



Corporate Law Reform Act 1992

No. 210 of 1992

TABLE OF PROVISIONS

PART 1—PRELIMINARY

Section	
1.	Short title
2.	Commencement
3.	Meaning of “Corporations Law” and “Principal Act”

PART 2—DUTIES OF OFFICERS OF CORPORATIONS

Division 1—Amendments of the Corporations Law

4.	Dictionary
5.	Insertion of new section: 73A. When a court is taken to find a person guilty of an offence
6.	Being or becoming subject to a section 229 prohibition, a section 230 or 599 order, a section 600 notice or a civil penalty disqualification
7.	Effect of such a prohibition, order, notice or disqualification
8.	Vacation of office of director
9.	Certain persons not to manage corporations
10.	Court may order person not to manage corporation
11.	Duty and liability of officer of corporation
12.	Register of disqualified company directors and other officers
13.	Public companies
14.	Contravention of Part
15.	References to civil penalty disqualification inserted in certain provisions
16.	Penalty notices
17.	Insertion of new Part:

TABLE OF PROVISIONS—*continued*

Section

PART 9.4B—CIVIL AND CRIMINAL CONSEQUENCES OF
CONTRAVENING CIVIL PENALTY PROVISIONS

Division 1—Preliminary

- 1317DA. Civil penalty provisions
- 1317DB. Person involved in contravening a provision taken to have contravened the provision
- 1317DC. Contravention committed partly in, and partly out of, the jurisdiction
- 1317DD. Reciprocity in relation to contraventions

Division 2—Civil penalty orders

- 1317EA. Court may make civil penalty orders
- 1317EB. Who may apply for civil penalty order
- 1317EC. Time limit for application
- 1317ED. Application for civil penalty order is a civil proceeding
- 1317EF. Person must comply with order not to manage corporation
- 1317EG. Enforcement of order to pay pecuniary penalty
- 1317EH. Commission may require a person to give assistance in connection with application for civil penalty order

Division 3—Criminal proceedings

- 1317FA. When contravention of civil penalty provision is an offence
- 1317FB. Application for civil penalty order precludes later criminal proceedings

Division 4—Effect of criminal proceedings on application for civil penalty order

- 1317GA. When Division applies
- 1317GB. Effect during criminal proceedings
- 1317GC. Final outcome precluding application for civil penalty order
- 1317GD. Final outcome not precluding application for civil penalty order
- 1317GE. After unsuccessful committal proceeding, court may preclude application for civil penalty order
- 1317GF. Application for civil penalty order based on alternative verdict at jury trial
- 1317GG. Application for civil penalty order based on alternative finding by court of summary jurisdiction
- 1317GH. Application for civil penalty order based on alternative finding by appeal court
- 1317GJ. After setting aside declaration, court may preclude application for civil penalty order
- 1317GK. On unsuccessful appeal against declaration, Court may make civil penalty orders
- 1317GL. Appeals under this Division

Division 5—Compensation for loss suffered by corporation

- 1317HA. On application for civil penalty order, Court may order compensation
- 1317HB. Criminal court may order compensation
- 1317HC. Enforcement of order under section 1317HA or 1317HB
- 1317HD. Recovery of profits, and compensation for loss, resulting from contravention
- 1317HE. Effect of sections 1317HA, 1317HB and 1317HD
- 1317HF. Certificates evidencing contravention

Division 6—Miscellaneous

- 1317JA. Relief from liability for contravention of civil penalty provision
- 1317JB. Effect of contravening civil penalty provisions of Corporations Law of 2 or more jurisdictions
- 1317JC. Part does not limit power to award punitive damages

TABLE OF PROVISIONS—*continued*

Section

18. Schedule 3

Division 2—Amendment of the Australian Securities Commission Act 1989

19. Recovery of expenses of investigation

Division 3—Amendment of the Bankruptcy Act 1966

20. Debts provable in bankruptcy

PART 3—FINANCIAL BENEFITS TO RELATED PARTIES OF PUBLIC COMPANIES

21. How to read references to provisions of this Law

22. Dictionary

23. Effect of certain contraventions of this Law

24. Directors to disclose certain interests

25. Insertion of new sections:

232A. Voting by interested director of public company

232B. Commission may exempt directors from section 232A in appropriate cases

26. Loans to directors

27. Insertion of new Part:

PART 3.2A—FINANCIAL BENEFITS TO RELATED PARTIES OF PUBLIC COMPANIES

Division 1—Object and outline of Part

243A. Object

243B. Outline

Division 2—The meaning of expressions

243C. Entities

243D. Parent entities, child entities and sibling entities

243E. Control

243F. Related party of a public company

243G. Giving a financial benefit

Division 3—The prohibitions

243H. Prohibited financial benefits to related parties of public companies

Division 4—General exceptions

243J. Financial benefit under contract made before section 243H begins to apply

243K. Remunerating officers

243L. Advances, up to prescribed amount, to director or director's spouse

243M. Financial benefit given to or by closely-held subsidiary

243N. Financial benefit on arm's length terms

243PA. Financial benefits to members as such

243PB. Financial benefit under court order

Division 5—Financial benefits approved by general meeting of public company

Subdivision A—Exceptions from the prohibitions

243Q. Financial benefit permitted by resolution of members

243R. Financial benefit under contract permitted by resolution of members

243S. Resolution may specify matters by class or kind

243T. Effect of resolution

TABLE OF PROVISIONS—*continued*

Section

Subdivision B—Conditions to be satisfied

- 243U. Company must lodge material that will be put to members
- 243V. Requirements for explanatory statement to members
- 243W. Commission may comment on proposed resolution
- 243X. Requirements for notice of meeting
- 243Y. Other material put to members
- 243ZA. Proposed resolution cannot be varied
- 243ZB. Voting on the resolution
- 243ZC. Notice of resolution to be lodged
- 243ZD. Declaration by Court of substantial compliance

Division 6—Enforcement

- 243ZE. Consequences of giving financial benefit when not permitted
 - 243ZF. Voting by or on behalf of related party interested in proposed resolution under Division 5
 - 243ZG. Contraventions by an entity that is not a legal person
 - 243ZH. Retaining records made under section 243ZB
 - 243ZI. Effect of Part
28. Schedule 3

PART 4—EXTERNAL ADMINISTRATION OF COMPANIES AND PART
5.7 BODIES

Division 1—Amendments of the Corporations Law

- 29. Dictionary
- 30. Affairs of a body corporate
- 31. Insertion of new sections:
 - 53AA. Business affairs of a body corporate
 - 53AB. Business affairs of a natural person
 - 53AC. Business affairs of a partnership
 - 53AD. Business affairs of a trust
- 32. Insertion of new sections:
 - 64A. Entities
 - 64B. Entities connected with a corporation
- 33. Officers of bodies corporate and other entities
- 34. Insertion of new section:
 - 95A. Solvency and insolvency
- 35. Interpretation
- 36. Duty and liability of officer of corporation
- 37. Substitution of Part heading
- 38. Application of Part
- 39. Insertion of new section:
 - 418A. Court may declare whether controller is validly acting
- 40. Insertion of new section:
 - 419A. Liability of controller under pre-existing agreement about property used by corporation
- 41. Insertion of new sections:
 - 420A. Controller's duty of care in exercising power of sale
 - 420B. Court may authorise managing controller to dispose of property despite prior charge
 - 420C. Receiver's power to carry on corporation's business during winding up
- 42. Controller's duties in relation to bank accounts and accounting records
- 43. Insertion of new section:
 - 421A. Managing controller to report within 2 months about corporation's affairs
- 44. Supervision of controller

TABLE OF PROVISIONS—*continued*

- Section
45. Substitution of section:
 424. Controller may apply to Court
46. Court's power to fix receiver's remuneration
47. Repeal of section 426 and substitution of new section:
 426. Controller has qualified privilege in certain cases

48. Notification of matters relating to controller
49. Statement that receiver appointed or other controller acting
50. Officers to report to controller about corporation's affairs
51. Controller may require reports
52. Controller may inspect books
53. Lodging controller's accounts
54. Enforcing controller's duty to make returns
55. Insertion of new sections:
 434A. Court may remove controller for misconduct
 434B. Court may remove redundant controller
 434C. Effect of sections 434A and 434B
56. Repeal of Part 5.3 and substitution of new Part:

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
435B. Interpretation
435C. When administration begins and ends

Division 2—Appointment of administrator and first meeting of creditors

- 436A. Company may appoint administrator if board thinks it is or will become insolvent
436B. Liquidator may appoint administrator
436C. Chargee may appoint administrator
436D. Company already under administration
436E. Purpose and timing of first meeting of creditors
436F. Functions of committee of creditors
436G. Membership of committee

Division 3—Administrator assumes control of company's affairs

- 437A. Role of administrator
437B. Administrator acts as company's agent
437C. Powers of other officers suspended
437D. Only administrator can deal with company's property
437E. Order for compensation where officer involved in void transaction
437F. Effect of administration on company's members

Division 4—Administrator investigates company's affairs

- 438A. Administrator to investigate affairs and consider possible courses of action
438B. Directors to help administrator
438C. Administrator's rights to company's books
438D. Reports by administrator

Division 5—Meeting of creditors decides company's future

- 439A. Administrator to convene meeting and inform creditors
439B. Conduct of meeting
439C. What creditors may decide

TABLE OF PROVISIONS—*continued*

Section

Division 6—Protection of company's property during administration

- 440A. Winding up company
- 440B. Charge unenforceable
- 440C. Owner or lessor cannot recover property used by company
- 440D. Stay of proceedings
- 440E. Administrator not liable in damages for refusing consent
- 440F. Suspension of enforcement process
- 440G. Duties of court officer in relation to property of company
- 440H. *Lis pendens* taken to exist
- 440J. Administration not to trigger liability of director or relative under guarantee of company's liability

Division 7—Rights of chargee, owner or lessor

- 441A. Where chargee acts before or during decision period
- 441B. Where enforcement of charge begins before administration
- 441C. Charge on perishable property
- 441D. Court may limit powers of chargee, etc. in relation to charged property
- 441E. Giving a notice under a charge
- 441F. Where recovery of property begins before administration
- 441G. Recovering perishable property
- 441H. Court may limit powers of receiver etc. in relation to property used by company
- 441J. Giving a notice under an agreement about property
- 441K. Effect of Division

Division 8—Powers of administrator

- 442A. Additional powers of administrator
- 442B. Dealing with property subject to a floating charge that has crystallised
- 442C. When administrator may dispose of encumbered property
- 442D. Administrator's powers subject to powers of chargee, receiver etc.
- 442E. Administrator has qualified privilege
- 442F. Protection of persons dealing with administrator

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

Subdivision A—Liability

- 443A. General debts
- 443B. Payments for property used or occupied by, or in the possession of, the company
- 443C. Administrator not otherwise liable for company's debts

Subdivision B—Indemnity

- 443D. Right of indemnity
- 443E. Right of indemnity has priority over other debts
- 443F. Lien to secure indemnity

Division 10—Execution and effect of deed of company arrangement

- 444A. Effect of creditors' resolution
- 444B. Execution of deed
- 444C. Creditor etc. not to act inconsistently with deed before its execution
- 444D. Effect of deed on creditors
- 444E. Protection of company's property from persons bound by deed
- 444F. Court may limit rights of secured creditor or owner or lessor
- 444G. Effect of deed on company, officers and members
- 444H. Extent of release of company's debts

TABLE OF PROVISIONS—*continued*

Section

Division 11—Variation, termination and avoidance of deed

- 445A. Variation of deed by creditors
- 445B. Court may cancel variation
- 445C. When deed terminates
- 445D. When Court may terminate deed
- 445E. Creditors may terminate deed and resolve that company be wound up
- 445F. Meeting of creditors to consider proposed variation or termination of deed
- 445G. When Court may void or validate deed
- 445H. Effect of termination or avoidance

Division 12—Transition to creditors' voluntary winding up

- 446A. Administrator becomes liquidator in certain cases
- 446B. Regulations may provide for transition in other cases

Division 13—Powers of Court

- 447A. General power to make orders
- 447B. Orders to protect creditors during administration
- 447C. Court may declare whether administrator validly appointed
- 447D. Administrator may seek directions
- 447E. Supervision of administrator of company or deed
- 447F. Effect of Division

Division 14—Qualifications of administrators

- 448A. Appointee must consent
- 448B. Administrator must be registered liquidator
- 448C. Disqualification of person connected with company
- 448D. Disqualification of insolvent under administration

Division 15—Removal, replacement and remuneration of administrator

- 449A. Appointment of administrator cannot be revoked
- 449B. Court may remove administrator
- 449C. Vacancy in office of administrator of company
- 449D. Vacancy in office of administrator of deed of company arrangement
- 449E. Remuneration of administrator

Division 16—Notices about steps taken under Part

- 450A. Appointment of administrator
- 450B. Execution of deed of company arrangement
- 450C. Failure to execute deed of company arrangement
- 450D. Termination of deed of company arrangement
- 450E. Notice in public documents etc. of company
- 450F. Effect of contravention of this Division

Division 17—Miscellaneous

- 451A. Appointment of 2 or more administrators of company
 - 451B. Appointment of 2 or more administrators of deed of company arrangement
 - 451C. Effect of things done during administration of company
 - 451D. Time for doing act does not run while act prevented by this Part
57. Insertion of new Part and heading:

TABLE OF PROVISIONS—*continued*

Section

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
- 459B. Order made on application under section 260, 462 or 464
- 459C. Presumptions to be made in certain proceedings
- 459D. Contingent or prospective liability relevant to whether company solvent

Division 2—Statutory demand

- 459E. Creditor may serve statutory demand on company
- 459F. When company taken to fail to comply with statutory demand

Division 3—Application to set aside statutory demand

- 459G. Company may apply
- 459H. Determination of application where there is a dispute or offsetting claim
- 459J. Setting aside demand on other grounds
- 459K. Effect of order setting aside demand
- 459L. Dismissal of application
- 459M. Order subject to conditions
- 459N. Costs where company successful

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

- 459P. Who may apply for order under section 459A
- 459Q. Application relying on failure to comply with statutory demand
- 459R. Period within which application must be determined
- 459S. Company may not oppose application on certain grounds
- 459T. Application to wind up joint debtors in insolvency

PART 5.4A—WINDING UP BY THE COURT ON OTHER GROUNDS

- 58. Repeal of section 460
- 59. General grounds on which company may be wound up by Court
- 60. Standing to apply for winding up
- 61. Repeal of section 463
- 62. Repeal of section 465 and substitution of headings and new section:

PART 5.4B—WINDING UP IN INSOLVENCY OR BY THE COURT

Division 1—General

- 465A. Notice of application
- 465B. Substitution of applicants
- 465C. Applicant to be given notice of grounds for opposing application
- 63. Court's powers on hearing application
- 64. Insertion of new sections:
 - 467A. Effect of defect or irregularity on application under Part 5.4 or 5.4A
 - 467B. Court may order winding up of company that is being wound up voluntarily
- 65. Avoidance of dispositions of property, attachments etc.
- 66. Insertion of Division heading
- 67. Effect on creditors and contributories
- 68. Insertion of new sections:
 - 471A. Powers of other officers suspended during winding up
 - 471B. Stay of proceedings and suspension of enforcement process
 - 471C. Secured creditor's rights not affected

TABLE OF PROVISIONS—*continued*

Section	
69.	Court to appoint official liquidator
70.	General provisions about liquidators
71.	Custody and vesting of company's property
72.	References to liquidator in certain provisions to include references to provisional liquidator
73.	Powers of liquidator
74.	Application of property; list of contributories
75.	Orders for release or dissolution
76.	Delivery of property to liquidator
77.	Insertion of new sections:
	486A. Court may make order to prevent officer or related entity from avoiding liability to company
	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
78.	Delegation to liquidator of certain powers of Court
79.	Insertion of new section:
	490. When company cannot wind up voluntarily
80.	Repeal of section 492
81.	Duty of liquidator where company turns out to be insolvent
82.	Powers and duties of liquidator
83.	Arrangement: when binding on creditors
84.	Application of Part
85.	Insertion of new Division:
	<i>Division 1A—When winding up taken to begin</i>
	513A. Winding up ordered by the Court
	513B. Voluntary winding up
	513C. Section 513C day in relation to an administration under Part 5.3A
	513D. Validity of proceedings in earlier winding up
86.	Repeal of section 525
87.	Insertion of new sections:
	530A. Officers to help liquidator
	530B. Liquidator's rights to company's books
	530C. Warrant to search for, and seize, company's property or books
88.	Books to be kept by liquidator
89.	Disqualification of liquidator
90.	When liquidator has qualified privilege
91.	Books of company
92.	Repeal of section 553 and substitution of headings and sections:
	<i>Subdivision A—Admission to proof of debts and claims</i>
	553. Debts or claims that are provable in winding up
	553A. Member cannot prove debt unless contributions paid
	553B. Insolvent companies—penalties and fines not generally provable
	553C. Insolvent companies—mutual credit and set-off
	553D. Debts or claims may be proved formally or informally
	553E. Application of Bankruptcy Act to winding up of insolvent company
	<i>Subdivision B—Computation of debts and claims</i>
93.	General rule—compute amount as at relevant date
94.	Insertion of sections and headings:
	554A. Determination of value of debts and claims of uncertain value
	554B. Discounting of debts payable after relevant date
	554C. Conversion into Australian currency of foreign currency debts or claims
	<i>Subdivision C—Special provisions relating to secured creditors of insolvent companies</i>
	554D. Application of Subdivision

TABLE OF PROVISIONS—*continued*

Section	<p>554E. Proof of debt by secured creditor</p> <p>554F. Redemption of security by liquidator</p> <p>554G. Amendment of valuation</p> <p>554H. Repayment of excess</p> <p>554J. Subsequent realisation of security</p> <p style="text-align: center;"><i>Subdivision D—Priorities</i></p> <p>95. Debts and claims proved to rank equally except as otherwise provided</p> <p>96. Priority payments</p> <p>97. Repeal of section 557</p> <p>98. Debts of a class to rank equally</p> <p>99. Advances for company to make priority payments in respect of employees</p> <p>100. Application of proceeds of contracts of insurance</p> <p>101. Insertion of new section: 562A. Application of proceeds of contracts of reinsurance</p> <p>102. Insertion of new sections and heading: 563A. Member's debts to be postponed until other debts and claims satisfied</p> <p style="text-align: center;"><i>Subdivision E—Miscellaneous</i></p> <p>563B. Interest on debts and claims from relevant date to date of payment</p> <p>563C. Debt subordination</p> <p>103. Substitution of heading</p> <p>104. Undue preference</p> <p>105. Effect of floating charge</p> <p>106. Liquidator's right to recover in respect of certain transactions</p> <p>107. Insertion of heading</p> <p>108. Disclaimer by liquidator; application to Court by party to contract</p> <p>109. Insertion of new sections and heading: 568A. Liquidator must give notice of disclaimer 568B. Application to set aside disclaimer before it takes effect 568C. When disclaimer takes effect 568D. Effect of disclaimer 568E. Application to set aside disclaimer after it has taken effect 568F. Court may dispose of disclaimed property</p> <p style="text-align: center;"><i>Division 7B—Effect on enforcement process against company's property</i></p> <p>110. Insertion of new headings and new sections: <i>Division 1—Application of Part 5.3A to matters arising under corresponding laws</i> 588AA. Application in this jurisdiction 588AB. Enforcement of orders <i>Division 2—Winding up recognised companies</i></p> <p>111. Insertion of new Part: PART 5.7B—RECOVERING PROPERTY OR COMPENSATION FOR THE BENEFIT OF CREDITORS OF INSOLVENT COMPANY <i>Division 1—Preliminary</i> 588D. Secured debt may become unsecured 588E. Presumptions to be made in recovery proceedings <i>Division 2—Voidable transactions</i> 588FA. Unfair preferences 588FB. Uncommercial transactions 588FC. Insolvent transactions 588FD. Unfair loans to a company 588FE. Voidable transactions</p>
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TABLE OF PROVISIONS—*continued*

Section	
588FF.	Court may make orders about voidable transactions
588FG.	Transaction not voidable as against certain persons
588FH.	Liquidator may recover from related entity benefit resulting from insolvent transaction
588FI.	Creditor who gives up benefit of unfair preference may prove for preferred debt
588FJ.	Floating charge created within 6 months before relation-back day
	<i>Division 3—Director's duty to prevent insolvent trading</i>
588G.	Director's duty to prevent insolvent trading by company
588H.	Defences
	<i>Division 4—Director liable to compensate company</i>
	<i>Subdivision A—Proceedings against director</i>
588J.	On application for civil penalty order, Court may order compensation
588K.	Criminal court may order compensation
588L.	Enforcement of order under section 588J or 588K
588M.	Recovery of compensation for loss resulting from insolvent trading
588N.	Avoiding double recovery
588P.	Effect of sections 588J, 588K and 588M
588Q.	Certificates evidencing contravention
	<i>Subdivision B—Proceedings by creditor</i>
588R.	Creditor may sue for compensation with liquidator's consent
588S.	Creditor may give liquidator notice of intention to sue for compensation
588T.	When creditor may sue for compensation without liquidator's consent
588U.	Events preventing creditor from suing
	<i>Division 5—Liability of holding company for insolvent trading by subsidiary</i>
588V.	When holding company liable
588W.	Recovery of compensation for loss resulting from insolvent trading
588X.	Defences
	<i>Division 6—Application of compensation under Division 4 or 5</i>
588Y.	Application of amount paid as compensation
	<i>Division 7—Person managing company while disqualified may become liable for company's debts</i>
588Z.	Court may make order imposing liability
112.	Interpretation and application
113.	Offences by officers of certain companies
114.	Incurring of certain debts; fraudulent conduct
115.	Inducement to be appointed liquidator etc. of company
116.	Insertion of heading and new sections:
	<i>Division 1—Examining a person about a corporation</i>
596A.	Mandatory examination
596B.	Discretionary examination
596C.	Affidavit in support of application under section 596B
596D.	Content of summons
596E.	Notice of examination
596F.	Court may give directions about examination
117.	Conduct of examination
118.	Insertion of new sections and heading:
597A.	When Court is to require affidavit about corporation's examinable affairs
597B.	Costs of unnecessary examination or affidavit

TABLE OF PROVISIONS—*continued*

Section	
	<i>Division 2—Orders against a person in relation to a corporation</i>
119.	Order against person concerned with corporation
120.	Insertion of new Division and heading: <i>Division 3—Provisions applying to various kinds of external administration</i>
	600A. Powers of Court where outcome of voting at creditors' meeting determined by related entity
	600B. Review by Court of resolution of creditors passed on casting vote of chairperson of meeting
	600C. Court's powers where proposed resolution of creditors lost on casting vote of chairperson of meeting
	600D. Interim order on application under section 600A, 600B or 600C
	600E. Order under section 600A or 600B does not affect act already done pursuant to resolution
	600F. Limitation on right of suppliers of essential services to insist on payment as condition of supply
	<i>Division 4—Transitional</i>
121.	Insertion of new section: 1091A. Rights of trustee of estate of bankrupt shareholder
122.	Schedule 3
123.	Consequential amendments of the Corporations Law <i>Division 2—Consequential amendment of the Australian Securities Commission Act 1989</i>
124.	Interpretation <i>Division 3—Consequential amendments of other Acts</i>
125.	Schedule 2 PART 5—IMPLEMENTING THE CLEARING HOUSE SUBREGISTER SYSTEM
126.	Dictionary
127.	Application not to be granted unless applications also made under corresponding laws
128.	Insertion of new Part: PART 7.2A—THE SECURITIES CLEARING HOUSE
	779A. Interpretation
	779B. Approval of securities clearing house
	779C. Commission to be notified of amendments of business rules
	779D. Securities clearing house to assist Commission
	779E. Securities clearing house to notify Commission of disciplinary action
	779F. Issuers of quoted securities and quoted rights to comply with SCH business rules
	779G. Power of Court to order compliance with provisions of SCH business rules
	779H. Qualified privilege in respect of disciplinary proceedings
	779J. Provision of settlement facilities not a securities business etc.
129.	Interpretation
130.	Transfer of securities etc. and payment of money
131.	Novation of agreements
132.	Definitions
133.	Effect of using a transfer delivery service
134.	Claim by selling dealer in respect of default by buying dealer
135.	Claim by buying dealer in respect of default by selling dealer
136.	Effect of novation, under business rules, of agreement for purchase

TABLE OF PROVISIONS—*continued*

Section	
137.	Claim by selling client in respect of default by selling dealer
138.	Claim by buying client in respect of default by buying dealer
139.	Insertion of new section: 952A. Cash settlement of claims—SCH-regulated transfers
140.	Cash settlement of claims—transfers other than SCH-regulated transfers
141.	Effect of using a transfer delivery service
142.	Effect of novation, under business rules, of guaranteed securities loan
143.	Effect of using a transfer delivery service
144.	Claim in respect of failure to pay net amount in respect of transactions
145.	Claim in respect of failure to transfer net number of securities in respect of transactions
146.	How claim under subsection 954P(2) is to be satisfied
147.	How claim under subsection 954P(3) is to be satisfied
148.	Claims in respect of default by TDS nominee
149.	How claim under subsection 954X(2) is to be satisfied
150.	Nexus with this jurisdiction
151.	Interpretation
152.	Repeal of section 956 and substitution of new section: 956. Situations to which Division applies
153.	Claim by transferee or sub-transferee
154.	Discretion to pay amounts not received etc. because of failure to transfer securities
155.	Application of Fund in respect of certain claims
156.	Arbitration of amount of cash settlement of certain claims
157.	Subrogation of SEGC to claimant's rights etc.
158.	Nature of shares and other interests
159.	Numbering shares
160.	Instrument of transfer
161.	Duties of company with respect to issue of certificates
162.	Insertion of heading
163.	Interpretation
164.	Insertion of new sections: 1097A. Quoted securities and rights 1097B. SCH business rules may provide that securities or rights continue to be quoted securities or rights 1097C. Commission may declare Law applies to securities as if they were quoted securities or rights 1097D. Transfer that substantially complies with SCH business rules
165.	Insertion of new heading and section: <i>Subdivision B—Sufficient transfers (transfers other than SCH-regulated transfers)</i>
	1099A. Subdivision does not apply to SCH-regulated transfers
166.	Insertion of new headings and sections: <i>Subdivision C—SCH-regulated transfers</i>
	1109A. Member organisation's authority to enter into transaction continues despite client's death
	1109B. Authority to enter into transaction gives authority to transfer
	1109C. Effect of proper SCH transfer
	1109D. Effect of proper SCH transfer on transferee
	1109E. Warranties by member organisation whose identification code is included in transfer document
	1109F. Indemnities in respect of warranted matters
	1109G. Joint and several warranties and liabilities
	1109H. Quoted securities and rights from other jurisdictions: effect of sections 1109E, 1109F and 1109G
	1109J. Securities clearing house entitled to assume its business rules complied with
	1109K. SCH-regulated transfer not to be registered unless proper SCH transfer
	1109L. Issuing body not to refuse to register proper SCH transfer
	1109M. Trustees and legal representatives may be SCH participants etc.

TABLE OF PROVISIONS—*continued*

Section

Subdivision D—Miscellaneous

- 167. Operation of Division
- 168. Occupation need not appear in transfer document, register etc.
- 169. Insertion of new section:
 - 1112A. Offences: inclusion of identification codes in proper SCH transfers
- 170. Power of Court to make certain orders
- 171. Repeal of section 1301 and substitution of new section:
 - 1301. Location of books on computers
- 172. Form and evidentiary value of books
- 173. Schedule 3

PART 6—MISCELLANEOUS

Division 1—Amendments of the Corporations Law

- 174. Dictionary
- 175. Address of registered office etc.
- 176. Return of allotment
- 177. Insertion of new section:
 - 335A. Company's address for service for the purposes of section 335
- 178. Exemption of certain companies
- 179. Insertion of new section:
 - 1345A. Minister may delegate prescribed functions and powers under this Law

Division 2—Amendments of the Australian Securities Commission Act 1989

- 180. Functions and powers
- 181. Liability for damages

PART 7—COMMENCEMENT AND APPLICATION OF CHANGES TO THE CORPORATIONS LAW RESULTING FROM THIS ACT

- 182. Effect of this Part
- 183. General penalty provisions
- 184. Changes to section 597
- 185. Insertion of new Division:

Division 5—Changes resulting from the Corporate Law Reform Act 1992

- 1372. Commencement of subsection 6(4)
- 1373. Application of changes to section 187
- 1374. Application of change to paragraph 230(1)(d)
- 1375. Application of certain changes to section 232
- 1376. Application of sections 243H and 243ZE
- 1377. Application of subsection 307(2)
- 1378. Application of change to section 318
- 1379. Application of certain changes to Part 5.2
- 1380. Continued application of old Part 5.3 and related provisions
- 1381. Certain provisions continue to apply in relation to official management
- 1382. Application of new provisions relating to winding up
- 1383. Continued application of old Parts 5.4, 5.5 and 5.6
- 1384. Continued application of old sections 589, 590 and 592
- 1385. Continued effect of authorisations under subsections 597(1) and 598(1)
- 1386. Continued application of old section 597
- 1387. Application of change to paragraph 1091(1A)(b)
- 1388. Application of change to section 1301
- 1389. Application of Part 9.4B to contravention committed before that Part commenced

TABLE OF PROVISIONS—*continued*

SCHEDULE 1

**AMENDMENTS OF THE CORPORATIONS LAW CONSEQUENT ON PART 4 OF THIS
ACT**

SCHEDULE 2

AMENDMENTS OF ACTS CONSEQUENT ON PART 4 OF THIS ACT



Corporate Law Reform Act 1992

No. 210 of 1992

An Act to change the Corporations Law and to amend some other Acts

[Assented to 24 December 1992]

The Parliament of Australia enacts:

PART 1—PRELIMINARY

Short title

- 5 1. This Act may be cited as the *Corporate Law Reform Act 1992*.

Commencement

- 2.(1) Part 1 commences on the day on which this Act receives the Royal Assent.
- (2) Subsections 26(2) and 28(1) commence on 1 February 1994.
- 10 (3) Subject to subsection (4), the remaining provisions of this Act commence on a day or days to be fixed by Proclamation.
- (4) If a provision referred to in subsection (3) does not commence under that subsection within the period of 6 months beginning on the

day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

Meaning of “Corporations Law” and “Principal Act”

3. In this Act:

“**Corporations Law**” means the Corporations Law set out in section 82 of the *Corporations Act 1989*;5

“**Principal Act**” means the Act referred to in the heading:

(a) if the expression occurs in a Division of a Part—to that Division; or

(b) otherwise—to the Part in which the expression occurs.10

PART 2—DUTIES OF OFFICERS OF CORPORATIONS

Division 1—Amendments of the Corporations Law

Dictionary

4. Section 9 of the Corporations Law is amended by inserting the following definitions:15

“**‘civil penalty disqualification’** has the meaning given by subsection 91(4A);

‘civil penalty order’ means a declaration or order made under section 1317EA of the Corporations Law of this jurisdiction;

‘civil penalty provision’ has the meaning given by section 1317DA;20

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

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

5. After section 73 of the Corporations Law the following section is inserted:25

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

“73A. An Australian court finds a person guilty of an offence if, and only if:

(a) the court convicts the person of the offence; or30

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

Being or becoming subject to a section 229 prohibition, a section 230 or 599 order, a section 600 notice or a civil penalty disqualification35

6. Section 91 of the Corporations Law is amended by inserting after subsection (4) the following subsection:

“(4A) A person is or becomes subject to a civil penalty disqualification if, and only if, an order relating to the person is in

force, or is made, as the case may be, under paragraph 1317EA(3)(a), and a reference to a civil penalty disqualification is a reference to an order so in force or made.”.

Effect of such a prohibition, order, notice or disqualification

- 5 7. Section 91A of the Corporations Law is amended by omitting from subsection (1) “599 and 600” and substituting “588Z, 599, 600, 1317EA and 1317EF”.

Vacation of office of director

8. Section 224 of the Corporations Law is amended:

- 10 (a) by adding at the end of paragraphs (1)(a), (b), (c), (d) and (e) “or”;
- (b) by adding at the end of subsection (1) the following word and paragraph:
 “; or (h) becomes subject to a civil penalty disqualification.”;
- 15 (c) by inserting after subsection (6) the following subsection:

 “(6A) A person whose office is vacated because of paragraph (1)(h) cannot, without the leave of the Court granted under section 1317EF, be re-appointed as a director until the end of the period specified in the disqualification.”.

20 **Certain persons not to manage corporations**

9. Section 229 of the Corporations Law is amended by inserting after paragraph (3)(c) the following word and paragraph:

“or (d) of an offence of which the person is guilty because of subsection 1317FA(1);”.

25 **Court may order person not to manage corporation**

10. Section 230 of the Corporations Law is amended:

- (a) by adding at the end of paragraphs (1)(a) and (b) “or”;
- (b) by omitting from paragraph (1)(d) all the words after “relevant officer” and substituting “of a body corporate (other than a corporation), the relevant person did an act, or made an omission, that would have constituted a contravention of subsection 232(2) or (4) in relation to the body if the body had been a corporation at that time;”.
- 30

Duty and liability of officer of corporation

35 11. Section 232 of the Corporations Law is amended:

 (a) by omitting subsections (3) and (4) and substituting the following subsection:

 “(4) In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like

40

position in a corporation would exercise in the corporation's circumstances.”;

- (b) by omitting subsections (7), (8), (9) and (10) and substituting the following subsection:

“(6B) Subsections (2), (4), (5) and (6) are civil penalty provisions as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening any of them, or of being involved in a contravention of any of them.”. 5

Register of disqualified company directors and other officers

- 12. Section 243 of the Corporations Law is amended: 10
 - (a) by omitting from subsection (1) “Act” and substituting “Law”;
 - (b) by inserting in paragraph (1)(a) “or paragraph 1317EA(3)(a)” after “599(2)”.

Public companies

- 13. Section 307 of the Corporations Law is amended by adding at the end the following subsection: 15

“(2) If subsection (1) applies, the report must also contain, or have attached to it, a statement that sets out:

- (a) how many meetings of the company's directors (including meetings of committees of directors) were held during the financial year, or would have been so held if a quorum had been present; and 20
- (b) in relation to each person who was a director of the company throughout the financial year—how many of the meetings referred to in paragraph (a) the person attended; and 25
- (c) in relation to each person who was such a director during some but not all of the financial year:
 - (i) how many of the meetings referred to in paragraph (a) were held while the person was such a director; and
 - (ii) how many of the meetings referred to in paragraph (a) the person attended while he or she was such a director.”. 30

Contravention of Part

- 14. Section 318 of the Corporations Law is amended by omitting subsection (2) and substituting the following subsection:

“(2) Subsection (1) is a civil penalty provision as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening it, or of being involved in a contravention of it.”. 35

References to civil penalty disqualification inserted in certain provisions

- 15.(1) Each of the following provisions of the Corporations Law:
 - (a) subsection 1280(3); 40
 - (b) subsection 1282(4);

- (c) subsection 1287(4);
- (d) paragraph 1292(7)(a);

is amended by omitting “or a section 600 notice” and substituting “, a section 600 notice or a civil penalty disqualification”.

- 5 (2) Subsection 1287(4) of the Corporations Law is amended by omitting “or section 600 notice” and substituting “, section 600 notice or civil penalty disqualification”.

Penalty notices

16. Section 1313 of the Corporations Law is amended:

- 10 (a) by inserting in paragraph (4)(b) “not” before “done”;
- (b) by omitting subsection (8) and substituting the following subsection:

 “(8) In this section:

 ‘**authority**’ includes a person;

15 ‘**prescribed offence**’ means:

 (a) a subsection 1311(5) offence; or

 (b) an offence against this Law that the regulations prescribe for the purposes of this section;

20 ‘**prescribed penalty**’, in relation to a prescribed offence in relation to which the Commission may give, or has given, to a person a notice under subsection (1), means:

 (a) if the offence is a subsection 1311(5) offence:

25 (i) if the regulations prescribe in relation to the offence for the purposes of this paragraph an amount not exceeding one half the amount of the penalty applicable to the offence:

 (A) if the person is a body corporate—a penalty of five times the amount so prescribed; or

30 (B) otherwise—a penalty of the amount so prescribed; or

 (ii) otherwise:

35 (A) if the person is a body corporate—a penalty of 1.25 times the amount of the penalty applicable to the offence; or

 (B) otherwise—a penalty of 0.25 times the amount of the penalty applicable to the offence; or

Note: Section 1311 provides for the penalty applicable to an offence.

40 (b) otherwise—a penalty of the amount that the regulations prescribe in relation to the offence;

 ‘**subsection 1311(5) offence**’ means an offence the penalty applicable to which is provided for by subsection 1311(5).”.

17. After section 1317C of the Corporations Law the following Part is inserted:

**“PART 9.4B—CIVIL AND CRIMINAL CONSEQUENCES OF
CONTRAVENING CIVIL PENALTY PROVISIONS**

“Division 1—Preliminary 5

Civil penalty provisions

“1317DA. Each of the following provisions of the Corporations Law of this jurisdiction is a civil penalty provision:

- Subsections 232(2), (4), (5) and (6);
- Subsections 243ZE(2) and (3); 10
- Subsection 318(1);
- Section 588G.

Person involved in contravening a provision taken to have contravened the provision

“1317DB. For the purposes of this Part, a person who is involved in a contravention of a particular provision of this Law or a corresponding law is taken to have contravened that provision. 15

Contravention committed partly in, and partly out of, the jurisdiction

“1317DC. Where:

- (a) a person does or omits to do an act outside this jurisdiction; 20
- and
- (b) if the person had done or omitted to do that act in this jurisdiction, the person would, because of also having done or omitted to do an act in this jurisdiction, have contravened a civil penalty provision; 25

the person contravenes that provision.

Reciprocity in relation to contraventions

“1317DD. Where:

- (a) a person does or omits to do an act in this jurisdiction; and
- (b) if the person had done or omitted to do that act in another jurisdiction, the person would have contravened a provision of the Corporations Law of another jurisdiction that corresponds to a civil penalty provision; 30

the person contravenes that civil penalty provision.

“Division 2—Civil penalty orders 35

Court may make civil penalty orders

“1317EA.(1) This section applies if the Court is satisfied that a person has contravened a civil penalty provision, whether or not the contravention also constitutes an offence because of section 1317FA.

Corporate Law Reform No. 210, 1992

Note: Section 1317HF provides that a certificate by a court that the court has declared a person to have contravened a civil penalty provision is conclusive evidence of the contravention.

“(2) The Court is to declare that the person has, by a specified act or omission, contravened that provision in relation to a specified corporation, but need not so declare if such a declaration is already in force under Division 4.

5 “(3) The Court may also make against the person either or both of the following orders in relation to the contravention:

(a) an order prohibiting the person, for such period as is specified in the order, from managing a corporation;

10 (b) an order that the person pay to the Commonwealth a pecuniary penalty of an amount so specified that does not exceed \$200,000.

“(4) The Court is not to make an order under paragraph (3)(a) if it is satisfied that, despite the contravention, the person is a fit and proper person to manage a corporation.

15 “(5) The Court is not to make an order under paragraph (3)(b) unless it is satisfied that the contravention is a serious one.

“(6) The Court is not to make an order under paragraph (3)(b) if it is satisfied that an Australian court has ordered the person to pay damages in the nature of punitive damages because of the act or omission constituting the contravention.

20 “(7) Section 91A defines what, for the purposes of this section, constitutes managing a corporation.

Who may apply for civil penalty order

“1317EB.(1) An application for a civil penalty order may be made by:

25 (a) the Commission; or

(b) a Commission delegate; or

(c) some other person authorised in writing by the Minister, under this paragraph, to make the application.

30 “(2) A delegation for the purposes of paragraph (1)(b), or an authorisation for the purposes of paragraph (1)(c), may relate to applications in relation to specified contraventions, or all contraventions, of civil penalty provisions.

35 “(3) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983* or of that Act as applying as a law of this jurisdiction.

Time limit for application

“1317EC. An application for a civil penalty order may be made within 6 years after the contravention.

Application for civil penalty order is a civil proceeding

“1317ED.(1) In hearing and determining an application for a civil penalty order, the Court is to apply the rules of evidence and procedure that it applies in hearing and determining civil matters.

“(2) Subsection (1) has effect subject to the rules. 5

Person must comply with order not to manage corporation

“1317EF.(1) A person who is subject to a civil penalty disqualification must not manage a corporation except with the leave of the Court.

“(2) Section 91A defines what, for the purposes of this section, constitutes managing a corporation. 10

“(3) When granting leave under subsection (1), the Court may impose such conditions or restrictions as it thinks appropriate.

“(4) A person must not contravene a condition or restriction imposed under subsection (3). 15

“(5) A person may only apply for leave under subsection (1) if he or she has given the Commission at least 21 days notice of the application.

“(6) On the application of the Commission, the Court may revoke leave granted under subsection (1). 20

Enforcement of order to pay pecuniary penalty

“1317EG. Where the Court makes under paragraph 1317EA(3)(b) an order that a person pay a pecuniary penalty:

(a) the penalty is payable to the Commission on the Commonwealth’s behalf; and 25

(b) the Commission or the Commonwealth may enforce the order as if it were a judgment of the Court.

Commission may require a person to give assistance in connection with application for civil penalty order

“1317EH.(1) This section applies where it appears to the Commission that a person may have contravened a civil penalty provision. 30

“(2) If the Commission, on reasonable grounds, suspects or believes that a person can give information relevant to an application for a civil penalty order in relation to the contravention, whether or not such an application has been made, the Commission may, by writing given to the person, require the person to give all reasonable assistance in connection with such an application. 35

“(3) Subsection (2) does not apply in relation to:

(a) the person referred to in subsection (1); or 40

(b) a person who is or has been that person's lawyer.

“(4) Where a person fails to give assistance as required under subsection (2):

- 5 (a) the person contravenes this subsection; and
(b) the Court may, on the application of the Commission, order the person to comply with the requirement as specified in the order.

“(5) Nothing in paragraph (4)(b) affects any penalty for a contravention of subsection (4).

10 “(6) Nothing in this section limits, or is limited by:

- (a) section 1317; or
(b) section 49 of the ASC Law.

“Division 3—Criminal proceedings

When contravention of civil penalty provision is an offence

15 “1317FA.(1) A person is guilty of an offence if the person contravenes a civil penalty provision:

- (a) knowingly, intentionally or recklessly; and
(b) either:
20 (i) dishonestly and intending to gain, whether directly or indirectly, an advantage for that or any other person; or
(ii) intending to deceive or defraud someone.

“(2) A person who contravenes a civil penalty provision is not guilty of an offence except as provided by subsection (1).

Application for civil penalty order precludes later criminal proceedings

25 “1317FB. Criminal proceedings for an offence constituted by a contravention of a civil penalty provision cannot be begun if a person has already applied for a civil penalty order in relation to the same contravention, even if the application has been finally determined or otherwise disposed of.

30 *“Division 4—Effect of criminal proceedings on application for civil penalty order*

When Division applies

35 “1317GA. This Division applies if criminal proceedings are begun against a person for an offence constituted by a contravention of a civil penalty provision.

Effect during criminal proceedings

“1317GB.(1) An application may be made for a civil penalty order against the person in relation to the same contravention.

“(2) However, an application is stayed, because of this subsection, until:

- (a) the criminal proceedings; and
- (b) all appeals and applications for review (including appeals and applications for review under this Division) arising out of the criminal proceedings;

have been finally determined or otherwise disposed of.

Final outcome precluding application for civil penalty order

“1317GC. When the criminal proceedings, appeals and applications for review are finally determined or otherwise disposed of:

- (a) an application for a civil penalty order in relation to the same contravention cannot be made (except under this Division); and
- (b) such an application that was stayed because of subsection 1317GB(2) is, because of this section, dismissed;

if the result of the criminal proceedings, appeals and applications for review is:

- (c) a court finding the person guilty of the offence; or

Note: Section 73A defines when a court is taken to find a person guilty of an offence.

- (d) the person being acquitted of the offence, unless there is in force a declaration that the person committed the contravention; or

Note: This kind of declaration is made under section 1317GF, 1317GG or 1317GH.

- (e) a declaration by a court that the evidence in a committal proceeding for the offence could not satisfy the Court, on an application for a civil penalty order, that the person committed the contravention; or

Note: This kind of declaration is made under section 1317GE.

- (f) a declaration by the Court that the person committed the contravention; or

Note: This kind of declaration is made under section 1317GF or 1317GH.

- (g) an order by a court prohibiting an application for a civil penalty order in relation to the contravention from being made or from proceeding; or

Note: This kind of order is made under section 1317GJ.

- (h) the Court, on an appeal or review, affirming, varying or substituting a declaration that the person committed the contravention.

Note: Section 1317GK applies in this case.

Final outcome not precluding application for civil penalty order

“1317GD. If the result of the criminal proceedings, appeals and applications for review being finally determined or otherwise disposed of is:

- 5 (a) a declaration by a court (other than the Court) that the person committed the contravention; or

Note: This kind of declaration is made under section 1317GF, 1317GG or 1317GH.

(b) none of the results referred to in section 1317GC;
then:

- 10 (c) if an application for a civil penalty order in relation to the contravention was stayed because of subsection 1317GB(2)—the application may proceed; or

(d) otherwise—such an application may be made and may proceed; as if the criminal proceedings had never begun.

After unsuccessful committal proceeding, court may preclude application for civil penalty order

15 “1317GE.(1) If:

- (a) a proceeding in a court for the commitment of the person for trial for the offence is finally determined or otherwise disposed of without the person being committed for trial for the offence; and
20 (b) the court is satisfied that the evidence in the proceeding could not satisfy the Court, on an application for a civil penalty order in relation to the contravention, that the person committed the contravention;

the court may declare that it is so satisfied.

25 “(2) A declaration under subsection (1) is subject to appeal or review in the same way as any other order or decision made in the proceeding.

Application for civil penalty order based on alternative verdict at jury trial

30 “1317GF.(1) This section applies if the person is tried on indictment for the offence and the jury is satisfied beyond reasonable doubt that the person committed the contravention, but is not satisfied beyond reasonable doubt that the person did so as mentioned in subsection 1317FA(1).

35 “(2) The jury may find the person not guilty of the offence, but guilty of the contravention.

“(3) If the jury does so, the court is to declare that the person has, by a specified act or omission, contravened the civil penalty provision in relation to a specified corporation.

“(4) If the court is the Court, it may then proceed to make orders under subsection 1317EA(3) on the application of the prosecutor or someone else who has power under section 1317EB to apply for a civil penalty order in relation to the contravention.

“(5) Subsection (4) has effect despite section 1317EC. 5

“(6) A declaration under subsection (3) is subject to appeal or review as if it were a conviction by the court for an offence constituted by the contravention.

Application for civil penalty order based on alternative finding by court of summary jurisdiction 10

“1317GG.(1) This section applies if, on the hearing of a proceeding for the summary conviction of the person for the offence, the court is satisfied beyond reasonable doubt that the person committed the contravention but is not satisfied beyond reasonable doubt that the person did so as mentioned in subsection 1317FA(1). 15

“(2) The court may find the person not guilty of the offence, but guilty of the contravention.

“(3) If the court does so, it is to declare that the person has, by a specified act or omission, contravened the civil penalty provision in relation to a specified corporation. 20

“(4) A declaration under subsection (3) is subject to appeal or review as if it were a conviction by the court for an offence constituted by the contravention.

Application for civil penalty order based on alternative finding by appeal court 25

“1317GH.(1) This section applies if:

- (a) a court finds the person guilty of the offence; and
- (b) on appeal or review, a court makes an order determining the criminal proceedings for the offence in a way that does not involve convicting the person of that or any other offence; and 30
- (c) the court is satisfied beyond reasonable doubt that the person committed the contravention.

“(2) The court may declare that the person has, by a specified act or omission, contravened the civil penalty provision in relation to a specified corporation. 35

“(3) If the court is the Court, it may then proceed to make orders under subsection 1317EA(3) on the application of the prosecutor or someone else who has power under section 1317EB to apply for a civil penalty order in relation to the contravention.

“(4) Subsection [] has effect despite section 1317EC. 40

“(5) A declaration under subsection (2) is subject to appeal or review in the same way as any other order or decision that was made on the appeal or review or might have been made.

5 **After setting aside declaration, court may preclude application for civil penalty order**

“1317GJ. If a court sets aside a declaration made under section 1317GF, 1317GG or 1317GH, the court may, by order, prohibit an application for a civil penalty order in relation to the contravention from being made or from proceeding.

10 **On unsuccessful appeal against declaration, Court may make civil penalty orders**

“1317GK.(1) This section applies if, on an appeal from, or review of, a declaration made under section 1317GF, 1317GG or 1317GH by a court other than the Court, the Court determines the appeal or review by:

- 15 (a) affirming or varying the declaration; or
(b) substituting another declaration for the first-mentioned declaration.

“20 (2) The Court may then proceed to make orders under subsection 1317EA(3) on the application of the prosecutor or someone else who has power under section 1317EB to apply for a civil penalty order in relation to the contravention.

“(3) Subsection (2) has effect despite section 1317EC.

Appeals under this Division

25 “1317GL. For the purposes of an appeal or review under subsection 1317GE(2), 1317GF(6), 1317GG(4) or 1317GH(5), a law about appeals or review has effect with such modifications as the circumstances require.

“Division 5—Compensation for loss suffered by corporation

30 **On application for civil penalty order, Court may order compensation**

“1317HA.(1) Where, on an application for a civil penalty order against a person in relation to a contravention, the Court is satisfied that:

- 35 (a) the person committed the contravention; and
(b) the corporation in relation to which the contravention was committed has suffered loss or damage as a result of the act or omission constituting the contravention;

40 the Court may (whether or not it makes an order under subsection 1317EA(3)) order the person to pay to the corporation compensation of such amount as the order specifies.

“(2) A corporation may intervene in an application for a civil penalty order against a person in relation to a contravention, unless the application was made under Division 4.

“(3) A corporation that so intervenes is entitled to be heard:

- (a) only if the Court is satisfied that the person committed the contravention in relation to that corporation; and 5
- (b) only on the question whether the Court should order the person to pay compensation to the corporation because of the contravention.

Criminal court may order compensation 10

“1317HB.(1) If:

- (a) a court finds a person guilty of an offence constituted by a contravention of a civil penalty provision in relation to a corporation; and
- (b) the court is satisfied that the corporation has suffered loss or damage as a result of the act or omission constituting the contravention; 15

the court may (whether or not it imposes a penalty) order the person to pay to the corporation compensation of such amount as the order specifies. 20

Note: Section 73A defines when a court is taken to find a person guilty of an offence.

“(2) If:

- (a) a court declares under Division 4 that a person has, by an act or omission, contravened a civil penalty provision in relation to a corporation; and
- (b) the court is satisfied that the corporation has suffered loss or damage as a result of that act or omission; 25

the court may (whether or not it makes an order under subsection 1317EA(3)) order the person to pay to the corporation compensation of such amount as the order specifies.

Enforcement of order under section 1317HA or 1317HB 30

“1317HC. An order to pay compensation that a court makes under section 1317HA or 1317HB may be enforced as if it were a judgment of the court.

Recovery of profits, and compensation for loss, resulting from contravention 35

“1317HD.(1) Where a person contravenes a civil penalty provision in relation to a corporation, the corporation may, by proceedings in a court of competent jurisdiction, recover from the person, as a debt due to the corporation:

- (a) if that or another person has made a profit because of the act 40

or omission constituting the contravention—an amount equal to the amount of that profit; and

- (b) if the corporation has suffered loss or damage as a result of that act or omission—an amount equal to the amount of that loss or damage;

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whether or not:

- (c) the first-mentioned person has been convicted of an offence in relation to the contravention; or

- (d) a civil penalty order has been made against the first-mentioned person in relation to the contravention.

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“(2) Proceedings under this section may only be begun within 6 years after the contravention.

Effect of sections 1317HA, 1317HB and 1317HD

“1317HE. Sections 1317HA, 1317HB and 1317HD:

- (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 corporation; 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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20 Certificates evidencing contravention

“1317HF. 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:

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- (i) that that court has declared that a specified person has, by a specified act or omission, contravened a specified civil penalty provision in relation to a specified corporation; or

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- (ii) that a specified person was convicted by that court of an offence constituted by a specified contravention of a civil penalty provision in relation to a specified corporation; or

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- (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:

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- (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.

“Division 6—Miscellaneous

Relief from liability for contravention of civil penalty provision

“1317JA.(1) In this section:

‘eligible proceedings’ means proceedings for a contravention of a civil penalty provision (including proceedings under section 588M, 588W or 1317HD of the Corporations Law of this jurisdiction) but does not include proceedings for an offence (except so far as the proceedings relate to the question whether the court should make an order under section 588K or 1317HB of that Law). 5

“(2) Where, in eligible proceedings against a person, it appears to the court that the person has, or may have, contravened a civil penalty provision but that: 10

- (a) the person has acted honestly; and
- (b) having regard to all the circumstances of the case (including, where applicable, those connected with the person’s appointment as an officer of a corporation or of a Part 5.7 body), the person ought fairly to be excused for the contravention; 15

the court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention. 20

“(3) In determining under subsection (2) whether a person ought fairly to be excused for a contravention of section 588G, 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 or Part 5.7 body; and 25
- (b) when that action was taken; and
- (c) the results of that action.

“(4) Where a person thinks that eligible proceedings will or may be begun against him or her, he or she may apply to the Court for relief.

“(5) On an application under subsection (4), the Court may grant relief under subsection (2) as if the eligible proceedings had been begun in the Court. 30

“(6) For the purposes of subsection (2) as applying for the purposes of a case tried by a judge with a jury:

- (a) a reference in that subsection to the court is a reference to the judge; and 35
- (b) the relief that may be granted includes withdrawing the case in whole or in part from the jury and directing judgment to be entered for the defendant on such terms as to costs as the judge thinks appropriate. 40

“(7) Nothing in this section limits, or is limited by, section 1318.

Effect of contravening civil penalty provisions of Corporations Law of 2 or more jurisdictions

“1317JB.(1) This section applies where an act or omission constitutes:

- 5 (a) a contravention (in this section called the ‘**local contravention**’) of a civil penalty provision; and
- (b) a contravention (in this section called the ‘**other contravention**’) of a provision of the Corporations Law of another jurisdiction that corresponds to that civil penalty provision.

10 “(2) A person who has been punished for an offence constituted by the other contravention is not liable to be punished for an offence constituted by the local contravention.

 “(3) If a civil penalty order within the meaning of that Law has been made in relation to the other contravention, no civil penalty order within the meaning of this Law can be made in relation to the local contravention.

 “(4) Criminal proceedings for an offence constituted by the local contravention cannot be begun if a person has already applied for a civil penalty order, within the meaning of that Law, in relation to the other contravention, even if the application has been finally determined or otherwise disposed of.

 “(5) Sections 1317GB, 1317GC and 1317GD apply in relation to the local contravention as if:

- 25 (a) criminal proceedings of a particular kind for an offence constituted by the other contravention were proceedings of the corresponding kind for an offence constituted by the local contravention; and
- (b) a court within the meaning of that Law were a court within the meaning of this Law; and
- 30 (c) anything done under a provision of Division 4 of Part 9.4B of that Law had been done under the corresponding provision of this Law.

 “(6) Nothing in this section limits, or is limited by, anything in section 1310A, 1310B or 1317FB.

35 “(7) The effect that sections 1317GB, 1317GC and 1317GD have because of subsection (5) of this section is additional to, and does not prejudice, the effect those sections otherwise have.

Part does not limit power to award punitive damages

40 “1317JC. Nothing in this Part limits a court’s power to order someone to pay damages in the nature of punitive damages because of an act or omission constituting a contravention of a civil penalty provision.”.

Schedule 3

18. Schedule 3 to the Corporations Law is amended:

(a) by omitting:

“Subsection 232(4):

Penalty: \$5,000.

5

Subsection 232(5):

Penalty: \$20,000 or imprisonment for 5 years, or both.

Subsection 232(6):

Penalty: \$20,000 or imprisonment for 5 years, or both.”;

(b) by inserting before “Section 1323.”:

10

“Subsection 1317EF(1) or (4):

Penalty: \$5,000 or imprisonment for 1 year, or both.

Subsection 1317FA(1):

Penalty: \$200,000 or imprisonment for 5 years, or both.”.

Division 2—Amendment of the Australian Securities Commission Act 1989²

15

Recovery of expenses of investigation

19. Section 91 of the Principal Act is amended by inserting in paragraph (1)(b) “, or a declaration or other order is made,” after “awarded”.

20

Division 3—Amendment of the Bankruptcy Act 1966³

Debts provable in bankruptcy

20. Section 82 of the Principal Act is amended by inserting after subsection (3) the following subsection:

“(3AA) An amount payable under an order made under paragraph 1317EA(3)(b) of the Corporations Law of a State or Territory is not provable in bankruptcy.”.

25

PART 3—FINANCIAL BENEFITS TO RELATED PARTIES OF PUBLIC COMPANIES

How to read references to provisions of this Law

30

21. Section 8 of the Corporations Law is amended by inserting in paragraph (5)(c) “Part 3.2A (except subsection 243L(2)),” before “Part 3.5”.

Dictionary

22. Section 9 of the Corporations Law is amended:

(a) by omitting the definitions of “control”, “parent entity” and “public company” and substituting the following definitions:

5 “‘control’, in relation to an entity, has:

(a) in Part 3.2A—the meaning given by section 243E; and

(b) in Parts 3.6 and 3.7—the meaning given by section 294B;

‘parent entity’:

10 (a) in Part 3.2A—has the meaning given by subsection 243D(1); and

(b) in Parts 3.6 and 3.7—has the meaning given by section 294A;

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

15 (a) in the definition of ‘public corporation’ (in this section) and in paragraph 228(1)(b) and subsection 879(1), includes a body corporate that is a public company for the purposes of the Corporations Law of another jurisdiction; and

20 (b) in section 232A, Part 3.2A and section 1376, includes a body corporate (other than a prescribed body corporate) that:

25 (i) is incorporated, or taken to be incorporated, in this jurisdiction, but not under the Corporations Law of this jurisdiction; and

(ii) is included in the official list of a securities exchange; and

30 (c) in Part 3.2A and section 1376, does not include a company in respect of which a licence under section 383 is in force;”;

(b) by inserting the following definitions:

“‘child entity’ has in Part 3.2A the meaning given by subsection 243D(2);

35 ‘financial benefit’ has in Part 3.2A a meaning affected by section 243G;

‘related party’ has in Part 3.2A the meaning given by section 243F;

‘sibling entity’ has in Part 3.2A the meaning given by subsection 243D(3);”.

40 **Effect of certain contraventions of this Law**

23. Section 103 of the Corporations Law is amended by inserting “232A, 232B, 243H, 243ZE,” after “126,”.

Directors to disclose certain interests

24. Section 231 of the Corporations Law is amended:

- (a) by inserting in subsection (1) “proprietary” before “company” (first occurring);
- (b) by inserting in subsection (6) “proprietary” before “company” (first occurring). 5

25. After section 232 of the Corporations Law the following sections are inserted:

Voting by interested director of public company

“232A.(1) A director of a public company who has a material personal interest in a matter that is being considered at a meeting of the board, or of directors, of the company: 10

- (a) must not vote on the matter (or in relation to a proposed resolution under subsection (3) in relation to the matter, whether in relation to that or a different director); and 15
- (b) must not be present while the matter (or a proposed resolution of that kind) is being considered at the meeting.

Note: In this section, ‘public company’ has an extended meaning: see paragraph (b) of the definition of ‘public company’ in section 9.

“(2) Subsection (1) does not apply to an interest that the director has:

- (a) as a member of the company; and 20
- (b) in common with the other members of the company.

“(3) Subsection (1) does not apply if the board has at any time passed a resolution that:

- (a) specifies the director, the interest and the matter; and
- (b) states that the directors voting for the resolution are satisfied that the interest should not disqualify the director from considering or voting on the matter. 25

“(4) A quorum is not present during the consideration of a matter at a meeting of the board, or of directors, of a public company unless at least 2 directors are present who are entitled to vote on any motion that may be moved at the meeting in relation to that matter. 30

“(5) A general meeting of a public company may deal with a matter in so far as the board cannot deal with it because of subsection (4).

“(6) If:

- (a) someone proposes a resolution of a public company’s board in connection with a general meeting of the company dealing with a matter; and 35
- (b) subsection (4) would prevent the proposed resolution from being considered;

subsections (1) and (4) do not apply in relation to a motion that relates to the proposed resolution.

5 “(7) If, because of subsection (6), subsection (4) does not apply in relation to a motion that is considered or voted on at a meeting, the directors present must ensure that the minutes record that fact.

“(8) A public company’s constitution may restrict a director’s entitlement to vote, or to be present, at a meeting even if this section would not.

10 **Commission may exempt directors from section 232A in appropriate cases**

“232B.(1) The Commission may by writing declare that, for the purposes of all or specified meetings of the board, or of directors, of a company, subsections 232A(1) and (4) do not apply in relation to a specified matter, but may only do so if satisfied that:

- 15 (a) the matter could not otherwise be dealt with at those meetings because of subsection 232A(4); and
(b) because it is urgent or for some other compelling reason, the matter should be dealt with at those meetings and not by a general meeting, even though directors have a material personal
20 interest in the matter.

“(2) A declaration may be expressed to apply generally or as otherwise specified, and may be subject to:

- (a) a specified condition to be complied with, in relation to the matter, by the company or a director; or
25 (b) 2 or more such conditions.

“(3) A declaration has effect accordingly.

“(4) A company or a director must not contravene a condition.

“(5) The Commission may by writing vary or revoke a declaration.”.

Loans to directors

30 **26.(1)** Section 234 of the Corporations Law is amended:

- (a) by omitting from subsection (1) “a company shall not” and substituting “a public company must not”;
(b) by inserting before paragraph (3)(a) the following paragraph:

35 “(aa) to anything done by a public company to which sections 243H and 243ZE apply because of section 1376;”.

(2) Section 234 of the Corporations Law is repealed.

27. After Part 3.2 of the Corporations Law the following Part is inserted:

**“PART 3.2A—FINANCIAL BENEFITS TO RELATED PARTIES
OF PUBLIC COMPANIES**

“Division 1—Object and outline of Part

Object

“243A. The object of this Part is to protect: 5

(a) a public company’s resources (in particular, those available to pay the company’s creditors); and

(b) the interests of its members as members;

by requiring that, in general, financial benefits to related parties that could diminish or endanger those resources, or that could adversely affect those interests, be disclosed, and approved by a general meeting, before they are given. 10

Outline

“243B.(1) Division 2 explains expressions used in this Part.

“(2) Division 3 sets out the prohibitions that give effect to the object of this Part. 15

“(3) Division 4 creates general exceptions for financial benefits that are consistent with the object of this Part.

“(4) Division 5 enables a public company in general meeting to permit a financial benefit not covered by the general exceptions. 20

“(5) Division 6 enforces the prohibitions (section 243ZE), creates some other offences (sections 243ZF and 243ZH) and describes how this Part interacts with other laws (section 243ZI).

“Division 2—The meaning of expressions

Entities 25

“243C.(1) Each of the following is an **entity**:

(a) a body corporate;

(b) a partnership;

(c) an unincorporated body;

(d) an individual; 30

(e) a trustee of a trust that has only one trustee.

“(2) If a trust has 2 or more trustees, those trustees together constitute an **entity**.

“(3) Subject to subsections (1) and (2), if an accounting standard:

(a) deals with disclosure in companies’ financial statements of information about related parties (for example, about transactions between companies and related parties); and 35

(b) is in force at a particular time (even if the standard does not

apply to a financial year of a company in which that time occurs); and

(c) defines the expression 'entity';

5 the question of what is or was an **entity** at that time is to be determined in accordance with the definition in the standard.

Parent entities, child entities and sibling entities

“243D.(1) An entity is a **parent entity** of another entity if:

- (a) both are bodies corporate and the first entity is a holding company of the other; or
- 10 (b) the first entity has control over the other.

“(2) An entity is a **child entity** of another entity if the other is its parent entity, or is one of its parent entities.

“(3) An entity is a **sibling entity** of another entity if they have a parent entity in common and neither is a parent entity of the other.

15 **Control**

“243E. If an accounting standard:

- (a) deals with disclosure in companies' financial statements of information about related parties (for example, about transactions between companies and related parties); and
- 20 (b) is in force at a particular time (even if the standard does not apply to a financial year of a company in which that time occurs); and
- (c) provides for determining whether an entity has control over another entity;

25 the question of whether an entity has or had **control** over another entity at that time is to be determined in accordance with the provision in the standard.

Related party of a public company

30 “243F.(1) Each of the following is a **related party** of a public company:

- (a) a director of the public company;
- (b) a director of a body corporate that is a parent entity of the public company;
- 35 (c) one of the persons constituting an entity (other than a body corporate) that is a parent entity of the public company;
- (d) a spouse or de facto spouse of such a director or person;
- (e) a parent, son or daughter of such a director, person, spouse or de facto spouse;
- 40 (f) an entity (other than a child entity of the public company) over which:

- (i) a person of a kind referred to in paragraph (a), (b), (c), (d) or (e) has control; or
- (ii) 2 or more such persons together have control;
- (g) a parent entity or sibling entity of the public company.

“(2) An entity is also a **related party** of a public company at a particular time if the entity was a related party of the public company because of subsection (1) at any time within the previous 6 months. 5

“(3) An entity is also a **related party** of a public company at a particular time if:

- (a) the entity believes at that time, or has at that time reasonable grounds to believe, that it is likely to become an entity of a particular kind at some future time; and 10
- (b) by becoming an entity of that kind, it would become at that future time a related party of the public company because of subsection (1). 15

“(4) For the purposes of subsection (3), an entity (other than a body corporate) constituted by 2 or more persons is taken to believe, or to have reasonable grounds to believe, something if at least one of those persons believes, or has such grounds to believe, that thing.

“(5) If, at a particular time, an entity: 20

- (a) was or is a related party of a public company because of subsection (1), (2) or (3); and
- (b) acted, or proposes to act, in concert with another entity (**‘the associate’**) in respect of the giving or proposed giving of a financial benefit (**‘the primary benefit’**) by the public company, or by a child entity of the public company, to the associate; and 25
- (c) so acted, or proposes so to act, for the reason, or for reasons including the reason, that a financial benefit has been given to a related party of the public company or is expected to be so given; 30

the associate is a **related party** of the public company in relation to the giving or proposed giving of the primary benefit.

Giving a financial benefit

“243G.(1) A reference to an entity giving a financial benefit: 35

- (a) is intended to operate broadly, even though criminal or civil penalties may be involved; and
- (b) includes a reference to giving a financial benefit indirectly (for example, through one or more interposed entities) or by making or giving effect to a relevant agreement (as defined in section 9). 40

“(2) In deciding whether an entity has given a financial benefit:

- (a) the economic and commercial substance and effect of what the entity has done is to prevail over its legal form; and
- (b) any consideration that has been or may be given for the benefit is to be disregarded, even if it is full or adequate.

5 “(3) A benefit that does not involve the payment of money can still be a financial benefit: for example, if it confers some financial advantage.

“(4) A few examples of an entity giving a financial benefit to another entity are:

- 10 (a) the first entity lending the other money, guaranteeing a loan to the other, or providing security for a loan to the other;
- (b) the first entity forgiving a debt owed by the other, otherwise releasing, or neglecting to enforce, an obligation of the other, or assuming an obligation of the other;
- 15 (c) the first entity buying or leasing an asset from the other, or selling or leasing an asset to the other;
- (d) the first entity acquiring services from the other, or supplying services to the other;
- (e) the first entity issuing securities, or granting an option, to the other;
- 20 (f) the first entity giving money or property to the other.

“Division 3—The prohibitions

Prohibited financial benefits to related parties of public companies

“243H.(1) A public company must not give a financial benefit to a related party except as permitted by Division 4 or 5.

25 “(2) A child entity of a public company must not give a financial benefit to a related party of the public company except as permitted by Division 4 or 5.

Definitions:

- 30 ‘public company’: see the definition in section 9 (note especially paragraph (b) of the definition);
- ‘give a financial benefit’: see section 243G;
- ‘related party’: see section 243F;
- ‘child entity’: see subsection 243D(2).

“Division 4—General exceptions

35 Financial benefit under contract made before section 243H begins to apply

“243J.(1) Section 243H does not prevent a public company, or a child entity of a public company, from giving a financial benefit to a related party of the public company as required by a contract made before the day on and after which that section applies to the public
40 company because of section 1376.

“(2) Subsection (1) does not apply if:

- (a) section 234, a corresponding law, or a corresponding previous law, prohibited the making of the contract; or
- (b) immediately before that day, section 234 or a corresponding law prohibited the public company or child entity from giving the benefit to the related party.

5

Remunerating officers

“243K.(1) A body corporate may pay or provide remuneration to a person in a capacity as an officer of the body if it is reasonable for a body corporate in the body’s circumstances to pay or provide that remuneration to an officer in the person’s circumstances.

10

“(2) A body corporate may pay or provide remuneration to a person in a capacity as an officer of the body if:

- (a) the body does so as required by a contract between the body and the person; and
- (b) it was reasonable for a body corporate in the body’s circumstances to make that contract with an officer in the person’s circumstances.

15

“(3) An entity may give a financial benefit to a person in the person’s capacity as an officer of a body corporate if subsection (1) or (2) would permit the body itself to give the benefit to the person in that capacity.

20

“(4) Any of the following paid by a body corporate to an officer of the body as such (however the rate or amount is worked out) is remuneration paid by the body to the officer:

25

- (a) salary;
- (b) wages;
- (c) bonuses;
- (d) allowances paid for the sole purpose of meeting expenses incurred in connection with performing services as such an officer.

30

“(5) A benefit that is in the nature of a fringe benefit and is provided by a body corporate to an officer of the body as such is remuneration provided by the body to the officer.

“(6) A contribution made by a body corporate to a fund for the purpose of making provision for, or obtaining, superannuation benefits for an officer of the body, or for dependants of such an officer, is remuneration provided by the body to the officer.

35

“(7) A financial benefit given to a person because of the person ceasing to hold an office or employment as an officer or employee of a body corporate is remuneration paid or provided to the person in a capacity as an officer of the body.

40

“(8) Subsections (4), (5), (6) and (7) have effect for the purposes of subsections (1), (2) and (3), but nothing in them limits the generality of:

- 5 (a) the expression ‘remuneration’ in subsections (1) and (2); or
- (b) anything else in subsections (4), (5), (6) and (7).

Advances, up to prescribed amount, to director or director’s spouse

“243L.(1) A body corporate may advance money to:

- (a) a director of the body; or
 - 10 (b) a spouse or de facto spouse of such a director;
- unless the total of the following would exceed \$2,000 or such greater amount as is prescribed:
- (c) the amount of the advance;
 - (d) each amount (if any) that is still owing and was advanced to
 - 15 the director, spouse or de facto spouse by the body, or by a parent entity, child entity or sibling entity of the body.

“(2) For the purposes of subsection (1), an amount already advanced is to be disregarded if, because of this Division (other than this section) or Division 5, section 243H did not prohibit the advance.

Financial benefit given to or by closely-held subsidiary

20 “243M.(1) A body corporate may give a financial benefit to a closely-held subsidiary of the body.

“(2) A closely-held subsidiary of a body corporate may give a financial benefit to the body, or to a child entity of the body.

25 “(3) For the purposes of this section, a body corporate is a closely-held subsidiary of another body corporate if, and only if, no member of the first-mentioned body is a person other than:

- (a) the other body; or
- (b) a nominee of the other body; or
- 30 (c) a body corporate that is a closely-held subsidiary of the other body because of any other application or applications of this subsection; or
- (d) a nominee of such a body.

“(4) For the purposes of subsection (3), disregard shares that are not voting shares.

35 **Financial benefit on arm’s length terms**

“243N.(1) A public company, or a child entity of a public company, may give a financial benefit to a related party of the public company if it does so on terms and conditions no more favourable to the related party than those on which it is reasonable to expect that the company or entity, as the case may be, would give the benefit directly if dealing

40 with the related party at arm’s length in the same circumstances.

“(2) In the case of a loan or other financial accommodation, the matters to consider for the purposes of subsection (1) include, for example:

- (a) the amount of the loan or the extent of the accommodation;
- (b) what interest or charges are payable; 5
- (c) the credit risk;
- (d) what security is given;
- (e) the timetable for repayments of amounts owing and for payments of interest or charges.

Financial benefits to members as such 10

“243PA. A public company, or a body corporate that is a child entity of a public company, may give financial benefits to any of its own members, in their capacity as members, on a basis that does not discriminate unfairly, either directly or indirectly, in favour of one or more related parties of the public company. 15

Financial benefit under court order

“243PB. An entity may give a financial benefit to another entity pursuant to an order of a court.

“Division 5—Financial benefits approved by general meeting of public company 20

“Subdivision A—Exceptions from the prohibitions

Financial benefit permitted by resolution of members

“243Q. A public company, or a child entity of a public company, may give a financial benefit to a related party of the public company if: 25

- (a) a resolution of the public company permits the benefit to be given; and
- (b) the resolution was passed at a general meeting of the public company held within 15 months before the public company, or the child entity, as the case may be, gives the benefit; and 30
- (c) the conditions prescribed by Subdivision B have been satisfied in relation to the resolution.

Financial benefit under contract permitted by resolution of members

“243R.(1) A public company, or a child entity of a public company, may give a financial benefit to a related party of the public company as required by a contract with the related party if: 35

- (a) a resolution of the public company permitted the public company, or the child entity, as the case may be, to make the contract; and
- (b) the resolution was passed at a general meeting of the public 40

company held within 15 months before the contract was made;
and

- (c) the conditions prescribed by Subdivision B have been satisfied in relation to the resolution.

5 “(2) A reference in this Division to a resolution or proposed resolution permitting a financial benefit to be given by a public company or entity includes a reference to the resolution or proposed resolution permitting the public company or entity to make a contract to give the benefit.

10 **Resolution may specify matters by class or kind**

 “243S. A resolution under this Division may specify anything either in particular or by reference to class or kind.

Effect of resolution

15 “243T.(1) A resolution of a public company that permits the company to give a financial benefit to a related party does not affect the application of subsection 243H(2) and this Division to the public company in its capacity as a child entity of another public company.

20 “(2) A resolution of a public company that permits a child entity of the public company to give a financial benefit to a related party of the public company does not affect:

- (a) if the child entity is also a public company—the application of subsection 243H(1) and this Division to the child entity in its capacity as a public company; or
- 25 (b) in any case—the application of subsection 243H(2) and this Division to the child entity in its capacity as a child entity of another public company.

Example: A Ltd, B Ltd and C Ltd are all public companies. X is a director of A Ltd. A Ltd is a holding company of B Ltd, which is a holding company of C Ltd.

 For C Ltd to give to X a financial benefit not covered by an exception in Division 4, all 3 companies must pass resolutions under this Division permitting the benefit.

 This is because 3 applications of section 243H prohibit C Ltd from giving the benefit. Subsection 243H(1) prohibits C Ltd as a public company of which X is a related party. Subsection 243H(2) prohibits C Ltd twice: once as a child entity of B Ltd, of which X is a related party, and once as a child entity of A Ltd, of which X is also a related party.

Subdivision B—Conditions to be satisfied

Company must lodge material that will be put to members

30 “243U.(1) At least 14 days before the notice convening the relevant meeting is given, the public company must lodge:

- (a) a proposed notice of meeting setting out the text of the proposed resolution; and
- (b) a proposed explanatory statement satisfying section 243V; and

- (c) any other document proposed to accompany the notice convening the meeting; and
 - (d) any other document that any of the following proposes to give to members of the public company before or at the meeting:
 - (i) the company; 5
 - (ii) a related party of the company to whom the proposed resolution would permit a financial benefit to be given;
 - (iii) an associate of the company or of such a related party; and can reasonably be expected to be material to a member in deciding how to vote on the proposed resolution. 10
- “(2) If, when the notice convening the meeting is given, the Commission:
- (a) has approved in writing a period of less than 14 days for the purposes of subsection (1); and
 - (b) has not revoked the approval by written notice to the public company; 15
- subsection (1) applies as if the reference to 14 days were a reference to the approved period.
- “(3) The Commission may give and revoke approvals for the purposes of subsection (2). 20
- Requirements for explanatory statement to members**
- “243V.(1) The proposed explanatory statement lodged under section 243U must be in writing and set out:
- (a) the related parties to whom the proposed resolution would permit financial benefits to be given; and 25
 - (b) the nature of the financial benefits; and
 - (c) in relation to each director of the company:
 - (i) if the director wanted to make a recommendation to members about the proposed resolution—the recommendation and his or her reasons for it; or 30
 - (ii) if not—why not; or
 - (iii) if the director was not available to consider the proposed resolution—why not;
 - (d) in relation to each such director:
 - (i) whether the director had an interest in the outcome of the proposed resolution; and 35
 - (ii) if so—what it was; and
 - (e) all other information that:
 - (i) is reasonably required by members in order to decide whether or not it is in the company’s interests to pass the proposed resolution; and 40
 - (ii) is known to the company or to any of its directors.

“(2) An example of the kind of information referred to in paragraph (1)(d) is information about what, from an economic and commercial point of view, are the true potential costs and detriments of, or resulting from, giving financial benefits as permitted by the proposed resolution, including (without limitation):

- (a) opportunity costs; and
- (b) taxation consequences (such as liability to fringe benefits tax); and
- (c) benefits forgone by whoever would give the benefits.

Note: Section 232 requires an officer of a corporation to act honestly and to exercise care and diligence. These duties extend to preparing an explanatory statement under this section. Section 1309 creates offences where false and misleading material relating to a corporation’s affairs is made available or furnished to members.

10 **Commission may comment on proposed resolution**

“243W.(1) Within 14 days after a public company lodges documents under section 243U, the Commission may give to the company written comments on those documents, other than comments about whether the proposed resolution is in the company’s best interests.

15 “(2) The Commission may consult with the Exchange for the purposes of giving comments to a company that is included in the official list of the Exchange or of a securities exchange that is a subsidiary of the Exchange.

20 “(3) Subsection (2) does not limit the persons with whom the Commission may consult.

“(4) The Commission must keep a copy of the written comments it gives to a company under subsection (1), and subsections 1274(2) and (5) apply to the copy as if it were a document lodged with the Commission.

25 “(5) The fact that the Commission has given particular comments, or has declined to give comments, under subsection (1) does not in any way affect the performance or exercise of any of the Commission’s functions and powers.

Requirements for notice of meeting

30 “243X. The notice convening the meeting:

- (a) must be the same, in all material respects, as the proposed notice lodged under section 243U; and
- (b) must be accompanied by an explanatory statement that is the same, in all material respects, as the proposed explanatory statement lodged under that section; and
- 35 (c) must be accompanied by a document that is, or documents that are, the same, in all material respects, as the document or documents (if any) lodged under paragraph 243U(1)(c); and
- (d) if the Commission has given to the public company, in

accordance with section 243W, comments on the documents lodged under section 243U—must be accompanied by a copy of those comments; and

(e) must not be accompanied by any other documents.

Other material put to members

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“243Y. Each document (if any) that:

(a) did not accompany the notice convening the meeting; and
(b) was given to members of the public company before or at the meeting by:

(i) the public company; or

10

(ii) a related party of the public company to whom the proposed resolution would permit a financial benefit to be given; or

(iii) an associate of the public company or of such a related party; and

15

(c) can reasonably be expected to have been material to a member in deciding how to vote on the proposed resolution;

must be the same, in all material respects, as a document lodged under paragraph 243U(1)(d).

Proposed resolution cannot be varied

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“243ZA. The resolution must be the same as the proposed resolution set out in the proposed notice lodged under section 243U.

Voting on the resolution

“243ZB.(1) If any votes on the resolution are cast in contravention of subsection 243ZF(1), it must be the case that the resolution would still be passed even if those votes were disregarded.

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Note: Section 243ZF prohibits voting by or on behalf of related parties to whom a proposed resolution would permit financial benefits to be given.

“(2) If a poll was duly demanded on the question that the resolution be passed, subsections (3) and (4) apply in relation to voting on the poll.

“(3) In relation to each member of the public company who voted on the resolution in person, the public company must record in writing:

30

(a) the member’s name; and

(b) how many votes the member cast for the resolution and how many against.

“(4) In relation to each member of the public company who voted on the resolution by proxy, or by a representative authorised under subsection 249(3), the public company must record in writing:

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(a) the member’s name; and

(b) in relation to each person who voted as proxy, or as such a representative, for the member:

- (i) the person's name; and
- (ii) how many votes the person cast on the resolution as proxy, or as such a representative, for the member; and
- (iii) how many of those votes the person cast for the resolution and how many against.

Notice of resolution to be lodged

“243ZC. Within 14 days after the resolution is passed, the public company must lodge a notice setting out the text of the resolution.

Declaration by Court of substantial compliance

“243ZD.(1) The Court may declare that the conditions prescribed by this Subdivision have been satisfied if it finds that they have been substantially satisfied.

“(2) A declaration may be made only on the application of an interested person.

“Division 6—Enforcement

Consequences of giving financial benefit when not permitted

“243ZE.(1) This section applies if:

- (a) a related party of a public company receives a financial benefit from the public company, or from a child entity of the public company; and
- (b) the public company contravenes subsection 243H(1), or the child entity contravenes subsection 243H(2), by giving the benefit.

“(2) The related party contravenes this subsection.

Note: If the related party is not itself a legal person, see section 243ZG.

“(3) Subject to subsection (4), a person contravenes this subsection if the person:

- (a) is involved (as defined in section 79) in; or
- (b) is, by act or omission, directly or indirectly, recklessly concerned in, or party to;

the contravention of subsection 243H(1) or (2), or the contravention of subsection (2) of this section.

“(4) Neither the public company nor the child entity:

- (a) is guilty of an offence because of the contravention of subsection 243H(1) or (2); or
- (b) is taken to be involved in, or concerned in or party to:
 - (i) a contravention of subsection (2) of this section by the

related party or by any of the persons constituting the related party; or

- (ii) a contravention of subsection (3) of this section by a person.

Note: In the case of a contravention of subsection 243H(2) by a child entity (other than a body corporate) constituted by 2 or more persons, subsection (4) of this section does not prevent any of those persons from contravening this section.

“(5) Subsections (2) and (3) are civil penalty provisions as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening, or of being involved in a contravention of, either of them. 5

“(6) In a proceeding against a person for:

- (a) a contravention of subsection (2); or 10
- (b) a contravention of subsection (2) because of section 243ZG, 1317DB, 1317DC or 1317DD;

it is a defence if it is proved that the person was unaware of a fact or circumstance essential to the contravention of subsection 243H(1) or (2), as the case requires. 15

Note: Section 103 prevents a contravention of section 243H or of this section from invalidating a transaction.

Voting by or on behalf of related party interested in proposed resolution under Division 5

“243ZF.(1) At a general meeting, a vote on a proposed resolution under Division 5 must not be cast (in any capacity) by or on behalf of:

- (a) a related party of the public company to whom the resolution would permit a financial benefit to be given; or 20
- (b) an associate of such a related party.

“(2) Subsection (1) does not prevent the casting of a vote if:

- (a) it is cast by a person as a proxy appointed by writing that specifies how the proxy is to vote on the proposed resolution; and 25
- (b) it is not cast on behalf of a related party or associate of a kind referred to in subsection (1).

“(3) The regulations may prescribe cases where subsection (1) does not apply. 30

“(4) The Commission may by writing declare that:

- (a) subsection (1) does not apply to a specified proposed resolution; or
- (b) subsection (1) does not prevent the casting of a vote, on a specified proposed resolution, by a specified entity, or on behalf of a specified entity; 35

but may only do so if satisfied that the declaration will not cause unfair prejudice to the interests of any member of the public company.

“(5) A declaration in force under subsection (4) has effect accordingly.

“(6) If a vote is cast in contravention of subsection (1), the related party or associate, as the case may be, contravenes this subsection, whether or not the proposed resolution is passed.

Note: If the related party is not itself a legal person, see section 243ZG.

5 “(7) For the purposes of this section, a vote is cast on behalf of an entity if, and only if, it is cast:

(a) as proxy for the entity; or

(b) otherwise on behalf of the entity; or

10 (c) in respect of a share in respect of which the entity has power to vote as defined in section 30.

“(8) Subject to subsection 243ZB(1), a contravention of this section does not affect the validity of a resolution.

Contraventions by an entity that is not a legal person

15 “243ZG. If an entity (other than a body corporate) constituted by 2 or more persons contravenes subsection 243ZE(2) or 243ZF(6), then, for the purposes of this Law, each of those persons contravenes that subsection.

Retaining records made under section 243ZB

20 “243ZH. For 7 years after the day when a resolution under Division 5 is passed, the public company must retain the records it made under section 243ZB in relation to the resolution.

Effect of Part

25 “243ZI.(1) Sections 243H, 243ZE and 243ZF have effect despite anything else in this Law or in any other law of this jurisdiction, or anything in a body corporate’s constitution.

“(2) Sections 243J to 243R, inclusive, have effect subject to:

(a) this Law (other than this Part); and

(b) any other law of this jurisdiction or anywhere else; and

30 (c) the constitution of a body corporate that those sections would otherwise permit to give financial benefits.

“(3) Without limiting subsection (2), this Part does not relieve a person of a duty imposed by this Law, by any other law of this jurisdiction or anywhere else, or by a body corporate’s constitution.

35 “(4) Nothing done under this Part relieves a person of such a duty merely because the thing was done under this Part.

“(5) In this section:

‘law’ includes a rule of common law or equity.”

Schedule 3

28.(1) Schedule 3 to the Corporations Law is amended by omitting:

“Section 234:

Penalty: \$5,000 or imprisonment for 1 year, or both.”.

(2) Schedule 3 to the Corporations Law is amended by inserting 5
before “Section 245:” the following:

“Section 243ZF:

Penalty: \$20,000 or imprisonment for 3 years, or both.

Section 243ZH:

Penalty: \$2,500 or imprisonment for 6 months, or both.”. 10

**PART 4—EXTERNAL ADMINISTRATION OF COMPANIES AND
PART 5.7 BODIES**

Division 1—Amendments of the Corporations Law

Dictionary

29. Section 9 of the Corporations Law is amended: 15

(a) by omitting “, 444 and 500,” from paragraph (a) of the definition of “company” and substituting “, 500 and 600F,”;

(b) by omitting “Part” (first occurring) from paragraph (c) of the definition of “company” and substituting “Parts 5.7B and”;

(c) by omitting “body corporate to which Part 5.7 applies” from 20
paragraph (b) of the definition of “contributory” and substituting
“Part 5.7 body”;

(d) by omitting paragraph (c) of the definition of
“externally-administered body corporate” and substituting the 25
following paragraphs:

“(c) that is under administration;

(ca) that has executed a deed of company arrangement that
has not yet terminated; or”;

(e) by omitting “in sections 475, 531, 532 and 535 to 540, inclusive, 30
and” from the definition of “liquidator”;

(f) by inserting “(for example, but without limitation, through the
operation of a presumption for which this Law or any other
law of this jurisdiction provides)” after “way” in the definition
of “prove”;

(g) by omitting the definitions of “entity”, “party”, “relevant date” 35
and “resolution” and substituting the following definitions:

“‘entity’:

(a) in Part 3.2A—has the meaning given by section 243C;
and

(b) in Parts 3.6 and 3.7—has the meaning given by section 294A; and

(c) otherwise—has the meaning given by section 64A;

‘party’:

5 (a) in relation to a transaction—includes, if the transaction has been completed or given effect to, or has been terminated, a person who was a party to the transaction; and

10 (b) in relation to a Chapter 8 agreement—means, in the case of a proposed or discharged relevant agreement, a person who would be a party to the relevant agreement if it were in effect;

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

‘resolution’ means:

(a) in relation to a body corporate—a resolution other than a special resolution; or

20 (b) in relation to creditors or contributories—a resolution passed at a meeting of the creditors or contributories;”;

(h) by inserting the following definitions:

25 “**‘administration’**, in relation to a body corporate or relevant body, or an entity within the meaning of Parts 3.6 and 3.7, has, in the case of a company or recognised company, the meaning given by:

(a) section 435C or a corresponding law; and

(b) section 1381 or a corresponding law;

‘administrator’:

30 (a) in relation to a body corporate or relevant body, or an entity within the meaning of Parts 3.6 and 3.7, but not in relation to a deed of company arrangement:

(i) means an administrator of the body or entity appointed under Part 5.3A; and

(ii) has a meaning affected by section 1381; and

35 (iii) if 2 or more persons are appointed under that Part as administrators of the body or entity—has a meaning affected by paragraph 451A(2)(b); or

(b) in relation to a deed of company arrangement:

40 (i) means an administrator of the deed appointed under Part 5.3A; and

(ii) if 2 or more persons are appointed under that Part as administrators of the deed—has a meaning affected by paragraph 451B(2)(b);

- 'affairs'**, in relation to a body corporate, has, in the provisions referred to in section 53, a meaning affected by that section;
- 'begin'**, in relation to a winding up, has the meaning given by Division 1A of Part 5.6;
- 'business affairs'**, in relation to an entity, has a meaning affected by sections 53AA, 53AB, 53AC and 53AD; 5
- 'commence'**, in relation to a winding up, has the meaning given by Division 1A of Part 5.6;
- 'committee of creditors'**, in relation to a company under administration, means a committee of creditors of the company appointed at a meeting convened under section 436E; 10
- 'connected entity'**, in relation to a corporation, means:
- (a) a body corporate that is, or has been, related to the corporation; or
 - (b) an entity that is, or has been, connected (as defined by section 64B) with the corporation; 15
- 'control day'**, in relation to a controller of property of a corporation, means:
- (a) unless paragraph (b) applies:
 - (i) in the case of a receiver, or receiver and manager, of that property—the day when the receiver, or receiver and manager, was appointed; or 20
 - (ii) in the case of any other person who is in possession, or has control, of that property for the purpose of enforcing a charge—the day when the person entered into possession, or took control, of property of the corporation for the purpose of enforcing that charge; or 25
 - (b) if the controller became a controller of property of the corporation:
 - (i) to act with an existing controller of such property; or 30
 - (ii) in place of a controller of such property who has died or ceased to be a controller of such property; the day that is, because of any other application or applications of this definition, the control day in relation to the controller referred to in subparagraph (i) or (ii); 35
- 'controller'**, in relation to property of a corporation, means:
- (a) a receiver, or receiver and manager, of that property; or
 - (b) anyone else who (whether or not as agent for the corporation) is in possession, or has control, of that property for the purpose of enforcing a charge; 40
- 'decision period'**, in relation to a chargee in relation to a charge

on property of a company under administration, means the period beginning on the day when:

(a) if notice of the appointment of the administrator must be given to the chargee under subsection 450A(3)—such notice is so given; or

(b) otherwise—the administration begins;

and ending at the end of the tenth business day after that day;

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

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

'defect', in relation to a statutory demand, includes:

(a) an irregularity; and

(b) a misstatement of an amount or total; and

(c) a misdescription of a debt or other matter; and

(d) a misdescription of a person or entity;

'eligible applicant', in relation to a corporation, means:

(a) the Commission; or

(b) a liquidator or provisional liquidator of the corporation; or

(c) an administrator of the corporation; or

(d) an administrator of a deed of company arrangement executed by the corporation; or

(e) a person authorised in writing by the Commission to make:

(i) applications under the Division of Part 5.9 in which the expression occurs; or

(ii) such an application in relation to the corporation;

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

(a) appoint a receiver of property of the company under a power contained in an instrument relating to the charge; or

(b) obtain an order for the appointment of a receiver of such property for the purpose of enforcing the charge; or

(c) enter into possession, or assume control, of such property for that purpose; or

(d) appoint a person so to enter into possession or assume control (whether as agent for the chargee or for the company); or

(e) exercise, as chargee or as a receiver or person so

appointed, a right, power or remedy existing because of the charge, whether arising under an instrument relating to the charge, under a written or unwritten law, or otherwise;

- 'enforcement process'**, in relation to property, means: 5
- (a) execution against that property; or
 - (b) any other enforcement process in relation to that property that involves a court or a sheriff;
- 'examinable affairs'**, in relation to a corporation means: 10
- (a) the promotion, formation, management, administration or winding up of the corporation; or
 - (b) any other affairs of the corporation (including anything that is included in the corporation's affairs because of section 53); or
 - (c) the business affairs of a connected entity of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything that is included in the corporation's examinable affairs because of paragraph (a) or (b); 15
- 'examinable assets and liabilities'**, in relation to an entity, means all of the following: 20
- (a) the entity's property and assets:
 - (i) whether present or future; and
 - (ii) whether held alone or jointly with any other person or persons; and 25
 - (iii) whether or not held as agent, bailee or trustee;
 - (b) the entity's liabilities:
 - (i) whether present or future; and
 - (ii) whether actual or contingent; and
 - (iii) whether owed alone or jointly with any other person or persons; and 30
 - (iv) whether or not owed as trustee;
- 'examinable officer'**, in relation to a corporation, means:
- (a) a director, secretary or executive officer of the corporation; or 35
 - (b) a receiver, or receiver and manager, of property of the corporation (whether appointed under a provision contained in an instrument, or by a court); or
 - (c) an administrator of the corporation; or
 - (d) an administrator of a deed of company arrangement executed by the corporation; or 40
 - (e) a liquidator or provisional liquidator of the corporation (whether or not appointed by a court); or
 - (f) a trustee or other person administering a compromise or

arrangement made between the corporation and any other person or persons;

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

- 5 (a) the entity's business, trading, transactions and dealings:
(i) whether alone or jointly with any other entity or entities; and
(ii) whether or not as agent, bailee or trustee;
- 10 (b) the entity's profits, income and receipts;
(c) the entity's losses, outgoings and expenditure;

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

'insolvent transaction' has the meaning given by section 588FC;

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

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

20 **'misconduct'** includes fraud, negligence, default, breach of trust and breach of duty;

'national newspaper' means a daily newspaper that circulates generally in each State, the Capital Territory and the Northern Territory;

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

- (a) a promoter of the body;
(b) a relative, or de facto spouse, of such a promoter;
(c) a relative of a spouse, or of a de facto spouse, of such a promoter;
- 30 (d) a director or member of the body or of a related body corporate;
(e) a relative, or de facto spouse, of such a director or member;
- 35 (f) a relative of a spouse, or of a de facto spouse, of such a director or member;
(g) a body corporate that is related to the first-mentioned body;
- (h) a beneficiary under a trust of which the first-mentioned body is or has at any time been a trustee;
- 40 (i) a relative, or de facto spouse, of such a beneficiary;
(j) a relative of a spouse, or of a de facto spouse, of such a beneficiary;

(k) a body corporate one of whose directors is also a director of the first-mentioned body;

(l) a trustee of a trust under which a person is a beneficiary, where the person is a related entity of the first-mentioned body because of any other application or applications of this definition;

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

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

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(b) otherwise—the day on which the winding up is taken because of Division 1A of Part 5.6 to have begun;

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

15

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

'statutory demand' means:

(a) a document that is, or purports to be, a demand served under section 459E; or

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(b) such a document as varied by an order under subsection 459H(4);

'statutory minimum' means:

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

25

(b) otherwise—\$2,000;

'swear', in relation to an affidavit, means, in the case of an affirmation, affirm;

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

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(a) a conveyance, transfer or other disposition by the body of property of the body; and

(b) a charge created by the body on property of the body; and

35

(c) a guarantee given by the body; and

(d) a payment made by the body; and

(e) an obligation incurred by the body; and

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

(g) a loan to the body;

40

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

'uncommercial transaction' has the meaning given by section 588FB;

- 'unfair loan' has the meaning given by section 588FD;
'unfair preference' has the meaning given by section 588FA;
'unsecured', in relation to a debt, has in Part 5.7B a meaning
affected by section 588D;
5 'winding up by the Court' includes winding up in insolvency;
'wound up by the Court' includes wound up in insolvency;".

Affairs of a body corporate

30. Section 53 of the Corporations Law is amended:

- 10 (a) by omitting "of section" and substituting "of the definition of
'examinable affairs' in section 9, section 53AA or";
(b) by omitting "or 597";
(c) by omitting subparagraph (d)(ii) and substituting the following
subparagraphs:
15 "(ii) the body is under administration;
(iia) a deed of company arrangement executed by the body
has not yet terminated;";
(d) by omitting from paragraph (d) "of an official manager or
deputy official manager of the body," and substituting "of an
administrator of the body, of an administrator of such a deed
20 of company arrangement,".

31. After section 53 of the Corporations Law the following sections
are inserted:

Business affairs of a body corporate

25 "53AA. A body corporate's business affairs include (without
limitation):

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

30 **Business affairs of a natural person**

"53AB. A natural person's business affairs include (without
limitation):

- (a) the person's examinable operations and examinable assets and
liabilities; and
35 (b) any act done (including any contract made and any transaction
entered into) by or on behalf of the person, or to or in relation
to the person or his or her business or property, at a time
when:
40 (i) the person was, under the *Bankruptcy Act 1966* or the
law of an external Territory, a bankrupt in respect of a

- bankruptcy from which the person had not been discharged; or
- (ii) the person had, under a law of an external Territory or of a foreign country, the status of an undischarged bankrupt; or 5
 - (iii) the person's property was subject to control under Division 2 of Part X of the *Bankruptcy Act 1966* because of an authority given by the person under section 188 of that Act; or
 - (iv) a deed of assignment, deed of arrangement, or composition, under Part X of the *Bankruptcy Act 1966* or under the corresponding provisions of the law of an external Territory or of a foreign country was in effect in relation to the person or the person's property; and 10
- (c) without limiting the generality of paragraph (b), any conduct of the trustee of such a bankrupt estate or of such a deed of assignment or arrangement, a person acting under such an authority or a person administering such a composition; and 15
- (d) matters concerned with ascertaining the corporations with which the person is or has been connected. 20

Business affairs of a partnership

“53AC. A partnership's business affairs include (without limitation):

- (a) the partnership's promotion, formation, membership, control, examinable operations and examinable assets and liabilities; and 25
- (b) the partnership's management and proceedings; and
- (c) any act done (including any contract made and any transaction entered into) by or on behalf of the partnership, or to or in relation to the partnership, at a time when the partnership is being wound up; and 30
- (d) matters concerned with ascertaining the corporations with which the partnership is or has been connected.

Business affairs of a trust

“53AD. A trust's business affairs include (without limitation):

- (a) the creation of the trust; and 35
- (b) matters arising under, or otherwise relating to, the terms of the trust; and
- (c) the appointment and removal of a trustee of the trust; and
- (d) the business, trading, transactions and dealings of the trustee of the trust; and 40
- (e) the profits, income and receipts of the trustee of the trust; and
- (f) the losses, outgoings and expenditure of the trustee of the trust; and

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

32. After section 64 of the Corporations Law the following sections are inserted:

Entities

- “64A. Except in Parts 3.2A, 3.6 and 3.7, a reference to an entity:
- 15 (a) is a reference to a natural person, a body corporate (other than an exempt public authority), a partnership or a trust; and
 - (b) includes, in the case of a trust, a reference to the trustee of the trust.

Entities connected with a corporation

20 **[Body corporate]**

- “64B.(1) A body corporate is connected with a corporation if, and only if, the corporation:
- (a) can control, or influence materially, the body’s activities or internal affairs; or
 - 25 (b) is a member of the body; or
 - (c) is in a position to cast, or to control the casting of, a vote at a general meeting of the body; or
 - (d) has power to dispose of, or to exercise control over the disposal of, a share in the body; or
 - 30 (e) is financially interested in the body’s success or failure or apparent success or failure; or
 - (f) is owed a debt by the body; or
 - (g) is engaged by the body under a contract for services; or
 - (h) acts as agent for the body in any transaction or dealing.

35 **[Natural person]**

- “(2) A natural person is connected with a corporation if, and only if, the corporation:
- (a) is a trustee of a trust under which the person is capable of benefiting; or
 - 40 (b) is engaged by the person under a contract for services; or
 - (c) acts as agent for the person in any transaction or dealing; or

- (d) is an attorney of the person under a power of attorney; or
- (e) has appointed the person as the corporation's attorney under a power of attorney; or
- (f) is given financial, business or legal advice by the person in the performance of the functions attaching to the person's professional capacity. 5

[Partnership]

“(3) A partnership is connected with a corporation if, and only if, the corporation:

- (a) is a partner in the partnership; or 10
- (b) can control, or influence materially, the partnership's activities or internal affairs; or
- (c) is financially interested in the partnership's success or failure or apparent success or failure; or
- (d) is a creditor of the partnership; or 15
- (e) is engaged by the partnership under a contract for services; or
- (f) acts as agent for the partnership in any transaction or dealing.

[Trust]

“(4) A trust is connected with a corporation if, and only if, the corporation: 20

- (a) is the settlor, or one of the settlors, of the trust; or
- (b) has power under the terms of the trust to appoint or remove a trustee of the trust or to vary, or cause to be varied, any of the terms of the trust; or
- (c) is a trustee of the trust; or 25
- (d) can control, or influence materially, the activities of the trust; or
- (e) is capable of benefiting under the trust; or
- (f) is a creditor of the trustee of the trust; or
- (g) is engaged by the trustee of the trust under a contract for services; or 30
- (h) acts as agent for the trustee of the trust in any transaction or dealing.”.

Officers of bodies corporate and other entities

33. Section 82A of the Corporations Law is amended by omitting paragraph (1)(e) and substituting the following paragraphs: 35

- “(e) an administrator of the body or entity; and
- (ea) an administrator of a deed of company arrangement executed by the body or entity; and”.

34. After section 95 of the Corporations Law the following section is inserted: 40

Solvency and insolvency

“95A.(1) A person is solvent if, and only if, the person is able to pay all the person’s debts, as and when they become due and payable.

“(2) A person who is not solvent is insolvent.

5 “(3) Section 922 defines when a person becomes insolvent for the purposes of Part 7.10.”.

Interpretation

35. Section 206BB of the Corporations Law is amended:

10 (a) by omitting paragraph (c) of the definition of “externally-administered company” and substituting the following paragraphs:

“(c) that is under administration; or

(d) that has executed a deed of company arrangement that has not yet terminated;”;

15 (b) by omitting the definitions of “national newspaper”, “relevant date” and “solvent”.

Duty and liability of officer of corporation

20 36. Section 232 of the Corporations Law is amended by omitting paragraph (c) of the definition of “officer” in subsection (1) and substituting the following paragraphs:

“(c) an administrator of the corporation;

(ca) an administrator of a deed of company arrangement executed by the corporation;”.

Substitution of Part heading

25 37. The heading to Part 5.2 of the Corporations Law is repealed and the following heading is substituted:

“PART 5.2—RECEIVERS, AND OTHER CONTROLLERS, OF PROPERTY OF CORPORATIONS”.

Application of Part

30 38. Section 417 of the Corporations Law is amended by inserting “in this Part or Part 9.11” after “appears”.

39. After section 418 of the Corporations Law the following section is inserted:

Court may declare whether controller is validly acting

35 “418A.(1) Where there is doubt, on a specific ground, about:

(a) whether a purported appointment of a person, after the commencement of this section, as receiver of property of a corporation is valid; or

(b) whether a person who has entered into possession, or assumed control, of property of a corporation after the commencement of this section did so validly under the terms of a charge on that property;
the person, the corporation or any of the corporation's creditors may apply to the Court for an order under subsection (2). 5

“(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 charge; 10

as the case may be, on the ground specified in the application or on some other ground.”.

40. After section 419 of the Corporations Law the following section is inserted: 15

Liability of controller under pre-existing agreement about property used by corporation

“419A.(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 20
- (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: 25

- (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 30
 - (ii) the controller is controller of the third party property.

“(3) Within 7 days after the control day, the controller may give to the owner or lessor a notice that specifies the third party property and states that the controller does not propose to exercise rights in relation to that property as controller of the property, whether on behalf of the corporation or anyone else. 35

“(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. 40

“(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
5 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
10 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 the Court, by order,
excuses the controller from liability, but an order does not affect a
15 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).”.

20 **41.** After section 420 of the Corporations Law the following sections
are inserted:

Controller’s duty of care in exercising power of sale

“420A.(1) In exercising a power of sale in respect of property of a
corporation, a controller must take all reasonable care to sell the
25 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.

30 “(2) Nothing in subsection (1) limits the generality of anything in
section 232.

**Court may authorise managing controller to dispose of property despite
prior charge**

35 “420B.(1) On the application of a managing controller of property
of a corporation, the Court may by order authorise the controller to
sell, or to dispose of in some other specified way, specified property of
the corporation, even though it is subject to a charge (in this section
called the ‘**prior charge**’) that has priority over a charge (in this section
called the ‘**controller’s charge**’) on that property that the controller is
40 enforcing.

“(2) However, the Court may only make an order if satisfied that:

- (a) apart from the existence of the prior charge, the controller would have power to sell, or to so dispose of, the property; and
 - (b) the controller has taken all reasonable steps to obtain the consent of the holder of the prior charge to the sale or disposal, but has not obtained that consent; and 5
 - (c) sale or disposal of the property under the order is in the best interests of the corporation's creditors and of the corporation; and
 - (d) sale or disposal of the property under the order will not unreasonably prejudice the rights or interests of the holder of the prior charge. 10
- “(3) The Court is to have regard to the need to protect adequately the rights and interests of the holder of the prior charge.
- “(4) If the property would be sold or disposed of together with other property that is subject to the controller's charge, the Court may have regard to: 15
- (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 20
 - (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. 25
- “(5) Nothing in subsection (3) or (4) limits the matters to which the Court may have regard for the purposes of subsection (2). 30
- “(6) An order may be made subject to conditions, for example (but without limitation):
- (a) a condition that:
 - (i) the net proceeds of the sale or disposal; and
 - (ii) the net proceeds of the sale or disposal of such other property (if any) as is specified in the condition and is subject to the controller's charge; 35or a specified part of those net proceeds, be applied in payment of specified amounts secured by the prior charge; or
 - (b) a condition that the controller apply a specified amount in payment of specified amounts secured by the prior charge. 40

Receiver's power to carry on corporation's business during winding up

“420C.(1) A receiver of property of a corporation that is being wound up may:

- 5 (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).

10 “(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.

15 “(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.

20 “(4) The consequences of subsection (3) include, but are not limited to, the following:

- (a) for the purposes of subsection 419(1), a debt that the receiver incurs in carrying on the business as mentioned in subsection (3) of this section is incurred in the course of the receivership;
- 25 (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.”.

Controller's duties in relation to bank accounts and accounting records

42. Section 421 of the Corporations Law is amended:

- (a) by omitting subsection (1) and substituting the following subsection:

30 “(1) A controller of property of a corporation must:

- (a) open and maintain an account, with an Australian bank, bearing:
- 35 (i) the controller's own name; and
- (ii) in the case of a receiver of the property—the title ‘receiver’; and
- (iii) otherwise—the title ‘controller’; and
- (iv) the corporation's name;

or 2 or more such accounts; and

- 40 (b) within 3 business days after money of the corporation comes under the control of the controller, pay that money into such an account that the controller maintains; and

- (c) ensure that no such account that the controller maintains contains money other than money of the corporation that comes under the control of the controller; and
 - (d) keep such accounting records as correctly record and explain all transactions that the controller enters into as the controller.”; 5
- (b) by omitting from subsection (2) “receiver” and substituting “controller”.

43. After section 421 of the Corporations Law the following section is inserted: 10

Managing controller to report within 2 months about corporation’s affairs

“421A.(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. 15

“(2) The managing controller must prepare and lodge the report within 2 months after the control day.

“(3) As soon as practicable, and in any event within 14 days, after lodging the report, the managing controller must cause to be published in a national newspaper, or in each jurisdiction in a daily newspaper that circulates generally in that jurisdiction, a notice stating: 20

- (a) that the report has been prepared; and
- (b) that a person can, on paying the prescribed fee, inspect the report at specified offices of the Commission. 25

“(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; 30

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: 35

- (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.”. 40

Supervision of controller

44. Section 423 of the Corporations Law is amended:

(a) by omitting paragraphs (1)(a) and (b) and substituting the following paragraphs:

5 “(a) it appears to the Court or to the Commission that a controller of property of a corporation has not faithfully performed, or is not faithfully performing, the controller’s functions or has not observed, or is not observing, a requirement of:

10 (i) in the case of a receiver—the order by which, or the instrument under which, the receiver was appointed; or

15 (ii) otherwise—an instrument under which the controller entered into possession, or took control, of that property; or

(iii) in any case—the Court; or

(iv) in any case—this Law, the regulations or the rules; or

20 (b) a person complains to the Court or to the Commission about an act or omission of a controller of property of a corporation in connection with performing or exercising any of the controller’s functions and powers;”;

25 (b) by omitting from subsection (2) “the receiver and the Court may order the receiver” and substituting “a controller of property of a corporation and the Court may order the controller”;

(c) by omitting subsection (3) and substituting the following subsection:

“**(3)** The Court may at any time:

30 (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

35 (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.”.

45. Section 424 of the Corporations Law is repealed and the following section is substituted:

40 **Controller may apply to Court**

“424.(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.”.

Court’s power to fix receiver’s remuneration

46. Section 425 of the Corporations Law is amended: 5

(a) by omitting from subsection (1) everything before “by order” and substituting “The Court may”;

(b) by omitting from subsection (1) “the corporation” and substituting “a corporation”;

(c) by omitting subsection (4) and substituting the following subsections: 10

“(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: 15

(a) a liquidator of the corporation; or

(b) an administrator of the corporation; or

(c) an administrator of a deed of company arrangement executed by the corporation; or

(d) the Commission. 20

“(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).”.

47. Section 426 of the Corporations Law is repealed and the following section is substituted: 25

Controller has qualified privilege in certain cases

“426. A controller of property of a corporation has qualified privilege in respect of:

(a) a matter contained in a report that the controller lodges under section 421A or 422; or 30

(b) a comment that the controller makes under paragraph 429(2)(c).”.

Notification of matters relating to controller

48. Section 427 of the Corporations Law is amended by omitting subsections (2), (3) and (4) and substituting the following subsections: 35

“(1A) A person who appoints another person to enter into possession, or take control, of property of a corporation (whether or not as agent for the corporation) for the purpose of enforcing a charge otherwise than as receiver of that property must: 40

(a) within 7 days after making the appointment, lodge notice of the appointment; and

(b) within 21 days after making the appointment, cause notice of the appointment to be published in the *Gazette*.

5 “(1B) A person who enters into possession, or takes control, as mentioned in subsection (1A) must:

(a) within 7 days after so entering into possession or taking control, lodge notice that the person has done so; and

10 (b) within 21 days after so entering into possession or taking control, cause to be published in the *Gazette* notice that the person has done so;

unless another person:

(c) appointed the first-mentioned person so to enter into possession or take control; and

15 (d) 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.

20 “(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:

25 (a) within 7 days after so ceasing, lodge notice that the person has so ceased; and

(b) within 21 days after so ceasing, cause notice that the person has so ceased to be published in the *Gazette*.”.

Statement that receiver appointed or other controller acting

30 **49.** Section 428 of the Corporations Law is amended by adding at the end the following subsection:

35 “(2) Where there is a controller (other than a receiver) of property (whether within Australia or elsewhere) of a corporation, the corporation must set out, in every public document, and in every eligible negotiable instrument, of the corporation, after the corporation’s name where it first appears, a statement that a controller is acting.”.

Officers to report to controller about corporation’s affairs

50. Section 429 of the Corporations Law is amended:

40 (a) by omitting from subsection (1) “receiver has been appointed, means a person who is” and substituting “person is controller, means a person who was”;

(b) by omitting from subsections (1) and (2) “day of the appointment” and substituting “control day”;

- (c) by omitting from subsection (2) everything before paragraph (a) and substituting “Where a person becomes a controller of property of a corporation.”;
- (d) by omitting from paragraphs (2)(a), (b) and (c) “receiver” (wherever occurring) and substituting “person”; 5
- (e) by omitting from paragraph (2)(a) “of the appointment” and substituting “that the person is a controller of property of the corporation”;
- (f) by omitting subparagraph (2)(c)(iii) and substituting the following subparagraph: 10
 - “(iii) if the person became a controller of the property:
 - (A) because of an appointment as receiver of the property that was made by or on behalf of the holder of debentures of the corporation; or
 - (B) by entering into possession, or taking control, of the property for the purpose of enforcing a charge securing such debentures; 15
 - 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).”; 20
- (g) by omitting from subsections (3) and (4) “receiver” (wherever occurring) and substituting “controller”;
- (h) by omitting subsection (6) and substituting the following subsections: 25
 - “(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. 30
 - “(6A) However, if subsection (2) applies in a case where a controller of property of a corporation dies, or ceases to be a controller of property of the corporation, before subsection (2) is fully complied with, then: 35
 - (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.”; 40
- (i) by omitting from subsection (7) “and section 430 apply even if the receiver” and substituting “(including subsection (6A)) and section 430 apply even if the controller”.

Controller may require reports

51. Section 430 of the Corporations Law is amended:

- (a) by omitting from subsections (1), (3) and (5) “receiver” (wherever occurring) and substituting “controller”;
- 5 (b) by omitting from paragraphs (1)(b), (c) and (d) “date of the receiver’s appointment” and substituting “control day”;
- (c) by omitting subsection (2) and substituting the following subsection:
10 “(2) Without limiting the generality of subsection (1), a notice under that subsection may specify the information that the controller requires as to affairs of the corporation by reference to information that this Law requires to be included in any other report, statement or notice under this Law.”;
- 15 (d) by omitting from subsections (3) and (5) “receiver’s” (wherever occurring) and substituting “controller’s”.

Controller may inspect books

52. Section 431 of the Corporations Law is amended by omitting “receiver” (twice occurring) and substituting “controller”.

Lodging controller’s accounts

20 53. Section 432 of the Corporations Law is amended:

- (a) by omitting subsection (1) and substituting the following subsections:

“(1) A controller of property of a corporation must lodge an account:

- 25 (a) within one month after the end of:
 - (i) 6 months, or such shorter period as the controller determines, after the day when the controller became a controller of property of the corporation; and
 - 30 (ii) each subsequent period of 6 months throughout which the controller is a controller of property of the corporation; and
- (b) within one month after the controller ceases to be a controller of property of the corporation.

35 “(1A) An account must be in the prescribed form and show:

- (a) the controller’s receipts and payments during:
 - (i) in the case of an account under paragraph (1)(a)—the 6 months or shorter period, as the case requires; or
 - 40 (ii) in the case of an account under paragraph (1)(b)—the period beginning at the end of the period to which the last account related, or on the control

- day, as the case requires, and ending on the day when the controller so ceased; and
- (b) except in the case of an account lodged under subparagraph (1)(a)(i)—the respective aggregates of the controller's receipts and payments since the control day; and 5
 - (c) in the case of:
 - (i) a receiver appointed under a power contained in an instrument; or
 - (ii) anyone else who is in possession, or has control, of property of the corporation for the purpose of enforcing a charge; 10
- the following:
- (iii) the amount (if any) owing under that instrument or charge: 15
 - (A) in the case of an account lodged under subparagraph (1)(a)(i)—at the end of the control day and at the end of the period to which the account relates; or
 - (B) otherwise—at the end of the period to which the account relates; 20
 - (iv) the controller's estimate of the total value, at the end of the period to which the account relates, of the property of the corporation that is subject to the instrument or charge.”; 25
- (b) by omitting from subsection (2) “receiver shall” and substituting “controller must”;
 - (c) by omitting from subsection (4) everything after “incurred by the” and substituting “controller as mentioned in subsection 419(1) and, where such an order is made, the controller is liable accordingly.”. 30

Enforcing controller's duty to make returns

54. Section 434 of the Corporations Law is amended:

- (a) by omitting from subsection (1) “receiver” (wherever occurring) and substituting “controller”; 35
- (b) by omitting from paragraph (1)(b) “been appointed under a power contained in an instrument” and substituting “become a controller of property of the corporation otherwise than by being appointed a receiver of such property by a court and who”; 40
- (c) by omitting from paragraph (1)(b) “receiver's” and substituting “controller's”.

55. After section 434 of the Corporations Law the following sections are inserted in Part 5.2:

Court may remove controller for misconduct

5 “434A. 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.

Court may remove redundant controller

10 “434B.(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.

15 “(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
20 under paragraph (1)(b).

“(3) For the purposes of subsection (2), the Court must have regard to:

- (a) the corporation’s interests; and
- 25 (b) the interests of the holder of the charge that the controller is enforcing; and
- (c) the interests of the corporation’s other creditors; and
- (d) any other relevant matter.

30 “(4) The Court may only make an order under subsection (1) on the application of a liquidator appointed for the purposes of winding up the corporation in insolvency.

“(5) An order under subsection (1) may also prohibit the holder of the charge from doing any or all of the following, except with the leave of the Court:

- 35 (a) appointing a person as receiver of property of the corporation under a power contained in an instrument relating to the charge;
- (b) entering into possession, or taking control, of such property for the purpose of enforcing the charge;
- (c) appointing a person so to enter into possession or take control (whether as agent for the chargee or for the corporation).

Effect of sections 434A and 434B

“434C.(1) Except as expressly provided in section 434A or 434B, an order under that section does not affect a charge on property of a corporation.

“(2) Nothing in section 434A or 434B limits any other power of the Court to remove, or otherwise deal with, a controller of property of a corporation (for example, the Court’s powers under section 423).” 5

56. Part 5.3 of the Corporations Law is repealed and the following Part is substituted:

“PART 5.3A—ADMINISTRATION OF A COMPANY’S AFFAIRS WITH A VIEW TO EXECUTING A DEED OF COMPANY ARRANGEMENT 10

“Division 1—Preliminary

Object of Part

“435A. The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that: 15

- (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. 20

Interpretation

“435B. In this Part, unless the contrary intention appears: ‘receiver’ includes a receiver and manager. 25

When administration begins and ends

- “435C.(1) The administration of a company:
- (a) begins when an administrator of the company is appointed under section 436A, 436B or 436C; and 30
 - (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: 35

- (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:

- 5 (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:
- 10 (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
- 15 (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
- 20 (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
- 25 (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.

30 “(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

Company may appoint administrator if board thinks it is or will become insolvent

35 “436A.(1) A company may, by writing under its common seal, 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
- 40 (b) an administrator of the company should be appointed.

“(2) Subsection (1) does not apply to a company that is already being wound up.

Liquidator may appoint administrator

“436B.(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.

5

“(2) With the leave of the Court, a liquidator or provisional liquidator of a company may appoint himself or herself under subsection (1).

“(3) Subsection (2) has effect subject to Division 14.

Chargee may appoint administrator

10

“436C.(1) A person who is entitled to enforce a charge on the whole, or substantially the whole, of a company’s property may by writing appoint an administrator of the company if the charge has become, and is still, enforceable.

“(2) Subsection (1) does not apply to a company that is already being wound up.

15

Company already under administration

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

Purpose and timing of first meeting of creditors

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“436E.(1) The administrator of a company under administration must convene a meeting of the company’s creditors in order to determine:

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

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

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

- (a) giving written notice of the meeting to as many of the company’s creditors as reasonably practicable; and
- (b) causing notice of the meeting to be published:
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction;

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at least 2 business days before the meeting.

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“(4) At the meeting, the company’s creditors may also, by resolution:

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

Functions of committee of creditors

“436F.(1) The functions of a committee of creditors of a company under administration are:

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

“(2) A committee cannot give directions to the administrator, except as provided in subsection (3).

10 “(3) As and when a committee reasonably requires, the administrator must report to the committee about matters relating to the administration.

Membership of committee

“436G. A person can be a member of a committee of creditors of a company under administration if, and only if, he or she is:

- 15 (a) a creditor of the company; or
- (b) the attorney of such a creditor because of a general power of attorney; or
- (c) authorised in writing by such a creditor to be such a member.

“Division 3—Administrator assumes control of company’s affairs

20 **Role of administrator**

“437A.(1) While a company is under administration, the administrator:

- (a) has control of the company’s business, property and affairs; and
- 25 (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
- 30 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.

Administrator acts as company’s agent

35 “437B. 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.

Powers of other officers suspended

“437C.(1) While a company is under administration, a person (other than the administrator) cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company, except with the administrator’s written approval. 5

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

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

“(4) In this section: 10
‘**officer**’, in relation to a company under administration, includes:

- (a) a receiver who is not also a manager; and
- (b) a receiver and manager appointed by a court; and
- (c) a liquidator or provisional liquidator appointed by the Court before the administration began. 15

“(5) However, a person is not an officer of a company for the purposes of this section merely because he or she is an employee of the company.

Only administrator can deal with company’s property

“437D.(1) This section applies where: 20

- (a) a company under administration purports to enter into; or
- (b) a person purports to enter into, on behalf of a company under administration;

a transaction or dealing affecting property of the company.

“(2) The transaction or dealing is void unless: 25

- (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: 30

- (a) by an Australian bank out of an account kept by the company with the bank; and
- (b) in good faith and in the ordinary course of the bank’s banking business; and
- (c) after the administration began and on or before the day on which: 35

- (i) the administrator gives to the bank (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; 40

whichever happens first.

“(4) Subsection (2) has effect subject to an order that the Court makes after the purported transaction or dealing.

“(5) If, because of subsection (2), the transaction or dealing is void, or would be void apart from subsection (4), an officer of the company who:

(a) purported to enter into the transaction or dealing on the company’s behalf; or

(b) was in any other way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the transaction or dealing; contravenes this subsection.

Order for compensation where officer involved in void transaction

“437E.(1) Where:

(a) a court finds a person guilty of an offence constituted by a contravention of subsection 437D(5) (including such an offence that is taken to have been committed because of section 5 of the *Crimes Act 1914* or that section as it applies as a law of this jurisdiction); and

(b) the court is satisfied that the company or another person has suffered loss or damage because of the act or omission constituting the offence;

the court may (whether or not it imposes a penalty) order the first-mentioned person to pay compensation to the company or other person, as the case may be, of such amount as the order specifies.

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.

Effect of administration on company’s members

“437F. A transfer of shares in a company, or an alteration in the status of members of a company, that is made during the administration of the company is void except so far as the Court otherwise orders.

“Division 4—Administrator investigates company’s affairs

Administrator to investigate affairs and consider possible courses of action

“438A. 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; 5
 - (iii) whether it would be in the creditors' interests for the company to be wound up.

Directors to help administrator

“438B.(1) As soon as practicable after the administration of a company begins, each director must: 10

- (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 15
- (b) if the director knows where other books relating to the company are—tell the administrator where those books are.

“(2) Within 7 days after the administration of a company begins or such longer period as the administrator allows, the directors must give to the administrator a statement about the company's business, property, affairs and financial circumstances. 20

“(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; 25

as the administrator reasonably requires.

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

Administrator's rights to company's books

“438C.(1) A person is not entitled, as against the administrator of a company under administration: 30

- (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. 35

“(3) The administrator of a company under administration may give to a person a written notice requiring the person to deliver to the 40

administrator, as specified in the notice, books so specified that are in the person's possession.

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

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

Reports by administrator

10 “438D.(1) If it appears to the administrator of a company under administration that:

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

15 (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

20 (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

25 (d) give the Commission such information, and such access to and facilities for inspecting and taking copies of documents, as the Commission requires.

“(2) The administrator may also lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to the Commission's notice.

“(3) If it appears to the Court:

30 (a) that a past or present officer, or a member, of a company under administration has been guilty of an offence in relation to the company; or

35 (b) that a person who has taken part in the formation, promotion, administration, management or winding up of a company under administration has engaged in conduct of a kind referred to in paragraph (1)(b) in relation to the company;

and that the administrator has not lodged a report about the matter, the Court may, on the application of an interested person or of its own motion, direct the administrator to lodge such a report.

“Division 5—Meeting of creditors decides company’s future

Administrator to convene meeting and inform creditors

“439A.(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). 5

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

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

(a) giving written notice of the meeting to as many of the company’s creditors as reasonably practicable; and 10

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

(i) in a national newspaper; or

(ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction; 15

at least 5 business days before the meeting.

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

(a) a report by the administrator about the company’s business, property, affairs and financial circumstances; and 20

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

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

(ii) whether it would be in the creditors’ interests for the administration to end; 25

(iii) whether it would be in the creditors’ interests for the company to be wound up;

and his or her reasons for those opinions; and

(c) if a deed of company arrangement is proposed—a statement setting out details of the proposed deed. 30

“(5) The convening period is:

(a) if the administration begins on a day that is in December, or is less than 28 days before Good Friday—the period of 28 days beginning on that day; or 35

(b) otherwise—the period of 21 days beginning on the day when the administration begins.

“(6) The Court may extend the convening period on an application made within the period referred to in paragraph (5)(a) or (b), as the case requires. 40

Conduct of meeting

“439B.(1) At a meeting convened under section 439A, the administrator is to preside.

5 “(2) A meeting convened under section 439A may be adjourned from time to time, but cannot be adjourned to a day that is more than 60 days after the first day on which the meeting was held, even if no resolution under section 439C has been passed at the meeting.

What creditors may decide

10 “439C. At a meeting convened under section 439A, the creditors may resolve:

- (a) that the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any) details of which accompanied the notice of meeting); or
- 15 (b) that the administration should end; or
- (c) that the company be wound up.

“Division 6—Protection of company’s property during administration

Winding up company

20 “440A.(1) A company under administration cannot be wound up voluntarily, except as provided by section 446A.

“(2) The Court is to adjourn the hearing of an application for an order to wind up a company if the company is under administration and the Court is satisfied that it is in the interests of the company’s creditors for the company to continue under administration rather than
25 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
30 provisional liquidator appointed.

Charge unenforceable

“440B. During the administration of a company, a person cannot enforce a charge on property of the company, except:

- 35 (a) with the administrator’s written consent; or
- (b) with the leave of the Court.

Owner or lessor cannot recover property used by company

“440C. During the administration of a company, the owner or lessor of property that is used or occupied by, or is in the possession of, the company cannot take possession of the property or otherwise recover
40 it, except:

- (a) with the administrator's written consent; or
- (b) with the leave of the Court.

Stay of proceedings

“440D.(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: 5

- (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: 10

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

Administrator not liable in damages for refusing consent

“440E. 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. 15

Suspension of enforcement process

“440F. During the administration of a company, no enforcement process in relation to property of the company can be begun or proceeded with, except: 20

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

Duties of court officer in relation to property of company

“440G.(1) This section applies where an officer of a court (in this section called the ‘court officer’), being: 25

- (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: 30

- (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 35

- (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 40

(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.

5 “(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:

10 (a) are in the court officer’s possession; or

(b) have been paid into the court and have not since been paid out.

15 “(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.

20 “(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.

25 “(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.

***Lis pendens* taken to exist**

“440H.(1) This section has effect only for the purposes of a law about the effect of a *lis pendens* on purchasers or mortgagees.

30 “(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*.

Administration not to trigger liability of director or relative under guarantee of company’s liability

35 “440J.(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

40 (ii) a spouse, de facto spouse or relative of such a director; and

(b) without limiting paragraph (a), a proceeding in relation to such a guarantee cannot be begun against such a director, spouse, de facto spouse or relative;
except with the leave of the Court and in accordance with such terms (if any) as the Court imposes. 5

“(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; 10

section 1323 applies in relation to the creditor and the guarantor as if:

(c) a civil proceeding against the guarantor had begun under this Law; and

(d) the creditor were the only person of a kind referred to in that section as an aggrieved person. 15

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; 20

‘liability’ means a debt, liability or other obligation. 25

“Division 7—Rights of chargee, owner or lessor

Where chargee acts before or during decision period

“441A.(1) This section applies where:

(a) the whole, or substantially the whole, of the property of a company under administration is subject to a charge; and 30

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

“(2) This section also applies where: 35

(a) a company is under administration; and

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

(c) the property of the company (in this subsection called the

‘charged property’) subject to the respective charges together constitutes the whole, or substantially the whole, of the company’s property; and

- 5 (d) before or during the decision period, the chargee enforced the charges in relation to all the charged property:
- (i) whether or not the charges were enforced in the same way in relation to all the charged property; and
 - (ii) whether or not any of the charges was enforced in the same way in relation to all the property of the company subject to that charge; and
 - (iii) in so far as the charges were enforced in relation to property of the company in a way referred to in paragraph (a), (b) or (d) of the definition of ‘enforce’ in section 9—
- 10 whether or not the same person was appointed in respect of all of the last-mentioned property.

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

- (a) the chargee;
- 20 (b) a receiver or person appointed as mentioned in paragraph (a), (b) or (d) of the definition of ‘enforce’ in section 9 as that definition applies in relation to the charge, or any of the charges (even if appointed after the decision period).

25 “(4) Section 437D does not apply in relation to a transaction or dealing that affects property of the company and is entered into by:

- (a) the chargee; or
- (b) a receiver or person of a kind referred to in paragraph (3)(b) of this section;

30 in the performance or exercise of a function or power as chargee, or as such a receiver or person, as the case may be.

Where enforcement of charge begins before administration

“441B.(1) This section applies if, before the beginning of the administration of a company, a chargee, receiver or other person:

- 35 (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
 - 40 (e) exercised any other power in relation to such property;
- for the purpose of enforcing a charge on that property.

“(2) Nothing in section 437C or 440B prevents the chargee, receiver or other person from enforcing the charge in relation to that property.

“(3) Section 437D does not apply in relation to a transaction or dealing that affects that property and is entered into:

- (a) in the exercise of a power of the chargee as chargee; or
- (b) in the performance or exercise of a function or power of the receiver or other person;

5

as the case may be.

Charge on perishable property

“441C.(1) This section applies where perishable property of a company under administration is subject to a charge.

“(2) Nothing in section 437C or 440B prevents:

10

- (a) the chargee; or
- (b) a receiver or person appointed (at any time) as mentioned in paragraph (a), (b) or (d) of the definition of ‘enforce’ in section 9;

from enforcing the charge, so far as it is a charge on perishable property.

15

“(3) Section 437D does not apply in relation to a transaction or dealing that affects perishable property of the company and is entered into by:

- (a) the chargee; or
- (b) a receiver or person appointed (at any time) as mentioned in paragraph (a), (b) or (d) of the definition of ‘enforce’ in section 9;

20

in the performance or exercise of a function or power as chargee, or as such a receiver or person, as the case may be.

25

Court may limit powers of chargee, etc. in relation to charged property

“441D.(1) This section applies if:

- (a) for the purpose of enforcing a charge on property of a company, the chargee, or a receiver or other person, does an act of a kind referred to in a paragraph of subsection 441B(1); and
- (b) the company is under administration when the chargee, receiver or other person does the act, or the company later begins to be under administration;

30

but does not apply in a case where section 441A applies.

“(2) On application by the administrator, the Court may order the chargee, receiver or other person not to perform specified functions, or exercise specified powers, except as permitted by the order.

35

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

40

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

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

Giving a notice under a charge

5 “441E. Nothing in section 437C or 440B prevents a person from giving a notice under the provisions of a charge.

Where recovery of property begins before administration

“441F.(1) This section applies if, before the beginning of the administration of a company, a receiver or other person:

10 (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.

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

20 “(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.

Recovering perishable property

“441G.(1) Nothing in section 437C or 440C prevents a person from taking possession of, or otherwise recovering, perishable property.

25 “(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.

Court may limit powers of receiver etc. in relation to property used by company

30 “441H.(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:

35 (i) enters into possession, or assumes control, of the property; or

(ii) exercises any other power in relation to the property; and

40 (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. 5

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

“(5) An order has effect despite sections 441F and 441G.

Giving a notice under an agreement about property 10

“441J. Nothing in section 437C or 440C prevents a person from giving a notice to a company under an agreement relating to property that is used or occupied by, or is in the possession of, the company.

Effect of Division

“441K. Except as expressly provided, nothing in this Division limits the generality of anything else in it. 15

“Division 8—Powers of administrator

Additional powers of administrator

“442A. Without limiting section 437A, the administrator of a company under administration has power to do any of the following: 20

- (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; 25
- (d) whatever else is necessary for the purposes of this Part.

Dealing with property subject to a floating charge that has crystallised

“442B.(1) This section applies where a charge on property of a company under administration was a floating charge when created but has since become a fixed or specific charge. 30

“(2) Subject to sections 442C and 442D, the administrator may deal with any of that property as if the charge were still a floating charge.

When administrator may dispose of encumbered property

“442C.(1) The administrator of a company under administration or of a deed of company arrangement must not dispose of: 35

- (a) property of the company that is subject to a charge; or

(b) property that is used or occupied by, or is in the possession of, the company but of which someone else is the owner or lessor.

“(2) Subsection (1) does not prevent a disposal:

- 5 (a) in the ordinary course of the company’s business; or
- (b) with the written consent of the chargee, owner or lessor, as the case may be; or
- (c) with the leave of the Court.

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

Administrator’s powers subject to powers of chargee, receiver etc.

“442D.(1) Where section 441A applies, the administrator’s functions and powers are subject to the functions and powers of a person as:

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

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

- 20 (a) the chargee; or
- (b) a receiver or person appointed (at any time) as mentioned in paragraph (a), (b) or (d) of the definition of ‘enforce’ in section 9.

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

Administrator has qualified privilege

“442E. 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.

Protection of persons dealing with administrator

“442F.(1) Sections 164 and 166 apply in relation to a company under administration as if:

- 35 (a) a reference in those sections to the company, or to an officer of the company, included a reference to the administrator; and
- 40 (b) a reference in those sections to an assumption referred to in subsection 164(3) included a reference to an assumption that the administrator is:

- (i) acting within his or her functions and powers as administrator; and
- (ii) in particular, is complying with this Law.

“(2) The effect that sections 164 and 166 have because of subsection (1) of this section is additional to, and does not prejudice, the effect that sections 164 and 166 otherwise have in relation to a company under administration. 5

“Division 9—Administrator’s liability and indemnity for debts of administration

Subdivision A—Liability 10

General debts

“443A.(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: 15

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

“(2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator’s rights against the company or anyone else. 20

Payments for property used or occupied by, or in the possession of, the company

“443B.(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. 25

“(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: 30

- (a) that begins more than 7 days after the administration began; and
- (b) throughout which:
 - (i) the company continues to use or occupy, or to be in possession of, the property; and 35
 - (ii) the administration continues.

“(3) Within 7 days after the beginning of the administration, the administrator may give to the owner or lessor a notice that specifies the property and states that the company does not propose to exercise rights in relation to the property. 40

“(4) Despite subsection (2), the administrator is not liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the company.

“(5) A notice under subsection (3) ceases to have effect if:

(a) the administrator revokes it by writing given to the owner or lessor; or

(b) the company exercises, or purports to exercise, a right in relation to the property.

“(6) For the purposes of subsection (5), the company does not exercise, or purport to exercise, a right in relation to the property merely because the company continues to occupy, or to be in possession of, the property, unless the company:

(a) also uses the property; or

(b) asserts a right, as against the owner or lessor, so to continue.

“(7) Subsection (2) does not apply in relation to so much of a period as elapses after:

(a) a receiver of the property is appointed; or

(b) a chargee appoints an agent, under the provisions of a charge on the property, to enter into possession, or to assume control, of the property; or

(c) a chargee takes possession, or assumes control, of the property under the provisions of a charge on the property;

but this subsection does not affect a liability of the company.

“(8) Subsection (2) does not apply in so far as the 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).

Administrator not otherwise liable for company's debts

“443C. The administrator of a company under administration is not liable for the company's debts except under section 443A or 443B.

“Subdivision B—Indemnity

Right of indemnity

“443D. The administrator of a company under administration is entitled to be indemnified out of the company's property for:

(a) debts for which the administrator is liable under section 443A or 443B; and

- (b) his or her remuneration as fixed under section 449E.

Right of indemnity has priority over other debts

“443E.(1) Subject to section 556, a right of indemnity under section 443D has priority over:

- (a) all the company’s unsecured debts; and 5
(b) subject to subsections (2) and (3) of this section, debts of the company secured by a floating charge on property of the company.

“(2) Where:

- (a) debts of a company under administration are secured by a floating charge on property of the company; and 10

- (b) before the beginning of the administration, the chargee:

- (i) appointed a receiver of property of the company under a power contained in an instrument relating to the charge; or 15

- (ii) obtained an order for the appointment of a receiver of property of the company for the purpose of enforcing the charge; or

- (iii) entered into possession, or assumed control, of property of the company for that purpose; or 20

- (iv) appointed a person so to enter into possession or assume control (whether as agent for the chargee or for the company); and

- (c) the receiver or person is still in office, or the chargee is still in possession or control of the property; 25

the right of indemnity of the administrator under section 443D does not have priority over those debts, except so far as the chargee agrees.

“(3) Where:

- (a) debts of a company under administration are secured by a floating charge on property of the company; and 30

- (b) during the administration, the chargee, consistently with this Part:

- (i) appoints a receiver of property of the company under a power contained in an instrument relating to the charge; or 35

- (ii) obtains an order for the appointment of a receiver of property of the company for the purpose of enforcing the charge; or

- (iii) enters into possession, or assumes control, of property of the company for that purpose; or 40

- (iv) appoints a person so to enter into possession or assume control (whether as agent for the chargee or for the company);

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

Lien to secure indemnity

“443F.(1) To secure a right of indemnity under section 443D, the administrator has a lien on the company’s property.

10 “(2) A lien under subsection (1) has priority over a charge only in so far as the right of indemnity under section 443D has priority over debts secured by the charge.

“Division 10—Execution and effect of deed of company arrangement

Effect of creditors’ resolution

15 “444A.(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.

20 “(3) The administrator of the deed must prepare an instrument setting out the terms of the deed.

“(4) The instrument must also specify the following:

- (a) the administrator of the deed;
- 25 (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;
- 30 (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
- 35 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.

40 “(5) The instrument is taken to include the prescribed provisions, except so far as it provides otherwise.

Execution of deed

“444B.(1) This section applies where an instrument is prepared under section 444A.

“(2) The company must execute the instrument within:

- (a) 21 days after the end of the meeting of creditors; or 5
- (b) such further period as the Court allows on an application made within those 21 days.

“(3) The board of the company may, by resolution, authorise the instrument to be executed by or on behalf of the company.

“(4) Subsection (3) has effect despite section 437C, but does not limit the functions and powers of the administrator of the company. 10

“(5) The administrator of the deed must execute the instrument before, or as soon as practicable after, the company executes it.

“(6) When executed by both the company and the deed’s administrator, the instrument becomes a deed of company arrangement. 15

“(7) Division 12 provides for consequences of the company contravening subsection (2).

Creditor etc. not to act inconsistently with deed before its execution

“444C.(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: 20

- (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; 25

whichever happens sooner.

“(2) In so far as a person would be bound by the deed if it had already been so executed, the person:

- (a) must not do anything inconsistent with the deed, except with the leave of the Court; and 30
- (b) is subject to section 444E.

Effect of deed on creditors

“444D.(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). 35

“(2) Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security, except so far as:

- (a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the company executed the deed; or 40

(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:

- 5 (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).

Protection of company’s property from persons bound by deed

10 “444E.(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.

15 “(3) The person cannot:

- (a) begin or proceed with a proceeding against the company or in relation to any of its property; or
(b) begin or proceed with enforcement process in relation to property of the company;

20 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):

25 ‘property’, in relation to the company, includes property used or occupied by, or in the possession of, the company.

Court may limit rights of secured creditor or owner or lessor

“444F.(1) This section applies where:

- 30 (a) it is proposed that a company execute a deed of company arrangement; or
(b) a company has executed such a deed.

“(2) Subject to subsection 441A(3), the Court may order a secured creditor of the company not to realise or otherwise deal with the security, except as permitted by the order.

35 “(3) The Court may only make an order under subsection (2) if satisfied that:

- (a) for the creditor to realise or otherwise deal with the security would have a material adverse effect on achieving the purposes of the deed; and

40 (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. 5

“(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 10
 - (b) having regard to:
 - (i) the terms of the deed; and
 - (ii) the terms of the order; and
 - (iii) any other relevant matter; 15
- 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; 20
- or
- (b) if paragraph (1)(b) applies—the deed's administrator.

Effect of deed on company, officers and members

“444G. A deed of company arrangement also binds:

- (a) the company; and 25
- (b) its officers and members; and
- (c) the deed's administrator.

Extent of release of company's debts

“444H. A deed of company arrangement releases the company from a debt only in so far as: 30

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

“Division 11—Variation, termination and avoidance of deed

Variation of deed by creditors

“445A. A deed of company arrangement may be varied by a resolution passed at a meeting of the company's creditors convened under section 445F, but only if the variation is not materially different from a proposed variation set out in the notice of the meeting. 35

Court may cancel variation

“445B.(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.

- 5 “(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.

10 **When deed terminates**

“445C. A deed of company arrangement terminates when:

- (a) the Court makes under section 445D an order terminating the deed; or
 - 15 (b) the company’s creditors pass a resolution terminating the deed at a meeting that was convened under section 445F by a notice setting out the proposed resolution; or
 - (c) if the deed specifies circumstances in which it is to terminate—those circumstances exist;
- whichever happens first.

20 **When Court may terminate deed**

“445D.(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:
 - 25 (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;
- 30 was given to the administrator of the company or to such creditors; or
- (b) such information was contained in a report or statement under subsection 439A(4) that accompanied a notice of the meeting at which the resolution was passed; or
- 35 (c) there was an omission from such a report or statement and the omission can reasonably be expected to have been material to such creditors in so deciding; or
- (d) there has been a material contravention of the deed by a person bound by the deed; or
- 40 (e) effect cannot be given to the deed without injustice or undue delay; or
- (f) the deed or a provision of it is, an act or omission done or

made under the deed was, or an act or omission proposed to be so done or made would be:

- (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or
- (ii) contrary to the interests of the creditors of the company as a whole; or

(g) the deed should be terminated for some other reason.

“(2) An order may be made on the application of:

- (a) a creditor of the company; or
- (b) the company; or
- (c) any other interested person.

Creditors may terminate deed and resolve that company be wound up

“445E. Where:

- (a) at a meeting convened under section 445F, the company’s creditors pass a resolution terminating the deed; and
- (b) the notice of the meeting set out a proposed resolution that the company be wound up;

the creditors may also resolve at the meeting that the company be wound up.

Meeting of creditors to consider proposed variation or termination of deed

“445F.(1) The administrator of a deed of company arrangement:

- (a) may at any time convene a meeting of the company’s creditors; and
- (b) must convene such a meeting if so requested in writing by creditors the value of whose claims against the company is not less than 10% of the value of all the creditors’ claims against the company.

“(2) A meeting under this section must be convened by the deed’s administrator:

- (a) giving written notice of the meeting to as many of the company’s creditors as reasonable practicable; and
- (b) causing notice of the meeting to be published:
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction;

at least 5 business days before the meeting.

“(3) The notice given to a creditor under paragraph (2)(a) must:

- (a) set out each resolution (if any) under section 445A or paragraph

445C(b) that the deed's administrator proposes that the meeting vote on; and

- 5 (b) if the meeting is convened under paragraph (1)(b) of this section—set out each proposed resolution under section 445A or paragraph 445C(b) that is set out in the request.

“(4) At a meeting convened under this section, the deed's administrator is to preside.

“(5) A meeting convened under this section may be adjourned from time to time.

10 **When Court may void or validate deed**

“445G.(1) Where there is doubt, on a specific ground, whether a deed of company arrangement was entered into in accordance with this Part or complies with this Part, the administrator of the deed, a member or creditor of the company, or the Commission, may apply to
15 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.

20 “(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
25 (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.

Effect of termination or avoidance

30 “445H. The termination or avoidance, in whole or in part, of a deed of company arrangement does not affect the previous operation of the deed.

“Division 12—Transition to creditors' voluntary winding up

Administrator becomes liquidator in certain cases

35 “446A.(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
40 (b) a company under administration contravenes subsection 444B(2) at a particular time; or

(c) at a meeting convened under section 445F, a company's creditors:

- (i) pass a resolution terminating a deed of company arrangement executed by the company; and
- (ii) also resolve at a particular time under section 445E that the company be wound up. 5

“(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 10
- (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. 15

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

- (a) the company is taken to have nominated:
 - (i) if paragraph (1)(a) or (b) of this section applies—the administrator of the company; or
 - (ii) if paragraph (1)(c) of this section applies—the administrator of the deed; 20
- to be liquidator for the purposes of the winding up; and
- (b) the creditors are taken not to have so nominated anyone.

“(5) The liquidator must:

- (a) within 7 days after the day on which the company is taken to have passed the resolution, lodge a written notice stating that the company is taken because of this section to have passed such a resolution and specifying that day; and 25
- (b) cause a notice of that kind to be published, within 21 days after that day: 30
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction.

“(6) Section 482 applies in relation to the winding up as if it were a winding up in insolvency or by the Court. 35

Note: Section 482 empowers the Court to stay or terminate a winding up and give consequential directions.

“(7) An application under section 482 as applying because of subsection (6) may be made:

- (a) despite subsection 499(4), by the company pursuant to a resolution of the board; or 40

- (b) by the liquidator; or
- (c) by a creditor; or
- (d) by a contributory.

Regulations may provide for transition in other cases

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

“Division 13—Powers of Court

20 **General power to make orders**

“447A.(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:

- 25
- (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.

30 “(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
- 35 (c) in the case of a company under administration—the administrator of the company; or
- (d) in the case of a company that has executed a deed of company arrangement—the deed’s administrator; or
- (e) the Commission; or
- (f) any other interested person.

Orders to protect creditors during administration

“447B.(1) On the application of the Commission, the Court may make such order as it thinks necessary to protect the interests of a company’s creditors while the company is under administration.

“(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. 5

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

Court may declare whether administrator validly appointed

“447C.(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). 10

“(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. 15

Administrator may seek directions

“447D.(1) The administrator of a company under administration, or of a deed of company arrangement, may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator’s functions and powers. 20

“(2) The administrator of a deed of company arrangement may apply to the Court for directions about a matter arising in connection with the operation of, or giving effect to, the deed. 25

Supervision of administrator of company or deed

“447E.(1) Where the Court is satisfied that the administrator of a company under administration, or of a deed of company arrangement:

(a) has managed, or is managing, the company’s business, property or affairs in a way that is prejudicial to the interests of some or all of the company’s creditors or members; or 30

(b) has done an act, or made an omission, or proposes to do an act, or to make an omission, that is or would be prejudicial to such interests;

the Court may make such order as it thinks just. 35

“(2) Where the Court is satisfied that:

(a) a company is under administration but:

(i) there is a vacancy in the office of administrator of the company; or

(ii) no administrator of the company is acting; or 40

(b) a deed of company arrangement has not yet terminated but:

(i) there is a vacancy in the office of administrator of the deed; or

(ii) no administrator of the deed is acting;

the Court may make such order as it thinks just.

5 “(3) An order may only be made on the application of the Commission or of a creditor or member of the company.

Effect of Division

“447F. Nothing in this Division limits the generality of anything else in it.

10 “*Division 14—Qualifications of administrators*

Appointee must consent

“448A. 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

15 (b) as at the time of the appointment, the person has not withdrawn the consent.

Administrator must be registered liquidator

20 “448B. A person must not consent to be appointed, and must not act, as administrator of a company or of a deed of company arrangement unless he or she is a registered liquidator.

Disqualification of person connected with company

“448C.(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:

25 (a) the person, or a body corporate in which the person is a substantial shareholder for the purposes of Part 6.7, is indebted in an amount exceeding \$5,000 to the company or to a body corporate related to the company; or

30 (b) the person is, otherwise than in a capacity as administrator or liquidator of, or as administrator of a deed of company arrangement executed by, the company or a related body corporate, a creditor of the company or of a related body corporate in an amount exceeding \$5,000; or

35 (c) the person is an officer of the company (otherwise than because of being an administrator or liquidator of, or an administrator of a deed of company arrangement executed by, a body corporate related to the company); or

(d) the person is an officer of a body corporate that is a mortgagee of property of the company; or

40 (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. 5

“(2) The reference in paragraph (1)(a) to indebtedness to a body corporate does not, in relation to indebtedness of a natural person, include a reference to indebtedness of that person to a body corporate that is a prescribed corporation for the purposes of Part 4.5 where: 10

- (a) the indebtedness arose as a result of a loan made to that person by the body corporate in the ordinary course of its ordinary business; and
- (b) the amount of that loan was used by the person to pay the whole or part of the purchase price of premises used by the person as his or her principal place of residence. 15

“(3) For the purposes of subsection (1), a person is taken to be an officer or auditor of a company if:

- (a) the person is an officer or auditor of the company or of a related body corporate; or 20
- (b) except where the Commission, if it thinks fit in the circumstances of the case, directs that this paragraph not apply in relation to the person—the person has, within the last 2 years, been an officer, auditor or promoter of the company or of a related body corporate. 25

Disqualification of insolvent under administration

“448D. A person must not consent to be appointed, and must not act, as administrator of a company or of a deed of company arrangement if he or she is an insolvent under administration.

“Division 15—Removal, replacement and remuneration of administrator 30

Appointment of administrator cannot be revoked

“449A. The appointment of a person as administrator of a company or of a deed of company arrangement cannot be revoked.

Court may remove administrator

“449B. On the application of the Commission or of a creditor of the company concerned, the Court may: 35

- (a) remove from office the administrator of a company under administration or of a deed of company arrangement; and
- (b) appoint someone else as administrator of the company or deed.

Vacancy in office of administrator of company

“449C.(1) Where the administrator of a company under administration:

- (a) dies; or
- 5 (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;

10 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:

- 15 (a) if the administrator was appointed by the Court under section 449B 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
 - 20 (ii) if the administration began because of an appointment under section 436B—a liquidator or provisional liquidator of the company; or
 - (iii) if the administration began because of an appointment under section 436C—a person who is entitled, or would apart from section 440B or 441D be entitled, to enforce the charge.

25

“(3) An appointment under subsection (1) by the company under administration must be made pursuant to a resolution of the board.

30 “(4) Within 5 business days after being appointed under subsection (1) as administrator of a company otherwise than by the Court, a person must convene a meeting of the company’s creditors so that they may:

- (a) determine whether to remove the person from office; and
- (b) if so, appoint someone else as administrator of the company.

“(5) A person must convene a meeting under subsection (4) by:

- 35 (a) giving written notice of the meeting to as many of the company’s creditors as reasonably practicable; and
- (b) causing notice of the meeting to be published:
 - (i) in a national newspaper; or
 - 40 (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction;

at least 2 business days before the meeting.

“(6) Where a company is under administration, but for some reason no administrator is acting, the Court may appoint a person as administrator on the application of the Commission or of an officer, member or creditor of the company.

“(7) Subsections (3) and (6) have effect despite section 437C. 5

Vacancy in office of administrator of deed of company arrangement

“449D.(1) Where the administrator of a deed of company arrangement:

(a) dies; or

(b) becomes prohibited from acting as administrator of the deed; 10
or

(c) resigns by notice in writing given to the company;

the Court may appoint someone else as administrator of the deed.

“(2) Where a deed of company arrangement has not yet terminated, but for some reason no administrator of the deed is acting, the Court may appoint a person as administrator of the deed. 15

“(3) An appointment may be made on the application of the Commission or of an officer, member or creditor of the company.

Remuneration of administrator

“449E.(1) The administrator of a company under administration, or of a deed of company arrangement, is entitled to: 20

(a) such remuneration as is fixed by a resolution of the company’s creditors passed at a meeting convened under section 439A, or under section 439A or 445F, as the case may be; or

(b) if no remuneration is so fixed—such remuneration as the Court fixes on the application of the administrator. 25

“(2) Where remuneration is fixed under paragraph (1)(a), the Court may, on the application of the administrator or of an officer, member or creditor of the company:

(a) review the remuneration; and 30

(b) confirm, increase or reduce it.

“(3) Subsection (2) has effect despite section 437C.

“Division 16—Notices about steps taken under Part

Appointment of administrator

“450A.(1) Where an administrator of a company is appointed under section 436A, 436B or 436C, the administrator must: 35

(a) lodge a notice of the appointment before the end of the next business day after the appointment; and

(b) cause such a notice to be published, within 3 business days after the appointment: 40

- (i) in a national newspaper; or
- (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction.

5 “(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.

10 “(3) As soon as practicable, and in any event before the end of the next business day, after an administrator of a company is appointed under section 436A, 436B or 436C, he or she must give a written notice of the appointment to:

- (a) each person who holds a charge on the whole, or substantially the whole, of the company’s property; and
- 15 (b) each person who holds 2 or more charges on property of the company where the property of the company subject to the respective charges together constitutes the whole, or substantially the whole, of the company’s property.

20 “(4) An administrator need not give a notice under subsection (3) to the person who appointed the administrator.

Execution of deed of company arrangement

“450B. As soon as practicable after a deed of company arrangement is executed, the deed’s administrator must:

- 25 (a) send to each creditor of the company a written notice of the execution of the deed; and
- (b) cause such a notice to be published:
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction;
 - 30 and
- (c) lodge a copy of the deed.

Failure to execute deed of company arrangement

35 “450C. As soon as practicable after a company contravenes subsection 444B(2), the deed’s administrator must:

- (a) lodge a notice that the company has failed to execute the instrument within the required period; and
- (b) cause a notice of the failure to be published as prescribed.

Termination of deed of company arrangement

40 “450D. Where a deed of company arrangement terminates because of paragraph 445C(b), the deed’s administrator must:

- (a) lodge a notice of the termination; and

- (b) send such a notice to each of the company's creditors; and
- (c) cause such a notice to be published as prescribed.

Notice in public documents etc. of company

“450E.(1) A company under administration must set out, in every public document, and in every eligible negotiable instrument, of the company, after the company's name where it first appears, the expression ‘(administrator appointed)’.

“(2) Until a deed of company arrangement terminates, the company must set out, in every public document, and in every eligible negotiable instrument, of the company, after the company's name where it first appears, the expression ‘(subject to deed of company arrangement)’.

Effect of contravention of this Division

“450F. 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

Appointment of 2 or more administrators of company

“451A.(1) Where a provision of this Law provides for an administrator of a company to be appointed, 2 or more persons may be appointed as administrators of the company.

“(2) Where, because of subsection (1), there are 2 or more administrators of a company:

- (a) a function or power of an administrator of the company may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the instrument or resolution appointing them otherwise provides; and
- (b) a reference in this Law to an administrator, or to the administrator, of a company is, in the case of the first-mentioned company, a reference to whichever one or more of those administrators the case requires.

Appointment of 2 or more administrators of deed of company arrangement

“451B.(1) Where a provision of this Law provides for an administrator of a deed of company arrangement to be appointed, 2 or more persons may be appointed as administrators of the deed.

“(2) Where, because of subsection (1), there are 2 or more administrators of a deed of company arrangement:

- (a) a function or power of an administrator of the deed may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the deed, or the

resolution or instrument appointing them, otherwise provides;
and

- 5 (b) a reference in this Law 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.

Effect of things done during administration of company

10 “451C. A payment made, transaction entered into, or any other act or thing done, in good faith, by, or with the consent of, the administrator of a company under administration:

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

Time for doing act does not run while act prevented by this Part

“451D. Where:

- 15 (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;

20 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.”

57. The respective headings to Part 5.4 of the Corporations Law, and to Division 1 of that Part, are repealed and the following Part and heading are substituted:

25 **“PART 5.4—WINDING UP IN INSOLVENCY**

“Division 1—When company to be wound up in insolvency

Order that insolvent company be wound up in insolvency

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

30 **Order made on application under section 260, 462 or 464**

“459B. Where, on an application under section 260, 462 or 464, the Court is satisfied that the company is insolvent, the Court may order that the company be wound up in insolvency.

Presumptions to be made in certain proceedings

35 “459C.(1) This section has effect for the purposes of:

- (a) an application under section 260, 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 5
- (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 floating charge on such property; or 10
- (d) an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such a charge; or
- (e) a person entered into possession, or assumed control, of such property for such a purpose; or 15
- (f) a person was appointed so to enter into possession or assume control (whether as agent for the chargee 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. 20

Contingent or prospective liability relevant to whether company solvent

“459D.(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. 25

“(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

Creditor may serve statutory demand on company 30

“459E.(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. 35

“(2) The demand:

- (a) if it relates to a single debt—must specify the debt and its amount; and 40
- (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

5 (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:

10 (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.

15 **When company taken to fail to comply with statutory demand**

“459F.(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.

20 “(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:

25 (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

30 (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

35 **Company may apply**

“459G.(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.

40 “(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.

5

Determination of application where there is a dispute or offsetting claim

“459H.(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.

10

“(2) The Court must calculate the substantiated amount of the demand in accordance with the formula:

$$\text{Admitted total} - \text{Offsetting total}$$

15

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;

20

‘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.

25

“(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:

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- (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:

35

- (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

40

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;

5 **‘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.

“(6) This section has effect subject to section 459J.

10 **Setting aside demand on other grounds**

“459J.(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

15 (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.

Effect of order setting aside demand

20 “459K. A statutory demand has no effect while there is in force under section 459H or 459J an order setting aside the demand.

Dismissal of application

“459L. Unless the Court makes, on an application under section 459J, an order under section 459H or 459J, the Court is to dismiss the application.

25 **Order subject to conditions**

“459M. An order under section 459H or 459J may be made subject to conditions.

Costs where company successful

30 “459N. 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

Who may apply for order under section 459A

35 “459P.(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) the Commission;
- (g) a prescribed agency.

5

“(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) the Commission.

10

“(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.

15

“(5) Except as permitted by this section, a person cannot apply for a company to be wound up in insolvency.

Application relying on failure to comply with statutory demand

“459Q. 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:

20

- (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.

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30

Period within which application must be determined

“459R.(1) An application for a company to be wound up in insolvency is to be determined within 6 months after it is made.

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“(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

40

(b) the order is made within that period as prescribed by subsection (1), or as last extended under this subsection, as the case requires.

5 “(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.

Company may not oppose application on certain grounds

10 “459S.(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

15 (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.

20 **Application to wind up joint debtors in insolvency**

“459T.(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.

25 “(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.

“PART 5.4A—WINDING UP BY THE COURT ON OTHER GROUNDS”.

Repeal of section 460

30 **58.** Section 460 of the Corporations Law is repealed.

General grounds on which company may be wound up by Court

59. Section 461 of the Corporations Law is amended by inserting in paragraph (d) “or of a recognised company” after “another company”.

Standing to apply for winding up

35 **60.** Section 462 of the Corporations Law is amended:

(a) by inserting before subsection (2) the following subsection:

“(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.”;

- (b) by omitting from subsection (2) “on a ground provided for by subsection 460(1) or section 461”;
- (c) by omitting from paragraph (2)(e) “or 453;” and substituting “; or”;
- (d) by omitting paragraphs (2)(f) and (g).

5

Repeal of section 463

61. Section 463 of the Corporations Law is repealed.

62. Section 465 of the Corporations Law is repealed and the following headings and sections are substituted:

“PART 5.4B—WINDING UP IN INSOLVENCY OR BY THE COURT

10

“Division 1—General

Notice of application

“465A. A person who applies under section 459P, 462 or 464 for a company to be wound up must:

15

- (a) lodge notice in the prescribed form that the application has been made; and
- (b) within 14 days after the application is made, serve a copy of it on the company; and
- (c) advertise the application as prescribed by the rules.

20

Substitution of applicants

“465B.(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.

25

“(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.

30

“(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.

35

Applicant to be given notice of grounds for opposing application

“465C. 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.”.

Court’s powers on hearing application

63. Section 467 of the Corporations Law is amended:

- (a) by inserting in subsection (1) “and section 467A” after “(2)”;
- (b) by omitting from paragraph (1)(a) “costs;” and substituting “costs, even if a ground has been proved on which the Court may order the company to be wound up on the application; or”;
- (c) by omitting from subsection (5) “a person referred to in paragraph 462(2)(c)” and substituting “a contributory”.

64. After section 467 of the Corporations Law the following sections are inserted:

Effect of defect or irregularity on application under Part 5.4 or 5.4A

“467A. 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).

Court may order winding up of company that is being wound up voluntarily

“467B. The Court may make an order under section 260, 459A, 459B or 461 even if the company is already being wound up voluntarily.”.

Avoidance of dispositions of property, attachments etc.

65. Section 468 of the Corporations Law is amended by omitting paragraph (2)(a) and substituting the following paragraphs:

- “(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 Law; 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”.
- 5

Insertion of Division heading

66. After section 470 of the Corporations Law the following heading is inserted:

“Division 1A—Effect of winding up order”.

10

Effect on creditors and contributories

67. Section 471 of the Corporations Law is amended by omitting subsection (2).

68. After section 471 of the Corporations Law the following sections are inserted in Division 1A of Part 5.4B:

15

Powers of other officers suspended during winding up

“471A.(1) While a company is being wound up in insolvency or by the Court, a person cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company, except:

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- (a) as a liquidator appointed for the purposes of the winding up; or
 - (b) as an administrator appointed for the purposes of an administration of the company beginning after the winding up order was made; or
 - (c) with the liquidator’s written approval; or
 - (d) with the approval of the Court.
- 25

“(2) While a provisional liquidator of a company is acting, a person cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company, except:

30

- (a) as a provisional liquidator of the company; or
 - (b) as an administrator appointed for the purposes of an administration of the company beginning after the provisional liquidator was appointed; or
 - (c) with the provisional liquidator’s written approval; or
 - (d) with the approval of the Court.
- 35

“(3) This section does not remove an officer of a company from office.

“(4) For the purposes of this section, a person is not an officer of a company merely because he or she is:

40

- (a) a receiver and manager, appointed under a power contained in an instrument, of property of the company; or
- (b) an employee of the company.

Stay of proceedings and suspension of enforcement process

5 “471B. 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
 - 10 (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.

Secured creditor’s rights not affected

15 “471C. Nothing in section 471A or 471B affects a secured creditor’s right to realise or otherwise deal with the security.”.

Court to appoint official liquidator

69. Section 472 of the Corporations Law is amended by adding at the end the following subsections:

- 20 “(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.

25 “(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.

30 “(6) The exercise by a company’s provisional liquidator of the powers conferred by subsection (4) is subject to the control of the Court, and a creditor or contributory, or the Commission, may apply to the Court in relation to the exercise or proposed exercise of any of those powers.”.

General provisions about liquidators

35 70. Section 473 of the Corporations Law is amended by omitting subparagraph (3)(b)(i) and substituting the following subparagraph:

- “(i) by resolution of the creditors; or”.

Custody and vesting of company's property

71. Section 474 of the Corporations Law is amended by omitting from subsection (1) everything before "appointed" and substituting "If a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company has been".

5

References to liquidator in certain provisions to include references to provisional liquidator

72. Sections 475, 536, 537, 538, 539 and 540 of the Corporations Law are each amended by inserting before subsection (1) the following subsection:

10

"(1A) In this section:
'liquidator' includes a provisional liquidator."

Powers of liquidator

73. Section 477 of the Corporations Law is amended:

(a) by omitting from subsection (1) everything before paragraph (1)(a) and substituting "Subject to this section, a liquidator of a company may:";

15

(b) by omitting from subsection (2) "The liquidator" and substituting "Subject to this section, a liquidator of a company";

(c) by inserting after paragraph (2)(c) the following paragraph:

20

"(ca) exercise the Court's powers under subsection 483(3) (except paragraph 483(3)(b)) in relation to calls on contributories;"

(d) by omitting paragraph (2)(j);

(e) by inserting after subsection (2) the following subsections:

25

"(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

30

(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 a charge) if:

35

(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;

40

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.”;

- (f) by omitting subsection (4);
- 5 (g) by inserting in subsection (6) “, or the Commission,” after “contributory”.

Application of property; list of contributories

74. Section 478 of the Corporations Law is amended by omitting subsections (1) and (2) and substituting the following subsections:

- 10 “(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
 - 15 (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:
 - 20 (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:
 - 25 (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.”.

30 **Orders for release or dissolution**

75. Section 481 of the Corporations Law is amended by omitting from paragraph (1)(a) “557” and substituting “539”.

Delivery of property to liquidator

- 35 76. Section 483 of the Corporations Law is amended by omitting from paragraph (3)(b) “so made” and substituting “made by the Court or the company’s liquidator”.

77. After section 486 of the Corporations Law the following sections are inserted:

Court may make order to prevent officer or related entity from avoiding liability to company

“486A.(1) On the application of a liquidator or provisional liquidator of a company, the Court may make one or more of the following:

- (a) an order prohibiting, either absolutely or subject to conditions, an officer or related entity of the company from taking or sending out of this jurisdiction or out of Australia money or other property of the company or of the officer or related entity; 5
- (b) an order appointing: 10
 - (i) a receiver or trustee, with specified powers, of property of an officer of the company, or of property of a related entity of the 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 the company that is not a natural person; 15
- (c) an order requiring an officer of the company, or a related entity of the 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 of the company, or a related entity of the company that is a natural person, from leaving Australia without the Court’s consent. 20

“(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 25
- (b) the Court is satisfied that there is at least a prima facie case that the officer 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 30
 - (ii) to account for property of the company; and
- (c) the Court is also satisfied that there is substantial evidence that the officer or related entity:
 - (i) has concealed or removed money or other property, has tried to do so, or intends to do so; or 35
 - (ii) has tried to leave 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 or related entity. 40

“(3) On hearing an application under subsection (1), the Court must have regard to any relevant application under section 1323.

“(4) Before considering an application 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 “(5) The Court must not require an applicant 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
10 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 contravene an order under this section that is applicable to the person.

15 “(9) This section has effect subject to the *Bankruptcy Act 1966*.

“(10) Nothing in this section affects any other powers of the Court.

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

20 “486B.(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

25 (b) the Court is satisfied that the person:

(i) is about to leave Australia in order to avoid:

(A) paying money payable to the company; or

(B) being examined about the company’s affairs; or

30 (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

35 (iii) has destroyed, concealed or removed books of the company or is about to do so.

“(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.

40 “(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) the Commission.”.

Delegation to liquidator of certain powers of Court

78. Section 488 of the Corporations Law is amended:

- (a) by omitting from paragraph (1)(c) “the making of calls and”; 5
- (b) by omitting subsection (2) and substituting the following subsection:

“(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.”. 10

79. Section 490 of the Corporations Law is repealed and the following section is substituted:

When company cannot wind up voluntarily

“490. Except with the leave of the Court, a company cannot resolve that it be wound up voluntarily if: 15

- (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.”. 20

Repeal of section 492

80. Section 492 of the Corporations Law is repealed.

Duty of liquidator where company turns out to be insolvent

81. Section 496 of the Corporations Law is amended by omitting from subsection (1) “shall as soon as practicable convene a meeting of the creditors.” and substituting the following: 25

“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; 30
- (c) convene a meeting of the company’s creditors;

and if he or she convenes such a meeting, the following subsections apply.”.

Powers and duties of liquidator

82. Section 506 of the Corporations Law is amended: 35

- (a) by omitting paragraphs (1)(a) and (b) and substituting the following paragraph:

“(b) exercise any of the powers that this Law confers on a liquidator in a winding up in insolvency or by the Court;”;

(b) by omitting paragraph (1)(d) and substituting the following paragraph:

5 “(d) exercise the Court’s powers under subsection 483(3) (except paragraph 483(3)(b)) in relation to calls on contributories;”;

(c) by inserting after subsection (1) the following subsection:

“(1A) Subsections 477(2A) and (2B) apply in relation to the liquidator as if:

10 (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.”.

15 **Arrangement: when binding on creditors**

83. Section 510 of the Corporations Law is amended by omitting paragraph (1)(b) and substituting the following paragraph:

“(b) binding on the creditors if sanctioned by a resolution of the creditors.”.

20 **Application of Part**

84. Section 513 of the Corporations Law is amended by inserting “in insolvency,” after “whether”.

85. After section 513 of the Corporations Law the following Division is inserted:

25 ***“Division 1A—When winding up taken to begin***

Winding up ordered by the Court

“513A. If the Court orders under section 260, 459A, 459B or 461 that a company be wound up, the winding up is taken to have begun or commenced:

30 (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

35 (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:

40 (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 5
 - (e) otherwise—on the day when the order was made.

Voluntary winding up

“513B. Where a company resolves by special resolution that it be wound up voluntarily, the winding up is taken to have begun or commenced: 10

- (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
- (b) if, immediately before the resolution was passed, the company was under administration—on the section 513C day in relation to the administration; or 15
- (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 20
- (d) if the resolution is taken to have been passed because, at a meeting convened under section 445F, the company’s creditors:
 - (i) passed a resolution terminating a deed of company arrangement executed by the company; and 25
 - (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;
- (e) otherwise—on the day on which the resolution was passed. 30

Section 513C day in relation to an administration under Part 5.3A

“513C. 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 35
- (b) otherwise—the day on which the administration began.

Validity of proceedings in earlier winding up

“513D. Where, at the time when:

- (a) the Court orders under section 260, 459A, 459B or 461 that a company be wound up; or 40

(b) a company resolves by special resolution that it be wound up voluntarily;

5 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.”.

Repeal of section 525

86. Section 525 of the Corporations Law is repealed.

10 87. Before section 531 of the Corporations Law the following sections are inserted in Division 3 of Part 5.6:

Officers to help liquidator

15 “530A.(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

20 (b) if the officer knows where other books relating to the company are—tell the liquidator or provisional liquidator where those books are.

25 “(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

30 (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.

35 “(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.

40 “(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, without reasonable excuse, fail to comply with subsection (1), (2), (3) or (4), or with a requirement under subsection (5). 5

“(7) In this section:
‘**officer**’, in relation to a company, means a person who is, or has been but is no longer, an officer (as defined by section 82A) of the company. 10

“(8) However, a person is not an officer of a company for the purposes of this section merely because he or she is or has been an employee of the company.

“(9) Nothing in this section limits the generality of anything else in it. 15

Liquidator's rights to company's books

“530B.(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; 20

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. 25

“(3) A person must not hinder or obstruct a liquidator of a company in obtaining possession of books of the company, unless the person is entitled, as against the company and the liquidator, to retain possession of the books.

“(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. 30

“(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.

“(6) A person must comply with a notice under subsection (4) except so far as the person is entitled, as against the company and the liquidator, to retain possession of the books. 35

“(7) In this section:
‘**liquidator**’ includes a provisional liquidator.

Warrant to search for, and seize, company's property or books

“530C.(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
- 5 (b) on application by the liquidator or provisional liquidator, as the case may be, by the Commission, the Court is satisfied that a person:
 - 10 (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.

15 “(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.

20 “(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.

25 “(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.”.

Books to be kept by liquidator

88. Section 531 of the Corporations Law is amended by inserting “or provisional liquidator” after “liquidator”.

30 **Disqualification of liquidator**

89. Section 532 of the Corporations Law is amended:

- (a) by inserting before subsection (1) the following subsection:

“(1A) In this section:

‘liquidator’ includes a provisional liquidator.”;

- 35 (b) by omitting from subsection (5) “carried by a majority of the creditors in number and value present and voting, either in person or by proxy, at a meeting” and substituting “of the creditors passed at a meeting of the creditors”.

When liquidator has qualified privilege

90. Section 535 of the Corporations Law is amended by adding at the end the following subsection:

“(2) In this section:
‘liquidator’ includes a provisional liquidator.”. 5

Books of company

91. Section 542 of the Corporations Law is amended by inserting in paragraph (3)(c) “by resolution” after “company”.

92. Section 553 of the Corporations Law is repealed and the following headings and sections are substituted: 10

“Subdivision A—Admission to proof of debts and claims

Debts or claims that are provable in winding up

“553.(1) Subject to this Division, 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. 15

“(2) Where, after the relevant date, an order is made under section 91 of the ASC Law 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. 20

Member cannot prove debt unless contributions paid

“553A. 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. 25

Insolvent companies—penalties and fines not generally provable

“553B.(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. 30

“(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.

Insolvent companies—mutual credit and set-off 35

“553C.(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
- 5 (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
10 time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

Debts or claims may be proved formally or informally

“553D.(1) A debt or claim must be proved formally if the liquidator, in accordance with the regulations, requires it to be proved formally.

- 15 “(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.

20 “(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.

Application of Bankruptcy Act to winding up of insolvent company

“553E. Subject to this Division and to sections 206RD and 279, in the winding up of an insolvent company the same rules are to prevail
25 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
30 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”.

General rule — compute amount as at relevant date

93. Section 554 of the Corporations Law is amended:
- 35 (a) by inserting in subsection (1) “or claim” after “debt” (wherever occurring);
- (b) by omitting from subsection (2) “required to be paid under subsection 557(1)” and substituting “admissible to proof under subsection 553(2)”.
- 40 94. After section 554 of the Corporations Law the following sections and headings are inserted:

Determination of value of debts and claims of uncertain value

“554A.(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: 5

- (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. 10

“(4) If:

- (a) the liquidator refers the question of the value of the debt or claim to the Court; or 15
- (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 20
- (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. 25

“(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 30
- (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: 35

- (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; 40

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.

Discounting of debts payable after relevant date

5 “554B. 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.

10 **Conversion into Australian currency of foreign currency debts or claims**

“554C.(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.

15 “(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
20 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
25 currency available at the Commonwealth Bank of Australia on the relevant date.

“Subdivision C—Special provisions relating to secured creditors of insolvent companies

Application of Subdivision

30 “554D.(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
35 the relevant date (as worked out in accordance with Subdivision B).

Proof of debt by secured creditor

“554E.(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
40 provisions of this Law 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 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, 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
- “(5) If the creditor has not realised or surrendered the security, the creditor may: 10
- (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 and the creditor’s estimate of its value.
- Redemption of security by liquidator 15**
- “554F.(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.
- “(2) The liquidator may, at any time, redeem the security on payment to the creditor of the amount of the creditor’s estimate of its value. 20
- “(3) If the liquidator is dissatisfied with the amount of the creditor’s estimate of the value of the security, the liquidator may require the property comprised in the security 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. 25
- “(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 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: 30
- (a) the liquidator is not entitled to exercise it; and 35
 - (b) subject to subsection (6), any equity of redemption or other interest in the property comprised in the security 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. 40

“(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.

5 Amendment of valuation

“554G.(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, 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 was made in good faith on a mistaken basis; or

15 (b) that the value of the security 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.

20 Repayment of excess

“554H.(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 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.

Subsequent realisation of security

35 “554J. 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; and

(b) subsequently:

40 (i) the creditor realises the security; or

(ii) the security is realised under section 554F;

the net amount realised is to be substituted for the estimated value of the security and section 554H applies as if the proof of debt had been amended accordingly under section 554G.

“Subdivision D—Priorities”.

Debts and claims proved to rank equally except as otherwise provided 5

95. Section 555 of the Corporations Law is amended by inserting “and claims” after “debts”.

Priority payments

96. Section 556 of the Corporations Law is amended:

(a) by omitting subsection (1) and substituting the following subsections: 10

“(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; 15

(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); 20

(c) next, the debts for which paragraph 443D(a) 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; 25

(d) if the winding up began within 2 months after the end of a period of official management of the company—next, debts of the company properly incurred by an official manager in carrying on the company’s business during the period of official management, except expenses covered by paragraph (a) of this subsection and deferred expenses; 30

(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; 35

(db) next, costs that form part of the expenses of the winding up because of subsection 539(6);

(dc) if the winding up began within 2 months after the end of a period of official management of the company—next, the remuneration, in respect of the period of official management, of any auditor appointed in accordance with Part 3.7; 40

- (dd) next, any other expenses (except deferred expenses) properly incurred by a relevant authority;
- (de) next, the deferred expenses;
- 5 (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, wages and superannuation contributions payable by the company in respect of services rendered to the company by employees before the relevant date;
- 10 (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:
 - 15 (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;
- 20 (h) subject to subsection (1C)—next, retrenchment payments payable to employees of the company.

25 “(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.

“(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.

30 “(1C) A payment under paragraph (1)(h) to an excluded employee of the company must not include an amount attributable to non-priority days.”;

(b) by inserting in subsection (2) the following definitions:

35 “**‘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
- 40 (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;
- '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;
- 'official manager'** includes a deputy official manager;
- 'relevant authority'**, in relation to a company, means any of the following:
- (a) in any case—a liquidator or provisional liquidator of the company;
 - (b) if the winding up began within 2 months after the end of a period of official management of the company—an official manager appointed for the purposes of the official management;
 - (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;
- 'spouse'** includes a de facto spouse;
- 'superannuation contribution'**, in relation to a company, means a contribution by the company to a fund for the purposes of making provision for, or obtaining, superannuation benefits for an employee of the company, or for dependants of such an employee."

Repeal of section 557

97. Section 557 of the Corporations Law is repealed.

Debts of a class to rank equally

5 **98.** Section 559 of the Corporations Law is amended by omitting all the words from and including “After” to and including “subsection 556(1)” and substituting “The debts of a class referred to in each of the paragraphs of subsection 556(1)”.

Advances for company to make priority payments in respect of employees

10 **99.** Section 560 of the Corporations Law is amended by inserting “or of superannuation contributions (within the meaning of section 556)” after “wages”.

Application of proceeds of contracts of insurance

100. Section 562 of the Corporations Law is amended by inserting in subsection (1) “(not being a contract of reinsurance)” after “insurance”.

15 **101.** After section 562 of the Corporations Law the following section is inserted:

Application of proceeds of contracts of reinsurance

“562A.(1) This section applies where:

20 (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.

25 “(2) Subject to subsection (4), if the amount received, after deducting expenses of or incidental to getting in that amount, equals or 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.

30 “(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;

‘Total amount owed’ means the total of all the amounts payable by the company under relevant contracts of insurance;

‘Reinsurance payment’ means the amount received under the contract of reinsurance, less any expenses of or incidental to getting in that amount. 5

“(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. 10

“(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: 15

(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 20

(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 25

(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. 30

“(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: 35

‘relevant contract of insurance’ means a contract of insurance entered into by the company, as insurer, before the relevant date.”.

102. After section 563 of the Corporations Law the following sections and heading are inserted:

Member’s debts to be postponed until other debts and claims satisfied 40

“563A. Payment of 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 to be postponed until all debts owed

to, or claims made by, persons otherwise than as members of the company have been satisfied.

“Subdivision E—Miscellaneous

Interest on debts and claims from relevant date to date of payment

5 “563B.(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
10 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 debts owed to members of the company as members
of the company (whether by way of dividends, profits or otherwise).

15 “(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:

- (a) the day on which the payment is made; and
- 20 (b) the future date, within the meaning of section 554B.

Debt subordination

“563C.(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
25 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
30 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.”.

35 **103.** The heading to Division 7 of Part 5.6 of the Corporations Law
is repealed and the following heading is substituted:

“Division 7—Effect on certain transactions”.

Undue preference

104. Section 565 of the Corporations Law is amended:

- (a) by inserting in subsection (1) “before the commencement of Part 5.7B,” after “incurred,”; 5
- (b) by omitting paragraphs (2)(a) and (b) and substituting the following paragraphs:
 - “(a) if the company was under official management at any time during the 6 months ending on the relation-back day—the day on which the official management commenced; or 10
 - (b) otherwise—the relation-back day.”;
- (c) by omitting from subsection (3) everything after “bankrupt is” and substituting “the relation-back day.”; 15
- (d) by omitting from subsection (4) “Any” and substituting “Subject to Part 5.3A, a”.

Effect of floating charge

105. Section 566 of the Corporations Law is amended by omitting “within 6 months before the commencement of the winding up” and substituting “before the commencement of Part 5.7B and within 6 months before the relation-back day”. 20

Liquidator’s right to recover in respect of certain transactions

106. Section 567 of the Corporations Law is amended:

- (a) by omitting from subsections (1) and (2) “within a period of 4 years before the commencement of the” and substituting “before the commencement of Part 5.7B and within 4 years before the relation-back day in relation to a”; 25
- (b) by omitting from paragraph (5)(a) “within the period of 6 months before the commencement of the” and substituting “before the commencement of Part 5.7B and within 6 months before the relation-back day in relation to a”. 30

Insertion of heading

107. Before section 568 of the Corporations Law the following heading is inserted:

“Division 7A—Disclaimer of onerous property”. 35

Disclaimer by liquidator; application to Court by party to contract

108. Section 568 of the Corporations Law is amended:

- (a) by omitting subsections (1), (2), (3), (4), (5), (6) and (7) and substituting the following subsections:

“(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:

- 5 (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
 - 10 (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:
- 15 (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,
 - 20 the contract or any property to which it relates.

“(1A) A liquidator cannot disclaim a contract (other than an unprofitable contract or a lease of land) except with the leave of the Court.

- 25 “(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.”;
- 30 (b) by omitting subsections (11) and (12).

109. After section 568 of the Corporations Law the following sections and heading are inserted:

Liquidator must give notice of disclaimer

- 35 “568A.(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
 - 40 (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. 5

“(2) If paragraph (1)(c) applies, the liquidator must cause notice of the disclaimer to be published:

- (a) if the property is situated in a jurisdiction and a daily newspaper circulates generally in that jurisdiction—in a daily newspaper that so circulates; and 10

- (b) in each jurisdiction in which:

- (i) the company has carried on business during or after the period of 6 months ending when the winding up began; and 15

- (ii) a daily newspaper circulates generally;

in a daily newspaper that circulates generally in that jurisdiction; whether on the same or different days.

Application to set aside disclaimer before it takes effect 20

“568B.(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 25

- (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 30

- (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 35

- (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. 40

When disclaimer takes effect

“568C.(1) A disclaimer takes effect if, and only if:

- 5 (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.

10 “(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).

15 “(3) A disclaimer that takes effect because of subsection (1) is taken to have taken effect on the day after:

- (a) if:
 - (i) the liquidator gave to a person notice of the disclaimer because of paragraph 568A(1)(b); or
 - 20 (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
- 25 (b) otherwise—the day when the liquidator lodged notice of the disclaimer.

Effect of disclaimer

30 “568D.(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.

35 “(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.

Application to set aside disclaimer after it has taken effect

40 “568E.(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: 5

(a) may by order set aside the disclaimer; and

(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. 10

“(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: 15

(a) the company’s creditors; and

(b) persons who have changed their position in reliance on the disclaimer taking effect.

Court may dispose of disclaimed property

“568F.(1) The Court may order that disclaimed property vest in, or be delivered to: 20

(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). 25

“(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 Law has not discharged; and 30

(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: 35

(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. 40

“Division 7B—Effect on enforcement process against company’s property”.

110. Before section 588A of the Corporations Law the following headings and sections are inserted in Part 5.7A:

5 ***“Division 1—Application of Part 5.3A to matters arising under corresponding laws***

Application in this jurisdiction

“588AA.(1) This section has effect for the purposes of:

- (a) the administration of a recognised company; or
- 10 (b) a deed of company arrangement executed by a recognised company;

in so far as those purposes concern this jurisdiction.

“(2) Part 5.3A applies in relation to the recognised company in the same way, as nearly as practicable, as it applies in relation to a
15 company.

“(3) Without limiting subsection (2), the administrator of the recognised company, or of the deed, as the case may be, may perform or exercise any function or power under Part 5.3A of a kind that an administrator of a company, or of a deed of company arrangement
20 executed by a company, may perform or exercise under that Part.

Enforcement of orders

“588AB.(1) This section applies if:

- (a) the Federal Court makes under Part 5.3A of the Corporations Law of another jurisdiction; or
- 25 (b) the Supreme Court of another jurisdiction makes under Part 5.3A of the Corporations Law of any jurisdiction; or
- (c) the Supreme Court of this jurisdiction makes under Part 5.3A of the Corporations Law of another jurisdiction;

30 an order in connection with the administration of, or a deed of company arrangement executed by, a company within the meaning of that Part of that Law.

“(2) The order has effect, and may be enforced in all respects, in this jurisdiction as if it were an order made under Part 5.3A, in relation to a company, by:

- 35 (a) if paragraph (1)(a) applies—the Federal Court; or
- (b) if paragraph (1)(b) or (c) applies—the Supreme Court of this jurisdiction.

“Division 2—Winding up recognised companies”.

111. After Part 5.7A of the Corporations Law the following Part is inserted:

**“PART 5.7B—RECOVERING PROPERTY OR COMPENSATION
FOR THE BENEFIT OF CREDITORS OF INSOLVENT
COMPANY**

5

“Division 1—Preliminary

Secured debt may become unsecured

“588D. 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. 10

Presumptions to be made in recovery proceedings

“588E.(1) In this section:

‘recovery proceeding’, in relation to a company, means:

- (a) an application under section 588FF by the company’s liquidator; 15
or
- (b) proceedings begun under subsection 588FH(2) by the company’s liquidator; or
- (c) proceedings, in so far as they relate to the question whether a charge created by the company is void to any extent, as against the company’s liquidator, because of subsection 588FJ(2); or 20
- (d) proceedings begun under subsection 588FJ(6) by the company’s liquidator; or
- (e) proceedings for a contravention of section 588G 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 25
- (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. 30

“(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; 35

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), (6) and (7), if it is proved that the company: 40

- (a) has contravened subsection 289(1) by failing to keep accounting records that correctly record and explain:
- (i) its transactions (including any transactions as trustee) during a particular period (**“the relevant period”**); and
 - 5 (ii) its financial position during the relevant period;
- or by failing to keep such accounting records in the manner required by paragraph 289(1)(b); or
- (b) has contravened subsection 289(2) by failing to retain such accounting records for the period required by that subsection;
- 10 it must be presumed that the company was insolvent throughout the relevant period.

“(5) Paragraph (4)(a) does not apply in relation to a contravention of subsection 289(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 insolvent because of a contravention of subsection 289(2), if it is proved that:

- (a) the contravention was due solely to someone destroying, concealing or removing accounting records of the company; and
 - 20 (b) none of those accounting 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 accounting records.
- 25

“(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:

- 35 (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 40 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
- (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.

“Division 2—Voidable transactions

Unfair preferences

“588FA.(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

- 5 (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.

Uncommercial transactions

10 “588FB.(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:

- 15 (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
20 (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
25 (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.

Insolvent transactions

30 “588FC. 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;
35 (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
40 (ii) a person doing an act, or making an omission, for the purpose of giving effect to the transaction.

Unfair loans to a company

“588FD.(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;

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even if the interest is, or the charges are, no longer extortionate.

“(2) In determining:

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- (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:

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- (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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Voidable transactions

“588FE.(1) Where a company is being wound up, a transaction of the company that was entered into at or after the commencement of this Part may be voidable because of any one or more of the following subsections.

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“(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.

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“(3) The transaction is voidable if:

35

- (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.

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“(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.

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“(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.

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“(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.

“(7) A reference in this section to doing an act includes a reference to making an omission.

20 **Court may make orders about voidable transactions**

“588FF.(1) Where, on the application of a company’s liquidator, the 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:

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(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;

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(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:

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(i) money that the company has paid under the transaction;

(ii) proceeds of property that the company has transferred under the transaction;

40

(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; 5
- (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; 10
- (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. 15

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

“(3) An application under subsection (1) may only be made:

- (a) within 3 years after the relation-back day; or 20
- (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator within those 3 years.

Transaction not voidable as against certain persons

“588FG.(1) The 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: 25

- (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: 30
 - (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 35
 - (B) a reasonable person in the person’s circumstances would have had no such grounds for so suspecting.

“(2) The 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 and it is proved that: 40

- (a) the person became a party to the transaction in good faith; and
- (b) at the time when the person became such a party:

- (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
- 5 (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.

10 **Liquidator may recover from related entity benefit resulting from insolvent transaction**

“588FH.(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
- 15 (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.

20 “(2) The company's liquidator may, by proceedings in a court of competent jurisdiction, recover from the related entity, as a debt due to the company, an amount equal to the amount referred to in paragraph (1)(c).

25 “(3) In deciding what orders (if any) to make under section 588FF on an application relating to the transaction, the 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
 - 30 (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).

Creditor who gives up benefit of unfair preference may prove for preferred debt

35 “588FI.(1) This section applies where:

- (a) a transaction is an unfair preference given by a company to a creditor of the company after the commencement of this Part; and
- 40 (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) The 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. 5

Floating charge created within 6 months before relation-back day

“588FJ.(1) This section applies if:

- (a) a company is being wound up in insolvency; and
- (b) the company created a floating charge on property of the company at a particular time that is at or after the commencement of this Part and: 10
 - (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 charge is void, as against the company’s liquidator, except so far as it secures: 15

- (a) an advance paid to the company, or at its direction, at or after that time and as consideration for the charge; 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 20
- (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. 25

“(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: 30

- (a) the chargee; or
- (b) if the chargee was a body corporate—a related entity of the body.

“(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. 35

“(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 charge 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 40

court of competent jurisdiction, recover from the chargee, as a debt due to the company, the amount worked out in accordance with the formula:

Unsecured amount — Realisation costs

5 where:

‘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);

10 ‘Realisation costs’ means so much (if any) of the costs and expenses of enforcing the charge as is attributable to realising the realised amount.

“Division 3—Director’s duty to prevent insolvent trading

Director’s duty to prevent insolvent trading by company

“588G.(1) This section applies if:

15 (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

20 (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 Part.

25 “(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.

30 “(3) This section is a civil penalty provision as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening it, or of being involved in a contravention of it.

35 “(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.

Defences

40 “588H.(1) This section has effect for the purposes of proceedings for a contravention of section 588G 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.

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“(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.

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“(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.

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“(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:

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(a) any action the person took with a view to appointing an administrator of the company; and

(b) when that action was taken; and

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(c) the results of that action.

“Division 4—Director liable to compensate company

“Subdivision A—Proceedings against director

On application for civil penalty order, Court may order compensation

“588J.(1) Where, on an application for a civil penalty order against a person in relation to a contravention of section 588G, the Court is satisfied that:

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(a) the person committed the contravention in relation to the incurring of a debt by a company; and

(b) the debt is wholly or partly unsecured; and

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(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;

5 the Court may (whether or not it makes an order under subsection 1317EA(3)) 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 section 588G, unless the application was made under Division 4 of Part 9.4B.

10 “(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

15 (b) only on the question whether the Court should order the person to pay compensation to the company.

Criminal court may order compensation

“588K.(1) If:

20 (a) a court finds a person guilty of an offence constituted by a contravention of section 588G 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

25 (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.

30 Note: Section 73A defines when a court is taken to find a person guilty of an offence.

“(2) If:

(a) a court declares under Division 4 of Part 9.4B that a person has, by failing to prevent a company from incurring a debt, contravened section 588G in relation to the company; and

35 (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;

40 the court may (whether or not it makes an order under subsection 1317EA(3)) order the first-mentioned person to pay to the company compensation equal to the amount of that loss or damage.

Enforcement of order under section 588J or 588K

“588L. 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.

Recovery of compensation for loss resulting from insolvent trading 5

“588M.(1) This section applies where:

(a) a person (in this section called the ‘director’) has contravened section 588G 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 10

(c) the debt was wholly or partly unsecured when the loss or damage was suffered; and

(d) the company is being wound up; 15

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. 20

“(2) The company’s liquidator may, by proceedings in a court of competent jurisdiction, 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, by proceedings in a court of competent jurisdiction, recover from the director, as a debt due to the creditor, an amount equal to the amount of the loss or damage. 25

“(4) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

Avoiding double recovery 30

“588N. 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 any other proceedings under that section in relation to the incurring of the debt.

Effect of sections 588J, 588K and 588M 35

“588P. 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. 40

Certificates evidencing contravention

“588Q. 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
 - 5 (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 section 588G in relation to the company; or
 - 10 (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
 - 15 (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:
- 20 (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**25 Creditor may sue for compensation with liquidator’s consent**

“588R.(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.

30 “(2) Subsection (1) has effect despite section 588T, but subject to section 588U.

Creditor may give liquidator notice of intention to sue for compensation

35 “588S. 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
- 40 (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.

When creditor may sue for compensation without liquidator's consent

“588T.(1) This section applies where a notice is given under section 588S. 5

“(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 10
- (b) on an application made after those 3 months, the court has given leave for the proceedings to begin.

“(3) If: 15

- (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: 20

- (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.

Events preventing creditor from suing 25

“588U.(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 30
- (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 section 588G in relation to the incurring of the debt. 35

“(2) Subsection (1) has effect despite sections 588R and 588T.

“Division 5—Liability of holding company for insolvent trading by subsidiary

When holding company liable

“588V.(1) A corporation contravenes this section if:

- 5 (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
- 10 (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:
- 15 (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:
- 20 (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 Part.

25 “(2) A corporation that contravenes this section is not guilty of an offence.

Recovery of compensation for loss resulting from insolvent trading

“588W.(1) Where:

- 30 (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
- 35 damage was suffered; and
- (d) the company is being wound up;

the company’s liquidator may, by proceedings in a court of competent jurisdiction, recover from the corporation, as a debt due to the company, an amount equal to the amount of the loss or damage.

40 “(2) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

Defences

“588X.(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. 5

“(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): 10

(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 15

(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. 20

“(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. 25

“(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). 30

“*Division 6—Application of compensation under Division 4 or 5*”

Application of amount paid as compensation

“588Y.(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. 35

“(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 40

(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;

5 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.

10 “(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).

15 ***“Division 7—Person managing company while disqualified may become liable for company's debts***

Court may make order imposing liability

“588Z. Where:

- (a) a company is being wound up; and
- 20 (b) at or after the commencement of this Part and within 4 years before the relation-back day, a person contravened:
 - (i) section 229, 230, 599, 600 or 1317EF; or
 - (ii) a previous law corresponding to a section referred to in subparagraph (i);

25 by managing the company (as defined by section 91A);

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.”.

Interpretation and application

112. Section 589 of the Corporations Law is amended:

30 (a) by omitting paragraph (1)(c) and substituting the following paragraphs:

- “(ba) of which a provisional liquidator has been appointed;
- (c) that is or has been under administration;
- 35 (ca) that has executed a deed of company arrangement, even if the deed has since terminated;”;

(b) by omitting from paragraph (2)(a) “4” and substituting “3”;

(c) by omitting paragraph (b) of the definition of “appropriate officer” in subsection (5) and substituting the following paragraphs:

40 “(aa) in relation to a company of which a provisional liquidator has been appointed—the provisional liquidator;

- (b) in relation to a company that is or has been under administration—the administrator;
- (ba) in relation to a company that has executed a deed of company arrangement—the deed’s administrator;”;
- (d) by omitting paragraph (a) of the definition of “relevant day” in subsection (5) and substituting the following paragraphs: 5
 - “(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 10
 - (ii) otherwise—the winding up is taken because of Division 1A of Part 5.6 to have begun; 15
 - (aa) in relation to a company of which a provisional liquidator has been appointed—the provisional liquidator was appointed;”;
- (e) by omitting paragraph (b) of the definition of “relevant day” in subsection (5) and substituting the following paragraphs: 20
 - “(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;”.

Offences by officers of certain companies 25

113. Section 590 of the Corporations Law is amended:

- (a) by omitting from each of paragraphs (1)(a), (c), (g) and (h) “5 years” and substituting “10 years”;
- (b) by inserting in subparagraph (1)(b)(ii) “(except books of which the person is entitled, as against the company and the appropriate officer, to retain possession)” after “company”. 30

Incurring of certain debts; fraudulent conduct

114. Section 592 of the Corporations Law is amended by inserting in paragraph (1)(a) “before the commencement of Part 5.7B” after “debt”. 35

Inducement to be appointed liquidator etc. of company

115. Section 595 of the Corporations Law is amended by omitting everything after “some other person,” and substituting the following: “as:

- (a) a liquidator or provisional liquidator of the company; or 40
- (b) an administrator of the company; or

- (c) an administrator of a deed of company arrangement executed, or to be executed, by the company; or
- (d) a receiver, or a receiver and manager, of property of the company; or
- 5 (e) a trustee or other person to administer a compromise or arrangement made between the company and any other person or persons.”.

116. Before section 597 of the Corporations Law the following heading and sections are inserted in Part 5.9:

10 “*Division 1—Examining a person about a corporation*”

Mandatory examination

“596A. 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
- 15 (b) the Court is satisfied that the person is an examinable officer of the corporation or was such an officer 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
 - 20 (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—
 - 25 when the winding up began; or
 - (iv) otherwise—when the application is made.

Discretionary examination

“596B.(1) The Court may summon a person for examination about a corporation’s examinable affairs if:

- 30 (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
 - 35 (ii) may be able to give information about examinable affairs of the corporation.

“(2) This section has effect subject to section 596A.

Affidavit in support of application under section 596B

“596C.(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. 5

Content of summons

“596D.(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 10
- (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: 15

- (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. 20

Notice of examination

“596E. 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 25
- (b) each eligible applicant in relation to the corporation, except:
 - (i) the person who applied for the examination; and
 - (ii) if a person authorised by the Commission applied for the examination—the Commission; and 30
 - (iii) a person who is such an eligible applicant only because the person is authorised by the Commission.

Court may give directions about examination

“596F.(1) Subject to section 597, the Court may at any time give one or more of the following: 35

- (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; 40

- (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;
- 5 (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.

10 “(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).”.

Conduct of examination

15 **117.** Section 597 of the Corporations Law is amended:

- (a) by omitting subsections (1), (2) and (3);
- (b) by omitting from subsection (4) “under this section shall” and substituting “is to”;
- 20 (c) by omitting subsection (5) and substituting the following subsections:

“(5A) Any of the following may take part in an examination:

- (a) the Commission;
 - (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.
- 25

“(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.”.

- 30 (d) by omitting from subsection (6) “ordered under subsection (3)” and substituting “summoned under section 596A or 596B”;
- (e) by omitting from paragraph (6)(a) “order” and substituting “summons”;
- (f) by omitting subsections (7), (8) and (9) and substituting the following subsections:

35 “(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
- 40 (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. 5

“(9A) A person may comply with a direction under subsection (9) by causing the books to be produced at the examination.”;

- (g) by omitting subsection (11) and substituting the following subsection: 10

“(10A) A person must not, without reasonable excuse, refuse or fail to comply with a direction under subsection (9).”;

- (h) by omitting from subsections (12) and (12A) “held under an order under subsection (3)”;

- (i) by omitting from subsection (13) “under this section”; 15

- (j) by inserting after subsection (14) the following subsection:

“(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 20
 - (iii) a creditor of the corporation; and

- (b) is to be open for inspection by anyone else on paying the prescribed fee.”;

- (k) by omitting from subsections (15), (16) and (17) “section” (wherever occurring) and substituting “Division”; 25

- (l) by omitting subsection (18).

118. After section 597 of the Corporations Law the following sections and heading are inserted:

When Court is to require affidavit about corporation’s examinable affairs 30

“597A.(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 examinable officer of the corporation or was such an officer during or after the 2 years ending: 35

- (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 40

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

5 (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:

10 (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.

15 “(3) A person must not, without reasonable excuse, refuse or fail to comply with a requirement made of the person under subsection (1).

“(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.

20 **Costs of unnecessary examination or affidavit**

“597B. 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 may order some or all of the costs incurred by the person because of the
25 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”.

30 **Order against person concerned with corporation**

119. Section 598 of the Corporations Law is amended:

(a) by omitting subsection (1);

(b) by omitting from subsection (2) “the Commission or a prescribed person,” and substituting “an eligible applicant,”.

35 120. After section 600 of the Corporations Law the following Division and heading are inserted:

“Division 3—Provisions applying to various kinds of external administration

Powers of Court where outcome of voting at creditors’ meeting determined by related entity

“600A.(1) Subsection (2) applies where, on the application of a creditor of a company or Part 5.1 body, the Court is satisfied: 5

- (a) that a proposed resolution has been voted on at:
 - (i) in the case of a company—a meeting of creditors of the company held:
 - (A) under Part 5.3A or a deed of company arrangement executed by the company; or 10
 - (B) in connection with winding up the company; or
 - (ii) in the case of a Part 5.1 body—a meeting of creditors, or of a class of creditors, of the body held under Part 5.1; and 15
- (b) that, if the vote or votes that a particular related creditor, or particular related creditors, of the company or body cast on the proposed resolution had been disregarded for the purposes of determining whether or not the proposed resolution was passed, the proposed resolution: 20
 - (i) if it was in fact passed—would not have been passed; or
 - (ii) if in fact it was not passed—would have been passed; or the question would have had to be decided on a casting vote; and
- (c) that the passing of the proposed resolution, or the failure to pass it, as the case requires: 25
 - (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:
 - (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 35
 - (B) the nature of the relationship between the related creditor and the company or body, or of the respective relationships between the related creditors and the company or body; and 40
 - (C) any other relevant matter.

“(2) The Court may make one or more of the following:

- 5
- (a) if the proposed resolution was passed—an order setting aside the resolution;
 - (b) an order that the proposed resolution be considered and voted on at a meeting of the creditors of the company or 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:
 - 10 (i) the proposed resolution; or
 - (ii) a resolution to amend or vary the proposed resolution;
 - (d) such other orders as the Court thinks necessary.

“(3) In this section:

- 15 **‘related creditor’**, in relation to a company or 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 company or body.

Review by Court of resolution of creditors passed on casting vote of chairperson of meeting

20 “600B.(1) This section applies if, because the person presiding at the meeting exercises a casting vote, a resolution is passed at a meeting of creditors of a company held:

- (a) under Part 5.3A or a deed of company arrangement executed by the company; or
- (b) in connection with winding up the company.

25 “(2) A person may apply to the Court for an order setting aside or varying the resolution, but only if:

- (a) the person voted against the resolution in some capacity (even if the person voted for the resolution in another capacity); or
 - (b) a person voted against the resolution on the first-mentioned person’s behalf.
- 30

“(3) On an application, the Court may:

- (a) by order set aside or vary the resolution; and
- (b) if it does so—make such further orders, and give such directions, as it thinks necessary.

35 “(4) On and after the making of an order varying the resolution, the resolution has effect as varied by the order.

Court’s powers where proposed resolution of creditors lost on casting vote of chairperson of meeting

40 “600C.(1) This section applies if, because the person presiding at the meeting exercises a casting vote, or refuses or fails to exercise such a vote, a proposed resolution is not passed at a meeting of creditors of a company held:

- (a) under Part 5.3A or a deed of company arrangement executed by the company; or
- (b) in connection with winding up the company.

“(2) A person may apply to the Court for an order under subsection (3), but only if: 5

- (a) the person voted for the proposed resolution in some capacity (even if the person voted against the proposed resolution in another capacity); or
- (b) a person voted for the proposed resolution on the first-mentioned person’s behalf. 10

“(3) On an application, the Court may:

- (a) order that the proposed resolution is taken to have been passed at the meeting; and
- (b) if it does so—make such further orders, and give such directions, as it thinks necessary. 15

“(4) If an order is made under paragraph (3)(a), the proposed resolution:

- (a) is taken for all purposes (other than those of subsection (1)) to have been passed at the meeting; and
- (b) is taken to have taken effect: 20
 - (i) if the order specifies a time when the proposed resolution is to be taken to have taken effect—at that time, even if it is earlier than the making of the order; or
 - (ii) otherwise—on the making of the order.

Interim order on application under section 600A, 600B or 600C 25

“600D.(1) Where:

- (a) an application under subsection 600A(1), 600B(2) or 600C(2) 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. 30

“(2) An interim order must be expressed to apply until the application is determined, but may be varied or discharged.

Order under section 600A or 600B does not affect act already done pursuant to resolution

“600E. An act done pursuant to a resolution as in force before the making under section 600A or 600B 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. 35

Limitation on right of suppliers of essential services to insist on payment as condition of supply

“600F.(1) If:

- 5 (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 this jurisdiction; and
- (b) the company owes an amount to the supplier in respect of the supply of the essential service before the effective day;
- 10 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.

15 “(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 section commenced;

‘eligible company’ means a company:

- 20 (a) that is being wound up; or
- (b) a provisional liquidator of which is acting; or
- (c) that is under administration; or
- (d) that has executed a deed of company arrangement that has not yet terminated; or
- 25 (e) a receiver, or receiver and manager, of property of which is acting;

‘essential service’ means:

- (a) electricity; or
- (b) gas; or
- 30 (c) water; or
- (d) a telecommunications service within the meaning of the *Telecommunications Act 1991*;

‘relevant authority’, in relation to an eligible company, means:

- (a) the liquidator; or
- 35 (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.

“Division 4—Transitional”.

121. After section 1091 of the Corporations Law the following section is inserted:

Rights of trustee of estate of bankrupt shareholder

- “1091A.(1) Where: 5
- (a) because of the *Bankruptcy Act 1966*, a share in a company, being part of the property of a bankrupt, vests in the trustee of the bankrupt’s estate; and
 - (b) the bankrupt is the registered holder of that share;
- this section applies whether or not the trustee has been registered as the holder of the share. 10
- “(2) On producing such information as the company’s directors properly require, the trustee is entitled to:
- (a) the same dividends and other benefits; and
 - (b) the same rights, for example, but without limitation, rights in relation to: 15
 - (i) meetings of the company; or
 - (ii) documents, including notices of such meetings; or
 - (iii) voting; or
 - (iv) inspection of the company’s records; 20
- as the bankrupt would be entitled to if he or she were not a bankrupt.
- “(3) The trustee has the same rights:
- (a) to transfer the share; and
 - (b) to require a person to do an act or give a consent in connection with completing or registering a transfer of the share; 25
- as the bankrupt would have if he or she were not a bankrupt.
- “(4) If the trustee transfers the share, the transfer is as valid as if the trustee had been registered as the holder of the share when the trustee executed the instrument of transfer.
- “(5) A person or body whose consent or approval is required for the transfer of shares in the company must not unreasonably withhold consent or approval for the transfer of the share by the trustee. 30
- “(6) A person who contravenes subsection (5) is not guilty of an offence.
- “(7) If: 35
- (a) the company’s constitution requires:
 - (i) the share to be offered for purchase to a member of the company; or
 - (ii) an invitation to buy the share to be issued to such a member; and 40

(b) as at the end of a reasonable period after the trustee so offers the share, or so issues such an invitation, no such member has agreed to buy the share from the trustee at a reasonable price; the trustee may sell and transfer the share to a person other than such a member.

“(8) A provision of the company’s constitution is void as against the trustee in so far as, apart from this section, it would affect rights attached to the share:

- (a) because the bankrupt is a bankrupt; or
- (b) because of some event that led to the bankrupt becoming, or that indicated that the bankrupt was about to become, or might be about to become, a bankrupt; or
- (c) for reasons including a reason referred to in paragraph (a) or (b).

“(9) Nothing in this section limits the generality of anything else in it.

“(10) This section has effect despite anything in the company’s constitution.”.

Schedule 3

122. Schedule 3 to the Corporations Law is amended:

(a) by omitting:

“Section 436:

Penalty: \$1,000 or imprisonment for 3 months, or both.

Section 437:

Penalty: \$1,000 or imprisonment for 3 months, or both.

Section 457:

Penalty: \$1,000 or imprisonment for 3 months, or both.” and substituting:

“Subsection 437C(1):

Penalty: \$2,500 or imprisonment for 6 months, or both.

Subsection 437D(5):

Penalty: \$2,500 or imprisonment for 6 months, or both.

Subsection 438B(4):

Penalty: \$5,000 or imprisonment for 1 year, or both.

Subsection 438C(5):

Penalty: \$5,000 or imprisonment for 1 year, or both.”;

Section 448B:

Penalty: \$2,500 or imprisonment for 6 months, or both.

Section 448C:	
Penalty: \$2,500 or imprisonment for 6 months, or both.	
Section 448D:	
Penalty: \$2,500 or imprisonment for 6 months, or both.	
Section 450E:	5
Penalty: \$1,000.	
Section 471A:	
Penalty: \$2,500 or imprisonment for 6 months, or both.”;	
(b) by inserting before “ Section 494: ”:	
“ Subsection 486A(8):	10
Penalty: \$10,000 or imprisonment for 2 years, or both.”;	
(c) by inserting before “ Section 532: ”:	
“ Subsection 530A(6):	
Penalty: \$5,000 or imprisonment for 1 year, or both.	
Subsections 530B(3) and (6):	15
Penalty: \$5,000 or imprisonment for 1 year, or both.”;	
(d) by omitting:	
“ Section 597:	
Penalty: \$10,000 or imprisonment for 2 years, or both.”	20
and substituting:	
“ Subsection 596F(3):	
Penalty: \$10,000 or imprisonment for 2 years, or both.	
Subsections 597(6), (7), (10A) and (13):	
Penalty: \$10,000 or imprisonment for 2 years, or both.	
Subsection 597A(3):	25
Penalty: \$10,000 or imprisonment for 2 years, or both.”.	
Consequential amendments of the Corporations Law	
123. The Corporations Law is amended as set out in Schedule 1.	
<i>Division 2—Consequential amendment of the Australian Securities Commission Act 1989²</i>	30
Interpretation	
124. Section 5 of the Principal Act is amended by inserting after paragraph (b) of the definition of “officer” in subsection (1) the following paragraphs:	
“(ba) an administrator of the body;	35

- (bb) an administrator of a deed of company arrangement executed by the body;”.

Division 3—Consequential amendments of other Acts

Schedule 2

- 5 **125.** The Acts specified in Schedule 2 are amended as set out in that Schedule.

**PART 5—IMPLEMENTING THE CLEARING HOUSE
SUBREGISTER SYSTEM**

Dictionary

- 10 **126.** Section 9 of the Corporations Law is amended:
- (a) by adding at the end of the definition of “document” the following note:
- “Note: In Division 3 of Part 7.13, ‘document’ has a meaning affected by the definition of ‘document’ in subsection 1097(1).”;
- (b) by adding at the end of the definition of “prospectus” the following note:
- “Note: A written notice or instrument issued by the securities clearing house will not generally constitute a prospectus—see subsection 779J(1).”;
- 15 (c) by adding at the end of the definition of “relevant interest” the following note:
- “Note: The activities of the securities clearing house will not generally give rise to a relevant interest—see subsection 779J(2).”;
- (d) by adding at the end of the definition of “securities business” the following note:
- “Note: The activities of the securities clearing house will not generally constitute a securities business—see subsection 779J(1).”;
- 20 (e) by inserting the following definitions:
- “ ‘proper SCH transfer’ means:
- (a) an SCH-regulated transfer of a quoted security or quoted right effected in accordance with the SCH business rules; or
- (b) a transfer that is taken by section 1097D to be a proper SCH transfer;
- 25 ‘quoted right’ has the meaning given by section 1097A;
- Note: The meaning of ‘quoted right’ may be extended by the SCH business rules (under section 1097B) or by a Commission declaration (under section 1097C).
- ‘quoted security’ has the meaning given by section 1097A;
- Note: The meaning of ‘quoted security’ may be extended by the SCH business rules (under section 1097B) or by a Commission declaration (under section 1097C).
- ‘SCH’ is short for securities clearing house;

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

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

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

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

Application not to be granted unless applications also made under corresponding laws

127. Section 102A of the Corporations Law is amended by inserting in subsection (3) "779B," after "770,".

128. The Corporations Law is amended by inserting after section 779 the following Part:

"PART 7.2A—THE SECURITIES CLEARING HOUSE

Interpretation

"779A. In this Part, unless the contrary intention appears:

'disciplinary proceeding', in relation to the securities clearing house, means:

(a) a proceeding under the SCH business rules that may result in the disciplining of an SCH participant; or

(b) an appeal under the SCH business rules from such a proceeding;

'disciplining', in relation to a person in the person's capacity as an SCH participant, includes, but is not limited to, taking action that has the effect of revoking or suspending the person's status as an SCH participant.

Approval of securities clearing house

"779B.(1) A body corporate may apply to the Commission in writing for approval by the Minister as the securities clearing house.

"(2) Subject to section 102A, if a body so applies, the Minister may by writing approve the body as the securities clearing house if, and only if, he or she is satisfied that:

(a) the body's business rules:

(i) include satisfactory provisions about:

(A) the facilities that the body proposes to provide for the settlement of transactions involving quoted securities or quoted rights; and

- 5 (B) the facilities that the body proposes to provide for the registration of transfers (within the meaning of Division 3 of Part 7.13) of quoted securities or quoted rights; and
- (C) any other facilities that the body proposes to provide (such as facilities in relation to dealings in quoted securities or quoted rights); and
- 10 (ii) include satisfactory provisions about the disciplining of persons (being persons who will be SCH participants if the approval is given) who contravene the business rules or this Chapter; and
- (iii) are otherwise satisfactory; and
- (b) the interests of the public will be served by granting the application.

15 “(3) An approval comes into force on the day specified in the instrument giving the approval, being the day on which the approval is given or a later day.

20 “(4) In exercising his or her powers under subsection (2), the Minister must ensure that no more than one approval is in force at any particular time.

“(5) The Commission must cause a copy of an instrument under this section to be published in the *Gazette*.

Commission to be notified of amendments of business rules

25 “779C.(1) As soon as practicable after the SCH business rules are amended (whether by way of rescission, alteration or addition), the securities clearing house must give written notice of the amendment to the Commission.

- “(2) A notice must:
- 30 (a) set out the text of the amendment; and
- (b) specify the day on which the amendment was made; and
- (c) explain the purpose of the amendment.

“(3) If a notice is not given as required within 21 days after an amendment is made, the amendment ceases to have effect.

35 “(4) The Commission must send a copy of a notice to the Minister as soon as practicable after receiving it.

“(5) The Minister may, within 28 days after the Commission receives a notice, disallow the whole or a specified part of the amendment to which the notice relates.

40 “(6) If the Minister disallows the whole or a part of an amendment, the Commission must, as soon as practicable, give notice of the disallowance to the securities clearing house and, when the securities

clearing house receives the notice, the amendment ceases to have effect to the extent of the disallowance.

Securities clearing house to assist Commission

“779D. The securities clearing house must provide such assistance to the Commission, or to a person acting on behalf of, or with the authority of, the Commission, as the Commission reasonably requires for the performance of its functions. 5

Securities clearing house to notify Commission of disciplinary action

“779E. If the securities clearing house decides to discipline an SCH participant, it must, as soon as practicable, lodge written particulars of the participant’s name and of the reason for, and nature of, the disciplinary action taken or to be taken. 10

Issuers of quoted securities and quoted rights to comply with SCH business rules

“779F. If: 15

(a) a provision of the SCH business rules purports to apply in relation to the issuing body, within the meaning of Division 3 of Part 7.13, in relation to quoted securities or quoted rights; and

(b) the issuing body is not otherwise bound to comply with the provision; 20

the issuing body is, by force of this section, bound to comply with the provision.

Power of Court to order compliance with provisions of SCH business rules

“779G.(1) If: 25

(a) a person is bound to comply with a provision of the SCH business rules; and

(b) the person contravenes the provision;

then, subject to subsection (2), the Court may, on the application of the securities clearing house, of the Commission, or of a person aggrieved by the contravention, make an order giving directions to the first-mentioned person about complying with the provision. 30

“(2) The Court may not make an order giving directions to a person unless the person has been given an opportunity of being heard. 35

Qualified privilege in respect of disciplinary proceedings

“779H.(1) The securities clearing house, or a member, officer or employee of the securities clearing house, or an SCH participant, has qualified privilege in respect of a statement made by a person, orally or in writing, in the course of, or otherwise for the purposes of or in 40

connection with, a disciplinary proceeding of the securities clearing house.

“(2) A person has qualified privilege in respect of the publication of:

5 (a) a statement made by a person, orally or in writing, in the course of, or otherwise for the purposes of or in connection with; or

10 (b) a document prepared, given or produced by a person, in the course of, or otherwise for the purposes of or in connection with;

a disciplinary proceeding of the securities clearing house.

Provision of settlement facilities not a securities business etc.

15 “779J.(1) Nothing that the securities clearing house does in the course of, or in connection with, providing facilities for the settlement of transactions constitutes, for the purposes of this Law:

(a) a securities business; or

(b) an offer of securities for subscription or purchase; or

(c) an invitation to subscribe for or buy securities.

20 “(2) The securities clearing house does not, for the purposes of this Law, have a relevant interest in a share or a security merely because of its provision of facilities for the settlement of transactions.”.

Interpretation

129. Section 920 of the Corporations Law is amended:

25 (a) by omitting “participating exchange” (wherever occurring) from the definition of “clearing nominee” in subsection (1) and substituting “settlement authority”;

(b) by inserting “, under the SCH business rules” after “rules” in the definition of “obligations” in subsection (1);

30 (c) by omitting “quoted securities, where:” from the definition of “reportable transaction” in subsection (1) and substituting “securities, where the securities are quoted on a stock market of a participating exchange or of an Exchange subsidiary when the agreement for the sale or purchase is made and:”;

35 (d) by omitting “participating exchange” from the definition of “TDS nominee” in subsection (1) and substituting “settlement authority”;

(e) by omitting “participating exchange” (wherever occurring) from the definition of “transfer delivery service provisions” in subsection (1) and substituting “settlement authority”;

40 (f) by omitting from subsection (1) the definition of “quoted securities”;

(g) by inserting in subsection (1) the following definition:

“‘**settlement authority**’ means a participating exchange or the securities clearing house;”.

Transfer of securities etc. and payment of money

130. Section 924 of the Corporations Law is amended by omitting subsection (2) and substituting the following subsection: 5

“(2) A person (**‘the transferor’**) transfers securities to another person (**‘the transferee’**) if, and only if:

(a) in the case of an SCH-regulated transfer—the transferor does, or causes to be done, all things that the SCH business rules require to be done by or on behalf of the transferor to effect the transfer; or 10

(b) in any other case—the transferor delivers, or causes to be delivered, to the transferee documents (**‘transfer documents’**) that are sufficient to enable the transferee:

(i) except in the case of marketable rights within the meaning of Division 3 of Part 7.13—to become registered as the holder of the securities; or 15

(ii) in the case of such marketable rights—to obtain the issue to the transferee of the securities to which the marketable rights relate; 20

without the transferor doing anything more, or causing anything more to be done, by way of executing or supplying documents.”.

Novation of agreements

131. Section 924A of the Corporations Law is amended by omitting “participating exchange’s” and substituting “settlement authority’s”. 25

Definitions

132. Section 948 of the Corporations Law is amended by inserting the following definition:

“**‘Exchange body’** means the Exchange or a subsidiary of the Exchange;”.

Effect of using a transfer delivery service 30

133. Section 948A of the Corporations Law is amended by omitting from subparagraph (b)(i) “participating exchange” and substituting “settlement authority”.

Claim by selling dealer in respect of default by buying dealer

134. Section 949 of the Corporations Law is amended: 35

(a) by omitting paragraph (1)(a) and substituting the following paragraph:

“(a) the first-mentioned dealer:

(i) if a transfer of the securities concerned pursuant to the sale would be an SCH-regulated transfer— is done, or is ready, willing and able to do, all 40

things that that dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; or

- 5 (ii) in any other case—has supplied, or is ready, willing and able to supply, to the other dealer, under the agreement for the sale, settlement documents in relation to the sale; and”;

(b) by inserting after subsection (4) the following subsections:

10 “(4A) If the SCH business rules purport to authorise the securities clearing house to make under this section on behalf of a dealer who is or was an SCH participant a claim that the dealer is entitled to make, the securities clearing house is entitled to make that claim on behalf of that dealer.

15 “(4B) If the securities clearing house is entitled under subsection (4A) to make claims under this section on behalf of 2 or more dealers, the securities clearing house is entitled to make a single claim under this section on behalf of both or all of those dealers in respect of the sum of the amounts in respect of which it is entitled to make separate claims on behalf of
20 each of those dealers.”;

(c) by inserting in subsection (5) “or the securities clearing house” after “body”;

(d) by omitting from paragraph (5)(a) “or (3)” and substituting “, (3) or (4A)”;

25 (e) by inserting after paragraph (5)(a) the following word and paragraph:

“and (aa) if a transfer of the securities pursuant to the sale would be an SCH-regulated transfer—the dealer:

30 (i) has done all things that the dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; or

35 (ii) has, for the purposes of the claim, in accordance with the SCH business rules, transferred to SEGC or to an Exchange body securities of the same kind and number as the first-mentioned securities; and”;

(f) by inserting in paragraph (5)(b) “if paragraph (aa) does not apply—” before “the dealer”;

40 (g) by adding at the end of paragraph (5)(b) “and”;

(h) by omitting from subsection (6) “or (4)” and substituting “, (4) or (4B)”;

(i) by omitting subsection (7) and substituting the following subsection:

“(7) If a dealer transfers securities to an Exchange body as mentioned in subparagraph (5)(aa)(ii), the Exchange body must account to SEGC for those securities in accordance with the SCH business rules.”.

Claim by buying dealer in respect of default by selling dealer 5

135. Section 950 of the Corporations Law is amended:

(a) by omitting paragraph (1)(b) and substituting the following paragraph:

“(b) the other dealer:

(i) if a transfer of the securities concerned pursuant to the purchase would be an SCH-regulated transfer—has not done all things that that dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the purchase; or 10

(ii) in any other case—has not supplied to the first-mentioned dealer, under that agreement, settlement documents in relation to the purchase;” 15

(b) by adding at the end of paragraph (2)(a) “and”;

(c) by inserting after paragraph (2)(b) the following word and paragraph: 20

“and (ba) if a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer—the other dealer has not done all things that that dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the purchase; and” 25

(d) by inserting in paragraph (2)(c) “if paragraph (ba) does not apply—” before “settlement”;

(e) by omitting from subsection (2) all the words after “allow the claim”;

(f) by adding at the end the following subsections:

“(3) If:

(a) SEGC allows under subsection (2) a claim in respect of a purchase of securities; and 35

(b) a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer;

SEGC must, subject to section 952A, transfer to the claimant securities of the same kind and number as the first-mentioned securities. 40

“(4) If:

(a) SEGC allows under subsection (2) a claim in respect of a purchase of securities; and

(b) subsection (3) does not apply;
SEGC must, subject to section 953, supply to the claimant settlement documents in relation to the purchase.”.

Effect of novation, under business rules, of agreement for purchase

5 **136.** Section 950A of the Corporations Law is amended by omitting from paragraph (3)(b) “participating exchange” and substituting “settlement authority”.

Claim by selling client in respect of default by selling dealer

137. Section 951 of the Corporations Law is amended:

10 **(a)** by inserting before paragraph (1)(a) the following paragraph:

“(aa) if a transfer of the securities concerned pursuant to the sale would be an SCH-regulated transfer—the person:

15 **(i)** in a case to which subparagraph (ii) does not apply—has done all things necessary to enable the dealer to do all things that the dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; or

20 **(ii)** if the dealer has been suspended by the participating exchange concerned, or the dealer’s status as an SCH participant has been suspended under the SCH business rules, and that suspension has not been removed—has done, or is ready, willing and able to do, all things necessary to enable the dealer to do all things that the dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; and”;

25 **(b)** by inserting in paragraph (1)(a) “if paragraph (aa) does not apply—” before “the person”;

30 **(c)** by inserting after paragraph (3)(a) the following word and paragraph:

“and (aa) if a transfer of the securities pursuant to the sale would be an SCH-regulated transfer—the claimant:

35 **(i)** has done all things necessary to enable the dealer to do all things that the dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; or

40 **(ii)** has, for the purposes of the claim, in accordance with the SCH business rules, transferred to SEGC or to an Exchange body securities of the same kind and number as the first-mentioned securities; and”;

- (d) by inserting in paragraph (3)(b) “if paragraph (aa) does not apply—” before “the claimant”;
- (e) by adding at the end the following subsection:

“(4) If a person transfers securities to an Exchange body as mentioned in subparagraph (3)(aa)(ii), the Exchange body must account to SEGC for those securities in accordance with the SCH business rules.”. 5

Claim by buying client in respect of default by buying dealer

138. Section 952 of the Corporations Law is amended:

- (a) by omitting from subparagraph (1)(a)(ii) “and the suspension” and substituting “, or the dealer’s status as an SCH participant has been suspended under the SCH business rules, and that suspension”; 10

- (b) by inserting after paragraph (1)(a) the following paragraph:
“(aa) if a transfer of the securities concerned pursuant to the purchase would be an SCH-regulated transfer—the dealer’s obligations to the person in respect of the purchase, in so far as they relate to the transfer of securities to the person, have not been discharged; and”; 15
20

- (c) by inserting in paragraph (1)(b) “if paragraph (aa) does not apply—” before “the dealer’s”;

- (d) by adding at the end of paragraph (3)(a) “and”;

- (e) by inserting after paragraph (3)(b) the following paragraph:
“(ba) if a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer—the dealer’s obligations to the claimant in respect of the purchase, in so far as they relate to the transfer of securities to the claimant, have not been discharged; and”; 25

- (f) by inserting in paragraph (3)(c) “if paragraph (ba) does not apply—” before “the dealer’s”; 30

- (g) by omitting from subsection (3) all the words after “allow the claim”;

- (h) by adding at the end the following subsections:

“(4) If: 35

(a) SEGC allows under subsection (3) a claim in respect of a purchase of securities by a dealer on behalf of a person; and

(b) a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer; 40

SEGC must, subject to section 952A, transfer to the claimant securities of the same kind and number as the first-mentioned securities.

“(5) If:

(a) SEGC allows under subsection (3) a claim in respect of a purchase of securities by a dealer on behalf of a person; and

5

(b) subsection (4) does not apply;

SEGC must, subject to section 953, supply to the claimant settlement documents in relation to the purchase.”.

139. After section 952 of the Corporations Law the following section is inserted:

10 **Cash settlement of claims—SCH-regulated transfers**

“952A. If:

(a) SEGC:

(i) allows under subsection 950(2) a claim in respect of a purchase of securities by the claimant from a dealer; or

15

(ii) allows under subsection 952(3) a claim in respect of a purchase of securities by a dealer on behalf of the claimant; and

(b) a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer; and

20

(c) it is not reasonably practicable for SEGC to obtain securities of the same kind and number as the first-mentioned securities from the dealer before the end of:

(i) if the SCH business rules, as in force when the Board allows the claim, prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim—that period; or

25

(ii) otherwise—such period as the Board, having regard to all the circumstances of the claim, considers reasonable; and

30

(d) it is not reasonably practicable for SEGC to obtain, otherwise than from the dealer, securities of that kind and number before the end of that period because:

(i) whether because that dealing in those securities is suspended or for any other reason, there exists at no time during that period an orderly market in those securities; or

35

(ii) the total number of those securities offered for sale on stock markets of participating exchanges or Exchange subsidiaries at times during that period when there exists an orderly market in those securities is insufficient;

40

SEGC must satisfy the claim by paying to the claimant the amount that, when the claimant became entitled to make the claim, was the amount of the actual pecuniary loss suffered by the claimant in respect of the purchase.”.

Cash settlement of claims—transfers other than SCH-regulated transfers

140. Section 953 of the Corporations Law is amended by inserting after paragraph (a) the following word and paragraph:

“and (aa) a transfer of the securities pursuant to the purchase would not be an SCH-regulated transfer; and”.

5

Effect of using a transfer delivery service

141. Section 954C of the Corporations Law is amended by omitting from subparagraph (b)(i) “participating exchange” and substituting “settlement authority”.

10

Effect of novation, under business rules, of guaranteed securities loan

142. Section 954E of the Corporations Law is amended by omitting from paragraph (3)(b) “participating exchange” and substituting “settlement authority”.

Effect of using a transfer delivery service

15

143. Section 954M of the Corporations Law is amended by omitting from subparagraph (b)(i) “participating exchange” and substituting “settlement authority”.

Claim in respect of failure to pay net amount in respect of transactions

144. Section 954N of the Corporations Law is amended:

20

(a) by omitting from paragraph (1)(a) “participating exchange” (wherever occurring) and substituting “settlement authority”;

(b) by omitting from subparagraph (1)(b)(i) “dealer or dealers” and substituting “person or persons”;

(c) by inserting in subparagraph (1)(b)(ii) “, or to some other person or persons nominated under the provisions” after “the dealer”;

25

(d) by omitting from subsection (1) “or partnership”;

(e) by omitting from subsection (2) “the participating” and substituting “a participating”;

30

(f) by adding at the end the following subsection:

“(4) In this section:

‘person’ includes a partnership.”.

Claim in respect of failure to transfer net number of securities in respect of transactions

35

145. Section 954P of the Corporations Law is amended:

(a) by omitting from paragraph (1)(a) “participating exchange” (wherever occurring) and substituting “settlement authority”;

(b) by omitting from subparagraph (1)(b)(i) “dealer or dealers” and substituting “person or persons”;

40

- (c) by inserting in subparagraph (1)(b)(ii) “, or to some other person or persons nominated under the provisions” after “the dealer”;
- 5 (d) by omitting from subsection (2) “participating exchange” and substituting “settlement authority”;
- (e) by omitting from subsection (2) “or partnership”;
- (f) by omitting from subsection (3) “participating exchange” (wherever occurring) and substituting “settlement authority”;
- 10 (g) by omitting from subsection (3) “or partnership” (wherever occurring);
- (h) by omitting from subsection (4) “the participating” and substituting “a participating”;
- (i) by adding at the end the following subsection:
 - 15 “(6) In this section:
‘person’ includes a partnership.”.

How claim under subsection 954P(2) is to be satisfied

146. Section 954S of the Corporations Law is amended by omitting “participating exchange” from paragraph (a) of the definition of “pre-cash settlement period” in subsection (5) and substituting “settlement authority”.

How claim under subsection 954P(3) is to be satisfied

147. Section 954T of the Corporations Law is amended by omitting “participating exchange” (wherever occurring) and substituting “settlement authority”.

25 **Claims in respect of default by TDS nominee**

148. Section 954X of the Corporations Law is amended by omitting from subparagraph (1)(c)(i) and subsections (2) and (3) “participating exchange” (wherever occurring) and substituting “settlement authority”.

How claim under subsection 954X(2) is to be satisfied

30 149. Section 954Z of the Corporations Law is amended by omitting “participating exchange” from paragraph (a) of the definition of “pre-cash settlement period” in subsection (5) and substituting “settlement authority”.

Nexus with this jurisdiction

35 150. Section 954ZB of the Corporations Law is amended by omitting from paragraph (a) “participating exchange” (wherever occurring) and substituting “settlement authority”.

Interpretation

40 151. Section 955 of the Corporations Law is amended:
(a) by inserting in subsection (1) the following definitions:

“**‘transferor’** has the meaning given by paragraph 956(3)(b);
‘transferred securities’ has the meaning given by paragraph 956(3)(c);
‘unauthorised execution’ has the meaning given by paragraph 956(3)(a).”;

5

- (b) by omitting from subsection (2) “A” and substituting “For the purposes of subsection 956(1), a”.

152. Section 956 of the Corporations Law is repealed and the following section is substituted:

Situations to which Division applies 10

“956.(1) This Division applies if:

- (a) a dealer executes a document of transfer of securities on behalf of a person as transferor of the securities; and
(b) the transfer is not an SCH-regulated transfer; and
(c) apart from the effect of paragraph 1105(3)(a), the person did not authorise the dealer to execute the document. 15

“(2) This Division also applies if:

- (a) a dealer effects, or purports to effect, a proper SCH transfer of securities on behalf of a person; and
(b) apart from the effect of section 1109B, the person did not authorise the dealer to effect the transfer. 20

“(3) In this Division:

- (a) the dealer’s action referred to in whichever of paragraphs (1)(a) and (2)(a) is applicable is called the **‘unauthorised execution’**; and 25
(b) the person referred to in whichever of those paragraphs is applicable is called the **‘transferor’**; and
(c) the securities referred to in whichever of those paragraphs is applicable are called the **‘transferred securities’**.”.

Claim by transferee or sub-transferee 30

153. Section 958 of the Corporations Law is amended:

- (a) by omitting paragraph (1)(a) and substituting the following paragraph:

“(a) in any case:

- (i) if subsection 956(1) applies—the person stated in the document as the transferee of the transferred securities; or 35
(ii) if subsection 956(2) applies—the person in whose favour the proper SCH transfer was effected, or purported to be effected; or”;

40

- (b) by omitting from paragraph (1)(b) “the person so stated” and substituting “that person”;
- (c) by omitting from paragraph (2)(a) “execution of the document” and substituting “unauthorised execution”.

5 Discretion to pay amounts not received etc. because of failure to transfer securities

154. Section 972A of the Corporations Law is amended by omitting from paragraph (1)(b) “participating exchange” (wherever occurring) and substituting “settlement authority”.

10 Application of Fund in respect of certain claims

155. Section 973 of the Corporations Law is amended by omitting from paragraph (1)(a) “950(2), 952(3),” and substituting “950(3), 950(4), 952(4), 952(5),”.

Arbitration of amount of cash settlement of certain claims

- 156.** Section 977 of the Corporations Law is amended by inserting “952A or” before “953” in the definition of “cash settlement provision” in subsection (7).

Subrogation of SEGC to claimant’s rights etc.

157. Section 980 of the Corporations Law is amended:

- (a) by omitting from subsection (2) “of a document of transfer” and substituting “(within the meaning of that Division)”;
- (b) by omitting from subsection (2) “that execution of that document” and substituting “the conduct that constitutes the unauthorised execution”.

25 Nature of shares and other interests

158. Section 1085 of the Corporations Law is amended:

- (a) by inserting in paragraph (1)(b) “, or, if they are applicable, the SCH business rules” after “articles”;
- (b) by inserting in paragraph (1)(c) “and, if they are applicable, the SCH business rules,” after “articles,”.

Numbering shares

159. Section 1086 of the Corporations Law is amended:

- (a) by omitting from paragraph (2)(a) “or” (last occurring) and substituting “and”;
- (b) by adding at the end of subsection (2) the following word and paragraph:
 - “; and (c) a share need not have a distinguishing number if the SCH business rules provide that it need not have such a number.”.

Instrument of transfer

160. Section 1091 of the Corporations Law is amended:

(a) by inserting before subsection (1) the following subsection:

“(1AA) This section does not apply to an SCH-regulated transfer.”;

5

(b) by omitting from paragraph (1A)(b) “other”.

Duties of company with respect to issue of certificates

161. Section 1096 of the Corporations Law is amended:

(a) by omitting from subsection (1) “Within” and substituting “Subject to subsection (1A), within”;

10

(b) by inserting after subsection (1) the following subsection:

“(1A) If the SCH business rules include a provision to the effect that:

(a) no document is required by subsection (1) to be completed and delivered by a company in relation to the allotment, issue or making available of a share, debenture or interest in specified circumstances; or

15

(b) the only document required by subsection (1) to be completed and delivered by a company in relation to the allotment, issue or making available of a share, debenture or interest in specified circumstances is such document as the provision requires;

20

the provision has effect accordingly.”;

(c) by inserting after subsection (2) the following subsection:

“(2A) The only document required by subsection (2) to be completed and delivered by a company in relation to an SCH-regulated transfer is such document (if any) as the SCH business rules require to be so completed and delivered.”.

25

Insertion of heading

162. Before section 1097 of the Corporations Law the following heading is inserted in Division 3 of Part 7.13:

30

“Subdivision A—Interpretation”.

Interpretation

163. Section 1097 of the Corporations Law is amended:

(a) by inserting “or made available” after “issued” in the definition of “issuing body” in subsection (1);

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(b) by inserting “or make available” after “issue” in the definition of “issuing body” in subsection (1);

(c) by omitting from subsection (1) the definition of “transfer” and substituting the following definition:

40

“**transfer**”, in relation to a marketable security or a marketable right, includes:

- (a) in the case of a quoted security or a quoted right—any change in the ownership of the security or right; and
- 5 (b) in the case of a marketable right—the renunciation and transfer of the right;”;

(d) by inserting in subsection (1) the following definitions:

“**Division 3 transfer**” means:

- 10 (a) a sufficient transfer under this Division of marketable securities or marketable rights; or
- (b) a proper SCH transfer;

document”, in relation to a transfer, includes, in the case of an SCH-regulated transfer, an electronic message or other electronic communication;

15 **identification code**”, in relation to a member organisation, means a code that, for the purposes of the SCH business rules, is the member organisation’s identification code, or one of its identification codes, as the case may be;

20 **member organisation**” means a member organisation of a securities exchange;

transfer document”, in relation to a proper SCH transfer, means the document that is taken under the SCH business rules to effect the transfer.”;

(e) by adding at the end the following subsection:

- 25 “(4) If the SCH business rules include provisions determining:
 - (a) which member organisation effected a proper SCH transfer; or
 - (b) when a proper SCH transfer takes effect;those provisions have effect for the purposes of this Division.”.

30 **164.** After section 1097 of the Corporations Law the following sections are inserted:

Quoted securities and rights

35 “1097A.(1) A quoted security is a marketable security in a class of marketable securities listed for quotation on a stock market of a securities exchange.

“(2) A quoted right is a marketable right in a class of marketable rights listed for quotation on a stock market of a securities exchange.

40 “(3) For the purposes of subsections (1) and (2), securities or rights in a class of marketable securities or marketable rights are not taken to have stopped being listed for quotation on a stock market of a securities exchange merely because of a temporary suspension of quotation of securities or rights in that class.

“(4) If:

- (a) there is a suspension of the quotation, on a stock market of a securities exchange, of marketable securities in a class of marketable securities, or of marketable rights in a class of marketable rights; and
- (b) during the suspension, the issuing body in relation to the securities or rights ceases to be included in an official list of the securities exchange;

5

then, for the purposes of subsections (1) and (2), marketable securities or marketable rights in that class are taken to stop being listed for quotation on a stock market of the securities exchange when the issuing body ceases to be so included.

10

“(5) Subsection (4) does not limit the circumstances in which marketable securities in a class of marketable securities, or marketable rights in a class of marketable rights, may be taken to have stopped being listed for quotation on a stock market of a securities exchange.

15

SCH business rules may provide that securities or rights continue to be quoted securities or rights

“1097B. If the SCH business rules provide that marketable securities or marketable rights that stop being quoted securities or quoted rights are to be taken to continue to be quoted securities or quoted rights for a specified period, then, for the purposes of:

20

- (a) the definitions of ‘proper SCH transfer’ and ‘SCH-regulated transfer’ in section 9; and
- (b) Parts 7.2A and 7.13, and any regulations made for the purposes of any of the provisions of those Parts;

25

those securities are taken to be quoted securities or quoted rights during that period.

Commission may declare Law applies to securities as if they were quoted securities or rights

30

“1097C.(1) The Commission may, by writing, declare that this Law, and the regulations, or that specified provisions of this Law and the regulations, have effect (subject to any modifications specified in the declaration) in relation to particular securities, or a particular class of securities, that are not quoted securities or quoted rights as if those securities, or securities of that class, were quoted securities or quoted rights.

35

“(2) A declaration under subsection (1) has effect accordingly.

“(3) The Commission must cause a copy of a declaration under subsection (1) to be published in the *Gazette*.

40

Transfer that substantially complies with SCH business rules

“1097D. For the purposes of this Division, if the securities clearing house determines under the SCH business rules that an SCH-regulated transfer substantially complies with the applicable provisions of those
5 business rules, the transfer is taken to be, and always to have been, a proper SCH transfer.”.

165. After section 1099 of the Corporations Law the following heading and section are inserted:

10 *“Subdivision B—Sufficient transfers (transfers other than SCH-regulated transfers)”*

Subdivision does not apply to SCH-regulated transfers

“1099A. Nothing in this Subdivision applies in relation to:

- (a) an SCH-regulated transfer; or
- (b) a document that relates to such a transfer.”.

15 **166.** After section 1109 of the Corporations Law the following headings and sections are inserted:

“Subdivision C—SCH-regulated transfers

Member organisation’s authority to enter into transaction continues despite client’s death

20 “1109A. If:

- (a) a person authorises a member organisation to enter into a transaction (for example, a sale) involving the disposal of quoted securities or quoted rights; and
- 25 (b) the person dies before the member organisation enters into the transaction; and
- (c) the authority is still in force immediately before the person dies;

then:

- 30 (d) the authority continues, despite the person’s death, as if the person were still alive, but can be revoked by the person’s legal representative just as the person could revoke it if the person were still alive; and
- 35 (e) if the member organisation enters into the transaction while the authority so continues—the transaction is binding on the person’s legal representative.

Authority to enter into transaction gives authority to transfer

“1109B.(1) If a person authorises a member organisation to enter into a transaction (for example, a sale) involving the disposal of quoted securities or quoted rights, the person is taken also to have authorised
40 the member organisation to effect any proper SCH transfer of all or

any of those securities or rights that the member organisation effects, even if the transfer has no connection with the transaction.

Note: The transfer may have no connection with the transaction because of the operation of the provisions of the SCH business rules referred to in subsection 954P(1).

“(2) The authority that the person is taken, by subsection (1), to have given:

- (a) is revoked if, before the transaction is entered into, the authority to enter into the transaction is revoked or otherwise ceases to have effect; and 5
- (b) cannot otherwise be revoked; and
- (c) if the person dies after the transaction is entered into—continues in force, despite the person’s death, as if the person were still alive (but cannot be revoked). 10

Effect of proper SCH transfer

“1109C.(1) A proper SCH transfer of quoted securities is valid and effective for the purposes of any law or instrument governing or relating to the securities. 15

“(2) A proper SCH transfer of quoted rights is valid and effective for the purposes of any law or instrument governing or relating to the rights or the marketable securities to which they relate.

Effect of proper SCH transfer on transferee

“1109D.(1) If a proper SCH transfer of quoted securities takes effect at a particular time: 20

- (a) the transferee is taken to have agreed at that time to accept the securities subject to the terms and conditions on which the transferor held them immediately before that time, being the terms and conditions applicable as between the issuing body in relation to, and the holder for the time being of, the securities; and 25
- (b) if the securities are shares—the transferee is also taken to have agreed at that time to become a member of the issuing body and to be bound by the issuing body’s constitution. 30

“(2) If a proper SCH transfer of quoted rights relating to marketable securities takes effect at a particular time:

- (a) the transferee is taken:
 - (i) to have applied at that time to the issuing body in relation to the securities for the allotment to him, her or it of the marketable securities; and 35
 - (ii) to have agreed at that time to accept the marketable securities subject to the terms and conditions on which the issuing body offers them for subscription; and
- (b) if the marketable securities are shares—the transferee is also taken to have agreed, at that time, to become a member of the 40

issuing body and to be bound, on being registered as the holder of the shares, by the issuing body's constitution.

Warranties by member organisation whose identification code is included in transfer document

5 "1109E.(1) This section applies if the transfer document for a proper SCH transfer of quoted securities or quoted rights includes a member organisation's identification code as the identification code of the member organisation effecting the transfer.

10 "(2) If the member organisation is the transferor, the member organisation or, if it is a partnership, each of the partners in the member organisation, is taken to have warranted that:

- (a) the transfer was effected by the member organisation; and
- (b) the transferor was legally entitled or authorised to transfer the securities or rights.

15 "(3) If:

- (a) the member organisation is not the transferor; and
- (b) the transfer is pursuant to a transaction in relation to which, or to transactions in relation to each of which, one of the following conditions is satisfied:

- 20 (i) the transaction was entered into in the ordinary course of trading on a stock market;
- (ii) the transaction is, under the business rules or listing rules of a stock exchange, described, or to be described, as 'special' when it is reported to the stock exchange;

25 the member organisation or, if it is a partnership, each of the partners in the member organisation, is taken to have warranted that:

- (c) the transferor was legally entitled or authorised to transfer the securities or rights; and
- (d) the transfer was effected by the member organisation; and
- 30 (e) the member organisation was authorised by the transferor to effect the transfer.

"(4) If:

- (a) the member organisation is not the transferor; and
- (b) subsection (3) does not apply;
- 35 the member organisation or, if it is a partnership, each of the partners in the member organisation, is taken to have warranted that:
- (c) the transfer was effected by the member organisation; and
- (d) the member organisation was authorised by the transferor to effect the transfer.

40 **Indemnities in respect of warranted matters**

"1109F.(1) If:

- (a) a member organisation, or each of the partners in a partnership

that is a member organisation, is taken by section 1109E to have warranted, in relation to a proper SCH transfer of quoted securities or quoted rights, that the transfer was effected by the member organisation; and

- (b) the transfer was not effected by the member organisation; 5
the member organisation, or, if it is a partnership, each of the partners in the member organisation, is liable to indemnify:
 - (c) the issuing body in relation to the securities or rights; and
 - (d) the transferor; and
 - (e) the transferee; and 10
 - (f) if a member organisation acted as the transferee's agent in the transfer—that member organisation; and
 - (g) the securities clearing house;against any loss or damage arising from the transfer not having been effected by the first-mentioned member organisation. 15

“(2) If:

- (a) a member organisation, or each of the partners in a partnership that is a member organisation, is taken by section 1109E to have warranted, in relation to a proper SCH transfer of quoted securities or quoted rights, that the transferor was legally entitled or authorised to transfer the securities or rights; and 20
- (b) the transferor was not legally entitled or authorised to transfer the securities or rights;
the member organisation, or, if it is a partnership, each of the partners in the member organisation, is liable to indemnify: 25
 - (c) the issuing body in relation to the securities or rights; and
 - (d) the transferee; and
 - (e) if a member organisation acted as the transferee's agent in the transfer—that member organisation; and
 - (f) the securities clearing house; 30against any loss or damage arising from the transferor not having been legally entitled or authorised to transfer the securities or rights.

“(3) If:

- (a) a member organisation, or each of the partners in a partnership that is a member organisation, is taken by section 1109E to have warranted, in relation to a proper SCH transfer of quoted securities or quoted rights, that the member organisation was authorised by the transferor to effect the transfer; and 35
- (b) the member organisation was not authorised by the transferor to effect the transfer; 40
the member organisation or, if it is a partnership, each of the partners in the member organisation, is liable to indemnify:
 - (c) the issuing body in relation to the securities or rights; and

- (d) the transferor; and
- (e) the transferee; and
- (f) if a member organisation acted as the transferee's agent in the transfer—that member organisation; and

5 (g) the securities clearing house;

against any loss or damage arising from the first-mentioned member organisation not having been authorised by the transferor to effect the transfer.

10 “(4) The effect of section 1109B is to be disregarded in determining, for the purposes of this section, whether a person or partnership:

- (a) was legally entitled or authorised to transfer quoted securities or quoted rights; or
- (b) was authorised by another person or partnership to effect a transfer of quoted securities or quoted rights.

15 **Joint and several warranties and liabilities**

“1109G.(1) If 2 or more persons are taken to have warranted as mentioned in subsection 1109E(2), (3) or (4), they are taken to have so warranted jointly and severally.

20 “(2) If 2 or more persons are liable as mentioned in subsection 1109F(1), (2) or (3), they are so liable jointly and severally.

Quoted securities and rights from other jurisdictions: effect of sections 1109E, 1109F and 1109G

25 “1109H.(1) Sections 1109E, 1109F and 1109G apply in relation to quoted securities and quoted rights, within the meaning of the Corporations Law of another jurisdiction, and, for the purposes of those sections as so applying:

- (a) subject to paragraph (b), an expression has the same meaning in those sections as in Division 3 of Part 7.13 of that Law; and
- 30 (b) a reference in section 1109E to a transfer document is taken to be a reference to a transfer document, within the meaning of that Division, that purports to have been completed in this jurisdiction.

35 “(2) The effect that a provision has because of subsection (1) is additional to, and does not prejudice, the effect the provision otherwise has.

Securities clearing house entitled to assume its business rules complied with

40 “1109J.(1) The securities clearing house is entitled to assume without inquiry, in the absence of knowledge to the contrary, that anything purporting to be done under the SCH business rules in connection with a transfer of a quoted security or quoted right has been done in accordance with those rules.

“(2) If, in reliance on subsection (1), the securities clearing house assumes that a thing was done in accordance with the SCH business rules then, for the purposes of this Law (including the definition of ‘proper SCH transfer’ in section 9), the thing is taken to have been done in accordance with those rules.

5

“(3) If the securities clearing house is acting on behalf of the issuing body in relation to quoted securities or quoted rights when, in reliance on subsection (1), it assumes that a thing was done in accordance with the SCH business rules, then the issuing body is also taken to assume, and to be entitled to assume, that the thing was so done.

10

SCH-regulated transfer not to be registered unless proper SCH transfer

“1109K.(1) The issuing body in relation to a quoted security or quoted right must not register, or otherwise give effect to, an SCH-regulated transfer of the security or right unless the transfer is a proper SCH transfer.

15

“(2) Subsection (1) has effect despite anything in the body’s constitution or in a deed relating to debentures or interests (including prescribed interests).

Issuing body not to refuse to register proper SCH transfer

“1109L. The issuing body in relation to a quoted security or a quoted right must not refuse or fail to register, or to give effect to, a proper SCH transfer of the security or right.

20

Trustees and legal representatives may be SCH participants etc.

“1109M.(1) A trustee, or a legal representative of a dead person, who, as trustee or legal representative, holds a quoted security or a quoted right may:

25

- (a) subject to the requirements of the SCH business rules, be an SCH participant; and
- (b) have the security or right converted into, and hold it in, a form in which it may be transferred in accordance with the SCH business rules.

30

“(2) Nothing in subsection (1) authorises the trustee or legal representative to do a thing that the trustee or legal representative is expressly prohibited from doing by any law or by the terms and conditions on which he, she or it holds office.

35

“Subdivision D—Miscellaneous”.

Operation of Division

167. Section 1110 of the Corporations Law is amended:

- (a) by inserting in subsection (3) “(other than section 1109L)” after “Division”;

40

- (b) by omitting from subsection (3) “instrument that is lodged with” and substituting “document that is lodged with or sent to”;
- 5 (c) by omitting from subsections (4) and (6) “sufficient transfer under this Division” and substituting “Division 3 transfer”;
- (d) by omitting from subsection (5) “This Division does not prevent or affect” and substituting “Nothing in this Division (except section 1109K) prevents or affects”;
- 10 (e) by omitting from paragraph (5)(b) “an instrument of transfer of” and substituting “a document transferring”.

Occupation need not appear in transfer document, register etc.

168. Section 1111 of the Corporations Law is amended by omitting subsection (1) and substituting the following subsection:

15 “(1) A document transferring marketable securities or marketable rights need not state the occupation of the transferor or transferee and, if the document is signed by a person, the signature need not be witnessed.”.

169. After section 1112 of the Corporations Law the following section is inserted in Division 3 of Part 7.13:

20 **Offences: inclusion of identification codes in proper SCH transfers**

“1112A. A person must not, in this jurisdiction or elsewhere, include a member organisation’s identification code in a document that may be used to effect a proper SCH transfer unless:

- (a) the person:
 - 25 (i) is the member organisation or, if it is a partnership, is a partner in the member organisation; or
 - (ii) is authorised so to include the identification code by the member organisation; and
 - (b) if:
 - 30 (i) the identification code is so included as the identification code of the member organisation effecting the transfer; and
 - (ii) the member organisation is not the transferor;
- the member organisation is, apart from the effect of section 1109B, authorised by the transferor to effect the transfer.”.
- 35

Power of Court to make certain orders

170. Section 1114 of the Corporations Law is amended:

- (a) by omitting from subparagraph (1)(a)(ii) “or the business rules or listing rules of a securities exchange” and substituting “, the business rules or listing rules of a securities exchange, or the SCH business rules”;
- 40

(b) by inserting after paragraph (1)(b) the following word and paragraph:

“or (ba) on the application of the securities clearing house, it appears to the Court that a person has contravened the SCH business rules;”;

5

(c) by omitting from paragraph (1)(c) “or of the business rules or listing rules of a securities exchange” and substituting “of the business rules or listing rules of a securities exchange, or of the SCH business rules”;

(d) by adding at the end the following subsection:

10

“(10) In this section:

‘securities’ includes marketable securities and marketable rights within the meaning of Division 3 of Part 7.10.”.

171. Section 1301 of the Corporations Law is repealed and the following section is substituted:

15

Location of books on computers

“1301.(1) This section applies if:

(a) a corporation records, otherwise than in writing, matters (**the stored matters**) this Law requires to be contained in a book; and

20

(b) the record of the stored matters is kept at a place (**the place of storage**) other than the place (**the place of inspection**) where the book is, apart from this section, required to be kept; and

(c) at the place of inspection means are provided by which the stored matters are made available for inspection in written form; and

25

(d) the corporation has lodged a notice:

(i) stating that this section is to apply in respect of:

(A) except where sub-subparagraph (B) applies—the book; or

30

(B) if the stored matters are only some of the information that is required to be contained in the book—the book and matters that are of the same kind as the stored matters; and

(ii) specifying the situation of the place of storage and the place of inspection.

35

“(2) Subject to subsection (4), the corporation is taken to have complied with the requirements of this Law as to the location of the book, but only in so far as the book is required to contain the stored matters.

40

“(3) Subject to subsection (4), for the purposes of the application of subsection 1085(3) and section 1300 in relation to the corporation and

the book, the book is taken to be kept at the place of inspection, even though the record of the stored matters is kept at the place of storage.

“(4) If:

- 5 (a) the situation of the place of storage or the place of inspection changes; and
(b) the corporation does not lodge notice of the change within 14 days after the change;

10 this section, as it applies to the corporation because of the lodging of the notice referred to in paragraph (1)(d), ceases to so apply at the end of that period of 14 days.”.

Form and evidentiary value of books

172. Section 1306 of the Corporations Law is amended:

- (a) by omitting subsection (5) and substituting the following subsections:

15 “(4A) The regulations may provide for how up to date the information contained in an instrument prepared for the purposes of subsection (4) must be.

“(5) If:

- 20 (a) because of this Law, a book that this Law requires to be kept or prepared is *prima facie* evidence of a matter; and
(b) the book, or a part of the book, is kept or prepared by recording or storing matters (including that matter) by means of a mechanical, electronic or other device;

25 a written reproduction of that matter as so recorded or stored is *prima facie* evidence of that matter.”;

- (b) by omitting from subsection (6) “matters” (first occurring) and substituting “a matter”;
(c) by omitting from subsection (6) “those matters” and substituting “that matter”.

30 Schedule 3

173. Schedule 3 to the Corporations Law is amended by inserting before “**Subsection 1114(8)**” the following:

“**Section 1112A:**

Penalty: \$2,500 or imprisonment for 6 months, or both.”.

35 PART 6—MISCELLANEOUS

Division 1—Amendments of the Corporations Law

Dictionary

174. Section 9 of the Corporations Law is amended by inserting the following definition:

40 “‘**Department**’, in a case where a provision uses the expression ‘the Department’ without specifying which Department is referred to, means:

- (a) if the Minister or Ministers for the time being administering the *Corporations Act 1989* administers or administer only one Department of State of the Commonwealth—that Department; or
- (b) otherwise—the Department of State of the Commonwealth prescribed for the purposes of this definition as it applies for the purposes of that provision;”.

Address of registered office etc.

175. Section 100 of the Corporations Law is amended:

- (a) by omitting from paragraph (1)(d) “shall be accompanied by a written statement, signed by an officer of the body,” and substituting “must include a written statement”;
- (b) by inserting in subsection (2) “notice that includes a” after “lodged a”.

Return of allotment

176. Section 187 of the Corporations Law is amended:

- (a) by omitting from subsection (3) everything after “contract in writing,” and substituting the following:
 - “the company must:
 - (a) lodge with the return the contract evidencing the allottee’s entitlement, or a certified copy of that contract; and
 - (b) lodge:
 - (i) if the regulations prescribe for the purposes of this paragraph a period ending after the return is lodged—within that period; or
 - (ii) otherwise—with the return;
 - a certificate to the effect that the contract referred to in paragraph (a) has been duly stamped as required by any applicable law relating to stamp duty.”;
 - (b) by omitting subsection (4) and substituting the following subsections:
 - “(4) If the Commission considers it appropriate to do so in a particular case, the Commission may by writing authorise a company to lodge a certificate under paragraph (3)(b) within a period that is specified in the authorisation and ends after:
 - (a) if subparagraph (3)(b)(i) applies—the period referred to in that subparagraph; or
 - (b) otherwise—the return is lodged.
 - “(4A) An authorisation under subsection (4) has effect despite paragraph (3)(b), but the company must lodge the certificate within the period specified in the authorisation.”.

177. After section 335 of the Corporations Law the following section is inserted:

Company's address for service for the purposes of section 335

5 "335A.(1) A company may lodge a notice in the prescribed form specifying its address for service for the purposes of section 335.

"(2) A company may lodge a notice in the prescribed form stating that the company no longer has an address for service for the purposes of section 335.

10 "(3) A notice lodged under subsection (1) or (2) takes effect at the beginning of:

(a) if the notice specifies, as the day on which it is to take effect, a day that is more than 7 days after the day of lodgment—the day so specified; or

(b) otherwise—the eighth day after the day of lodgment.

15 "(4) The Commission may serve a document on a company under subsection 335(2) by leaving it at, or sending it by post to, the address specified in:

(a) if only one notice lodged by the company under subsection (1) has taken effect—that notice; or

20 (b) if 2 or more such notices have taken effect—the later or latest such notice to take effect;

unless a notice lodged by the company under subsection (2) has taken effect since the notice referred to in paragraph (a) or (b) of this subsection took effect.

25 "(5) The address specified in a notice under subsection (1) need not be the address of particular premises, but may be a postal address, for example, a post office box number at a post office.

30 "(6) This section does not affect the operation of any other provision of this Law or any other law of the Commonwealth or of this jurisdiction that authorises a document to be served otherwise than as provided in subsection (4)."

Exemption of certain companies

178. Section 337 of the Corporations Law is amended by omitting from subsection (1) "Division" (twice occurring) and substituting "Part".

35 179. Before section 1346 of the Corporations Law the following section is inserted in Part 9.9:

Minister may delegate prescribed functions and powers under this Law

40 "1345A.(1) The Minister may, by signed instrument, delegate to an officer of the Department such of the Minister's functions and powers under this Law as are prescribed.

“(2) A delegate is, in the performance or exercise of a delegated function or power, subject to the Minister’s directions.”.

Division 2—Amendments of the Australian Securities Commission Act 1989²

Functions and powers

5

180. Section 226 of the Principal Act is amended:

(a) by inserting after subsection (4) the following subsection:

“(4A) The Standards Board must, so far as it is reasonably practicable to do so, ensure that the New Zealand authority is consulted in the course of:

10

- (a) the development of possible accounting standards; and
- (b) the review of proposed accounting standards.”;

(b) by inserting in subsection (5) the following definition:

“‘**New Zealand authority**’ means the person or authority that in New Zealand has functions that are analogous to the functions of the Standards Board.”.

15

Liability for damages

181. Section 246 of the Principal Act is amended:

(a) by inserting before paragraph (a) the following paragraph:

“(aa) the Minister;”;

20

(b) by adding at the end the following subsection:

“(2) The protection from liability given by subsection (1) to the Minister applies only in respect of acts done, and omissions occurring, after the commencement of section 181 of the *Corporate Law Reform Act 1992*.”.

25

PART 7—COMMENCEMENT AND APPLICATION OF CHANGES TO THE CORPORATIONS LAW RESULTING FROM THIS ACT

Effect of this Part

182. Section 6 of the Corporations Law is amended by adding at the end the following subsection:

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“(4) Where, because of Part 9.11, provisions of this Law, as in force at a particular time, continue to apply:

- (a) in relation to someone or something; or
- (b) for particular purposes;

35

then, for the purposes of those provisions as so applying:

- (c) this Part as in force at that time continues to have effect; and
- (d) this Part as in force at a later time does not have effect.

General penalty provisions

183. Section 1311 of the Corporations Law is amended by inserting after subsection (3) the following subsection:

5 “(3A) Where, because of Part 9.11, provisions of this Law, as in force at a particular time, continue to apply:

(a) in relation to someone or something; or

(b) for particular purposes;

then, for the purposes of those provisions as so applying:

(c) Schedule 3 as in force at that time continues to have effect; and

10 (d) Schedule 3 as in force at a later time does not have effect;

except so far as the contrary intention appears in this Law.”.

Changes to section 597

184. Section 1370 of the Corporations Law is amended:

15 (a) by inserting in subsection (1) “and before the commencement of section 117 of the *Corporate Law Reform Act 1992*” after “1992”;

(b) by omitting from subsection (1) “that” (twice occurring) and substituting “the first-mentioned”.

20 185. At the end of Part 9.11 of the Corporations Law the following Division is added:

“Division 5—Changes resulting from the Corporate Law Reform Act 1992

Commencement of subsection 6(4)

25 “1372. Subsection 6(4) is taken to have commenced on 27 June 1991.

Application of changes to section 187

30 “1373.(1) Subsections 187(3), (4) and (4A), as in force after the commencement of section 176 of the *Corporate Law Reform Act 1992*, apply in relation to an allotment made, or taken to have been made, at or after that commencement.

“(2) Subsections 187(3) and (4), as in force before that commencement, continue to apply in relation to an allotment made, or taken to have been made, before that commencement.

Application of change to paragraph 230(1)(d)

35 “1374.(1) Paragraph 230(1)(d), as in force after the commencement of section 10 of the *Corporate Law Reform Act 1992*, applies in relation to an act done, or an omission made, at or after that commencement.

“(2) Paragraph 230(1)(d), as in force before that commencement, continues to apply in relation to an act done, or a failure committed, by a person before that commencement, unless:

- (a) the act or failure constituted a contravention of subsection 232(3) or (4) as so in force; and 5
- (b) the person consents under subsection 1389(1) to Part 9.4B applying in relation to the contravention; and
- (c) when the person so consents, no application made under subsection 230(1) in relation to the act or failure, and no appeal arising out of such an application, is pending. 10

Application of certain changes to section 232

“1375.(1) Subsection 232(3) of this Law, as in force before the commencement of section 11 of the *Corporate Law Reform Act 1992*, continues to apply in relation to a contravention of subsection 232(2) of this Law committed before that commencement. 15

“(2) Subsections 232(7), (8), (9) and (10) of this Law, as in force before the commencement of section 11 of the *Corporate Law Reform Act 1992*, continue to apply in relation to a contravention of section 232 of this Law committed before that commencement.

Application of sections 243H and 243ZE 20

“1376.(1) Sections 243H and 243ZE apply to a public company on and after 1 February 1994.

“(2) A majority of a public company’s directors may elect in writing that sections 243H and 243ZE apply to the company on and after a specified day that is sooner than 1 February 1994. 25

“(3) An election has effect accordingly and cannot be revoked.

Application of subsection 307(2)

“1377. Subsection 307(2) applies in relation to a company in relation to a financial year of the company that ends at or after the commencement of section 13 of the *Corporate Law Reform Act 1992*. 30

Application of change to section 318

“1378. Subsection 318(2) of this Law, as in force before the commencement of section 14 of the *Corporate Law Reform Act 1992*, continues to apply in relation to a contravention of subsection 318(1) of this Law committed before that commencement. 35

Application of certain changes to Part 5.2

“1379.(1) The following apply in relation to a controller of property of a corporation if, and only if, the control day begins at or after the commencement of section 40 of the *Corporate Law Reform Act 1992*:

(a) sections 419A, 420A, 420B and 421A, subsection 428(2) and sections 434A, 434B and 434C of this Law;

(b) sections 423, 424, 426, 429, 430, 431, 432 and 434 of this Law, as in force after that commencement.

5 “(2) Sections 423, 424, 426, 429, 430, 431, 432 and 434, as in force before the commencement of section 40 of the *Corporate Law Reform Act 1992*, continue to apply in relation to a receiver, or receiver and manager, of property of a corporation if the control day began before that commencement.

10 “(3) Section 420C applies in relation to a receiver, or receiver and manager, of property of a corporation if, and only if, the control day begins at or after the commencement of section 41 of the *Corporate Law Reform Act 1992*, even if the corporation began to be wound up before that commencement.

15 “(4) Section 421, as in force after the commencement of section 42 of the *Corporate Law Reform Act 1992*:

(a) applies in relation to a receiver, or receiver and manager, of property of a corporation even if the control day began before that commencement; and

20 (b) applies in relation to any other controller of property of a corporation if, and only if, the control day began at or after that commencement.

Continued application of old Part 5.3 and related provisions

25 “1380.(1) If, before the commencement of section 56 of the *Corporate Law Reform Act 1992*, a company was placed under official management, Part 5.3 and paragraphs 462(2)(e), (f) and (g) of this Law, as in force before that commencement, continue to apply in relation to the company, but the company cannot again be placed under official management after that commencement.

30 “(2) While a company is under official management, an administrator of the company cannot be appointed under section 436A, 436B or 436C.

Certain provisions continue to apply in relation to official management

35 “1381. Except so far as the contrary intention appears, in this Law (other than Part 5.3A, Division 1A of Part 5.6 and section 556):

(a) a reference to an administrator of a body corporate or relevant body being appointed under section 436A, 436B or 436C includes a reference to the body being placed under official management; and

40 (b) a reference to a body corporate or relevant body being under administration includes a reference to the body being under official management; and

(c) a reference to a body corporate or relevant body that is or has

been under administration includes a reference to such a body that is, or has been, as the case may be, under official management; and

- (d) a reference to an administrator of a body corporate, of a relevant body, or of an entity within the meaning of Parts 3.6 and 3.7, includes a reference to an official manager or deputy official manager of the body or entity;

even if the body or entity ceased before the commencement of section 56 of the *Corporate Law Reform Act 1992* to be under official management.

Application of new provisions relating to winding up

“1382. Subject to sections 1383, 1384 and 1386, the following provisions:

- (a) Parts 5.4, 5.4A, 5.4B, 5.5 and 5.6;
- (b) sections 589, 590 and 592;
- (c) Division 1 of Part 5.9;
- (d) section 598;

as in force after the commencement of section 57 of the *Corporate Law Reform Act 1992*, apply, according to their tenor, in relation to:

- (e) acts done; and
- (f) omissions made; and
- (g) events occurring; and
- (h) matters and things arising;

whether before, at or after that commencement.

Continued application of old Parts 5.4, 5.5 and 5.6

“1383.(1) In this section:

‘old winding up law’ means Parts 5.4, 5.5 and 5.6 as in force before the relevant commencement;

‘relevant commencement’ means the commencement of section 57 of the *Corporate Law Reform Act 1992*.

“(2) If, before the relevant commencement, the Court ordered the winding up of a company, the old winding up law continues to apply for the purposes of the winding up.

“(3) If, before the relevant commencement, an application was made for the Court to order the winding up of a company, the old winding up law continues to apply for the purposes of:

- (a) determining, or otherwise disposing of, the application; and
- (b) winding up the company under an order of the Court made on the application.

“(4) If, before the relevant commencement, a demand was served on a company under paragraph 460(2)(a), the old winding up law continues to apply for the purposes of:

- 5
- (a) making after that commencement, in reliance on the demand, an application for the Court to order the winding up of the company on the ground provided for by subsection 460(1); and
 - (b) determining, or otherwise disposing of, an application of that kind so made; and
 - (c) winding up the company under an order of the Court made on an application of that kind so made.

10 “(5) If, before the relevant commencement, a company passed a special resolution under section 491 that the company be wound up voluntarily, the old winding up law continues to apply for the purposes of:

- 15
- (a) the voluntary winding up; and
 - (b) making after that commencement an application for the Court to order the winding up of the company; and
 - (c) determining, or otherwise disposing of, an application of that kind made after that commencement; and
 - (d) winding up the company under an order of the Court made, after that commencement, on an application of that kind.

20 “(6) Even if the old winding up law continues to apply, because of this section, for particular purposes relating to a company, an administrator of the company may still be appointed under section 436A, 436B or 436C.

25 “(7) The old winding up law continues to apply, because of this section, as if:

- 30
- (a) despite subsection 6(4), there were inserted in section 9 (as in force before the relevant commencement) the definitions of ‘administration’, ‘administrator’ and ‘deed of company arrangement’ that section 29 of the *Corporate Law Reform Act 1992* inserts in section 9 of the *Corporations Law* set out in section 82 of the *Corporations Act 1989*; and
 - (b) despite subsection 6(4), section 82A of this Law (as so in force) were amended as set out in section 33 of that Act; and
 - (c) section 468 of this Law (as so in force) were amended as set out in section 65 of that Act; and
 - (d) section 481 of this Law (as so in force) were amended as set out in section 75 of that Act; and
 - (e) section 556 of this Law (as so in force) were amended by inserting after paragraph (1)(d) the following paragraphs:

40 ‘(da) if the company has been under administration, even if the administration ended before the relevant date—next, the costs, charges and expenses, of and incidental to the administration, properly and reasonably incurred by the administrator, including the administrator’s remuneration;

- (db) if paragraph (da) applies—next, the debts for which paragraph 443D(a) entitles an administrator of the company to be indemnified, except costs, charges and expenses covered by paragraph (da) of this subsection;
- (dc) if the company has executed a deed of company arrangement, even if it terminated before the relevant date—next, the costs, charges and expenses, of and incidental to executing and giving effect to the deed, properly and reasonably incurred by an administrator of the company or of the deed, including the remuneration of the deed’s administrator; and
- (f) sections 57 to 64, inclusive, 66 to 74, inclusive, 76 to 109, inclusive, and 111, of that Act had not been enacted.

“(8) Subsection 565(4), as continuing to apply because of this section, has effect subject to Part 5.3A.

Continued application of old sections 589, 590 and 592

“1384.(1) If, immediately before the commencement of section 112 of the *Corporate Law Reform Act 1992*, a company or Part 5.7 body was a company to which sections 590 to 593 (inclusive) of this Law apply, then paragraph (a) of the definition of ‘relevant day’ in subsection 589(5), and sections 590 and 592, of this Law, as in force before that commencement, continue to apply in relation to the company or body.

“(2) If, because of section 1383, provisions continue to apply for particular purposes relating to a company, paragraph (a) of the definition of ‘relevant day’ in subsection 589(5), and sections 590 and 592, of this Law, as in force before the commencement of section 112 of the *Corporate Law Reform Act 1992*, also apply in relation to the company.

“(3) Provisions continue to apply, or apply, because of this section, as if paragraph 112(d), and sections 113 and 114, of the *Corporate Law Reform Act 1992* had not been enacted.

Continued effect of authorisations under subsections 597(1) and 598(1)

“1385. An authorisation that, immediately before the commencement of section 117 or 119 of the *Corporate Law Reform Act 1992*, was in force under subsection 597(1) or 598(1), as the case may be, of this Law, has effect after that commencement as if a reference in it to section 597 or 598, as the case may be, of this Law included a reference to Division 1 or 2, as the case may be, of Part 5.9 of this Law.

Continued application of old section 597

“1386.(1) If, before the commencement of section 117 of the *Corporate Law Reform Act 1992*, the Court made an order under subsection 597(3) of this Law, then section 597 of this Law, as in force before that commencement, continues to apply for the purposes of holding an examination under the order.

“(2) If, before that commencement, an application was made under subsection 597(2) of this Law, then section 597 of this Law, as in force before that commencement, continues to apply for the purposes of:

- 5 (a) determining, or otherwise disposing of, the application; and
 (b) holding an examination under an order made under subsection 597(3) on the application.

Application of change to paragraph 1091(1A)(b)

10 “1387. Paragraph 1091(1A)(b) of this Law, as in force immediately after the commencement of section 160 of the *Corporate Law Reform Act 1992*, is taken to have commenced on 1 January 1991.

Application of change to section 1301

15 “1388. If, immediately before the commencement of section 171 of the *Corporate Law Reform Act 1992*, there was in force a notice lodged by a corporation for the purposes of paragraph 1301(3)(a) of this Law, section 1301 of this Law as in force after that commencement applies as if the notice were a notice lodged for the purposes of paragraph 1301(1)(d) of this Law as in force after that commencement.

Application of Part 9.4B to contravention committed before that Part commenced

20 “1389.(1) Subsections (2) and (3) of this section apply where:

- (a) it is alleged or suspected that a person has contravened:
 (i) subsection 232(2), (4), (5) or (6); or
 (ii) subsection 234(5); or
 (iii) subsection 318(1);
25 before the commencement of Part 9.4B; and
 (b) the person consents in writing to that Part applying in relation to the contravention.

30 “(2) The provisions of Part 9.4B (except sections 1317FA, 1317HA, 1317HB, 1317HD and 1317HF) apply in relation to the contravention as if they had been in force when it was committed.

 “(3) In the case of a contravention of subsection 232(2), (4), (5) or (6):

- 35 (a) the provisions of sections 1317HA and 1317HD and subsection 1317HF(1) apply in relation to the contravention as if they had been in force when it was committed; and
 (b) despite subsection 1375(2), subsection 232(8) does not apply in relation to the contravention.

 “(4) Sections 1317DB, 1317DC and 1317DD have effect for the purposes of this section as if this section were in Part 9.4B.

40 “(5) Except as provided in paragraph (3)(b), this section does not affect the operation of section 1375 or 1378.”.

SCHEDULE 1

**AMENDMENTS OF THE CORPORATIONS LAW CONSEQUENT
ON PART 4 OF THIS ACT**

Paragraph 67(4)(e):

Omit the paragraph, substitute:

- “(e) as an administrator of a body corporate; or
- (ea) as an administrator of a deed of company arrangement executed by a body corporate;”.

Paragraph 68(2)(f):

Omit the paragraph, substitute:

- “(f) as an administrator of a body corporate; or
- (fa) as an administrator of a deed of company arrangement executed by a body corporate; or”.

Paragraph 206QB(3)(d):

Omit the paragraph, substitute:

- “(d) an administrator of the company is appointed under section 436A, 436B or 436C.”.

Paragraph 206QC(1)(a):

Omit the paragraph, substitute:

- “(a) on a particular day:
 - (i) a court orders that a company be wound up; or
 - (ii) a company resolves that it be wound up; or
 - (iii) a company is placed under official management; or
 - (iv) an administrator of a company is appointed under section 436A, 436B or 436C; and”.

Subparagraphs 206QC(1)(b)(i) and (ii):

Omit the subparagraphs, substitute:

- “(i) if subparagraph (a)(i) or (ii) applies—the day when the winding up is taken to have begun; or
- (ia) if subparagraph (a)(iii) applies—the day when the official management began; or
- (ib) if subparagraph (a)(iv) applies—the section 513C day in relation to the administration; or
- (ii) if the company was insolvent throughout a period ending immediately before the day referred to in subparagraph (i), (ia) or (ib), as the case requires—the day when the company last ceased, before the day so referred to, to be solvent;”.

SCHEDULE 1—continued

Paragraph 206QC(1)(c):

Omit “that”, substitute “those”.

Paragraph 206RB(1)(c):

Omit the paragraph, substitute:

“(c) the company is under administration; or

(ca) a deed of company arrangement executed by the company has not yet terminated; or”.

Subsection 206RC(3):

Omit “section 553 or 554”, substitute “Subdivision A, B or C of Division 6 of Part 5.6”.

Subsection 230(6) (paragraph (a) of the definition of “prescribed person”):

Omit the paragraph, substitute:

“(a) a liquidator or provisional liquidator of the body corporate;

(ba) an administrator of the body corporate;

(bb) an administrator of a deed of company arrangement executed by the body corporate;”.

Subsection 241(4) (paragraph (c) of the definition of “officer”):

Omit the paragraph, substitute:

“(c) an administrator of the company;

(ca) an administrator of a deed of company arrangement executed by the company;”.

Paragraphs 266(1)(b) and (3)(b):

Omit the paragraphs, substitute in each case:

“(b) an administrator of a company is appointed under section 436A, 436B or 436C; or

(ba) a company executes a deed of company arrangement;”.

Subsection 266(1):

Omit “or official manager,”, substitute “, the administrator of the company, or the deed’s administrator,”.

Subparagraphs 266(1)(c)(ii) and (3)(c)(ii):

Omit “commencement of the winding up or the appointment of the official manager, as the case may be;”, substitute “critical day;”.

Paragraphs 266(1)(d), (e) and (f):

Omit “commencement of the winding up or at the time of the appointment referred to in paragraph (b)”, substitute “start of the critical day”.

SCHEDULE 1—continued

Paragraph 266(3)(d):

Omit “commencement of the winding up or at the time of the appointment of the official manager”, substitute “start of the critical day”.

Subsection 266(5):

Omit “official manager of the company, notwithstanding that”, substitute “administrator of the company, or an administrator of a deed of company arrangement executed by the company, even if ”.

Paragraph 266(6)(a):

Add at the end “or”.

Paragraph 266(6)(c):

Omit the paragraph, substitute:

“(c) an administrator of the company being appointed under section 436A, 436B or 436C; or

(d) the company executing a deed of company arrangement.”.

Subsection 266(7):

Omit “and (c)”, substitute “, (c) and (d)”.

Section 266:

Add at the end:

“(8) In this section:

‘critical day’, in relation to a company, means:

(a) if the company is being wound up—the day when the winding up began; or

(b) if the company is under administration—the section 513C day in relation to the administration; or

(c) if the company has executed a deed of company arrangement—the section 513C day in relation to the administration that ended when the deed was executed.”.

Subsections 493(1) and (2):

Omit “commencement of the winding up”, substitute “passing of the resolution”.

Subsection 500(1):

Omit “a company after the commencement of a creditors’ voluntary winding up”, substitute “the company after the passing of the resolution for voluntary winding up”.

SCHEDULE 1—continued

Subsection 500(2):

Omit “commencement of a creditors’ voluntary winding up of a company,”, substitute “passing of the resolution for voluntary winding up,”.

Paragraph 585(a):

Omit “\$1000”, substitute “the statutory minimum”.

Paragraph 599(1)(c):

Omit the paragraph, substitute:

“(c) that has been or is under administration;

(ca) that has executed a deed of company arrangement, even if the deed has terminated;”.

Paragraph 599(3)(c):

Omit “official management,”, substitute “administration, having executed a deed of company arrangement,”.

Section 603 (paragraph (k) of the definition of “prescribed occurrence”):

Omit the paragraph, substitute:

“(k) an administrator of the target company, or of a subsidiary, being appointed under section 436A, 436B or 436C;

(l) the target company or a subsidiary executing a deed of company arrangement; or”.

Paragraphs 647(2)(b) and 683(2)(b):

Omit the paragraphs, substitute in each case:

“(b) if the company is being wound up or is under administration—be signed by the liquidator or administrator, as the case may be; or

(c) if the company has executed a deed of company arrangement that has not yet terminated—be signed by the deed’s administrator.”.

Paragraph 684(4)(a):

Omit the paragraph, substitute:

“(a) an administrator of that body corporate, or, if there are 2 or more bodies corporate, of either or any of them, is appointed under section 436A, 436B or 436C;”.

Subsection 684(4):

Omit “body corporate was placed under official management,”, substitute “administrator was so appointed,”.

SCHEDULE 1—continued

Section 750 (paragraph (1)(a) in Part B and paragraph (1)(a) in Part D):

Omit everything before subparagraph (i), substitute:

“(a) unless paragraph (b) applies—in relation to each director of the target company:”.

Section 750 (paragraph (1)(b) in Part B):

Omit the paragraph, substitute:

“(b) if the target company is being wound up, is under administration, or has executed a deed of company arrangement that has not yet terminated—in relation to each liquidator, each administrator of the company, or each administrator of the deed, as the case may be:

- (i) if he or she wants to make, and thinks himself or herself justified in making, a recommendation in relation to the offers—whether he or she recommends the acceptance of offers made or to be made by the offerer or recommends against acceptance, and why he or she so recommends; or
- (ii) otherwise—that he or she does not want to make, or does not think himself or herself justified in making, a recommendation, and why not.”.

Section 750 (paragraph (13)(b) in Part B):

Omit the paragraph, substitute:

“(b) in the case of a Part B statement that is signed as mentioned in paragraph 647(2)(b) or (c)—any liquidator or administrator of the company, or any administrator of the deed of company arrangement, as the case may be;”.

Section 750 (paragraph (1)(b) in Part D):

Omit the paragraph, substitute:

“(b) if the target company is being wound up, is under administration, or has executed a deed of company arrangement that has not yet terminated—in relation to each liquidator, each administrator of the company, or each administrator of the deed, as the case may be:

- (i) if he or she wants to make, and thinks himself or herself justified in making, a recommendation in relation to the offers—whether he or she recommends the acceptance of offers under the takeover announcement or recommends against acceptance, and why he or she so recommends; or
- (ii) otherwise—that he or she does not want to make, or

SCHEDULE 1—continued

does not think himself or herself justified in making, a recommendation, and why not.”.

Section 750 (paragraph (12)(b) in Part D):

Omit the paragraph, substitute:

“(b) in the case of a Part D statement that is signed as mentioned in paragraph 683(2)(b) or (c)—any liquidator or administrator of the company, or any administrator of the deed of company arrangement, as the case may be;”.

Before paragraph 922(1)(a):

Insert:

“(aa) an administrator of the body corporate is appointed under section 436A, 436B or 436C;”.

Paragraph 922(1)(a):

Omit “, comes under official management”.

Paragraph 922(1)(c):

After “creditors” insert “or a class of them”.

Paragraph 1058(11)(a):

Omit the paragraph, substitute:

“(a) it is under administration or being wound up; or”.

Paragraph 1252(2)(c):

Omit the paragraph, substitute:

“(c) an administrator of the body corporate;

(ca) an administrator of a deed of company arrangement executed by the body corporate;”.

Subparagraph 1274(2)(a)(iv):

After “422,” insert “438D,”.

Paragraph 1317C(f):

Omit the paragraph, substitute:

“(f) a decision to apply under section 596A or 596B for the Court to summon a person for examination about a corporation’s examinable affairs; or

(g) a decision to apply under section 597A for the Court to require a person to file an affidavit about a corporation’s examinable affairs.”.

SCHEDULE 1—continued

Paragraph 1318(5)(c):

- “(c) an administrator of the corporation;
- (ca) an administrator of a deed of company arrangement executed by the corporation;”.

Paragraph 1321(c):

Omit the paragraph, substitute:

- “(c) an administrator of a company;
 - (ca) an administrator of a deed of company arrangement executed by a company; or”.
-

SCHEDULE 2

AMENDMENTS OF ACTS CONSEQUENT ON PART 4 OF THIS ACT

Australian Meat and Live-stock Corporation Act 1977

Subparagraphs 16F(c)(i), (ii) and (iii):

Add at the end “or”.

Subparagraph 16F(c)(v):

Omit the subparagraph, substitute:

“(v) an administrator of the holder of the licence is appointed under section 436A, 436B or 436C of the Corporations Law; or

(vi) the holder of the licence executes a deed of company arrangement under Part 5.3A of that Law;”.

Bankruptcy Act 1966

Subsection 5(1) (definition of “company officer”):

After paragraph (b) insert:

“(ba) an administrator, within the meaning of the Corporations Law, of the corporation;

(bb) an administrator of a deed of company arrangement executed by the corporation under Part 5.3A of that Law;”.

After subparagraph 5G(c)(i):

Insert:

“(ia) the company is under administration within the meaning of the Corporations Law;

(ib) a deed of company arrangement that the company executed under Part 5.3A of that Law has not yet terminated;”.

Paragraph 5G(c):

After “receiver and manager,” insert “of an administrator (within the meaning of that Law) of the company, of an administrator of such a deed,”.

Child Support (Registration and Collection) Act 1988

Subsection 4(1) (paragraphs (a), (b), (c) and (d) of the definition of “trustee”):

Add at the end “or”.

SCHEDULE 2—continued

Subsection 4(1) (definition of “trustee”):

After paragraph (e) insert:

- “(ea) an administrator, within the meaning of the Corporations Law, of a company; or
- (eb) an administrator of a deed of company arrangement executed by a company under Part 5.3A of that Law; or”.

Customs Act 1901

After paragraph 81(3)(c):

Insert:

- “(ca) whether the company is under administration within the meaning of the Corporations Law;
- (cb) whether the company has executed under Part 5.3A of that Law a deed of company arrangement that has not yet terminated;”.

Paragraph 82(1)(ba):

Omit the paragraph, substitute:

- “(ba) in the case of a licence held by a company—any of the following events occurs:
 - (i) the company is convicted of an offence of a kind referred to in paragraph 81(3)(a) or (b);
 - (ii) a receiver of the property, or part of the property, of the company is appointed;
 - (iii) an administrator of the company is appointed under section 436A, 436B or 436C of the Corporations Law;
 - (iv) the company executes a deed of company arrangement under Part 5.3A of that Law;
 - (v) the company begins to be wound up;”.

After paragraph 183CC(4A)(c):

Insert:

- “(ca) whether the company is under administration within the meaning of the Corporations Law;
- (cb) whether the company has executed under Part 5.3A of that Law a deed of company arrangement that has not yet terminated;”.

Paragraph 183CG(1)(c):

Omit the paragraph, substitute:

- “(c) in the case of a licence held by a company:
 - (i) a receiver of the property, or part of the property, of the company is appointed; or

SCHEDULE 2—continued

- (ii) an administrator of the company is appointed under section 436A, 436B or 436C of the Corporations Law; or
- (iii) the company executes a deed of company arrangement under Part 5.3A of that Law; or
- (iv) the company begins to be wound up;”.

Fringe Benefits Tax Assessment Act 1986

Subsection 136(1) (paragraphs (a), (b), (c) and (d) of the definition of “trustee”):

Add at the end “or”.

Subsection 136(1) (definition of “trustee”):

After paragraph (e) insert:

- “(ea) an administrator, within the meaning of the Corporations Law, of a company; or
- (eb) an administrator of a deed of company arrangement executed by a company under Part 5.3A of that Law; or”.

Insurance Act 1973

Subsection 50(1) (definition of “prescribed person”):

Omit everything after paragraph (d), substitute:

“but does not include:

- (e) a receiver, or a receiver and manager, of property of the body; or
- (f) an administrator, within the meaning of the Corporations Law, of the body; or
- (g) an administrator of a deed of company arrangement executed by the body under Part 5.3A of that Law; or
- (h) an official manager or deputy official manager of the body; or
- (i) a liquidator or provisional liquidator of the body.”.

Insurance (Agents and Brokers) Act 1984

Section 9 (definition of “insolvent company under administration”):

Omit the definition, substitute:

“ ‘insolvent company under administration’ means a company:

- (a) that has entered into a compromise or arrangement with its creditors, or a class of them, the administration of which has not ended; or
- (b) in respect of property of which a receiver, or a receiver and manager, has been appointed (whether or not by a court) and is acting; or

SCHEDULE 2—continued

- (c) that is under administration within the meaning of the Corporations Law; or
- (d) that has executed under Part 5.3A of that Law a deed of company arrangement that has not yet terminated; or
- (e) that is under official management; or
- (f) that is being wound up; or
- (g) in respect of which a provisional liquidator has been appointed and not since removed;”.

Overseas Students (Refunds) Act 1990

After subparagraph 5(4)(a)(ii):

Insert:

- “(iii) an administrator, within the meaning of the Corporations Law, of the institution; and
- (iv) an administrator of a deed of company arrangement executed by the institution under Part 5.3A of that Law; and”.

After sub-subparagraph 5(4)(b)(ii)(B):

Insert:

- “; or (C) an administrator, within the meaning of the Corporations Law, of that person; or
- (D) an administrator of a deed of company arrangement executed by that person under Part 5.3A of that Law.”.

Petroleum Resource Rent Tax Assessment Act 1987

Section 2 (paragraphs (a), (b), (c) and (d) of the definition of “trustee”):

Add at the end “or”.

Section 2 (definition of “trustee”):

After paragraph (e) insert:

- “(ea) an administrator, within the meaning of the Corporations Law, of a company; or
- (eb) an administrator of a deed of company arrangement executed by a company under Part 5.3A of that Law; or”.

Sales Tax Assessment Act 1992

Section 5 (definition of “trustee”):

After paragraph (e) insert:

- “(ea) an administrator, within the meaning of the Corporations Law, of a company;

SCHEDULE 2—continued

- (eb) an administrator of a deed of company arrangement executed by a company under Part 5.3A of that Law; or”.

Taxation Administration Act 1953

After paragraph 8Y(4)(b):

Insert:

- “(ba) an administrator, within the meaning of the Corporations Law, of the corporation;
(bb) an administrator of a deed of company arrangement executed by the corporation under Part 5.3A of that Law;”.

Training Guarantee (Administration) Act 1990

Section 4 (definition of “trustee”):

After paragraph (e) insert:

- “(ea) an administrator, within the meaning of the Corporations Law, of a company; and
(eb) an administrator of a deed of company arrangement executed by a company under Part 5.3A of that Law; and”.

NOTES

1. No. 109, 1989, as amended. For previous amendments, see No. 110, 1990; Nos. 110, 200 and 201, 1991; and No. 27, 1992.
2. No. 90, 1989, as amended. For previous amendments, see Nos. 41 and 110, 1990; Nos. 110, 122 and 188, 1991; and No. 27, 1992.
3. No. 33, 1966, as amended. For previous amendments, see No. 121, 1968; No. 40, 1969; No. 122, 1970; No. 216, 1973; No. 56, 1975; Nos. 37, 91 and 161, 1976; No. 111, 1977, No. 155, 1979; Nos. 12 and 70, 1980; Nos. 74 and 176, 1981; No. 18, 1983; Nos. 10 and 63, 1984; Nos. 21 and 193, 1985; Nos. 154 and 168, 1986; Nos. 73 and 119, 1987; Nos. 8, 38 and 99, 1988; No. 129, 1989; No. 115, 1990; and No. 9, 1992.

NOTES ABOUT SECTION HEADINGS

1. On the commencement of section 37 of this Act, the heading to section 419 of the Corporations Law set out in section 82 of the *Corporations Act 1989* is altered by omitting “receiver” and substituting “controller”.
2. On the commencement of section 123 of this Act, the heading to section 266 of the Corporations Law set out in section 82 of the *Corporations Act 1989* is altered by omitting “official manager” and substituting “administrator”.
3. On the commencement of section 169 of this Act, the heading to section 1112 of the Corporations Law set out in section 82 of the *Corporations Act 1989* is omitted and the following heading is substituted:
“Offences: stamping of broker’s stamp on sufficient transfer”.

Corporate Law Reform No. 210, 1992

*[Minister's second reading speech made in—
House of Representatives on 3 November 1992
Senate on 12 November 1992]*