*Rights of secured creditors*

- (7) An order or direction under subsection (1) does not affect the rights of a secured creditor, unless the relevant debt is payable by a company or companies in the group to any other company or companies in the group.

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*Lodgment of order or direction*

- (8) An order or direction under subsection (1) must be lodged with ASIC.

**579H Variation of ancillary orders etc.**

*Variation of ancillary order*

- (1) The Court may, by order, vary an order made under subsection 579G(1) if the Court is of the opinion that it is just and equitable to do so.
- (2) An order made under subsection 579G(1) may only be varied on the application of:
- (a) the liquidator of a company in the group; or
  - (b) a creditor of a company in the group, so long as the creditor is not a company in the group; or
  - (c) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.

*Variation of direction*

- (3) The Court may vary a direction given under subsection 579G(1) if the Court is of the opinion that it is just and equitable to do so.
- (4) A direction given under subsection 579G(1) may only be varied on the application of:
- (a) the liquidator of a company in the group; or
  - (b) a creditor of a company in the group; or
  - (c) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.

*Lodgment of order or direction*

- (5) An order under subsection (1) must be lodged with ASIC.
- (6) A variation of a direction given under subsection 579G(1) must be lodged with ASIC.

**579J Notice of application for pooling order etc.**

- (1) If the liquidator or liquidators of the companies in a group apply for a pooling order, the liquidator or liquidators must give written notice of:
  - (a) the application; or
  - (b) a website where persons can view a copy of the application;to:
  - (c) each eligible unsecured creditor of each company in the group; and
  - (d) in a case where a company in the group is being wound up under a members' voluntary winding up—each member of the company, so long as the member is not a company in the group; and
  - (e) such other persons (if any) as the Court directs.

Note 1: For *eligible unsecured creditor*, see section 579Q.

Note 2: For electronic notification under this subsection, see section 600G.

- (2) If:
  - (a) a pooling order is made in relation to a group of 2 or more companies; and
  - (b) the liquidator of a company in the group applies for:
    - (i) an order under subsection 579F(1); or
    - (ii) an order under subsection 579G(1); or
    - (iii) an order under subsection 579H(1); or
    - (iv) a direction under subsection 579G(1); or
    - (v) a variation of a direction given under subsection 579G(1);

the liquidator must give written notice of:

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- (c) the application; or
  - (d) a website where persons can view a copy of the application;
- to:
- (e) each eligible unsecured creditor of each company in the group; and
  - (f) in a case where a company in the group is being wound up under a members' voluntary winding up—each member of the company, so long as the member is not a company in the group; and
  - (g) such other persons (if any) as the Court directs.

Note 1: For *eligible unsecured creditor*, see section 579Q.

Note 2: For electronic notification under this subsection, see section 600G.

**579K Notice of pooling order etc.**

*Notice of pooling order*

- (1) If a pooling order is made in relation to a group of 2 or more companies, the liquidator or liquidators of the companies in the group must:
  - (a) give each eligible unsecured creditor of each company in the group a written notice setting out:
    - (i) the order; and
    - (ii) a summary description of the order; or
  - (b) give each eligible unsecured creditor of each company in the group a written notice of a website where persons can view a copy of:
    - (i) the order; and
    - (ii) a summary description of the order.

Note 1: For *eligible unsecured creditor*, see section 579Q.

Note 2: For electronic notification under this subsection, see section 600G.

- (2) If:
  - (a) a pooling order is made in relation to a group of 2 or more companies; and

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- (b) a company in the group is being wound up under a members' voluntary winding up;
- the liquidator or liquidators of the companies in the group must:
- (c) give each member of that company a written notice setting out:
- (i) the order; and
  - (ii) a summary description of the order;
- so long as the member is not a company in the group; or
- (d) give each member of that company a written notice of a website where persons can view a copy of:
- (i) the order; and
  - (ii) a summary description of the order;
- so long as the member is not a company in the group.

Note: For electronic notification under this subsection, see section 600G.

*Notice of application by liquidator*

- (3) If:
- (a) a pooling order is made in relation to a group of 2 or more companies; and
  - (b) the Court does any of the following on the application of a liquidator of a company in the group:
    - (i) makes an order under subsection 579F(1);
    - (ii) makes an order under subsection 579G(1);
    - (iii) makes an order under subsection 579H(1);
    - (iv) gives a direction under subsection 579G(1);
    - (v) varies a direction given under subsection 579G(1);
- the liquidator must:
- (c) give each eligible unsecured creditor of each company in the group a written notice setting out:
    - (i) the order, direction or variation; and
    - (ii) a summary description of the order, direction or variation; or

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- (d) give each eligible unsecured creditor of each company in the group a written notice of a website where persons can view a copy of:
  - (i) the order, direction or variation; and
  - (ii) a summary description of the order, direction or variation.

Note 1: For *eligible unsecured creditor*, see section 579Q.

Note 2: For electronic notification under this subsection, see section 600G.

- (4) If:
  - (a) a pooling order is made in relation to a group of 2 or more companies; and
  - (b) the Court does any of the following on the application of a liquidator of a company in the group:
    - (i) makes an order under subsection 579F(1);
    - (ii) makes an order under subsection 579G(1);
    - (iii) makes an order under subsection 579H(1);
    - (iv) gives a direction under subsection 579G(1);
    - (v) varies a direction given under subsection 579G(1); and
  - (c) a company in the group is being wound up under a members' voluntary winding up;  
the liquidator must:
    - (d) give each member of that company a written notice setting out:
      - (i) the order, direction or variation; and
      - (ii) a summary description of the order, direction or variation;so long as the member is not a company in the group; or
    - (e) give each member of that company a written notice of a website where persons can view a copy of:
      - (i) the order, direction or variation; and
      - (ii) a summary description of the order, direction or variation;so long as the member is not a company in the group.



Note: For electronic notification under this subsection, see section 600G.

### **579L Consolidated meetings of creditors**

- (1) If:
- (a) either:
    - (i) a pooling determination is in force in relation to a group of 2 or more companies; or
    - (ii) a pooling order is in force in relation to a group of 2 or more companies; and
  - (b) each company in the group is being wound up;
- then, unless the Court otherwise orders:
- (c) instead of convening separate meetings under or for the purposes of a particular provision of this Act, the liquidator or liquidators may convene a meeting under or for the purposes of that provision, on a consolidated basis, of the creditors of the companies in the group; and
  - (d) a resolution passed at a consolidated meeting by those creditors is taken to have been passed by the creditors of each of the companies in the group; and
  - (e) if there are 2 or more liquidators—one of those liquidators is to preside at a consolidated meeting; and
  - (f) notice of a consolidated meeting may be given by the liquidator or liquidators.

Note: See also Division 80 (committees of inspection) of Schedule 2.

- (2) The regulations may make provision for or in relation to:
- (a) the convening of, conduct of, and procedure and voting at, consolidated meetings of creditors; and
  - (b) the number of persons required to constitute a quorum at any such meeting; and
  - (c) the sending of notices of meetings to persons entitled to attend any such meeting; and
  - (d) the lodging of copies of notices of, and of resolutions passed at, any such meeting; and

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- (e) generally regulating the conduct of, and procedure at, any such meeting.

**Subdivision C—Other provisions**

**579M When debts or claims are provable in winding up**

If a debt or claim becomes a debt payable by, or a claim against, a company under any of the following provisions:

- (a) subsection 571(2) (including that subsection as modified by a determination under paragraph 571(1)(d));
- (b) subsection 571(6) (including that subsection as modified by a determination under paragraph 571(1)(d));
- (c) subsection 571(7) (including that subsection as modified by a determination under paragraph 571(1)(d));
- (d) subsection 579E(2) (including that subsection as modified by an order under paragraph 579G(1)(d));
- (e) subsection 579E(6) (including that subsection as modified by an order under paragraph 579G(1)(d));
- (f) subsection 579E(7) (including that subsection as modified by an order under paragraph 579G(1)(d));
- (g) subsection 579G(1);

then, in the winding up of the company, the debt or claim is admissible to proof against the company.

**579N Group of companies**

To avoid doubt, for the purposes of:

- (a) this Division; or
- (b) any other provision of this Act to the extent to which it relates to this Division;

a group of 2 or more companies need not be associated with each other in any way (other than a way described in paragraph 571(1)(b) or 579E(1)(b)).

### **579P Secured debt may become unsecured**

For the purposes of this Division, a secured debt becomes an unsecured debt to the extent that the creditor proves for the debt as an unsecured creditor.

### **579Q Eligible unsecured creditor**

- (1) Subject to subsection (2), for the purposes of the application of this Division to a group of 2 or more companies, a creditor of a company in the group is an **eligible unsecured creditor** of that company if:
  - (a) both:
    - (i) the creditor's debt or claim is unsecured; and
    - (ii) the creditor is not a company in the group; or
  - (b) the creditor is specified in the regulations.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (2) The regulations may provide that, for the purposes of the application of this Division to a group of 2 or more companies, a specified creditor of a company in the group is not an **eligible unsecured creditor** of that company.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

## Division 9—Co-operation between Australian and foreign courts in external administration matters

### 580 Definitions

In this Division:

***external administration matter*** means a matter relating to:

- (a) winding up, under this Chapter, a company or a Part 5.7 body; or
- (b) winding up, outside Australia, a body corporate or a Part 5.7 body; or
- (c) the insolvency of a body corporate or of a Part 5.7 body.

***prescribed country*** means:

- (a) a country prescribed for the purposes of this definition; or
- (b) a colony, overseas territory or protectorate of a country so prescribed.

### 581 Courts to act in aid of each other

- (1) All courts having jurisdiction in matters arising under this Act, the Judges of those courts and the officers of, or under the control of, those courts must severally act in aid of, and be auxiliary to, each other in all external administration matters.
- (2) In all external administration matters, the Court:
  - (a) must act in aid of, and be auxiliary to, the courts of:
    - (i) external Territories; and
    - (ii) States that are not in this jurisdiction; and
    - (iii) prescribed countries;that have jurisdiction in external administration matters; and
  - (b) may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters.

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- (3) Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in an external administration matter is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen in its own jurisdiction.
- (4) The Court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in external administration matters to act in aid of, and be auxiliary to, it in an external administration matter.

## Part 5.7—Winding up bodies other than companies

### 582 Application of Part

- (1) This Part has effect in addition to, and not in derogation of, sections 601CC and 601CL and any provisions contained in this Act or any other law with respect to the winding up of bodies, and the liquidator or Court may exercise any powers or do any act in the case of Part 5.7 bodies that might be exercised or done by him, her or it in the winding up of companies.
- (2) Nothing in this Part affects the operation of the *Bankruptcy Act 1966*.
- (3) A Part 5.7 body may be wound up under this Part notwithstanding that it is being wound up or has been dissolved, deregistered or has otherwise ceased to exist as a body corporate under or by virtue of the laws of the place under which it was incorporated.

### 583 Winding up Part 5.7 bodies

Subject to this Part, a Part 5.7 body may be wound up under this Chapter and this Chapter applies accordingly to a Part 5.7 body with such adaptations as are necessary, including the following adaptations:

- (a) the principal place of business of a Part 5.7 body in this jurisdiction is taken, for all the purposes of the winding up, to be the registered office of the Part 5.7 body;
- (b) a Part 5.7 body is not to be wound up voluntarily under this Chapter;
- (c) the circumstances in which a Part 5.7 body may be wound up are as follows:
  - (i) if the Part 5.7 body is unable to pay its debts, has been dissolved or deregistered, has ceased to carry on business in this jurisdiction or has a place of business in

- this jurisdiction only for the purpose of winding up its affairs;
- (ii) if the Court is of opinion that it is just and equitable that the Part 5.7 body should be wound up;
  - (iii) if ASIC has stated in a report prepared under Division 1 of Part 3 of the ASIC Act that, in its opinion:
    - (A) the Part 5.7 body cannot pay its debts and should be wound up; or
    - (B) it is in the interests of the public, of the members, or of the creditors, that the Part 5.7 body should be wound up;
  - (d) if the Part 5.7 body is a registrable Australian body—the winding up must deal only with the affairs of the body outside its place of origin.

### **585 Insolvency of Part 5.7 body**

For the purposes of this Part, a Part 5.7 body is taken to be unable to pay its debts if:

- (a) a creditor, by assignment or otherwise, to whom the Part 5.7 body is indebted in a sum exceeding the statutory minimum then due has served on the Part 5.7 body, by leaving at its principal place of business in this jurisdiction or by delivering to the secretary or a director or senior manager of the Part 5.7 body or by otherwise serving in such manner as the Court approves or directs, a demand, signed by or on behalf of the creditor, requiring the body to pay the sum so due and the body has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the satisfaction of the creditor; or
- (b) an action or other proceeding has been instituted against any member for any debt or demand due or claimed to be due from the Part 5.7 body or from the member as such and, notice in writing of the institution of the action or proceeding having been served on the body by leaving it at its principal place of business in this jurisdiction or by delivering it to the secretary or a director or senior manager of the Part 5.7 body

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or by otherwise serving it in such manner as the Court approves or directs, the Part 5.7 body has not, within 10 days after service of the notice, paid, secured or compounded for the debt or demand or procured the action or proceeding to be stayed or indemnified the defendant to his, her or its reasonable satisfaction against the action or proceeding and against all costs, damages and expenses to be incurred by him, her or it by reason of the action or proceeding; or

- (c) execution or other process issued on a judgment, decree or order obtained in a court (whether an Australian court or not) in favour of a creditor against the Part 5.7 body or a member of the Part 5.7 body as such, or a person authorised to be sued as nominal defendant on behalf of the Part 5.7 body, is returned unsatisfied; or
- (d) it is otherwise proved to the satisfaction of the Court that the Part 5.7 body is unable to pay its debts.

**586 Contributories in winding up of Part 5.7 body**

- (1) On a Part 5.7 body being wound up, every person who:
  - (a) in any case—is liable to pay or contribute to the payment of:
    - (i) a debt or liability of the Part 5.7 body; or
    - (ii) any sum for the adjustment of the rights of the members among themselves; or
    - (iii) the costs and expenses of winding up; or
  - (b) if the Part 5.7 body has been dissolved or deregistered in its place of origin—was so liable immediately before the dissolution or deregistration;

is a contributory and every contributory is liable to contribute to the property of the Part 5.7 body all sums due from the contributory in respect of any such liability.

- (2) On the death or bankruptcy of a contributory, the provisions of this Act with respect to the personal representatives of deceased contributories or the assignees and trustees of bankrupt contributories, as the case may be, apply.



### **587 Power of Court to stay or restrain proceedings**

- (1) The provisions of this Act with respect to staying and restraining actions and other civil proceedings against a company at any time after the filing of an application for winding up and before the making of a winding up order extend, in the case of a Part 5.7 body where the application to stay or restrain is by a creditor, to actions and other civil proceedings against a contributory of the Part 5.7 body.
- (2) Where an order has been made for winding up a Part 5.7 body, no action or other civil proceeding is to be proceeded with or commenced against a contributory of the Part 5.7 body in respect of a debt of the Part 5.7 body except by leave of the Court and subject to such terms as the Court imposes.

### **588 Outstanding property of defunct registrable body**

- (1) This section applies if, after the dissolution or deregistration of a registrable body, outstanding property of the body remains:
  - (a) in this jurisdiction; and
  - (b) outside the body's place of origin.
- (2) The estate and interest in the property, at law or in equity, of the body or its liquidator at that time, together with all claims, rights and remedies that the body or its liquidator then had in respect of the property, vests by force of this section in:
  - (a) if the body was incorporated in Australia or an external Territory—the person entitled to the property under the law of the body's place of origin; or
  - (b) if paragraph (a) does not apply and the property was held by the body or liquidator on trust—the Commonwealth; or
  - (c) otherwise—ASIC.
- (3) Where any claim, right or remedy of a liquidator may under this Act be made, exercised or availed of only with the approval or concurrence of the Court or some other person, the Commonwealth or ASIC may, for the purposes of this section, make, exercise or

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avail itself of the claim, right or remedy without such approval or concurrence.

- (4) Section 601AE applies to:
- (a) property that vests in the Commonwealth under paragraph (2)(b) of this section as if the property were vested in the Commonwealth under subsection 601AD(1A); and
  - (b) property that vests in ASIC under paragraph (2)(c) of this section as if the property were vested in ASIC under subsection 601AD(2).

- (5) In this section:

***property*** of a body includes PPSA retention of title property, if the security interest in the property is vested in the body because of the operation of any of the following provisions:

- (a) section 267 or 267A of the *Personal Property Securities Act 2009* (property subject to unperfected security interests);
- (b) section 588FL of this Act (collateral not registered within time).

Note: See sections 9 (definition of ***property***) and 51F (PPSA retention of title property).

## **Part 5.7B—Recovering property or compensation for the benefit of creditors of insolvent company**

### **Division 1—Preliminary**

#### **588C Definitions**

In this Part:

*property* of a company includes PPSA retention of title property, if the security interest in the property is vested in the company because of the operation of any of the following provisions:

- (a) section 267 or 267A of the *Personal Property Securities Act 2009* (property subject to unperfected security interests);
- (b) section 588FL of this Act (collateral not registered within time).

Note: See sections 9 (definition of *property*) and 51F (PPSA retention of title property).

#### **588D Secured debt may become unsecured**

For the purposes of this Part, a secured debt becomes an unsecured debt to the extent that the creditor proves for the debt as an unsecured creditor.

#### **588E Presumptions to be made in recovery proceedings**

(1) In this section:

*recovery proceeding*, in relation to a company, means:

- (a) an application under section 588FF by the company's liquidator; or
- (b) proceedings begun under subsection 588FH(2) by the company's liquidator; or

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- (c) proceedings, in so far as they relate to the question whether a security interest created by the company is void to any extent, as against the company's liquidator, because of subsection 588FJ(2); or
  - (d) proceedings begun under subsection 588FJ(6) by the company's liquidator; or
  - (e) proceedings for a contravention of subsection 588G(2) in relation to the incurring of a debt by the company (including proceedings under section 588M in relation to the incurring of the debt but not including proceedings for an offence); or
  - (f) proceedings under section 588W in relation to the incurring of a debt by the company.
- (2) Subsections (3) to (9), inclusive, have effect for the purposes of a recovery proceeding in relation to a company.
- (3) If:
- (a) the company is being wound up; and
  - (b) it is proved, or because of subsection (4) or (8) it must be presumed, that the company was insolvent at a particular time during the 12 months ending on the relation-back day;
- it must be presumed that the company was insolvent throughout the period beginning at that time and ending on that day.
- (4) Subject to subsections (5) to (7), if it is proved that the company:
- (a) has failed to keep financial records in relation to a period as required by subsection 286(1); or
  - (b) has failed to retain financial records in relation to a period for the 7 years required by subsection 286(2);
- the company is to be presumed to have been insolvent throughout the period.
- (5) Paragraph (4)(a) does not apply in relation to a contravention of subsection 286(1) that is only minor or technical.
- (6) Subsection (4) does not have effect, in so far as it would prejudice a right or interest of a person for the company to be presumed

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insolvent because of a contravention of subsection 286(2), if it is proved that:

- (a) the contravention was due solely to someone destroying, concealing or removing financial records of the company; and
  - (b) none of those financial records was destroyed, concealed or removed by the first-mentioned person; and
  - (c) the person was not in any way, by act or omission, directly or indirectly, knowingly or recklessly, concerned in, or party to, destroying, concealing or removing any of those financial records.
- (7) If the recovery proceeding is an application under section 588FF, subsection (4) of this section does not have effect for the purposes of proving, for the purposes of the application, that an unfair preference given by the company to a creditor of the company is an insolvent transaction, unless it is proved, for the purposes of the application, that a related entity of the company was a party to the unfair preference.
- (8) If, for the purposes of another recovery proceeding in relation to the company, there has been proved:
- (a) if the other proceeding is of the kind referred to in paragraph (1)(a) of this section—a matter of the kind referred to in a paragraph of section 588FC or of subsection 588FG(2); or
  - (b) if the other proceeding is of the kind referred to in paragraph (1)(b) of this section—a matter of the kind referred to in a paragraph of section 588FC or of subsection 588FG(2) or 588FH(1), or a defence under subsection 588FH(3); or
  - (c) if the other proceeding is of the kind referred to in paragraph (1)(c) or (d) of this section—a matter of the kind referred to in subsection 588FJ(3); or
  - (d) if the other proceeding is of the kind referred to in paragraph (1)(e) of this section—a matter of the kind referred to in a paragraph of section 588G, or a defence under section 588H; or

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- (e) if the other proceeding is of the kind referred to in paragraph (1)(f) of this section—a matter of the kind referred to in a paragraph of subsection 588V(1), or a defence under section 588X;  
it must be presumed that that matter was the case, or that the matters constituting that defence were the case.
- (9) A presumption for which this section provides operates except so far as the contrary is proved for the purposes of the proceeding concerned.

**588F Certain taxation liabilities taken to be debts**

- (1) For the purposes of this Part, a company's liability under a remittance provision to pay to the Commissioner of Taxation an amount equal to a deduction made by the company, after 1 July 1993, from a payment:
- (a) is taken to be a debt; and
  - (b) is taken to have been incurred when the deduction was made.
- (2) In this section:
- remittance provision** means any of the following former provisions of the *Income Tax Assessment Act 1936*:
- (aa) section 220AAE, 220AAM or 220AAR;
  - (a) section 221F (except subsection 221F(12)) or section 221G (except subsection 221G(4A));
  - (b) subsection 221YHDC(2);
  - (c) subsection 221YHZD(1) or (1A);
  - (d) subsection 221YN(1);
- or any of the provisions of Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*.
- (3) This section is not intended to limit the generality of a reference in this Act to a debt or to incurring a debt.

## **Division 2—Voidable transactions**

### **588FA Unfair preferences**

- (1) A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
  - (a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
  - (b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;  
even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.
- (2) For the purposes of subsection (1), a secured debt is taken to be unsecured to the extent of so much of it (if any) as is not reflected in the value of the security.
- (3) Where:
  - (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including such a relationship to which other persons are parties); and
  - (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;then:
  - (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and

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- (d) the transaction referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor if, because of subsection (1) as applying because of paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.

**588FB Uncommercial transactions**

- (1) A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
  - (a) the benefits (if any) to the company of entering into the transaction; and
  - (b) the detriment to the company of entering into the transaction; and
  - (c) the respective benefits to other parties to the transaction of entering into it; and
  - (d) any other relevant matter.
- (2) A transaction may be an uncommercial transaction of a company because of subsection (1):
  - (a) whether or not a creditor of the company is a party to the transaction; and
  - (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

**588FC Insolvent transactions**

A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and:

- (a) any of the following happens at a time when the company is insolvent:
  - (i) the transaction is entered into; or



- (ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction; or
- (b) the company becomes insolvent because of, or because of matters including:
  - (i) entering into the transaction; or
  - (ii) a person doing an act, or making an omission, for the purpose of giving effect to the transaction.

### **588FD Unfair loans to a company**

- (1) A loan to a company is unfair if, and only if:
  - (a) the interest on the loan was extortionate when the loan was made, or has since become extortionate because of a variation; or
  - (b) the charges in relation to the loan were extortionate when the loan was made, or have since become extortionate because of a variation;even if the interest is, or the charges are, no longer extortionate.
- (2) In determining:
  - (a) whether interest on a loan was or became extortionate at a particular time as mentioned in paragraph (1)(a); or
  - (b) whether charges in relation to a loan were or became extortionate at a particular time as mentioned in paragraph (1)(b);regard is to be had to the following matters as at that time:
  - (c) the risk to which the lender was exposed; and
  - (d) the value of any security in respect of the loan; and
  - (e) the term of the loan; and
  - (f) the schedule for payments of interest and charges and for repayments of principal; and
  - (g) the amount of the loan; and
  - (h) any other relevant matter.

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**588FDA Unreasonable director-related transactions**

- (1) A transaction of a company is an *unreasonable director-related transaction* of the company if, and only if:
- (a) the transaction is:
    - (i) a payment made by the company; or
    - (ii) a conveyance, transfer or other disposition by the company of property of the company; or
    - (iii) the issue of securities by the company; or
    - (iv) the incurring by the company of an obligation to make such a payment, disposition or issue; and
  - (b) the payment, disposition or issue is, or is to be, made to:
    - (i) a director of the company; or
    - (ii) a close associate of a director of the company; or
    - (iii) a person on behalf of, or for the benefit of, a person mentioned in subparagraph (i) or (ii); and
  - (c) it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
    - (i) the benefits (if any) to the company of entering into the transaction; and
    - (ii) the detriment to the company of entering into the transaction; and
    - (iii) the respective benefits to other parties to the transaction of entering into it; and
    - (iv) any other relevant matter.

The obligation referred to in subparagraph (a)(iv) may be a contingent obligation.

Note: Subparagraph (a)(iv)—This would include, for example, granting options over shares in the company.

- (2) To avoid doubt, if:
- (a) the transaction is a payment, disposition or issue; and
  - (b) the transaction is entered into for the purpose of meeting an obligation the company has incurred;

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the test in paragraph (1)(c) applies to the transaction taking into account the circumstances as they exist at the time when the transaction is entered into (rather than as they existed at the time when the obligation was incurred).

- (3) A transaction may be an unreasonable director-related transaction because of subsection (1):
- (a) whether or not a creditor of the company is a party to the transaction; and
  - (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

**588FE Voidable transactions**

- (1) If a company is being wound up:
- (a) a transaction of the company may be voidable because of any one or more of subsections (2) to (6) if the transaction was entered into on or after 23 June 1993; and
  - (b) a transaction of the company may be voidable because of subsection (6A) if the transaction was entered into on or after the commencement of the *Corporations Amendment (Repayment of Directors' Bonuses) Act 2003*.
- (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.
- (2A) The transaction is voidable if:
- (a) the transaction is:
    - (i) an uncommercial transaction of the company; or
    - (ii) an unfair preference given by the company to a creditor of the company; or

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- (iii) an unfair loan to the company; or
    - (iv) an unreasonable director-related transaction of the company; and
  - (b) the company was under administration immediately before:
    - (i) the company resolved by special resolution that it be wound up voluntarily; or
    - (ii) the Court ordered that the company be wound up; and
  - (c) the transaction was entered into, or an act was done for the purpose of giving effect to it, during the period beginning at the start of the relation-back day and ending:
    - (i) when the company made the special resolution that it be wound up voluntarily; or
    - (ii) when the Court made the order that the company be wound up; and
  - (d) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done, on behalf of the company by, or under the authority of, the administrator of the company.
- (2B) The transaction is voidable if:
- (a) the transaction is:
    - (i) an uncommercial transaction of the company; or
    - (ii) an unfair preference given by the company to a creditor of the company; or
    - (iii) an unfair loan to the company; or
    - (iv) an unreasonable director-related transaction of the company; and
  - (b) the company was subject to a deed of company arrangement immediately before:
    - (i) the company resolved by special resolution that it be wound up voluntarily; or
    - (ii) the Court ordered that the company be wound up; and
  - (c) the transaction was entered into, or an act was done for the purpose of giving effect to it, during the period beginning at the start of the relation-back day and ending:

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- (i) when the company made the special resolution that it be wound up voluntarily; or
- (ii) when the Court made the order that the company be wound up; and
- (d) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done, on behalf of the company by, or under the authority of:
  - (i) the administrator of the deed; or
  - (ii) the administrator of the company.
- (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.
- (6) The transaction is voidable if it is an unfair loan to the company made at any time on or before the day when the winding up began.

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- (6A) The transaction is voidable if:
- (a) it is an unreasonable director-related transaction of the company; and
  - (b) it was entered into, or an act was done for the purposes of giving effect to it:
    - (i) during the 4 years ending on the relation-back day; or
    - (ii) after that day but on or before the day when the winding up began.
- (7) A reference in this section to doing an act includes a reference to making an omission.

**588FF Courts may make orders about voidable transactions**

- (1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:
- (a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;
  - (b) an order directing a person to transfer to the company property that the company has transferred under the transaction;
  - (c) an order requiring a person to pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction;
  - (d) an order requiring a person to transfer to the company property that, in the court's opinion, fairly represents the application of either or both of the following:
    - (i) money that the company has paid under the transaction;
    - (ii) proceeds of property that the company has transferred under the transaction;

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- (e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;
  - (f) if the transaction is an unfair loan and such a debt, security or guarantee has been assigned—an order directing a person to indemnify the company in respect of some or all of its liability to the assignee;
  - (g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;
  - (h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;
  - (i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time;
  - (j) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable.
- (2) Nothing in subsection (1) limits the generality of anything else in it.
- (3) An application under subsection (1) may only be made:
- (a) during the period beginning on the relation-back day and ending:
    - (i) 3 years after the relation-back day; or
    - (ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;whichever is the later; or
  - (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

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- (4) If the transaction is a voidable transaction solely because it is an unreasonable director-related transaction, the court may make orders under subsection (1) only for the purpose of recovering for the benefit of the creditors of the company the difference between:
- (a) the total value of the benefits provided by the company under the transaction; and
  - (b) the value (if any) that it may be expected that a reasonable person in the company's circumstances would have provided having regard to the matters referred to in paragraph 588FDA(1)(c).

**588FG Transaction not voidable as against certain persons**

- (1) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person other than a party to the transaction if it is proved that:
- (a) the person received no benefit because of the transaction; or
  - (b) in relation to each benefit that the person received because of the transaction:
    - (i) the person received the benefit in good faith; and
    - (ii) at the time when the person received the benefit:
      - (A) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and
      - (B) a reasonable person in the person's circumstances would have had no such grounds for so suspecting.
- (2) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and it is proved that:
- (a) the person became a party to the transaction in good faith; and
  - (b) at the time when the person became such a party:



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- (i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and
  - (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and
  - (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.
- (3) For the purposes of paragraph (2)(c), if an amount has been paid or applied towards discharging to a particular extent a liability to pay tax, the discharge is valuable consideration provided:
- (a) by the person to whom the tax is payable; and
  - (b) under any transaction that consists of, or involves, the payment or application.
- (4) In subsection (3):
- tax* means tax (however described) payable under a law of the Commonwealth or of a State or Territory, and includes, for example, a levy, a charge, and municipal or other rates.
- (5) For the purposes of paragraph (2)(c), if an amount has been paid or applied towards discharging to a particular extent a liability to the Commonwealth, or to the Commissioner of Taxation, that arose under or because of an Act of which the Commissioner has the general administration, the discharge is valuable consideration provided by the Commonwealth, or by the Commissioner, as the case requires, under any transaction that consists of, or involves, the payment or application.
- (6) Subsections (3) and (5):
- (a) are to avoid doubt and are not intended to limit the cases where a person may be taken to have provided valuable consideration under a transaction; and
  - (b) apply to an amount even if it was paid or applied before the commencement of this Act.

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**588FGA Directors to indemnify Commissioner of Taxation if certain payments set aside**

- (1) This section applies if the court makes an order under section 588FF against the Commissioner of Taxation because of the payment of an amount in respect of a liability:
    - (a) under any of the following provisions:
      - (i) former section 220AAE, 220AAM or 220AAR of the *Income Tax Assessment Act 1936*;
      - (ii) former section 221F (except subsection 221F(12)), former section 221G (except subsection 221G(4A)) or former section 221P of the *Income Tax Assessment Act 1936*;
      - (iii) former subsection 221YHDC(2) of the *Income Tax Assessment Act 1936*;
      - (iv) former subsection 221YHZD(1) or (1A) of the *Income Tax Assessment Act 1936*;
      - (v) former subsection 221YN(1) of the *Income Tax Assessment Act 1936*;
      - (vi) section 222AHA of the *Income Tax Assessment Act 1936*;
      - (vii) Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*; or
    - (b) to pay the amount of an estimate of unpaid superannuation guarantee charge under Division 268 in Schedule 1 to the *Taxation Administration Act 1953*.
  - (2) Each person who was a director of the company when the payment was made is liable to indemnify the Commissioner in respect of any loss or damage resulting from the order.
  - (3) An amount payable to the Commissioner under subsection (2):
    - (a) is a debt due to the Commonwealth and payable to the Commissioner; and
    - (b) may be recovered in a court of competent jurisdiction by the Commissioner, or a Deputy Commissioner of Taxation, suing in his or her official name.
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- (4) The court may, in the proceedings in which it made the order against the Commissioner, order a person to pay to the Commissioner an amount payable by the person under subsection (2).
- (5) A person who pays an amount under subsection (2) has the same rights:
  - (a) whether by way of indemnity, subrogation, contribution or otherwise; and
  - (b) against the company or anyone else;as if the payment had been made under a guarantee:
  - (c) of the liability referred to in subsection (1); and
  - (d) under which the person and every other person who was a director of the company as mentioned in subsection (2) were jointly and severally liable as guarantors.

**588FGB Defences in proceedings under section 588FGA**

- (1) This section has effect for the purposes of:
  - (a) proceedings to recover from a person an amount payable under subsection 588FGA(2); and
  - (b) proceedings under subsection 588FGA(5) against a person of the kind referred to in paragraph 588FGA(5)(d).
- (2) The time when the payment referred to in subsection 588FGA(1) was made is called *the payment time*.
- (3) It is a defence if it is proved that, at the payment time, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it made the payment.
- (4) Without limiting the generality of subsection (3), it is a defence if it is proved that, at the payment time, the person:
  - (a) had reasonable grounds to believe, and did believe:
    - (i) that a competent and reliable person (*the other person*) was responsible for providing to the first-mentioned

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- person adequate information about whether the company was solvent; and
- (ii) that the other person was fulfilling that responsibility; and
- (b) expected, on the basis of information provided to the first-mentioned person by the other person, that the company was solvent at that time and would remain solvent even if it made the payment.
- (5) It is a defence if it is proved that, because of illness or for some other good reason, the person did not take part in the management of the company at the payment time.
- (6) It is a defence if it is proved that:
- (a) the person took all reasonable steps to prevent the company from making the payment; or
- (b) there were no such steps the person could have taken.
- (7) In determining whether a defence under subsection (6) has been proved, the matters to which regard is to be had include, but are not limited to:
- (a) any action the person took with a view to appointing an administrator of the company; and
- (b) when that action was taken; and
- (c) the results of that action.

**588FH Liquidator may recover from related entity benefit resulting from insolvent transaction**

- (1) This section applies where a company is being wound up and a transaction of the company:
- (a) is an insolvent transaction of the company; and
- (b) is voidable under section 588FE; and

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- (c) has had the effect of discharging, to the extent of a particular amount, a liability (whether under a guarantee or otherwise and whether contingent or otherwise) of a related entity of the company.
- (2) The company's liquidator may recover from the related entity, as a debt due to the company, an amount equal to the amount referred to in paragraph (1)(c).
- (3) In deciding what orders (if any) to make under section 588FF on an application relating to the transaction, a court must take into account any amount recovered under subsection (2) of this section.
- (4) If the liquidator recovers an amount under subsection (2) from the related entity, the related entity has the same rights:
  - (a) whether by way of indemnity, subrogation, contribution or otherwise; and
  - (b) against the company or anyone else;as if the related entity had paid the amount in discharging, to the extent of that amount, the liability referred to in paragraph (1)(c).

**588FI Creditor who gives up benefit of unfair preference may prove for preferred debt**

- (1) This section applies where:
  - (a) a transaction is an unfair preference given by a company to a creditor of the company after 23 June 1993; and
  - (b) at the request of the company's liquidator, because of an order under section 588FF, or for any other reason, the creditor has put the company in the same position as if the transaction had not been entered into.
- (2) A court must not make under section 588FF, on an application relating to the transaction, an order prejudicing a right or interest of the creditor.
- (3) The creditor may prove in the winding up as if the transaction had not been entered into.

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**588FJ Circulating security interest created within 6 months before relation-back day**

- (1) This section applies if:
  - (a) a company is being wound up in insolvency; and
  - (b) the company created a circulating security interest in property of the company at a particular time that is at or after 23 June 1993 and:
    - (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.
- (2) The circulating security interest is void, as against the company's liquidator, except so far as it secures:
  - (a) an advance paid to the company, or at its direction, at or after that time and as consideration for the circulating security interest; or
  - (b) interest on such an advance; or
  - (c) the amount of a liability under a guarantee or other obligation undertaken at or after that time on behalf of, or for the benefit of, the company; or
  - (d) an amount payable for property or services supplied to the company at or after that time; or
  - (e) interest on an amount so payable.
- (3) Subsection (2) does not apply if it is proved that the company was solvent immediately after that time.
- (4) Paragraphs (2)(a) and (b) do not apply in relation to an advance so far as it was applied to discharge, directly or indirectly, an unsecured debt, whether contingent or otherwise, that the company owed to:
  - (a) the secured party; or
  - (b) if the secured party was a body corporate—a related entity of the body.

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- (5) Paragraphs (2)(d) and (e) do not apply in relation to an amount payable as mentioned in paragraph (2)(d) in so far as the amount exceeds the market value of the property or services when supplied to the company.
- (6) If, during the 6 months ending on the relation-back day, or after that day but on or before the day when the winding up began, a debt secured by the circulating security interest was discharged, out of the company's money or property, to the extent of a particular amount (in this subsection called the **realised amount**), the liquidator may, by proceedings in a court of competent jurisdiction, recover from the secured party, as a debt due to the company, the amount worked out in accordance with the formula:

Unsecured amount – Realisation costs

where:

**realisation costs** means so much (if any) of the costs and expenses of enforcing the security interest as is attributable to realising the realised amount.

**unsecured amount** means so much of the realised amount as does not exceed so much of the debt as would, if the debt had not been so discharged, have been unsecured, as against the liquidator, because of subsection (2).

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**Division 2A—Vesting of PPSA security interests if not continuously perfected**

**588FK Interpretation and application**

- (1) A word or expression used in this Division has the same meaning as in the *Personal Property Securities Act 2009*.
- (2) Subsection (1) applies despite any other provision of this Act (subject to subsection (4)).
- (3) For the purposes of this Division, whether or not a person has acquired actual or constructive knowledge of a circumstance is to be determined in accordance with sections 297 to 300 of the *Personal Property Securities Act 2009*.
- (4) In this Division:

**PPSA security interest** has the meaning given by section 51.

Note: As a result of this section, in this Division, **company** has the same meaning as in the *Personal Property Securities Act 2009*. At the time this section was enacted, section 10 of that Act provided that **company** means:

- (a) a company registered under Part 2A.2 or Part 5B.1 of the *Corporations Act 2001*; or
- (b) a registrable body that is registered under Division 1 or 2 of Part 5B.2 of that Act.

**588FL Vesting of PPSA security interests if collateral not registered within time**

*Scope*

- (1) This section applies if:
  - (a) any of the following events occurs:
    - (i) an order is made, or a resolution is passed, for the winding up of a company;



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- (ii) an administrator of a company is appointed under section 436A, 436B or 436C;
- (iii) a company executes a deed of company arrangement under Part 5.3A; and
- (b) a PPSA security interest granted by the company in collateral is covered by subsection (2).

Note: A security interest granted by a company in relation to which paragraph (a) applies that is unperfected at the critical time may vest in the company under section 267 or 267A of the *Personal Property Securities Act 2009*.

- (2) This subsection covers a PPSA security interest if:
- (a) at the critical time, or, if the security interest arises after the critical time, when the security interest arises:
    - (i) the security interest is enforceable against third parties under the law of Australia; and
    - (ii) the security interest is perfected by registration, and by no other means; and
  - (b) the registration time for the collateral is after the latest of the following times:
    - (i) 6 months before the critical time;
    - (ii) the time that is the end of 20 business days after the security agreement that gave rise to the security interest came into force, or the time that is the critical time, whichever time is earlier;
    - (iii) if the security agreement giving rise to the security interest came into force under the law of a foreign jurisdiction, but the security interest first became enforceable against third parties under the law of Australia after the time that is 6 months before the critical time—the time that is the end of 56 days after the security interest became so enforceable, or the time that is the critical time, whichever time is earlier;
    - (iv) a later time ordered by the Court under section 588FM.

Note 1: For the meaning of *critical time*, see subsection (7).

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- Note 2: For when a security interest is enforceable against third parties under the law of Australia, see section 20 of the *Personal Property Securities Act 2009*.
- Note 3: A security interest may become perfected at a particular time by a registration that is made earlier than that time, if the security interest attaches to the collateral at the later time (after registration). See section 21 of the *Personal Property Securities Act 2009*.
- Note 4: The *Personal Property Securities Act 2009* provides for perfection by registration, possession or control, or by force of that Act (see section 21 of that Act).

*Vesting of security interest in company*

- (4) The PPSA security interest vests in the company at the following time, unless the security interest is unaffected by this section because of section 588FN:
- (a) if the security interest first becomes enforceable against third parties at or before the critical time—immediately before the event mentioned in paragraph (1)(a);
  - (b) if the security interest first becomes enforceable against third parties after the critical time—at the time it first becomes so enforceable.

Note: For the meaning of *critical time*, see subsection (7).

*Property acquired for new value without knowledge*

- (5) Subsection (4) does not affect the title of a person to personal property if:
- (a) the person acquires the personal property for new value from a secured party, from a person on behalf of a secured party, or from a receiver in the exercise of powers:
    - (i) conferred by the security agreement providing for the security interest; or
    - (ii) implied by the general law; and
  - (b) at the time the person acquires the property, the person has no actual or constructive knowledge of the following (as the case requires):

- (i) the filing of an application for an order to wind up the company;
- (ii) the passing of a resolution to wind up the company;
- (iii) the appointment of an administrator of the company under section 436A, 436B or 436C;
- (iv) the execution of a deed of company arrangement by the company under Part 5.3A.

Note: For what is actual or constructive knowledge, see sections 297 and 298 of the *Personal Property Securities Act 2009*.

(6) In a proceeding in Australia under this Act, the onus of proving the fact that a person acquires personal property without actual or constructive knowledge as mentioned in paragraph (5)(b) lies with the person asserting that fact.

(7) In this section:

**critical time**, in relation to a company, means:

- (a) if the company is being wound up—when, on a day, the event occurs by virtue of which the winding up is taken to have begun or commenced on that day under section 513A or 513B; or
- (b) in any other case—when, on a day, the event occurs by virtue of which the day is the section 513C day for the company.

### **588FM Extension of time for registration**

(1) A company, or any person interested, may apply to the Court (within the meaning of section 58AA) for an order fixing a later time for the purposes of subparagraph 588FL(2)(b)(iv).

Note: If an insolvency-related event occurs in relation to a company, paragraph 588FL(2)(b) fixes a time by which a PPSA security interest granted by the company must be registered under the *Personal Property Securities Act 2009*, failing which the security interest may vest in the company.

(2) On an application under this section, the Court may make the order sought if it is satisfied that:

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- (a) the failure to register the collateral earlier:
    - (i) was accidental or due to inadvertence or some other sufficient cause; or
    - (ii) is not of such a nature as to prejudice the position of creditors or shareholders; or
  - (b) on other grounds, it is just and equitable to grant relief.
- (3) The Court may make the order sought on any terms and conditions that seem just and expedient to the Court.

**588FN PPSA security interests unaffected by section 588FL**

*PPSA security interests arising under certain transactions*

- (1) Subsection 588FL(4) (vesting of security interests in company) does not apply to a PPSA security interest provided for by any of the following transactions, if the interest does not secure the payment or performance of an obligation:
- (a) a transfer of an account or chattel paper;
  - (b) a PPS lease, if paragraph (e) (serial numbered goods) of the definition of **PPS lease** in subsection 13(1) of the *Personal Property Securities Act 2009* applies to the lease, and none of paragraphs (a) to (d) of that definition applies to the lease;
  - (c) a commercial consignment.

Example: An example of a PPSA security interest mentioned in paragraph (b) is a PPS lease of goods that does not secure the payment or performance of an obligation, if:

- (a) the goods leased may or must be described by serial number in accordance with regulations made for the purposes of the *Personal Property Securities Act 2009*; and
- (b) the lease is for a term of between 90 days and 1 year; and
- (c) paragraphs (c) and (d) of the definition of **PPS lease** in subsection 13(1) of the *Personal Property Securities Act 2009* do not apply to the lease.

*PPSA security interests and subordinated debts*

- (2) Subsection 588FL(4) (vesting of security interests in company) does not apply to a PPSA security interest in an account if all of the following conditions are satisfied:
- (a) a person (the **obligor**) owes money to another person (the **senior creditor**);
  - (b) the obligor also owes money to a third person (the **junior creditor**);
  - (c) an agreement between the senior creditor and the junior creditor provides (in substance):
    - (i) for the postponement or subordination of the obligor's debt to the junior creditor, to the obligor's debt to the senior creditor; and
    - (ii) in the event of the obligor's debt to the junior creditor being discharged (whether wholly or partly) by the obligor transferring personal property to the junior creditor—for the junior creditor to transfer the property, or proceeds of the property, to the senior creditor to the value of the amount owed by the obligor to the senior creditor; and
    - (iii) in the event that the property or proceeds are not transferred—for the junior creditor to hold the property or proceeds on trust for the senior creditor to that value; and
    - (iv) in the event of such a trust arising—for a security interest to be granted by the junior creditor to the senior creditor over the personal property or proceeds securing payment of the obligor's debt to the senior creditor;
  - (d) the security interest is a security interest granted under the agreement, in the circumstances described in subparagraph (c)(iv).

*Transfer of collateral subject to PPSA security interests*

- (3) Subsection 588FL(4) (vesting of security interests in company) does not apply to a PPSA security interest if:
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- (a) before the critical time that applies under section 588FL, the company acquired, by transfer, the collateral in which the PPSA security interest is granted; and
  - (b) the company did not acquire the collateral free of the security interest; and
  - (c) the security interest became perfected before the critical time; and
  - (d) the security interest was continuously perfected by registration during a period covered by subsection (4) that begins before the critical time.
- (4) The period covered by this subsection:
- (a) begins at whichever of the following times is applicable:
    - (i) in a case in which the secured party consented to the transfer—the end of 5 business days after the day of the transfer;
    - (ii) in a case in which the secured party otherwise acquires the actual or constructive knowledge required to perfect the secured party's interest by registration (or to re-perfect the interest by an amendment of a registration)—the end of 5 business days after the day the secured party acquires the knowledge; and
  - (b) ends no earlier than at the critical time that applies under section 588FL.

Note: For what is actual or constructive knowledge, see sections 297 and 298 of the *Personal Property Securities Act 2009*.

**588FO Certain lessors, bailors and consignors entitled to damages**

*Scope*

- (1) This section applies if either of the following PPSA security interests is vested in a company under section 588FL:
- (a) a PPSA security interest of a consignor under a commercial consignment;
  - (b) a PPSA security interest of a lessor or bailor under a PPS lease.

*Entitlement to damages and compensation*

- (2) The consignor, lessor or bailor:
- (a) is taken to have suffered damage immediately before the PPSA security interest was vested in the company; and
  - (b) may recover an amount of compensation from the company equal to the greater of the following amounts:
    - (i) the amount determined in accordance with the consignment, lease or bailment;
    - (ii) the sum of the market value of the consigned, leased or bailed property immediately before the critical time that applies under section 588FL, and the amount of any other damage or loss resulting from the termination of the consignment, lease or bailment.

Note: The consignor, lessor or bailor may be able to prove the amount of compensation in proceedings related to the winding up of the company.

## **Division 2B—Security interests in favour of company officers etc.**

### **588FP Security interests in favour of an officer of a company etc. void**

#### *General rule*

- (1) A security interest, and any powers purporting to be conferred by the instrument under which the security interest is created, are void, and are taken always to have been void, if:
    - (a) a company grants the security interest; and
    - (b) a person covered by subsection (2) is a secured party; and
    - (c) the secured party purports to take a step to enforce the security interest, within 6 months after the time (the ***relevant time***) the instrument is made, without the leave of the Court under subsection (4).
  - (2) This subsection covers the following persons:
    - (a) a person who is an officer (including a local agent of a foreign company) of the company at the relevant time;
    - (b) a person who has been such an officer of the company at any time within the period of 6 months ending at the relevant time;
    - (c) a person associated, in relation to the creation of the security interest, with a person of a kind mentioned in paragraph (a) or (b).
  - (3) Without limiting paragraph (1)(c), a secured party takes a step to enforce a security interest if:
    - (a) the secured party appoints a receiver, or a receiver and manager, under powers conferred by an instrument creating or evidencing the security interest; or
    - (b) whether directly or by an agent, the secured party enters into possession or assumes control of property of a company for the purposes of enforcing the security interest; or
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- (c) the secured party seizes the property under section 123 of the *Personal Property Securities Act 2009* for the purposes of enforcing the security interest.

*Extension of time on application to the Court*

- (4) On application by a secured party, the Court may give leave for a security interest granted by a company to be enforced by the secured party within 6 months after the relevant time, if it is satisfied that:
- (a) the company was solvent immediately before the relevant time; and
  - (b) in all the circumstances of the case, it is just and equitable for the Court to do so.

*Exception for security interests in PPSA retention of title property*

- (5) This section does not apply in relation to a PPSA security interest in PPSA retention of title property.

*Effect on debts, liabilities, obligations and title*

- (6) A debt, liability or obligation is not affected by the fact that the security interest securing the debt, liability or obligation is void under subsection (1).
- (7) Subsection (1) does not affect the title of a person to property if:
- (a) the person acquires the property for new value (within the meaning of the *Personal Property Securities Act 2009*) from any of the following persons (the **seller**):
    - (i) a person covered by subsection (2);
    - (ii) another person on behalf of a person covered by subsection (2);
    - (iii) a receiver, or receiver and manager, appointed under powers conferred by an instrument creating or evidencing the security interest; and

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- (b) at the time the person acquires the property, the person has no actual or constructive knowledge that the seller is a secured party or acting on behalf of a secured party.
- (8) Sections 297 to 300 of the *Personal Property Securities Act 2009* apply in relation to the determination of whether or not a person has actual or constructive knowledge as mentioned in paragraph (7)(b) of this section.

*Onus of proof*

- (9) In a proceeding in Australia under this Act, the onus of proving the fact that a person acquires property without actual or constructive knowledge as mentioned in paragraph (7)(b) lies with the person asserting that fact.

## **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.

<b>When debts are incurred</b>		[operative table]
<b>Action of company</b>	<b>When debt is incurred</b>	
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

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<b>When debts are incurred</b>		[operative table]
<b>Action of company</b>	<b>When debt is incurred</b>	
4	redeeming redeemable preference shares that are redeemable at its option	when the company exercises the option
5	issuing redeemable preference shares that are redeemable otherwise than at its option	when the shares are issued
6	financially assisting a person to acquire shares (or units of shares) in itself or a holding company	when the agreement to provide the assistance is entered into or, if there is no agreement, when the assistance is provided
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	when the transaction is entered into

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- (2) By failing to prevent the company from incurring the debt, the person contravenes this section if:
- (a) the person is aware at that time that there are such grounds for so suspecting; or
  - (b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

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

- (3) A person commits an offence if:
- (a) a company incurs a debt at a particular time; and
  - (aa) at that time, a person is a director of the company; 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) the person suspected at the time when the company incurred the debt that the company was insolvent or would become

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insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and

(d) the person's failure to prevent the company incurring the debt was dishonest.

(3A) For the purposes of an offence based on subsection (3), absolute liability applies to paragraph (3)(a).

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

(3B) For the purposes of an offence based on subsection (3), strict liability applies to paragraphs (3)(aa) and (b).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

(4) The provisions of Division 4 of this Part are additional to, and do not derogate from, Part 9.4B as it applies in relation to a contravention of this section.

### 588H Defences

- (1) This section has effect for the purposes of proceedings for a contravention of subsection 588G(2) in relation to the incurring of a debt (including proceedings under section 588M in relation to the incurring of the debt).
- (2) It is a defence if it is proved that, at the time when the debt was incurred, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.
- (3) Without limiting the generality of subsection (2), it is a defence if it is proved that, at the time when the debt was incurred, the person:
  - (a) had reasonable grounds to believe, and did believe:
    - (i) that a competent and reliable person (the *other person*) was responsible for providing to the first-mentioned person adequate information about whether the company was solvent; and

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- (ii) that the other person was fulfilling that responsibility; and
  - (b) expected, on the basis of information provided to the first-mentioned person by the other person, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.
- (4) If the person was a director of the company at the time when the debt was incurred, it is a defence if it is proved that, because of illness or for some other good reason, he or she did not take part at that time in the management of the company.
- (5) It is a defence if it is proved that the person took all reasonable steps to prevent the company from incurring the debt.
- (6) In determining whether a defence under subsection (5) has been proved, the matters to which regard is to be had include, but are not limited to:
  - (a) any action the person took with a view to appointing an administrator of the company; and
  - (b) when that action was taken; and
  - (c) the results of that action.

## **Division 4—Director liable to compensate company**

### **Subdivision A—Proceedings against director**

#### **588J On application for civil penalty order, Court may order compensation**

- (1) Where, on an application for a civil penalty order against a person in relation to a contravention of subsection 588G(2), the Court is satisfied that:
  - (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.
- (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).
- (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.

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**588K Criminal court may order compensation**

If:

- (a) a court finds a person guilty of an offence under subsection 588G(3) in relation to the incurring of a debt by a company; and
- (b) the court is satisfied that:
  - (i) the debt is wholly or partly unsecured; and
  - (ii) 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 imposes a penalty) order the first-mentioned person to pay to the company compensation equal to the amount of that loss or damage.

Note: Section 73A defines when a court is taken to find a person guilty of an offence.

**588L Enforcement of order under section 588J or 588K**

An order to pay compensation that a court makes under section 588J or 588K may be enforced as if it were a judgment of the court.

**588M Recovery of compensation for loss resulting from insolvent trading**

- (1) This section applies where:
  - (a) a person (in this section called the *director*) has contravened subsection 588G(2) or (3) in relation to the incurring of a debt by a company; and
  - (b) the person (in this section called the *creditor*) to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and
  - (c) the debt was wholly or partly unsecured when the loss or damage was suffered; and



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- (d) the company is being wound up;  
whether or not:
  - (e) the director has been convicted of an offence in relation to the contravention; or
  - (f) a civil penalty order has been made against the director in relation to the contravention.
- (2) The company's liquidator may recover from the director, as a debt due to the company, an amount equal to the amount of the loss or damage.
- (3) The creditor may, as provided in Subdivision B but not otherwise, recover from the director, as a debt due to the creditor, an amount equal to the amount of the loss or damage.
- (4) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

#### **588N Avoiding double recovery**

An amount recovered in proceedings under section 588M in relation to the incurring of a debt by a company is to be taken into account in working out the amount (if any) recoverable in:

- (a) any other proceedings under that section in relation to the incurring of the debt; and
- (b) proceedings under section 596AC in relation to a contravention of section 596AB that is linked to the incurring of the debt.

#### **588P Effect of sections 588J, 588K and 588M**

Sections 588J, 588K and 588M:

- (a) have effect in addition to, and not in derogation of, any rule of law about the duty or liability of a person because of the person's office or employment in relation to a company; and
- (b) do not prevent proceedings from being instituted in respect of a breach of such a duty or in respect of such a liability.

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**588Q Certificates evidencing contravention**

For the purposes of this Part, a certificate that:

- (a) purports to be signed by the Registrar or other proper officer of an Australian court; and
- (b) states:
  - (i) that that court has declared that a specified person has, by failing to prevent a specified company from incurring a specified debt, contravened subsection 588G(3) in relation to the company; or
  - (ii) that a specified person was convicted by that court for an offence constituted by a contravention of section 588G in relation to the incurring of a specified debt by a specified company; or
  - (iii) that a specified person charged before that court with such an offence was found in that court to have committed the offence but that the court did not proceed to convict the person of the offence;

is, unless it is proved that the declaration, conviction or finding was set aside, quashed or reversed, conclusive evidence:

- (c) that the declaration was made, that the person was convicted of the offence, or that the person was so found, as the case may be; and
- (d) that the person committed the contravention.

**Subdivision B—Proceedings by creditor**

**588R Creditor may sue for compensation with liquidator's consent**

- (1) A creditor of a company that is being wound up may, with the written consent of the company's liquidator, begin proceedings under section 588M in relation to the incurring by the company of a debt that is owed to the creditor.
- (2) Subsection (1) has effect despite section 588T, but subject to section 588U.

**588S Creditor may give liquidator notice of intention to sue for compensation**

After the end of 6 months beginning when a company begins to be wound up, a creditor of the company may give to the company's liquidator a written notice:

- (a) stating that the creditor intends to begin proceedings under section 588M in relation to the incurring by the company of a specified debt that is owed to the creditor; and
- (b) asking the liquidator to give to the creditor, within 3 months after receiving the notice:
  - (i) a written consent to the creditor beginning the proceedings; or
  - (ii) a written statement of the reasons why the liquidator thinks that proceedings under section 588M in relation to the incurring of that debt should not be begun.

**588T When creditor may sue for compensation without liquidator's consent**

- (1) This section applies where a notice is given under section 588S.
- (2) The creditor may begin proceedings in a court under section 588M in relation to the incurring by the company of the debt specified in the notice if:
  - (a) as at the end of 3 months after the liquidator receives the notice, he or she has not consented to the creditor beginning such proceedings; and
  - (b) on an application made after those 3 months, the court has given leave for the proceedings to begin.
- (3) If:
  - (a) during those 3 months, the liquidator gives to the creditor a written statement of the reasons why the liquidator thinks that such proceedings should not be begun; and
  - (b) the creditor applies for leave under paragraph (2)(b);then:

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- (c) the creditor must file the statement with the court when so applying; and
- (d) in determining the application, the court is to have regard to the reasons set out in the statement.

**588U Events preventing creditor from suing**

- (1) A creditor of a company that is being wound up cannot begin proceedings under section 588M in relation to the incurring of a debt by the company if:
  - (a) the company's liquidator has applied under section 588FF in relation to the debt, or in relation to a transaction under which the debt was incurred; or
  - (b) the company's liquidator has begun proceedings under section 588M in relation to the incurring of the debt; or
  - (c) the company's liquidator has intervened in an application for a civil penalty order against a person in relation to a contravention of subsection 588G(2) in relation to the incurring of the debt.
- (2) Subsection (1) has effect despite sections 588R and 588T.

## **Division 5—Liability of holding company for insolvent trading by subsidiary**

### **588V When holding company liable**

- (1) A corporation contravenes this section if:
  - (a) the corporation is the holding company 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) one or both of the following subparagraphs applies:
    - (i) the corporation, or one or more of its directors, is or are aware at that time that there are such grounds for so suspecting;
    - (ii) having regard to the nature and extent of the corporation's control over the company's affairs and to any other relevant circumstances, it is reasonable to expect that:
      - (A) a holding company in the corporation's circumstances would be so aware; or
      - (B) one or more of such a holding company's directors would be so aware; and
  - (e) that time is at or after the commencement of this Act.
- (2) A corporation that contravenes this section is not guilty of an offence.

### **588W Recovery of compensation for loss resulting from insolvent trading**

- (1) Where:
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**Chapter 5** External administration

**Part 5.7B** Recovering property or compensation for the benefit of creditors of insolvent company

**Division 5** Liability of holding company for insolvent trading by subsidiary

**Section 588X**

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- (a) a corporation has contravened section 588V in relation to the incurring of a debt by a company; and
  - (b) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and
  - (c) the debt was wholly or partly unsecured when the loss or damage was suffered; and
  - (d) the company is being wound up;
- the company's liquidator may recover from the corporation, as a debt due to the company, an amount equal to the amount of the loss or damage.
- (2) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

**588X Defences**

- (1) This section has effect for the purposes of proceedings under section 588W.
- (2) It is a defence if it is proved that, at the time when the debt was incurred, the corporation, and each relevant director (if any), had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.
- (3) Without limiting the generality of subsection (2), it is a defence if it is proved that, at the time when the debt was incurred, the corporation, and each relevant director (if any):
  - (a) had reasonable grounds to believe, and did believe:
    - (i) that a competent and reliable person was responsible for providing to the corporation adequate information about whether the company was solvent; and
    - (ii) that the person was fulfilling that responsibility; and
  - (b) expected, on the basis of the information provided to the corporation by the person, that the company was solvent at

that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.

- (4) If it is proved that, because of illness or for some other good reason, a particular relevant director did not take part in the management of the corporation at the time when the company incurred the debt, the fact that the director was aware as mentioned in subparagraph 588V(1)(d)(i) is to be disregarded.
- (5) It is a defence if it is proved that the corporation took all reasonable steps to prevent the company from incurring the debt.
- (6) In subsections (2), (3) and (4):

***relevant director*** means a director of the corporation who was aware as mentioned in subparagraph 588V(1)(d)(i).

## **Division 6—Application of compensation under Division 4 or 5**

### **588Y Application of amount paid as compensation**

- (1) An amount paid to a company under section 588J, 588K, 588M or 588W is not available to pay a secured debt of the company unless all the company's unsecured debts have been paid in full.
- (2) Where:
  - (a) under section 588J or 588K, or in proceedings under section 588M or 588W, a court orders a person to pay to the company compensation, or an amount, equal to the amount of loss or damage suffered by a person in relation to a debt because of the company's insolvency; and
  - (b) the court is satisfied that, at the time when the company incurred the debt, the person who suffered the loss or damage knew that the company was insolvent at that time or would become insolvent by incurring the debt, or by incurring at that time debts including the debt, as the case requires;  
the court may order that the compensation or amount paid to the company is not available to pay that debt unless all the company's unsecured debts (other than debts to which orders under this subsection relate) have been paid in full.
- (3) Subsection (2) does not apply in relation to proceedings under section 588M in relation to the incurring of a debt by a company if the proceedings are begun by a creditor of the company (as provided for in Subdivision B of Division 4).
- (4) Subsection (2) does not apply in relation to a liability that is taken to be a debt because of section 588F.



**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.

## Part 5.8—Offences

### 589 Interpretation and application

- (1) Sections 590 to 593 (inclusive) apply to a company:
  - (a) that has been wound up or is in the course of being wound up; or
  - (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
  - (ba) of which a provisional liquidator has been appointed; or
  - (c) that is or has been under administration; or
  - (ca) that has executed a deed of company arrangement, even if the deed has since terminated; or
  - (d) affairs of which are or have been under investigation; or
  - (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
  - (f) that has ceased to carry on business or is unable to pay its debts; or
  - (g) that has entered into a compromise or arrangement with its creditors.
- (2) For the purposes of this Part, affairs of a company are or have been under investigation if, and only if:
  - (a) ASIC is investigating, or has at any time investigated, under Division 1 of Part 3 of the ASIC Act:
    - (i) matters being, or connected with, affairs of the company; or
    - (ii) matters including such matters; or
  - (b) affairs of the company have at any time been under investigation under:
    - (i) Part VII of the *Companies Act 1981*; or

- (ii) the provisions of a previous law of a State or Territory that correspond to that Part.
- (3) For the purposes of this Part, a company is taken to have ceased to carry on business only if:
- (a) ASIC has published in the prescribed manner a notice of the proposed deregistration of the company under subsection 601AA(4) or 601AB(3); and
  - (b) if the notice was published under subsection 601AA(4) or under subsection 601AB(3) because of a decision under subsection 601AB(1)—2 months have passed since the notice was published and ASIC has not been informed that the company is carrying on business.
- (4) For the purposes of this Part, a company is taken to be unable to pay its debts if, and only if, execution or other process issued on a judgment, decree or order of a court (whether or not an Australian court) in favour of a creditor of the company is returned unsatisfied in whole or in part.
- (5) In this Part:
- appropriate officer*** means:
- (a) in relation to a company that has been, has been being or is being wound up—the liquidator; and
  - (aa) in relation to a company of which a provisional liquidator has been appointed—the provisional liquidator; and
  - (b) in relation to a company that is or has been under administration—the administrator; and
  - (ba) in relation to a company that has executed a deed of company arrangement—the deed’s administrator; and
  - (c) in relation to a company affairs of which are or have been under investigation—ASIC or the NCSC, as the case requires; and
  - (d) in relation to a company in respect of property of which a receiver, or a receiver and manager, has been appointed—the receiver or the receiver and manager; and

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- (e) in relation to a company that has ceased to carry on business or is unable to pay its debts—ASIC or the NCSC, as the case requires; and
- (f) in relation to a company that has entered into a compromise or arrangement with its creditors—the person appointed by the Court to administer the compromise or arrangement.

**property** of a company includes any PPSA retention of title property of the company.

Note: See sections 9 (definition of **property**) and 51F (PPSA retention of title property).

**relevant day** means the day on which:

- (a) in relation to a company that has been wound up, has been in the course of being wound up, or is being wound up:
  - (i) if, because of Division 1A of Part 5.6, the winding up is taken to have begun on the day when an order that the company be wound up was made—the application for the order was filed; or
  - (ii) otherwise—the winding up is taken because of Division 1A of Part 5.6 to have begun;
- (aa) in relation to a company of which a provisional liquidator has been appointed—the provisional liquidator was appointed;
- (b) in relation to a company that is or has been under administration—the administration began;
- (ba) in relation to a company that has executed a deed of company arrangement—the deed was executed;
- (c) in relation to a company affairs of which are or have been under investigation:
  - (i) if paragraph (2)(a) applies—the investigation began; or
  - (ii) if paragraph (2)(b) applies—a direction was given to the NCSC to arrange for the investigation;
- (d) in relation to a company in respect of property of which a receiver, or a receiver and manager, has been appointed—the receiver, or the receiver and manager, was appointed;

- (e) in relation to a company that is unable to pay its debts—the execution or other process was returned unsatisfied in whole or in part;
  - (f) in relation to a company that has ceased to carry on business—a notice was first published in relation to the company under subsection 601AA(4) or 601AB(3);
  - (g) in relation to a company that has entered into a compromise or arrangement with its creditors—the compromise or arrangement was approved by the Court.
- (6) This Part applies in relation to a company that was first incorporated other than under this Act:
- (a) as if, in this Part (other than section 595) as so applying:
    - (i) a reference to the company included a reference to the company as it existed at a time before its registration day (including a time before the commencement of this Act); and
    - (iii) a reference, in relation to a provision of this Act, to ASIC included a reference to the NCSC (if relevant); and
  - (b) with such other modifications as the circumstances require.

### **590 Offences by officers of certain companies**

- (1) A person who, being a past or present officer or employee of a company to which this section applies:
- (a) does not disclose to the appropriate officer all the property of the company, and how and to whom and for what consideration and when any part of the property of the company was disposed of within 10 years next before the relevant day, except such part as has been disposed of in the ordinary course of the business of the company; or
  - (c) has, within 10 years next before the relevant day or at a time on or after that day:
    - (i) engaged in conduct that resulted in the fraudulent concealment or removal of any part of the property of the company to the value of \$100 or more; or

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- (ii) engaged in conduct that resulted in the concealment of any debt due to or by the company; or
  - (iii) engaged in conduct that resulted in the fraudulent parting with, alteration or making of any omission in, or being privy to fraudulent parting with, altering or making any omission in, any book affecting or relating to affairs of the company; or
  - (iv) by any false representation or other fraud, obtained on credit, for or on behalf of the company, any property that the company has not subsequently paid for; or
  - (v) engaged in conduct that resulted in the fraudulent pawning, pledging or disposal of, otherwise than in the ordinary course of the business of the company, property of the company that has been obtained on credit and has not been paid for;
- (d) fraudulently makes any material omission in any statement or report relating to affairs of the company; or
- (f) engaged in conduct that prevented the production to the appropriate officer of any book affecting or relating to affairs of the company; or
- (g) has, within 10 years next before the relevant day or at a time on or after that day, attempted to account for any part of the property of the company by making entries in the books of the company showing fictitious transactions, losses or expenses; or
- (h) has, within 10 years next before the relevant day or at a time on or after that day, been guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to affairs of the company or to the winding up; contravenes this subsection.
- (2) Absolute liability applies to so much of an offence based on paragraph (1)(c), (g) or (h) as requires that an event occur within 10 years next before the relevant day or at a time on or after that day.

Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.

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- (3) Paragraph (1)(a) does not apply to the extent that the person is not capable of disclosing the information referred to in that paragraph.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3), see subsection 13.3(3) of the *Criminal Code*.

- (4) A person who, being a past or present officer or employee of a company to which this section applies, does not deliver up to, or in accordance with the directions of, the appropriate officer:

- (a) all the property of the company in the person's possession; or
- (b) all books in the person's possession belonging to the company (except books of which the person is entitled, as against the company and the appropriate officer, to retain possession);

contravenes this subsection.

- (4A) A person who, being a past or present officer or employee of a company and knowing or believing that a false debt has been proved by a person, fails for a period of one month to inform the appropriate officer of his or her knowledge or belief contravenes this subsection.

- (4B) A person must not intentionally or recklessly fail to comply with subsection (4) or (4A).

- (5) Where a person pawns, pledges or disposes of any property in circumstances that amount to a contravention by virtue of subparagraph (1)(c)(v), a person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in those circumstances contravenes this subsection.

- (6) A person who takes in pawn or pledge or otherwise receives property in circumstances mentioned in subsection (5) and with the knowledge mentioned in that subsection is taken to hold the property as trustee for the company concerned and is liable to account to the company for the property.

- (7) Where, in proceedings under subsection (6), it is necessary to establish that a person has taken property in pawn or pledge, or otherwise received property:

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- (a) in circumstances mentioned in subsection (5); and
  - (b) with the knowledge mentioned in that subsection;
- the matter referred to in paragraph (b) of this subsection may be established on the balance of probabilities.

**592 Incurring of certain debts; fraudulent conduct**

- (1) Where:
- (a) a company has incurred a debt before 23 June 1993; and
  - (b) immediately before the time when the debt was incurred:
    - (i) there were reasonable grounds to expect that the company will not be able to pay all its debts as and when they become due; or
    - (ii) there were reasonable grounds to expect that, if the company incurs the debt, it will not be able to pay all its debts as and when they become due; and
  - (c) the company was, at the time when the debt was incurred, or becomes at a later time, a company to which this section applies;

any person who was a director of the company, or took part in the management of the company, at the time when the debt was incurred contravenes this subsection and the company and that person or, if there are 2 or more such persons, those persons are jointly and severally liable for the payment of the debt.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) In any proceedings against a person under subsection (1), it is a defence if it is proved:
- (a) that the debt was incurred without the person's express or implied authority or consent; or
  - (b) that at the time when the debt was incurred, the person did not have reasonable cause to expect:
    - (i) that the company would not be able to pay all its debts as and when they became due; or



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- (ii) that, if the company incurred that debt, it would not be able to pay all its debts as and when they became due.

Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (2), see section 13.4 of the *Criminal Code*.

- (3) Proceedings may be brought under subsection (1) for the recovery of a debt whether or not the person against whom the proceedings are brought, or any other person, has been convicted of an offence under subsection (1) in respect of the incurring of that debt.
- (4) In proceedings brought under subsection (1) for the recovery of a debt, the liability of a person under that subsection in respect of the debt may be established on the balance of probabilities.
- (5) Where subsection (1) renders a person or persons liable to pay a debt incurred by a company, the payment by that person or either or any of those persons of the whole or any part of that debt does not render the company liable to the person concerned in respect of the amount so paid.
- (6) Where:
- (a) a company has done an act (including the making of a contract or the entering into of a transaction) with intent to defraud creditors of the company or of any other person or for any other fraudulent purpose; and
  - (b) the company was at the time when it does the act, or becomes at a later time, a company to which this section applies;
- any person who was knowingly concerned in the doing of the act with that intent or for that purpose contravenes this subsection.
- (6A) For the purposes of an offence based on subsection (6), absolute liability applies to paragraph (6)(b).
- Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.
- (7) A certificate issued by the proper officer of an Australian court stating that a person specified in the certificate:
- (a) was convicted of an offence under subsection (1) in relation to a debt specified in the certificate incurred by a company so specified; or

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- (b) was convicted of an offence under subsection (6) in relation to a company specified in the certificate;  
is, in any proceedings, prima facie evidence of the matters stated in the certificate.
- (8) A document purporting to be a certificate issued under subsection (7) is, unless the contrary is established, taken to be such a certificate and to have been duly issued.

**593 Powers of Court**

- (1) Where a person has been convicted of an offence under subsection 592(1) in respect of the incurring of a debt, the Court, on the application of ASIC or the person to whom the debt is payable, may, if it thinks it proper to do so, declare that the first-mentioned person is personally responsible without any limitation of liability for the payment to the person to whom the debt is payable of an amount equal to the whole of the debt or such part of it as the Court thinks proper.
- (2) Where a person has been convicted of an offence under subsection 592(6), the Court, on the application of ASIC or of a prescribed person, may, if it thinks it proper to do so, declare that the first-mentioned person is personally responsible without any limitation of liability for the payment to the company of the amount required to satisfy so much of the debts of the company as the Court thinks proper.
- (3) In relation to a company in respect of which a conviction referred to in subsection (2) relates:
- (a) the appropriate officer; and
  - (b) a creditor or contributory of the company authorised by ASIC to make an application under that subsection; and
  - (c) if the company was a company to which section 592 applied by reason of paragraph 589(1)(c)—a member of the company;
- are prescribed persons for the purposes of that subsection.

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- (4) Where the Court makes a declaration under subsection (1) in relation to a person, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.
- (5) In particular, the Court may order that the liability of the person under the declaration is a charge:
  - (a) on a debt or obligation due from the company to the person;  
or
  - (b) on a right or interest under a security interest in any property of the company held by or vested in the person or a person on the person's behalf, or a person claiming as assignee from or through the person liable or a person acting on the person's behalf.
- (6) The Court may, from time to time, make such further order as it thinks proper for the purpose of enforcing a charge imposed under subsection (5).
- (7) For the purpose of subsection (5), *assignee* includes a person to whom or in whose favour, by the directions of the person liable, the debt, obligation or security interest was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without actual knowledge of any of the matters upon which the conviction or declaration was made.
- (8) On the hearing of an application under subsection (1) or (2), the appropriate officer or other applicant may give evidence or call witnesses.

#### **594 Certain rights not affected**

Except as provided by subsection 592(4) nothing in subsection 592(1) or 593(1) or (2) affects any rights of a person to indemnity, subrogation or contribution.

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**595 Inducement to be appointed liquidator etc. of company**

- (1) A person must not give, or agree or offer to give, to another person any valuable consideration with a view to securing the first-mentioned person's own appointment or nomination, or to securing or preventing the appointment or nomination of a third person, as:
- (a) a liquidator or provisional liquidator of a company; or
  - (b) an administrator of a company; or
  - (c) an administrator of a deed of company arrangement executed, or to be executed, by a company; or
  - (d) a receiver, or a receiver and manager, of property of a company; or
  - (e) a trustee or other person to administer a compromise or arrangement made between a company and any other person or persons.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**596 Frauds by officers**

- (1) A person who, while an officer or employee of a company:
- (a) by false pretences or by means of any other fraud, induces a person to give credit to the company or to a related body corporate; or
  - (b) with intent to defraud the company or a related body corporate, or members or creditors of the company or of a related body corporate, makes or purports to make, or causes to be made or to be purported to be made, any gift or transfer of, or security interest in, or causes or connives at the levying of any execution against, property of the company or of a related body corporate; or
  - (c) with intent to defraud the company or a related body corporate, or members or creditors of the company or of a related body corporate, engages in conduct that results in the concealment or removal of any part of the property of the

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company or of a related body corporate after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or a related body corporate;

contravenes this section.

- (2) Absolute liability applies to so much of an offence based on paragraph (1)(c) as requires that an event occur after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or a related body corporate.

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

## Part 5.8A—Employee entitlements

### 596AA Object and coverage of Part

#### *Object*

- (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.

#### *Employee entitlements*

- (2) The **entitlements** of an employee of a company that are protected under this Part are:
  - (a) wages payable by the company for services rendered to the company by the employee; and
  - (b) superannuation contributions (that is, contributions by the company to a fund or scheme for the purposes of making provision for, or obtaining, superannuation benefits (including defined 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
  - (c) amounts due in respect of injury compensation in relation to the employee; and
  - (d) amounts due under an industrial instrument in respect of the employee's leave of absence; and
  - (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).

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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- (3) The entitlements of an excluded employee (within the meaning of section 556) are protected under this Part only to the extent to which they have priority under paragraph 556(1)(e), (f), (g) or (h).

*Employees*

- (4) For the purposes of this Part, a person is an **employee** of a company if the person is, or has been, an employee of the company (whether remunerated by salary, wages, commission or otherwise).
- (5) If an entitlement of an employee of a company is owed to a person other than the employee, this Part applies to the entitlement as if a reference to the **employee** included a reference to the person to whom the entitlement is owed.

**596AB Entering into agreements or transactions to avoid employee entitlements**

- (1) A person must not enter into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of:
- (a) preventing the recovery of the entitlements of employees of a company; or
  - (b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.
- (2) Subsection (1) applies even if:
- (a) the company is not a party to the agreement or transaction; or
  - (b) the agreement or transaction is approved by a court.
- (3) A reference in this section to a **relevant agreement or a transaction** includes a reference to:
- (a) a relevant agreement and a transaction; and
  - (b) a series or combination of:
    - (i) relevant agreements or transactions; or
    - (ii) relevant agreements; or
    - (iii) transactions.

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- (4) If a person contravenes this section by incurring a debt (within the meaning of section 588G), the incurring of the debt and the contravention are *linked* for the purposes of this Act.

**596AC Person who contravenes section 596AB liable to compensate for loss**

- (1) A person is liable to pay compensation under subsection (2) or (3) if:
- (a) the person contravenes section 596AB in relation to the entitlements of employees of a company; and
  - (b) the company is being wound up; and
  - (c) the employees suffer loss or damage because of:
    - (i) the contravention; or
    - (ii) action taken to give effect to an agreement or transaction involved in the contravention.

The person is liable whether or not the person has been convicted of an offence in relation to the contravention.

- (2) The company's liquidator may recover from the person an amount equal to the loss or damage as a debt due to the company.

Note: Because employee entitlements are priority payments under paragraphs 556(1)(e) to (h), employees have priority to any compensation recovered by the liquidator in proceedings brought under this section.

- (3) If an employee of the company has suffered loss or damage because of:
- (a) the contravention; or
  - (b) action taken to give effect to an agreement or transaction involved in the contravention;

the employee may, as provided in section 596AF to 596AI (but not otherwise), recover from the person, as a debt due to the employee, an amount equal to the amount of the loss or damage. Any amount recovered by the employee under this subsection is to be taken into account in working out the amount for which the employee may prove in the liquidation of the company.



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- (4) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

**596AD Avoiding double recovery**

An amount recovered in proceedings under section 596AC in relation to a contravention of section 596AB is to be taken into account in working out the amount (if any) recoverable in:

- (a) any other proceedings under that section in relation to the contravention; and
- (b) proceedings under section 588M in relation to the incurring of a debt that is linked to the contravention.

**596AE Effect of section 596AC**

Section 596AC:

- (a) has effect in addition to, and not in derogation of, any rule of law about the duty or liability of a person because of the person's office or employment in relation to a company; and
- (b) does not prevent proceedings from being instituted in respect of a breach of such a duty or in respect of such a liability.

**596AF Employee may sue for compensation with liquidator's consent**

- (1) If a company is being wound up, an employee of the company may, with the written consent of the company's liquidator, begin proceedings under section 596AC in relation to a contravention of section 596AB in relation to an entitlement of the employee.
- (2) Subsection (1) has effect despite section 596AH, but subject to section 596AI.

**596AG Employee may give liquidator notice of intention to sue for compensation**

An employee of a company that is being wound up may give the company's liquidator a written notice:

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- (a) stating that the employee intends to begin proceedings under section 596AC in relation to a contravention of section 596AB in relation to an entitlement of the employee; and
- (b) specifying the contravention of section 596AB and the entitlement to which the proposed proceedings relate; and
- (c) asking the liquidator to give the employee, within 3 months after receiving the notice:
  - (i) a written consent to the employee beginning the proceedings; or
  - (ii) a written statement of the reasons why the liquidator thinks that proceedings under section 596AC in relation to the contravention should not be begun.

The notice may be given only after the end of 6 months beginning when the company begins to be wound up.

### **596AH When employee may sue for compensation without liquidator's consent**

- (1) This section applies if an employee of a company gives a notice under section 596AG in relation to a contravention of section 569AB and to an entitlement.
- (2) The employee may begin proceedings in a court under section 596AC in relation to the contravention and the entitlement if:
  - (a) as at the end of 3 months after the liquidator receives the notice, he or she has not consented to the employee beginning such proceedings; and
  - (b) on an application made after those 3 months, the court has given leave for the proceedings to begin.
- (3) If:
  - (a) during those 3 months, the liquidator gives to the employee a written statement of the reasons why the liquidator thinks that such proceedings should not be begun; and
  - (b) the employee applies for leave under paragraph (2)(b);

then:

- (c) the employee must file the statement with the court when so applying; and
- (d) in determining the application, the court is to have regard to the reasons set out in the statement.

### **596AI Events preventing employee from suing**

- (1) An employee of a company that is being wound up cannot begin proceedings under section 596AC in relation to a contravention in relation to an entitlement of the employee if:
  - (a) the company's liquidator has applied under section 588FF in relation to a transaction that constituted, or was part of, the contravention; or
  - (b) the company's liquidator has begun proceedings under section 596AC in relation to the contravention; or
  - (c) the company's liquidator has begun proceedings under section 588M in relation to the incurring of the debt that is linked to the contravention; or
  - (d) the company's liquidator has intervened in an application for a civil penalty order against a person in relation to a contravention of section 588G in relation to the incurring of the debt that is linked to the contravention.
- (2) Subsection (1) has effect despite sections 596AF and 596AH.

## **Part 5.9—Miscellaneous**

### **Division 1—Examining a person about a corporation**

#### **596A Mandatory examination**

The Court is to summon a person for examination about a corporation's examinable affairs if:

- (a) an eligible applicant applies for the summons; and
- (b) the Court is satisfied that the person is an officer or provisional liquidator of the corporation or was such an officer or provisional liquidator during or after the 2 years ending:
  - (i) if the corporation is under administration—on the section 513C day in relation to the administration; or
  - (ii) if the corporation has executed a deed of company arrangement that has not yet terminated—on the section 513C day in relation to the administration that ended when the deed was executed; or
  - (iii) if the corporation is being, or has been, wound up—when the winding up began; or
  - (iv) otherwise—when the application is made.

#### **596B Discretionary examination**

- (1) The Court may summon a person for examination about a corporation's examinable affairs if:
  - (a) an eligible applicant applies for the summons; and
  - (b) the Court is satisfied that the person:
    - (i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or
    - (ii) may be able to give information about examinable affairs of the corporation.

- (2) This section has effect subject to section 596A.

**596C Affidavit in support of application under section 596B**

- (1) A person who applies under section 596B must file an affidavit that supports the application and complies with the rules.
- (2) The affidavit is not available for inspection except so far as the Court orders.

**596D Content of summons**

- (1) A summons to a person under section 596A or 596B is to require the person to attend before the Court:
- (a) at a specified place and at a specified time on a specified day, being a place, time and day that are reasonable in the circumstances; and
  - (b) to be examined on oath about the corporation's examinable affairs.
- (2) A summons to a person under section 596A or 596B may require the person to produce at the examination specified books that:
- (a) are in the person's possession; and
  - (b) relate to the corporation or to any of its examinable affairs.
- (3) A summons under section 596A is to require under subsection (2) of this section the production of such of the books requested in the application for the summons as the summons may so require.

**596E Notice of examination**

If the Court summons a person for examination, the person who applied for the summons must give written notice of the examination to:

- (a) as many of the corporation's creditors as reasonably practicable; and
- (b) each eligible applicant in relation to the corporation, except:
  - (i) the person who applied for the examination; and

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- (ii) if a person authorised by ASIC applied for the examination—ASIC; and
- (iii) a person who is such an eligible applicant only because the person is authorised by ASIC.

**596F Court may give directions about examination**

- (1) Subject to section 597, the Court may at any time give one or more of the following:
  - (a) a direction about the matters to be inquired into at an examination;
  - (b) a direction about the procedure to be followed at an examination;
  - (c) a direction about who may be present at an examination while it is being held in private;
  - (d) a direction that a person be excluded from an examination, even while it is being held in public;
  - (e) a direction about access to records of the examination;
  - (f) a direction prohibiting publication or communication of information about the examination (including questions asked, and answers given, at the examination);
  - (g) a direction that a document that relates to the examination and was created at the examination be destroyed.
- (2) The Court may give a direction under paragraph (1)(e), (f) or (g) in relation to all or part of an examination even if the examination, or that part, was held in public.
- (3) A person must not contravene a direction under subsection (1).

**597 Conduct of examination**

- (4) An examination is to be held in public except to such extent (if any) as the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private.
- (5A) Any of the following may take part in an examination:
  - (a) ASIC;

- (b) any other eligible applicant in relation to the corporation;  
and for that purpose may be represented by a lawyer or by an agent  
authorised in writing for the purpose.
- (5B) The Court may put, or allow to be put, to a person being examined  
such questions about the corporation or any of its examinable  
affairs as the Court thinks appropriate.
- (6) A person who is summoned under section 596A or 596B to attend  
before the Court must not intentionally or recklessly:
- (a) fail to attend as required by the summons; or
  - (b) fail to attend from day to day until the conclusion of the  
examination.
- (6A) Subsection (6) does not apply to the extent that the person has a  
reasonable excuse.
- Note: A defendant bears an evidential burden in relation to the matter in  
subsection (6A), see subsection 13.3(3) of the *Criminal Code*.
- (7) A person who attends before the Court for examination must not:
- (a) without reasonable excuse, refuse or fail to take an oath or  
make an affirmation; or
  - (b) without reasonable excuse, refuse or fail to answer a question  
that the Court directs him or her to answer; or
  - (c) make a statement that is false or misleading in a material  
particular; or
  - (d) without reasonable excuse, refuse or fail to produce books  
that the summons requires him or her to produce.
- (9) The Court may direct a person to produce, at an examination of  
that or any other person, books that are in the first-mentioned  
person's possession and are relevant to matters to which the  
examination relates or will relate.
- (9A) A person may comply with a direction under subsection (9) by  
causing the books to be produced at the examination.

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- (10) Where the Court so directs a person to produce any books and the person has a lien on the books, the production of the books does not prejudice the lien.
- (10A) A person must not refuse, or intentionally or recklessly fail, to comply with a direction under subsection (9).
- (11) Subsection (10A) does not apply to the extent that the person has a reasonable excuse.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (11), see subsection 13.3(3) of the *Criminal Code*.
- (12) A person is not excused from answering a question put to the person at an examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty.
- (12A) Where:
- (a) before answering a question put to a person (other than a body corporate) at an examination, the person claims that the answer might tend to incriminate the person or make the person liable to a penalty; and
  - (b) the answer might in fact tend to incriminate the person or make the person so liable;
- the answer is not admissible in evidence against the person in:
- (c) a criminal proceeding; or
  - (d) a proceeding for the imposition of a penalty;
- other than a proceeding under this section, or any other proceeding in respect of the falsity of the answer.
- (13) The Court may order the questions put to a person and the answers given by him or her at an examination to be recorded in writing and may require him or her to sign that written record.
- (14) Subject to subsection (12A), any written record of an examination so signed by a person, or any transcript of an examination of a person that is authenticated as provided by the rules, may be used in evidence in any legal proceedings against the person.
- (14A) A written record made under subsection (13):



- (a) is to be open for inspection, without fee, by:
    - (i) the person who applied for the examination; or
    - (ii) an officer of the corporation; or
    - (iii) a creditor of the corporation; and
  - (b) is to be open for inspection by anyone else on paying the prescribed fee.
- (15) An examination under this Division may, if the Court so directs and subject to the rules, be held before such other court as is specified by the Court and the powers of the Court under this Division may be exercised by that other court.
- (16) A person ordered to attend before the Court or another court for examination under this Division may, at his or her own expense, employ a solicitor, or a solicitor and counsel, and the solicitor or counsel, as the case may be, may put to the person such questions as the Court, or the other court, as the case may be, considers just for the purpose of enabling the person to explain or qualify any answers or evidence given by the person.
- (17) The Court or another court before which an examination under this Division takes place may, if it thinks fit, adjourn the examination from time to time.

**597A When Court is to require affidavit about corporation's examinable affairs**

- (1) The Court is to require a person to file an affidavit about a corporation's examinable affairs if:
- (a) an eligible applicant applies for the requirement to be made; and
  - (b) the Court is satisfied that the person is an officer or provisional liquidator of the corporation or was such an officer or provisional liquidator during or after the 2 years ending:
    - (i) if the corporation is under administration—on the section 513C day in relation to the administration; or

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- (ii) if the corporation has executed a deed of company arrangement that has not yet terminated—on the section 513C day in relation to the administration that ended when the deed was executed; or
  - (iii) if the corporation is being, or has been, wound up—when the winding up began; or
  - (iv) otherwise—when the application is made;  
even if the person has been summoned under section 596A or 596B for examination about those affairs.
- (2) The requirement is to:
- (a) specify such of the information requested in the application as relates to examinable affairs of the corporation; and
  - (b) require the affidavit to set out the specified information; and
  - (c) require the affidavit to be filed on or before a specified day that is reasonable in the circumstances.
- (3) A person must not refuse, or intentionally or recklessly fail, to comply with a requirement made of the person under subsection (1).
- (3A) Subsection (3) does not apply to the extent that the person has a reasonable excuse.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (3A), see subsection 13.3(3) of the *Criminal Code*.
- (4) The Court may excuse a person from answering a question at an examination about a corporation's examinable affairs if the person has already filed an affidavit under this section about that corporation's examinable affairs that sets out information that answers the question.

**597B Costs of unnecessary examination or affidavit**

Where the Court is satisfied that a summons to a person under section 596A or 596B, or a requirement made of a person under section 597A, was obtained without reasonable cause, the Court

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may order some or all of the costs incurred by the person because of the summons or requirement to be paid by:

- (a) in any case—the applicant for the summons or requirement;  
or
- (b) in the case of a summons—any person who took part in the examination.

## **Division 2—Orders against a person in relation to a corporation**

### **598 Order against person concerned with corporation**

- (2) Subject to subsection (3), where, on application by an eligible applicant, the Court is satisfied that:
- (a) a person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation to a corporation; and
  - (b) the corporation has suffered, or is likely to suffer, loss or damage as a result of the fraud, negligence, default, breach of trust or breach of duty;
- the Court may make such order or orders as it thinks appropriate against or in relation to the person (including either or both of the orders specified in subsection (4)) and may so make an order against or in relation to a person even though the person may have committed an offence in respect of the matter to which the order relates.
- (3) The Court must not make an order against a person under subsection (2) unless the Court has given the person the opportunity:
- (a) to give evidence; and
  - (b) to call witnesses to give evidence; and
  - (c) to bring other evidence in relation to the matters to which the application relates; and
  - (d) to employ, at the person's own expense, a solicitor, or a solicitor and counsel, to put to the person, or to any other witness, such questions as the Court considers just for the purpose of enabling the person to explain or qualify any answers or evidence given by the person.
- (4) The orders that may be made under subsection (2) against a person include:
- (a) an order directing the person to pay money or transfer property to the corporation; and

- (b) an order directing the person to pay to the corporation the amount of the loss or damage.
- (5) Nothing in this section prevents any person from instituting any other proceedings in relation to matters in respect of which an application may be made under this section.

## **Division 3—Provisions applying to various kinds of external administration**

### **599 Appeals from decisions of receivers etc.**

- (1) A person aggrieved by any act, omission or decision of:
  - (a) a person administering a compromise, arrangement or scheme referred to in Part 5.1; or
  - (b) a controller, or a managing controller, of property of a corporation;

may appeal to the Court in respect of the act, omission or decision and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit.

- (2) Paragraph (1)(b) does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note: Similar provision is made in relation to Aboriginal and Torres Strait Islander corporations under section 576-10 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

### **600AA Duty of receiver, administrator or liquidator—parental leave pay**

- (1) A person who:
  - (a) is appointed (whether or not by a court), and acts, as a receiver and manager in respect of property of a body corporate; or
  - (b) is appointed as the administrator of a body corporate under Division 2 of Part 5.3A; or
  - (c) is appointed as the liquidator or provisional liquidator of a body corporate;

must, as soon as possible, notify the Secretary (within the meaning of the *Paid Parental Leave Act 2010*) of the person's appointment, if the body corporate was a paid parental leave employer just before the appointment.

- (2) A person is a ***paid parental leave employer*** at a particular time if:
- (a) the person must pay an instalment under section 72 of the *Paid Parental Leave Act 2010*; and
  - (b) either:
    - (i) that time occurs during the instalment period (within the meaning of that Act) to which the instalment relates; or
    - (ii) that time occurs after the end of the instalment period to which the instalment relates, but the person has not paid the instalment by that time.

**600F Limitation on right of suppliers of essential services to insist on payment as condition of supply**

- (1) If:
- (a) a relevant authority of an eligible company requests, or authorises someone else to request, a person or authority (***the supplier***) to supply an essential service to the company in Australia; and
  - (b) the company owes an amount to the supplier in respect of the supply of the essential service before the effective day;
- the supplier must not:
- (c) refuse to comply with the request for the reason only that the amount is owing; or
  - (d) make it a condition of the supply of the essential service pursuant to the request that the amount is to be paid.

- (2) In this section:

***effective day***, in relation to a relevant authority of an eligible company, means the day when the relevant authority became a relevant authority of the company, even if that day began before this Act commenced.

***eligible company*** means a company:

- (a) that is being wound up; or
- (b) a provisional liquidator of which is acting; or
- (c) that is under administration; or

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- (d) that has executed a deed of company arrangement that has not yet terminated; or
- (e) a receiver, or receiver and manager, of property of which is acting.

**essential service** means:

- (a) electricity; or
- (b) gas; or
- (c) water; or
- (d) a carriage service (within the meaning of the *Telecommunications Act 1997*).

**relevant authority**, in relation to an eligible company, means:

- (a) the liquidator; or
  - (b) the provisional liquidator; or
  - (c) the administrator of the company; or
  - (d) the administrator of the deed of company arrangement; or
  - (e) the receiver, or receiver and manager;
- as the case requires.

**600G Electronic methods of giving or sending certain notices etc.**

- (1) This section applies if a person (the **notifier**) is authorised or required to give or send a notice, or other document, to a person (the **recipient**) under any of the following provisions:
  - (a) paragraph 436E(3)(a);
  - (f) subsection 450A(3);
  - (g) paragraph 450B(a);
  - (h) paragraph 450C(b);
  - (i) paragraph 450D(b);
  - (l) paragraph 497(1)(a);
  - (p) paragraph 568A(1)(b);
  - (s) subsection 579J(1);
  - (t) subsection 579J(2);
  - (u) subsection 579K(1);



- (v) subsection 579K(2);
  - (w) subsection 579K(3);
  - (x) subsection 579K(4);
  - (y) a provision of Schedule 2 or the Insolvency Practice Rules.
- (2) If the recipient nominates a fax number, or electronic address, by which the recipient may be notified of such notices or documents, the notifier may give or send the notice or document to the recipient by sending it to that fax number or electronic address.
- (3) If the recipient nominates any other electronic means by which the recipient may be notified of such notices or documents, the notifier may give or send the notice or document to the recipient by using that electronic means.
- (4) If the notifier makes the notice or document publicly available by electronic means, the notifier may give or send the notice or document to the recipient by notifying the recipient (using the electronic means nominated by the recipient or otherwise in writing):
- (a) that the notice or document is available electronically; and
  - (b) the way in which the notice or document can be accessed.
- (4A) Subsection (4) does not apply if the recipient notifies the notifier in accordance with the regulations, before the time for giving or sending the notice or document expires, that the recipient does not have access to the internet.
- (5) A notice or document sent to a fax number or electronic address, or by other electronic means, is taken to be given or sent on the business day after it is sent.
- (6) A notice or document given or sent under subsection (4) is taken to be given or sent on the business day after the day on which the recipient is notified that the notice or document is available.
- (7) Subsections (2), (3) and (4) do not limit the provisions mentioned in subsection (1).

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**600H Rights if claim against the company postponed**

- (1) A person whose claim against a company is postponed under section 563A is entitled:
  - (a) to receive a copy of any notice, report or statement to creditors only if the person asks the administrator or liquidator of the company, in writing, for a copy of the notice, report or statement; and
  - (b) to vote in their capacity as a creditor of the company, at a meeting ordered under subsection 411(1) or during the external administration of the company, only if the Court so orders.
- (2) In this section:

*external administration* includes the following:

  - (a) voluntary administration;
  - (b) a compromise or arrangement under part 5.1;
  - (c) administration under a deed of company arrangement;
  - (d) winding up by the Court;
  - (e) voluntary winding up.

**600J Acts of external administrator valid etc.**

- (1) The acts of an external administrator are valid despite any defects that may afterwards be discovered in his or her appointment or qualification.
- (2) A disposition of a company's property by an external administrator (including a disposition by way of conveyance, assignment, transfer or an instrument giving rise to a security interest) is, despite any defect or irregularity affecting the validity of the winding up or the appointment of the external administrator, valid in favour of any person taking such property in good faith and for value and without actual knowledge of the defect or irregularity.
- (3) A person making or permitting a disposition of property to an external administrator is to be protected and indemnified in so

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doing despite any defect or irregularity affecting the validity of the winding up or the appointment of the external administrator that is not then known to that person.

- (4) For the purposes of this section, a disposition of property is taken to include a payment of money.
- (5) In this section:

*external administrator* of a company has the same meaning as in Schedule 2.

**Chapter 5** External administration

**Part 5.9** Miscellaneous

**Division 4** Insolvency Practice Schedule (Corporations)

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## **Division 4—Insolvency Practice Schedule (Corporations)**

### **600K Insolvency Practice Schedule (Corporations)**

Schedule 2 has effect.

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## **Chapter 5A—Deregistration, and transfer of registration, of companies**

### **Part 5A.1—Deregistration**

#### **601 Definitions**

In this Part:

*property* of a company includes PPSA retention of title property, if the security interest in the property is vested in the company because of the operation of any of the following provisions:

- (a) section 267 or 267A of the *Personal Property Securities Act 2009* (property subject to unperfected security interests);
- (b) section 588FL of this Act (collateral not registered within time).

Note: See sections 9 (definition of *property*) and 51F (PPSA retention of title property).

#### **601AA Deregistration—voluntary**

*Who may apply for deregistration*

- (1) An application to deregister a company may be lodged with ASIC by:
  - (a) the company; or
  - (b) a director or member of the company; or
  - (c) a liquidator of the company.

If the company lodges the application, it must nominate a person to be given notice of the deregistration.

*Circumstances in which application can be made*

- (2) A person may apply only if:

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- (a) all the members of the company agree to the deregistration; and
- (b) the company is not carrying on business; and
- (c) the company's assets are worth less than \$1,000; and
- (d) the company has paid all fees and penalties payable under this Act; and
- (e) the company has no outstanding liabilities; and
- (f) the company is not a party to any legal proceedings.

*ASIC may ask for information about officers*

- (3) The applicant must give ASIC any information that ASIC requests about the current and former officers of the company.

*Deregistration procedure*

- (4) If:
  - (a) ASIC decides to deregister the company under this section; and
  - (b) ASIC is not aware of any failure to comply with subsections (1) to (3);ASIC must:
  - (c) give notice of the proposed deregistration on ASIC database; and
  - (d) publish notice of the proposed deregistration in the prescribed manner.
- (4A) When 2 months have passed since the publication of the notice under paragraph (4)(d), ASIC may deregister the company.
- (5) ASIC must give notice of the deregistration to:
  - (a) the applicant; or
  - (b) the person nominated in the application to be given the notice.
- (6) ASIC may refuse to deregister a company under this section if ASIC decides to order under section 489EA that the company be wound up.

- (7) Subsection (6) does not limit ASIC's power to refuse to deregister the company.

### **601AB Deregistration—ASIC initiated**

#### *Circumstances in which ASIC may deregister*

- (1) ASIC may decide to deregister a company if:
- (a) the response to a return of particulars given to the company is at least 6 months late; and
  - (b) the company has not lodged any other documents under this Act in the last 18 months; and
  - (c) ASIC has no reason to believe that the company is carrying on business.
- (1A) ASIC may also decide to deregister a company if the company's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment.
- (1B) ASIC may also decide to deregister a company if:
- (a) the company is liable to pay levy imposed by the *ASIC Supervisory Cost Recovery Levy Act 2017*; and
  - (b) the company has not paid in full at least 12 months after the due date for payment:
    - (i) the amount of the levy; and
    - (ii) the amount of any late payment penalty payable in relation to the levy; and
    - (iii) the amount of any shortfall penalty payable in relation to the levy.
- (2) ASIC may also decide to deregister a company if the company is being wound up and ASIC has reason to believe that:
- (a) the liquidator is no longer acting; or
  - (b) the company's affairs have been fully wound up and a return that the liquidator should have lodged is at least 6 months late; or

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- (c) the company's affairs have been fully wound up under Part 5.4 and the company has no property or not enough property to cover the costs of obtaining a Court order for the company's deregistration.

*Deregistration procedure*

- (3) If ASIC decides to deregister a company under this section, it must:
  - (a) give notice of the proposed deregistration:
    - (i) to the company; and
    - (ii) to the company's liquidator (if any); and
    - (iii) to the company's directors; and
    - (iv) on ASIC database; and
  - (b) publish notice of the proposed deregistration in the prescribed manner.
- (3A) When 2 months have passed since the publication of the notice under paragraph (3)(b), ASIC may deregister the company.
- (4) ASIC does not have to give a person notice under paragraph (3)(a) if ASIC does not have the necessary information about the person's identity or address.
- (5) ASIC must give notice of the deregistration to everyone who was notified of the proposed deregistration under subparagraph (3)(a)(ii) or (iii).
- (6) ASIC may refuse to deregister a company under this section if ASIC decides to order under section 489EA that the company be wound up.
- (7) Subsection (6) does not limit ASIC's power to refuse to deregister the company.

**601AC Deregistration—following amalgamation or winding up**

- (1) ASIC must deregister a company if the Court orders the deregistration of the company under:



- (a) paragraph 413(1)(d) (reconstruction and amalgamation of Part 5.1 bodies); or
- (b) paragraph 481(5)(b) (release of liquidator); or
- (c) subsection 509(2) (deregistration after end of administration return is lodged).

### **601AD Effect of deregistration**

#### *Company ceases to exist*

- (1) A company ceases to exist on deregistration.

Note: Despite the deregistration, officers of the company may still be liable for things done before the company was deregistered.

#### *Trust property vests in the Commonwealth*

- (1A) On deregistration, all property that the company held on trust immediately before deregistration vests in the Commonwealth. If property is vested in a liquidator on trust immediately before deregistration, that property vests in the Commonwealth. This subsection extends to property situated outside this jurisdiction.

#### *Other company property vests in ASIC*

- (2) On deregistration, all the company's property (other than any property held by the company on trust) vests in ASIC. If company property is vested in a liquidator (other than any company property vested in a liquidator on trust) immediately before deregistration, that property vests in ASIC. This subsection extends to property situated outside this jurisdiction.

#### *Rights and powers in respect of property*

- (3) Under subsection (1A) or (2), the Commonwealth or ASIC takes only the same property rights that the company itself held. If the company held particular property subject to a security or other interest or claim, the Commonwealth or ASIC takes the property subject to that interest or claim.

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Note: See also subsection 601AE(3)—which deals with liabilities that a law imposes on the property (particularly liabilities such as rates, taxes and other charges).

- (3A) The Commonwealth has, subject to its obligations as trustee of the trust, all the powers of an owner over property vested in it under subsection (1A).

Note: Section 601AF confers additional powers on the Commonwealth to fulfil outstanding obligations of the deregistered company.

- (4) ASIC has all the powers of an owner over property vested in it under subsection (2).

Note: Section 601AF confers additional powers on ASIC to fulfil outstanding obligations of the deregistered company.

### *Company books to be kept by former directors*

- (5) The directors of the company immediately before deregistration must keep the company's books for 3 years after the deregistration.

- (6) Subsection (5) does not apply to books that a liquidator has to keep under subsection 542(2), or subsection 70-35(1) of Schedule 2 (retention and return or destruction of books).

Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.

### *Strict liability offences*

- (7) An offence based on subsection (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## **601AE What the Commonwealth or ASIC does with the property**

### *Trust property vested in the Commonwealth*

- (1) If property vests in the Commonwealth under subsection 601AD(1A), the Commonwealth may:
- (a) continue to act as trustee; or
  - (b) apply to a court for the appointment of a new trustee.

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Note: Under paragraph (1)(a), the Commonwealth may be able to transfer the property to a new trustee chosen in accordance with the trust instrument.

- (1A) If the Commonwealth continues to act as trustee in respect of the property, subject to its obligations as trustee, the Commonwealth:
- (a) in the case of money—must credit the amount of the money to a special account (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or
  - (b) otherwise:
    - (i) may sell or dispose of the property as it thinks fit; and
    - (ii) if the Commonwealth does so—must credit the amount of the proceeds to a special account (within the meaning of the *Public Governance, Performance and Accountability Act 2013*).

Note: ASIC may, for and on behalf of the Commonwealth, perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to property held on trust by the Commonwealth (see subsection 8(6) of the ASIC Act).

*Property vested in ASIC*

- (2) If property vests in ASIC under subsection 601AD(2), ASIC may:
- (a) dispose of or deal with the property as it sees fit; and
  - (b) apply any money it receives to:
    - (i) defray expenses incurred by ASIC in exercising its powers in relation to the company under this Chapter; and
    - (ii) make payments authorised by subsection (3).

ASIC must deal with the rest (if any) under Part 9.7.

*Obligations attaching to property vested in the Commonwealth*

- (2A) For the purposes of subsection (3), if any liability is imposed on property under a law of the Commonwealth immediately before the property vests in the Commonwealth under subsection 601AD(1A), then:

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- (a) immediately after that time, the liability applies to the Commonwealth as if the Commonwealth were a body corporate; and
- (b) the Commonwealth is liable to make notional payments to discharge that liability.

*Obligations attaching to property*

- (3) Any property that vests in the Commonwealth or ASIC under subsection 601AD(1A) or (2) remains subject to all liabilities imposed on the property under a law and does not have the benefit of any exemption that the property might otherwise have because it is vested in the Commonwealth or ASIC. These liabilities include a liability that:
  - (a) is a security interest in or claim on the property; and
  - (b) arises under a law that imposes rates, taxes or other charges.

*Extent of Commonwealth's and ASIC's obligation*

- (4) The Commonwealth's or ASIC's obligation under subsection (2A) or (3) is limited to satisfying the liabilities out of the company's property to the extent that the property is properly available to satisfy those liabilities.

*Accounts*

- (5) The Commonwealth or ASIC (as the case requires) must keep:
  - (a) a record of property that it knows is vested in it under this Chapter; and
  - (b) a record of its dealings with that property; and
  - (c) accounts of all money received from those dealings; and
  - (d) all accounts, vouchers, receipts and papers relating to the property and that money.

**601AF The Commonwealth's and ASIC's power to fulfil  
outstanding obligations of deregistered company**

The Commonwealth or ASIC may do an act on behalf of the company or its liquidator if the Commonwealth or ASIC is satisfied that the company or liquidator would be bound to do the act if the company still existed.

Note: This power is a general one and is not limited to acts in relation to property vested in the Commonwealth under subsection 601AD(1A), or ASIC under subsection 601AD(2). The Commonwealth or ASIC has all the powers that automatically flow from the vesting of property under that subsection (see subsections 601AD(3A) and (4)) and may exercise those powers whether or not the company was bound to do so.

**601AG Claims against insurers of deregistered company**

A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:

- (a) the company had a liability to the person; and
- (b) the insurance contract covered that liability immediately before deregistration.

**601AH Reinstatement**

*Reinstatement by ASIC*

- (1) ASIC may reinstate the registration of a company if ASIC is satisfied that the company should not have been deregistered.
- (1A) ASIC may reinstate the registration of a company deregistered under subsection 601AB(1B) if:
  - (a) ASIC receives an application in relation to the reinstatement of the company's registration; and
  - (b) the levy imposed on the company by the *ASIC Supervisory Cost Recovery Levy Act 2017* is paid in full; and
  - (c) the amount of any late payment penalty payable in relation to the levy is paid in full; and

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- (d) the amount of any shortfall penalty payable in relation to the levy is paid in full.

*Reinstatement by Court*

- (2) The Court may make an order that ASIC reinstate the registration of a company if:
  - (a) an application for reinstatement is made to the Court by:
    - (i) a person aggrieved by the deregistration; or
    - (ii) a former liquidator of the company; and
  - (b) the Court is satisfied that it is just that the company's registration be reinstated.

- (3) If:
  - (a) ASIC reinstates the registration of a company under subsection (1) or (1A); or
  - (b) the Court makes an order under subsection (2);the Court may:
  - (c) validate anything done during the period:
    - (i) beginning when the company was deregistered; and
    - (ii) ending when the company's registration was reinstated; and
  - (d) make any other order it considers appropriate.

Note: For example, the Court may direct ASIC to transfer to another person property vested in ASIC under subsection 601AD(2).

*ASIC to give notice of reinstatement*

- (4) ASIC must give notice of a reinstatement in the *Gazette*.
- (4A) If an application was made to ASIC for the reinstatement of a company's registration, ASIC must give notice of the reinstatement to the applicant.

*Effect of reinstatement*

- (5) If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a

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director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC reverts in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim.

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## **Part 5A.2—Transfer of registration**

### **601AI Transferring registration**

A company may transfer its registration to registration under a law of the Commonwealth, or of a State or Territory, by:

- (a) passing a special resolution resolving to transfer its registration to registration under that law; and
- (b) complying with sections 601AJ and 601AK.

The company may transfer its registration to registration under the law of a State or Territory only if the State or Territory is the one in which it is taken to be registered.

Note 1: Section 119A tells you which State or Territory the company is taken to be registered in.

Note 2: In order to be registered under the State or Territory law, the company may need to amend its constitution, or adopt a new one, and the provisions of this Act (including the class rights provisions in Part 2F.2) will apply to the amendment or adoption.

### **601AJ Applying to transfer registration**

- (1) To transfer its registration, a company must lodge an application with ASIC together with:
  - (a) a copy of the special resolution that resolves to change the company's registration to a registration under the law of the Commonwealth or of the State or Territory; and
  - (b) a statement signed by the directors of the company that in their opinion the company's creditors are not likely to be materially prejudiced by the change and sets out their reasons for that opinion.
- (2) The application must be in the prescribed form.



### **601AK ASIC makes transfer of registration declaration**

ASIC may make a transfer of registration declaration in relation to the company under this section if ASIC is satisfied that:

- (a) the application complies with section 601AJ; and
- (b) the company's creditors are not likely to be materially prejudiced by the transfer of the company's registration; and
- (c) the law of the Commonwealth or of the State or Territory concerned adequately provides for:
  - (i) the continuation of the company's legal personality after the transfer; and
  - (ii) the preservation of any rights or claims against the company (other than the right of a member as a member) that accrued while the company was registered under this Act.

### **601AL ASIC to deregister company**

- (1) ASIC must deregister the company if:
  - (a) ASIC makes a transfer of registration declaration in relation to the company; and
  - (b) the company is registered under the law of the Commonwealth or of the State or Territory.

Note: Despite the deregistration, officers of the company may still be liable for things done before the company was deregistered.

- (2) Sections 601AD, 601AE, 601AF and 601AG do not apply to the deregistration of a company under this section.

## **Chapter 5B—Bodies corporate registered as companies, and registrable bodies**

### **Part 5B.1—Registering a body corporate as a company**

#### **Division 1—Registration**

##### **601BA Bodies corporate may be registered as certain types of companies**

- (1) A body corporate that is not a company or corporation sole may be registered under this Act as a company of one of the following types:
  - (a) a proprietary company limited by shares;
  - (b) an unlimited proprietary company with share capital;
  - (c) a public company limited by shares;
  - (d) a company limited by guarantee;
  - (e) an unlimited public company with share capital;
  - (f) a no liability company.
- (2) A body corporate may be registered as a no liability company only if:
  - (a) the body has a share capital; and
  - (b) the body's constitution states that its sole objects are mining purposes; and
  - (c) under the constitution the body has no contractual right to recover calls made on its shares from a member who fails to pay them.

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

### **601BB Bodies registered as proprietary companies**

- (1) The body must have no more than 50 non-employee shareholders if it is to be registered as a proprietary company under this Part.
- (2) In applying subsection (1):
  - (a) count joint holders of a particular parcel of shares as 1 person; and
  - (b) an employee shareholder is:
    - (i) a shareholder who is an employee of the body or of a subsidiary of the body; or
    - (ii) a shareholder who was an employee of the body, or of a subsidiary of the body, when they became a shareholder.

### **601BC Applying for registration under this Part**

- (1) To register the body as a company under this Part, a person must lodge an application with ASIC.

Note 1: For the types of companies that can be registered under this Part, see section 601BA.

Note 2: A name may be reserved for a company to be registered under this Part before the application is lodged (see Part 2B.6).
- (2) The application must state the following:
  - (a) the type of company that the body is proposed to be registered as under this Act;
  - (b) the name of the body;
  - (c) if the body is a registered body—its ARBN;
  - (d) the proposed name under which the body is to be registered (unless the ACN is to be used);
  - (e) the name and address of each member of the body;
  - (f) the present given and family name, all former given and family names and the date and place of birth of each person who consents in writing to become a director;

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- (g) the present given and family name, all former given and family names and the date and place of birth of each person who consents in writing to become a company secretary;
- (h) the address of each person who consents in writing to become a director or company secretary;
- (i) the address of the body's proposed registered office;
- (j) for a body proposed to be registered as a public company—the proposed opening hours of its registered office (if they are not the standard opening hours);
- (k) the address of the body's proposed principal place of business (if it is not the address of the proposed registered office);
- (l) for a body proposed to be registered as a company limited by shares or an unlimited company—the following:
  - (i) the number and class of shares each member already holds or has agreed, in writing, to take up;
  - (ii) the amount each member has already paid or agreed, in writing, to pay for each share;
  - (ia) whether the shares each member already holds or has agreed, in writing, to take up will be fully paid on registration;
  - (iii) the amount unpaid on each share;
  - (iv) whether or not the shares each member agrees in writing to take up will be beneficially owned by the member on registration;
  - (v) on registration, the classes into which shares will be divided;
  - (vi) for each class of share on issue on registration—the number of shares in the class on registration;
  - (vii) for each class of share on issue on registration—the total amount paid up for the class on registration;
  - (viii) for each class of share on issue on registration—the total amount unpaid for the class on registration;
- (la) whether or not, on registration, the company will have an ultimate holding company;

- (lb) if, on registration, the company will have an ultimate holding company—the following:
- (i) the name of the ultimate holding company;
  - (ii) if the ultimate holding company is registered in Australia—its ABN, ACN or ARBN;
  - (iii) if the ultimate holding company is not registered in Australia—the place at which it was incorporated or formed;
- (lc) for a body proposed to be registered as a company limited by shares or an unlimited company—the top 20 members of each class (worked out according to the number and class of shares each member holds and has agreed, in writing, to take up);
- (m) for a body proposed to be registered as a public company, if shares have been issued for non-cash consideration—the prescribed particulars about the issue of the shares, unless the shares were issued under a written contract and a copy of the contract is lodged with the application;
- (n) for a body proposed to be registered as a company limited by guarantee—the amount of the guarantee that each member has agreed to in writing;
- (o) the State or Territory in this jurisdiction in which the company is to be taken to be registered.

Note: See also section 107.

- Note 1: Paragraph (h)—the address that must be stated is usually the residential address, although an alternative address can sometimes be stated instead (see section 205D).
- Note 2: Paragraph (i)—if the body when it is registered under this Part is not to be the occupier of premises at the address of its registered office, the application must state that the occupier has consented to the address being specified in the application and has not withdrawn that consent (see section 100).

- (3) If the body is proposed to be registered as a public company, the application must be accompanied by a copy of each document (including an agreement or consent) or resolution that is necessary

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to ascertain the rights attached to issued or unissued shares of the body.

- (4) The application must be in the prescribed form.
- (5) An applicant must have the consents and agreements referred to in subsection (2) when the application is lodged. After the body is registered as a company, the applicant must give the consents and agreements to the company. The company must keep the consents and agreements.
- (5A) An offence based on subsection (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (6) The following documents must be lodged with the application:
  - (a) a certified copy of a current certificate of the body's incorporation in its place of origin, or of a document that has a similar effect;
  - (b) a certified printed copy of the body's constitution (if any);
  - (d) any other documents that are prescribed;
  - (e) any other documents that ASIC requires by written notice given to the body.

A document need not be lodged if ASIC already has the document and agrees not to require its lodgment.

- (7) The application must be accompanied by evidence that:
  - (a) the body is not a Chapter 5 body corporate; and
  - (b) no application to wind up the body has been made to a court (in Australia or elsewhere) that has not been dealt with; and
  - (c) no application to approve a compromise or arrangement between the body and another person has been made to a court (in Australia or elsewhere) that has not been dealt with.
- (8) The application must be accompanied by evidence that under the law of the body's place of origin:
  - (a) the body's type is the same or substantially the same as the proposed type specified in the application; and

- (b) if the members of the body have limited liability—the body’s constitution defines how and to what extent that liability is limited; and
  - (d) the transfer of the body’s incorporation is authorised; and
  - (e) the body has complied with the requirements (if any) of that law for the transfer of its incorporation; and
  - (f) if those requirements do not include consent to the transfer by the members of the body—the members:
    - (i) have consented to the transfer by a resolution that has been passed at a meeting by at least 75% of the votes cast by members entitled to vote on the resolution; and
    - (ii) were given at least 21 days notice of the meeting and the proposed resolution.
- (9) The evidence lodged in accordance with subsections (7) and (8) must be satisfactory proof to ASIC of the matters referred to in those subsections.

Note: Section 1304 requires documents that are not in English to be translated into English.

### **601BD ASIC gives body ACN, registers as company and issues certificate**

#### *Registration*

- (1) If an application is lodged under section 601BC, ASIC may:
- (a) give the body an ACN; and
  - (b) register the body as a company of the proposed type specified in the application; and
  - (c) issue a certificate that states:
    - (i) the company’s name; and
    - (ii) the company’s ACN; and
    - (iii) the company’s type; and
    - (iv) that the company is registered as a company under this Act; and

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- (v) the State or Territory in which the company is taken to be registered; and
- (vi) the date of registration.

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

*ASIC must keep record of registration*

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

**601BE Registered office**

The address specified in the application as the body's proposed registered office becomes the address of its registered office as a company on registration.

**601BF Name**

A company registered under this Part has a name on registration that is:

- (a) an available name; or
- (b) the expression "Australian Company Number" followed by the company's ACN.

The name must also include the words required by subsection 148(2) or 148(3).

**601BG Constitution**

- (1) The constitution on registration (if any) of a company registered under this Part is the constitution lodged with the application.
- (2) If any text in a constitution lodged with the application is not in English, the English translation of that text lodged with the application for registration is taken to be the relevant text in the constitution on registration.



### **601BH Modifications of constitution**

- (1) A company registered under this Part must modify its constitution within 3 months after registration to give effect to this Part.
- (2) If the constitution specifies amounts of money expressed in foreign currency, the company must:
  - (a) fix a single rate of conversion by resolution; and
  - (b) modify its constitution by special resolution to convert those amounts into Australian currency using that rate.The modification must be made within 3 months after registration.
- (2A) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (3) An amendment of a company's constitution under this section does not affect the number and class of shares held by each member.

### **601BJ ASIC may direct company to apply for Court approval for modifications of constitution**

- (1) ASIC may give the company a written direction to apply to the Court within a specified period for an order approving the modified constitution.
- (2) The Court may make an order:
  - (a) declaring that the company has complied with section 601BH; or
  - (b) declaring that the company will comply with section 601BH if it makes further modifications of its constitution as specified in the order.
- (3) The company must lodge a copy of the order with ASIC within 14 days after the order is made.
- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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**601BK Establishing registers and minute books**

- (1) A company registered under this Part must, within 14 days after registration:
  - (a) set up the register required by section 168; and
  - (b) include in the register the information that is required to be included in the register and that is available to the company on registration; and
  - (c) set up the minute books required by section 251A.
- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) During the 14 days the company need not comply with a person's request to inspect or obtain a copy of:
  - (a) information in a register; or
  - (b) a minute of a general meeting.However, the period within which the company must comply with the request begins at the end of the 14 days.

**601BL Registration of registered bodies**

- (1) If a registered body becomes registered as a company under this Part, it ceases to be a registered body. ASIC must remove the body's name from the appropriate register kept for the purposes of Division 1 or 2 of Part 5B.2.
- (2) ASIC may keep any of the documents relating to the company that were lodged because the company used to be a registered body.

## **Division 2—Operation of this Act**

### **601BM Effect of registration under this Part**

- (1) Registration under this Part does not:
  - (a) create a new legal entity; or
  - (b) affect the body's existing property, rights or obligations (except as against the members of the body in their capacity as members); or
  - (c) render defective any legal proceedings by or against the body or its members.
- (2) This Part sets out special provisions for companies registered under this Part.

### **601BN Liability of members on winding up**

A person who stopped being a member of the body before it was registered as a company under this Part is to be treated as a past member of the company in applying Division 2 of Part 5.6 to a winding up of the company. However, the person's liability to contribute to the company's property is further limited by this section to an amount sufficient for the following:

- (a) payment of debts and liabilities contracted by the company before the day on which the company was registered under this Part;
- (b) payment of the costs, charges and expenses of winding up the company, so far as those costs, charges and expenses relate to those debts and liabilities;
- (c) the adjustment of the rights between the contributories, so far as the adjustment relates to those debts and liabilities.

### **601BP Bearer shares**

- (1) A bearer of a bearer share in a company registered under this Part may surrender the share to the company. The company must:

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- (a) cancel the share; and
- (b) include the bearer's name in the company's register of members.

(1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The company is liable to compensate anyone who suffers a loss because the company includes the bearer's name in the company's register of members despite the fact that:
  - (a) the share was not surrendered to the company; or
  - (b) the company failed to cancel the share.
- (3) Subject to this section, the constitution of a company registered under this Part may provide that the bearer of a bearer share in the company is taken to be a member of the company for all purposes or for specified purposes.

Note: A body must not issue bearer shares after it is registered as a company under this Part (see paragraph 254F(a)).

**601BQ References in pre-registration contracts and other documents to par value in existing contracts and documents**

- (1) This section applies in relation to a company registered under this Part for the purpose of interpreting and applying after registration:
  - (a) a contract entered into before the registration; or
  - (b) a trust deed or other document executed before the registration.
- (2) A reference to the par value of a share is taken to be a reference to the par value of the share immediately before the registration, or the par value that the share would have had if it had been issued then.
- (3) A reference to a right to a return of capital on a share is taken to be a reference to a right to a return of capital of a value equal to the amount paid before the registration in respect of the share's par

value, or the par value that the share would have had if it had been issued then.

- (4) A reference to the aggregate par value of the company's issued share capital is taken to be a reference to that aggregate as it existed immediately before the registration.

#### **601BR First AGM**

- (1) Despite subsection 250N(1), a public company registered under this Part must hold its first AGM after registration in the calendar year of its registration.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

#### **601BS Modification by regulations**

The regulations may modify the operation of this Part in relation to a company registered under this Part.

## Part 5B.2—Registrable bodies

### Division 1A—Preliminary

#### 601C Definitions

In this Part:

*property* of a corporation includes PPSA retention of title property, if the security interest in the property is vested in the corporation because of the operation of any of the following provisions:

- (a) section 267 or 267A of the *Personal Property Securities Act 2009* (property subject to unperfected security interests);
- (b) section 588FL of this Act (collateral not registered within time).

Note: See sections 9 (definition of *property*) and 51F (PPSA retention of title property).

## **Division 1—Registrable Australian bodies**

### **601CA When a registrable Australian body may carry on business in this jurisdiction and outside its place of origin**

A registrable Australian body must not carry on business in a State or Territory in this jurisdiction unless:

- (a) that State or Territory is its place of origin; or
- (b) it has its head office or principal place of business in that State or Territory; or
- (c) it is registered under this Division; or
- (d) it has applied to be so registered and the application has not been dealt with.

### **601CB Application for registration**

Subject to this Part, where a registrable Australian body lodges an application for registration under this Division that is in the prescribed form and is accompanied by:

- (a) a certified copy of a current certificate of its incorporation or registration in its place of origin, or a document of similar effect; and
- (b) a certified copy of its constitution; and
- (c) a list of its directors containing personal details of those directors that are equivalent to the personal details of directors referred to in subsection 242(2); and
- (e) notice of the address of:
  - (i) if it has in its place of origin a registered office for the purposes of a law (other than this Act) there in force—that office; or
  - (ii) otherwise—its principal place of business in its place of origin; and
- (f) notice of the address of its registered office under section 601CT;

ASIC must:

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- (g) grant the application and register the body under this Division by entering the body's name in a register kept for the purposes of this Division; and
- (h) allot to the body an ARBN distinct from the ARBN or ACN of each body corporate (other than the body) already registered as a company or registered body under this Act.

**601CC Cessation of business etc.**

- (1) Within 7 days after ceasing to carry on business interstate, a registered Australian body must lodge written notice that it has so ceased.
- (1A) For the purposes of this section, a body *carries on business interstate* if, and only if, the body carries on business at a place that is in this jurisdiction and outside the body's place of origin.
- (2) Where ASIC has reasonable cause to believe that a registered Australian body does not carry on business interstate, ASIC may send to the body in the prescribed manner a letter to that effect and stating that, if no answer showing cause to the contrary is received within one month from the date of the letter, a notice will be published in the *Gazette* with a view to striking the body's name off the register.
- (3) Unless ASIC receives, within one month after the date of the letter, an answer to the effect that the body is still carrying on business interstate, it may publish in the *Gazette*, and send to the body in the prescribed manner, a notice that, at the end of 3 months after the date of the notice, the body's name will, unless cause to the contrary is shown, be struck off the register.
- (4) At the end of the period specified in a notice sent under subsection (3), ASIC may, unless cause to the contrary has been shown, strike the body's name off the register and must publish in the *Gazette* notice of the striking off.
- (5) Nothing in subsection (4) affects the power of the Court to wind up a body whose name has been struck off the register.



- (6) Where a body's name is struck off the register under subsection (4), the body ceases to be registered under this Division.
- (7) If ASIC is satisfied that a body's name was struck off the register as a result of an error on ASIC's part, ASIC may restore the body's name to the register, and thereupon the body's name is taken never to have been struck off and the body is taken never to have ceased to be registered under this Division.
- (8) A person who is aggrieved by a body's name having been struck off the register may, within 15 years after the striking off, apply to the Court for the body's name to be restored to the register.
- (9) If, on an application under subsection (8), the Court is satisfied that:
- (a) at the time of the striking off, the body was carrying on business interstate; or
  - (b) it is otherwise just for the body's name to be restored to the register;
- the Court may, by order:
- (c) direct the body's name to be restored to the register; and
  - (d) give such directions, and make such provisions, as it thinks just for placing the body and all other persons in the same position, as nearly as practicable, as if the body's name had never been struck off.
- (10) On the lodging of an office copy of an order under subsection (9), the body's name is taken never to have been struck off.
- (11) Where a body's name is restored to the register under subsection (7) or (9), ASIC must cause notice of that fact to be published in the *Gazette*.
- (12) Where a body ceases to be registered under this Division, an obligation to lodge a document that this Act imposes on the body by virtue of the doing of an act or thing, or the occurrence of an event, at or before the time when the body so ceased, being an obligation not discharged at or before that time, continues to apply

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in relation to the body even if the period prescribed for lodging the document has not ended at or before that time.

- (13) Where a registered Australian body commences to be wound up, or is dissolved or deregistered, in its place of origin, the Court must, on application by the person who is the liquidator for the body's place of origin, or by ASIC, appoint a liquidator of the body.
- (14) A liquidator of a registered Australian body who is appointed by the Court:
- (a) must, before any distribution of the body's property is made, by advertisement in a daily newspaper circulating generally in each State or Territory where the body carried on business at any time during the 6 years before the liquidation, invite all creditors to make their claims against the body within a reasonable time before the distribution; and
  - (b) must not, without obtaining an order of the Court, pay out a creditor of the body to the exclusion of another creditor of the body; and
  - (c) must, unless the Court otherwise orders, recover and realise the property of the body that is located:
    - (i) in this jurisdiction; and
    - (ii) outside the body's place of origin;and must pay the net amount so recovered and realised to the liquidator of the body for its place of origin.
- (15) If a registered Australian body has been wound up so far as its property located:
- (a) in this jurisdiction; and
  - (b) outside its place of origin;
- is concerned and there is no liquidator for its place of origin, the liquidator may apply to the Court for directions about the disposal of the net amount recovered under subsection (14).

## **Division 2—Foreign companies**

### **601CD When a foreign company may carry on business in this jurisdiction**

- (1) A foreign company must not carry on business in this jurisdiction unless:
  - (a) it is registered under this Division; or
  - (b) it has applied to be so registered and the application has not been dealt with.
- (2) For the purposes of this Division, a foreign company carries on business in this jurisdiction if it:
  - (a) offers debentures in this jurisdiction; or
  - (b) is a guarantor body for debentures offered in this jurisdiction; and Part 2L.1 applies to the debentures.

### **601CDA Limited disclosure if place of origin is a prescribed country**

A foreign company is not required to lodge information or a copy of a document with ASIC under this Division if:

- (a) the company's place of origin is a country prescribed by the regulations; and
- (b) the company has given the information or a copy of the document to an authority in that country whose functions under the law of the country include functions equivalent to any of those of ASIC under this Act.

### **601CE Application for registration**

Subject to this Part, where a foreign company lodges an application for registration under this Division that is in the prescribed form and is accompanied by:

- (a) a certified copy of a current certificate of its incorporation or registration in its place of origin, or a document of similar effect; and

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- (b) a certified copy of its constitution; and
- (c) a list of its directors containing personal details of those directors that are equivalent to the personal details of directors referred to in subsection 205B(3); and
- (d) if that list includes directors who are:
  - (i) resident in Australia; and
  - (ii) members of a local board of directors;a memorandum that is duly executed by or on behalf of the foreign company and states the powers of those directors; and
- (f) notice of the address of:
  - (i) if it has in its place of origin a registered office for the purposes of a law there in force—that office; or
  - (ii) otherwise—its principal place of business in its place of origin; and
- (g) notice of the address of its registered office under section 601CT;

ASIC must:

- (h) grant the application and register the foreign company under this Division by entering the foreign company's name in a register kept for the purposes of this Division; and
- (j) allot to the foreign company an ARBN distinct from the ARBN or ACN of each body corporate (other than the foreign company) already registered as a company or registered body under this Act.

**601CF Appointment of local agent**

- (1) A foreign company may at any time appoint a person as a local agent.
- (2) ASIC must not register a foreign company under this Division unless the foreign company has at least one local agent in relation to whom the foreign company has complied with section 601CG.

- (3) Where:
- (a) because a person ceased on a particular day to be a local agent of the foreign company, a registered foreign company has no local agent; and
  - (b) the foreign company carries on business, or has a place of business, in this jurisdiction;
- the foreign company must, within 21 days after that day, appoint a person as a local agent.

### **601CG Local agent: how appointed**

- (1) A foreign company that lodges a memorandum of appointment, or a power of attorney, that is duly executed by or on behalf of the foreign company and states the name and address of a person who is:
- (a) a natural person or a company; and
  - (b) resident in this jurisdiction; and
  - (c) authorised to accept on the foreign company's behalf service of process and notices;
- is taken to appoint that person as a local agent.
- (2) Where a memorandum of appointment, or a power of attorney, lodged under subsection (1) is executed on the foreign company's behalf, the foreign company must, unless it has already done so, lodge a copy, verified in writing in the prescribed form to be a true copy, of the document authorising the execution.
- (3) A copy lodged under subsection (2) is taken for all purposes to be the original of the document.
- (4) A foreign company that appoints a local agent must lodge a written statement that is in the prescribed form and is made by the local agent.
- (5) A person whom a foreign company appoints as a local agent is a local agent of the foreign company until the person:
- (a) ceases by virtue of section 601CH to be such a local agent; or
  - (b) dies or ceases to exist.

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**601CH Local agent: how removed**

- (1) Where a person is a local agent of a foreign company, the foreign company or the person may lodge a written notice stating that the person's appointment as a local agent has terminated, or will terminate, on a specified day.
- (2) Where a notice is lodged under subsection (1), the person ceases to be a local agent of the foreign company at the end of:
  - (a) the period of 21 days beginning on the day of lodgment; or
  - (b) the day specified in the notice;whichever is the later.

**601CJ Liability of local agent**

A local agent of a registered foreign company:

- (a) is answerable for the doing of all acts, matters and things that the foreign company is required by or under this Act to do; and
- (b) is personally liable to a penalty imposed on the foreign company for a contravention of this Act if the court or tribunal hearing the matter is satisfied that the local agent should be so liable.

**601CK Balance-sheets and other documents**

- (1) Subject to this section, a registered foreign company must, at least once in every calendar year and at intervals of not more than 15 months, lodge a copy of its balance-sheet made up to the end of its last financial year, a copy of its cash flow statement for its last financial year and a copy of its profit and loss statement for its last financial year, in such form and containing such particulars and including copies of such documents as the company is required to prepare by the law for the time being applicable to that company in its place of origin, together with a statement in writing in the prescribed form verifying that the copies are true copies of the documents so required.

- (2) ASIC may extend the period within which subsection (1) requires a balance-sheet, profit and loss statement, cash flow statement or other document to be lodged.
- (3) ASIC may, if it is of the opinion that the balance-sheet, the profit and loss statement and the other documents referred to in subsection (1) do not sufficiently disclose the company's financial position:
- (a) require the company to lodge a balance-sheet; or
  - (b) require the company to lodge an audited balance-sheet; or
  - (ba) require the company to lodge a cash flow statement; or
  - (bb) require the company to lodge an audited cash flow statement; or
  - or
  - (c) require the company to lodge a profit and loss statement; or
  - (d) require the company to lodge an audited profit and loss statement;
- within such period, in such form, containing such particulars and including such documents as ASIC by notice in writing to the company requires, but this subsection does not authorise ASIC to require a balance-sheet or a profit and loss statement to contain any particulars or include any documents that would not be required to be given if the company were a public company within the meaning of this Act.
- (4) The registered foreign company must comply with the requirements set out in the notice.
- (5) Where a registered foreign company is not required by the law of the place of its incorporation or formation to prepare a balance-sheet, the company must prepare and lodge a balance-sheet, or, if ASIC so requires, an audited balance-sheet, within such period, in such form and containing such particulars and including such documents as the company would have been required to prepare if the company were a public company incorporated under this Act.
- (5A) If a registered foreign company is not required by the law of the place of its incorporation or formation to prepare a cash flow

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statement, the company must prepare and lodge a cash flow statement, or, if ASIC so requires, an audited cash flow statement, within the period, in the form, containing the particulars and including the documents that the company would have been required to prepare if the company were a public company registered under this Act.

- (6) Where a registered foreign company is not required by the law of its place of origin to prepare a profit and loss statement, the company must prepare and lodge a profit and loss statement or, if ASIC so requires, an audited profit and loss statement, within such period, in such form, containing such particulars and including such documents as the company would have been required to prepare if the company were a public company incorporated under this Act.
- (7) ASIC may, by *Gazette* notice, declare that this section does not apply to specified foreign companies.
- (8) Subsections (1) to (6), inclusive, do not apply in relation to a foreign company in relation to which a notice is in force under subsection (7).
- (9) A registered foreign company in relation to which a notice is in force under subsection (7) must, at least once in every calendar year, lodge with ASIC a return in the prescribed form made up to the date of its annual general meeting.
- (10) The return must be lodged within 1 month after the date to which it is made up, or within such further period as ASIC, in special circumstances, allows.

**601CL Cessation of business etc.**

- (1) Within 7 days after ceasing to carry on business in this jurisdiction, a registered foreign company must lodge written notice that it has so ceased.
- (2) Where ASIC receives notice from a local agent of a registered foreign company that the foreign company has been dissolved or



deregistered, ASIC must remove the foreign company's name from the register.

- (3) Where ASIC has reasonable cause to believe that a registered foreign company does not carry on business in this jurisdiction, ASIC may send to the foreign company in the prescribed manner a letter to that effect and stating that, if no answer showing cause to the contrary is received within one month from the date of the letter, a notice will be published in the *Gazette* with a view to striking the foreign company's name off the register.
- (4) Unless ASIC receives, within one month after the date of the letter, an answer to the effect that the foreign company is still carrying on business in this jurisdiction, it may publish in the *Gazette*, and send to the foreign company in the prescribed manner, a notice that, at the end of 3 months after the date of the notice, the foreign company's name will, unless cause to the contrary is shown, be struck off the register.
- (5) At the end of the period specified in a notice sent under subsection (4), ASIC may, unless cause to the contrary has been shown, strike the foreign company's name off the register and must publish in the *Gazette* notice of the striking off.
- (6) Nothing in subsection (5) affects the power of the Court to wind up a foreign company whose name has been struck off the register.
- (7) Where a foreign company's name is struck off the register under subsection (5), the foreign company ceases to be registered under this Division.
- (8) If ASIC is satisfied that a foreign company's name was struck off the register as a result of an error on ASIC's part, ASIC may restore the foreign company's name to the register, and thereupon the foreign company's name is taken never to have been struck off and the foreign company is taken never to have ceased to be registered under this Division.
- (9) A person who is aggrieved by a foreign company's name having been struck off the register may, within 15 years after the striking

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off, apply to the Court for the foreign company's name to be restored to the register.

- (10) If, on an application under subsection (9), the Court is satisfied that:
- (a) at the time of the striking off, the foreign company was carrying on business in this jurisdiction; or
  - (b) it is otherwise just for the foreign company's name to be restored to the register;
- the Court may, by order:
- (c) direct the foreign company's name to be restored to the register; and
  - (d) give such directions, and make such provision, as it thinks just for placing the foreign company and all other persons in the same position, as nearly as practicable, as if the foreign company's name had never been struck off.
- (11) On the lodging of an office copy of an order under subsection (10), the foreign company's name is taken never to have been struck off.
- (12) Where a foreign company's name is restored to the register under subsection (8) or (10), ASIC must cause notice of that fact to be published in the *Gazette*.
- (13) Where a foreign company ceases to be registered under this Division, an obligation to lodge a document that this Act imposes on the foreign company by virtue of the doing of an act or thing, or the occurrence of an event, at or before the time when the foreign company so ceased, being an obligation not discharged at or before that time, continues to apply in relation to the foreign company even if the period prescribed for lodging the document has not ended at or before that time.
- (14) Where a registered foreign company commences to be wound up, or is dissolved or deregistered, in its place of origin:
- (a) each person who, on the day when the winding up proceedings began, was a local agent of the foreign company must, within the period of 1 month after that day or within that period as extended by ASIC in special circumstances,

- lodge or cause to be lodged notice of that fact and, when a liquidator is appointed, notice of the appointment; and
- (b) the Court must, on application by the person who is the liquidator for the foreign company's place of origin, or by ASIC, appoint a liquidator of the foreign company.
- (15) A liquidator of a registered foreign company who is appointed by the Court:
- (a) must, before any distribution of the foreign company's property is made, by advertisement in a daily newspaper circulating generally in each State or Territory where the foreign company carried on business at any time during the 6 years before the liquidation, invite all creditors to make their claims against the foreign company within a reasonable time before the distribution; and
- (b) must not, without obtaining an order of the Court, pay out a creditor of the foreign company to the exclusion of another creditor of the foreign company; and
- (c) must, unless the Court otherwise orders, recover and realise the property of the foreign company in this jurisdiction and must pay the net amount so recovered and realised to the liquidator of the foreign company for its place of origin.
- (16) Where a registered foreign company has been wound up so far as its property in this jurisdiction is concerned and there is no liquidator for its place of origin, the liquidator may apply to the Court for directions about the disposal of the net amount recovered under subsection (15).

### **601CM Register of members of foreign company**

- (1) A registered foreign company that has a share capital may cause a branch register of members to be kept in this jurisdiction.
- (2) If a member of a registered foreign company is resident in this jurisdiction and requests the foreign company in writing to register in a branch register kept under subsection (1) shares held by the member, then:

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- (a) if the foreign company already keeps a register under subsection (1)—the foreign company must register in that register the shares held by the member; or
- (b) otherwise—the foreign company must, within 1 month after receiving the request:
  - (i) keep at its registered office or at some other place in this jurisdiction a branch register of members; and
  - (ii) register in that register the shares held by the member.
- (3) Subsection (2) does not apply in relation to a foreign company whose constitution prohibits any invitation to the public to subscribe for, and any offer to the public to accept subscriptions for, shares in the foreign company.
- (4) Subject to this section, a registered foreign company may discontinue a register kept under subsection (1) and must, if it does so, transfer all entries in that register to a register of members kept outside Australia.
- (5) If shares held by a member of a registered foreign company who is resident in this jurisdiction are registered in a register kept by the foreign company under subsection (1), the foreign company must not discontinue that register without that member's written consent.

**601CN Register kept under section 601CM**

- (1) This section has effect where a registered foreign company keeps a register under section 601CM.
- (2) The foreign company must keep the register in the same manner as this Act requires a company to keep its register of members.
- (3) Subject to subsection (2), the foreign company must register a transaction in the register in the same way, and at the same charge, as it would have registered the transaction in the register of members that the foreign company keeps in its place of origin.

- (4) A transfer of shares in the foreign company that is lodged at the foreign company's registered office, or at the place where the register is kept, is binding on the foreign company.
- (5) The Court has the same powers in relation to correction of the register as it has in relation to correction of a company's register of members.
- (6) The register is taken to be part of the foreign company's register of members.
- (7) At the written request of a member who holds shares registered in the register, the foreign company must remove the shares from the register and register them in such other register as is specified in the request.
- (8) The register is prima facie evidence of matters that this Act requires or authorises to be entered in the register.

#### **601CP Notifying ASIC about register kept under section 601CM**

Within 14 days after:

- (a) beginning to keep a register under section 601CM; or
- (b) changing the place where a register is so kept; or
- (c) discontinuing a register under section 601CM;

a registered foreign company must lodge a written notice of that fact specifying, if paragraph (a) or (b) applies, the address or new address, as the case may be, where the register is kept.

#### **601CQ Effect of right to acquire shares compulsorily**

Where:

- (a) a law of the place of origin of a foreign company that corresponds to section 414, 661A or 664A entitles a person to give notice to another person that the first-mentioned person wishes to acquire shares in the foreign company that the other person holds; and

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(b) some or all of those shares are registered in a register kept under section 601CM;  
sections 601CM, 601CN and 601CP cease to apply in relation to the foreign company until the first-mentioned person acquires, or ceases to be entitled to acquire, the shares so registered.

**601CR Index of members and inspection of registers**

Subsection 169(2) and sections 173, 174 and 177 apply in relation to a register kept under section 601CM.

**601CS Certificate as to shareholding**

A certificate under the seal of a foreign company specifying shares held by a member of that company and registered in a register kept under section 601CM is prima facie evidence of the title of the member to the shares and of the fact that the shares are registered in the register.

## **Division 3—Bodies registered under this Part**

### **601CTA Limited disclosure if place of origin is a prescribed country**

A foreign company is not required to lodge information or a copy of a document with ASIC under this Division if:

- (a) the company's place of origin is a country prescribed by regulations made for the purposes of section 601CDA; and
- (b) the company has given the information or a copy of the document to an authority in that country whose functions under the law of the country include functions equivalent to any of those of ASIC under this Act.

### **601CT Registered office**

- (1) A registered body must have a registered office in this jurisdiction to which all communications and notices may be addressed and that must be open:
  - (a) if the body has:
    - (i) lodged a notice under subsection (2); or
    - (ii) lodged a notice under subsection (2) and a notice or notices under subsection (4);for such hours (being not fewer than 3) between 9 am and 5 pm on each business day as are specified in that notice, or in the later or last of those notices, as the case may be; or
  - (b) otherwise—each business day from at least 10 am to 12 noon and from at least 2 pm to 4 pm;and at which a representative of the body is present at all times when the office is open.
- (2) A registered body may lodge written notice of the hours (being not fewer than 3) between 9 am and 5 pm on each business day during which the body's registered office is open.

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- (3) Within 7 days after a change in the situation of its registered office, a registered body must lodge a written notice of the change and of the new address of that office.
- (4) A registered body that has lodged a notice under subsection (2) must, within 7 days after a change in the hours during which its registered office is open, lodge a notice, in the prescribed form, of the change.

**601CU Certificate of registration**

- (1) On registering a body corporate under Division 1 or 2 or registering under section 601DH or 601DJ a change in a registered body's name, ASIC must issue to the body a certificate, under ASIC's common seal and in the prescribed form, of the body's registration under that Division.
- (2) A certificate under subsection (1) is prima facie evidence of the matters stated in it.

**601CV Notice of certain changes**

- (1) A registered body must, within 1 month after a change in:
  - (b) its constitution or any other document lodged in relation to the body; or
  - (c) its directors; or
  - (d) if the body is a foreign company;
    - (i) the powers of any directors who are resident in Australia and members of an Australian board of directors of the foreign company; or
    - (ii) a local agent or local agents; or
    - (iii) the name or address of a local agent; or
  - (e) the situation of:
    - (i) if it has in its place of origin a registered office for the purposes of a law (other than this Act) there in force—that office; or



- (ii) otherwise—its principal place of business in its place of origin;  
lodge a written notice of particulars of the change, together with such documents (if any) as the regulations require.
- (2) ASIC may in special circumstances extend the period within which subsection (1) requires a notice or document to be lodged.

**601CW Body’s name etc. must be displayed at office and place of business**

- (1) Subject to subsection (2), this section applies to a registrable body.
- (2) If the registrable body is a registrable Australian body, this section does not apply to a place at which the body carries on business if the place is in the body’s place of origin.
- (9) Unless the body is an Australian ADI, it must paint or affix and keep painted or affixed, in a conspicuous position and in letters easily legible, on the outside of every office and place (including its registered office) that is in this jurisdiction, at which its business is carried on and that is open and accessible to the public:
  - (a) its name and the name of its place of origin; and
  - (b) if the liability of its members is limited and the last word of its name is neither the word “Limited” nor the abbreviation “Ltd.”—notice of the fact that the liability of its members is limited; and
  - (c) in the case of its registered office—the expression “Registered Office”.
- (10) If the body is an Australian ADI, it must paint or affix its name, and must keep its name painted or affixed, in a conspicuous position and in letters easily legible, on the outside of every office or place (including its registered office) that is in this jurisdiction, at which its business is carried on and that is open and accessible to the public.
- (11) An offence based on subsection (9) or (10) is an offence of strict liability.

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Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**601CX Service of documents on registered body**

- (1) A document may be served on a registered body:
  - (a) by leaving it at, or by sending it by post to, the registered office of the body; or
  - (b) in the case of a registered foreign company—by leaving it at, or by sending it by post to, the address of a local agent of the foreign company, being:
    - (i) in a case to which subparagraph (ii) does not apply—an address notice of which has been lodged under subsection 601CG(1); or
    - (ii) if a notice or notices of a change or alteration in that address has or have been lodged under subsection 601CV(1)—the address shown in that last-mentioned notice or the later or latest of those last-mentioned notices.
- (2) For the purposes of subsection (1), the situation of the registered office of a registered body:
  - (a) in a case to which neither paragraph (b) nor paragraph (c) applies—is taken to be the place notice of the address of which has been lodged under paragraph 601CB(e) or 601CE(g); or
  - (b) if only one notice of a change in the situation of the registered office has been lodged with ASIC under subsection 601CT(3)—is, on and from:
    - (i) the day that is 7 days after the day on which the notice was lodged; or
    - (ii) the day that is specified in the notice as the day from which the change is to take effect;whichever is later, taken to be the place the address of which is specified in the notice; or
  - (c) if 2 or more notices of a change in the situation of the registered office have been lodged under subsection 601CT(3)—is, on and from:

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- (i) the day that is 7 days after the day on which the later or latest of those notices was lodged; or
- (ii) the day that is specified in the later or latest of those notices as the day from which the change is to take effect;

whichever is later, taken to be the place the address of which is specified in the relevant notice;

and is so taken to be that place irrespective of whether the address of a different place is shown as the address of the registered office of the registered body in a return or other document (not being a notice under subsection 601CT(3)) lodged after the notice referred to in paragraph (a) or (b), or the later or latest of the notices referred to in paragraph (c), was lodged.

- (3) Without limiting the operation of subsection (1), if 2 or more directors of a registered body reside in Australia or an external Territory, a document may be served on the body by delivering a copy of the document personally to each of 2 of those directors.
- (3A) Without limiting the operation of subsection (1), a document may be served on a registered body that is registered as a proprietary company and has only one director by delivering a copy personally to that director.
- (4) Where a liquidator of a registered body has been appointed, a document may be served on the body by leaving it at, or by sending it by post to, the last address of the office of the liquidator notice of which has been lodged.
- (5) Nothing in this section affects the power of the Court to authorise a document to be served on a registered body in a manner not provided for by this section.
- (6) Subject to subsection 8(4), subsection 8(3) applies in relation to a reference in this section.

### **601CY Power to hold land**

A registered body has power to hold land in this jurisdiction.

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## Division 4—Register of debenture holders for non-companies

### 601CZA Certain documents are debentures

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.

### 601CZB Register of debenture holders to be maintained by non-companies

- (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.

Note 1: Companies have to keep a register of debenture holders under sections 168 and 171.

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

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The register must contain the following information about each debenture holder:

- (a) their name and address;
- (b) the amount of the debentures held.

- (3) A body's failure to comply with this section in relation to a debenture does not affect the debenture itself.

### 601CZC Location of register

- (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.
- (2) The body must lodge with ASIC a notice of the address at which the register is kept within 7 days after the register is:
- (a) established at an office that is neither the body's registered office nor at its principal place of business; or
  - (b) moved from one office to another.
- Notice is not required for moving the register between the registered office and an office at the principal place of business.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **601CZD Application of sections 173 to 177**

Sections 173 to 177 apply to a register kept under this Division as if it were kept under Chapter 2C.

Note: Sections 173 to 177 deal with rights to inspect the register and get copies, the obligations of agents who maintain the register, correction of the register, the evidential value of the register and the use of information on the register.

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**Part 5B.3—Names of registrable Australian bodies  
and foreign companies**

**601DA Reserving a name**

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

Note: For available names, see section 601DC.

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

**601DB Acceptable abbreviations**

- (1) The abbreviations set out in the following table may be used:
- (a) instead of words that this Act requires to be part of a registrable Australian body's or foreign company's name or to be included in a document; and
  - (b) instead of words that are part of a registrable Australian body's or foreign company's name; and
  - (c) with or without full stops.

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<b>Acceptable abbreviations</b>		[operative table]
	<b>Word</b>	<b>Abbreviation</b>
1	Company	Co or Coy
2	Proprietary	Pty
3	Limited	Ltd
4	Australian	Aust

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Section 601DC

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<b>Acceptable abbreviations</b>		[operative table]
<b>Word</b>		<b>Abbreviation</b>
5	Number	No
6	and	&
7	Australian Registered Body Number	ARBN
8	Registered	Regd

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- (2) If a registrable Australian body's or foreign company's name includes any of these abbreviations, the word corresponding to the abbreviation may be used instead.

**601DC When a name is available**

*Name is available unless identical or unacceptable*

- (1) A name is available to a registrable Australian body or a foreign company unless the name is:
- (a) identical (under rules set out in the regulations) to a name that is reserved or registered under this Act for another body; or
  - (b) identical (under rules set out in the regulations) to a name that is held or registered on the Business Names Register in respect of another individual or body who is not the person applying to have the name; or
  - (c) unacceptable for registration under the regulations.

*Minister may consent to a name being available*

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

## Section 601DD

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Note: If the body or company breaches a condition, ASIC may direct it to change its name under section 601DJ.

- (4) The regulations may specify that a particular unacceptable name is available to a registrable Australian body or foreign company if:
- (a) a specified public authority, or an instrumentality or agency of the Crown in right of the Commonwealth, a State or an internal Territory has consented to the body or company using or assuming the name; or
  - (b) the body or company is otherwise permitted to use or assume the name by or under a specified provision of an Act of the Commonwealth, a State or an internal Territory.

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

Note: If the consent is withdrawn, the body or company ceases to be permitted or it breaches a condition, ASIC may direct it to change its name under section 601DJ.

### **601DD Registered Australian bodies and registered foreign companies can carry on business with some names only**

- (1) A registered Australian body or registered foreign company must not carry on business under a name in this jurisdiction unless subsection (2) or (3) authorises the body or company to use the name.
- (1A) An offence based on subsection (1) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) The body or company may use the name if the company or body is registered under that name under Part 5B.2.
- (3) A registered Australian body may use a name in the State or Territory that is its place of origin if the name is registered to the body on the Business Names Register.



## **601DE Using a name and ARBN**

### *Requirements for bodies that are not Australian ADIs*

- (1) Subject to sections 601DF and 601DG, a registered Australian body or registered foreign company must set out the following on all its public documents and negotiable instruments published or signed in this jurisdiction:
- (a) its name;
  - (b) either:
    - (i) the expression “Australian Registered Body Number” followed by the body’s ARBN; or
    - (ii) if the last 9 digits of the body’s ABN are the same, and in the same order, as the last 9 digits of its ARBN—the words “Australian Business Number” followed by the body’s ABN;
  - (c) its place of origin;
  - (d) if the liability of its members is limited and this is not apparent from its name—notice of the limited liability of its members.

Paragraphs (c) and (d) do not apply to an Australian ADI.

Note: In any case where the body’s ARBN would be used, the body’s ABN may be used instead if section 1344 is satisfied.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### *Where information to be set out*

- (2) Subject to sections 601DF and 601DG, the information required by paragraph (1)(b) must be set out with the company’s or body’s name, or 1 of the references to its name in the document or instrument. If the name appears on 2 or more pages of the document or instrument, this must be done on the first of those pages.

Section 601DF

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**601DF Exception to requirement to have ARBN on receipts**

A registered Australian body or a registered foreign company does not have to set out the expression “Australian Registered Body Number” followed by its ARBN on a receipt (for example, a cash register receipt) that sets out information recorded in the machine that produced the receipt.

**601DG Regulations may exempt from requirement to set out information on documents**

The regulations may exempt a specified registered Australian body or registered foreign company, or a class of those bodies or companies, from the requirement in paragraphs 601DE(1)(b), (c) and (d) to set out information on its public documents and negotiable instruments. The exemption may relate to specified documents or instruments, or a class of documents or instruments.

**601DH Notice of name change must be given to ASIC**

- (1) A registered Australian body or a registered foreign company must give ASIC written notice of a change to its name within 14 days after the date the change occurred.
  - (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
  - (2) If the proposed name is available, ASIC must alter the details of the body’s or foreign company’s registration to reflect the change. For the purposes of this Act (other than subsection (1)), the change of name takes effect when ASIC alters the details of the body’s or foreign company’s registration.

Note 1: For the reservation of names, see section 601DA.  
Note 2: For available names, see section 601DC.  
Note 3: ASIC must issue a new certificate reflecting the name change (see section 601CU).

**601DJ ASIC's power to direct a registered name be changed**

- (1) ASIC may direct a registered Australian body or registered foreign company in writing to change the name under which the body or company is registered within 2 months if:
  - (a) the name should not have been registered; or
  - (b) the body or company has breached a condition under subsection 601DC(3) on the availability of the name; or
  - (c) a consent given under subsection 601DC(4) to use or assume the name has been withdrawn; or
  - (d) the body or company has breached a condition on a consent given under subsection 601DC(4); or
  - (e) the body or company ceases to be permitted to use or assume the name (as referred to in paragraph 601DC(4)(b)).
- (2) The body or company must comply with the direction within 2 months after being given it by doing everything necessary to change its name for the purposes of this Act under section 601DH.
- (3) If the body or company does not comply with subsection (2), ASIC may change the body's or company's name to a name that includes its ARBN by altering the details of the body's or company's registration to reflect the change.
- (4) For the purposes of this Act, a change of name under subsection (3) takes effect when ASIC alters the details of the body's or foreign company's registration.

Note: ASIC must issue a new certificate reflecting the name change (see section 601CU).