

Corporations Act 2001

Act No. 50 of 2001 as amended

This compilation was prepared on 12 January 2009
taking into account amendments up to Act No. 146 of 2008

Volume 1 includes: Table of Contents
Chapters 1–2K (ss. 1 – 282)

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Volume 2 includes: Table of Contents
Chapters 2L–5B (ss. 283AA – 601DJ)

Volume 3 includes: Table of Contents
Chapters 5C–6D (ss. 601EA – 742)

Volume 4 includes: Table of Contents
Chapters 7 and 8 (ss. 760A – 1200U)

Volume 5 includes: Table of Contents
Chapters 9 and 10 (ss. 1274 – 1484)
Schedules 3 and 4
Note 1
Table of Acts
Act Notes
Table of Amendments
Note 2
Table A

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Contents

Chapter 1—Introductory	1
Part 1.1—Preliminary	1
1 Short title [see Note 1].....	1
2 Commencement [see Note 1].....	1
3 Constitutional basis for this Act	1
4 Referring States	2
5 General territorial application of Act.....	4
5A Application to the Crown	7
5B ASIC has general administration of this Act	7
5C Application of the <i>Acts Interpretation Act 1901</i>	7
Part 1.1A—Interaction between Corporations legislation and State and Territory laws	9
5D Coverage of Part.....	9
5E Concurrent operation intended	9
5F Corporations legislation does not apply to matters declared by State or Territory law to be an excluded matter	10
5G Avoiding direct inconsistency arising between the Corporations legislation and State and Territory laws	12
5H Registration of body as company on basis of State or Territory law	19
5I Regulations may modify operation of the Corporations legislation to deal with interaction between that legislation and State and Territory laws	21
Part 1.2—Interpretation	23
Division 1—General	23
6 Effect of this Part.....	23
7 Location of other interpretation provisions.....	23
9 Dictionary	24
9AA Certain family relationships.....	86
9A Meaning of <i>rights issue</i>	86
Division 2—Associates	89
10 Effect of Division	89
11 Associates of bodies corporate	89
12 References in Chapters 6 to 6C, and other references relating to voting power and takeovers etc.	89
13 References in Chapter 7	91
15 General	91
16 Exclusions	92

17	Associates of composite person that carries on a financial services business.....	93
Division 3—Carrying on business		94
18	Carrying on business: otherwise than for profit.....	94
19	Businesses of a particular kind	94
20	Carrying on a business: alone or together with others	94
21	Carrying on business in Australia or a State or Territory	94
Division 5A—Types of company		96
45A	Proprietary companies	96
Division 6—Subsidiaries and related bodies corporate		98
46	What is a subsidiary.....	98
47	Control of a body corporate's board.....	98
48	Matters to be disregarded	99
49	References in this Division to a subsidiary.....	99
50	Related bodies corporate	100
50AAA	Associated entities	100
50AA	Control.....	101
Division 7—Interpretation of other expressions		102
52	Doing acts.....	102
52A	Signing	102
53	Affairs of a body corporate.....	102
53AA	Business affairs of a body corporate.....	104
53AB	Business affairs of a natural person	104
53AC	Business affairs of a partnership.....	105
53AD	Business affairs of a trust.....	105
57	Classes of shares or interests in managed investment schemes	106
57A	Meaning of <i>corporation</i>	106
58AA	Meaning of <i>court</i> and <i>Court</i>	106
58B	Discharge of obligations under this Act.....	107
59	Debentures as consideration for acquisition of shares	107
60	Declaration of relevant relationships	107
64	Entering into a transaction in relation to shares or securities.....	109
64A	Entities.....	109
64B	Entities connected with a corporation.....	109
65	Eligible money market dealer.....	111
66A	Exempt bodies	111
70	Extension of period for doing an act.....	111
73A	When a court is taken to find a person guilty of an offence.....	111
75	Inclusion in official list.....	111
79	Involvement in contraventions	112

80	Jervis Bay Territory taken to be part of the Australian Capital Territory	112
82	Offers and invitations to the public.....	112
83	Officers, and other persons, in default.....	113
86	Possession.....	113
88A	Public document of a body corporate	113
88B	Qualified accountants	114
89	Qualified privilege.....	115
90	Receivers and managers	115
92	Securities	115
95A	Solvency and insolvency	117
Division 8—Miscellaneous interpretation rules		118
100	Address of registered office etc.	118
100A	Operation of certain laws relating to instruments on which stamp duty has not been paid.....	118
101	Amount of stock representing a number of shares.....	119
102	Applications to be in writing	119
102B	<i>In Australia or elsewhere, in this jurisdiction or elsewhere etc.</i>	119
102C	<i>In Australia</i>	119
103	Effect of certain contraventions of this Act	119
104	Effect of provisions empowering a person to require or prohibit conduct.....	120
105	Calculation of time	120
106	Performance of functions by Commission delegate.....	120
107	Notice in relation to top 20 members of a class.....	120
108	Parts of dollar to be disregarded in determining majority in value of creditors etc.	121
109	References to persons, things and matters	121
109X	Service of documents	121
Part 1.2A—Disclosing entities		123
Division 1—Object of Part		123
111AA	Object of Part.....	123
Division 2—Definitions		124
111AB	Terms defined in Division	124
111AC	Disclosing entity.....	124
111AD	ED securities.....	124
111AE	Securities of body or undertaking that is included in a licensed market's official list.....	125
111AF	Securities (except debentures and managed investment products) held by 100 or more persons.....	126
111AFA	Managed investment products held by 100 or more persons	126

111AG	Securities issued as consideration for an acquisition under an off-market takeover bid or Part 5.1 compromise or arrangement.....	127
111AH	When a person holds securities for the purposes of sections 111AF, 111AFA and 111AG.....	127
111AI	Debentures.....	128
111AJ	Regulations may declare securities not to be ED securities.....	128
111AK	ED securities of a disclosing entity.....	128
111AL	Listed or unlisted disclosing entity	128
111AM	Quoted ED securities	128
Division 3—Significance of being a disclosing entity		129
111AN	Division contains outline of significance of being a disclosing entity.....	129
111AO	Accounting requirements.....	129
111AP	Continuous disclosure requirements.....	129
111AQ	Prospectus relief	129
111AQA	Product Disclosure Statement relief	129
Division 4—Exemptions and modifications		130
111AR	Meaning of <i>disclosing entity provisions</i>	130
111AS	Exemptions by regulations	130
111AT	Exemptions by ASIC.....	130
111AU	Enforcing conditions of exemptions	130
111AV	Modifications by regulations	131
111AW	Exemptions and modifications have effect.....	131
111AX	Effect of Division	131
Part 1.4—Technical provisions about aids for readers		132
111J	Small business guide	132
Part 1.5—Small business guide		133
1	What registration means	133
2	The company structure for small business.....	138
3	Setting up a new company.....	138
4	Continuing obligations after the company is set up.....	141
5	Company directors and company secretaries.....	144
6	Shares and shareholders.....	147
7	Signing company documents.....	148
8	Funding the company’s operations	149
9	Returns to shareholders	149
10	Annual financial reports and audit.....	150
11	Disagreements within the company	152
12	Companies in financial trouble.....	153

Chapter 2A—Registering a company	155
Part 2A.1—What companies can be registered	155
112 Types of companies	155
113 Proprietary companies	156
114 Minimum of 1 member	157
115 Restrictions on size of partnerships and associations	157
116 Trade unions cannot be registered	158
Part 2A.2—How a company is registered	159
117 Applying for registration	159
118 ASIC gives company ACN, registers company and issues certificate	161
119 Company comes into existence on registration.....	162
119A Jurisdiction of incorporation and jurisdiction of registration	162
120 Members, directors and company secretary of a company	163
121 Registered office.....	163
122 Expenses incurred in promoting and setting up company.....	163
123 Company may have common seal	164
Chapter 2B—Basic features of a company	165
Part 2B.1—Company powers and how they are exercised	165
124 Legal capacity and powers of a company	165
125 Constitution may limit powers and set out objects	166
126 Agent exercising a company’s power to make contracts	166
127 Execution of documents (including deeds) by the company itself.....	166
Part 2B.2—Assumptions people dealing with companies are entitled to make	168
128 Entitlement to make assumptions	168
129 Assumptions that can be made under section 128	168
130 Information available to the public from ASIC does not constitute constructive notice	170
Part 2B.3—Contracts before registration	171
131 Contracts before registration.....	171
132 Person may be released from liability but is not entitled to indemnity.....	172
133 This Part replaces other rights and liabilities.....	172
Part 2B.4—Replaceable rules and constitution	173
134 Internal management of companies	173
135 Replaceable rules.....	173
136 Constitution of a company.....	174

137	Date of effect of adoption, modification or repeal of constitution	175
138	ASIC may direct company to lodge consolidated constitution	176
139	Company must send copy of constitution to member	176
140	Effect of constitution and replaceable rules	176
141	Table of replaceable rules	177
Part 2B.5—Registered office and places of business		179
142	Registered office	179
143	ASIC may change address of registered office to a director's address	179
144	Company's name must be displayed at registered office etc.	180
145	Opening hours of registered office of public company	180
146	Change of address of principal place of business	181
146A	Contact address	181
Part 2B.6—Names		182
Division 1—Selecting and using a name		182
147	When a name is available	182
148	A company's name	183
149	Acceptable abbreviations	184
150	Exception to requirement for using "Limited" in name	185
151	Exception to requirement for using "Limited" in name—pre-existing licences	185
152	Reserving a name	186
153	Using a name and ACN on documents	187
154	Exception to requirement to have ACN on receipts	187
155	Regulations may exempt from requirement to set out information on documents	188
156	Carrying on business using "Limited", "No Liability" or "Proprietary" in name	188
Division 2—Changing a company's name		189
157	Company changing its name	189
157A	Change of name of company under external administration	189
158	ASIC's power to direct company to change its name	191
159	ASIC's power to include "Limited" in company's name	191
160	ASIC must issue new certificate if company's name changes	192
161	Effect of name change	192
161A	Company under external administration—former name to be used on documents	192
Part 2B.7—Changing company type		195
162	Changing company type	195
163	Applying for change of type	197
164	ASIC changes type of company	199

165	ASIC may direct a proprietary company to change to a public company in certain circumstances	201
166	Effect of change of type.....	201
167	Issue of shares by company or holding company—company limited by guarantee changing to company limited by shares	202
167AA	Application of Part to company limited both by shares and by guarantee	203
Chapter 2C—Registers		204
Part 2C.1—Registers generally		204
167A	Who is covered by this Chapter	204
168	Registers to be maintained.....	204
169	Register of members.....	205
170	Register of option holders and copies of options documents	207
171	Register of debenture holders	208
172	Location of registers	208
173	Right to inspect and get copies	209
174	Agent's obligations.....	211
175	Correction of registers	212
176	Evidentiary value of registers	212
177	Use of information on registers	212
178	Overseas branch registers	213
Part 2C.2—Notice by proprietary companies of changes to member register		214
178A	Notice of change to member register	214
178B	Top 20 only	215
178C	Notice of change to share structure.....	215
178D	Time within which ASIC must be notified.....	215
Chapter 2D—Officers and employees		217
Part 2D.1—Duties and powers		217
179	Background to duties of directors, other officers and employees	217
Division 1—General duties		218
180	Care and diligence—civil obligation only	218
181	Good faith—civil obligations	219
182	Use of position—civil obligations	219
183	Use of information—civil obligations	220
184	Good faith, use of position and use of information—criminal offences	220
185	Interaction of sections 180 to 184 with other laws etc	221
186	Territorial application of sections 180 to 184	221

187	Directors of wholly-owned subsidiaries	222
188	Responsibility of secretaries and directors for certain contraventions	222
189	Reliance on information or advice provided by others	223
190	Responsibility for actions of delegate.....	224
190A	Limited application of Division to registrable Australian bodies	224
190B	Division does not apply to Aboriginal and Torres Strait Islander corporations	225
Division 2—Disclosure of, and voting on matters involving, material personal interests		226
191	Material personal interest—director’s duty to disclose.....	226
192	Director may give other directors standing notice about an interest	228
193	Interaction of sections 191 and 192 with other laws etc.	229
194	Voting and completion of transactions—directors of proprietary companies (<i>replaceable rule—see section 135</i>)	230
195	Restrictions on voting—directors of public companies only	230
196	ASIC power to make declarations and class orders	232
Division 3—Duty to discharge certain trust liabilities		233
197	Directors liable for debts and other obligations incurred by corporation as trustee.....	233
Division 4—Powers		234
198A	Powers of directors (<i>replaceable rule—see section 135</i>).....	234
198B	Negotiable instruments (<i>replaceable rule—see section 135</i>).....	234
198C	Managing director (<i>replaceable rule—see section 135</i>)	234
198D	Delegation	234
198E	Single director/shareholder proprietary companies	235
198F	Right of access to company books.....	235
Part 2D.2—Restrictions on indemnities, insurance and termination payments		237
Division 1—Indemnities and insurance for officers and auditors		237
199A	Indemnification and exemption of officer or auditor	237
199B	Insurance premiums for certain liabilities of director, secretary, other officer or auditor	238
199C	Certain indemnities, exemptions, payments and agreements not authorised and certain documents void.....	239
Division 2—Termination payments		240
200A	When benefit given in connection with retirement from office	240
200B	Retirement benefits generally need membership approval	241

200C	Benefits on transfer of undertaking or property need membership approval	242
200D	Contravention to receive benefit without member approval	243
200E	Approval by members	243
200F	Exempt benefits and benefits given in certain circumstances	244
200G	Genuine payments of pension and lump sum	246
200H	Benefits required by law	248
200J	Benefits to be held in trust for company	248
Part 2D.3—Appointment, remuneration and cessation of appointment of directors		249
Division 1—Appointment of directors		249
201A	Minimum number of directors	249
201B	Who can be a director	249
201D	Consent to act as director	249
201E	Special rules for the appointment of public company directors	250
201F	Special rules for the appointment of directors for single director/single shareholder proprietary companies	250
201G	Company may appoint a director (<i>replaceable rule—see section 135</i>)	251
201H	Directors may appoint other directors (<i>replaceable rule—see section 135</i>)	251
201J	Appointment of managing directors (<i>replaceable rule—see section 135</i>)	252
201K	Alternate directors (<i>replaceable rule—see section 135</i>)	252
201L	Signpost—ASIC to be notified of appointment	252
201M	Effectiveness of acts by directors	253
Division 2—Remuneration of directors		254
202A	Remuneration of directors (<i>replaceable rule—see section 135</i>)	254
202B	Members may obtain information about directors' remuneration	254
202C	Special rule for single director/single shareholder proprietary companies	255
Division 3—Resignation, retirement or removal of directors		256
203A	Director may resign by giving written notice to company (<i>replaceable rule—see section 135</i>)	256
203B	Signpost to consequences of disqualification from managing corporations	256
203C	Removal by members—proprietary companies (<i>replaceable rule—see section 135</i>)	256
203D	Removal by members—public companies	256

203E	Director cannot be removed by other directors—public companies.....	258
203F	Termination of appointment of managing director (<i>replaceable rule—see section 135</i>)	258
Part 2D.4—Appointment of secretaries		259
204A	Minimum number of secretaries	259
204B	Who can be a secretary	259
204C	Consent to act as secretary.....	259
204D	How a secretary is appointed.....	260
204E	Effectiveness of acts by secretaries	260
204F	Terms and conditions of office for secretaries (<i>replaceable rule—see section 135</i>)	260
204G	Signpost to consequences of disqualification from managing corporations.....	260
Part 2D.5—Public information about directors and secretaries		261
205A	Director, secretary or alternate director may notify ASIC of resignation or retirement.....	261
205B	Notice of name and address of directors and secretaries to ASIC.....	261
205C	Director and secretary must give information to company	263
205D	Address for officers	263
205E	ASIC’s power to ask for information about person’s position as director or secretary.....	264
205F	Director must give information to company	264
205G	Listed company—director to notify market operator of shareholdings etc.	265
Part 2D.6—Disqualification from managing corporations		267
206A	Disqualified person not to manage corporations.....	267
206B	Automatic disqualification	268
206BA	Extension of period of automatic disqualification	269
206C	Court power of disqualification—contravention of civil penalty provision	270
206D	Court power of disqualification—insolvency and non-payment of debts	270
206E	Court power of disqualification—repeated contraventions of Act	272
206EA	Disqualification under the <i>Trade Practices Act 1974</i>	273
206F	ASIC’s power of disqualification	273
206G	Court power to grant leave	274
206GA	Involvement of ACCC—leave orders under section 206G.....	275
206H	Territorial application of this Part.....	276
206HA	Limited application of Part to registrable Australian bodies.....	276

206HB	Part does not apply to Aboriginal and Torres Strait Islander corporations	276
Chapter 2E—Related party transactions		278
207	Purpose	278
Part 2E.1—Member approval needed for related party benefit		279
Division 1—Need for member approval		279
208	Need for member approval for financial benefit.....	279
209	Consequences of breach	279
Division 2—Exceptions to the requirement for member approval		281
210	Arm’s length terms	281
211	Remuneration and reimbursement for officer or employee	281
212	Indemnities, exemptions, insurance premiums and payment for legal costs for officers.....	282
213	Small amounts given to related entity.....	283
214	Benefit to or by closely-held subsidiary	284
215	Benefits to members that do not discriminate unfairly	284
216	Court order	285
Division 3—Procedure for obtaining member approval		286
217	Resolution may specify matters by class or kind	286
218	Company must lodge material that will be put to members with ASIC.....	286
219	Requirements for explanatory statement to members.....	287
220	ASIC may comment on proposed resolution	288
221	Requirements for notice of meeting.....	288
222	Other material put to members	288
223	Proposed resolution cannot be varied	289
224	Voting by or on behalf of related party interested in proposed resolution.....	289
225	Voting on the resolution	290
226	Notice of resolution to be lodged.....	291
227	Declaration by court of substantial compliance	291
Part 2E.2—Related parties and financial benefits		292
228	Related parties	292
229	Giving a financial benefit	293
Part 2E.3—Interaction with other rules		295
230	General duties still apply	295
Chapter 2F—Members’ rights and remedies		296
231	Membership of a company	296

Part 2F.1—Oppressive conduct of affairs	297
232 Grounds for Court order	297
233 Orders the Court can make	297
234 Who can apply for order	298
235 Requirement for person to lodge order	299
Part 2F.1A—Proceedings on behalf of a company by members and others	300
236 Bringing, or intervening in, proceedings on behalf of a company	300
237 Applying for and granting leave	300
238 Substitution of another person for the person granted leave	302
239 Effect of ratification by members	302
240 Leave to discontinue, compromise or settle proceedings brought, or intervened in, with leave	303
241 General powers of the Court	303
242 Power of the Court to make costs orders	304
Part 2F.2—Class rights	305
246B Varying and cancelling class rights	305
246C Certain actions taken to vary rights etc.	306
246D Variation, cancellation or modification without unanimous support of class	307
246E Variation, cancellation or modification with unanimous support of class	308
246F Company must lodge documents and resolutions with ASIC	308
246G Member's copies of documents and resolutions	309
Part 2F.3—Inspection of books	311
247A Order for inspection of books of company or registered managed investment scheme	311
247B Ancillary orders	312
247C Disclosure of information acquired in inspection	312
247D Company or directors may allow member to inspect books (<i>replaceable rule see section 135</i>)	312
Chapter 2G—Meetings	313
Part 2G.1—Directors' meetings	313
Division 1—Resolutions and declarations without meetings	313
248A Circulating resolutions of companies with more than 1 director (<i>replaceable rule see section 135</i>)	313
248B Resolutions and declarations of 1 director proprietary companies	313

Division 2—Directors’ meetings	315
248C Calling directors’ meetings (<i>replaceable rule see section 135</i>)	315
248D Use of technology	315
248E Chairing directors’ meetings (<i>replaceable rule see section 135</i>)	315
248F Quorum at directors’ meetings (<i>replaceable rule see section 135</i>)	315
248G Passing of directors’ resolutions (<i>replaceable rule see section 135</i>)	316
Part 2G.2—Meetings of members of companies	317
Division 1—Resolutions without meetings	317
249A Circulating resolutions of proprietary companies with more than 1 member	317
249B Resolutions of 1 member companies	318
Division 2—Who may call meetings of members	319
249C Calling of meetings of members by a director (<i>replaceable rule—see section 135</i>)	319
249CA Calling of meetings of members of a listed company by a director	319
249D Calling of general meeting by directors when requested by members	319
249E Failure of directors to call general meeting	320
249F Calling of general meetings by members	321
249G Calling of meetings of members by the Court	321
Division 3—How to call meetings of members	322
249H Amount of notice of meetings	322
249HA Amount of notice of meetings of listed company	322
249J Notice of meetings of members to members and directors	323
249K Auditor entitled to notice and other communications	324
249L Contents of notice of meetings of members	324
249LA Notice of meeting not required to contain certain information	325
249M Notice of adjourned meetings (<i>replaceable rule—see section 135</i>)	326
Division 4—Members’ rights to put resolutions etc. at general meetings	327
249N Members’ resolutions	327
249O Company giving notice of members’ resolutions	327
249P Members’ statements to be distributed	328
Division 5—Holding meetings of members	330
249Q Purpose	330
249R Time and place for meetings of members	330

249S	Technology	330
249T	Quorum (<i>replaceable rule—see section 135</i>)	330
249U	Chairing meetings of members (<i>replaceable rule—see section 135</i>)	331
249V	Auditor’s right to be heard at general meetings	331
249W	Adjourned meetings.....	332
Division 6—Proxies and body corporate representatives		333
249X	Who can appoint a proxy (<i>replaceable rule for proprietary companies and mandatory rule for public companies—see section 135</i>)	333
249Y	Rights of proxies	333
249Z	Company sending appointment forms or lists of proxies must send to all members	334
250A	Appointing a proxy.....	334
250B	Proxy documents	336
250BA	Proxy documents—listed companies.....	337
250C	Validity of proxy vote	337
250D	Body corporate representative	338
Division 7—Voting at meetings of members		339
250E	How many votes a member has (<i>replaceable rule—see section 135</i>)	339
250F	Jointly held shares (<i>replaceable rule—see section 135</i>)	339
250G	Objections to right to vote (<i>replaceable rule—see section 135</i>)	339
250H	Votes need not all be cast in the same way.....	340
250J	How voting is carried out (<i>replaceable rule—see section 135</i>)	340
250K	Matters on which a poll may be demanded	340
250L	When a poll is effectively demanded.....	340
250M	When and how polls must be taken (<i>replaceable rule—see section 135</i>)	341
Division 8—AGMs of public companies		342
250N	Public company must hold AGM	342
250P	Extension of time for holding AGM.....	342
250PAA	Exemptions by ASIC—class orders relating to externally-administered companies	343
250PAB	Exemptions by ASIC—individual externally-administered companies.....	343
250PA	Written questions to auditor submitted by members of listed company before AGM.....	344
250R	Business of AGM	346
250RA	Auditor required to attend listed company’s AGM.....	346
250S	Questions and comments by members on company management at AGM	347

250SA	Listed company—remuneration report	347
250T	Questions by members of auditors at AGM	347
Part 2G.3—Minutes and members’ access to minutes		349
251A	Minutes.....	349
251AA	Disclosure of proxy votes—listed companies.....	350
251B	Members’ access to minutes.....	350
Part 2G.4—Meetings of members of registered managed investment schemes		352
Division 1—Who may call meetings of members		352
252A	Calling of meetings of members by responsible entity	352
252B	Calling of meetings of members by responsible entity when requested by members	352
252C	Failure of responsible entity to call meeting of the scheme’s members	353
252D	Calling of meetings of members by members	354
252E	Calling of meetings of members by the Court	354
Division 2—How to call meetings of members		355
252F	Amount of notice of meetings	355
252G	Notice of meetings of members to members, directors and auditors	355
252H	Auditors entitled to other communications.....	356
252J	Contents of notice of meetings of members	356
252K	Notice of adjourned meetings.....	357
Division 3—Members’ rights to put resolutions etc. at meetings of members		358
252L	Members’ resolutions	358
252M	Responsible entity giving notice of members’ resolutions	359
252N	Members’ statements to be distributed	359
Division 4—Holding meetings of members		362
252P	Time and place for meetings of members.....	362
252Q	Technology.....	362
252R	Quorum.....	362
252S	Chairing meetings of members.....	363
252T	Auditors’ right to be heard at meetings of members.....	363
252U	Adjourned meetings.....	363
Division 5—Proxies and body corporate representatives		365
252V	Who can appoint a proxy.....	365
252W	Rights of proxies	365
252X	Responsible entity sending appointment forms or lists of proxies must send to all members.....	366
252Y	Appointing a proxy.....	366

252Z	Proxy documents	367
253A	Validity of proxy vote	369
253B	Body corporate representative	369
Division 6—Voting at meetings of members		371
253C	How many votes a member has	371
253D	Jointly held interests	371
253E	Responsible entity and associates cannot vote if interested in resolution	371
253F	How to work out the value of an interest	371
253G	Objections to a right to vote	372
253H	Votes need not all be cast in the same way	372
253J	How voting is carried out	372
253K	Matters on which a poll may be demanded	373
253L	When a poll is effectively demanded	373
Division 7—Minutes and members’ access to minutes		374
253M	Minutes	374
253N	Members’ access to minutes	374
Chapter 2H—Shares		376
Part 2H.1—Issuing and converting shares		376
254A	Power to issue bonus, partly-paid, preference and redeemable preference shares	376
254B	Terms of issue	377
254C	No par value shares	378
254D	Pre-emption for existing shareholders on issue of shares in proprietary company (<i>replaceable rule—see section 135</i>)	378
254E	Court validation of issue	379
254F	Bearer shares and stock must not be issued	379
254G	Conversion of shares	379
254H	Resolution to convert shares into larger or smaller number	380
Part 2H.2—Redemption of redeemable preference shares		381
254J	Redemption must be in accordance with terms of issue	381
254K	Other requirements about redemption	381
254L	Consequences of contravening section 254J or 254K	381
Part 2H.3—Partly-paid shares		383
254M	Liability on partly-paid shares	383
254N	Calls may be limited to when company is externally-administered	383
254P	No liability companies—calls on shares	383
254Q	No liability companies—forfeiture and sale of shares for failure to meet call	384
254R	No liability companies—redemption of forfeited shares	387

Part 2H.4—Capitalisation of profits	388
254S Capitalisation of profits	388
Part 2H.5—Dividends	389
254T Dividends to be paid out of profits	389
254U Other provisions about paying dividends (<i>replaceable rule—</i> <i>see section 135</i>)	389
254V When does the company incur a debt?	389
254W Dividend rights	389
Part 2H.6—Notice requirements	391
254X Notice to ASIC of share issue.....	391
254Y Notice to ASIC of share cancellation	392
Chapter 2J—Transactions affecting share capital	393
Part 2J.1—Share capital reductions and share buy-backs	393
256A Purpose	393
Division 1—Reductions in share capital not otherwise authorised by law	394
256B Company may make reduction not otherwise authorised	394
256C Shareholder approval.....	395
256D Consequences of failing to comply with section 256B	396
256E Signposts to other relevant provisions	396
Division 2—Share buy-backs	398
257A The company’s power to buy back its own shares.....	398
257B Buy-back procedure—general	398
257C Buy-back procedure—shareholder approval if the 10/12 limit exceeded.....	400
257D Buy-back procedure—special shareholder approval for selective buy-back	401
257E Buy-back procedure—lodgment of offer documents with ASIC.....	402
257F Notice of intended buy-back.....	402
257G Buy-back procedure—disclosure of relevant information when offer made	403
257H Acceptance of offer and transfer of shares to the company	403
257J Signposts to other relevant provisions	403
Division 3—Other share capital reductions	406
258A Unlimited companies.....	406
258B Right to occupy or use real property.....	406
258C Brokerage or commission.....	406
258D Cancellation of forfeited shares	406
258E Other share cancellations.....	407

258F	Reductions because of lost capital	407
Part 2J.2—Self-acquisition and control of shares		408
259A	Directly acquiring own shares	408
259B	Taking security over own shares or shares in holding company	408
259C	Issuing or transferring shares to controlled entity	409
259D	Company controlling entity that holds shares in it.....	410
259E	When a company controls an entity.....	411
259F	Consequences of failing to comply with section 259A or 259B	412
Part 2J.3—Financial assistance		413
260A	Financial assistance by a company for acquiring shares in the company or a holding company	413
260B	Shareholder approval	413
260C	Exempted financial assistance	415
260D	Consequences of failing to comply with section 260A.....	416
Part 2J.4—Interaction with general directors' duties		418
260E	General duties still apply	418
Chapter 2K—Charges		419
Part 2K.1—Preliminary		419
261	Interpretation and application	419
Part 2K.2—Registration		421
262	Charges required to be registered	421
263	Lodgment of notice of charge and copy of instrument	424
264	Acquisition of property subject to charge	427
265	Registration of documents relating to charges.....	428
265A	Standard time for the purposes of section 265	431
266	Certain charges void against liquidator or administrator	432
267	Charges in favour of certain persons void in certain cases	435
268	Assignment and variation of charges.....	437
269	Satisfaction of, and release of property from, charges.....	438
270	Lodgment of notices, offences etc.	438
271	Company to keep documents relating to charges and register of charges	439
272	Certificates	440
273A	Application of State and Territory laws to charges required to be registered under this Part	441
273B	Application of State and Territory laws to transfers, assignments or giving of charges registered under this Part	442

273C	Application of specified State and Territory laws to crop liens, wool liens and stock mortgages registered under this Part	443
273D	Sections 273A to 273C do not apply to charges given by company jointly with person who is not a company	445
274	Power of Court to rectify Register	445
277	Power to exempt from compliance with certain requirements of Division	445
Part 2K.3—Order of priority		447
278	Definitions	447
279	Priorities of charges	448
280	General priority rules in relation to registered charges	449
281	General priority rule in relation to unregistered charges	450
282	Special priority rules	450

An Act to make provision in relation to corporations and financial products and services, and for other purposes

Chapter 1—Introductory

Part 1.1—Preliminary

1 Short title *[see Note 1]*

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

2 Commencement *[see Note 1]*

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

3 Constitutional basis for this Act

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

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

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

Section 4

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

- (3) The operation of this Act outside Australia is based on:
 - (a) the legislative power the Commonwealth Parliament has under paragraph 51(xxix) of the Constitution; and
 - (b) the other legislative powers that the Commonwealth Parliament has under section 51 of the Constitution; and
 - (c) the legislative powers that the Commonwealth Parliament has under section 122 of the Constitution to make laws for the government of those Territories.
- (4) The operation of this Act in a State that is not a referring State is based on:
 - (a) the legislative powers that the Commonwealth Parliament has under section 51 (other than paragraph 51(xxxvii)) and section 122 of the Constitution; and
 - (b) the legislative powers that the Commonwealth Parliament has in respect of matters to which this Act relates because those matters are referred to it by the Parliaments of the referring States under paragraph 51(xxxvii) of the Constitution.

4 Referring States

Reference of matters by State Parliament to Commonwealth Parliament

- (1) A State is a **referring State** if the Parliament of the State has referred the matters covered by subsections (4) and (5) to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:
 - (a) if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and
 - (b) if and to the extent to which the matters are included in the legislative powers of the Parliament of the State.
- This subsection has effect subject to subsections (6) and (7).

Section 4

- (2) A State is a **referring State** even if the State reference Act includes a provision to the effect that nothing in the State reference Act is intended to enable the making of laws pursuant to the amendment reference with the sole or main underlying purpose or object of regulating industrial relations matters even if, but for that provision in the State reference Act, the law would be a law with respect to a matter referred to the Parliament of the Commonwealth by the amendment reference.
- (3) A State is a **referring State** even if a law of the State provides that the reference to the Commonwealth Parliament of either or both of the matters covered by subsections (4) and (5) is to terminate in particular circumstances.

Reference covering initial Corporations Act and ASIC Act

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

Reference covering amendments of this Act and ASIC Act

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

Effect of termination of reference

- (6) A State ceases to be a **referring State** if the State's initial reference terminates.
- (7) A State ceases to be a **referring State** if:
 - (a) the State's amendment reference terminates; and
 - (b) subsection (8) does not apply to the termination.
- (8) A State does not cease to be a **referring State** because of the termination of its amendment reference if:
 - (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and

Section 5

- (b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and
- (c) that State's amendment reference, and the amendment reference of every other State, terminates on the same day.

Definitions

- (9) In this section:

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

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

initial ASIC Act means the ASIC Act as originally enacted.

initial Corporations Act means this Act as originally enacted.

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

referred provisions means:

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

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

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

5 General territorial application of Act

Geographical coverage of "this jurisdiction"

- (1) Section 9 defines ***this jurisdiction*** as the area that includes:

Section 5

- (a) each referring State (including its coastal sea); and
 - (b) the Capital Territory (including the coastal sea of the Jervis Bay Territory); and
 - (c) the Northern Territory (including its coastal sea); and
 - (d) also, for the purposes of the application of a provision of Chapter 7 or an associated provision (see subsection (10))—any external Territory in which the provision applies because of subsection (9) (but only to the extent provided for in that subsection).
- (2) Throughout this Act, *this jurisdiction* therefore consists of:
- (a) either:
 - (i) the whole of Australia (if all the States are referring States); or
 - (ii) Australia (other than any State that is not a referring State) if one or more States are not referring States; and
 - (b) also, when used in or in relation to a provision of Chapter 7 or an associated provision (see subsection (10))—any external Territory in which the provision applies because of subsection (9) (but only to the extent provided for in that subsection).

Operation in this jurisdiction

- (3) Each provision of this Act applies in this jurisdiction.

Operation outside this jurisdiction

- (4) Subject to subsection (8), each provision of this Act also applies, according to its tenor, in relation to acts and omissions outside this jurisdiction.

Residence, place of formation etc.

- (7) Each provision of this Act applies according to its tenor to:
- (a) natural persons whether:
 - (i) resident in this jurisdiction or not; and
 - (ii) resident in Australia or not; and
 - (iii) Australian citizens or not; and
 - (b) all bodies corporate and unincorporated bodies whether:

Section 5

- (i) formed or carrying on business in this jurisdiction or not; and
- (ii) formed or carrying on business in Australia or not.

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

Operation in non-referring States

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

Expanded application of provisions of Chapter 7 and associated provisions

- (9) The regulations may provide that, in specified circumstances, a specified external Territory is included in **this jurisdiction** for the purposes of a specified provision of Chapter 7 (the **applicable provision**). If the regulations do so:
 - (a) the applicable provision applies in that external Territory in those circumstances; and
 - (b) the associated provisions (see subsection (10)) in relation to the applicable provision apply in that external Territory in relation to the applicable provision as so applying.

Meaning of associated provisions

- (10) For the purposes of this section, the **associated provisions** in relation to a provision of Chapter 7 are:
 - (a) the provisions of Chapters 1, 9 (including the provisions of Division 2 of Part 9.4 that create offences and of Part 9.4B that allow for pecuniary penalty orders) and 10 as they apply or have effect in relation to, or for the purposes of, the provision; and
 - (b) any regulations or other instruments (including any that create offences or allow for pecuniary penalty orders) made under this Act for the purposes of any of the provisions covered by paragraph (a); and
 - (c) if regulations made for the purposes of subsection (9) have been made in relation to the provision—any other provisions

Section 5A

of this Act, or any regulations or other instruments made under this Act (including any that create offences or allow for pecuniary penalty orders), specified in those regulations.

5A Application to the Crown

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

5B ASIC has general administration of this Act

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

5C Application of the *Acts Interpretation Act 1901*

- (1) Until the date of commencement of section 4 of the *Legislative Instruments (Transitional and Consequential Amendments) Act 2003* (the ***Legislative Instruments commencement day***), the *Acts Interpretation Act 1901* as in force on 1 November 2000 applies to this Act.
- (2) On and after the Legislative Instruments commencement day, the *Acts Interpretation Act 1901* as in force on that day applies to this Act.

Section 5C

- (3) Amendments of the *Acts Interpretation Act 1901* made after the Legislative Instruments commencement day do not apply to this Act.

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

5D Coverage of Part

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

5E Concurrent operation intended

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

Section 5F

- (d) imposes additional limits on the interests a person may hold or acquire in a company or other body; or
- (e) prevents a person from:
 - (i) being a director of; or
 - (ii) being involved in the management or control of; a company or other body; or
- (f) requires a company:
 - (i) to have a constitution; or
 - (ii) to have particular rules in its constitution.

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

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

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

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

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

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

Section 5F

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

Section 5G

- (6) In this section:

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

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

Section overrides other provisions of the Corporations legislation

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

Section does not deal with provisions capable of concurrent operation

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

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

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

- (3) This section applies to the interaction between:
- (a) a provision of a law of a State or Territory (the ***State provision***); and
 - (b) a provision of the Corporations legislation (the ***Commonwealth provision***);
- only if the State provision meets the conditions set out in the following table:

Section 5G

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

Section 5G

Conditions to be met before section applies [operative]		
Item	Kind of provision	Conditions to be met
4	a provision that is materially amended on or after this Act commenced if the amendment was enacted before this Act commenced	<p>(a) the State provision as amended would have operated, immediately before this Act commenced, despite the provision of:</p> <ul style="list-style-type: none"> (i) the Corporations Law of the State or Territory (as in force at that time); or (ii) the ASC or ASIC Law of the State or Territory (as in force at that time); <p>that corresponds to the Commonwealth provision if the amendment had commenced before the commencement of this Act; and</p> <p>(b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by:</p> <ul style="list-style-type: none"> (i) regulations made under this Act; or (ii) a law of the State or Territory.
5	a provision that is materially amended on or after this Act commenced if the amendment is enacted on or after this Act commenced	the State provision as amended is declared by a law of the State or Territory to be a Corporations legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision)
<p>Note 1: Item 1—subsection (12) tells you when a provision is a pre-commencement (commenced) provision.</p> <p>Note 2: Item 1 paragraph (a)—For example, a State or Territory provision enacted after the commencement of the Corporations Law might not have operated despite the Corporations Law if it was not expressly provided that the provision was to operate despite a specified provision, or despite any provision, of the Corporations Law (see, for example, section 5 of the Corporations (New South Wales) Act 1990).</p> <p>Note 3: Item 2—subsection (13) tells you when a provision is a pre-commencement (enacted) provision.</p> <p>Note 4: Item 3—subsection (14) tells you when a provision is a post-commencement provision.</p> <p>Note 5: Subsections (15) to (17) tell you when a provision is materially amended after commencement.</p>		

Section 5G

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

- (4) A provision of the Corporations legislation does not:
- (a) prohibit the doing of an act; or
 - (b) impose a liability (whether civil or criminal) for doing an act;
- if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

Instructions given to directors under State and Territory laws

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

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

Use of names authorised by State and Territory laws

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

Section 5G

- (b) require a company or other body to use a word as part of its name if the company or body is expressly authorised not to use that word by a provision of a law of a State or Territory.

Meetings held in accordance with requirements of State and Territory laws

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

External administration under State and Territory laws

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

State and Territory laws dealing with company constitutions

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

Other cases

- (11) A provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between:
 - (a) the provision of the Corporations legislation; and

Section 5G

- (b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with the provision of the Corporations legislation.

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

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

Pre-commencement (commenced) provision

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

Pre-commencement (enacted) provision

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

Post-commencement provision

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

Section 5G

Provision materially amended after commencement

- (15) A provision of a law of a State or Territory is ***materially amended after commencement*** if:
- (a) an amendment of the provision commences on or after the commencement of this Act; and
 - (b) neither subsection (16) nor subsection (17) applies to the amendment.
- (16) A provision of a law of a State or Territory is not ***materially amended after commencement*** under subsection (15) if the amendment merely:
- (a) changes:
 - (i) a reference to the Corporations Law or the ASC or ASIC Law, or the Corporations Law or the ASC or ASIC Law of a State or Territory, to a reference to the Corporations Act or the ASIC Act; or
 - (ii) a reference to a provision of the Corporations Law or the ASC or ASIC Law, or the Corporations Law or ASC or ASIC Law of a State or Territory, to a reference to a provision of the Corporations Act or the ASIC Act; or
 - (iii) a penalty for a contravention of a provision of a law of a State or Territory; or
 - (iv) a reference to a particular person or body to a reference to another person or body; or
 - (b) adds a condition that must be met before a right is conferred, an obligation imposed or a power conferred; or
 - (c) adds criteria to be taken into account before a power is exercised; or
 - (d) amends the provision in way declared by the regulations to not constitute a material amendment for the purposes of this subsection.
- (17) A provision of a law of a State or Territory is not ***materially amended after commencement*** under subsection (15) if:
- (a) the provision as amended would be inconsistent with a provision of the Corporations legislation but for this section; and
 - (b) the amendment would not materially reduce the range of persons, acts and circumstances to which the provision of the

Section 5H

Corporations legislation applies if this section applied to the provision of the State or Territory law as amended.

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

- (1) A body is taken to be registered under this Act as a company of a particular type under section 118 if a law of a State or Territory in this jurisdiction:
- (a) provides that the body is a deemed registration company for the purposes of this section; and
 - (b) specifies:
 - (i) the day on which the body is to be taken to be registered (the **registration day**) or the manner in which that day is to be fixed; and
 - (ii) the type of company the body is to be registered as under this Act;
 - (iii) the company's proposed name (unless the ACN is to be used in its name);
- and subsections (2) and (3) are satisfied.
- (2) A notice setting out the following details must be lodged before the registration day:
- (a) the name and address of each person who is to be a member on registration;
 - (b) the present given and family name, all former given and family names and the date and place of birth of each person who is to be a director on registration;
 - (c) the present given and family name, all former given and family names and the date and place of birth of each person who consents in writing to become a company secretary;
 - (d) the address of each person who is to be a director or company secretary on registration;
 - (e) the address of the company's proposed registered office;
 - (f) for a public company—the proposed opening hours of its registered office (if they are not the standard opening hours);
 - (g) the address of the company's proposed principal place of business (if it is not the address of the proposed registered office);

Section 5H

- (h) for a company limited by shares or an unlimited company—the following:
 - (i) the number and class of shares each member agrees in writing to take up;
 - (ii) the amount (if any) each member agrees in writing to pay for each share;
 - (iii) if that amount is not to be paid in full on registration—the amount (if any) each member agrees in writing to be unpaid on each share;
 - (i) for a public company that is limited by shares or is an unlimited company, if shares will be issued for non-cash consideration—the prescribed particulars about the issue of the shares, unless the shares will be issued under a written contract and a copy of the contract is lodged with the application;
 - (j) for a company limited by guarantee—the proposed amount of the guarantee that each member agrees to in writing.
- (3) If the company:
- (a) is to be a public company; and
 - (b) is to have a constitution on registration;
- a copy of the constitution must be lodged before the registration day.
- (4) On the registration day, the body is taken:
- (a) to be registered as a company under this Act; and
 - (b) to be registered in the State or Territory referred to in subsection (1).
- (5) The regulations may modify the operation of this Act to facilitate the registration of the company.
- (6) Without limiting subsection (5), the regulations may make provision in relation to:
- (a) the share capital of the company on registration; and
 - (b) the issue of a certificate of registration on the basis of the company's registration.

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

- (1) The regulations may modify the operation of the Corporations legislation so that:
 - (a) provisions of the Corporations legislation do not apply to a matter that is dealt with by a law of a State or Territory specified in the regulations; or
 - (b) no inconsistency arises between the operation of a provision of the Corporations legislation and the operation of a provision of a State or Territory law specified in the regulations.
- (2) Without limiting subsection (1), regulations made for the purposes of that subsection may provide that the provision of the Corporations legislation:
 - (a) does not apply to:
 - (i) a person specified in the regulations; or
 - (ii) a body specified in the regulations; or
 - (iii) circumstances specified in the regulations; or
 - (iv) a person or body specified in the regulations in the circumstances specified in the regulations; or
 - (b) does not prohibit an act to the extent to which the prohibition would otherwise give rise to an inconsistency with the State or Territory law; or
 - (c) does not require a person to do an act to the extent to which the requirement would otherwise give rise to an inconsistency with the State or Territory law; or
 - (d) does not authorise a person to do an act to the extent to which the conferral of that authority on the person would otherwise give rise to an inconsistency with the State or Territory law; or
 - (e) does not impose an obligation on a person to the extent to which complying with that obligation would require the person to not comply with an obligation imposed on the person under the State or Territory law; or
 - (f) authorises a person to do something for the purposes of the Corporations legislation that the person:
 - (i) is authorised to do under the State or Territory law; and

Section 5I

(ii) would not otherwise be authorised to do under the Corporations legislation; or

(g) will be taken to be satisfied if the State or Territory law is satisfied.

(3) In this section:

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

Part 1.2—Interpretation

Division 1—General

6 Effect of this Part

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

7 Location of other interpretation provisions

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

Section 9

9 Dictionary

Unless the contrary intention appears:

AASB means the Australian Accounting Standards Board.

ABN (short for “Australian Business Number”) has the meaning given by section 41 of the *A New Tax System (Australian Business Number) Act 1999*.

Aboriginal and Torres Strait Islander corporation means a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

accounting standard means:

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

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

acquire, in relation to financial products, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

act includes thing.

administration, in relation to a company, has the meaning given by section 435C.

administrator:

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

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

admit to quotation: financial products are *admitted to quotation* on a market if the market operator has given unconditional permission for quotation of the financial products on the market.

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

affidavit includes affirmation.

agency means an agency, authority, body or person.

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

agreement, in Chapter 6 or 7, means a relevant agreement.

amount includes a nil amount and zero.

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

- (a) section 5, 6, 7 or 7A of the *Crimes Act 1914*; or
- (b) subsection 86(1) of that Act by virtue of paragraph 86(1)(a) of that Act;

being an offence that is related to that other offence.

APRA means the Australian Prudential Regulation Authority.

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

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

Section 9

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

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

ASIC means the Australian Securities and Investments Commission.

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

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

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

assets, in relation to a financial services licensee, means all the licensee’s assets (whether or not used in connection with the licensee’s Australian financial services licence).

associate has the meaning given by sections 10 to 17.

associated entity has the meaning given by section 50AAA.

AUASB means the Auditing and Assurance Standards Board.

audit means an audit conducted for the purposes of this Act and includes a review of a financial report for a half-year conducted for the purposes of this Act.

audit activity: see the definition of *engage in audit activity*.

audit company means a company that consents to be appointed, or is appointed, as auditor of a company or registered scheme.

audit-critical employee, in relation to a company, or the responsible entity for a registered scheme, that is the audited body for an audit, means a person who:

- (a) is an employee of the company or of the responsible entity for the registered scheme; and
- (b) is able, because of the position in which the person is employed, to exercise significant influence over:
 - (i) a material aspect of the contents of the financial report being audited; or
 - (ii) the conduct or efficacy of the audit.

audited body, in relation to an audit of a company or registered scheme, means the company or registered scheme in relation to which the audit is, or is to be, conducted.

audit firm means a firm that consents to be appointed, or is appointed, as auditor of a company or registered scheme.

auditing standard means:

- (a) a standard in force under section 336; or
- (b) a provision of such a standard as it so has effect.

auditor independence requirements of this Act means the requirements of Divisions 3, 4 and 5 of Part 2M.4.

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

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

Australian ADI means:

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

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

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

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

Section 9

Australian CS facility licence, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

Australian financial services licence, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

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

Australian market licence, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

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

authorised audit company means a company registered under Part 9.2A.

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

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

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

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

benefit:

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

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

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

Note: A person who announces a bid on behalf of another person is not making the bid, the other person is making the bid.

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

bid period:

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

Board, when used in Part 9.2, means the Companies Auditors and Liquidators Disciplinary Board.

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

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

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

body corporate:

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

Section 9

body regulated by APRA has the meaning given by subsection 3(2) of the *Australian Prudential Regulation Authority Act 1998*.

books includes:

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

but does not include an index or recording made under Subdivision D of Division 5 of Part 6.5.

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

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

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

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

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

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

carry on has a meaning affected by Division 3.

cash management trust interest means an interest that:

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

cause includes procure.

certified means:

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

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

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

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

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

child: without limiting who is a child of a person for the purposes of this Act, someone is the **child** of a person if he or she is a child of the person within the meaning of the *Family Law Act 1975*.

civil matter means a matter other than a criminal matter.

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

civil penalty order means any of the following:

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

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

class has:

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

clearing and settlement facility, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

Section 9

close associate of a director means:

- (a) a relative of the director; or
- (b) a relative of a spouse of the director.

coastal sea:

- (a) in relation to Australia—means:
 - (i) the territorial sea of Australia; and
 - (ii) the sea on the landward side of the territorial sea of Australia and not within the limits of a State or internal Territory;
and includes the airspace over, and the sea-bed and subsoil beneath, any such sea; and
- (b) in relation to a State or Territory—means so much of the coastal sea of Australia as is within the area described in Schedule 1 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* under the heading that refers to that State or Territory.

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

commencement, in relation to an accounting standard, means:

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

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

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

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

Companies and Unclaimed Moneys Special Account means the Account established under section 133 of the *Australian Securities and Investments Commission Act 2001*.

company means a company registered under this Act and:

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

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

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

compliance period for an infringement notice has the meaning given by section 1317DAA.

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

connected entity, in relation to a corporation, means:

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

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

constitution means (depending on the context):

- (a) a company's constitution, which (where relevant) includes rules and consequential amendments that are part of the company's constitution because of the *Life Insurance Act 1995*; or

Section 9

- (b) a managed investment scheme's constitution; or
- (c) in relation to any other kind of body:
 - (i) the body's charter or memorandum; or
 - (ii) any instrument or law (other than this Act) constituting, or defining the constitution of, the body or governing the activities of the body or its members.

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

continuous disclosure notice means:

- (a) a document used to notify a market operator of information relating to a body under provisions of the market's listing rules referred to in subsection 674(1); or
- (b) a document under section 675 lodged in relation to the body.

continuously quoted securities are securities that:

- (a) are in a class of securities that were quoted ED securities at all times in the 3 months before the date of the prospectus or Product Disclosure Statement; and
- (b) are securities of an entity in relation to which the following subparagraphs are satisfied during the shorter of the period during which the class of securities were quoted, and the period of 12 months before the date of the prospectus or Product Disclosure Statement:
 - (i) no exemption under section 111AS or 111AT, or modification under section 111AV, covered the entity, or any person as director or auditor of the entity;
 - (ii) no exemption under paragraph 741(1)(a), or declaration under paragraph 741(1)(b), relating to a provision that is a disclosing entity provision for the purposes of Division 4 of Part 1.2A covered the entity, or any person as director or auditor of the entity;
 - (iii) no order under section 340 or 341 covered the entity, or any person as director or auditor of the entity;

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

contribution plan means a plan in respect of which the following conditions are met:

- (a) regular deductions are made from the wages or salary of an employee or director (the **contributor**) to acquire financial products that are offered for issue or sale to the contributor under an eligible employee share scheme;
- (b) the deductions are authorised by the contributor in a form which is included in, or accompanies, the disclosure document or the Product Disclosure Statement for the scheme;
- (c) before acquiring the financial products under the scheme, the deductions are held on trust in an account with an Australian ADI that is kept solely for that purpose;
- (d) the contributor may elect to discontinue the deductions at any time;
- (e) if the contributor so elects, the amount of the deductions standing, at that time, to the credit of the account for the contributor, and any interest on that amount, is repaid to the contributor;
- (f) the scheme does not involve the offer to the contributor of a loan or similar financial assistance for the purpose of, or in connection with, the acquisition of the financial products that are offered under the scheme.

contributory means:

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

Section 9

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

control has the meaning given by section 50AA.

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

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

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

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

and has a meaning affected by paragraph 434F(b) (which deals with 2 or more persons appointed as controllers).

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

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

corporation has the meaning given by section 57A.

corporation/scheme civil penalty provision has the meaning given by section 1317DA.

Corporations legislation means:

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

court has the meaning given by section 58AA.

Court has the meaning given by section 58AA.

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

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

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

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

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

Section 9

date of a takeover bid is:

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

deal:

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

dealing, in relation to financial products, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

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

- (a) an undertaking to repay money deposited with or lent to the body by a person if:
 - (i) the person deposits or lends the money in the ordinary course of a business carried on by the person; and
 - (ii) the body receives the money in the ordinary course of carrying on a business that neither comprises nor forms part of a business of borrowing money and providing finance; or
- (b) an undertaking by an Australian ADI to repay money deposited with it, or lent to it, in the ordinary course of its banking business; or

Note: This paragraph has an extended meaning in relation to Chapter 8 (see subsection 1200A(2)).

- (c) an undertaking to pay money under:
 - (i) a cheque; or
 - (ii) an order for the payment of money; or
 - (iii) a bill of exchange; or
- (d) an undertaking to pay money under a promissory note that has a face value of at least \$50,000; or
- (e) an undertaking by a body corporate to pay money to a related body corporate; or
- (f) an undertaking to repay money that is prescribed by the regulations.

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

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

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

and ending at the end of the thirteenth business day after that day.

declaration of indemnities, in relation to an administrator of a company under administration, means a written declaration:

- (a) stating whether the administrator has, to any extent, been indemnified (otherwise than under section 443D), in relation to that administration, for:
 - (i) any debts for which the administrator is, or may become, liable under Subdivision A of Division 9 of Part 5.3A; or
 - (ii) any debts for which the administrator is, or may become, liable under a remittance provision as defined in section 443BA; or
- (iii) his or her remuneration as determined under section 449E; and

Section 9

- (b) if so, stating:
 - (i) the identity of each indemnifier; and
 - (ii) the extent and nature of each indemnity.

declaration of relevant relationships has the meaning given by section 60.

deed includes a document having the effect of a deed.

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

defeating condition for a takeover bid means a condition that:

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

defect, in relation to a statutory demand, includes:

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

deregistered means:

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

derivative, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

director of a company or other body means:

- (a) a person who:
 - (i) is appointed to the position of a director; or
 - (ii) is appointed to the position of an alternate director and is acting in that capacity;
- regardless of the name that is given to their position; and

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

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

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

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

disclosing entity has the meaning given by section 111AC.

disclosure document for an offer of securities means:

- (a) a prospectus for the offer; or
- (b) a profile statement for the offer; or
- (c) an offer information statement for the offer.

dispose has a meaning affected by the following paragraphs:

- (a) when used in relation to financial products in a provision outside Chapter 7, otherwise than in a situation to which paragraph (b) applies, ***dispose*** has the same meaning as it has in Chapter 7;
- (b) for the purposes of Chapter 6, a person who has a relevant interest in securities ***disposes*** of the securities if, and only if, they cease to have a relevant interest in the securities.

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

ED securities has the meaning given by section 111AD.

eligible applicant, in relation to a corporation, means:

- (a) ASIC; or

Section 9

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

eligible employee creditor, in relation to a company, means a creditor whose debt or claim would, in a winding up of the company, be payable in priority to other unsecured debts and claims in accordance with paragraph 556(1)(e), (g) or (h) or section 560 or 561.

eligible employee share scheme means an employee share scheme for a body corporate in respect of which the following conditions are met:

- (a) the scheme is offered only to employees or directors mentioned in paragraph (a) of the definition of ***employee share scheme***;
- (b) the financial products that are offered under the scheme are offered:
 - (i) under a disclosure document or Product Disclosure Statement; or
 - (ii) without disclosure under Part 6D.2 in accordance with subsection 708(12);
- (c) the financial products which may be acquired under the scheme are the following:
 - (i) fully paid ordinary shares;
 - (ii) options, offered for no more than nominal consideration, for the issue or transfer of fully paid ordinary shares;
 - (iii) units in fully paid ordinary shares.

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

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

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

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

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

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

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

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

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

Section 9

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

enforcement process, in relation to property, means:

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

engage in audit activity: an individual auditor, audit firm or audit company ***engages in audit activity*** in relation to an audited body for an audit if the individual auditor, audit firm or audit company:

- (a) consents to be appointed as auditor of the audited body for a financial year; or
- (b) acts as the auditor of the audited body for a financial year; or
- (c) prepares a report in relation to the audited body that is required by this Act to be prepared by:
 - (i) a registered company auditor; or
 - (ii) an auditor of the audited body in relation to a financial year or half-year.

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

enter into: a person who:

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

is taken to enter into a transaction in relation to the shares or securities.

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

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

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

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

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

event includes any happening, circumstance or state of affairs.

examinable affairs, in relation to a corporation means:

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

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

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

Section 9

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

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

excluded security means:

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

exempt body has the meaning given by section 66A.

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

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

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

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

extend, in relation to a period:

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

externally-administered body corporate means a body corporate:

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

extract of particulars for a company or a registered scheme means a statement given by ASIC that contains either or both of the following:

- (a) some or all of the particulars in relation to the company or scheme that are recorded in the register or registers maintained by ASIC under subsection 1274(1);
- (b) a requirement to provide a particular under section 346B.

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

- (a) of which notice as set out in paragraph 252J(c) has been given; and
- (b) that has been passed by at least 50% of the total votes that may be cast by members entitled to vote on the resolution (including members who are not present in person or by proxy).

Family Court means the Family Court of Australia.

Federal Court means the Federal Court of Australia.

FHSA product when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

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

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

Section 9

financial market, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

financial product, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

financial records includes:

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

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

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

financial reporting requirements for a financial report means the requirements imposed under:

- (a) section 296 or 297 if the financial report is an annual financial report; or
- (b) section 304 or 305 if the financial report is a half-year financial report.

financial service, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

financial services business, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

financial services civil penalty provision has the meaning given by section 1317DA.

financial services licensee, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

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

financial year has the meaning given by section 323D.

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

firm, in relation to an administrator or liquidator, means:

- (a) if the administrator or liquidator is a partner or employee of a partnership (the **partnership firm**) that provides advice or other services in relation to externally-administered bodies corporate—the partnership firm; or
- (b) if the administrator or liquidator is an officer or employee of a body corporate (the **body corporate firm**) that provides advice or other services in relation to externally-administered bodies corporate—the body corporate firm.

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

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

foreign company means:

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

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

franchise means an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the

Section 9

supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf.

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

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

function includes a duty.

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

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

group executives for a consolidated entity means:

- (a) the directors of the companies or bodies within the consolidated entity; and
- (b) the secretaries of the companies or bodies within the consolidated entity; and
- (c) the senior managers of any corporation within the consolidated entity; and
- (d) the partners, and senior managers, of any partnership within the consolidated entity; and
- (e) the trustees, and senior managers, of any trusts within the consolidated entity; and
- (f) the senior managers of any joint venture within the consolidated entity.

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

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

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

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

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

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

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

immediate family member for a person means:

- (a) the person's spouse; or
- (b) a person who is wholly or partly dependent on the person for financial support.

in Australia has the meaning given by section 102C.

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

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

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

incorporation:

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

individual auditor means an individual who consents to be appointed, or is appointed, as auditor of a company or registered scheme.

industrial instrument means:

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

information includes complaint.

Section 9

infringement notice has the meaning given by section 1317DAA.

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

insolvent has the meaning given by subsection 95A(2).

insolvent transaction has the meaning given by section 588FC.

insolvent under administration means a person who:

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

and includes:

- (c) a person any of whose property is subject to control under:
 - (i) section 50 or Division 2 of Part X of the *Bankruptcy Act 1966*; or
 - (ii) a corresponding provision of the law of an external Territory or the law of a foreign country; or
- (d) a person who has executed a personal insolvency agreement under:
 - (i) Part X of the *Bankruptcy Act 1966*; or
 - (ii) the corresponding provisions of the law of an external Territory or the law of a foreign country;where the terms of the agreement have not been fully complied with.

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

investment in a company, disclosing entity or other body means:

- (a) a share in the company, disclosing entity or body; or
- (b) a debenture of the company, disclosing entity or body; or
- (c) a legal or equitable interest in:
 - (i) a share in the company, disclosing entity or body; or
 - (ii) a debenture of the company, disclosing entity or body;or

- (d) an option to acquire (whether by way of issue or transfer) an investment in the company, disclosing entity or body covered by paragraph (a), (b) or (c); or
- (e) an option to dispose of an investment in the company, disclosing entity or body covered by paragraph (a), (b) or (c); or
- (f) an interest a person holds under an arrangement that is a derivative if:
 - (i) the consideration to be provided under the arrangement; or
 - (ii) the value of the arrangement;is ultimately determined, derived from or varies by reference to an investment in the company, disclosing entity or body covered by paragraph (a), (b), (c), (d) or (e).

To avoid doubt, the consideration to be provided under, or the value of, an arrangement in relation to an index is not ultimately determined, derived from or varies by reference to an investment in the company merely because the investment is taken into account in determining the value of the index.

investment in a registered scheme means:

- (a) an interest in the scheme; or
- (b) a legal or equitable interest in an interest in the scheme; or
- (c) an option to acquire (whether by way of issue or transfer) an investment in the scheme covered by paragraph (a) or (b); or
- (d) an option to dispose of an investment in the scheme covered by paragraph (a) or (b); or
- (e) an interest a person holds under an arrangement that is a derivative if:
 - (i) the consideration to be provided under the arrangement; or
 - (ii) the value of the arrangement;is ultimately determined, derived from or varies by reference to an investment in the scheme covered by paragraph (a), (b), (c) or (d); or
- (f) an investment in the responsible entity of the scheme.

To avoid doubt, the consideration to be provided under, or the value of, an arrangement in relation to an index is taken not to be ultimately determined, derived from or vary by reference to an

Section 9

investment in the scheme merely because the investment is taken into account in determining the value of the index.

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

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

issue includes:

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

Note: When **issue** is used in Chapter 7 in relation to a financial product it has a meaning affected by section 761E.

Judge means a judge of the Court.

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

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

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

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

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

lead auditor has the meaning given by section 324AF.

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

limited company means:

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

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

liquidator:

- (a) has a meaning affected by paragraph 530(b) (which deals with 2 or more persons appointed as liquidators); and
- (b) in Chapter 7, includes a provisional liquidator.

listed: a company, managed investment scheme or other body is **listed** if it is included in the official list of a prescribed financial market operated in this jurisdiction.

listed corporation means a body corporate that is included in an official list of a prescribed financial market.

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

listing market, in relation to a listed disclosing entity, has the meaning given by subsection 111AE(1) or (1A).

listing rules of a financial market, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

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

lodge means lodge with ASIC in this jurisdiction.

lodging entity has the meaning given by subsection 323EA(2).

Section 9

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

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

managed investment product, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

managed investment scheme means:

(a) a scheme that has the following features:

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

(b) a time-sharing scheme;

but does not include the following:

- (c) a partnership that has more than 20 members but does not need to be incorporated or formed under an Australian law because of regulations made for the purposes of subsection 115(2);

Note: This paragraph has an extended meaning in relation to Chapter 8 (see subsection 1200A(3)).

- (d) a body corporate (other than a body corporate that operates as a time sharing scheme);
- (e) a scheme in which all the members are bodies corporate that are related to each other and to the body corporate that promotes the scheme;
- (f) a franchise;

- (g) a statutory fund maintained under the *Life Insurance Act 1995*;
- (h) a regulated superannuation fund, an approved deposit fund, a pooled superannuation trust, or a public sector superannuation scheme, within the meaning of the *Superannuation Industry (Supervision) Act 1993*;
- (ha) an FHSA trust, within the meaning of the *First Home Saver Accounts Act 2008*;
- (i) a scheme operated by an Australian ADI in the ordinary course of its banking business;

Note: This paragraph has an extended meaning in relation to Chapter 8 (see subsection 1200A(3)).
- (j) the issue of debentures or convertible notes by a body corporate;
- (k) a barter scheme under which each participant may obtain goods or services from another participant for consideration that is wholly or substantially in kind rather than in cash;
- (l) a retirement village scheme operating within or outside Australia:
 - (i) under which the participants, or a majority of them, are provided, or are to be provided, with residential accommodation within a retirement village (whether or not the entitlement of a participant to be provided with accommodation derives from a proprietary interest held by the participant in the premises where the accommodation is, or is to be, provided); and
 - (ii) which is not a time-sharing scheme;
- (m) a scheme that is operated by a co-operative company registered under Part VI of the *Companies (Co-operative) Act 1943* of Western Australia or under a previous law of Western Australia that corresponds to that Part;
- (ma) a contribution plan;
- (n) a scheme of a kind declared by the regulations not to be a managed investment scheme.

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

manager has a meaning affected by section 90.

Section 9

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;
- and has a meaning affected by paragraph 434G(b) (which deals with 2 or more persons appointed as managing controllers).

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

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

market traded option means an option declared by an operator of a prescribed financial market to be a market traded option.

member:

- (a) in relation to a managed investment scheme—means a person who holds an interest in the scheme; or
- (e) in relation to a company—a person who is a member under section 231.

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

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

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

mining purposes means any or all of the following purposes:

- (a) prospecting for ores, metals or minerals;
- (b) obtaining, by any mode or method, ores, metals or minerals;
- (c) the sale or other disposal of ores, metals, minerals or other products of mining;

(d) the carrying on of any business or activity necessary for, or incidental to, any of the foregoing purposes; whether in Australia or elsewhere, but does not include quarrying operations for the sole purpose of obtaining stone for building, roadmaking or similar purposes.

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

modifications includes additions, omissions and substitutions.

money includes a payment order.

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

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

NCSC means the National Companies and Securities Commission.

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

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

negative solvency resolution means a resolution by the directors of a company that, in their opinion, there are not reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable.

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

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

Section 9

(c) a letter of credit;
of, or purporting to be issued or signed by or on behalf of, the
body.

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

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

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

non-audit services provider for an auditor conducting an audit
means a person who:

- (a) is not a professional member of the audit team conducting the
audit of the audited body; and
- (b) is either:
 - (i) if the auditor is an individual auditor—an employee of
the individual auditor (or of an entity acting for, or on
behalf of, the individual auditor); or
 - (ii) if the auditor is an audit firm—a member of the audit
firm or senior manager of the audit firm (or of an entity
acting for, or on behalf of, the audit firm); or
 - (iii) if the auditor is an audit company—a director of the
audit company or a senior manager of the audit
company (or of an entity acting for, or on behalf of, the
audit company); and
- (c) provides, or has provided, services (other than services
related to the conduct of an audit) to the audited body.

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

notice includes a circular and an advertisement.

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

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

offence based on a particular provision of this Act means, unless a contrary intention appears:

- (a) if that provision creates an offence—an offence against that provision, or an offence against section 1314 that relates to that provision; or
- (b) if section 1311 creates an offence relating to that provision—an offence against section 1311 or 1314 that relates to that provision.

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

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

officer of a corporation means:

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

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

Section 9

officer of an entity that is neither an individual nor a corporation means:

- (a) a partner in the partnership if the entity is a partnership; or
- (b) an office holder of the unincorporated association if the entity is an unincorporated association; or
- (c) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
 - (ii) who has the capacity to affect significantly the entity's financial standing.

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

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

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

old Corporations Law, in relation to a State or Territory, has the same meaning as it has in Part 10.1.

old Division 11 of Part 11.2 transitionals means the following:

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

old Division 12 of Part 11.2 transitionals means the following:

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

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

on behalf of includes on the instructions of.

on-market: a transaction of any kind is an on-market transaction if it is effected on a prescribed financial market and is:

- (a) an on-market transaction as defined in the rules governing the operation of the market; or
- (b) if those rules do not define on-market transactions—effected in the ordinary course of trading on the market.

on-market buy-back means a buy-back by a listed corporation on a prescribed financial market in the ordinary course of trading on that market.

operated in this jurisdiction, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

operating rules, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

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

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

Panel means the Takeovers Panel.

parent: without limiting who is a parent of a person for the purposes of this Act, someone is the **parent** of a person if the person is his or her child because of the definition of **child** in this section.

Part 5.1 body means:

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

Section 9

Part 5.7 body means:

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

but does not include an Aboriginal and Torres Strait Islander corporation.

Note: The winding up of Aboriginal and Torres Strait Islander corporations is dealt with in Part 11-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

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

participant, when used in a provision (the **relevant provision**) outside Chapter 7 in relation to a clearing and settlement facility or a financial market, has the same meaning as it has in Chapter 7 in relation to a clearing and settlement facility or a financial market, except that it does not include a reference to a recognised affiliate (within the meaning of that Chapter) in relation to such a facility or market unless regulations for the purposes of this definition provide that, in the relevant provision, it does include a recognised affiliate.

party, in relation to a transaction that has been completed, given effect to, or terminated, includes a person who was a party to the transaction.

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

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

person, when used in Division 2 of Part 2D.2 (sections 200A to 200J), includes a superannuation fund.

place of origin:

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

play a significant role: a person *plays a significant role* in the audit of a company or a registered scheme for a financial year if:

- (a) the person is appointed as an individual auditor of the company or scheme for that financial year and:
 - (i) acts as an auditor for the company or scheme for that financial year; or
 - (ii) prepares an audit report for the company or the scheme in relation to a financial report of the company or scheme for that financial year or for a half-year falling within that financial year; or
- (b) a firm or company is appointed as an auditor of the company or scheme for that financial year and the person:
 - (i) is a registered company auditor; and
 - (ii) acts, on behalf of the firm or company, as a lead auditor, or review auditor, in relation to an audit of the company or scheme for that financial year or for a half-year falling within that financial year.

pooling determination means a determination under subsection 571(1).

pooling order means an order under subsection 579E(1).

positive solvency resolution means a resolution by the directors of a company that, in their opinion, there are reasonable grounds to

Section 9

believe that the company will be able to pay its debts as and when they become due and payable.

possession has a meaning affected by section 86.

power includes an authority.

premises includes:

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

prescribed financial market means a financial market that is prescribed by regulations made for the purposes of this definition.

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

procure includes cause.

Product Disclosure Statement, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

Note: For the effect of the lodgment of a Replacement Product Disclosure Statement, see section 1014J.

professional accounting body has the same meaning as in the ASIC Act.

professional employee of an individual auditor, audit firm or audit company means an employee of the auditor, firm or company who participates in the conduct of the audits on behalf of the auditor, firm or company and, in the course of doing so, exercises professional judgment in relation to the application of or compliance with:

- (a) accounting standards; or
- (b) auditing standards; or
- (c) the provisions of this Act dealing with financial reporting and the conduct of audits.

professional investor means a person in relation to whom one or more of the following paragraphs apply:

- (a) the person is a financial services licensee;

- (b) the person is a body regulated by APRA, other than a trustee of any of the following (within the meaning of the *Superannuation Industry (Supervision) Act 1993*):
 - (i) a superannuation fund;
 - (ii) an approved deposit fund;
 - (iii) a pooled superannuation trust;
 - (iv) a public sector superannuation scheme;
- (c) the person is a body registered under the *Financial Corporations Act 1974*;
- (d) the person is the trustee of:
 - (i) a superannuation fund; or
 - (ii) an approved deposit fund; or
 - (iii) a pooled superannuation trust; or
 - (iv) a public sector superannuation scheme;within the meaning of the *Superannuation Industry (Supervision) Act 1993* and the fund, trust or scheme has net assets of at least \$10 million;
- (e) the person controls at least \$10 million (including any amount held by an associate or under a trust that the person manages);
- (f) the person is a listed entity, or a related body corporate of a listed entity;
- (g) the person is an exempt public authority;
- (h) the person is a body corporate, or an unincorporated body, that:
 - (i) carries on a business of investment in financial products, interests in land or other investments; and
 - (ii) for those purposes, invests funds received (directly or indirectly) following an offer or invitation to the public, within the meaning of section 82, the terms of which provided for the funds subscribed to be invested for those purposes;
- (i) the person is a foreign entity that, if established or incorporated in Australia, would be covered by one of the preceding paragraphs.

professional member of an audit team has the meaning given by section 324AE.

Section 9

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

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

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

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

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

prospectus means a prospectus that is lodged with ASIC.

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

providing finance means:

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

provision of a law includes:

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

provisional liquidator has a meaning affected by paragraph 530AA(b) (which deals with 2 or more persons appointed as provisional liquidators).

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

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

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

publish:

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

qualified accountant has the meaning given by section 88B.

qualified privilege has the meaning given by section 89.

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

quotation, in relation to financial products or in relation to a financial market, includes the displaying or providing, on a financial market, of information concerning:

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

Section 9

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

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

quoted security means a security that is quoted on a prescribed financial market.

receiver has a meaning affected by paragraph 434D(b) (which deals with 2 or more persons appointed as receivers).

receiver and manager has a meaning affected by section 90 and has a meaning affected by paragraph 434E(b) (which deals with 2 or more persons appointed as receivers and managers).

recognised offer has the meaning given by section 1200B.

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

referring State has the meaning given by section 4.

register means register under this Act.

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

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

registered company auditor:

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

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

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

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

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

registrable Australian body means:

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

but does not include a foreign company.

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

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

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

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

Section 9

- (k) a body corporate one of whose directors is also a director of the first-mentioned body;
- (l) a trustee of a trust under which a person is a beneficiary, where the person is a related entity of the first-mentioned body because of any other application or applications of this definition.

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

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

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

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

relevant agreement means an agreement, arrangement or understanding:

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

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

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

relevant financial market, for a listed company, or listed registered scheme, means:

- (a) the prescribed financial market on which the company or scheme is listed; or

- (b) if the company or scheme is listed on 2 or more prescribed financial markets—each of those markets.

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

relevant market operator, for a listed company, or listed registered scheme, means:

- (a) if there is only one relevant financial market for the company or scheme—the operator of that relevant financial market; or
- (b) if there is 2 or more relevant financial markets for the company or scheme—each of the operators of each of those relevant financial markets.

remedial order means an order that:

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

Section 9

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

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

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

remuneration report means the section of the directors' report for a financial year for a listed public company that is included under subsection 300A(1).

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

Replacement Product Disclosure Statement, when used in a provision outside Chapter 7, has the same meaning it has in Chapter 7.

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

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

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

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

responsible officer, in relation to a body corporate that applies for an Australian financial services licence, means an officer of the body who would perform duties in connection with the holding of the licence.

result includes:

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

retention of title clause: if:

- (a) a contract for the sale of property contains a provision the effect of which is that the seller retains title in the property until the purchase price, or other amount, has been paid in full; and
- (b) the purchase price, or the other amount, as the case may be, has not been paid in full;

the property is subject to a **retention of title clause** under that contract.

retirement village scheme means a scheme, undertaking or enterprise (in this definition called the **relevant scheme**), whether in Australia or elsewhere, that is being, or is proposed to be, carried out or undertaken with the intention that the participants, or

Section 9

a majority of the participants, in the relevant scheme be provided, in connection with the relevant scheme, with residential accommodation within a retirement community, whether or not the entitlement of a participant to be provided with such accommodation derives from a proprietary interest held by the participant in the premises where the accommodation is provided, but does not include a time-sharing scheme.

return of particulars for a company or a registered scheme means a statement given by ASIC that contains any or all of the following:

- (a) some or all of the particulars in relation to the company or scheme that are recorded in the register or registers maintained by ASIC under subsection 1274(1);
- (b) a requirement to provide a particular under section 348B;
- (c) a requirement to comply with a subsection of section 348C (and, if applicable, pass a resolution).

review auditor has the meaning given by section 324AF.

review date has the meaning given by section 345A.

review fee has the meaning given by section 5 of the *Corporations (Review Fees) Act 2003*.

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

rights issue has the meaning given by subsections 9A(1) and (2).

rules means:

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

scheme property of a registered scheme means:

- (a) contributions of money or money's worth to the scheme; and
- (b) money that forms part of the scheme property under provisions of this Act or the ASIC Act; and
- (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and

- (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
- (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).

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

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

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

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

securities has the meaning given by section 92.

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

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

senior manager:

- (a) in relation to a corporation—means a person (other than a director or secretary of the corporation) who:
 - (i) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) has the capacity to affect significantly the corporation's financial standing; and
- (b) in relation to a partnership—means a person (other than a partner) who:
 - (i) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the partnership; or

Section 9

- (ii) has the capacity to affect significantly the partnership's financial standing; and
- (c) in relation to a trust—means a person (other than a trustee) who:
 - (i) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or affairs of the trust; or
 - (ii) has the capacity to affect significantly the financial standing of the trust; and
- (d) in relation to a joint venture—means a person (other than a director or secretary of a corporation participating in the joint venture) who:
 - (i) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the joint venture; or
 - (ii) has the capacity to affect significantly the financial standing of the joint venture.

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

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

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

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

solvency resolution means a resolution by the directors of a company as to whether or not, in their opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable.

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

special resolution means:

- (a) in relation to a company, a resolution:
 - (i) of which notice as set out in paragraph 249L(c) has been given; and

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

spouse of a person includes a de facto partner of the person within the meaning of the *Acts Interpretation Act 1901*.

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

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

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

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

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

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

Section 9

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

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

State or Territory Supreme Court means the Supreme Court of:

- (a) a State; or
- (b) the Capital Territory; or
- (c) the Northern Territory.

statutory demand means:

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

statutory minimum means:

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

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

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

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

- (a) the total votes attached to voting shares in the body, or voting interests in the scheme, in which they or their associates:
 - (i) have relevant interests; and
 - (ii) would have a relevant interest but for subsection 609(6) (market traded options) or 609(7) (conditional agreements);is 5% or more of the total number of votes attached to voting shares in the body, or interests in the scheme; or
- (b) the person has made a takeover bid for voting shares in the body, or voting interests in the scheme, and the bid period has started and not yet ended.

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

substantial interest has a meaning affected by section 602A.

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

superannuation guarantee charge has the same meaning as in the *Superannuation Guarantee (Administration) Act 1992*.

superannuation guarantee shortfall has the same meaning as in the *Superannuation Guarantee (Administration) Act 1992*.

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

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

Supplementary Product Disclosure Statement, when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7.

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

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

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

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

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

Territory means:

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

Section 9

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

this Act includes the regulations.

this jurisdiction means the geographical area that consists of:

- (a) each referring State (including its coastal sea); and
- (b) the Capital Territory (including the coastal sea of the Jervis Bay Territory); and
- (c) the Northern Territory (including its coastal sea); and
- (d) also, for the purposes of the application of a provision of Chapter 7 or an associated provision (as defined in section 5)—any external Territory in which the provision applies because of subsection 5(9) (but only to the extent provided for in that subsection).

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

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

trade, in relation to financial products, in relation to a financial market, includes:

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

trading day of a financial market means a day on which the market is open for trading in financial products.

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

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

- (b) a charge created by the body on property of the body; and
- (c) a guarantee given by the body; and
- (d) a payment made by the body; and
- (e) an obligation incurred by the body; and
- (f) a release or waiver by the body; and
- (g) a loan to the body;

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

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

- (a) sounds, including speech and music; or
- (b) visual images; or
- (c) signals for the communication, whether as between persons and persons, persons and things or things and things, of any matter otherwise than in the form of sounds or visual images; or
- (d) signals for the actuation or control of machinery or apparatus.

transparency, in relation to a document, means:

- (a) a developed negative or positive photograph of that document (in this definition called an **original photograph**) made, on a transparent base, by means of light reflected from, or transmitted through, the document; or
- (b) a copy of an original photograph made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with the original photograph; or
- (c) any one of a series of copies of an original photograph, the first of the series being made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with a copy referred to in paragraph (b), and each succeeding copy in the series being made, in the same manner, from any preceding copy in the series.

Tribunal means the Administrative Appeals Tribunal.

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

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

Section 9

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

unclaimed property means:

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

uncommercial transaction has the meaning given by section 588FB.

underlying securities means:

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

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

underwrite includes sub-underwrite.

unfair loan has the meaning given by section 588FD.

unfair preference has the meaning given by section 588FA.

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

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

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

unreasonable director-related transaction has the meaning given by section 588FDA.

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

value, in relation to an asset, includes amount.

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

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

voting power in a body or managed investment scheme has the meaning given by section 610.

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

- (a) a right to vote while a dividend (or part of a dividend) in respect of the share is unpaid;
- (b) a right to vote on a proposal to reduce the body's share capital;
- (c) a right to vote on a resolution to approve the terms of a buy-back agreement;
- (d) a right to vote on a proposal that affects the rights attached to the share;
- (e) a right to vote on a proposal to wind the body up;
- (f) a right to vote on a proposal for the disposal of the whole of the body's property, business and undertaking;
- (g) a right to vote during the body's winding up.

wages, in relation to a company, means amounts payable to or in respect of an employee of the company (whether the employee is remunerated by salary, wages, commission or otherwise) under an

Section 9AA

industrial instrument, including amounts payable by way of allowance or reimbursement but excluding amounts payable in respect of leave of absence.

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

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

winding up by the Court includes winding up in insolvency.

wound up by the Court includes wound up in insolvency.

9AA Certain family relationships

For the purposes of this Act, relationships (including the relationship of being family) are taken to include:

- (a) relationships between de facto partners (within the meaning of the *Acts Interpretation Act 1901*); and
- (b) relationships of child and parent that arise:
 - (i) if someone is an exnuptial or adoptive child of a person; or
 - (ii) if someone is the child of a person because of the definition of ***child*** in this Act; and
- (c) relationships traced through relationships referred to in paragraphs (a) and (b).

9A Meaning of *rights issue*

- (1) A ***rights issue*** is an offer of a body's securities for issue in respect of which the following conditions are met:
 - (a) the securities being offered for issue are in a particular class;
 - (b) either:
 - (i) the offer is made to every person who holds securities in that class to issue them, or their assignee, with the percentage of the securities to be issued that is the same

Section 9A

- as the percentage of the securities in that class that they hold before the offer; or
 - (ii) if the conditions in subsection (3) are met—such an offer is made to every person with a registered address in Australia or New Zealand who holds securities in that class;
 - (c) the terms of each offer are the same.
- (2) A **rights issue** is an offer of interests in a managed investment scheme for issue in respect of which the following conditions are met:
- (a) the interests being offered for issue are in a particular class;
 - (b) either:
 - (i) the offer is made to every person who holds interests in that class to issue them, or their assignee, with the percentage of the interests to be issued that is the same as the percentage of the interests in that class that they hold before the offer; or
 - (ii) if the conditions in subsection (3) are met—such an offer is made to every person with a registered address in Australia or New Zealand who holds interests in that class;
 - (c) the terms of each offer are the same.
- (3) The conditions in this subsection are met if:
- (a) the body or responsible entity (as the case requires) decides that it is unreasonable to offer securities or interests (as the case requires) for issue to persons (the **non-residents**) with a registered address in a place outside Australia or New Zealand, after taking into account the following matters:
 - (i) the number of non-residents, in that place, to whom offers would otherwise be made;
 - (ii) the number and value of the securities or interests that would otherwise be offered for issue;
 - (iii) the cost of complying with the laws, and any requirements of any regulatory authority, of the place where the securities or interests would otherwise be offered for issue; and

Section 9A

- (b) the body or responsible entity:
 - (i) sends details of the offer to each non-resident in that place; and
 - (ii) advises each non-resident in that place that the non-resident will not be offered the securities or interests; and
- (c) if the invitation to apply for, or the right to be issued with, the securities or interests is able to be assigned—the body or responsible entity:
 - (i) advises each non-resident in that place that a nominee will be appointed to sell the invitation or right that would otherwise have been offered to the non-resident; and
 - (ii) advises each non-resident that the nominee will send the non-resident any net proceeds from the sale of that invitation or those rights; and
 - (iii) appoints a nominee in Australia to carry out the obligations referred to in subparagraphs (i) and (ii).
- (4) For the purposes of this section, a reference to an offer of securities includes a reference to an invitation to apply for the issue of securities.

Division 2—Associates

10 Effect of Division

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

11 Associates of bodies corporate

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

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

12 References in Chapters 6 to 6C, and other references relating to voting power and takeovers etc.

- (1) Subject to subsection 16(1), but despite anything else in this Part, this section applies for the purposes of interpreting a reference to an associate (the *associate reference*), in relation to a designated body, if:
 - (a) the reference occurs in a provision of Chapter 6, 6A, 6B or 6C; or
 - (b) the reference occurs in a provision outside those Chapters that relates to any of the following matters:
 - (i) the extent, or restriction, of a power to exercise, or to control the exercise of, the votes attached to voting shares in the designated body;
 - (ii) the primary person's voting power in the designated body;
 - (iii) relevant interests in securities in the designated body;
 - (iv) a substantial holding in the designated body;

Section 12

- (v) a takeover bid for securities in the designated body;
 - (vi) the compulsory acquisition, or compulsory buy-out, of securities in the designated body.
- (2) For the purposes of the application of the associate reference in relation to the designated body, a person (the *second person*) is an associate of the primary person if, and only if, one or more of the following paragraphs applies:
 - (a) the primary person is a body corporate and the second person is:
 - (i) a body corporate the primary person controls; or
 - (ii) a body corporate that controls the primary person; or
 - (iii) a body corporate that is controlled by an entity that controls the primary person;
 - (b) the second person is a person with whom the primary person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs;
 - (c) the second person is a person with whom the primary person is acting, or proposing to act, in concert in relation to the designated body's affairs.
- (3) For the purposes of the application of this section in relation to a designated body that is a managed investment scheme:
 - (a) a reference to controlling or influencing the composition of the designated body's board is taken to be a reference to controlling or influencing:
 - (i) if the scheme is a registered scheme—whether a particular company becomes or remains the scheme's responsible entity; or
 - (ii) if the scheme is not a registered scheme—whether a particular person is appointed, or remains appointed, to the office (by whatever name it is known) in relation to the scheme that corresponds most closely to the office of responsible entity of a registered scheme; and
 - (b) a reference to voting shares in the designated body is taken to be a reference to voting interests in the managed investment scheme.

- (4) In relation to a matter relating to securities in a designated body, a person may be an associate of the body and the body may be an associate of the person.
- (5) In this section:
 - designated body* means:
 - (a) a body; or
 - (b) a managed investment scheme.

13 References in Chapter 7

If the associate reference occurs in Chapter 7, it includes a reference to:

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

15 General

- (1) The associate reference includes a reference to:
 - (a) a person in concert with whom the primary person is acting, or proposes to act; and
 - (b) a person who, under the regulations, is, for the purposes of the provision in which the associate reference occurs, an associate of the primary person; and

Section 16

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

16 Exclusions

- (1) A person is not an associate of another person by virtue of section 12 or subsection 15(1), or by virtue of subsection 15(2) as it applies in relation to section 12 or subsection 15(1), merely because of one or more of the following:
 - (a) one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship;
 - (b) one, a client, gives specific instructions to the other, whose ordinary business includes dealing in financial products, to acquire financial products on the client's behalf in the ordinary course of that business;
 - (c) one had sent, or proposes to send, to the other an offer under a takeover bid for shares held by the other;
 - (d) one has appointed the other, otherwise than for valuable consideration given by the other or by an associate of the other, to vote as a proxy or representative at a meeting of members, or of a class of members, of a body corporate.
- (2) For the purposes of proceedings under this Act in which it is alleged that a person was an associate of another person by virtue of paragraph 13(b) or (e), the first-mentioned person is not taken to have been an associate of the other person in relation to a matter by virtue of that paragraph unless it is proved that the first-mentioned person knew, or ought to have known, at that time, the material particulars of that matter.

17 Associates of composite person that carries on a financial services business

A reference to an associate, in relation to an entity (other than a body corporate) that carries on a financial services business, is, if 2 or more persons constitute the entity, a reference to an associate of any of those persons.

Division 3—Carrying on business

18 Carrying on business: otherwise than for profit

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

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

19 Businesses of a particular kind

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

20 Carrying on a business: alone or together with others

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

21 Carrying on business in Australia or a State or Territory

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

Section 21

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

Division 5A—Types of company

45A Proprietary companies

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

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

Note 2: A proprietary company must:

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

(see section 113).

Small proprietary company

- (2) A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:
- (a) the consolidated revenue for the financial year of the company and the entities it controls (if any) is less than \$25 million, or any other amount prescribed by the regulations for the purposes of this paragraph;
 - (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$12.5 million, or any other amount prescribed by the regulations for the purposes of this paragraph;
 - (c) the company and the entities it controls (if any) have fewer than 50, or any other number prescribed by the regulations for the purposes of this paragraph, employees at the end of the financial year.

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

Large proprietary company

- (3) A proprietary company is a large proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:
- (a) the consolidated revenue for the financial year of the company and the entities it controls (if any) is \$25 million, or any other amount prescribed by the regulations for the purposes of paragraph (2)(a), or more;
 - (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is \$12.5 million, or any other amount prescribed by the regulations for the purposes of paragraph (2)(b), or more;
 - (c) the company and the entities it controls (if any) have 50, or any other number prescribed by the regulations for the purposes of paragraph (2)(c), or more employees at the end of the financial year.

When a company controls an entity

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

Counting employees

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

Accounting standards

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

Division 6—Subsidiaries and related bodies corporate

46 What is a subsidiary

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

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

47 Control of a body corporate's board

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

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

48 Matters to be disregarded

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

49 References in this Division to a subsidiary

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

Section 50

50 Related bodies corporate

Where a body corporate is:

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

50AAA Associated entities

- (1) One entity (the *associate*) is an associated entity of another entity (the *principal*) if subsection (2), (3), (4), (5), (6) or (7) is satisfied.
- (2) This subsection is satisfied if the associate and the principal are related bodies corporate.
- (3) This subsection is satisfied if the principal controls the associate.
- (4) This subsection is satisfied if:
 - (a) the associate controls the principal; and
 - (b) the operations, resources or affairs of the principal are material to the associate.
- (5) This subsection is satisfied if:
 - (a) the associate has a qualifying investment (see subsection (8)) in the principal; and
 - (b) the associate has significant influence over the principal; and
 - (c) the interest is material to the associate.
- (6) This subsection is satisfied if:
 - (a) the principal has a qualifying investment (see subsection (8)) in the associate; and
 - (b) the principal has significant influence over the associate; and
 - (c) the interest is material to the principal.
- (7) This subsection is satisfied if:
 - (a) an entity (the *third entity*) controls both the principal and the associate; and
 - (b) the operations, resources or affairs of the principal and the associate are both material to the third entity.

Section 50AA

- (8) For the purposes of this section, one entity (the *first entity*) has a *qualifying investment* in another entity (the *second entity*) if the first entity:
- (a) has an asset that is an investment in the second entity; or
 - (b) has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.

50AA Control

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

Division 7—Interpretation of other expressions

52 Doing acts

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

52A Signing

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

53 Affairs of a body corporate

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

- (a) the promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or trustee), property (whether held alone or jointly with any other person or persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with any other person or persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the body; and
- (b) in the case of a body corporate (not being an authorised trustee corporation) that is a trustee (but without limiting the generality of paragraph (a))—matters concerned with the ascertainment of the identity of the persons who are beneficiaries under the trust, their rights under the trust and any payments that they have received, or are entitled to receive, under the terms of the trust; and
- (c) the internal management and proceedings of the body; and
- (d) any act or thing done (including any contract made and any transaction entered into) by or on behalf of the body, or to or in relation to the body or its business or property, at a time when:

- (i) a receiver, or a receiver and manager, is in possession of, or has control over, property of the body; or
- (ii) the body is under administration; or
- (iia) a deed of company arrangement executed by the body has not yet terminated; or
- (iii) a compromise or arrangement made between the body and any other person or persons is being administered; or
- (iv) the body is being wound up;
and, without limiting the generality of the foregoing, any conduct of such a receiver or such a receiver and manager, of an administrator of the body, of an administrator of such a deed of company arrangement, of a person administering such a compromise or arrangement or of a liquidator or provisional liquidator of the body; and
- (e) the ownership of shares in, debentures of, and interests in a managed investment scheme made available by, the body; and
- (f) the power of persons to exercise, or to control the exercise of, the rights to vote attached to shares in the body or to dispose of, or to exercise control over the disposal of, such shares; and
- (g) matters concerned with the ascertainment of the persons who are or have been financially interested in the success or failure, or apparent success or failure, of the body or are or have been able to control or materially to influence the policy of the body; and
- (h) the circumstances under which a person acquired or disposed of, or became entitled to acquire or dispose of, shares in, debentures of, or interests in a managed investment scheme made available by, the body; and
- (j) where the body has made available interests in a managed investment scheme—any matters concerning the financial or business undertaking, scheme, common enterprise or investment contract to which the interests relate; and
- (k) matters relating to or arising out of the audit of, or working papers or reports of an auditor concerning, any matters referred to in a preceding paragraph.

Section 53AA

53AA Business affairs of a body corporate

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

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

53AB Business affairs of a natural person

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

- (a) the person's examinable operations and examinable assets and liabilities; and
- (b) any act done (including any contract made and any transaction entered into) by or on behalf of the person, or to or in relation to the person or his or her business or property, at a time when:
 - (i) the person was, under the *Bankruptcy Act 1966* or the law of an external Territory, a bankrupt in respect of a bankruptcy from which the person had not been discharged; or
 - (ii) the person had, under a law of an external Territory or of a foreign country, the status of an undischarged bankrupt; or
 - (iii) the person's property was subject to control under Division 2 of Part X of the *Bankruptcy Act 1966* because of an authority given by the person under section 188 of that Act; or
 - (iv) a personal insolvency agreement under Part X of the *Bankruptcy Act 1966* or under the corresponding provisions of the law of an external Territory or of a foreign country was in effect in relation to the person or the person's property; and
- (c) without limiting the generality of paragraph (b), any conduct of the trustee of such a bankrupt estate or of such a personal insolvency agreement or a person acting under such an authority; and
- (d) matters concerned with ascertaining the corporations with which the person is or has been connected.

53AC Business affairs of a partnership

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

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

53AD Business affairs of a trust

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

- (a) the creation of the trust; and
- (b) matters arising under, or otherwise relating to, the terms of the trust; and
- (c) the appointment and removal of a trustee of the trust; and
- (d) the business, trading, transactions and dealings of the trustee of the trust; and
- (e) the profits, income and receipts of the trustee of the trust; and
- (f) the losses, outgoings and expenditure of the trustee of the trust; and
- (g) the trust property, including transactions and dealings in, and the income arising from, the trust property; and
- (h) the liabilities of the trustee of the trust; and
- (j) the management of the trust; and
- (k) any act done (including any contract made and any transaction entered into) by or on behalf of the trustee of the trust, or to or in relation to the trust, at a time when the trust is being wound up; and
- (l) matters concerned with ascertaining the corporations with which the trust is or has been connected.

Section 57

57 Classes of shares or interests in managed investment schemes

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

57A Meaning of *corporation*

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

Note: Various provisions of this Act that generally apply to corporations do not apply to Aboriginal and Torres Strait Islander corporations because of express provisions to that effect: see section 190B, subsection 197(5), section 206HB and subsections 1309(6), 1318(5), 1321(2) and 1335(3).

58AA Meaning of *court* and *Court*

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

court means any court.

Court means any of the following courts:

 - (a) the Federal Court;
 - (b) the Supreme Court of a State or Territory;
 - (c) the Family Court of Australia;

Section 58B

- (d) a court to which section 41 of the *Family Law Act 1975* applies because of a Proclamation made under subsection 41(2) of that Act.
- (2) Except where there is a clear expression of a contrary intention (for example, by use of the expression “the Court”), proceedings in relation to a matter under this Act may, subject to Part 9.7, be brought in any court.

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

58B Discharge of obligations under this Act

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

59 Debentures as consideration for acquisition of shares

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

60 Declaration of relevant relationships

Administrator

- (1) In this Act, a ***declaration of relevant relationships***, in relation to an administrator of a company under administration, means a written declaration:

Section 60

- (a) stating whether any of the following:
 - (i) the administrator;
 - (ii) if the administrator's firm (if any) is a partnership—a partner in that partnership;
 - (iii) if the administrator's firm (if any) is a body corporate—that body corporate or an associate of that body corporate;has, or has had within the preceding 24 months, a relationship with:
 - (iv) the company; or
 - (v) an associate of the company; or
 - (vi) a former liquidator, or former provisional liquidator, of the company; or
 - (vii) a person who is entitled to enforce a charge on the whole, or substantially the whole, of the company's property; and
- (b) if so, stating the administrator's reasons for believing that none of the relevant relationships result in the administrator having a conflict of interest or duty.

Liquidator

- (2) In this Act, a ***declaration of relevant relationships***, in relation to a liquidator of a company, means a written declaration:
 - (a) stating whether any of the following:
 - (i) the liquidator;
 - (ii) if the liquidator's firm (if any) is a partnership—a partner in that partnership;
 - (iii) if the liquidator's firm (if any) is a body corporate—that body corporate or an associate of that body corporate;has, or has had within the preceding 24 months, a relationship with:
 - (iv) the company; or
 - (v) an associate of the company; or
 - (vi) a former liquidator, or former provisional liquidator, of the company; or
 - (vii) a former administrator of the company; or
 - (viii) a former administrator of a deed of company arrangement executed by the company; and

- (b) if so, stating the liquidator's reasons for believing that none of the relevant relationships result in the liquidator having a conflict of interest or duty.

64 Entering into a transaction in relation to shares or securities

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

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

64A Entities

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

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

64B Entities connected with a corporation

Body corporate

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

Section 64B

Natural person

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

Partnership

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

Trust

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

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

65 Eligible money market dealer

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

66A Exempt bodies

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

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

70 Extension of period for doing an act

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

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

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

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

75 Inclusion in official list

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

- (a) a body corporate or other person whose name is included in that official list; or

Section 79

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

79 Involvement in contraventions

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

- (a) has aided, abetted, counselled or procured the contravention;
or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

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

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

82 Offers and invitations to the public

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

- (a) is an offer or invitation to enter into an underwriting agreement; or

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

83 Officers, and other persons, in default

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

86 Possession

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

88A Public document of a body corporate

- (1) Subject to this section, *public document*, in relation to a body, means:
 - (a) an instrument of, or purporting to be signed, issued or published by or on behalf of, the body that:
 - (i) when signed, issued or published, is intended to be lodged or is required by or under this Act or the ASIC Act to be lodged; or
 - (ii) is signed, issued or published under or for the purposes of this Act, the ASIC Act or any other Australian law; or
 - (b) an instrument of, or purporting to be signed or issued by or on behalf of, the body that is signed or issued in the course of, or for the purposes of, a particular transaction or dealing; or

Section 88B

- (c) without limiting paragraph (a) or (b), a business letter, statement of account, invoice, receipt, order for goods, order for services or official notice of, or purporting to be signed or issued by or on behalf of, the body.
- (2) A thing is not a public document of a body if it:
 - (a) is applied, or is intended or required to be applied:
 - (i) to goods; or
 - (ii) to a package, label, reel or thing in or with which goods are, or are to be, supplied; and
 - (b) is so applied, or is intended or required to be so applied, for a purpose connected with the supply of the goods.
- (3) In subsection (2):
 - apply to* includes print on, weave in, impress on, work into, or annex, affix or attach to.
 - label* includes a band or ticket.
 - package* includes:
 - (a) a covering, stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper; or
 - (b) any other container or thing in which goods are, or are to be, packed.

88B Qualified accountants

- (1) For the purposes of this Act, a *qualified accountant* is a person covered by a declaration in force under subsection (2).
- (2) ASIC may, in writing, declare that all members of a specified professional body, or all persons in a specified class of members of a specified professional body, are qualified accountants for the purposes of this Act.
- (3) ASIC may, in writing, vary or revoke a declaration made under subsection (2).

89 Qualified privilege

- (1) Where this Act provides that a person has qualified privilege in respect of an act, matter or thing, the person:
 - (a) has qualified privilege in proceedings for defamation; or
 - (b) is not, in the absence of malice on the person's part, liable to an action for defamation at the suit of a person;as the case requires, in respect of that act, matter or thing.
- (2) In subsection (1):

malice includes ill will to the person concerned or any other improper motive.
- (3) Neither this section nor a provision of this Act that provides as mentioned in subsection (1) limits or affects any right, privilege or immunity that a person has, apart from this section or such a provision, as defendant in proceedings, or an action, for defamation.

90 Receivers and managers

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

92 Securities

- (1) Subject to this section, *securities* means:
 - (a) debentures, stocks or bonds issued or proposed to be issued by a government; or
 - (b) shares in, or debentures of, a body; or
 - (c) interests in a managed investment scheme; or
 - (d) units of such shares;but does not include:
 - (f) a derivative (as defined in Chapter 7), other than an option to acquire by way of transfer a security covered by paragraph (a), (b), (c) or (d); or
 - (g) an excluded security.

Note: A derivative does not include an option to acquire a security by way of issue (see the combined effect of paragraph 761D(3)(c), paragraph

Section 92

764A(1)(a) and paragraph (d) of the definition of *security* in section 761A).

- (2) The expression *securities*, when used in relation to a body, means:
- (a) shares in the body; or
 - (b) debentures of the body; or
 - (c) interests in a managed investment scheme made available by the body; or
 - (d) units of such shares;
- but does not include:
- (e) a derivative (as defined in Chapter 7), other than an option to acquire by way of transfer a security covered by paragraph (a), (b), (c) or (d); or
 - (f) an excluded security.

Note: A derivative does not include an option to acquire a security by way of issue (see the note to subsection (1)).

- (3) In Chapters 6 to 6CA (inclusive) and Part 1.2A:

securities means:

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

It does not cover:

- (f) a derivative (as defined in Chapter 7), other than an option to acquire by way of transfer a security covered by paragraph (a), (b), (c) or (d); or
- (g) a market traded option.

Note: A derivative does not include an option to acquire a security by way of issue (see the note to subsection (1)).

Note: Section 9 defines *body*.

Section 95A

- (4) In Chapter 6D *securities* has the meaning given by section 700 and in Chapter 7 *security* has the meaning given by section 761A.

95A Solvency and insolvency

- (1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
- (2) A person who is not solvent is insolvent.

Division 8—Miscellaneous interpretation rules

100 Address of registered office etc.

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

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

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

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

101 Amount of stock representing a number of shares

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

102 Applications to be in writing

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

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

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

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

102C In Australia

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

Note: This definition is needed if there is a State that is not a referring State. If all the States are referring States, every place in Australia will also be in this jurisdiction.

103 Effect of certain contraventions of this Act

- (1) This section has effect except so far as this Act otherwise provides.
- (2) An act, transaction, agreement, instrument, matter or thing is not invalid merely because of:
 - (a) a contravention of section 115, 208, 209, 601CA or 601CD;
or
 - (b) a failure to comply with a requirement of this Act that a person cause a notice, or a copy of a document, to be published in the *Gazette* or in a newspaper.

Section 104

Note: Section 1101H provides that a failure to comply with requirements of Chapter 7 generally does not affect the validity or enforceability of any transaction, contract or other arrangement.

(4) In this section:

invalid includes void, voidable and unenforceable.

(5) Nothing in this section limits the generality of anything else in it.

104 Effect of provisions empowering a person to require or prohibit conduct

Where, in accordance with a provision of this Act other than the replaceable rules, a person requires another person to do, or prohibits another person from doing, a particular act, that provision is taken to require the other person to comply with the requirement or prohibition, as the case may be.

105 Calculation of time

Without limiting subsection 36(1) of the *Acts Interpretation Act 1901*, in calculating how many days a particular day, act or event is before or after another day, act or event, the first-mentioned day, or the day of the first-mentioned act or event, is to be counted but not the other day, or the day of the other act or event.

106 Performance of functions by Commission delegate

For the purpose of the performance of a function, or the exercise of a power, under this Act by a Commission delegate, a reference to ASIC in a provision of this Act relating to the performance of the function, or the exercise of the power, includes a reference to the Commission delegate.

107 Notice in relation to top 20 members of a class

For the purposes of subsection 163(3B), section 178B and paragraph 601BC(2)(lc), if 2 or more members in the top 20 members of a class of shares each hold the same number of shares, details of each of those members must be included in any notice given in relation to those provisions.

108 Parts of dollar to be disregarded in determining majority in value of creditors etc.

In determining whether a majority in value of creditors, or a particular proportion in value of creditors, has passed a resolution or done any other act or thing, if a creditor's debt consists of a number of whole dollars and a part of a dollar, the part of the dollar is to be disregarded.

109 References to persons, things and matters

- (1) Except so far as the contrary intention appears, a provision of this Act is to be interpreted in such a manner that any 2 or more references in the provision are capable of having the same referent or referents, or of having a referent or referents in common, as the case requires.
- (2) In subsection (1), *referent*, in relation to a reference in a provision, means:
 - (a) in so far as the reference is interpreted as being in the singular number—a person to whom, or a thing or matter to which; or
 - (b) in so far as the reference is interpreted as being in the plural number—any one or 2 or more persons to whom, or of 2 or more things or matters to which;the reference is taken, in the application of the provision, to refer.

109X Service of documents

- (1) For the purposes of any law, a document may be served on a company by:
 - (a) leaving it at, or posting it to, the company's registered office; or
 - (b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or
 - (c) if a liquidator of the company has been appointed—leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or

Section 109X

- (d) if an administrator of the company has been appointed—
leaving it at, or posting it to, the address of the administrator
in the most recent notice of that address lodged with ASIC.
- (2) For the purposes of any law, a document may be served on a director or company secretary by leaving it at, or posting it to, the alternative address notified to ASIC under subsection 5H(2), 117(2), 205B(1) or (4) or 601BC(2). However, this only applies to service on the director or company secretary:
 - (a) in their capacity as a director or company secretary; or
 - (b) for the purposes of a proceeding in respect of conduct they engaged in as a director or company secretary.
- (3) Subsections (1) and (2) do not apply to a process, order or document that may be served under section 9 of the *Service and Execution of Process Act 1992*.
- (6) This section does not affect:
 - (a) any other provision of this Act, or any provision of another law, that permits; or
 - (b) the power of a court to authorise;
a document to be served in a different way.
- (7) This section applies to provisions of a law dealing with service whether it uses the expression “serve” or uses any other similar expression such as “give” or “send”.

Part 1.2A—Disclosing entities

Division 1—Object of Part

111AA Object of Part

The object of this Part is:

- (a) to define *disclosing entity* and other key terms relevant to disclosing entities (this is done in Division 2); and
- (b) to outline the significance for this Act of being a disclosing entity (this is done in Division 3); and
- (c) to provide for exemptions from, and modifications of, the special requirements imposed by this Act in relation to disclosing entities (this is done in Division 4).

Division 2—Definitions

111AB Terms defined in Division

This Division contains definitions of the following terms:

- (a) disclosing entity (section 111AC);
- (b) ED securities (section 111AD);
- (c) ED securities of a disclosing entity (section 111AK);
- (d) listed disclosing entity (subsection 111AL(1));
- (e) quoted ED securities (section 111AM);
- (f) unlisted disclosing entity (subsection 111AL(2)).

111AC Disclosing entity

- (1) If any securities of a body (except interests in a managed investment scheme) are ED securities, the body is a ***disclosing entity*** for the purposes of this Act.
- (2) If any interests in a managed investment scheme are ED securities, the undertaking to which the interests relate is a ***disclosing entity*** for the purposes of this Act.

111AD ED securities

- (1) Securities of a body are ***ED securities*** (short for “enhanced disclosure securities”) for the purposes of this Act if, and only if:
 - (a) they are ED securities under section 111AE, 111AF, 111AFA, 111AG or 111AI; and
 - (b) they are not declared under section 111AJ not to be ED securities.
- (2) For the purposes of sections 111AE, 111AF, 111AG and 111AI, a class of shares or debentures is taken to include units of shares or debentures in that class.

111AE Securities of body or undertaking that is included in a licensed market's official list

(1) If:

- (a) a body corporate is, with its agreement, consent or acquiescence, included in the official list of a prescribed financial market; and
- (b) the market's listing rules (according to their terms) apply to the body in relation to a class (which may be some or all) of securities issued by the body;

securities issued by the body in that class are **ED securities**, and that market is a **listing market** in relation to that body.

(1A) If:

- (a) an undertaking to which interests in a registered scheme relates is, with the agreement, consent or acquiescence of the responsible entity, included in the official list of a prescribed financial market; and
- (b) the market's listing rules (according to their terms) apply to the undertaking in relation to a class (which may be some or all) of managed investment products that relate to the scheme;

managed investment products in that class that relate to the scheme are **ED securities**, and that market is a **listing market** in relation to the undertaking.

(2) Subsections (1) and (1A) do not apply to securities of a body if:

- (a) the body is a public authority of the Commonwealth or an instrumentality or agency of the Crown in right of the Commonwealth; and
- (b) the only securities issued by the body that would otherwise be ED securities because of subsection (1) or (1A) are debentures; and
- (c) both the repayment of principal, and the payment of interest, in respect of those debentures is guaranteed by the Commonwealth.

(3) Subsections (1) and (1A) do not apply to securities of a body that is:

- (a) a public authority of a State or Territory; or

Section 111AF

- (b) an instrumentality or agency of the Crown in right of a State or Territory.

111AF Securities (except debentures and managed investment products) held by 100 or more persons

- (1) Securities (except debentures or managed investment products) in a class of securities of a body are ***ED securities*** if:
 - (a) a disclosure document in relation to securities in that class has been lodged with ASIC under Chapter 6D; and
 - (b) securities in that class have been issued pursuant to the disclosure document; and
 - (c) after an issue of securities in that class pursuant to the disclosure document, 100 or more persons held securities in that class; and
 - (d) securities in that class have been held by 100 or more persons at all times since the issue of securities referred to in paragraph (c).
- (2) Securities (except debentures and managed investment products) in a class of securities of a body are ***ED securities*** if securities in that class have been issued under a recognised offer and the offeror's records indicate that 100 or more people who reside in this jurisdiction have held securities in that class (whether or not as a result of the recognised offer) at all times since the issue.

111AFA Managed investment products held by 100 or more persons

- (1) Managed investment products in a class of managed investment products issued by a body are ***ED securities*** if 100 or more people hold managed investment products in that class as a result of offers that gave rise to obligations to give Product Disclosure Statements (whether or not all in the same terms) under Chapter 7.
- (2) Interests in a class of interests in a managed investment scheme issued by a body are ***ED securities*** if interests in that class have been issued under a recognised offer and the offeror's records indicate that 100 or more people who reside in this jurisdiction have held interests in that class (whether or not as a result of the recognised offer) at all times since the issue.

111AG Securities issued as consideration for an acquisition under an off-market takeover bid or Part 5.1 compromise or arrangement

- (1) Securities (except debentures) in a class of securities of a body are **ED securities** if:
 - (a) securities in that class have been issued by the body as consideration for offers under an off-market bid; and
 - (b) after an issue of securities in that class under the off-market bid, 100 or more persons held securities in that class; and
 - (c) securities in that class have been held by 100 or more persons at all times since the issue of securities referred to in paragraph (b).
- (2) Securities in a class of securities of a body are **ED securities** if:
 - (a) securities in that class have been issued as consideration for the acquisition or cancellation of securities of another body pursuant to a compromise or arrangement under Part 5.1; and
 - (b) securities in that class, or those or any other securities of the other body, were ED securities immediately before securities in that class were first issued pursuant to the compromise or arrangement; and
 - (c) after an issue of securities in that class pursuant to the compromise or arrangement, 100 or more persons held securities in that class; and
 - (d) securities in that class have been held by 100 or more persons at all times since the issue of securities referred to in paragraph (c).

111AH When a person holds securities for the purposes of sections 111AF, 111AFA and 111AG

- (1) For the purposes of sections 111AF, 111AFA and 111AG, a person holds securities if, and only if:
 - (a) the person is registered as the holder of the securities in a register under section 169, 170, 171 or 601CZB; or
 - (b) the person is entitled to be so registered.
- (2) For the purposes of sections 111AF, 111AFA and 111AG, joint holders of securities count as one person.

Section 111AI

111AI Debentures

Debentures of a borrower are *ED securities* if:

- (a) section 283AA requires the borrower to appoint a trustee; or
- (b) section 283AA does not apply to the borrower only because the offer of the debentures to which section 283AA would otherwise have applied is a recognised offer.

111AJ Regulations may declare securities not to be ED securities

- (1) The regulations may declare specified securities of bodies not to be ED securities.
- (2) Regulations in force for the purposes of subsection (1) have effect accordingly, despite anything else in this Division.

111AK ED securities of a disclosing entity

For the purposes of this Act, ED securities because of which (having regard to section 111AC) a disclosing entity is such an entity are ED securities of the entity.

111AL Listed or unlisted disclosing entity

- (1) For the purposes of this Act, a disclosing entity is a *listed disclosing entity* if all or any ED securities of the entity are quoted ED securities.
- (2) For the purposes of this Act, a disclosing entity that is not a listed disclosing entity is an *unlisted disclosing entity*.

111AM Quoted ED securities

For the purposes of this Act, ED securities are *quoted ED securities* if they are ED securities because of section 111AE.

Division 3—Significance of being a disclosing entity

111AN Division contains outline of significance of being a disclosing entity

This Division outlines the significance for this Act of being a disclosing entity.

111AO Accounting requirements

A disclosing entity incorporated or formed in Australia has to prepare financial statements and reports for half-years as well as full financial years. These requirements are set out in Chapter 2M.

111AP Continuous disclosure requirements

- (1) A disclosing entity is subject to the continuous disclosure requirements of sections 674 and 675.

111AQ Prospectus relief

Section 713 applies (subject to certain qualifications) to prospectuses for quoted ED securities of disclosing entities. The section's requirements for the content of prospectuses are less comprehensive than those that apply to other prospectuses under section 710.

111AQA Product Disclosure Statement relief

Obligations that apply to disclosing entities can be taken into account in deciding what information should be included in a Product Disclosure Statement—see section 1013FA and paragraph 1013F(2)(d).

Division 4—Exemptions and modifications

111AR Meaning of *disclosing entity provisions*

- (1) For the purposes of this Division, the *disclosing entity provisions* are the provisions of the following:
 - (a) Chapter 2M as it applies to disclosing entities;
 - (d) sections 674 and 675.
- (2) A reference in subsection (1) to a Part, Division or section includes a reference to regulations in force for the purposes of the Part, Division or section.

111AS Exemptions by regulations

- (1) The regulations may exempt specified persons from all or specified disclosing entity provisions:
 - (a) either generally or as otherwise specified; and
 - (b) either unconditionally or subject to specified conditions.
- (2) Without limiting subsection (1), an exemption may relate to specified securities.

111AT Exemptions by ASIC

- (1) ASIC may, by writing, exempt specified persons from all or specified disclosing entity provisions:
 - (a) either generally or as otherwise specified; and
 - (b) either unconditionally or subject to specified conditions.
- (2) Without limiting subsection (1), an exemption may relate to specified securities.
- (3) ASIC must cause a copy of an exemption to be published in the *Gazette*.

111AU Enforcing conditions of exemptions

- (1) A person must not intentionally or recklessly contravene a condition to which an exemption under section 111AS or 111AT is subject.

Section 111AV

- (2) If a person contravenes such a condition, the Court may, on the application of ASIC, order the person to comply with the condition.

111AV Modifications by regulations

- (1) The regulations may make modifications of all or specified disclosing entity provisions.
- (2) Without limiting subsection (1), a modification may relate to specified securities.

111AW Exemptions and modifications have effect

Exemptions and modifications under this Division have effect accordingly.

111AX Effect of Division

Nothing in this Division limits, or is limited by, any other exemption or modification power (for example, section 340, 341 or 741).

Part 1.4—Technical provisions about aids for readers

111J Small business guide

- (1) If, because of:
 - (a) regulations made under this Act; or
 - (b) instruments issued by ASIC under this Act;the small business guide as set out in Part 1.5 has become out of date, the regulations may set out modifications of the guide that would bring it up to date. The guide then is to be read as if it were so modified.
- (2) The small business guide is divided into sections (numbered 1, 2, 3...) and the sections are divided into paragraphs (numbered 1.1, 1.2, 1.3...). For example, a reference in the guide to 3.1 is a reference to paragraph 3.1 of the guide.

Part 1.5—Small business guide

This guide summarises the main rules in the Corporations Act (the *Corporations Act 2001*) that apply to proprietary companies limited by shares—the most common type of company used by small business. The guide gives a general overview of the Corporations Act as it applies to those companies and directs readers to the operative provisions in the Corporations Act.

The notes in square brackets at the end of paragraphs in the guide indicate the main provisions of the Corporations Act, the regulations made under the Corporations Act, and ASIC Practice Notes that are relevant to the information in the paragraphs.

Other Commonwealth, State and Territory laws also impose obligations on proprietary companies and their operators.

1 What registration means

1.1 Separate legal entity that has its own powers

As far as the law is concerned, a company has a separate legal existence that is distinct from that of its owners, managers, operators, employees and agents. A company has its own property, its own rights and its own obligations. A company's money and other assets belong to the company and must be used for the company's purposes.

A company has the powers of an individual, including the powers to:

- own and dispose of property and other assets
- enter into contracts
- sue and be sued.

Once a company is registered, its separate legal status, property, rights and liabilities continue until ASIC (Australian Securities and Investments Commission) deregisters the company.

[sections 119, 124—125, 601AA—601AD]

Section 1

1.2 Limited liability of shareholders

Shareholders of a company are not liable (in their capacity as shareholders) for the company's debts. As shareholders, their only obligation is to pay the company any amount unpaid on their shares if they are called upon to do so. However, particularly if a shareholder is also a director, this limitation may be affected by other laws and the commercial practices discussed in 1.3 and 1.4.

[section 516]

1.3 Director's liability for company's debts

A director of a company may be liable for debts incurred by the company at a time when the company itself is unable to pay those debts as they fall due.

A director of a company may be liable to compensate the company for any losses the company suffers from a breach of certain of the director's duties to the company (see 5.3).

In addition to having liability for the company's debts or to pay compensation to the company, a director may also be subject to a civil penalty.

If a company holds property on trust, a director of the company may be liable in some circumstances for liabilities incurred by the company as trustee.

[sections 197, 344, 588G, 588J, 588M, 1317H]

1.4 Director's liability as guarantor/security over personal assets

As a matter of commercial practice, a bank, trade creditor or anyone else providing finance or credit to a company may ask a director of the company:

- for a personal guarantee of the company's liabilities; and
- for some form of security over their house or personal assets to secure the performance by the company of its obligations.

The director of a company may, for example, be asked by a bank to give a mortgage over their house to secure the company's

Section 1

repayment of a loan. If the company does not repay the loan as agreed with the bank, the director may lose the house.

1.5 Continuous existence

A company continues to exist even if 1 or more of its shareholders or directors sells their shares, dies or leaves the company. If a company has only 1 shareholder who is also the only director of the company and that person dies, their personal representative is able to ensure that the company continues to operate.

[sections 119, 224A]

1.6 Rules for the internal management of a company

The Corporations Act contains a basic set of rules for the internal management of a company (appointments, meetings etc.).

Some of these rules are mandatory for all companies. There are a few special rules for single shareholder/single director companies.

Other internal management rules in the Corporations Act are replaceable rules. The replaceable rules do not apply to:

- a single shareholder/single director company; or
- a company that had a constitution before the introduction of the replaceable rules regime and has not repealed it.

A company does not need to have a separate constitution of its own; it can simply take advantage of the rules in the Corporations Act. The company will need a constitution only if it wants to displace, modify or add to the replaceable rules.

[sections 134-141 and 198E]

1.7 How a company acts

A company does not have a physical existence. It must act through other people.

Individual directors, the company secretary, company employees or agents may be authorised to enter into contracts that bind the company (see 7).

Section 1

In some circumstances, a company will be bound by something done by another person (see 1.8).

1.8 Directors

The directors of a company are responsible for managing the company's business. It is a replaceable rule (see 1.6) that generally the directors may exercise all the powers of the company except a power that the Corporations Act, a replaceable rule or a provision of the company's constitution (if any) requires the company to exercise in general meeting.

The only director of a company who is also the only shareholder is responsible for managing the company's business and may exercise all of the company's powers.

The Corporations Act sets out rules dealing with the calling and conduct of directors' meetings. Directors must keep a written record (minutes) of their resolutions and meetings.

There are 2 ways that directors may pass resolutions:

- at a meeting; or
- by having all of the directors record and sign their decision.

If a company has only 1 director, the sole director may also pass a resolution by recording and signing their decision.

[sections 198A, 198E, 202C, subsection 202F(1), sections 248A-248G, 251A]

1.9 Shareholders

The shareholders of a company own the company, but the company has a separate legal existence and the company's assets belong to the company.

Shareholders can make decisions about the company by passing a resolution, usually at a meeting. A "special resolution" usually involves more important questions affecting the company as a whole or the rights of some or all of its shareholders.

There are 2 ways that shareholders may pass a resolution:

Section 1

- at a meeting; or
- by having all of the shareholders record and sign their decision.

If a meeting is held, an ordinary resolution must be passed by a majority of the votes cast by shareholders of the company entitled to vote on the resolution at the meeting in person or by proxy (if proxies are allowed). A special resolution must be passed by at least 75% of the votes cast by shareholders of the company entitled to vote on the resolution and who vote at the meeting in person or by proxy (if proxies are allowed).

The sole shareholder of a company may pass a resolution by recording and signing their decision.

A company must keep a written record (minutes) of the members' resolutions and meetings.

[sections 9 (*special resolution*), 249A, 249B, 249L, 251A]

1.10 What others can assume about the company

Anyone who does any business with the company is entitled to assume that the company has a legal right to conduct that business unless the person knows, or suspects, otherwise. For example, an outsider dealing with the company is entitled to assume:

- that a person who is shown in a notice lodged with ASIC as being the director or company secretary of a company has been properly appointed and is authorised to act for the company; and
- that a person who is held out by the company to be a director, company secretary or agent of the company has been properly appointed and is authorised to act for the company.

[sections 128—130]

Section 2

2 The company structure for small business

2.1 Proprietary company for small business

Generally, a proprietary company limited by shares is the most suitable company for use by small business. Such a proprietary company must have a least 1 shareholder but no more than 50 shareholders (not counting employee shareholders). It may have 1 or more directors.

[sections 112—113]

3 Setting up a new company

The operators of small businesses can either buy “shelf” companies or set up new companies themselves.

3.1 “Shelf” companies

The operator of a small business may find it more convenient to buy a “shelf” company (a company that has already been registered but has not traded) from businesses which set up companies for this purpose or from some legal or accounting firms.

3.2 Setting up a company

To set up a new company themselves, the operator must apply to ASIC for registration of the company.

A proprietary company limited by shares must have at least 1 shareholder.

To obtain registration, a person must lodge a properly completed application form with ASIC. The form must set out certain information including details of every person who has consented to be a shareholder, director or company secretary of the company.

The company comes into existence when ASIC registers it.

[sections 117—119, 135—136, 140]

3.3 ACN and name

When a company is registered, ASIC allocates to it a unique 9 digit number called the Australian Company Number (ACN). (For use of the ACN see 4.1).

Section 3

In practice, a new company must have a name that is different from the name of a company that is already registered. A proprietary company limited by shares must have the words “Proprietary Limited” as part of its name. Those words can be abbreviated to “Pty Ltd”.

A proprietary company may adopt its ACN as its name. If it does so, its name must also contain the words “Australian Company Number” (which can be abbreviated to “ACN”). For example, the company’s name might be “ACN 123 456 789 Pty Ltd”.

[sections 119, 147—161]

3.4 Contracts entered into before the company is registered

A company can ratify a contract entered into by someone on its behalf or for its benefit before it was registered. If the company does not ratify the contract, the person who entered into the contract may be personally liable.

[sections 131—133]

3.5 First shareholders, directors and company secretary

A person listed with their consent as a shareholder, director or company secretary in the application for registration of the company becomes a shareholder, director or company secretary of the company on its registration.

The same person may be both a director of the company and the company secretary.

See 5.1 and 5.2 for directors and 5.4 for company secretaries. See 6.1 for shareholders.

[section 120]

3.6 Issuing shares

It is a replaceable rule (see 1.6) that, before issuing new shares, a company must first offer them to the existing shareholders in the proportions that the shareholders already hold. A company may issue shares at a price it determines.

[sections 254B, 254D]

Section 3

3.7 Registered office

A company must have a registered office in Australia and must inform ASIC of the location of the office. A post office box cannot be the registered office of a company. The purpose of the registered office is to have a place where all communications and notices to the company may be sent.

If the company does not occupy the premises where its registered office is located, the occupier of the premises must agree in writing to having the company's registered office located there.

A proprietary company is not required to open its registered office to the public but this does not affect its obligation to make documents available for inspection.

The company must notify ASIC of any change of address of its registered office.

[sections 100, 142, 143, 173, 1300]

3.8 Principal place of business

If a company has a principal place of business that is different from its registered office, it must notify ASIC of the address of its principal place of business and of any changes to that address.

[sections 117, 146]

3.9 Registers kept by the company

A company must keep registers, including a register of shareholders and a register of charges. A company must keep its registers at:

- the company's registered office; or
- the company's principal place of business; or
- a place (whether on premises of the company or of someone else) where the work in maintaining the register is done; or
- another place approved by ASIC.

A register may be kept either in a bound or looseleaf book or on computer.

If a register is kept on computer, its contents must be capable of being printed out in hard copy.

[sections 172, 1300—1302, 1306]

3.10 Register of shareholders

A company must keep in its register of shareholders such information as:

- the names and addresses of its shareholders; and
- details of shares held by individual shareholders.

[sections 168—169]

3.11 Register of charges

A company must keep a register of charges if the company gives a bank, trade creditor or anybody else a charge over company assets.

[section 271]

4 Continuing obligations after the company is set up

The Corporations Act and other laws impose obligations on companies themselves and on their directors and company secretaries. Some of the more important obligations imposed under the Corporations Act are discussed below.

4.1 Use of company name and ACN

The name of a company must be shown at all the company's business premises (including its registered office) that are open to the public. The company's name and its ACN or ABN (if the last 9 digits are the same, and in the same order, as the last 9 digits of its ACN) must appear:

- on some of its public documents; and
- on its cheques and negotiable instruments; and
- on all documents lodged with ASIC; and

Section 4

- if it has one, on its common seal.

[sections 123, 144, 147—156,
ASIC Practice Note 47]

4.2 Extract of particulars

Each year, ASIC issues each company with an extract of particulars within 2 weeks of the company's review date (which is generally the anniversary of the company's registration). The extract includes details recorded on ASIC's database such as:

- names and addresses of each director and company secretary;
- issued shares and options granted;
- details of its shareholders;
- address of its registered office;
- address of its principal place of business.

If any of the details are not correct as at the date the extract is received, the company must correct those details.

The correction may be lodged with ASIC on a printed form or, if an agreement is in place to lodge electronically, in accordance with the agreement.

[Sections 346A and 346C, 352]

4.3 Review fee

A company must pay a review fee to ASIC each year.

[Corporations (Review Fees) Act 2003]

4.4 Notification to ASIC of changes

The company must notify ASIC if certain basic changes to the company occur. The following table sets out these notification requirements.

Section 4

Notification requirements			
	If...	the company must notify ASIC of the change...	see section...
1	a company issues shares	within 28 days after the issue	254X
2	a company changes the location of a register	within 7 days after the change	172, 1302
3	a company changes the address of its registered office or principal place of business	within 28 days after the change	142, 146
4	a company changes its directors or company secretary	within 28 days after the change (unless the director or company secretary has notified ASIC of the change)	205B
5	there is a change in the name or address of the company's directors or secretary	within 28 days after the change	205B
6	a company creates certain kinds of charges	within 45 days after the charge is created	263
7	a company has a new ultimate holding company, or details about the ultimate holding company change	within 28 days after the change happens	349A
8	any of the changes in items 1 to 7 means that: (a) the company must add or alter particulars in its member register kept under section 169; or (b) the company must add or alter particulars in its member register kept under section 169, and as a result, details about the number and class of shares on issue, or the amount paid and unpaid on the shares, alter.	within the time determined under the table in section 178D	178A 178C

Section 5

5 Company directors and company secretaries

5.1 Who can be a director

Only an individual who is at least 18 years old can be a director. If a company has only 1 director, they must ordinarily reside in Australia. If a company has more than 1 director, at least 1 of the directors must ordinarily reside in Australia.

A director must consent in writing to holding the position of director. The company must keep the consent and must notify ASIC of the appointment.

In some circumstances, the Corporations Act imposes the duties and obligations of a director on a person who, although not formally appointed as a director of a company, nevertheless acts as a director or gives instructions to the formally appointed directors as to how they should act.

The Court or ASIC may prohibit a person from being a director or from otherwise being involved in the management of a company if, for example, the person has breached the Corporations Act.

A person needs the Court's permission to be a director if the person has been convicted of certain offences or is, in some circumstances, unable to pay their debts as they fall due.

Generally, a director may resign by giving notice of the resignation to the company. A director who resigns may notify ASIC of the resignation. If the director does not do so, the company must notify ASIC of the director's resignation.

[sections 9, 201A, 201B, 201D, 205A, 205B and 206A-206G, 228-230 and 242 and subsection 1317EA(3)]

5.2 Appointment of new directors

It is a replaceable rule (see 1.6) that shareholders may appoint directors by resolution at a general meeting.

[section 201G]

5.3 Duties and liabilities of directors

In managing the business of a company (see 1.7), each of its directors is subject to a wide range of duties under the

Corporations Act and other laws. Some of the more important duties are:

- to act in good faith
- to act in the best interests of the company
- to avoid conflicts between the interests of the company and the director's interests
- to act honestly
- to exercise care and diligence
- to prevent the company trading while it is unable to pay its debts
- if the company is being wound up—to report to the liquidator on the affairs of the company
- if the company is being wound up—to help the liquidator (by, for example, giving to the liquidator any records of the company that the director has).

A director who fails to perform their duties:

- may be guilty of a criminal offence with a penalty of \$200,000 or imprisonment for up to 5 years, or both; and
- may contravene a civil penalty provision (and the Court may order the person to pay to the Commonwealth an amount of up to \$200,000); and
- may be personally liable to compensate the company or others for any loss or damage they suffer; and
- may be prohibited from managing a company.

A director's obligations may continue even after the company has been deregistered.

[Sections 180, 181, 182, 183, 184, 475, 530A, 588G, 596, 601AE, 601AH, 1317H]

Section 5

5.4 Company secretaries

A company other than a proprietary company must have a company secretary. However, a proprietary company may choose to have a company secretary. The directors appoint the company secretary. A company secretary must be at least 18 years old. If a company has only 1 company secretary, they must ordinarily reside in Australia. If a company has more than 1 company secretary, at least 1 of them must ordinarily reside in Australia.

A company secretary must consent in writing to holding the position of company secretary. The company must keep the consent and must notify ASIC of the appointment.

The same person may be both a director of a company and the company secretary.

Generally, a company secretary may resign by giving written notice of the resignation to the company. A company secretary who resigns may notify ASIC of the resignation. If the company secretary does not do so, the company must notify ASIC of the company secretary's resignation.

The company secretary is an officer of the company and, in that capacity, may be subject to the requirements imposed by the Corporations Act on company officers.

The company secretary has specific responsibilities under the Corporations Act, including responsibility for ensuring that the company:

- notifies ASIC about changes to the identities, names and addresses of the company's directors and company secretaries; and
- notifies ASIC about changes to the register of members; and
- notifies ASIC about changes to any ultimate holding company; and
- responds, if necessary, to an extract of particulars that it receives and that it responds to any return of particulars that it receives.

Section 6

A company secretary's obligations may continue even after the company has been deregistered.

[sections 83, 142, 178A, 178C, 188, 204A-204G, 205A, 205B, 346C, 348D, 349A, 601AD, 601AH]

6 Shares and shareholders

A proprietary company limited by shares must have a share capital and at least 1 shareholder. ASIC may apply to a Court to have a company wound up if it does not have any shareholders.

[sections 461—462]

6.1 Becoming a shareholder and ceasing to be a shareholder

A person may become a shareholder of a company in several ways, including the following:

- the person being listed as a shareholder of the company in the application for registration of the company
- the company issuing shares to the person
- the person buying shares in the company from an existing shareholder and the company registering the transfer.

Some of the ways in which a person ceases to be a shareholder are:

- the person sells all of their shares in the company and the company registers the transfer of the shares
- the company buys back all the person's shares
- ASIC cancels the company's registration.

[sections 117, 120, 601AA—601AD]

6.2 Classes of shares

A company may have different classes of shares. The rights and restrictions attached to the shares in a class distinguish it from other classes of shares.

[sections 254A—254B]

Section 7

6.3 Meetings of shareholders

Directors have the power to call meetings of all shareholders or meetings of only those shareholders who hold a particular class of shares.

Shareholders who hold at least 5% of the votes which may be cast at a general meeting of a company have the power to call and hold a meeting themselves or to require the directors to call and hold a meeting. Meetings may be held regularly or to resolve specific questions about the management or business of the company.

The Corporations Act sets out rules dealing with shareholders' meetings.

A shareholder of a company may ask the company for a copy of the record of a meeting or of a decision of shareholders taken without a meeting.

[sections 249A—251B]

6.4 Voting rights

Different rights to vote at meetings of shareholders may attach to different classes of shares. It is a replaceable rule (see 1.6) that, subject to those different rights, each shareholder has 1 vote on a show of hands and, on a poll, 1 vote for each share held.

[sections 250E, 254A—254B]

6.5 Buying and selling shares

A shareholder may sell their shares but only if the sale would not breach the company's constitution (if any). It is a replaceable rule (see 1.6) that the directors have a discretion to refuse to register a transfer of shares.

[sections 1091D—1091E]

7 Signing company documents

A company's power to sign, discharge and otherwise deal with contracts can be exercised by an individual acting with the company's authority and on its behalf. A company can deal with contracts without using a common seal.

Section 8

A company may execute a document by having it signed by:

- 2 directors of the company; or
- a director and the company secretary; or
- for a company with a sole director who is also the sole secretary—that director.

If the document is to have effect as a deed, it should be expressed to be a deed.

[sections 126—127]

A company is not required to have a common seal. If it does, the seal must show the company's name and its ACN or ABN (if the last 9 digits are the same, and in the same order, as the last 9 digits of its ACN). The seal is equivalent to the company's signature and may be used on important company documents such as mortgages.

[sections 123, 127(2)]

8 Funding the company's operations

The shareholders may fund the company's operations by lending money to the company or by taking up other shares in the company. Except if it is raising funds from its own employees or shareholders, a proprietary company must not engage in any fundraising activity that would require disclosure to investors under Chapter 6D (for example, advertising in a newspaper inviting people to invest in the company).

The company may also borrow money from banks and other financial organisations.

Anyone who has lent money, or provided credit, to the company may ask for a mortgage or charge over the company's assets to secure the performance by the company of its obligations.

[sections 113, 124]

9 Returns to shareholders

Shareholders can take money out of the company in a number of ways, but only if the company complies with its constitution (if any), the Corporations Act and all other relevant laws. If a

Section 10

company pays out money in a way that results in the company being unable to pay its debts as they fall due, its directors may be liable:

- to pay compensation; and
- for criminal and civil penalties.

[sections 588G, 1317E, 1317G, 1317H, 1317P]

9.1 Dividends

Dividends are payments to shareholders out of the company's after tax profits. It is a replaceable rule (see 1.6) that the directors decide whether the company should pay a dividend.

[sections 254T, 254U]

9.2 Buy-back of shares

A company can buy back shares from shareholders.

[sections 257A—257J]

9.4 Distribution of surplus assets on winding up

If a company is wound up and there are any assets left over after all the company's debts have been paid, the surplus is distributed to shareholders in accordance with the rights attaching to their shares.

10 Annual financial reports and audit

10.1 The small/large distinction

The accounting requirements imposed on a proprietary company under the Corporations Act depend on whether the company is classified as small or large. A company's classification can change from 1 financial year to another as its circumstances change.

A company is classified as small for a financial year if it satisfies at least 2 of the following tests:

- gross operating revenue of less than \$10 million for the year
- gross assets of less than \$5 million at the end of the year

Section 10

- fewer than 50 employees at the end of the year.

A company that does not satisfy at least 2 of these tests is classified as large.

[section 45A]

As the great majority of proprietary companies are small under these tests, the discussion below deals mainly with the accounting requirements for small proprietary companies.

[sections 286—301]

10.2 Financial records

Under the Corporations Act, all proprietary companies must keep sufficient financial records to record and explain their transactions and financial position and to allow true and fair financial statements to be prepared and audited. **Financial record** here means some kind of systematic record of the company's financial transactions—not merely a collection of receipts, invoices, bank statements and cheque butts. Financial records may be kept on computer.

[sections 286—289]

10.3 Preparing annual financial reports and directors' reports

The Corporations Act requires a small proprietary company to prepare an annual financial report (an annual profit and loss statement, a balance sheet and a statement of cash flows) and a directors' report (about the company's operations, dividends paid or recommended, options issued etc.) if:

- the shareholders with at least 5% of the votes in the company direct it to do so; or
- ASIC directs it to do so.

Unless the shareholders' direction specifies otherwise, the company must prepare the annual financial report in accordance with the applicable accounting standards.

Although the Corporations Act itself may not require a small proprietary company to prepare a financial report except in the circumstances mentioned, the company may need to prepare the

Section 11

annual financial reports for the purposes of other laws (for example, income tax laws). Moreover, good business practice may also make it advisable for the company to prepare the financial reports so that it can monitor and better manage its financial position.

Large proprietary companies must prepare annual financial reports and a directors' report, have the financial report audited and send both reports to shareholders. They must also lodge the annual financial reports with ASIC unless exempted.

[sections 286—301, 319—320]

11 Disagreements within the company

11.1 Special problems faced by minority shareholders

There are remedies available to a shareholder of a company if:

- the affairs of the company are being conducted in a way that is unfair to that shareholder or to other shareholders of the company; or
- the affairs of the company are being conducted in a way that is against the interests of the company as a whole.

A Court may, for example, order the winding up of a company or the appointment of a receiver.

[sections 232-235, 461]

11.2 Buy—back of shares

A company may buy back the shares of a shareholder who wants to sever their relationship with the company.

[sections 257A—257J]

11.3 Selling shares

A shareholder in a company who wants to sever their relationship with the company may decide to sell their shares. However, the shareholder may not be able to sell their shares readily—particularly if they want to sell their shares to someone who is not an existing shareholder. Some of the difficulties they may face in that case are:

Section 12

- under the replaceable rules the directors have a discretion to refuse to transfer the shares; and
- restrictions in the company's constitution (if any) on transferring shares.

[sections 995, 707, 1091D—1091E]

12 Companies in financial trouble

12.1 Voluntary administration

If a company experiences financial problems, the directors may appoint an administrator to take over the operations of the company to see if the company's creditors and the company can work out a solution to the company's problems.

If the company's creditors and the company cannot agree, the company may be wound up (see 12.3).

[Part 5.3A]

12.2 Receivers

A receiver, or receiver and manager, may be appointed by order of a Court or under an agreement with a secured creditor to take over some or all of the assets of a company. Generally this would occur if the company is in financial difficulty. A receiver may be appointed, for example, because an amount owed to a secured creditor is overdue.

[Part 5.2]

12.3 Winding up and distribution

A company may be wound up by order of a Court, or voluntarily if the shareholders of the company pass a special resolution to do so.

A liquidator is appointed:

- when a Court orders a company to be wound up; or
- the shareholders of a company pass a resolution to wind up the company.

[Parts 5.4, 5.4B, 5.5].

Section 12

12.4 Liquidators

A liquidator is appointed to administer the winding up of a company. The liquidator's main functions are:

- to take possession of the company's assets; and
- to determine debts owed by the company and pay the company's creditors; and
- to distribute to shareholders any assets of the company left over after paying creditors (any distribution to shareholders is made according to the rights attaching to their shares); and
- finally, to have the company deregistered.

[Parts 5.4B, 5.6]

12.5 Order of payment of debts

Generally, creditors who hold security over company assets are paid first.

[Division 6 of Part 5.6]

12.6 Cancellation of registration

If a company has ceased trading or has been wound up, it remains on the register until ASIC cancels the company's registration. Once a company is deregistered, it ceases to exist.

[sections 601AA—601AB, 601AH]

Chapter 2A—Registering a company

Part 2A.1—What companies can be registered

112 Types of companies

Types of companies

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

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

Note: Other types of companies that were previously allowed continue to exist under the Part 10.1 transitionals.

No liability companies

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

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

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

No liability company provisions		
item	topic	provisions
1	names	148, 156, 162
2	terms of issue of shares	254B

Section 113

No liability company provisions		
item	topic	provisions
3	liability on partly-paid shares	254M
4	calls	254P-254R
5	winding up	477-478, 483, 514
6	registering a body as a company	610BA
7	transitional	the Part 10.1 transitionals

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

113 Proprietary companies

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

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

- (2) In applying subsection (1):
- (a) count joint holders of a particular parcel of shares as 1 person; and
 - (b) an employee shareholder is:

Section 114

- (i) a shareholder who is an employee of the company or of a subsidiary of the company; or
 - (ii) a shareholder who was an employee of the company, or of a subsidiary of the company, when they became a shareholder.
- (3) A proprietary company must not engage in any activity that would require disclosure to investors under Chapter 6D, except for an offer of its shares to:
 - (a) existing shareholders of the company; or
 - (b) employees of the company or of a subsidiary of the company.
- (3A) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (4) An act or transaction is not invalid merely because of a contravention of subsection (3).

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

114 Minimum of 1 member

A company needs to have at least 1 member.

115 Restrictions on size of partnerships and associations

- (1) A person must not participate in the formation of a partnership or association that:
 - (a) has as an object gain for itself or for any of its members; and
 - (b) has more than 20 members;unless the partnership or association is incorporated or formed under an Australian law.

Note: For the effect of a contravention of this section, see section 103.
- (2) The regulations may specify a higher number that is higher than the number specified in paragraph (1)(b) for the purposes of the application of that paragraph to a particular kind of partnership or association.
- (3) An offence based on subsection (1) is an offence of strict liability.

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

Section 116

116 Trade unions cannot be registered

A trade union cannot be registered under this Act.

Part 2A.2—How a company is registered

117 Applying for registration

Lodging application

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

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

Contents of the application

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

Section 117

- (ii) the amount (if any) each member agrees in writing to pay for each share;
 - (iia) whether the shares each member agrees in writing to take up will be fully paid on registration;
 - (iii) if that amount is not to be paid in full on registration—the amount (if any) each member agrees in writing to be unpaid on each share;
 - (iv) whether or not the shares each member agrees in writing to take up will be beneficially owned by the member on registration;
- (l) for a public company that is limited by shares or is an unlimited company, if shares will be issued for non-cash consideration—the prescribed particulars about the issue of the shares, unless the shares will be issued under a written contract and a copy of the contract is lodged with the application;
- (m) for a company limited by guarantee—the proposed amount of the guarantee that each member agrees to in writing;
- (ma) whether or not, on registration, the company will have an ultimate holding company;
- (mb) if, on registration, the company will have an ultimate holding company—the following:
 - (i) the name of the ultimate holding company;
 - (ii) if the ultimate holding company is registered in Australia—its ABN, ACN or ARBN;
 - (iii) if the ultimate holding company is not registered in Australia—the place at which it was incorporated or formed;
- (n) the State or Territory in this jurisdiction in which the company is to be taken to be registered.

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

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

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

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

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

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

118 ASIC gives company ACN, registers company and issues certificate

Registration

- (1) If an application is lodged under section 117, ASIC may:
 - (a) give the company an ACN; and
 - (b) register the company; and
 - (c) issue a certificate that states:
 - (i) the company's name; and
 - (ii) the company's ACN; and
 - (iii) the company's type; and
 - (iv) that the company is registered as a company under this Act; and
 - (v) the State or Territory in this jurisdiction in which the company is taken to be registered; and
 - (vi) the date of registration.

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

ASIC must keep record of registration

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

Section 119

119 Company comes into existence on registration

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

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

119A Jurisdiction of incorporation and jurisdiction of registration

Jurisdiction in which company incorporated

- (1) A company is incorporated in this jurisdiction.

Jurisdiction of registration

- (2) A company is taken to be registered in:
- (a) the State or Territory specified:
 - (i) in the application for the company's registration under paragraph 117(2)(n) (registration of company under this Part); or
 - (ii) in the application for the company's registration under paragraph 601BC(2)(o) (registration of registrable body as company under Part 5B.1); or
 - (b) the State or Territory in which the company is taken to be registered under paragraph 5H(4)(b) (registration of body as company on basis of State or Territory law).

This subsection has effect subject to subsection (3).

Note 1: ASIC must specify the State or Territory in which the company is taken to be registered in the company's certificate of registration (see paragraph 118(1)(c)(v) and 601BD(1)(c)(v)).

Note 2: The company's legal capacity and powers do not depend in any way on the particular State or Territory it is taken to be registered in (see section 124).

Note 3: A law of a State or Territory may impose obligations, or confer rights or powers, on a person by reference to the State or Territory in which a company is taken to be registered for the purposes of this Act. For example, a State or Territory law dealing with stamp duty on share transfers might impose duty on transfers of shares in companies that are taken to be registered in that State or Territory for the purposes of this Act.

Section 120

- (3) The State or Territory in which a company is taken to be registered changes to the State or Territory in this jurisdiction nominated by the company if:
 - (a) either:
 - (i) the relevant Minister of the State or Territory in which the company is taken to be registered before the change approves the change; or
 - (ii) the State in which the company is taken to be registered ceases to be a referring State; and
 - (b) the procedural requirements specified in the regulations are satisfied.
- (4) A company continues to be registered under this Act even if the State in which the company is taken to be registered ceases to be a referring State.

120 Members, directors and company secretary of a company

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

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

121 Registered office

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

122 Expenses incurred in promoting and setting up company

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

Section 123

123 Company may have common seal

- (1) A company may have a common seal. If a company does have a common seal, the company must set out on it:
- (a) for a company that has its ACN in its name—the company’s name; or
 - (b) otherwise—the company’s name and either:
 - (i) the expression “Australian Company Number” and the company’s ACN; or
 - (ii) if the last 9 digits of the company’s ABN are the same, and in the same order, as the last 9 digits of its ACN—the expression “Australian Business Number” and the company’s ABN.

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

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

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

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

Chapter 2B—Basic features of a company

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

124 Legal capacity and powers of a company

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

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

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

- (2) A company's legal capacity to do something is not affected by the fact that the company's interests are not, or would not be, served by doing it.
- (3) For the avoidance of doubt, this section does not:
 - (a) authorise a company to do an act that is prohibited by a law of a State or Territory; or

Section 125

- (b) give a company a right that a law of a State or Territory denies to the company.

125 Constitution may limit powers and set out objects

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

126 Agent exercising a company's power to make contracts

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

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

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

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

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

Section 127

- (c) for a proprietary company that has a sole director who is also the sole company secretary—that director.

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

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

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

128 Entitlement to make assumptions

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

129 Assumptions that can be made under section 128

Constitution and replaceable rules complied with

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

Director or company secretary

- (2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:
 - (a) has been duly appointed; and

- (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.

Officer or agent

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

Proper performance of duties

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

Document duly executed without seal

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

Document duly executed with seal

- (6) A person may assume that a document has been duly executed by the company if:
 - (a) the company's common seal appears to have been fixed to the document in accordance with subsection 127(2); and
 - (b) the fixing of the common seal appears to have been witnessed in accordance with that subsection.

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

Section 130

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

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

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

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

Part 2B.3—Contracts before registration

131 Contracts before registration

- (1) If a person enters into, or purports to enter into, a contract on behalf of, or for the benefit of, a company before it is registered, the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract:
 - (a) within the time agreed to by the parties to the contract; or
 - (b) if there is no agreed time—within a reasonable time after the contract is entered into.

- (2) The person is liable to pay damages to each other party to the pre-registration contract if the company is not registered, or the company is registered but does not ratify the contract or enter into a substitute for it:
 - (a) within the time agreed to by the parties to the contract; or
 - (b) if there is no agreed time—within a reasonable time after the contract is entered into.

The amount that the person is liable to pay to a party is the amount the company would be liable to pay to the party if the company had ratified the contract and then did not perform it at all.

- (3) If proceedings are brought to recover damages under subsection (2) because the company is registered but does not ratify the pre-registration contract or enter into a substitute for it, the court may do anything that it considers appropriate in the circumstances, including ordering the company to do 1 or more of the following:
 - (a) pay all or part of the damages that the person is liable to pay;
 - (b) transfer property that the company received because of the contract to a party to the contract;
 - (c) pay an amount to a party to the contract.
- (4) If the company ratifies the pre—registration contract but fails to perform all or part of it, the court may order the person to pay all or part of the damages that the company is ordered to pay.

Section 132

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

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

133 This Part replaces other rights and liabilities

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

Part 2B.4—Replaceable rules and constitution

134 Internal management of companies

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

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

135 Replaceable rules

Companies to which replaceable rules apply

- (1) A section or subsection (except subsection 129(1), this section and sections 140 and 141) whose heading contains the words:
 - (a) *replaceable rule*—applies as a replaceable rule to:
 - (i) each company that is or was registered after 1 July 1998; and
 - (ii) any company registered before 1 July 1998 that repeals or repealed its constitution after that day; and
 - (b) *replaceable rule for proprietary companies and mandatory rule for public companies*—applies:
 - (i) as a replaceable rule to any proprietary company that is or was registered after 1 July 1998; and
 - (ii) as a replaceable rule to any company that is or was registered after 1 July 1998 and that changes or changed to a proprietary company (but only while it is a proprietary company); and
 - (iii) as a replaceable rule to any proprietary company that is or was registered before 1 July 1998 that repeals or repealed its constitution after that day; and
 - (iv) as an ordinary provision of this Act to any public company whenever registered.

Section 136

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

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

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

Company's constitution can displace or modify replaceable rules

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

Failure to comply with replaceable rules

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

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

136 Constitution of a company

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

Note: The *Life Insurance Act 1995* has rules about how benefit fund rules become part of a company's constitution and about amending those rules. They override this Act (see section 1348 of this Act). Consequential amendments to the rest of the company's constitution can be made under that Act or this Act (see Subdivision 2 of Division 4 of Part 2A of that Act).

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

Section 137

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

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

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

- (6) An offence based on subsection (5) is an offence of strict liability.

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

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

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

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

Section 138

- (ii) on a date specified by the order.

138 ASIC may direct company to lodge consolidated constitution

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

139 Company must send copy of constitution to member

- (1) A company must send a copy of its constitution to a member of the company within 7 days if the member:
 - (a) asks the company, in writing, for the copy; and
 - (b) pays any fee (up to the prescribed amount) required by the company.
- (2) An offence based on subsection (1) is an offence of strict liability.

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

140 Effect of constitution and replaceable rules

- (1) A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:
 - (a) between the company and each member; and
 - (b) between the company and each director and company secretary; and
 - (c) between a member and each other member;under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.
- (2) Unless a member of a company agrees in writing to be bound, they are not bound by a modification of the constitution made after the date on which they became a member so far as the modification:
 - (a) requires the member to take up additional shares; or
 - (b) increases the member's liability to contribute to the share capital of, or otherwise to pay money to, the company; or
 - (c) imposes or increases restrictions on the right to transfer the shares already held by the member, unless the modification is made:
 - (i) in connection with the company's change from a public company to a proprietary company under Part 2B.7; or

Section 141

- (ii) to insert proportional takeover approval provisions into the company's constitution.

141 Table of replaceable rules

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

Provisions that apply as replaceable rules		
Officers and Employees		
1	Voting and completion of transactions—directors of proprietary companies	194
2	Powers of directors	198A
3	Negotiable instruments	198B
4	Managing director	198C
5	Company may appoint a director	201G
6	Directors may appoint other directors	201H
7	Appointment of managing directors	201J
8	Alternate directors	201K
9	Remuneration of directors	202A
10	Director may resign by giving written notice to company	203A
11	Removal by members—proprietary company	203C
12	Termination of appointment of managing director	203F
13	Terms and conditions of office for secretaries	204F
Inspection of books		
14	Company or directors may allow member to inspect books	247D
Director's Meetings		
15	Circulating resolutions of companies with more than 1 director	248A
16	Calling directors' meetings	248C
17	Chairing directors' meetings	248E
18	Quorum at directors' meetings	248F
19	Passing of directors' resolutions	248G
Meetings of members		
20	Calling of meetings of members by a director	249C
21	Notice to joint members	249J(2)
22	When notice by post or fax is given	249J(4)

Section 141

Provisions that apply as replaceable rules		
22A	When notice under paragraph 249J(3)(cb) is given	249J(5)
23	Notice of adjourned meetings	249M
24	Quorum	249T
25	Chairing meetings of members	249U
26	Business at adjourned meetings	249W(2)
27	Who can appoint a proxy <i>[replaceable rule for proprietary companies only]</i>	249X
28	Proxy vote valid even if member dies, revokes appointment etc.	250C(2)
29	How many votes a member has	250E
30	Jointly held shares	250F
31	Objections to right to vote	250G
32	How voting is carried out	250J
33	When and how polls must be taken	250M
Shares		
33A	Pre-emption for existing shareholders on issue of shares in proprietary company	254D
33B	Other provisions about paying dividends	254U
34	Dividend rights for shares in proprietary companies	254W(2)
Transfer of shares		
35	Transmission of shares on death	1072A
36	Transmission of shares on bankruptcy	1072B
37	Transmission of shares on mental incapacity	1072D
38	Registration of transfers	1072F
39	Additional general discretion for directors of proprietary companies to refuse to register transfers	1072G

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

142 Registered office

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

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

Note 2: Communications and notices from ASIC may also be addressed to the company's contact address (see section 146A).

- (2) A company must lodge notice of a change of address of its registered office with ASIC not later than 28 days after the date on which the change occurs. The notice must be in the prescribed form.

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

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

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

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

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

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

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

Section 144

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

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

- (2) If ASIC becomes aware that the occupier of those premises:
- (a) has not consented to the use of the premises as the address of the company's registered office; or
 - (b) has withdrawn the consent;

ASIC may give written notice to a director of the company who resides in this jurisdiction that ASIC intends to change the address of the company's registered office to the director's address.

- (3) If ASIC is not notified of the address of the company's proposed new registered office under subsection 142(2) within 28 days after the notice under subsection (2) is sent, ASIC may change the address of the company's registered office to the director's address.

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

- (1) A company must display its name prominently at every place at which the company carries on business and that is open to the public.
- (2) A public company must also display its name and the words "Registered Office" prominently at its registered office.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

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

145 Opening hours of registered office of public company

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

Section 146

company under section 117 (normal registration process) or the notice lodged under section 5H (registration of body as company on basis of State or Territory law); or

- (b) if the company changes its opening hours after its registration—in the most recent notice of change of opening hours lodged with ASIC under subsection (3).
- (3) The company must lodge notice of a change in the opening hours of its registered office with ASIC before the day on which a change occurs. The notice must be in the prescribed form.
- (4) An offence based on subsection (1) or (3) is an offence of strict liability.

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

146 Change of address of principal place of business

- (1) A company must lodge with ASIC notice of a change of the address of its principal place of business not later than 28 days after the date on which the change occurs. The notice must be in the prescribed form.
- (2) An offence based on subsection (1) is an offence of strict liability.

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

146A Contact address

- (1) A company may have a contact address (whether or not in this jurisdiction). Communications and notices from ASIC to the company may be addressed to its contact address.
- (2) If a company is to have a contact address, the company must lodge notice of the address in the prescribed form.

Part 2B.6—Names

Division 1—Selecting and using a name

147 When a name is available

Name is available unless identical or unacceptable

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

Minister may consent to a name being available to a company

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

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

- (i) an Act of the Commonwealth, a State or an internal Territory; or
- (ii) a specified provision of an Act of the Commonwealth, a State or an internal Territory.

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

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

National business names register

- (5) If the Minister is satisfied that ASIC has access to electronic records of information containing, in relation to a State or Territory in this jurisdiction, names registered from time to time as business names in that State or Territory, the Minister may, by notice published in the *Gazette* identifying the records concerned, declare that he or she is so satisfied.

148 A company's name

Company may use available name or ACN

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

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

Limited companies

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

Unlimited proprietary companies

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

Section 149

No liability companies

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

Public companies with “Proprietary” included in their name

- (5) A public company must not include the word “Proprietary” (or an abbreviation of it) in its name unless:
- (a) it was a public company before 1 July 1998; and
 - (b) the word “Proprietary” (or an abbreviation of it) was included in its name before 1 July 1998.
- (6) An offence based on subsection (2), (3), (4) or (5) is an offence of strict liability.

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

149 Acceptable abbreviations

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

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

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

150 Exception to requirement for using "Limited" in name

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

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

151 Exception to requirement for using "Limited" in name—pre-existing licences

- (1) A licence that:
- (a) allowed a company to omit "Limited" from its name; and
 - (b) was in force immediately before 1 July 1998; and
 - (c) was in force immediately before the commencement of this section;
- continues in force subject to subsection (3).
- (2) The company must notify ASIC as soon as practicable if it:
- (a) breaches a condition of the licence; or
 - (b) pursues objects or purposes that would have prevented it being granted the licence; or
 - (c) applies its profits or other income to promote objects or purposes that would have prevented it being granted the licence; or
 - (d) pays a dividend to its members; or

Section 152

- (e) modifies its constitution to allow it to do anything set out in paragraphs (a) to (d).

(2AA) If:

- (a) a company holds a licence that is in force under this section; and
- (b) either the licence or the company's constitution requires a modification to the constitution to have previously been submitted to, and approved by:
 - (i) the Minister; or
 - (ii) another Minister of the Commonwealth, a State or a Territory; or
 - (iii) an officer, instrumentality or agency of the Commonwealth, a State or a Territory;

then the licence or constitution (as the case requires) is taken instead to require the company to notify ASIC as soon as practicable of the modification.

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

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

(3) ASIC may revoke the company's licence if:

- (a) the company does anything set out in paragraphs (2)(a) to (e); or
- (b) the company fails to notify ASIC in accordance with subsection (2AA).

152 Reserving a name

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

Note: For available names, see section 147.

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

153 Using a name and ACN on documents

- (1) A company must set out its name on all its public documents and negotiable instruments.
- (2) Subject to sections 154 and 155, if the company's ACN is not used in its name, the company must also set out with its name, or with 1 of the references to its name, either:
 - (a) the expression "Australian Company Number" followed by the company's ACN; or
 - (b) if the last 9 digits of the company's ABN are the same, and in the same order, as the last 9 digits of its ACN—the words "Australian Business Number" followed by the company's ABN.

If the company's name appears on 2 or more pages of the document or instrument, this must be done on the first of those pages.

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

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

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

Note 4: In any case where the company's ACN would be used, the company's ABN may be used instead if section 1344 is satisfied.

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

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

154 Exception to requirement to have ACN on receipts

A company does not have to set out the expression "Australian Company Number" followed by its ACN on a receipt (for example, a cash register receipt) that sets out information recorded in the machine that produced the receipt.

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

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

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

- (1) A person must not carry on business in this jurisdiction under a name or title that:
 - (a) has the words “Limited” or “No Liability” (or an abbreviation of those words) at the end; or
 - (b) includes the word “Proprietary” (or an abbreviation of it).
- (2) An offence based on subsection (1) is an offence of strict liability.
- (3) Subsection (1) does not apply to the extent that the person is allowed or required to carry on business in this jurisdiction under the name or title under a law of the Commonwealth or a law of a State or Territory in this jurisdiction.

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

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

Division 2—Changing a company's name

157 Company changing its name

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

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

- (2) The company must lodge a copy of the special resolution with ASIC within 14 days after it is passed.

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

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

- (3) If the proposed name is available, ASIC must change the company's name by altering the details of the company's registration to reflect the change. The change of name takes effect when ASIC alters the details of the company's registration.

Note: For available names, see section 147.

157A Change of name of company under external administration

Application by liquidator

- (1) The liquidator of a company that is being wound up may lodge an application with ASIC to change the name of the company if the liquidator is satisfied that the proposed change of name is in the interests of the creditors of the company as a whole.
- (2) Subsection (1) does not apply to a members' voluntary winding up.

Application by administrator

- (3) The administrator of a company under administration may lodge an application with ASIC to change the name of the company if the administrator is satisfied that the proposed change of name is in the interests of the creditors of the company as a whole.

Section 157A

Application by deed administrator

- (4) The administrator of a deed of company arrangement may lodge an application with ASIC to change the name of the company if the administrator is satisfied that the proposed change of name is in the interests of the creditors of the company as a whole.

Application by managing controller

- (5) If:
- (a) a person is the managing controller of property of a company; and
 - (b) the person is entitled to enforce a charge on the whole, or substantially the whole, of the company's property;
- the person may lodge an application with ASIC to change the name of the company if the person is satisfied that the proposed change of name is in the interests of the creditors of the company as a whole.

Application by receiver

- (6) If:
- (a) a person is a receiver of property of a company; and
 - (b) the property subject to the receivership consists of, or includes, goodwill in relation to the name of the company;
- the person may lodge an application with ASIC to change the name of the company if the person is satisfied that the proposed change of name is in the interests of the creditors of the company as a whole.

Change of name

- (7) If:
- (a) an application is lodged under subsection (1), (3), (4), (5) or (6); and
 - (b) the proposed name is available;
- ASIC must change the company's name by altering the details of the company's registration to reflect the change. The change of name takes effect when ASIC alters the details of the company's registration.

Note: For available names, see section 147.

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

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

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (3) If the company does not comply with subsection (2), ASIC may change the company's name to its ACN and any other words that section 148 requires, by altering the details of the company's registration to reflect the change.
- (4) A change of name under subsection (3) takes effect when ASIC alters the details of the company's registration.

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

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

Section 160

- (2) The change of name takes effect when ASIC alters the details of the company's registration.

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

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

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

161 Effect of name change

- (1) A change of company name does not:
 - (a) create a new legal entity; or
 - (b) affect the company's existing property, rights or obligations; or
 - (c) render defective any legal proceedings by or against the company.
- (2) Any legal proceedings that could have been continued or begun by or against the company in its former name may be continued or begun by or against it in its new name.

161A Company under external administration—former name to be used on documents

- (1) This section applies to a company if:
 - (a) any of the following conditions is satisfied:
 - (i) the company is being wound up;
 - (ii) the company is under administration;
 - (iii) the company has executed a deed of company arrangement that has not yet terminated;
 - (iv) there is a managing controller of property of the company;
 - (v) there is a receiver of property of the company; and
 - (b) any of the following conditions is satisfied:
 - (i) a change of the company's name takes effect;

Section 161A

- (ii) in the case of a company that is being wound up—a change of the company's name took effect during the 6-month period ending immediately before the relevant date;
 - (iii) in the case of a company under administration—a change of the company's name took effect during the 6-month period ending immediately before the administration began;
 - (iv) in the case of a company that has executed a deed of company arrangement—a change of the company's name took effect during the 6-month period ending immediately before the beginning of the administration that ended when the deed was executed;
 - (v) in the case of a company where there is a managing controller—a change in the company's name took effect during the 6-month period ending immediately before the appointment of the managing controller;
 - (vi) in the case of a company where there is a receiver—a change in the company's name took effect during the 6-month period ending immediately before the appointment of the receiver.
- (2) If subparagraph (1)(b)(i), (ii), (iv), (v) or (vi) applies, the company must set out its former name on all its public documents and negotiable instruments.
 - (3) If subparagraph (1)(b)(iii) applies, then, except with the leave of the Court, the company must set out its former name on all its public documents and negotiable instruments.
 - (4) An offence based on subsection (2) or (3) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
 - (5) The regulations may exempt a specified company, or a class of companies, from the requirement in subsection (2) or (3). The exemption may relate to specified documents or instruments, or a specified class of documents or instruments.
 - (6) The Court may only grant leave under subsection (3) on the application of the administrator of the deed of company arrangement.
-

Section 161A

- (7) The Court may only grant leave under subsection (3) if it is satisfied that the granting of leave will not result in any significant risk to the interests of the company's creditors (including contingent or prospective creditors) as a whole.

Part 2B.7—Changing company type

162 Changing company type

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

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

Section 162

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

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

Note 2: Other types of companies that were previously allowed can change type under the Part 10.1 transitionals.

- (2) A public company limited by shares may only convert to a no liability company if:
- (a) the company's constitution states that its sole objects are mining purposes; and
 - (b) under the constitution the company has no contractual right to recover calls made on its shares from a shareholder who fails to pay them; and
 - (c) all the company's issued shares are fully paid up.

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

- (3) The company must lodge a copy of the special resolution with ASIC within 14 days after it is passed.

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

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

- (4) A special resolution to change an unlimited company that has share capital to a company limited by shares may also provide that a

specified portion of its uncalled share capital may only be called up if the company becomes an externally-administered body corporate.

163 Applying for change of type

Lodging application

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

Contents of the application

- (2) The application must be accompanied by the following:
 - (a) a copy of:
 - (i) the special resolution that resolves to change the type of the company, specifies the new type and the company's new name (if a change of name is necessary); and
 - (ii) any other special resolution passed in connection with the change of type;
 - (b) for a company limited by guarantee changing to a company limited by shares:
 - (i) a statement signed by the directors of the company that in their opinion the company's creditors are not likely to be materially prejudiced by the change of type and that sets out their reasons for that opinion; and
 - (ii) any special resolution dealing with an issue of shares according to section 167;
 - (c) for a company limited by shares or a company limited by guarantee changing to an unlimited company:
 - (i) an assent to the change of type in the prescribed form signed by all the members of the company; and
 - (ii) a statement signed by a director or a company secretary of the company that all the members of the company have signed the assent;
 - (d) for a proprietary company changing to a public company:
 - (i) a consolidated copy of the company's constitution (if any) as at the date of lodgment; and
 - (ii) a copy of each document (including an agreement or consent) or resolution that is necessary to ascertain the

Section 163

rights attached to issued or unissued shares of the company.

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

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

Company limited by guarantee to company limited by shares

(3) If shares will be issued to persons under paragraph 166(2)(c) on the change of type from a company limited by guarantee to a company limited by shares, the application must state:

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

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

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

Section 164

- (3A) For a company changing to a proprietary company, if any of the particulars in the register kept by the company under section 169 and mentioned in paragraph 178A(1)(b) are different from the particulars set out:
- (a) in the latest extract of particulars received by the company; or
 - (b) if the company responded to the latest extract it received—in the company's extract taken together with the company's response to the extract;
- the application must set out those different particulars in addition to the other information required by this section.
- (3B) If the company has more than 20 members, the company is only required to set out the different particulars under subsection (3A) that relate to a person who is a top 20 member of a class of the company.
- Note: See also section 107.
- (3C) If subsection (3A) applies and any details mentioned in subsection 178C(1) are different from the details set out:
- (a) in the latest extract of particulars received by the company; or
 - (b) if the company responded to the latest extract it received—in the company's extract taken together with the company's response to the extract;
- the application must set out those different details as well.
- (4) The application must be in the prescribed form.
- (5) The company must have the consents referred to in paragraph (3)(e) (if any) when the application is lodged. The company must keep the consents.
- (6) An offence based on subsection (5) is an offence of strict liability.

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

164 ASIC changes type of company

- (1) ASIC must give notice under subsection (3) that it intends to alter the details of the company's registration if:
- (a) ASIC is satisfied that:
 - (i) the application complies with section 163; and

Section 164

- (ii) for an application by a company limited by guarantee to change to a company limited by shares—the company’s creditors are not likely to be materially prejudiced by the change; and
 - (b) for an application by a company limited by guarantee to change to a company limited by shares that is accompanied by a copy of a special resolution dealing with an issue of shares according to section 167—ASIC is not of the opinion that the obligations that would attach to the shares are unreasonable compared with the obligations that attach to membership of the company limited by guarantee.
- (2) To make a decision under subparagraph (1)(a)(ii), ASIC may direct the company in writing to:
 - (a) notify some or all of its creditors of the proposed change in the way ASIC specifies; and
 - (b) invite those creditors to make submissions to ASIC.
- (3) The notice that ASIC intends to alter the details of the company’s registration must be:
 - (a) included on ASIC database; and
 - (b) published in the *Gazette*.

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

Section 165

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

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

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

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

- (1) ASIC may direct a proprietary company in writing to change to a public company within 2 months if it is satisfied that the company has contravened section 113 (requirements for proprietary companies).
- (2) The company must comply with the direction within 2 months after being given it by doing everything necessary to change to a public company under section 164.

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

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

- (3) If a proprietary company does not comply with subsection (2), ASIC may change the company from a proprietary to a public company by altering the details of the company's registration to reflect the company's new type.
- (4) A change of type under this section takes effect when ASIC alters the details of the company's registration.
- (5) ASIC must give the company a new certificate of registration after it alters the details of the company's registration under subsection (3). The company's name is the name specified in the certificate of registration issued under this section.

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

166 Effect of change of type

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

Section 167

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

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

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

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

Section 167AA

the company changing type (together with its subsidiaries)
immediately before the change of type took effect.

- (2) If shares are issued according to this section, a court is not to make an order reversing the issue of the shares.

167AA Application of Part to company limited both by shares and by guarantee

- (1) A company limited both by shares and by guarantee may change to one of the following types of companies under this Part:
- (a) a proprietary company limited by shares;
 - (b) a public company limited by shares;
 - (c) a company limited by guarantee.
- (2) This Part applies to the change with any modifications that are necessary.

Chapter 2C—Registers

Part 2C.1—Registers generally

167A Who is covered by this Chapter

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

168 Registers to be maintained

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

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

Note 1A: See also section 672DA (register of relevant interests in listed company or registered scheme).

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

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

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

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

169 Register of members

General requirements

- (1) The register of members must contain the following information about each member:
 - (a) the member's name and address;
 - (b) the date on which the entry of the member's name in the register is made.

Index to register

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

Companies with share capital

- (3) If the company has a share capital, the register must also show:
 - (a) the date on which every allotment of shares takes place; and
 - (b) the number of shares in each allotment; and
 - (c) the shares held by each member; and
 - (d) the class of shares; and
 - (e) the share numbers (if any), or share certificate numbers (if any), of the shares; and
 - (ea) the amount paid on the shares; and
 - (eb) whether or not the shares are fully paid; and
 - (f) the amount unpaid on the shares (if any).

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

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

- (4) The register does not have to show the amount unpaid on the shares (see paragraph (1)(f)) if:
 - (a) all of the company's shares were issued before 1 July 1998; and

Section 169

- (b) the register continues to show the par values of the shares as they were immediately before 1 July 1998.
- (5) The register does not have to show the amount unpaid on the shares (see paragraph (1)(f)) if:
 - (a) all of the company's shares were issued before 1 July 1998; and
 - (b) the company is not a listed company.

Non-beneficial ownership—companies other than listed companies

- (5A) The register of a company that:
 - (a) has a share capital; and
 - (b) is neither a listed company (within the meaning of section 603) nor a company covered by an order under section 707;must indicate any shares that a member does not hold beneficially.
- Note: See also section 1072H (in particular, subsection 1072H(8) which contains relevant presumptions about beneficial ownership).
- (6) In deciding for the purposes of subsection (5A) whether a member holds shares beneficially or non-beneficially, the company is to have regard only to information in notices given to the company under section 1072H, 672B or 672C.

Registered schemes

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

Former members

- (7) A register of members must also show:
 - (a) the name and details of each person who stopped being a member of the company or scheme within the last 7 years; and

Section 170

(b) the date on which the person stopped being a member.

The company or scheme may keep these entries separately from the rest of the register.

Joint holders

(8) For the purposes of this section:

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

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

170 Register of option holders and copies of options documents

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

Because it is a register of the holders of options that are still exercisable, the register must be updated whenever options are exercised or expire.

Section 171

- (2) Information about the grant of an option must be entered in the register within 14 days after the grant of the option.

Copies of options documents

- (3) The company or scheme must keep with the register a copy of every document that grants an option over unissued shares or interests.

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

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

- (3B) Subsection (3) does not apply if the option is listed for quotation on a prescribed financial market.

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

- (4) The company or scheme must change the register to reflect the transfer of an option only if the person transferring the option gives the company or scheme written notice of the transfer.
- (5) A failure to comply with this section in relation to an option does not affect the option itself.

171 Register of debenture holders

- (1) The register of debenture holders must contain the following information about each holder of a debenture:
- (a) the debenture holder's name and address;
 - (b) the amount of the debentures held.

Note: See subsection 168(2) for the coverage of *debenture*.

- (2) A company's failure to comply with this section in relation to a debenture does not affect the debenture itself.

172 Location of registers

- (1) A register kept under this Chapter that relates to a company must be kept at:
- (a) the company's registered office; or
 - (b) the company's principal place of business in this jurisdiction;
- or

Section 173

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

Notice to ASIC

- (2) The company or scheme must lodge with ASIC a notice of the address at which the register is kept within 7 days after the register is:
- (a) established at an office that:
 - (i) is not the registered office of the company or responsible entity; and
 - (ii) is not at the principal place of business of the company or responsible entity in this jurisdiction; or
 - (b) moved from one place to another.

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

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

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

173 Right to inspect and get copies

Right to inspect

- (1) A company or registered scheme must allow anyone to inspect a register kept under this Chapter. If the register is not kept on a computer, the person inspects the register itself. If the register is

Section 173

kept on a computer, the person inspects a hard copy of the information on the register.

Note: Other provisions that are relevant to the inspection of registers are:
section 1300 (place and times for inspection)
section 1301 (the location of documents that are kept on computers)
section 1306 (form and evidentiary value).

- (1A) The requirement in subsection (1) to allow the person to inspect a hard copy of the information on the register does not apply in relation to a register that is kept on a computer if the person and the company or the responsible entity agree that the person can access the information by computer.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

Inspection fees

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

Right to get copies

- (3) The company or scheme must give a person a copy of the register (or a part of the register) within 7 days if the person:
- (a) asks for the copy; and
 - (b) pays any fee (up to the prescribed amount) required by the company or scheme.

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

- (4) A person has the same rights to inspect, and obtain copies of, the documents kept under subsection 170(3) as the person has in respect of the register of option holders itself.

Section 174

- (5) The company is not required under subsection (1) or (3) to allow a person to see, or to give a person a copy that contains, share certificate numbers.

ASIC power in relation to register of debenture holders

- (6) ASIC may exempt a company from complying with subsections (1) and (3) in relation to information in a register of debenture holders about debentures that are not convertible into shares or options over unissued shares.
- (7) The exemption:
- (a) must be in writing; and
 - (b) may be general or limited; and
 - (c) may be subject to conditions specified in the exemption.
- (8) ASIC must publish a copy of the exemption in the *Gazette*.
- (9) A person must not contravene a condition of the exemption.
- (9A) An offence based on subsection (1), (3) or (9) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (10) On application by ASIC, the Court may order a person who contravenes a condition of the exemption to comply with the condition.

174 Agent's obligations

- (1) A person who agrees to maintain a register on behalf of a company or registered scheme for the purposes of this Chapter must:
- (a) make the register available for inspection under this Chapter; and
 - (b) provide the copies required by this Chapter.
- (2) An offence based on subsection (1) is an offence of strict liability.

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

Section 175

175 Correction of registers

- (1) A company or registered scheme or a person aggrieved may apply to the Court to have a register kept by the company or scheme under this Part corrected.
- (2) If the Court orders the company or scheme to correct the register, it may also order the company or scheme to compensate a party to the application for loss or damage suffered.
- (3) If:
 - (a) the Court orders a company or scheme to correct its register of members; and
 - (b) the company or scheme has lodged a list of its members with ASIC;the company or scheme must lodge notice of the correction with ASIC.

Note: A proprietary company may also have to notify certain particulars under Part 2C.2 of this Chapter.

176 Evidentiary value of registers

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

177 Use of information on registers

- (1) A person must not:
 - (a) use information about a person obtained from a register kept under this Chapter to contact or send material to the person; or
 - (b) disclose information of that kind knowing that the information is likely to be used to contact or send material to the person.

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

Section 178

- (1A) Subsection (1) does not apply if the use or disclosure of the information is:
- (a) relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them; or
 - (b) approved by the company or scheme.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

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

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

- (2) A person who contravenes subsection (1) is liable to compensate anyone else who suffers loss or damage because of the contravention.
- (3) A person who makes a profit from a contravention of subsection (1) owes a debt to the company or the scheme. The amount of the debt is the amount of the profit.
- (4) If a person owes a debt under subsection (3) to the scheme:
 - (a) the debt may be recovered by the responsible entity as a debt due to it; and
 - (b) any amount paid or recovered in respect of the debt forms part of the scheme property.

178 Overseas branch registers

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

Part 2C.2—Notice by proprietary companies of changes to member register

178A Notice of change to member register

- (1) A proprietary company must notify ASIC within the time determined under section 178D and in the prescribed form, if:
 - (a) it is required to add or alter a particular in the register it maintains under section 169; and
 - (b) the particular is one required to be kept under any of the following:
 - (i) subsection 169(1) (name and address and date of entry of member's name into register);
 - (ii) paragraph 169(3)(b) (number of shares in each allotment to the member);
 - (iii) paragraph 169(3)(c) (the number of shares held by the member);
 - (iv) paragraph 169(3)(d) (the class of shares held by the member);
 - (v) paragraph 169(3)(ea) (the amount paid on the member's shares);
 - (vi) paragraph 169(3)(eb) (whether the member's shares are fully paid);
 - (vii) paragraph 169(3)(f) (the amount unpaid, if any, on the member's shares);
 - (viii) subsection 169(5A) (statement whether any of the member's shares are held beneficially).
- (2) An offence based on subsection (1) is an offence of strict liability.

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

Section 178B

178B Top 20 only

If a proprietary company has more than 20 members, the company is only required to notify additions or alterations of particulars under section 178A that relate to a person who is, or as a result of the addition or alteration will become, a top 20 member of a class of the company.

Note: See also section 107.

178C Notice of change to share structure

- (1) A proprietary company that is required to notify ASIC under section 178A of an addition or alteration must also notify ASIC, at the same time, of any of the following details in relation to the company that are different from the details previously notified to ASIC:
 - (a) the total number of the company's shares on issue;
 - (b) the classes into which the shares are divided;
 - (c) for each class issued:
 - (i) the total number of shares for the class;
 - (ii) the total amount paid up for the class;
 - (iii) the total amount unpaid for the class.
- (2) An offence based on subsection (1) is an offence of strict liability.

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

178D Time within which ASIC must be notified

A proprietary company must notify ASIC under section 178A within the time determined by this table.

Time within which the company must notify ASIC		
Item	If the need to add or alter a particular arises in connection with this event...	The company must notify ASIC within this time...
1	the Court orders the company to correct its member register kept under section 169	at the same time that it notifies ASIC of the correction under subsection 175(3)

Section 178D

Time within which the company must notify ASIC		
Item	If the need to add or alter a particular arises in connection with this event...	The company must notify ASIC within this time...
2	the company divides shares into classes, or converts shares of a class into shares of another class	within the time within which it must notify ASIC of the particulars of the division or conversion under subsection 246F(1)
3	the company issues shares	within the time within which it must notify ASIC of the particulars of the issue under subsection 254X(1)
4	the company reduces its share capital	within the time within which it must notify ASIC of shareholder approval of the reduction under subsection 256C(3)
5	an event not covered by items 1 to 4	within 28 days after the day on which it adds or alters the particular in the register

Chapter 2D—Officers and employees

Part 2D.1—Duties and powers

179 Background to duties of directors, other officers and employees

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

Division 1—General duties

180 Care and diligence—civil obligation only

Care and diligence—directors and other officers

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

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

Business judgment rule

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

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

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

- (3) In this section:

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

181 Good faith—civil obligations

Good faith—directors and other officers

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

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

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

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

Note 1: Section 79 defines *involved*.

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

182 Use of position—civil obligations

Use of position—directors, other officers and employees

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

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

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

Note 1: Section 79 defines *involved*.

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

Section 183

183 Use of information—civil obligations

Use of information—directors, other officers and employees

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

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

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

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

Note 1: Section 79 defines *involved*.

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

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

Good faith—directors and other officers

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

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

Use of position—directors, other officers and employees

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

Section 185

- (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

Use of information—directors, other officers and employees

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

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

Sections 180 to 184:

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

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

186 Territorial application of sections 180 to 184

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

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

187 Directors of wholly-owned subsidiaries

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

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

188 Responsibility of secretaries and directors for certain contraventions

Secretary's functions

- (1) A secretary of a company contravenes this subsection if the company contravenes:
 - (a) section 142 (requirement for companies to have registered office); or
 - (b) section 145 (requirement for registered office of public company to be open to public); or
 - (c) section 346C (requirement to respond to extract of particulars); or
 - (ca) section 348D (requirement to respond to return of particulars); or
 - (d) section 205B (lodgment of notices with ASIC); or
 - (e) section 146 (notice of change of principal place of business); or
 - (f) section 178A (notice of change to member register (proprietary companies only)); or
 - (g) section 178C (notice of change to share structure (proprietary companies only)); or
 - (h) section 254X (notice of issue of shares); or
 - (i) subsection 319(1) (lodgment of financial reports); or
 - (j) section 349A (notice of changes to ultimate holding company (proprietary companies only)).

Section 189

Note: See section 204A for the circumstances in which a company must have a secretary.

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

- (2) Each director of a proprietary company contravenes this subsection if:
- (a) the proprietary company contravenes a provision referred to in subsection (1); and
 - (b) the proprietary company does not have a secretary when it contravenes that section.
- (2A) An offence based on subsection (1) or (2) is an offence of strict liability.

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

Defence

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

Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (3), see section 13.4 of the *Criminal Code*.

189 Reliance on information or advice provided by others

If:

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

Section 190

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

190 Responsibility for actions of delegate

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

190A Limited application of Division to registrable Australian bodies

This Division does not apply to an act or omission by a director or other officer or employee of a corporation that is a registrable Australian body unless the act or omission occurred in connection with:

- (a) the body carrying on business outside its place of origin; or

Section 190B

- (b) an act that the body does or proposed to do outside its place of origin; or
- (c) a decision by the body whether or not to do or refrain from doing outside its place of origin.

**190B Division does not apply to Aboriginal and Torres Strait
Islander corporations**

This Division does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note: Division 265 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* deals with the general duties of directors, secretaries, officers and employees of Aboriginal and Torres Strait Islander corporations.

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

191 Material personal interest—director’s duty to disclose

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

- (1) A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise.
- (1A) For an offence based on subsection (1), strict liability applies to the circumstance, that the director of a company has a material personal interest in a matter that relates to the affairs of the company.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) The director does not need to give notice of an interest under subsection (1) if:
 - (a) the interest:
 - (i) arises because the director is a member of the company and is held in common with the other members of the company; or
 - (ii) arises in relation to the director’s remuneration as a director of the company; or
 - (iii) relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members; or
 - (iv) arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan (or proposed loan) to the company; or
 - (v) arises merely because the director has a right of subrogation in relation to a guarantee or indemnity referred to in subparagraph (iv); or
 - (vi) relates to a contract that insures, or would insure, the director against liabilities the director incurs as an officer of the company (but only if the contract does not

Section 191

make the company or a related body corporate the insurer); or

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

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

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

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

Section 192

Effect of contravention by director

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

Section does not apply to single director proprietary company

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

192 Director may give other directors standing notice about an interest

Power to give notice

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

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

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

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

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

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

Nature and extent of interest must be recorded in minutes

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

Dates of effect and expiry of standing notice

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

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

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

Effect of material increase in nature or extent of interest

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

Effect of contravention by director

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

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

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

- (a) any general law rule about conflicts of interest; and
- (b) any provision in a company's constitution (if any) that restricts a director from:
 - (i) having a material personal interest in a matter; or
 - (ii) holding an office or possessing property;

Section 194

involving duties or interests that conflict with their duties or interests as a director.

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

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

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

then:

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

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

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

195 Restrictions on voting—directors of public companies only

Restrictions on voting and being present

- (1) A director of a public company who has a material personal interest in a matter that is being considered at a directors' meeting must not:
 - (a) be present while the matter is being considered at the meeting; or
 - (b) vote on the matter.

(1A) Subsection (1) does not apply if:

- (a) subsection (2) or (3) allows the director to be present; or

(b) the interest does not need to be disclosed under section 191.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

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

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

Participation with approval of other directors

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

Participation with ASIC approval

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

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

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

Effect of contravention by director

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

196 ASIC power to make declarations and class orders

ASIC's power to make specific declarations

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

ASIC's power to make class orders

- (3) ASIC may make an order in writing that enables directors who have a material personal interest in a matter to be present while the matter is being considered at a directors' meeting, vote on that matter, or both be present and vote. The order may be made in respect of a specified class of public companies, directors, resolutions or interests.
- (4) The order may be expressed to be subject to conditions.
- (5) Notice of the making, revocation or suspension of the order must be published in the *Gazette*.

Division 3—Duty to discharge certain trust liabilities

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

- (1) A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:
- (a) has not discharged, and cannot discharge, the liability or that part of it; and
 - (b) is not entitled to be fully indemnified against the liability out of trust assets solely because of one or more of the following:
 - (i) a breach of trust by the corporation;
 - (ii) the corporation's acting outside the scope of its powers as trustee;
 - (iii) a term of the trust denying, or limiting, the corporation's right to be indemnified against the liability.

The person is liable both individually and jointly with the corporation and anyone else who is liable under this subsection.

Note: The person will not be liable under this subsection merely because there are insufficient trust assets out of which the corporation can be indemnified.

- (2) The person is not liable under subsection (1) if the person would be entitled to have been fully indemnified by 1 of the other directors against the liability had all the directors of the corporation been trustees when the liability was incurred.
- (3) This section does not apply to a liability incurred outside Australia by a foreign company.
- (4) This section does not apply to a liability incurred by a registrable Australian body outside its place of origin.
- (5) This section does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note: Section 271-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* deals with the liability of directors of Aboriginal and Torres Strait Islander corporations for debts and other liabilities incurred by those corporations as trustee.

Division 4—Powers

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

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

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

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

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

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

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

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

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

198D Delegation

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

Section 198E

(d) any other person.

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

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

198E Single director/shareholder proprietary companies*Powers of director*

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

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

Negotiable instruments

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

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

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

Section 198F

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

Right during 7 years after ceasing to be director

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

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

Right to take copies

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

Company not to refuse access

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

Interaction with other rules

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

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

Division 1—Indemnities and insurance for officers and auditors

199A Indemnification and exemption of officer or auditor

Exemptions not allowed

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

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

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

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

When indemnity for legal costs not allowed

- (3) A company or related body corporate must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against legal costs incurred in defending an action for a liability incurred as an officer or auditor of the company if the costs are incurred:

Section 199B

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

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

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

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

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

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

- (1) A company or a related body corporate must not pay, or agree to pay, a premium for a contract insuring a person who is or has been an officer or auditor of the company against a liability (other than one for legal costs) arising out of:
 - (a) conduct involving a wilful breach of duty in relation to the company; or
 - (b) a contravention of section 182 or 183.

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

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

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

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

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

Division 2—Termination payments

200A When benefit given in connection with retirement from office

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

200B Retirement benefits generally need membership approval

Benefits in connection with retirement from board or managerial office

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

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

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

- (1A) For an offence based on subsection (1), strict liability applies to the circumstance, that the benefit is in connection with the person's, or someone else's, retirement.

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

Prescribed superannuation funds

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

Prescribed circumstances

- (3) For the purposes of this section, if:
- (a) a company, or an associate of a company, gives a benefit to a superannuation fund solely for the purpose of enabling or assisting the superannuation fund to give to a person a benefit in connection with a person's retirement from an office in the company or a related body corporate; or

Section 200C

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

- (4) In this section:

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

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

- (1) A person must not give a benefit to a person who:
 - (a) holds, or has at any previous time held, a board or managerial office in a company or a related body corporate; or
 - (b) is the spouse of a person referred to in paragraph (a); or
 - (c) is a relative of a person referred to in paragraph (a) or of the spouse of such a person; or
 - (d) is an associate of a person referred to in paragraph (a) or the spouse of an associate of such a person;in connection with the transfer of the whole or any part of the undertaking or property of the company.

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

- (2) For an offence based on subsection (1), strict liability applies to the circumstance, that the transfer is in connection with the transfer of the whole or any part of the undertaking or property of the company.

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

- (3) Subsection (1) does not apply to the extent that there is member approval under section 200E.

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

200D Contravention to receive benefit without member approval

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

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

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

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

200E Approval by members

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

Section 200F

(b) otherwise:

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

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

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

200F Exempt benefits and benefits given in certain circumstances

- (1) Subsection 200B(1) does not apply to:
 - (a) a benefit given in connection with a person's retirement from an office in relation to a company if the benefit is:
 - (i) given under an agreement entered into before 1 January 1991 if giving the benefit in accordance with the agreement would have been lawful if the benefit were given when the agreement was entered into; or
 - (iv) a payment made in respect of leave of absence to which the person is entitled under an industrial instrument; or
 - (aa) a benefit given under an order of a court; or
 - (b) a benefit given in prescribed circumstances.
- (2) Subsection 200B(1) does not apply to a benefit given in connection with a person's retirement from an office in relation to a company if:
 - (a) the benefit is:

- (i) a genuine payment by way of damages for breach of contract; or
 - (ii) given to the person under an agreement made between the company and the person before the person became the holder of the office as the consideration, or part of the consideration, for the person agreeing to hold the office; and
- (b) the value of the benefit, when added to the value of all other payments (if any) already made or payable in connection with the person's retirement from board or managerial offices in the company and related bodies corporate, does not exceed the greater of:
 - (i) the amount worked out under subsection (3); and
 - (ii) the amount worked out under subsection (4).

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

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

where:

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

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

Note: **Relevant period** is defined in subsection (5).

- (4) The amount worked out under this subsection is:
- (a) if the relevant period for the person is less than 12 months—a reasonable estimate of the total remuneration that the person would have received from the company and related bodies corporate during the relevant period if the relevant period had been 12 months; or
 - (b) if the relevant period for the person is 12 months—the total remuneration that the person received from the company and related bodies corporate in the relevant period; or
 - (c) if the relevant period for the person is more than 12 months—the total remuneration that the person received

Section 200G

from the company and related bodies corporate in the last 12 months of the relevant period.

- (5) For the purposes of this section, if a person has held an office in relation to a company:
- (a) throughout a period; or
 - (b) throughout a number of periods;
- the **relevant period** for that person is that period or the period consisting of those periods.

200G Genuine payments of pension and lump sum

- (1) Subsection 200B(1) does not apply to a benefit if:
- (a) the benefit is a payment in connection with a person's retirement from a board or managerial office (the **relevant office**) in a company or a related body corporate; and
 - (b) the payment is for past services the person rendered to:
 - (i) the company; or
 - (ii) a related body corporate; or
 - (iii) a body that was a related body corporate of the company when the past services were rendered; and
 - (c) the value of the benefit, when added to the value of all other payments (if any) already made or payable in connection with the person's retirement from board or managerial offices in the company and related bodies corporate does not exceed the payment limit set by subsection (2).

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

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

- (b) otherwise—the total remuneration of the person from the company and related bodies corporate during the period of 3 years ending when the person retired from the relevant office.

Note: Section 9 defines *remuneration*.

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

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

where:

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

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

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

Section 200H

- (b) the person was a genuine full-time employee of a body corporate at that time and the body corporate was related to the company at that time.
- (6) In this section:

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

200H Benefits required by law

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

200J Benefits to be held in trust for company

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

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

Division 1—Appointment of directors

201A Minimum number of directors

Proprietary companies

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

Public companies

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

201B Who can be a director

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

201D Consent to act as director

- (1) A company contravenes this subsection if a person does not give the company a signed consent to act as a director of the company before being appointed.
- (2) The company must keep the consent.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

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

Section 201E

201E Special rules for the appointment of public company directors

- (1) A resolution passed at a general meeting of a public company appointing or confirming the appointment of 2 or more directors is void unless:
 - (a) the meeting has resolved that the appointments or confirmations may be voted on together; and
 - (b) no votes were cast against the resolution.
- (2) This section does not affect:
 - (a) a resolution to appoint directors by an amendment to the company's constitution (if any); or
 - (b) a ballot or poll to elect 2 or more directors if the ballot or poll does not require members voting for 1 candidate to vote for another candidate.
- (3) For the purposes of paragraph (2)(b), a ballot or poll does not require a member to vote for a candidate merely because the member is required to express a preference among individual candidates in order to cast a valid vote.

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

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

Appointment of new director on death, mental incapacity or bankruptcy

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

- (3) If:
- (a) the office of the director of a proprietary company is vacated under subsection 206B(3) or (4) because of the bankruptcy of the director; and
 - (b) the person is the only director and the only shareholder of the company; and
 - (c) a trustee in bankruptcy is appointed to the person's property; the trustee may appoint a person as the director of the company.
- (4) A person who has a power of appointment under subsection (2) or (3) may appoint themselves as director.
- (5) A person appointed as a director of a company under subsection (2), (3) or (4) holds office as if they had been appointed in the usual way.

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

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

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

Appointment by other directors

- (1) The directors of a company may appoint a person as a director. A person can be appointed as a director in order to make up a quorum for a directors' meeting even if the total number of directors of the company is not enough to make up that quorum.

Proprietary company—confirmation by meeting within 2 months

- (2) If a person is appointed under this section as a director of a proprietary company, the company must confirm the appointment by resolution within 2 months after the appointment is made. If the appointment is not confirmed, the person ceases to be a director of the company at the end of those 2 months.

Section 201J

Public company—confirmation by next AGM

- (3) If a person is appointed by the other directors as a director of a public company, the company must confirm the appointment by resolution at the company's next AGM. If the appointment is not confirmed, the person ceases to be a director of the company at the end of the AGM.

201J Appointment of managing directors (*replaceable rule—see section 135*)

The directors of a company may appoint 1 or more of themselves to the office of managing director of the company for the period, and on the terms (including as to remuneration), as the directors see fit.

201K Alternate directors (*replaceable rule—see section 135*)

- (1) With the other directors' approval, a director may appoint an alternate to exercise some or all of the director's powers for a specified period.
- (2) If the appointing director requests the company to give the alternate notice of directors' meetings, the company must do so.
- (3) When an alternate exercises the director's powers, the exercise of the powers is just as effective as if the powers were exercised by the director.
- (4) The appointing director may terminate the alternate's appointment at any time.
- (5) An appointment or its termination must be in writing. A copy must be given to the company.

Note: ASIC must be given notice of the appointment and termination of appointment of an alternate (see subsections 205B(2) and (5)).

201L Signpost—ASIC to be notified of appointment

Under section 205B, a company must notify ASIC within 28 days if a person is appointed as a director or as an alternate director.

201M Effectiveness of acts by directors

- (1) An act done by a director is effective even if their appointment, or the continuance of their appointment, is invalid because the company or director did not comply with the company's constitution (if any) or any provision of this Act.
- (2) Subsection (1) does not deal with the question whether an effective act by a director:
 - (a) binds the company in its dealings with other people; or
 - (b) makes the company liable to another person.

Note: The kinds of acts that this section validates are those that are only legally effective if the person doing them is a director (for example, calling a meeting of the company's members or signing a document to be lodged with ASIC or minutes of a meeting). Sections 128-130 contain rules about the assumptions people are entitled to make when dealing with a company and its officers.

Division 2—Remuneration of directors

202A Remuneration of directors (*replaceable rule—see section 135*)

- (1) The directors of a company are to be paid the remuneration that the company determines by resolution.

Note: Chapter 2E makes special provision for the payment of remuneration to the directors of public companies.

- (2) The company may also pay the directors' travelling and other expenses that they properly incur:
- (a) in attending directors' meetings or any meetings of committees of directors; and
 - (b) in attending any general meetings of the company; and
 - (c) in connection with the company's business.

202B Members may obtain information about directors' remuneration

- (1) A company must disclose the remuneration paid to each director of the company or a subsidiary (if any) by the company or by an entity controlled by the company if the company is directed to disclose the information by:
- (a) members with at least 5% of the votes that may be cast at a general meeting of the company; or
 - (b) at least 100 members who are entitled to vote at a general meeting of the company.

The company must disclose all remuneration paid to the director, regardless of whether it is paid to the director in relation to their capacity as director or another capacity.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The company must comply with the direction as soon as practicable by:
- (a) preparing a statement of the remuneration of each director of the company or subsidiary for the last financial year before the direction was given; and
 - (b) having the statement audited; and

- (c) sending a copy of the audited statement to each person entitled to receive notice of general meetings of the company.

202C Special rule for single director/single shareholder proprietary companies

A person who is the only director and the only shareholder of a proprietary company is to be paid any remuneration for being a director that the company determines by resolution. The company may also pay the director's travelling and other expenses properly incurred by the director in connection with the company's business.

Division 3—Resignation, retirement or removal of directors

203A Director may resign by giving written notice to company *(replaceable rule—see section 135)*

A director of a company may resign as a director of the company by giving a written notice of resignation to the company at its registered office.

203B Signpost to consequences of disqualification from managing corporations

A person ceases to be a director of a company if the person becomes disqualified from managing corporations under Part 2D.6 (see subsection 206A(2)) unless ASIC or the Court allows them to manage the company (see sections 206F and 206G).

203C Removal by members—proprietary companies *(replaceable rule—see section 135)*

A proprietary company:

- (a) may by resolution remove a director from office; and
- (b) may by resolution appoint another person as a director instead.

203D Removal by members—public companies

Resolution for removal of director

- (1) A public company may by resolution remove a director from office despite anything in:
- (a) the company's constitution (if any); or
 - (b) an agreement between the company and the director; or
 - (c) an agreement between any or all members of the company and the director.

If the director was appointed to represent the interests of particular shareholders or debenture holders, the resolution to remove the

director does not take effect until a replacement to represent their interests has been appointed.

Note: See sections 249C to 249G for the rules on who may call meetings, sections 249H to 249M on how to call meetings and sections 249N to 249Q for rules on members' resolutions.

Notice of intention to move resolution for removal of director

- (2) Notice of intention to move the resolution must be given to the company at least 2 months before the meeting is to be held. However, if the company calls a meeting after the notice of intention is given under this subsection, the meeting may pass the resolution even though the meeting is held less than 2 months after the notice of intention is given.

Note: Short notice of the meeting cannot be given for this resolution (see subsection 249H(3)).

Director to be informed

- (3) The company must give the director a copy of the notice as soon as practicable after it is received.

Director's right to put case to members

- (4) The director is entitled to put their case to members by:
- (a) giving the company a written statement for circulation to members (see subsections (5) and (6)); and
 - (b) speaking to the motion at the meeting (whether or not the director is a member of the company).
- (5) The written statement is to be circulated by the company to members by:
- (a) sending a copy to everyone to whom notice of the meeting is sent if there is time to do so; or
 - (b) if there is not time to comply with paragraph (a)—having the statement distributed to members attending the meeting and read out at the meeting before the resolution is voted on.
- (6) The director's statement does not have to be circulated to members if it is more than 1,000 words long or defamatory.

Section 203E

Time of retirement

- (7) If a person is appointed to replace a director removed under this section, the time at which:
- (a) the replacement director; or
 - (b) any other director;
- is to retire is to be worked out as if the replacement director had become director on the day on which the replaced director was last appointed a director.

Strict liability offences

- (8) An offence based on subsection (3) or (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

203E Director cannot be removed by other directors—public companies

A resolution, request or notice of any or all of the directors of a public company is void to the extent that it purports to:

- (a) remove a director from their office; or
- (b) require a director to vacate their office.

203F Termination of appointment of managing director (*replaceable rule—see section 135*)

- (1) A person ceases to be managing director if they cease to be a director.
- (2) The directors may revoke or vary an appointment of a managing director.

Part 2D.4—Appointment of secretaries

204A Minimum number of secretaries

Proprietary companies

- (1) A proprietary company is not required to have a secretary but, if it does have 1 or more secretaries, at least 1 of them must ordinarily reside in Australia.

Public companies

- (2) A public company must have at least 1 secretary. At least 1 of them must ordinarily reside in Australia.

Strict liability offences

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

204B Who can be a secretary

- (1) Only an individual who is at least 18 may be appointed as a secretary of a company.
- (2) A person who is disqualified from managing corporations under Part 2D.6 may only be appointed as a secretary of a company if the appointment is made with permission granted by ASIC under section 206F or leave granted by the Court under section 206G.

204C Consent to act as secretary

- (1) A company contravenes this subsection if a person does not give the company a signed consent to act as secretary of the company before being appointed.
- (2) The company must keep the consent.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Section 204D

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

204D How a secretary is appointed

A secretary is to be appointed by the directors.

Note 1: The company must notify ASIC of the appointment within 28 days (see subsection 205B(1)).

Note 2: Section 188 deals with the responsibilities of secretaries for contraventions by the company.

204E Effectiveness of acts by secretaries

- (1) An act done by a secretary is effective even if their appointment, or the continuance of their appointment, is invalid because the company or secretary did not comply with the company's constitution (if any) or any provision of this Act.
- (2) Subsection (1) does not deal with the question whether an effective act by a secretary:
 - (a) binds the company in its dealings with other people; or
 - (b) makes the company liable to another person.

Note: The kinds of acts that this section validates are those that are only legally effective if the person doing them is a secretary (for example, signing and sending out a notice of a meeting of directors if the company's constitution authorises the secretary to do so or signing a document to be lodged with ASIC). Sections 128-130 contain rules about the assumptions people are entitled to make when dealing with a company and its officers.

204F Terms and conditions of office for secretaries (*replaceable rule—see section 135*)

A secretary holds office on the terms and conditions (including as to remuneration) that the directors determine.

204G Signpost to consequences of disqualification from managing corporations

A person ceases to be a secretary of a company if the person becomes disqualified from managing corporations under Part 2D.6 (see subsection 206A(2)) unless ASIC or the Court allows them to manage the company (see sections 206F and 206G).

Part 2D.5—Public information about directors and secretaries

205A Director, secretary or alternate director may notify ASIC of resignation or retirement

- (1) If a director, secretary or alternate director retires or resigns, they may give ASIC written notice of the retirement or resignation. The notice must be in the prescribed form.
- (2) To be effective, a notice of resignation must be accompanied by a copy of the letter of resignation given to the company.

Note: If a director, secretary or alternative director of a company gives a written notice in accordance with this section, the company is not required to lodge a notice with ASIC under subsection 205B(5) (see subsection 205B(6)).

205B Notice of name and address of directors and secretaries to ASIC

New directors or secretaries

- (1) A company must lodge with ASIC a notice of the personal details of a director or secretary within 28 days after they are appointed. The notice must be in the prescribed form.

Note 1: If a person becomes a director under subsection 120(1) there is no appointment and no notice is required under this subsection.

Note 2: If a person who was appointed as an alternate director becomes a director under the terms of their appointment as an alternate director, there is no appointment as a director and no notice is required under this subsection.

New alternate directors

- (2) A company must lodge with ASIC a notice of:
 - (a) the personal details of a person who is appointed as an alternate director; and
 - (b) the terms of their appointment (including terms about when the alternate director is to act as a director);

Section 205B

within 28 days after their appointment as an alternate director. The notice must be in the prescribed form.

Personal details

- (3) The personal details of a director, alternate director, or secretary are:
- (a) their given and family names; and
 - (b) all of their former given and family names; and
 - (c) their date and place of birth; and
 - (d) their address.

Note: For *address* see section 205D.

Changes in details

- (4) The company must lodge with ASIC notice of any change in the personal details of a director, alternate director or secretary within 28 days after the change. The notice must be in the prescribed form.

Notice required if person stops being a director or secretary

- (5) If a person stops being a director, alternate director or secretary of the company, the company must lodge with ASIC notice of the fact within 28 days. The notice must be in the prescribed form.
- (6) Subsection (5) does not apply if:
- (a) the person was an alternate director who stopped being a director in accordance with the terms of their appointment as an alternate director; or
 - (b) the person gives ASIC a written notice of the person's retirement or resignation as a director, alternate director or secretary of the company in accordance with section 205A.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.

- (7) An offence based on subsection (1), (2), (4) or (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

205C Director and secretary must give information to company

- (1) A director, alternate director or secretary must give the company any information the company needs to comply with subsection 205B(1) or (2) within 7 days after their initial appointment unless they have previously given the information to the company.
- (2) A director, alternate director or secretary must give the company any information the company needs to comply with subsection 205B(4) within 7 days after any change in their personal details.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

205D Address for officers

Address is normally residential address

- (1) A person's address for the purposes of a notice or application under subsection 5H(2), 117(2), 205B(1), (2) or (4) or 601BC(2) must be their usual residential address unless they are entitled to have an alternative address substituted for their usual residential address under subsection (2).

Entitlement to have alternative address

- (2) The person is entitled to have an alternative address substituted for their usual residential address if:
 - (a) their name, but not their residential address, is on an electoral roll under the *Commonwealth Electoral Act 1918* because of section 104 of that Act; or
 - (b) their name is not on an electoral roll under that Act and ASIC determines, in writing, that including their residential address in the notice or application would put at risk their personal safety or the personal safety of members of their family.

This alternative address must be in Australia and be one at which documents can be served on the person. At any particular time, a person is entitled to have only 1 alternative address under this section.

Note: See subsection 109X(2) on the status of the alternative address as an address for service.

Section 205E

- (3) A person who takes advantage of subsection (2) must:
 - (a) before or at the same time as the alternative address is first included in a notice or application, lodge with ASIC notice of the person's usual residential address; and
 - (b) lodge with ASIC notice of any change in the person's usual residential address within 14 days after the change.

A notice under this subsection must be in the prescribed form.

- (4) If a court gives a judgment for payment of a sum of money against a person who is taking advantage of subsection (2), ASIC may give details of the person's usual residential address to an officer of the court for the purposes of enforcing the judgment debt.

205E ASIC's power to ask for information about person's position as director or secretary

- (1) ASIC may ask a person, in writing, to inform ASIC:
 - (a) whether the person is a director or secretary of a particular company; and
 - (b) if the person is no longer a director or secretary of the company—the date on which the person stopped being a director or secretary.
- (2) The person must give the information to ASIC in writing by the date specified in the request.
- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

205F Director must give information to company

- (1) A director must give the company any information affecting or relating to the director that the company needs, or will need, to comply with Chapter 6. The director must give the information to the company as soon as practicable after becoming aware that the company needs, or will need, the information. The company must give the information to each of the other directors of the company within 7 days of receiving it.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

205G Listed company—director to notify market operator of shareholdings etc.

Notifiable interests

- (1) A director of a listed public company must notify the relevant market operator under subsections (3) and (4) of the following interests of the director:
- (a) relevant interests in securities of the company or a related body corporate;
 - (b) contracts:
 - (i) to which the director is a party or under which the director is entitled to a benefit; and
 - (ii) that confer a right to call for or deliver shares in, debentures of, or interests in a managed investment scheme made available by, the company or a related body corporate.

Note: Under section 353, ASIC may determine conditions that must be complied with when lodging documents electronically under this subsection.

- (2) A notice of a relevant interest in securities under paragraph (1)(a) must give details of:
- (a) the number of securities; and
 - (b) the circumstances giving rise to the relevant interest.

Occasions for initial notification

- (3) The director must notify the relevant market operator within 14 days after each of the following occasions:
- (a) appointment as a director of the company;
 - (b) the listing of the company.

Paragraph (a) does not apply to a director who retires and is then reappointed at the same meeting.

Note: Under section 353, ASIC may determine conditions that must be complied with when lodging documents electronically under this subsection.

Updating notices

- (4) The director must notify the relevant market operator within 14 days after any change in the director's interests.

Section 205G

Note: Under section 353, ASIC may determine conditions that must be complied with when lodging documents electronically under this subsection.

- (5) The director need not give the information to the relevant market operator under this section if the director has already given the information to the relevant market operator.

ASIC's power to make class orders

- (6) ASIC may make an order in writing relieving a director of the obligation to notify the relevant market operator of an interest in a security or contract. The order may be made in respect of a specified class of companies, directors, securities or contracts.
- (7) The order may be expressed to be subject to conditions.
- (8) Notice of the making, revocation or suspension of the order must be published in the *Gazette*.

Strict liability offences

- (9) An offence based on subsection (1), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 2D.6—Disqualification from managing corporations

206A Disqualified person not to manage corporations

- (1) A person who is disqualified from managing corporations under this Part commits an offence if:
- (a) they make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (b) they exercise the capacity to affect significantly the corporation's financial standing; or
 - (c) they communicate instructions or wishes (other than advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation) to the directors of the corporation:
 - (i) knowing that the directors are accustomed to act in accordance with the person's instructions or wishes; or
 - (ii) intending that the directors will act in accordance with those instructions or wishes.

Note: Under section 1274AA, ASIC is required to keep a record of persons disqualified from managing corporations.

- (1A) For an offence based on subsection (1), strict liability applies to the circumstance, that the person is disqualified from managing corporations under this Part.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (1B) It is a defence to a contravention of subsection (1) if the person had permission to manage the corporation under either section 206F or 206G and their conduct was within the terms of that permission.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1B), see subsection 13.3(3) of the *Criminal Code*.

- (2) A person ceases to be a director, alternate director or a secretary of a company if:
- (a) the person becomes disqualified from managing corporations under this Part; and

Section 206B

- (b) they are not given permission to manage the corporation under section 206F or 206G.

Note: If a person ceases to be a director, alternate director or a secretary under subsection (2) the company must notify ASIC (see subsection 205B(5)).

206B Automatic disqualification

Convictions

- (1) A person becomes disqualified from managing corporations if the person:
 - (a) is convicted on indictment of an offence that:
 - (i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or
 - (ii) concerns an act that has the capacity to affect significantly the corporation's financial standing; or
 - (b) is convicted of an offence that:
 - (i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; or
 - (ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or
 - (c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.The offences covered by paragraph (a) and subparagraph (b)(ii) include offences against the law of a foreign country.
- (2) The period of disqualification under subsection (1) starts on the day the person is convicted and lasts for:
 - (a) if the person does not serve a term of imprisonment—5 years after the day on which they are convicted; or
 - (b) if the person serves a term of imprisonment—5 years after the day on which they are released from prison.

Bankruptcy or personal insolvency agreement

- (3) A person is disqualified from managing corporations if the person is an undischarged bankrupt under the law of Australia, its external territories or another country.

Section 206BA

- (4) A person is disqualified from managing corporations if:
 - (a) the person has executed a personal insolvency agreement under:
 - (i) Part X of the *Bankruptcy Act 1966*; or
 - (ii) a similar law of an external Territory or a foreign country; and
 - (b) the terms of the agreement have not been fully complied with.
- (5) A person is disqualified from managing corporations at a particular time if the person is, at that time, disqualified from managing Aboriginal and Torres Strait Islander corporations under Part 6-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

206BA Extension of period of automatic disqualification

- (1) This section applies if:
 - (a) under subsection 206B(1); or
 - (b) as a result of the operation of subsection 279-5(1) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* and subsection 206B(5) of this Act;a person is disqualified from managing corporations on being convicted of an offence.
- (2) On application by ASIC, the Court may extend by up to an additional 15 years the period of disqualification.
- (3) ASIC must apply:
 - (a) before the period of disqualification begins; or
 - (b) before the end of the first year of the disqualification.
- (4) ASIC may apply only once in relation to the disqualification.
- (5) In determining whether an extension is justified (and if so, for how long), the Court may have regard to any matters that the Court considers appropriate.

Section 206C

206C Court power of disqualification—contravention of civil penalty provision

- (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
 - (a) a declaration is made under:
 - (i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or
 - (ii) section 386-1 (civil penalty provision) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* that the person has contravened a civil penalty provision (within the meaning of that Act); and
 - (b) the Court is satisfied that the disqualification is justified.
- (2) In determining whether the disqualification is justified, the Court may have regard to:
 - (a) the person's conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.
- (3) To avoid doubt, the reference in paragraph (2)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

206D Court power of disqualification—insolvency and non-payment of debts

- (1) On application by ASIC, the Court may disqualify a person from managing corporations for up to 20 years if:
 - (a) within the last 7 years, the person has been an officer of 2 or more corporations when they have failed; and
 - (b) the Court is satisfied that:
 - (i) the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; and
 - (ii) the disqualification is justified.

Section 206D

- (1A) To avoid doubt, the references in paragraphs (1)(a) and (b) to a corporation include references to an Aboriginal and Torres Strait Islander corporation.
- (2) For the purposes of subsection (1), a corporation fails if:
- (a) a Court orders the corporation to be wound up under:
 - (i) section 459B of this Act; or
 - (ii) section 526-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*;because the Court is satisfied that the corporation is insolvent; or
 - (b) the corporation enters into voluntary liquidation and creditors are not fully paid or are unlikely to be fully paid; or
 - (c) the corporation executes a deed of company arrangement and creditors are not fully paid or are unlikely to be fully paid; or
 - (d) the corporation ceases to carry on business and creditors are not fully paid or are unlikely to be fully paid; or
 - (e) a levy of execution against the corporation is not satisfied; or
 - (f) a receiver, receiver and manager, or provisional liquidator is appointed in relation to the corporation; or
 - (g) the corporation enters into a compromise or arrangement with its creditors under Part 5.1 (including that Part as applied by section 45-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*); or
 - (h) the corporation is wound up and a liquidator lodges a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts.
- Note: To satisfy paragraph (h), a corporation must begin to be wound up while the person is an officer or within 12 months after the person ceases to be an officer. However, the report under subsection 533(1) may be lodged by the liquidator at a time that is more than 12 months after the person ceases to be an officer. Sections 513A to 513D contain rules about when a company begins to be wound up.
- (2A) The reference in paragraph (2)(c) to a deed of company arrangement includes a reference to a deed of corporation arrangement (within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*).

Section 206E

- (2B) For the purposes of subsection (1), a person is an **officer** of an Aboriginal and Torres Strait Islander corporation if the person is an officer of that corporation within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.
- (3) In determining whether the disqualification is justified, the Court may have regard to:
 - (a) the person's conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.
- (4) To avoid doubt, the reference in paragraph (3)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

206E Court power of disqualification—repeated contraventions of Act

- (1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:
 - (a) the person:
 - (i) has at least twice been an officer of a body corporate that has contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or
 - (ii) has at least twice contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of a body corporate; or
 - (iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and
 - (b) the Court is satisfied that the disqualification is justified.
- (1A) For the purposes of subsection (1), a person is an **officer** of an Aboriginal and Torres Strait Islander corporation if the person is an officer of that corporation within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Section 206EA

- (2) In determining whether the disqualification is justified, the Court may have regard to:
 - (a) the person's conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.
- (3) To avoid doubt, the reference in paragraph (2)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

206EA Disqualification under the *Trade Practices Act 1974*

A person is disqualified from managing corporations if a court order disqualifying the person from managing corporations is in force under section 86E of the *Trade Practices Act 1974*.

206F ASIC's power of disqualification

Power to disqualify

- (1) ASIC may disqualify a person from managing corporations for up to 5 years if:
 - (a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):
 - (i) the person has been an officer of 2 or more corporations; and
 - (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts; and
 - (b) ASIC has given the person:
 - (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and
 - (ii) an opportunity to be heard on the question; and
 - (c) ASIC is satisfied that the disqualification is justified.

Section 206G

- (1A) To avoid doubt, the references in paragraph (1)(a) to corporations include references to Aboriginal and Torres Strait Islander corporations.

Grounds for disqualification

- (2) In determining whether disqualification is justified, ASIC:
- (a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and
 - (b) may have regard to:
 - (i) the person's conduct in relation to the management, business or property of any corporation; and
 - (ii) whether the disqualification would be in the public interest; and
 - (iii) any other matters that ASIC considers appropriate.
- (2A) To avoid doubt, the references in subsection (2) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

Notice of disqualification

- (3) If ASIC disqualifies a person from managing corporations under this section, ASIC must serve a notice on the person advising them of the disqualification. The notice must be in the prescribed form.

Start of disqualification

- (4) The disqualification takes effect from the time when a notice referred to in subsection (3) is served on the person.

ASIC power to grant leave

- (5) ASIC may give a person who it has disqualified from managing corporations under this Part written permission to manage a particular corporation or corporations. The permission may be expressed to be subject to conditions and exceptions determined by ASIC.

206G Court power to grant leave

- (1) A person who is disqualified from managing corporations may apply to the Court for leave to manage:
-

Section 206GA

- (a) corporations; or
 - (b) a particular class of corporations; or
 - (c) a particular corporation;
- if the person was not disqualified by ASIC.
- (2) The person must lodge a notice with ASIC at least 21 days before commencing the proceedings. The notice must be in the prescribed form.
 - (3) The order granting leave may be expressed to be subject to exceptions and conditions determined by the Court.
- Note: If the Court grants the person leave to manage the corporation, the person may be appointed as a director (see section 201B) or secretary (see section 204B) of a company.
- (4) The person must lodge with ASIC a copy of any order granting leave within 14 days after the order is made.
 - (5) On application by ASIC, the Court may revoke the leave. The order revoking leave does not take effect until it is served on the person.

206GA Involvement of ACCC—leave orders under section 206G

Scope of section

- (1) This section applies in relation to a person who is disqualified from managing corporations under section 206EA.

Notice lodged with ASIC before leave application

- (2) If the person lodges a notice with ASIC under subsection 206G(2), ASIC must give the ACCC a copy of the notice.

Leave orders

- (3) If the person lodges a copy of an order with ASIC under subsection 206G(4), ASIC must give the ACCC a copy of the order.

Revoking leave

- (4) If ASIC decides to apply for an order under subsection 206G(5) in relation to the person, it must consult the ACCC before making the application.

Section 206H

Definition

(5) In this section:

ACCC means the Australian Competition and Consumer Commission.

206H Territorial application of this Part

This Part does not apply in respect of an act or omission by a person while they are managing a corporation that is a foreign company unless the act or omission occurred in connection with:

- (a) the foreign company carrying on business in this jurisdiction; or
- (b) an act that the foreign company does, or proposes to do, in this jurisdiction; or
- (c) a decision by the foreign company whether or not to do, or refrain from doing, an act in this jurisdiction.

206HA Limited application of Part to registrable Australian bodies

This Part does not apply in respect of an act or omission by a person while they are managing a corporation that is a registrable Australian body unless the act or omission occurred in connection with:

- (a) the body carrying on business outside its place of origin; or
- (b) an act that the body does or proposes to do outside its place of origin; or
- (c) a decision by the body whether or not to do, or refrain from doing, an act outside its place of origin.

206HB Part does not apply to Aboriginal and Torres Strait Islander corporations

This Part does not apply, of its own force, to disqualify a person from managing a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note 1: Subsection 279-5(5) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* provides that a person who is disqualified from managing corporations under this Part will be automatically disqualified under Part 6-5 of that Act from managing Aboriginal and Torres Strait Islander corporations.

Section 206HB

Note 2: Similarly, subsection 206B(5) of this Act provides that a person who is disqualified from managing Aboriginal and Torres Strait Islander corporations under Part 6-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* will be automatically disqualified under this Part from managing corporations.

Chapter 2E—Related party transactions

207 Purpose

The rules in this Chapter are designed to protect the interests of a public company's members as a whole, by requiring member approval for giving financial benefits to related parties that could endanger those interests.

Part 2E.1—Member approval needed for related party benefit

Division 1—Need for member approval

208 Need for member approval for financial benefit

- (1) For a public company, or an entity that the public company controls, to give a financial benefit to a related party of the public company:
 - (a) the public company or entity must:
 - (i) obtain the approval of the public company's members in the way set out in sections 217 to 227; and
 - (ii) give the benefit within 15 months after the approval; or
 - (b) the giving of the benefit must fall within an exception set out in sections 210 to 216.

Note: Section 228 defines *related party*, section 9 defines *entity*, section 50AA defines *control* and section 229 affects the meaning of *giving a financial benefit*.

- (2) If:
 - (a) the giving of the benefit is required by a contract; and
 - (b) the making of the contract was approved in accordance with subparagraph (1)(a)(i) as a financial benefit given to the related party; and
 - (c) the contract was made:
 - (i) within 15 months after that approval; or
 - (ii) before that approval, if the contract was conditional on the approval being obtained;

member approval for the giving of the benefit is taken to have been given and the benefit need not be given within the 15 months.

209 Consequences of breach

- (1) If the public company or entity contravenes section 208:
 - (a) the contravention does not affect the validity of any contract or transaction connected with the giving of the benefit; and
 - (b) the public company or entity is not guilty of an offence.

Chapter 2E Related party transactions

Part 2E.1 Member approval needed for related party benefit

Division 1 Need for member approval

Section 209

Note: A Court may order an injunction to stop the company or entity giving the benefit to the related party (see section 1324).

- (2) A person contravenes this subsection if they are involved in a contravention of section 208 by a public company or entity.

Note 1: This subsection is a civil penalty provision.

Note 2: Section 79 defines *involved*.

- (3) A person commits an offence if they are involved in a contravention of section 208 by a public company or entity and the involvement is dishonest.

Division 2—Exceptions to the requirement for member approval

210 Arm's length terms

Member approval is not needed to give a financial benefit on terms that:

- (a) would be reasonable in the circumstances if the public company or entity and the related party were dealing at arm's length; or
- (b) are less favourable to the related party than the terms referred to in paragraph (a).

211 Remuneration and reimbursement for officer or employee

Benefits that are reasonable remuneration

- (1) Member approval is not needed to give a financial benefit if:
 - (a) the benefit is remuneration to a related party as an officer or employee of the following:
 - (i) the public company;
 - (ii) an entity that the public company controls;
 - (iii) an entity that controls the public company;
 - (iv) an entity that is controlled by an entity that controls the public company; and
 - (b) to give the remuneration would be reasonable given:
 - (i) the circumstances of the public company or entity giving the remuneration; and
 - (ii) the related party's circumstances (including the responsibilities involved in the office or employment).

Benefits that are payments of expenses incurred

- (2) Member approval is not needed to give a financial benefit if:
 - (a) the benefit is payment of expenses incurred or to be incurred, or reimbursement for expenses incurred, by a related party in performing duties as an officer or employee of the following:
 - (i) the public company;
 - (ii) an entity that the public company controls;

Section 212

- (iii) an entity that controls the public company;
 - (iv) an entity that is controlled by an entity that controls the public company; and
 - (b) to give the benefit would be reasonable in the circumstances of the public company or entity giving the remuneration.
- (3) For the purposes of this section:
- (a) a contribution made by a body corporate to a fund for the purpose of making provision for, or obtaining, superannuation benefits for an officer of the body, or for dependants of an officer of the body, is remuneration provided by the body to the officer of the body; and
 - (b) a financial benefit given to a person because of the person ceasing to hold an office or employment as an officer or employee of a body corporate is remuneration paid or provided to the person in a capacity as an officer of the body.

212 Indemnities, exemptions, insurance premiums and payment for legal costs for officers

Indemnities, exemptions and insurance premiums

- (1) Member approval is not needed to give a financial benefit if:
- (a) the benefit is for a related party who is an officer of the public company or entity; and
 - (b) the benefit is:
 - (i) an indemnity, exemption or insurance premium in respect of a liability incurred as an officer of the public company or entity; or
 - (ii) an agreement to give an indemnity or exemption, or to pay an insurance premium, of that kind; and
 - (c) to give the benefit would be reasonable in the circumstances of the public company or entity giving the benefit.

Note: Sections 199A to 199C may prohibit giving an indemnity or exemption or paying an insurance premium for an officer.

Payments in respect of legal costs

- (2) Member approval is not needed to give a financial benefit if:
- (a) the benefit is for a related party who is an officer of the public company or entity; and

- (b) the benefit is the making of, or an agreement to make, a payment (whether by way of advance, loan or otherwise) in respect of legal costs incurred by the officer in defending an action for a liability incurred as an officer of the public company or entity; and
 - (c) either:
 - (i) section 199A does not apply to the costs; or
 - (ii) if section 199A applies to the costs—the officer must repay the amount paid if the costs become costs for which the company must not give the officer an indemnity under that section; and
 - (d) to give the benefit would be reasonable in the circumstances of the public company or entity giving the benefit.
- (3) In working out for the purposes of subsection (1) or (2) whether giving the benefit is reasonable in the circumstances:
- (a) assess whether it would be reasonable on the basis of the circumstances existing:
 - (i) if the benefit is given under an agreement—at the time when the agreement is or was made; or
 - (ii) if the benefit is not given under an agreement—at the time when the benefit is or was given; and
 - (b) disregard any other financial benefit given or payable to the officer by the public company or entity.

213 Small amounts given to related entity

- (1) Member approval is not needed to give a financial benefit to a related party in a financial year if the total of the following amounts or values is less than or equal to the amount prescribed by the regulations for the purposes of this section:
- (a) the amount or value of the financial benefit;
 - (b) the total of all other amounts or values of financial benefits given to the related party, in the financial year, for which member approval was not needed because of this section.
- (2) In working out the total of the amounts or values referred to in paragraphs (1)(a) and (b):
- (a) add in all amounts or values of financial benefits given to the related party in the financial year by:
 - (i) the public company or entity; and

Section 214

- (ii) any entities controlled by the public company or entity;
and
- (b) disregard:
 - (i) amounts that have been repaid; and
 - (ii) amounts that fall under any other exception in this Part.

For the purposes of this subsection, the time at which the entity must be controlled by the public company is the time at which the financial benefit is given.

214 Benefit to or by closely-held subsidiary

- (1) Member approval is not needed to give a financial benefit if the benefit is given:
 - (a) by a body corporate to a closely-held subsidiary of the body;
or
 - (b) by a closely-held subsidiary of a body corporate to the body or an entity it controls.
- (2) For the purposes of this section, a body corporate is a closely-held subsidiary of another body corporate if, and only if, no member of the first-mentioned body is a person other than:
 - (a) the other body; or
 - (b) a nominee of the other body; or
 - (c) a body corporate that is a closely-held subsidiary of the other body because of any other application or applications of this subsection; or
 - (d) a nominee of a body referred to in paragraph (c).
- (3) For the purposes of subsection (2), disregard shares that are not voting shares.

215 Benefits to members that do not discriminate unfairly

Member approval is not needed to give a financial benefit if:

- (a) the benefit is given to the related party in their capacity as a member of the public company; and
- (b) giving the benefit does not discriminate unfairly against the other members of the public company.

216 Court order

Member approval is not needed to give a financial benefit under an order of a court.

Division 3—Procedure for obtaining member approval

217 Resolution may specify matters by class or kind

A resolution under this Division may specify anything either in particular or by reference to class or kind.

218 Company must lodge material that will be put to members with ASIC

- (1) At least 14 days before the notice convening the relevant meeting is given, the public company must lodge:
 - (a) a proposed notice of meeting setting out the text of the proposed resolution; and
 - (b) a proposed explanatory statement satisfying section 219; and
 - (c) any other document that is proposed to accompany the notice convening the meeting and that relates to the proposed resolution; and
 - (d) any other document that any of the following proposes to give to members of the public company before or at the meeting:
 - (i) the company;
 - (ii) a related party of the company to whom the proposed resolution would permit a financial benefit to be given;
 - (iii) an associate of the company or of such a related party; and can reasonably be expected to be material to a member in deciding how to vote on the proposed resolution.
- (2) If, when the notice convening the meeting is given, ASIC:
 - (a) has approved in writing a period of less than 14 days for the purposes of subsection (1); and
 - (b) has not revoked the approval by written notice to the public company;subsection (1) applies as if the reference to 14 days were a reference to the approved period.
- (3) ASIC may give and revoke approvals for the purposes of subsection (2).

219 Requirements for explanatory statement to members

- (1) The proposed explanatory statement lodged under section 218 must be in writing and set out:
 - (a) the related parties to whom the proposed resolution would permit financial benefits to be given; and
 - (b) the nature of the financial benefits; and
 - (c) in relation to each director of the company:
 - (i) if the director wanted to make a recommendation to members about the proposed resolution—the recommendation and his or her reasons for it; or
 - (ii) if not—why not; or
 - (iii) if the director was not available to consider the proposed resolution—why not; and
 - (d) in relation to each such director:
 - (i) whether the director had an interest in the outcome of the proposed resolution; and
 - (ii) if so—what it was; and
 - (e) all other information that:
 - (i) is reasonably required by members in order to decide whether or not it is in the company's interests to pass the proposed resolution; and
 - (ii) is known to the company or to any of its directors.
- (2) An example of the kind of information referred to in paragraph (1)(e) 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: Sections 180 and 181 require an officer of a corporation to act honestly and to exercise care and diligence. These duties extend to preparing an explanatory statement under this section. Section 1309 creates offences where false and misleading material relating to a corporation's affairs is made available or furnished to members.

Section 220

220 ASIC may comment on proposed resolution

- (1) Within 14 days after a public company lodges documents under section 218, ASIC may give to the company written comments on those documents (other than comments about whether the proposed resolution is in the company's best interests).
- (2) If the company is listed, ASIC may consult with the relevant market operator for the purposes of giving comments to the company.
- (3) Subsection (2) does not limit the persons with whom ASIC may consult.
- (4) ASIC must keep a copy of the written comments it gives to a company under subsection (1), and subsections 1274(2) and (5) apply to the copy as if it were a document lodged with ASIC.
- (5) The fact that ASIC has given particular comments, or has declined to give comments, under subsection (1) does not in any way affect the performance or exercise of any of ASIC's functions and powers.

221 Requirements for notice of meeting

The notice convening the meeting:

- (a) must be the same, in all material respects, as the proposed notice lodged under section 218; and
- (b) must be accompanied by an explanatory statement that is the same, in all material respects, as the proposed explanatory statement lodged under that section; and
- (c) must be accompanied by a document that is, or documents that are, the same, in all material respects, as the document or documents (if any) lodged under paragraph 218(1)(c); and
- (d) if ASIC has given to the public company, under section 220, comments on the documents lodged under section 218—must be accompanied by a copy of those comments; and
- (e) must not be accompanied by any other documents.

222 Other material put to members

Each document (if any) that:

- (a) did not accompany the notice convening the meeting; and

- (b) was given to members of the public company before or at the meeting by:
 - (i) the public company; or
 - (ii) a related party of the public company to whom the proposed resolution would permit a financial benefit to be given; or
 - (iii) an associate of the public company or of such a related party; and
- (c) can reasonably be expected to have been material to a member in deciding how to vote on the proposed resolution; must be the same, in all material respects, as a document lodged under paragraph 218(1)(d).

223 Proposed resolution cannot be varied

The resolution must be the same as the proposed resolution set out in the proposed notice lodged under section 218.

224 Voting by or on behalf of related party interested in proposed resolution

- (1) At a general meeting, a vote on a proposed resolution under this Division must not be cast (in any capacity) by or on behalf of:
 - (a) a related party of the public company to whom the resolution would permit a financial benefit to be given; or
 - (b) an associate of such a related party.
- (2) Subsection (1) does not prevent the casting of a vote if:
 - (a) it is cast by a person as a proxy appointed by writing that specifies how the proxy is to vote on the proposed resolution; and
 - (b) it is not cast on behalf of a related party or associate of a kind referred to in subsection (1).
- (3) The regulations may prescribe cases where subsection (1) does not apply.
- (4) ASIC may by writing declare that:
 - (a) subsection (1) does not apply to a specified proposed resolution; or

Section 225

- (b) subsection (1) does not prevent the casting of a vote, on a specified proposed resolution, by a specified entity, or on behalf of a specified entity;
but may only do so if satisfied that the declaration will not cause unfair prejudice to the interests of any member of the public company.
- (5) A declaration in force under subsection (4) has effect accordingly.
- (6) If a vote is cast in contravention of subsection (1), the related party or associate, as the case may be, contravenes this subsection, whether or not the proposed resolution is passed.
- (7) For the purposes of this section, a vote is cast on behalf of an entity if, and only if, it is cast:
 - (a) as proxy for the entity; or
 - (b) otherwise on behalf of the entity; or
 - (c) in respect of a share in respect of which the entity has:
 - (i) power to vote; or
 - (ii) power to exercise, or control the exercise of, a right to vote.
- (8) Subject to subsection 225(1), a contravention of this section does not affect the validity of a resolution.
- (9) Subject to Part 1.1A, this section has effect despite:
 - (a) anything else in:
 - (i) this Act; or
 - (ii) any other law (including the general law) of a State or Territory; or
 - (b) anything in a body corporate's constitution.

225 Voting on the resolution

- (1) If any votes on the resolution are cast in contravention of subsection 224(1), it must be the case that the resolution would still be passed even if those votes were disregarded.
- (2) If a poll was duly demanded on the question that the resolution be passed, subsections (3) and (4) apply in relation to voting on the poll.

- (3) In relation to each member of the public company who voted on the resolution in person, the public company must record in writing:
 - (a) the member's name; and
 - (b) how many votes the member cast for the resolution and how many against.
- (4) In relation to each member of the public company who voted on the resolution by proxy, or by a representative authorised under section 250D, the public company must record in writing:
 - (a) the member's name; and
 - (b) in relation to each person who voted as proxy, or as such a representative, for the member:
 - (i) the person's name; and
 - (ii) how many votes the person cast on the resolution as proxy, or as such a representative, for the member; and
 - (iii) how many of those votes the person cast for the resolution and how many against.
- (5) For 7 years after the day when a resolution under this Division is passed, the public company must retain the records it made under this section in relation to the resolution.
- (6) An offence based on subsection (3), (4) or (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

226 Notice of resolution to be lodged

The public company must lodge a notice setting out the text of the resolution within 14 days after the resolution is passed.

227 Declaration by court of substantial compliance

- (1) The Court may declare that the conditions prescribed by this Division have been satisfied if it finds that they have been substantially satisfied.
- (2) A declaration may be made only on the application of an interested person.

Part 2E.2—Related parties and financial benefits

228 Related parties

Controlling entities

- (1) An entity that controls a public company is a related party of the public company.

Directors and their spouses

- (2) The following persons are related parties of a public company:
 - (a) directors of the public company;
 - (b) directors (if any) of an entity that controls the public company;
 - (c) if the public company is controlled by an entity that is not a body corporate—each of the persons making up the controlling entity;
 - (d) spouses of the persons referred to in paragraphs (a), (b) and (c).

Relatives of directors and spouses

- (3) The following relatives of persons referred to in subsection (2) are related parties of the public company:
 - (a) parents;
 - (b) children.

Entities controlled by other related parties

- (4) An entity controlled by a related party referred to in subsection (1), (2) or (3) is a related party of the public company unless the entity is also controlled by the public company.

Related party in previous 6 months

- (5) An entity is a related party of a public company at a particular time if the entity was a related party of the public company of a kind referred to in subsection (1), (2), (3) or (4) at any time within the previous 6 months.

Entity has reasonable grounds to believe it will become related party in future

- (6) An entity is a related party of a public company at a particular time if the entity believes or has reasonable grounds to believe that it is likely to become a related party of the public company of a kind referred to in subsection (1), (2), (3) or (4) at any time in the future.

Acting in concert with related party

- (7) An entity is a related party of a public company if the entity acts in concert with a related party of the public company on the understanding that the related party will receive a financial benefit if the public company gives the entity a financial benefit.

229 Giving a financial benefit

- (1) In determining whether a financial benefit is given for the purposes of this Chapter:
- (a) give a broad interpretation to financial benefits being given, even if criminal or civil penalties may be involved; and
 - (b) the economic and commercial substance of conduct is to prevail over its legal form; and
 - (c) disregard any consideration that is or may be given for the benefit, even if the consideration is adequate.
- (2) ***Giving a financial benefit*** includes the following:
- (a) giving a financial benefit indirectly, for example, through 1 or more interposed entities;
 - (b) giving a financial benefit by making an informal agreement, oral agreement or an agreement that has no binding force;
 - (c) giving a financial benefit that does not involve paying money (for example by conferring a financial advantage).
- (3) The following are examples of ***giving a financial benefit*** to a related party:
- (a) giving or providing the related party finance or property;
 - (b) buying an asset from or selling an asset to the related party;
 - (c) leasing an asset from or to the related party;
 - (d) supplying services to or receiving services from the related party;

Section 229

- (e) issuing securities or granting an option to the related party;
- (f) taking up or releasing an obligation of the related party.

Part 2E.3—Interaction with other rules

230 General duties still apply

A director is not relieved from any of their duties under this Act (including sections 180 and 184), or their fiduciary duties, in connection with a transaction merely because the transaction is authorised by a provision of this Chapter or is approved by a resolution of members under a provision of this Chapter.

Chapter 2F—Members' rights and remedies

231 Membership of a company

A person is a member of a company if they:

- (a) are a member of the company on its registration; or
- (b) agree to become a member of the company after its registration and their name is entered on the register of members; or
- (c) become a member of the company under section 167 (membership arising from conversion of a company from one limited by guarantee to one limited by shares).

Part 2F.1—Oppressive conduct of affairs

232 Grounds for Court order

The Court may make an order under section 233 if:

- (a) the conduct of a company's affairs; or
- (b) an actual or proposed act or omission by or on behalf of a company; or
- (c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

- (d) contrary to the interests of the members as a whole; or
- (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.

Note: For *affairs*, see section 53.

233 Orders the Court can make

- (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
 - (a) that the company be wound up;
 - (b) that the company's existing constitution be modified or repealed;
 - (c) regulating the conduct of the company's affairs in the future;
 - (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
 - (e) for the purchase of shares with an appropriate reduction of the company's share capital;
 - (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
 - (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law,

Section 234

to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

- (h) appointing a receiver or a receiver and manager of any or all of the company's property;
- (i) restraining a person from engaging in specified conduct or from doing a specified act;
- (j) requiring a person to do a specified act.

Order that the company be wound up

- (2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:
 - (a) as if the order were made under section 461; and
 - (b) with such changes as are necessary.

Order altering constitution

- (3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:
 - (a) the order states that the company does have the power to make such a change or repeal; or
 - (b) the company first obtains the leave of the Court.

234 Who can apply for order

An application for an order under section 233 in relation to a company may be made by:

- (a) a member of the company, even if the application relates to an act or omission that is against:
 - (i) the member in a capacity other than as a member; or
 - (ii) another member in their capacity as a member; or
- (b) a person who has been removed from the register of members because of a selective reduction; or
- (c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or

Section 235

- (d) a person to whom a share in the company has been transmitted by will or by operation of law; or
- (e) a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into:
 - (i) the company's affairs; or
 - (ii) matters connected with the company's affairs.

Note 1: If an application is made under this section, in certain cases the court may order that the company be wound up in insolvency (see section 459B).

Note 2: For *selective reduction*, see subsection 256B(2).

235 Requirement for person to lodge order

- (1) If an order is made under section 233, the applicant must lodge a copy of the order with ASIC within 14 days after it is made.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 2F.1A—Proceedings on behalf of a company by members and others

236 Bringing, or intervening in, proceedings on behalf of a company

- (1) A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:
 - (a) the person is:
 - (i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or
 - (ii) an officer or former officer of the company; and
 - (b) the person is acting with leave granted under section 237.
- (2) Proceedings brought on behalf of a company must be brought in the company's name.
- (3) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

Note 1: For the right to inspect company books, see subsections 247A(3) to (6).

Note 2: For the requirements to disclose proceedings and leave applications in the annual directors' report, see subsections 300(14) and (15).

Note 3: This section does not prevent a person bringing, or intervening in, proceedings on their own behalf in respect of a personal right.

237 Applying for and granting leave

- (1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.
- (2) The Court must grant the application if it is satisfied that:
 - (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
 - (b) the applicant is acting in good faith; and

- (c) it is in the best interests of the company that the applicant be granted leave; and
 - (d) if the applicant is applying for leave to bring proceedings—there is a serious question to be tried; and
 - (e) either:
 - (i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
 - (ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.
- (3) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that:
- (a) the proceedings are:
 - (i) by the company against a third party; or
 - (ii) by a third party against the company; and
 - (b) the company has decided:
 - (i) not to bring the proceedings; or
 - (ii) not to defend the proceedings; or
 - (iii) to discontinue, settle or compromise the proceedings; and
 - (c) all of the directors who participated in that decision:
 - (i) acted in good faith for a proper purpose; and
 - (ii) did not have a material personal interest in the decision; and
 - (iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and
 - (iv) rationally believed that the decision was in the best interests of the company.

The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold.

- (4) For the purposes of subsection (3):
- (a) a person is a third party if:
 - (i) the company is a public company and the person is not a related party of the company; or

Section 238

- (ii) the company is not a public company and the person would not be a related party of the company if the company were a public company; and
- (b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

Note: *Related party* is defined in section 228.

238 Substitution of another person for the person granted leave

- (1) Any of the following persons may apply to the Court for an order that they be substituted for a person to whom leave has been granted under section 237:
 - (a) a member, former member, or a person entitled to be registered as a member, of the company or of a related body corporate;
 - (b) an officer, or former officer, of the company.
- (2) The Court may make the order if it is satisfied that:
 - (a) the applicant is acting in good faith; and
 - (b) it is appropriate to make the order in all the circumstances.
- (3) An order substituting one person for another has the effect that:
 - (a) the grant of leave is taken to have been made in favour of the substituted person; and
 - (b) if the other person has already brought the proceedings or intervened—the substituted person is taken to have brought those proceedings or to have made that intervention.

239 Effect of ratification by members

- (1) If the members of a company ratify or approve conduct, the ratification or approval:
 - (a) does not prevent a person from bringing or intervening in proceedings with leave under section 237 or from applying for leave under that section; and
 - (b) does not have the effect that proceedings brought or intervened in with leave under section 237 must be determined in favour of the defendant, or that an application for leave under that section must be refused.

- (2) If members of a company ratify or approve conduct, the Court may take the ratification or approval into account in deciding what order or judgment (including as to damages) to make in proceedings brought or intervened in with leave under section 237 or in relation to an application for leave under that section. In doing this, it must have regard to:
- (a) how well-informed about the conduct the members were when deciding whether to ratify or approve the conduct; and
 - (b) whether the members who ratified or approved the conduct were acting for proper purposes.

240 Leave to discontinue, compromise or settle proceedings brought, or intervened in, with leave

Proceedings brought or intervened in with leave must not be discontinued, compromised or settled without the leave of the Court.

241 General powers of the Court

- (1) The Court may make any orders, and give any directions, that it considers appropriate in relation to proceedings brought or intervened in with leave, or an application for leave, including:
- (a) interim orders; and
 - (b) directions about the conduct of the proceedings, including requiring mediation; and
 - (c) an order directing the company, or an officer of the company, to do, or not to do, any act; and
 - (d) an order appointing an independent person to investigate, and report to the Court on:
 - (i) the financial affairs of the company; or
 - (ii) the facts or circumstances which gave rise to the cause of action the subject of the proceedings; or
 - (iii) the costs incurred in the proceedings by the parties to the proceedings and the person granted leave.
- (2) A person appointed by the Court under paragraph (1)(d) is entitled, on giving reasonable notice to the company, to inspect any books of the company for any purpose connected with their appointment.

Section 242

- (3) If the Court appoints a person under paragraph (1)(d):
 - (a) the Court must also make an order stating who is liable for the remuneration and expenses of the person appointed; and
 - (b) the Court may vary the order at any time; and
 - (c) the persons who may be made liable under the order, or the order as varied, are:
 - (i) all or any of the parties to the proceedings or application; and
 - (ii) the company; and
 - (d) if the order, or the order as varied, makes 2 or more persons liable, the order may also determine the nature and extent of the liability of each of those persons.
- (4) Subsection (3) does not affect the powers of the Court as to costs.

242 Power of the Court to make costs orders

The Court may at any time make any orders it considers appropriate about the costs of the following persons in relation to proceedings brought or intervened in with leave under section 237 or an application for leave under that section:

- (a) the person who applied for or was granted leave;
- (b) the company;
- (c) any other party to the proceedings or application.

An order under this section may require indemnification for costs.

Part 2F.2—Class rights

Note: This Part does not apply to the adoption or amendment of benefit fund rules or to consequential amendments to the rest of the company's constitution made under the *Life Insurance Act 1995*, see Subdivision 2 of Division 4 of Part 2A of that Act.

246B Varying and cancelling class rights

If constitution sets out procedure

- (1) If a company has a constitution that sets out the procedure for varying or cancelling:
 - (a) for a company with a share capital—rights attached to shares in a class of shares; or
 - (b) for a company without a share capital—rights of members in a class of members;

those rights may be varied or cancelled only in accordance with the procedure. The procedure may be changed only if the procedure itself is complied with.

If constitution does not set out procedure

- (2) If a company does not have a constitution, or has a constitution that does not set out the procedure for varying or cancelling:
 - (a) for a company with a share capital—rights attached to shares in a class of shares; or
 - (b) for a company without a share capital—rights of members in a class of members;

those rights may be varied or cancelled only by special resolution of the company and:

- (c) by special resolution passed at a meeting:
 - (i) for a company with a share capital of the class of members holding shares in the class; or
 - (ii) for a company without a share capital of the class of members whose rights are being varied or cancelled; or
- (d) with the written consent of members with at least 75% of the votes in the class.

Section 246C

- (3) The company must give written notice of the variation or cancellation to the members of the class within 7 days after the variation or cancellation is made.
- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

246C Certain actions taken to vary rights etc.

Company with share capital

- (1) If the shares in a class of shares in a company are divided into further classes, and after the division the rights attached to all of those shares are not the same:
 - (a) the division is taken to vary the rights attached to every share that was in the class existing before the division; and
 - (b) members who hold shares to which the same rights are attached after the division form a separate class.
- (2) If the rights attached to some of the shares in a class of shares in a company are varied:
 - (a) the variation is taken to vary the rights attached to every other share that was in the class existing before the variation; and
 - (b) members who hold shares to which the same rights are attached after the variation form a separate class.

Company without share capital

- (3) If the members in a class of members in a company without share capital are divided into further classes of members, and after the division the rights of all of those members are not the same:
 - (a) the division is taken to vary the rights of every member who was in the class existing before the division; and
 - (b) members who have the same rights after the division form a separate class.
- (4) If the rights of some of the members in a class of members in a company without a share capital are varied:
 - (a) the variation is taken to vary the rights of every other member who was in the class existing before the variation; and

Section 246D

- (b) members who have the same rights after the variation form a separate class.

Company with 1 class of shares issuing new class of shares

- (5) If a company with 1 class of shares issues new shares, the issue is taken to vary the rights attached to shares already issued if:
 - (a) the rights attaching to the new shares are not the same as the rights attached to shares already issued; and
 - (b) those rights are not provided for in:
 - (i) the company's constitution (if any); or
 - (ii) a notice, document or resolution that is lodged with ASIC.
- (6) If a company issues new preference shares that rank equally with existing preference shares, the issue is taken to vary the rights attached to the existing preference shares unless the issue is authorised by:
 - (a) the terms of issue of the existing preference shares; or
 - (b) the company's constitution (if any) as in force when the existing preference shares were issued.

246D Variation, cancellation or modification without unanimous support of class

- (1) If members in a class do not all agree (whether by resolution or written consent) to:
 - (a) a variation or cancellation of their rights; or
 - (b) a modification of the company's constitution (if any) to allow their rights to be varied or cancelled;members with at least 10% of the votes in the class may apply to the Court to have the variation, cancellation or modification set aside.
- (2) An application may only be made within 1 month after the variation, cancellation or modification is made.
- (3) The variation, cancellation or modification takes effect:
 - (a) if no application is made to the Court to have it set aside—1 month after the variation, cancellation or modification is made; or

Section 246E

- (b) if an application is made to the Court to have it set aside—
when the application is withdrawn or finally determined.
- (4) The members of the class who want to have the variation, cancellation or modification set aside may appoint 1 or more of themselves to make the application on their behalf. The appointment must be in writing.
- (5) The Court may set aside the variation, cancellation or modification if it is satisfied that it would unfairly prejudice the applicants. However, the Court must confirm the variation, cancellation or modification if the Court is not satisfied of unfair prejudice.
- (6) Within 14 days after the Court makes an order, the company must lodge a copy of it with ASIC.
- (7) An offence based on subsection (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

246E Variation, cancellation or modification with unanimous support of class

If the members in a class all agree (whether by resolution or written consent) to the variation, cancellation or modification, it takes effect:

- (a) if no later date is specified in the resolution or consent—on the date of the resolution or consent; or
- (b) on a later date specified in the resolution or consent.

246F Company must lodge documents and resolutions with ASIC

- (1) A company must lodge with ASIC a notice in the prescribed form setting out particulars of any of the following:
 - (a) a division of shares in the company into classes if the shares were not previously so divided;
 - (b) a conversion of shares in a class of shares in the company into shares in another class.

Note: A proprietary company may also have to notify certain particulars under Part 2C.2.

Section 246G

- (2) The notice must be lodged within 14 days after the division or conversion.
- (3) A public company must lodge with ASIC a copy of each document (including an agreement or consent) or resolution that:
 - (a) does any of the following:
 - (i) attaches rights to issued or unissued shares;
 - (ii) varies or cancels rights attaching to issued or unissued shares;
 - (iii) varies or cancels rights of members in a class of members of a company that does not have a share capital;
 - (iv) binds a class of members; and
 - (b) is not already lodged with ASIC.

This also applies to a proprietary company that has applied under Part 2B.7 to change to a public company, while its application has not yet been determined.

- (3A) An offence based on subsection (1) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (4) The document must be lodged within 14 days after it is made. The resolution must be lodged within 14 days after it is passed.

246G Member's copies of documents and resolutions

- (1) A member of a company may ask the company in writing for a copy of a document or resolution referred to in section 246F. The company must send the copy to the member.
- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) If the company requires the member to pay for the copy, the company must send it:
 - (a) within 7 days after the company receives the payment; or
 - (b) within any longer period approved by ASIC.
- (3) The amount of any payment the company requires cannot exceed the prescribed amount.

Section 246G

- (4) If the company does not require payment for the copy, the company must send it:
 - (a) within 7 days after the member asks for it; or
 - (b) within any longer period approved by ASIC.

Part 2F.3—Inspection of books

247A Order for inspection of books of company or registered managed investment scheme

- (1) On application by a member of a company or registered managed investment scheme, the Court may make an order:
 - (a) authorising the applicant to inspect books of the company or scheme; or
 - (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.

The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

- (2) A person authorised to inspect books may make copies of the books unless the Court orders otherwise.
- (3) A person who:
 - (a) is granted leave under section 237; or
 - (b) applies for leave under that section; or
 - (c) is eligible to apply for leave under that section;may apply to the Court for an order under this section.
- (4) On application, the Court may make an order authorising:
 - (a) the applicant to inspect books of the company; or
 - (b) another person to inspect books of the company on the applicant's behalf.
- (5) The Court may make the order only if it is satisfied that:
 - (a) the applicant is acting in good faith; and
 - (b) the inspection is to be made for a purpose connected with:
 - (i) applying for leave under section 237; or
 - (ii) bringing or intervening in proceedings with leave under that section.
- (6) A person authorised to inspect books may make copies of the books unless the Court orders otherwise.

Section 247B

247B Ancillary orders

If the Court makes an order under section 247A, the Court may make any other orders it considers appropriate, including either or both of the following:

- (a) an order limiting the use that a person who inspects books may make of information obtained during the inspection;
- (b) an order limiting the right of a person who inspects books to make copies in accordance with subsection 247A(2).

247C Disclosure of information acquired in inspection

- (1) A person who inspects books on behalf of an applicant under section 247A must not disclose information obtained during the inspection.
- (2) Subsection (1) does not apply to the extent that the disclosure is to:
 - (a) ASIC; or
 - (b) the applicant.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2), see subsection 13.3(3) of the *Criminal Code*.

- (3) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

247D Company or directors may allow member to inspect books
(*replaceable rule see section 135*)

The directors of a company, or the company by a resolution passed at a general meeting, may authorise a member to inspect books of the company.

Chapter 2G—Meetings

Part 2G.1—Directors' meetings

Division 1—Resolutions and declarations without meetings

248A Circulating resolutions of companies with more than 1 director (*replaceable rule see section 135*)

Resolutions

- (1) The directors of a company may pass a resolution without a directors' meeting being held if all the directors entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document.

Copies

- (2) Separate copies of a document may be used for signing by directors if the wording of the resolution and statement is identical in each copy.

When the resolution is passed

- (3) The resolution is passed when the last director signs.

Note: Passage of a resolution under this section must be recorded in the company's minute books (see section 251A).

248B Resolutions and declarations of 1 director proprietary companies

Resolutions

- (1) The director of a proprietary company that has only 1 director may pass a resolution by recording it and signing the record.

Declarations

- (2) The director of a proprietary company that has only 1 director may make a declaration by recording it and signing the record.

Chapter 2G Meetings

Part 2G.1 Directors' meetings

Division 1 Resolutions and declarations without meetings

Section 248B

Recording and signing the declaration satisfies any requirement in this Act that the declaration be made at a directors' meeting.

Note 1: For directors' declarations, see sections 295 and 494.

Note 2: Passage of a resolution or the making of a declaration under this section must be recorded in the company's minute books (see section 251A).

Division 2—Directors' meetings

248C Calling directors' meetings (*replaceable rule see section 135*)

A directors' meeting may be called by a director giving reasonable notice individually to every other director.

Note: A director who has appointed an alternate director may ask for the notice to be sent to the alternate director (see subsection 201K(2)).

248D Use of technology

A directors' meeting may be called or held using any technology consented to by all the directors. The consent may be a standing one. A director may only withdraw their consent within a reasonable period before the meeting.

248E Chairing directors' meetings (*replaceable rule see section 135*)

- (1) The directors may elect a director to chair their meetings. The directors may determine the period for which the director is to be the chair.
- (2) The directors must elect a director present to chair a meeting, or part of it, if:
 - (a) a director has not already been elected to chair the meeting; or
 - (b) a previously elected chair is not available or declines to act, for the meeting or the part of the meeting.

248F Quorum at directors' meetings (*replaceable rule see section 135*)

Unless the directors determine otherwise, the quorum for a directors' meeting is 2 directors and the quorum must be present at all times during the meeting.

Note 1: For special quorum rules for public companies, see section 195.

Note 2: For resolutions of 1 director proprietary companies without meetings, see section 248B.

Section 248G

248G Passing of directors' resolutions (*replaceable rule see section 135*)

- (1) A resolution of the directors must be passed by a majority of the votes cast by directors entitled to vote on the resolution.
- (2) The chair has a casting vote if necessary in addition to any vote they have in their capacity as a director.

Note: The chair may be precluded from voting, for example, by a conflict of interest.

Part 2G.2—Meetings of members of companies

Division 1—Resolutions without meetings

249A Circulating resolutions of proprietary companies with more than 1 member

- (1) This section applies to resolutions of the members of proprietary companies that this Act or, if a company has a constitution, the company's constitution requires or permits to be passed at a general meeting. It does not apply to a resolution under section 329 to remove an auditor.
- (2) A company may pass a resolution without a general meeting being held if all the members entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document. Each member of a joint membership must sign.
- (3) Separate copies of a document may be used for signing by members if the wording of the resolution and statement is identical in each copy.
- (4) The resolution is passed when the last member signs.
- (5) A company that passes a resolution under this section without holding a meeting satisfies any requirement in this Act:
 - (a) to give members information or a document relating to the resolution—by giving members that information or document with the document to be signed; and
 - (b) to lodge with ASIC a copy of a notice of meeting to consider the resolution—by lodging a copy of the document to be signed by members; and
 - (c) to lodge a copy of a document that accompanies a notice of meeting to consider the resolution—by lodging a copy of the information or documents referred to in paragraph (a).
- (6) The passage of the resolution satisfies any requirement in this Act, or a company's constitution (if any), that the resolution be passed at a general meeting.

Chapter 2G Meetings

Part 2G.2 Meetings of members of companies

Division 1 Resolutions without meetings

Section 249B

- (7) This section does not affect any rule of law relating to the assent of members not given at a general meeting.

Note 1: A body corporate representative may sign a circulating resolution (see section 250D).

Note 2: Passage of a resolution under this section must be recorded in the company's minute books (see section 251A).

249B Resolutions of 1 member companies

- (1) A company that has only 1 member may pass a resolution by the member recording it and signing the record.
- (2) If this Act requires information or a document relating to the resolution to be lodged with ASIC, that requirement is satisfied by lodging the information or document with the resolution that is passed.

Note 1: A body corporate representative may sign such a resolution (see section 250D).

Note 2: Passage of a resolution under this section must be recorded in the company's minute books (see section 251A).

Division 2—Who may call meetings of members

249C Calling of meetings of members by a director (*replaceable rule—see section 135*)

A director may call a meeting of the company's members.

249CA Calling of meetings of members of a listed company by a director

- (1) A director may call a meeting of the company's members.
- (2) This section only applies to a company that is listed.
- (3) This section applies despite anything in the company's constitution.

249D Calling of general meeting by directors when requested by members

- (1) The directors of a company must call and arrange to hold a general meeting on the request of:
 - (a) members with at least 5% of the votes that may be cast at the general meeting; or
 - (b) at least 100 members who are entitled to vote at the general meeting.
- (1A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (1)(b) to:
 - (a) a particular company; or
 - (b) a particular class of company.

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the company.
- (2) The request must:
 - (a) be in writing; and
 - (b) state any resolution to be proposed at the meeting; and
 - (c) be signed by the members making the request; and
 - (d) be given to the company.

Section 249E

- (3) Separate copies of a document setting out the request may be used for signing by members if the wording of the request is identical in each copy.
- (4) The percentage of votes that members have is to be worked out as at the midnight before the request is given to the company.
- (5) The directors must call the meeting within 21 days after the request is given to the company. The meeting is to be held not later than 2 months after the request is given to the company.

249E Failure of directors to call general meeting

- (1) Members with more than 50% of the votes of all of the members who make a request under section 249D may call and arrange to hold a general meeting if the directors do not do so within 21 days after the request is given to the company.
- (2) The meeting must be called in the same way—so far as is possible—in which general meetings of the company may be called. The meeting must be held not later than 3 months after the request is given to the company.
- (3) To call the meeting the members requesting the meeting may ask the company under section 173 for a copy of the register of members. Despite paragraph 173(3)(b), the company must give the members the copy of the register without charge.
- (4) The company must pay the reasonable expenses the members incurred because the directors failed to call and arrange to hold the meeting.
- (4A) An offence based on subsection (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (5) The company may recover the amount of the expenses from the directors. However, a director is not liable for the amount if they prove that they took all reasonable steps to cause the directors to comply with section 249D. The directors who are liable are jointly and individually liable for the amount. If a director who is liable for the amount does not reimburse the company, the company must deduct the amount from any sum payable as fees to, or remuneration of, the director.

249F Calling of general meetings by members

- (1) Members with at least 5% of the votes that may be cast at a general meeting of the company may call, and arrange to hold, a general meeting. The members calling the meeting must pay the expenses of calling and holding the meeting.
- (2) The meeting must be called in the same way—so far as is possible—in which general meetings of the company may be called.
- (3) The percentage of votes that members have is to be worked out as at the midnight before the meeting is called.

249G Calling of meetings of members by the Court

- (1) The Court may order a meeting of the company's members to be called if it is impracticable to call the meeting in any other way.
- (2) The Court may make the order on application by:
 - (a) any director; or
 - (b) any member who would be entitled to vote at the meeting.

Note: For the directions the Court may give for calling, holding or conducting a meeting it has ordered be called, see section 1319.

Division 3—How to call meetings of members

249H Amount of notice of meetings

General rule

- (1) Subject to subsection (2), at least 21 days notice must be given of a meeting of a company's members. However, if a company has a constitution, it may specify a longer minimum period of notice.

Calling meetings on shorter notice

- (2) A company may call on shorter notice:
 - (a) an AGM, if all the members entitled to attend and vote at the AGM agree beforehand; and
 - (b) any other general meeting, if members with at least 95% of the votes that may be cast at the meeting agree beforehand.

A company cannot call an AGM or other general meeting on shorter notice if it is a meeting of the kind referred to in subsection (3) or (4).

Shorter notice not allowed—removing or appointing director

- (3) At least 21 days notice must be given of a meeting of the members of a public company at which a resolution will be moved to:
 - (a) remove a director under section 203D; or
 - (b) appoint a director in place of a director removed under that section.

Shorter notice not allowed—removing auditor

- (4) At least 21 days notice must be given of a meeting of a company at which a resolution will be moved to remove an auditor under section 329.

249HA Amount of notice of meetings of listed company

- (1) Despite section 249H, at least 28 days notice must be given of a meeting of a company's members.
- (2) This section only applies to a company that is listed.

- (3) This section applies despite anything in the company's constitution.

249J Notice of meetings of members to members and directors

Notice to members and directors individually

- (1) Written notice of a meeting of a company's members must be given individually to each member entitled to vote at the meeting and to each director. Notice need only be given to 1 member of a joint membership.

Notice to joint members (replaceable rule—see section 135)

- (2) Notice to joint members must be given to the joint member named first in the register of members.

How notice is given

- (3) A company may give the notice of meeting to a member:
- (a) personally; or
 - (b) by sending it by post to the address for the member in the register of members or the alternative address (if any) nominated by the member; or
 - (c) by sending it to the fax number or electronic address (if any) nominated by the member; or
 - (ca) by sending it to the member by other electronic means (if any) nominated by the member; or
 - (cb) by notifying the member in accordance with subsection (3A); or
 - (d) by any other means that the company's constitution (if any) permits.

Note: A defect in the notice given may not invalidate a meeting (see section 1322).

- (3A) If the member nominates:
- (a) an electronic means (the ***nominated notification means***) by which the member may be notified that notices of meeting are available; and
 - (b) an electronic means (the ***nominated access means***) the member may use to access notices of meeting;

Section 249K

the company may give the member notice of the meeting by notifying the member (using the nominated notification means):

- (c) that the notice of meeting is available; and
- (d) how the member may use the nominated access means to access the notice of meeting.

This subsection does not limit subsection (3).

When notice by post or fax is given (replaceable rule—see section 135)

- (4) A notice of meeting sent by post is taken to be given 3 days after it is posted. A notice of meeting sent by fax, or other electronic means, is taken to be given on the business day after it is sent.

When notice under paragraph (3)(cb) is given (replaceable rule—see section 135)

- (5) A notice of meeting given to a member under paragraph (3)(cb) is taken to be given on the business day after the day on which the member is notified that the notice of meeting is available.

249K Auditor entitled to notice and other communications

- (1) A company must give its auditor:
 - (a) notice of a general meeting in the same way that a member of the company is entitled to receive notice; and
 - (b) any other communications relating to the general meeting that a member of the company is entitled to receive.

Note 1: For when a company must have an auditor, see Part 2M.3.

Note 2: An auditor may appoint a representative to attend a meeting (see subsection 249V(4)).

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

249L Contents of notice of meetings of members

- (1) A notice of a meeting of a company's members must:
 - (a) set out the place, date and time for the meeting (and, if the meeting is to be held in 2 or more places, the technology that will be used to facilitate this); and

Section 249LA

- (b) state the general nature of the meeting's business; and
- (c) if a special resolution is to be proposed at the meeting—set out an intention to propose the special resolution and state the resolution; and
- (d) if a member is entitled to appoint a proxy—contain a statement setting out the following information:
 - (i) that the member has a right to appoint a proxy;
 - (ii) whether or not the proxy needs to be a member of the company;
 - (iii) that a member who is entitled to cast 2 or more votes may appoint 2 proxies and may specify the proportion or number of votes each proxy is appointed to exercise.

Note: There may be other requirements for disclosure to members.

- (2) The notice of the AGM of a listed company must also inform members that the resolution referred to in subsection 250R(2) (resolution on remuneration report) will be put at the AGM.
- (3) The information included in the notice of meeting must be worded and presented in a clear, concise and effective manner.

249LA Notice of meeting not required to contain certain information

- (1) The regulations may provide that a notice of a meeting of a company's members is not required by section 249L or otherwise to include information specified in the regulations if any conditions specified in the regulations are satisfied.
- (2) Without limiting subsection (1), the regulations may specify different conditions for:
 - (a) different kinds of information; and
 - (b) a notice of meeting given by a company or a class of companies.
- (3) If:
 - (a) regulations are made for the purposes of subsection (1); and
 - (b) a notice of meeting does not include particular information in accordance with those regulations;the information is taken to be included in the notice of meeting.

Chapter 2G Meetings

Part 2G.2 Meetings of members of companies

Division 3 How to call meetings of members

Section 249M

249M Notice of adjourned meetings (*replaceable rule—see section 135*)

When a meeting is adjourned, new notice of the resumed meeting must be given if the meeting is adjourned for 1 month or more.

Division 4—Members' rights to put resolutions etc. at general meetings

249N Members' resolutions

- (1) The following members may give a company notice of a resolution that they propose to move at a general meeting:
 - (a) members with at least 5% of the votes that may be cast on the resolution; or
 - (b) at least 100 members who are entitled to vote at a general meeting.
- (1A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (1)(b) to:
 - (a) a particular company; or
 - (b) a particular class of company.

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the company.
- (2) The notice must:
 - (a) be in writing; and
 - (b) set out the wording of the proposed resolution; and
 - (c) be signed by the members proposing to move the resolution.
- (3) Separate copies of a document setting out the notice may be used for signing by members if the wording of the notice is identical in each copy.
- (4) The percentage of votes that members have is to be worked out as at the midnight before the members give the notice.

249O Company giving notice of members' resolutions

- (1) If a company has been given notice of a resolution under section 249N, the resolution is to be considered at the next general meeting that occurs more than 2 months after the notice is given.
- (2) The company must give all its members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting.

Section 249P

- (3) The company is responsible for the cost of giving members notice of the resolution if the company receives the notice in time to send it out to members with the notice of meeting.
- (4) The members requesting the meeting are jointly and individually liable for the expenses reasonably incurred by the company in giving members notice of the resolution if the company does not receive the members' notice in time to send it out with the notice of meeting. At a general meeting, the company may resolve to meet the expenses itself.
- (5) The company need not give notice of the resolution:
 - (a) if it is more than 1,000 words long or defamatory; or
 - (b) if the members making the request are to bear the expenses of sending the notice out—unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur in giving the notice.

249P Members' statements to be distributed

- (1) Members may request a company to give to all its members a statement provided by the members making the request about:
 - (a) a resolution that is proposed to be moved at a general meeting; or
 - (b) any other matter that may be properly considered at a general meeting.
 - (2) The request must be made by:
 - (a) members with at least 5% of the votes that may be cast on the resolution; or
 - (b) at least 100 members who are entitled to vote at the meeting.
 - (2A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (2)(b) to:
 - (a) a particular company; or
 - (b) a particular class of company.

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the company.
 - (3) The request must be:
 - (a) in writing; and
 - (b) signed by the members making the request; and
-

- (c) given to the company.
- (4) Separate copies of a document setting out the request may be used for signing by members if the wording of the request is identical in each copy.
- (5) The percentage of votes that members have is to be worked out as at the midnight before the request is given to the company.
- (6) After receiving the request, the company must distribute to all its members a copy of the statement at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a general meeting.
- (7) The company is responsible for the cost of making the distribution if the company receives the statement in time to send it out to members with the notice of meeting.
- (8) The members making the request are jointly and individually liable for the expenses reasonably incurred by the company in making the distribution if the company does not receive the statement in time to send it out with the notice of meeting. At a general meeting, the company may resolve to meet the expenses itself.
- (9) The company need not comply with the request:
 - (a) if the statement is more than 1,000 words long or defamatory; or
 - (b) if the members making the request are responsible for the expenses of the distribution—unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur in making the distribution.

Division 5—Holding meetings of members

249Q Purpose

A meeting of a company's members must be held for a proper purpose.

249R Time and place for meetings of members

A meeting of a company's members must be held at a reasonable time and place.

249S Technology

A company may hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.

Note: See section 1322 for the consequences of a member not being given a reasonable opportunity to participate.

249T Quorum (*replaceable rule—see section 135*)

- (1) The quorum for a meeting of a company's members is 2 members and the quorum must be present at all times during the meeting.

Note: For single member companies, see section 249B.

- (2) In determining whether a quorum is present, count individuals attending as proxies or body corporate representatives. However, if a member has appointed more than 1 proxy or representative, count only 1 of them. If an individual is attending both as a member and as a proxy or body corporate representative, count them only once.

Note 1: For rights to appoint proxies, see section 249X.

Note 2: For body corporate representatives, see section 250D.

- (3) A meeting of the company's members that does not have a quorum present within 30 minutes after the time for the meeting set out in the notice of meeting is adjourned to the date, time and place the directors specify. If the directors do not specify 1 or more of those things, the meeting is adjourned to:

Section 249U

- (a) if the date is not specified—the same day in the next week;
and
 - (b) if the time is not specified—the same time; and
 - (c) if the place is not specified—the same place.
- (4) If no quorum is present at the resumed meeting within 30 minutes after the time for the meeting, the meeting is dissolved.

249U Chairing meetings of members (*replaceable rule—see section 135*)

- (1) The directors may elect an individual to chair meetings of the company's members.
- (2) The directors at a meeting of the company's members must elect an individual present to chair the meeting (or part of it) if an individual has not already been elected by the directors to chair it or, having been elected, is not available to chair it, or declines to act, for the meeting (or part of the meeting).
- (3) The members at a meeting of the company's members must elect a member present to chair the meeting (or part of it) if:
 - (a) a chair has not previously been elected by the directors to chair the meeting; or
 - (b) a previously elected chair is not available, or declines to act, for the meeting (or part of the meeting).
- (4) The chair must adjourn a meeting of the company's members if the members present with a majority of votes at the meeting agree or direct that the chair must do so.

249V Auditor's right to be heard at general meetings

- (1) A company's auditor is entitled to attend any general meeting of the company.

Note: Section 250RA imposes on the auditor of a listed public company an obligation to attend or be represented at the AGM.
- (2) The auditor is entitled to be heard at the meeting on any part of the business of the meeting that concerns the auditor in their capacity as auditor.

Section 249W

- (3) The auditor is entitled to be heard even if:
 - (a) the auditor retires at the meeting; or
 - (b) the meeting passes a resolution to remove the auditor from office.
- (4) The auditor may authorise a person in writing as their representative for the purpose of attending and speaking at any general meeting.

Note 1: At an AGM, members may ask the auditor questions (see section 250T).

Note 2: For when a company must have an auditor, see Part 2M.3.

249W Adjourned meetings

When resolution passed

- (1) A resolution passed at a meeting resumed after an adjournment is passed on the day it was passed.

Business at adjourned meetings (replaceable rule—see section 135)

- (2) Only unfinished business is to be transacted at a meeting resumed after an adjournment

Division 6—Proxies and body corporate representatives

249X Who can appoint a proxy (*replaceable rule for proprietary companies and mandatory rule for public companies—see section 135*)

- (1) A member of a company who is entitled to attend and cast a vote at a meeting of the company's members may appoint a person as the member's proxy to attend and vote for the member at the meeting.
- (1A) The person appointed as the member's proxy may be an individual or a body corporate.

Note: A body corporate may appoint a representative to exercise the powers that the body corporate may exercise as the member's proxy, see section 250D.
- (2) The appointment may specify the proportion or number of votes that the proxy may exercise.
- (3) Each member may appoint a proxy. If the member is entitled to cast 2 or more votes at the meeting, they may appoint 2 proxies. If the member appoints 2 proxies and the appointment does not specify the proportion or number of the member's votes each proxy may exercise, each proxy may exercise half of the votes.
- (4) Disregard any fractions of votes resulting from the application of subsection (2) or (3).

249Y Rights of proxies

Rights of proxies

- (1) A proxy appointed to attend and vote for a member has the same rights as the member:
 - (a) to speak at the meeting; and
 - (b) to vote (but only to the extent allowed by the appointment); and
 - (c) join in a demand for a poll.

Section 249Z

Proxy's right to vote

- (2) If a company has a constitution, the constitution may provide that a proxy is not entitled to vote on a show of hands.

Note: Even if the proxy is not entitled to vote on a show of hands, they may make or join in the demand for a poll.

Effect of member's presence on proxy's authority

- (3) A company's constitution (if any) may provide for the effect that a member's presence at a meeting has on the authority of a proxy appointed to attend and vote for the member. However, if the constitution does not deal with this, a proxy's authority to speak and vote for a member at a meeting is suspended while the member is present at the meeting.

249Z Company sending appointment forms or lists of proxies must send to all members

- (1) If a company sends a member a proxy appointment form for a meeting or a list of persons willing to act as proxies at a meeting:
- (a) if the member requested the form or list—the company must send the form or list to all members who ask for it and who are entitled to appoint a proxy to attend and vote at the meeting; or
 - (b) otherwise—the company must send the form or list to all its members entitled to appoint a proxy to attend and vote at the meeting.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

250A Appointing a proxy

- (1) An appointment of a proxy is valid if it is signed, or otherwise authenticated in a manner prescribed by the regulations, by the member of the company making the appointment and contains the following information:
- (a) the member's name and address;
 - (b) the company's name;
 - (c) the proxy's name or the name of the office held by the proxy;
 - (d) the meetings at which the appointment may be used.

An appointment may be a standing one.

- (1A) The regulations made for the purposes of subsection (1) may prescribe different requirements for the authentication of an appointment given to the company by different means (electronic or otherwise).
- (2) If a company has a constitution, the constitution may provide that an appointment is valid even if it contains only some of the information required by subsection (1).
- (3) An undated appointment is taken to have been dated on the day it is given to the company.
- (4) An appointment may specify the way the proxy is to vote on a particular resolution. If it does:
 - (a) the proxy need not vote on a show of hands, but if the proxy does so, the proxy must vote that way; and
 - (b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution—the proxy must not vote on a show of hands; and
 - (c) if the proxy is the chair—the proxy must vote on a poll, and must vote that way; and
 - (d) if the proxy is not the chair—the proxy need not vote on a poll, but if the proxy does so, the proxy must vote that way.

If a proxy is also a member, this subsection does not affect the way that the person can cast any votes they hold as a member.

Note: A company's constitution may provide that a proxy is not entitled to vote on a show of hands (see subsection 249Y(2)).

- (5) A person who contravenes subsection (4) is guilty of an offence, but only if their appointment as a proxy resulted from the company sending to members:
 - (a) a list of persons willing to act as proxies; or
 - (b) a proxy appointment form holding the person out as being willing to act as a proxy.

- (5A) An offence based on subsection (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (6) An appointment does not have to be witnessed.

Section 250B

- (7) A later appointment revokes an earlier one if both appointments could not be validly exercised at the meeting.

250B Proxy documents

Documents to be received by company before meeting

- (1) For an appointment of a proxy for a meeting of a company's members to be effective, the following documents must be received by the company at least 48 hours before the meeting:
- (a) the proxy's appointment;
 - (b) if the appointment is signed, or otherwise authenticated in a manner prescribed by regulations made for the purposes of subsection 250A(1), by the appointor's attorney—the authority under which the appointment was signed or authenticated or a certified copy of the authority.

Documents received following adjournment of meeting

- (2) If a meeting of a company's members has been adjourned, an appointment and any authority received by the company at least 48 hours before the resumption of the meeting are effective for the resumed part of the meeting.

Receipt of documents

- (3) A company receives a document referred to in subsection (1):
- (a) when the document is received at any of the following:
 - (i) the company's registered office;
 - (ii) a fax number at the company's registered office;
 - (iii) a place, fax number or electronic address specified for the purpose in the notice of meeting; and
 - (b) if the notice of meeting specifies other electronic means by which a member may give the document—when the document given by those means is received by the company as prescribed by the regulations.

Constitution or notice of meeting may provide for different notification period

- (5) The company's constitution (if any) or the notice of meeting may reduce the period of 48 hours referred to in subsection (1) or (2).

250BA Proxy documents—listed companies

- (1) In a notice of meeting for a meeting of the members of the company, the company:
 - (a) must specify a place and a fax number for the purposes of receipt of proxy appointments and proxy appointment authorities; and
 - (b) may specify:
 - (i) an electronic address for the purposes of receipt of proxy appointments and proxy appointment authorities; and
 - (ii) other electronic means by which a member may give the company a proxy appointment or proxy appointment authority.
- (2) This section only applies to a company that is listed.
- (3) This section applies despite anything in the company's constitution.

250C Validity of proxy vote

Proxy vote valid even if proxy cannot vote as member

- (1) A proxy who is not entitled to vote on a resolution as a member may vote as a proxy for another member who can vote if their appointment specifies the way they are to vote on the resolution and they vote that way.

*Proxy vote valid even if member dies, revokes appointment etc.
(replaceable rule—see section 135)*

- (2) Unless the company has received written notice of the matter before the start or resumption of the meeting at which a proxy votes, a vote cast by the proxy will be valid even if, before the proxy votes:
 - (a) the appointing member dies; or
 - (b) the member is mentally incapacitated; or
 - (c) the member revokes the proxy's appointment; or
 - (d) the member revokes the authority under which the proxy was appointed by a third party; or

Section 250D

- (e) the member transfers the share in respect of which the proxy was given.

Note: A proxy's authority to vote is suspended while the member is present at the meeting (see subsection 249Y(3)).

250D Body corporate representative

- (1) A body corporate may appoint an individual as a representative to exercise all or any of the powers the body corporate may exercise:
 - (a) at meetings of a company's members; or
 - (b) at meetings of creditors or debenture holders; or
 - (c) relating to resolutions to be passed without meetings; or
 - (d) in the capacity of a member's proxy appointed under subsection 249X(1).

The appointment may be a standing one.

- (2) The appointment may set out restrictions on the representative's powers. If the appointment is to be by reference to a position held, the appointment must identify the position.
- (3) A body corporate may appoint more than 1 representative but only 1 representative may exercise the body's powers at any one time.
- (4) Unless otherwise specified in the appointment, the representative may exercise, on the body corporate's behalf, all of the powers that the body could exercise at a meeting or in voting on a resolution.

Note: For resolutions of members without meetings, see sections 249A and 249B.

Division 7—Voting at meetings of members

250E How many votes a member has (*replaceable rule—see section 135*)

Company with share capital

- (1) Subject to any rights or restrictions attached to any class of shares, at a meeting of members of a company with a share capital:
 - (a) on a show of hands, each member has 1 vote; and
 - (b) on a poll, each member has 1 vote for each share they hold.

Note: Unless otherwise specified in the appointment, a body corporate representative has all the powers that a body corporate has as a member (including the power to vote on a show of hands).

Company without share capital

- (2) Each member of a company that does not have a share capital has 1 vote, both on a show of hands and a poll.

Chair's casting vote

- (3) The chair has a casting vote, and also, if they are a member, any vote they have in their capacity as a member.

Note 1: The chair may be precluded from voting, for example, by a conflict of interest.

Note 2: For rights to appoint proxies, see section 249X.

250F Jointly held shares (*replaceable rule—see section 135*)

If a share is held jointly and more than 1 member votes in respect of that share, only the vote of the member whose name appears first in the register of members counts.

250G Objections to right to vote (*replaceable rule—see section 135*)

A challenge to a right to vote at a meeting of a company's members:

- (a) may only be made at the meeting; and
- (b) must be determined by the chair, whose decision is final.

Section 250H

250H Votes need not all be cast in the same way

On a poll a person voting who is entitled to 2 or more votes:

- (a) need not cast all their votes; and
- (b) may cast their votes in different ways.

Note: For proxy appointments that specify the way the proxy is to vote on a particular resolution, see subsection 250A(4).

250J How voting is carried out (*replaceable rule—see section 135*)

- (1) A resolution put to the vote at a meeting of a company's members must be decided on a show of hands unless a poll is demanded.
- (1A) Before a vote is taken the chair must inform the meeting whether any proxy votes have been received and how the proxy votes are to be cast.
- (2) On a show of hands, a declaration by the chair is conclusive evidence of the result, provided that the declaration reflects the show of hands and the votes of the proxies received. Neither the chair nor the minutes need to state the number or proportion of the votes recorded in favour or against.

Note: Even though the chair's declaration is conclusive of the voting results, the members present may demand a poll (see paragraph 250L(3)(c)).

250K Matters on which a poll may be demanded

- (1) A poll may be demanded on any resolution.
- (2) If a company has a constitution, the constitution may provide that a poll cannot be demanded on any resolution concerning:
 - (a) the election of the chair of a meeting; or
 - (b) the adjournment of a meeting.
- (3) A demand for a poll may be withdrawn.

250L When a poll is effectively demanded

- (1) At a meeting of a company's members, a poll may be demanded by:
 - (a) at least 5 members entitled to vote on the resolution; or
 - (b) members with at least 5% of the votes that may be cast on the resolution on a poll; or
-

Section 250M

(c) the chair.

Note: A proxy may join in the demand for a poll (see paragraph 249Y(1)(c)).

- (2) If a company has a constitution, the constitution may provide that fewer members or members with a lesser percentage of votes may demand a poll.
- (3) The poll may be demanded:
 - (a) before a vote is taken; or
 - (b) before the voting results on a show of hands are declared; or
 - (c) immediately after the voting results on a show of hands are declared.
- (4) The percentage of votes that members have is to be worked out as at the midnight before the poll is demanded.

250M When and how polls must be taken (*replaceable rule—see section 135*)

- (1) A poll demanded on a matter other than the election of a chair or the question of an adjournment must be taken when and in the manner the chair directs.
- (2) A poll on the election of a chair or on the question of an adjournment must be taken immediately.

Division 8—AGMs of public companies

250N Public company must hold AGM

- (1) A public company must hold an annual general meeting (**AGM**) within 18 months after its registration.
- (2) A public company must hold an AGM at least once in each calendar year and within 5 months after the end of its financial year.

Note: An AGM held to satisfy this subsection may also satisfy subsection (1).

- (2A) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) An AGM is to be held in addition to any other meetings held by a public company in the year.

Note 1: The company's annual financial report, directors' report and auditor's report must be laid before the AGM (see section 317).

Note 2: The rules in sections 249C-250M apply to an AGM.

- (4) A public company that has only 1 member is not required to hold an AGM under this section.

250P Extension of time for holding AGM

- (1) A public company may lodge an application with ASIC to extend the period within which section 250N requires the company to hold an AGM.
- (2) If the company applies before the end of the period within which the company would otherwise be required to hold an AGM, ASIC may extend the period in writing. ASIC must specify the period of the extension.
- (3) A company granted an extension under subsection (2) must hold its AGM within the extended period.
- (4) ASIC may impose conditions on the extension and the company must comply with those conditions.

- (5) An offence based on subsection (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

250PAA Exemptions by ASIC—class orders relating to externally-administered companies

- (1) ASIC may, by legislative instrument, make an order exempting any of the following from section 250N:
- (a) a specified class of companies that are being wound up;
 - (b) a specified class of companies under administration;
 - (c) a specified class of companies subject to deeds of company arrangement.
- (2) The order may be:
- (a) unconditional; or
 - (b) subject to one or more specified conditions.
- (3) ASIC must cause a copy of the order to be published in the *Gazette*.

250PAB Exemptions by ASIC—individual externally-administered companies

- (1) The liquidator of a company that is being wound up may lodge an application with ASIC to exempt the company from section 250N.
- (2) The administrator of a company under administration may lodge an application with ASIC to exempt the company from section 250N.
- (3) The administrator of a deed of company arrangement may lodge an application with ASIC to exempt the company from section 250N.
- (4) If an application is lodged under subsection (1), (2) or (3), ASIC may, by writing, exempt the company from section 250N.
- (5) The exemption may be:
- (a) unconditional; or
 - (b) subject to one or more specified conditions.
- (6) ASIC must cause a copy of the exemption to be published in the *Gazette*.

Section 250PA

250PA Written questions to auditor submitted by members of listed company before AGM

Member may submit question

- (1) A member of a listed company who is entitled to cast a vote at the AGM may submit a written question to the auditor under this section if the question is relevant to:
 - (a) the content of the auditor's report to be considered at the AGM; or
 - (b) the conduct of the audit of the annual financial report to be considered at the AGM.

The member submits the question to the auditor under this subsection by giving the question to the listed company no later than the fifth business day before the day on which the AGM is held.

- (2) Despite the question being one that is addressed to the auditor, the listed company may:
 - (a) examine the contents of the question; and
 - (b) make a copy of the question.

Company to pass question on to auditor

- (3) The listed company must, as soon as practicable after the question is received by the company, pass the question on to the auditor. The company must pass the question on to the auditor even if the company believes the question is not relevant to the matters specified in paragraph (1)(a) and (b).

Contravention by individual auditor

- (4) If the auditor is an individual auditor, the auditor contravenes this subsection if the auditor does not prepare, and give to the listed company, a document (the **question list**) that sets out the questions that:
 - (a) the listed company has passed on to the auditor; and
 - (b) the auditor considers to be relevant to the matters specified in paragraphs (1)(a) and (b);as soon as practicable after the end of the time for submitting questions under subsection (1) and a reasonable time before the AGM.

Section 250PA

- (5) An offence based on subsection (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Contravention by lead auditor

- (6) A person contravenes this subsection if:
- (a) the auditor is an audit firm or audit company; and
 - (b) the person is the lead auditor for the audit; and
 - (c) the person does not prepare, and give to the listed company, a document (the *question list*) that sets out the questions that:
 - (i) the listed company has passed on to the auditor; and
 - (ii) the person considers to be relevant to the matters specified in paragraphs (1)(a) or (b);as soon as practicable after the end of the time for submitting questions under subsection (1) and a reasonable time before the AGM.

- (7) An offence based on subsection (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Certain questions do not need to be included in question list

- (8) A question need not be included in the question list under subsection (4) or (6) if:
- (a) the question list includes a question that is the same in substance as that question (even if it is differently expressed); or
 - (b) it is not practicable to include the question in the question list, or to decide whether to include the question in the question list, because of the time when the question is passed on to the auditor.

Listed company to make question list available at AGM

- (9) The listed company must, at or before the start of the AGM, make copies of the question list reasonably available to the members attending the AGM.

Section 250R

250R Business of AGM

- (1) The business of an AGM may include any of the following, even if not referred to in the notice of meeting:
 - (a) the consideration of the annual financial report, directors' report and auditor's report;
 - (b) the election of directors;
 - (c) the appointment of the auditor;
 - (d) the fixing of the auditor's remuneration.
- (2) At a listed company's AGM, a resolution that the remuneration report be adopted must be put to the vote.

Note: Under subsection 249L(2), the notice of the AGM must inform members that this resolution will be put at the AGM.
- (3) The vote on the resolution is advisory only and does not bind the directors or the company.

250RA Auditor required to attend listed company's AGM

Contravention by individual auditor

- (1) If a listed company's auditor for a financial year is an individual auditor, the auditor contravenes this subsection if:
 - (a) the auditor does not attend the company's AGM at which the audit report for that financial year is considered; and
 - (b) the auditor does not arrange to be represented, at that AGM, by a person who:
 - (i) is a suitably qualified member of the audit team that conducted the audit; and
 - (ii) is in a position to answer questions about the audit.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Contravention by lead auditor

- (3) A person contravenes this subsection if:
 - (a) a listed company's auditor for a financial year is an audit firm or an audit company; and
 - (b) the person is the lead auditor for the audit; and

Section 250S

- (c) the person is not represented, at the AGM at which the audit report for that financial year is considered, by a person who:
 - (i) is a suitably qualified member of the audit team that conducted the audit; and
 - (ii) is in a position to answer questions about the audit.
- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

250S Questions and comments by members on company management at AGM

- (1) The chair of an AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

250SA Listed company—remuneration report

At a listed company's AGM, the chair must allow a reasonable opportunity for the members as a whole to ask questions about, or make comments on, the remuneration report. This section does not limit section 250S.

250T Questions by members of auditors at AGM

- (1) If the company's auditor or their representative is at the meeting, the chair of an AGM must:
 - (a) allow a reasonable opportunity for the members as a whole at the meeting to ask the auditor or the auditor's representative questions relevant to:
 - (i) the conduct of the audit; and
 - (ii) the preparation and content of the auditor's report; and
 - (iii) the accounting policies adopted by the company in relation to the preparation of the financial statements; and
 - (iv) the independence of the auditor in relation to the conduct of the audit; and

Section 250T

- (b) allow a reasonable opportunity for the auditor or their representative to answer written questions submitted to the auditor under section 250PA.
- (2) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (3) If :
 - (a) the company's auditor or their representative is at the meeting; and
 - (b) the auditor has prepared a written answer to a written question submitted to the auditor under section 250PA;the Chair of the AGM may permit the auditor or their representative to table the written answer to the written question.
- (4) The listed company must make the written answer tabled under subsection (3) reasonably available to members as soon as practicable after the AGM.

Part 2G.3—Minutes and members' access to minutes

251A Minutes

- (1) A company must keep minute books in which it records within 1 month:
 - (a) proceedings and resolutions of meetings of the company's members; and
 - (b) proceedings and resolutions of directors' meetings (including meetings of a committee of directors); and
 - (c) resolutions passed by members without a meeting; and
 - (d) resolutions passed by directors without a meeting; and
 - (e) if the company is a proprietary company with only 1 director—the making of declarations by the director.

Note: For resolutions and declarations without meetings, see sections 248A, 248B, 249A and 249B.

- (2) The company must ensure that minutes of a meeting are signed within a reasonable time after the meeting by 1 of the following:
 - (a) the chair of the meeting;
 - (b) the chair of the next meeting.
- (3) The company must ensure that minutes of the passing of a resolution without a meeting are signed by a director within a reasonable time after the resolution is passed.
- (4) The director of a proprietary company with only 1 director must sign the minutes of the making of a declaration by the director within a reasonable time after the declaration is made.
- (5) A company must keep its minute books at:
 - (a) its registered office; or
 - (b) its principal place of business in this jurisdiction; or
 - (c) another place in this jurisdiction approved by ASIC.
- (5A) An offence based on subsection (1), (2), (3), (4) or (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section 251AA

- (6) A minute that is so recorded and signed is evidence of the proceeding, resolution or declaration to which it relates, unless the contrary is proved.

251AA Disclosure of proxy votes—listed companies

- (1) A company must record in the minutes of a meeting, in respect of each resolution in the notice of meeting, the total number of proxy votes exercisable by all proxies validly appointed and:
 - (a) if the resolution is decided by a show of hands—the total number of proxy votes in respect of which the appointments specified that:
 - (i) the proxy is to vote for the resolution; and
 - (ii) the proxy is to vote against the resolution; and
 - (iii) the proxy is to abstain on the resolution; and
 - (iv) the proxy may vote at the proxy's discretion; and
 - (b) if the resolution is decided on a poll—the information specified in paragraph (a) and the total number of votes cast on the poll:
 - (i) in favour of the resolution; and
 - (ii) against the resolution; and
 - (iii) abstaining on the resolution.
- (2) A company that must notify the operator of each market on which financial products of the company are listed of a resolution passed by members at a meeting of the company must, at the same time, give the relevant market operator the information specified in subsection (1).
- (3) This section only applies to a company that is listed.
- (4) This section applies despite anything in the company's constitution.

251B Members' access to minutes

- (1) A company must ensure that the minute books for the meetings of its members and for resolutions of members passed without meetings are open for inspection by members free of charge.

Section 251B

- (2) A member of a company may ask the company in writing for a copy of:
 - (a) any minutes of a meeting of the company's members or an extract of the minutes; or
 - (b) any minutes of a resolution passed by members without a meeting.
- (3) If the company does not require the member to pay for the copy, the company must send it:
 - (a) within 14 days after the member asks for it; or
 - (b) within any longer period that ASIC approves.
- (4) If the company requires payment for the copy, the company must send it:
 - (a) within 14 days after the company receives the payment; or
 - (b) within any longer period that ASIC approves.

The amount of any payment the company requires cannot exceed the prescribed amount.
- (5) An offence based on subsection (1), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 2G.4—Meetings of members of registered managed investment schemes

Division 1—Who may call meetings of members

252A Calling of meetings of members by responsible entity

The responsible entity of a registered scheme may call a meeting of the scheme's members.

252B Calling of meetings of members by responsible entity when requested by members

- (1) The responsible entity of a registered scheme must call and arrange to hold a meeting of the scheme's members to consider and vote on a proposed special or extraordinary resolution on the request of:
 - (a) members with at least 5% of the votes that may be cast on the resolution; or
 - (b) at least 100 members who are entitled to vote on the resolution.
- (1A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (1)(b) to:
 - (a) a particular scheme; or
 - (b) a particular class of scheme.

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the scheme.
- (2) The request must:
 - (a) be in writing; and
 - (b) state any resolution to be proposed at the meeting; and
 - (c) be signed by the members proposing to move the resolution.
- (3) The request may be accompanied by a statement about the proposed resolution provided by the members making the request.
- (4) Separate copies of a document setting out the request and statement (if any) may be used for signing by members if the wording of the request and statement (if any) is identical in each copy.

- (5) The percentage of the votes that members have is to be worked out as at the midnight before the request is given to the responsible entity.
- (6) The responsible entity must call the meeting within 21 days after the request is given to it. The meeting is to be held not later than 2 months after the request is given to the responsible entity.
- (7) The responsible entity must give to each of the members a copy of the proposed resolution and statement (if any) at the same time, or as soon as practicable afterwards, as it gives notice of the meeting. The responsible entity must distribute the copies in the same way in which it gives notice of the meeting.
- (8) The responsible entity does not have to distribute a copy of the resolution or statement if either is more than 1,000 words long or defamatory.
- (9) The responsible entity is responsible for the expenses of calling and holding the meeting and making the distribution. The responsible entity may meet those expenses from the scheme's assets.

252C Failure of responsible entity to call meeting of the scheme's members

- (1) Members with more than 50% of the votes carried by interests held by the members who make a request under section 252B may call and arrange to hold a meeting of the scheme's members and distribute the statement (if any) if the responsible entity does not do so within 21 days after the request is given to the responsible entity.
- (2) The meeting must be called and the statement is to be distributed in the same way—so far as is possible—in which meetings of the scheme's members may be called by the responsible entity and information is distributed to members by the responsible entity. The meeting must be held not later than 3 months after the request is given to the responsible entity.
- (3) To call the meeting the members requesting the meeting may ask the responsible entity under section 173 for a copy of the register of members. Despite paragraph 173(3)(b), the responsible entity

Section 252D

must give the members requesting the meeting the copy of the register without charge.

- (4) The responsible entity must pay the reasonable expenses the members incurred because the responsible entity failed to call and arrange to hold the meeting and to make the distribution (if any). The responsible entity must not pay those expenses from the scheme's assets.
- (5) An offence based on subsection (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

252D Calling of meetings of members by members

- (1) Members of a registered scheme who hold interests carrying at least 5% of the votes that may be cast at a meeting of the scheme's members may call and arrange to hold a meeting of the scheme's members to consider and vote on a proposed special resolution or a proposed extraordinary resolution. The members calling the meeting must pay the expenses of calling and holding the meeting.
- (2) The meeting must be called in the same way—so far as is possible—in which meetings of the scheme's members may be called by the responsible entity.
- (3) The percentage of the votes carried by interests that members hold is to be worked out as at the midnight before the meeting is called.

252E Calling of meetings of members by the Court

- (1) The Court may order a meeting of a registered scheme's members to be called to consider and vote on a proposed special or extraordinary resolution if it is impracticable to call the meeting in any other way.
- (2) The Court may make the order on application by:
 - (a) the responsible entity; or
 - (b) any member of the scheme who would be entitled to vote at the meeting.

Note: For the directions the Court may give for calling, holding or conducting a meeting it has ordered be called, see section 1319.

Division 2—How to call meetings of members

252F Amount of notice of meetings

At least 21 days notice must be given of a meeting of the members of a registered scheme. However, the scheme's constitution may specify a longer minimum period of notice.

252G Notice of meetings of members to members, directors and auditors

Notice to members, directors and auditors individually

- (1) Written notice of a meeting of a registered scheme's members must be given to:
 - (a) each member of the scheme entitled to vote at the meeting; and
 - (b) each director of the responsible entity; and
 - (c) the auditor of the scheme; and
 - (d) the auditor of the scheme compliance plan.

If an interest is held jointly, notice need only be given to 1 of the members.

Notice to joint members

- (2) Unless the scheme's constitution provides otherwise, notice to joint members must be given to the joint member named first in the register of members.

How notice is given

- (3) Unless the scheme's constitution provides otherwise, the responsible entity may give notice of the meeting to a member:
 - (a) personally; or
 - (b) by sending it by post to the address for the member in the register of members or an alternative address (if any) nominated by the member; or
 - (c) by sending it to the fax number or electronic address (if any) nominated by the member.

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 2 How to call meetings of members

Section 252H

Note: A defect in the notice given may not invalidate a meeting (see section 1322).

When notice by post or fax is given

- (4) Unless the scheme's constitution provides otherwise, a notice of meeting sent by post is taken to be given 3 days after it is posted. A notice of meeting sent by fax, or other electronic means, is taken to be given on the business day after it is sent.

252H Auditors entitled to other communications

- (1) The responsible entity of a registered scheme must give the auditor of the scheme and the auditor of the scheme compliance plan any other communications relating to the meeting that a member of the scheme is entitled to receive.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

252J Contents of notice of meetings of members

A notice of a meeting of a registered scheme's members must:

- (a) set out the place, date and time for the meeting (and, if the meeting is to be held in 2 or more places, the technology that will be used to facilitate this); and
- (b) state the general nature of the meeting's business; and
- (c) if a special or extraordinary resolution is to be proposed at the meeting—set out an intention to propose the special or extraordinary resolution and state the resolution; and
- (d) contain a statement setting out the following information:
 - (i) that the member has a right to appoint a proxy;
 - (ii) that the proxy does not need to be a member of the registered scheme;
 - (iii) that if the member appoints 2 proxies the member may specify the proportion or number of votes the proxy is appointed to exercise.

Note: There may be other requirements for disclosure to members.

252K Notice of adjourned meetings

When a meeting is adjourned, new notice of the adjourned meeting must be given if the meeting is adjourned for 1 month or more.

Division 3—Members' rights to put resolutions etc. at meetings of members

252L Members' resolutions

- (1) The following members of a registered scheme may give the responsible entity notice of a resolution that they propose to move at a meeting of the scheme's members:
- (a) members with at least 5% of the votes that may be cast on the resolution; or
 - (b) at least 100 members who are entitled to vote at a meeting of the scheme's members.

- (1A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (1)(b) to:
- (a) a particular scheme; or
 - (b) a particular class of scheme.

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the scheme.

- (1B) The resolution must be:
- (a) a special resolution; or
 - (b) an extraordinary resolution; or
 - (c) a resolution to remove the responsible entity of a scheme that is listed and choose a new responsible entity.
- (2) The notice must:
- (a) be in writing; and
 - (b) set out the wording of the proposed resolution; and
 - (c) be signed by the members giving the notice.
- (3) Separate copies of a document setting out the notice may be used for signing by members if the wording of the notice is identical in each copy.
- (4) The percentage of the votes that members have is to be worked out as at the midnight before the members give the notice.

252M Responsible entity giving notice of members' resolutions

- (1) If a responsible entity has been given notice of a resolution under section 252L, the resolution is to be considered at the next meeting of the scheme's members that occurs more than 2 months after the notice is given.
- (2) The responsible entity must give all the members of the scheme notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting.
- (3) The responsible entity is responsible for the cost of giving members notice of the resolution if the responsible entity receives the notice in time to send it out to members with the notice of meeting.
- (4) The members requesting the meeting are jointly and individually liable for the expenses reasonably incurred by the responsible entity in giving members notice of the resolution if the responsible entity does not receive the members' notice in time to send it out with the notice of meeting. A resolution may be passed at a meeting of the scheme's members that the responsible entity is to meet the expenses out of the scheme's assets.
- (5) The responsible entity need not give notice of the resolution:
 - (a) if it is more than 1,000 words long or defamatory; or
 - (b) if the members making the request are to bear the expenses of sending the notice out—unless the members give the responsible entity a sum reasonably sufficient to meet the expenses that it will reasonably incur in giving the notice.

252N Members' statements to be distributed

- (1) Members may request a responsible entity to give to all its members a statement provided by the members making the request about:
 - (a) a resolution that is proposed to be moved at a meeting of the scheme's members; or
 - (b) any other matter that may be properly considered at a meeting of the scheme's members.

Section 252N

- (2) The request must be made by:
 - (a) members with at least 5% of the votes that may be cast on the resolution; or
 - (b) at least 100 members who are entitled to vote at the meeting.
- (2A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (2)(b) to:
 - (a) a particular scheme; or
 - (b) a particular class of scheme.

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the scheme.
- (3) The request must be:
 - (a) in writing; and
 - (b) signed by the members making the request; and
 - (c) given to the responsible entity.
- (4) Separate copies of a document setting out the request may be used for signing by members if the wording of the request is identical in each copy.
- (5) The percentage of the votes that members have is to be worked out as at the midnight before the request is given to the responsible entity.
- (6) After receiving the request, the responsible entity must distribute to all the members of the scheme a copy of the statement at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting.
- (7) The responsible entity is responsible for the cost of making the distribution if the responsible entity receives the statement in time to send it out to members with the notice of meeting.
- (8) The members making the request are jointly and individually liable for the expenses reasonably incurred by the responsible entity in making the distribution if the responsible entity does not receive the statement in time to send it out with the notice of meeting. A resolution may be passed at a meeting of the scheme's members that the responsible entity is to meet the expenses out of the scheme's assets.

- (9) The responsible entity need not comply with the request:
- (a) if the statement is more than 1,000 words long or defamatory; or
 - (b) if the members making the request are responsible for the expenses of the distribution—unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur in making the distribution.

Division 4—Holding meetings of members

252P Time and place for meetings of members

A meeting of a registered scheme's members must be held at a reasonable time and place.

252Q Technology

A responsible entity of a registered scheme may hold a meeting of the scheme's members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.

Note: See section 1322 for the consequences of members not being given a reasonable opportunity to participate.

252R Quorum

- (1) This section applies to a registered scheme subject to the provisions of the scheme's constitution.
- (2) The quorum for a meeting of a registered scheme's members is 2 members and the quorum must be present at all times during the meeting.
- (3) In determining whether a quorum is present, count individuals attending as proxies or body corporate representatives. However, if a member has appointed more than 1 proxy or representative, count only 1 of them. If an individual is attending both as a member and as a proxy or body corporate representative, count them only once.

Note 1: For rights to appoint proxies, see section 252V.

Note 2: For body corporate representatives, see section 253B.

- (4) A meeting of the scheme's members that does not have a quorum present within 30 minutes after the time for the start of the meeting set out in the notice of meeting is adjourned to the date, time and place the responsible entity specifies. If the responsible entity does not specify 1 or more of those things, the meeting is adjourned to:
 - (a) if the date is not specified—the same day in the next week;
 - and

- (b) if the time is not specified—the same time; and
 - (c) if the place is not specified—the same place.
- (5) If no quorum is present at the resumed meeting within 30 minutes after the time for the start of the meeting, the meeting is dissolved.

252S Chairing meetings of members

- (1) The responsible entity may, in writing, appoint an individual to chair a meeting called under section 252A or 252B.
- (2) The members present at a meeting called under section 252A or 252B must elect a member present to chair the meeting (or part of it) if:
 - (a) a chair has not previously been appointed to chair the meeting; or
 - (b) a previously appointed chair is not available, or declines to act, for the meeting (or part of the meeting).
- (3) The members present at a meeting called under section 252C, 252D or 252E must elect a member present to chair the meeting. This is not so if the meeting is called under section 252E and the Court has directed otherwise under section 1319.

252T Auditors' right to be heard at meetings of members

- (1) The auditor of a registered scheme and the auditor of the scheme compliance plan are entitled to attend any meeting of the scheme's members.
- (2) An auditor is entitled to be heard at the meeting on any part of the business of the meeting that concerns the auditor in their capacity as auditor.
- (3) An auditor may authorise a person in writing as their representative for the purpose of attending and speaking at any meeting of the scheme's members.

252U Adjourned meetings

- (1) A resolution passed at a meeting resumed after an adjournment is passed on the day it was passed.

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 4 Holding meetings of members

Section 252U

- (2) Only unfinished business is to be transacted at a meeting resumed after an adjournment.

Division 5—Proxies and body corporate representatives

252V Who can appoint a proxy

- (1) A member of a registered scheme who is entitled to attend and cast a vote at a meeting of the scheme's members may appoint a person as the member's proxy to attend and vote for the member at the meeting.
- (2) The appointment may specify the proportion or number of votes that the proxy may exercise.
- (3) A member may appoint 1 or 2 proxies. If the member appoints 2 proxies and the appointment does not specify the proportion or number of the member's votes each proxy may exercise, each proxy may exercise half of the votes.
- (4) Disregard any fractions of votes resulting from the application of subsection (2) or (3).

252W Rights of proxies

Rights of proxies

- (1) A proxy appointed to attend and vote for a member has the same rights as the member:
 - (a) to speak at the meeting; and
 - (b) to vote (but only to the extent allowed by the appointment).

Proxy's right to vote

- (2) A registered scheme's constitution (if any) may provide that a proxy is not entitled to vote on a show of hands.

Note: Even if the proxy is not entitled to vote on a show of hands, they may make or join in the demand for a poll (see section 253L).

Effect of member's presence on proxy's authority

- (3) A registered scheme's constitution (if any) may provide for the effect that a member's presence at a meeting has on the authority of a proxy appointed to attend and vote for the member. However, if the constitution does not make such provision, a proxy's

Section 252X

authority to speak and vote for a member at a meeting is suspended while the member is present at the meeting.

252X Responsible entity sending appointment forms or lists of proxies must send to all members

- (1) If the responsible entity of a registered scheme sends a member a proxy appointment form for a meeting or a list of persons willing to act as proxies at a meeting:
 - (a) if the member requested the form or list—the responsible entity must send the form or list to all members who ask for it and who are entitled to appoint a proxy to attend and vote at the meeting; or
 - (b) otherwise—the responsible entity must send the form or list to all its members entitled to appoint a proxy to attend and vote at the meeting.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

252Y Appointing a proxy

- (1) An appointment of a proxy is valid if it is signed by the member of the registered scheme making the appointment and contains the following information:
 - (a) the member's name and address;
 - (b) the scheme's name;
 - (c) the proxy's name or the name of the office held by the proxy;
 - (d) the meetings at which the appointment may be used.

An appointment may be a standing one

- (2) A registered scheme's constitution may provide that an appointment is valid even if it contains only some of the information required by subsection (1).
- (3) An undated appointment is taken to have been dated on the day it is given to the responsible entity.

Section 252Z

- (4) An appointment may specify the way the proxy is to vote on a particular resolution. If it does:
- (a) the proxy need not vote on a show of hands, but if the proxy does so, the proxy must vote that way; and
 - (b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution—the proxy must not vote on a show of hands; and
 - (c) if the proxy is the chair—the proxy must vote on a poll, and must vote that way; and
 - (d) if the proxy is not the chair—the proxy need not vote on a poll, but if the proxy does so, the proxy must vote that way.
- If a proxy is also a member, this subsection does not affect the way that the person can cast any votes they hold as a member.

Note: The scheme's constitution may provide that a proxy is not entitled to vote on a show of hands (see subsection 252W(2)).

- (5) A person who contravenes subsection (4) is guilty of an offence, but only if their appointment as a proxy resulted from the responsible entity sending to members:
- (a) a list of persons willing to act as proxies; or
 - (b) a proxy appointment form holding the person out as being willing to act as a proxy.
- (5A) An offence based on subsection (5) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (6) An appointment does not have to be witnessed.
- (7) A later appointment revokes an earlier one if both appointments could not be validly exercised at the meeting.

252Z Proxy documents

Section applies subject to scheme's constitution

- (1) Subsections (2), (3) and (4) apply to a registered scheme subject to the provisions of the scheme's constitution.

Documents to be received by responsible entity before meeting

- (2) For an appointment of a proxy for a meeting of the scheme's members to be effective, the following documents must be

Section 252Z

received by the responsible entity at least 48 hours before the meeting:

- (a) the proxy's appointment
- (b) if the appointment is signed by the appointor's attorney—the authority under which the appointment was signed or a certified copy of the authority.

Documents received following adjournment of meeting

- (3) If a meeting of the scheme's members has been adjourned, an appointment and any authority received by the responsible entity at least 48 hours before the resumption of the meeting are effective for the resumed part of the meeting.

Receipt of documents

- (3A) A responsible entity receives an appointment authority when it is received at any of the following:
 - (a) the responsible entity's registered office;
 - (b) a fax number at the responsible entity's registered office;
 - (c) a place, fax number or electronic address specified for the purpose in the notice of meeting.

Ineffective appointments of fax or electronic notification

- (4) An appointment of a proxy is ineffective if:
 - (a) the responsible entity receives either or both the appointment or authority at a fax number or electronic address; and
 - (b) a requirement (if any) in the notice of meeting that:
 - (i) the transmission be verified in a way specified in the notice; or
 - (ii) the proxy produce the appointment and authority (if any) at the meeting;is not complied with.

Constitution or notice of meeting may provide for different notification period

- (5) The scheme's constitution or the notice of meeting may reduce the period of 48 hours referred to in subsection (2) or (3).

253A Validity of proxy vote

Proxy vote valid even if member dies, revokes appointment etc.

- (1) Unless the responsible entity has received written notice of the matter before the start or resumption of the meeting at which a proxy votes, a vote cast by the proxy will be valid even if, before the proxy votes:
 - (a) the appointing member dies; or
 - (b) the member is mentally incapacitated; or
 - (c) the member revokes the proxy's appointment; or
 - (d) the member revokes the authority under which the proxy was appointed by a third party; or
 - (e) the member transfers the interest in respect of which the proxy was given.

This subsection applies to a registered scheme subject to the provisions of the scheme's constitution.

Note: A proxy's authority to vote is suspended while the member is present at the meeting (see subsection 252W(3)).

Proxy vote valid even if proxy cannot vote as member

- (2) A proxy who is not entitled to vote on a resolution as a member may vote as a proxy for another member who can vote if their appointment specifies the way they are to vote on the resolution and they vote that way.

253B Body corporate representative

- (1) A body corporate may appoint an individual as a representative to exercise all or any of its powers at a meeting of a registered scheme's members. The appointment may be a standing one.
- (2) The appointment must set out what the representative is appointed to do and may set out restrictions on the representative's powers. If the appointment is to be by reference to a position held, the appointment must identify the position.
- (3) A body corporate may appoint more than 1 representative but only 1 representative may exercise the body's powers at any one time.

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 5 Proxies and body corporate representatives

Section 253B

- (4) Unless otherwise specified in the appointment, the representative may exercise, on the body corporate's behalf, all of the powers that the body could exercise at a meeting or in voting on a resolution.

Division 6—Voting at meetings of members

253C How many votes a member has

- (1) On a show of hands, each member of a registered scheme has 1 vote.
- (2) On a poll, each member of the scheme has 1 vote for each dollar of the value of the total interests they have in the scheme.

Note 1: For rights to appoint proxies, see section 252V.

Note 2: Unless otherwise specified in the appointment, a body corporate representative has all the powers that a body corporate has as a member (including the power to vote on a show of hands).

253D Jointly held interests

If an interest in a registered scheme is held jointly and more than 1 member votes in respect of that interest, only the vote of the member whose name appears first in the register of members counts.

253E Responsible entity and associates cannot vote if interested in resolution

The responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member. However, if the scheme is listed, the responsible entity and its associates are entitled to vote their interest on resolutions to remove the responsible entity and choose a new responsible entity.

Note: The responsible entity and its associates may vote as proxies if their appointments specify the way they are to vote and they vote that way (see subsection 253A(2)).

253F How to work out the value of an interest

The value of an interest in a registered scheme is:

- (a) if it is quoted on a prescribed financial market—the last sale price on that market on the trading day immediately before the day on which the poll is taken; or

Section 253G

- (b) if it is not quoted on a prescribed financial market and the scheme is liquid and has a withdrawal provision in its constitution—the amount that would be paid for the interest under that provision on the business day immediately before the day on which the poll is taken; or
- (c) in any other case—the amount that the responsible entity determines in writing to be the price that a willing but not anxious buyer would pay for the interest if it was sold on the business day immediately before the day on which the poll is taken.

253G Objections to a right to vote

A challenge to a right to vote at a meeting of members of a registered scheme:

- (a) may only be made at the meeting; and
- (b) must be determined by the chair, whose decision is final.

253H Votes need not all be cast in the same way

On a poll a person voting who is entitled to 2 or more votes:

- (a) need not cast all their votes; and
- (b) may cast their votes in different ways.

Note: For proxy appointments that specify the proxy is to vote on a particular resolution, see subsection 252Y(4).

253J How voting is carried out

- (1) A special or extraordinary resolution put to the vote at a meeting of a registered scheme's members must be decided on a poll.
- (2) Any other resolution put to the vote at a meeting of the scheme's members must be decided on a show of hands unless a poll is demanded. The resolution is passed on a poll if it has been passed by at least 50% of the votes cast by members entitled to vote on the resolution.
- (3) On a show of hands, a declaration by the chair is conclusive evidence of the result. Neither the chair nor the minutes need to state the number or proportion of the votes recorded in favour or against.

Note: Even though the chair's declaration is conclusive of the voting results, the members present may demand a poll (see paragraph 253L(3)(c)).

253K Matters on which a poll may be demanded

- (1) A poll may be demanded on any resolution.
- (2) A registered scheme's constitution may provide that a poll cannot be demanded on any resolution concerning:
 - (a) the election of the chair of a meeting; or
 - (b) the adjournment of a meeting.
- (3) A demand for a poll may be withdrawn.

253L When a poll is effectively demanded

- (1) At a meeting of a registered scheme's members, a poll may be demanded by:
 - (a) at least 5 members present entitled to vote on the resolution; or
 - (b) members present with at least 5% of the votes that may be cast on the resolution on a poll; or
 - (c) the chair.
- (2) A registered scheme's constitution may provide that fewer members or members with a lesser percentage of votes may demand a poll.
- (3) The poll may be demanded:
 - (a) before a vote is taken; or
 - (b) before the voting results on a show of hands are declared; or
 - (c) immediately after the voting results on a show of hands are declared.
- (4) The percentage of votes that members have is to be worked out as at close of business on the day before the poll is demanded.

Division 7—Minutes and members' access to minutes

253M Minutes

- (1) A responsible entity of a registered scheme must keep minute books in which it records within 1 month:
 - (a) proceedings of meetings of the scheme's members; and
 - (b) resolutions of meetings of the scheme's members.
- (2) The responsible entity must ensure that minutes of a meeting are signed within a reasonable time after the meeting by the chair of the meeting or the chair of the next meeting.
- (3) The responsible entity must keep the minute books at:
 - (a) its registered office; or
 - (b) its principal place of business in this jurisdiction; or
 - (c) another place in this jurisdiction approved by ASIC.
- (3A) An offence based on subsection (1), (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (4) A minute that is so recorded and signed is evidence of the proceeding or resolution to which it relates, unless the contrary is proved.

253N Members' access to minutes

- (1) The responsible entity of a registered scheme must ensure that the minute books for the meetings of the scheme's members are open for inspection by members free of charge.
- (2) A member of a registered scheme may ask the responsible entity in writing for a copy of any minutes of a meeting of the scheme's members or an extract of the minutes.
- (3) If the responsible entity does not require the member to pay for the copy, the responsible entity must send it:
 - (a) within 14 days after the member asks for it; or
 - (b) within any longer period that ASIC approves.

- (4) If the responsible entity requires payment for the copy, the responsible entity must send it:
- (a) within 14 days after the responsible entity receives the payment; or
 - (b) within any longer period that ASIC approves.

The amount of any payment the responsible entity requires cannot exceed the prescribed amount.

- (5) An offence based on subsection (1), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Chapter 2H—Shares

Part 2H.1—Issuing and converting shares

254A Power to issue bonus, partly-paid, preference and redeemable preference shares

- (1) A company's power under section 124 to issue shares includes the power to issue:
- (a) bonus shares (shares for whose issue no consideration is payable to the issuing company); and
 - (b) preference shares (including redeemable preference shares); and
 - (c) partly-paid shares (whether or not on the same terms for the amount of calls to be paid or the time for paying calls).
- Note 1: Subsections 246C(5) and (6) provide that in certain circumstances the issue of preference shares is taken to be a variation of class rights.
- Note 2: Partly-paid shares are dealt with in sections 254M-254N.
- Note 3: On the issue of a bonus share there need not be any increase in the company's share capital.
- (2) A company can issue preference shares only if the rights attached to the preference shares with respect to the following matters are set out in the company's constitution (if any) or have been otherwise approved by special resolution of the company:
- (a) repayment of capital;
 - (b) participation in surplus assets and profits;
 - (c) cumulative and non-cumulative dividends;
 - (d) voting;
 - (e) priority of payment of capital and dividends in relation to other shares or classes of preference shares.
- (3) Redeemable preference shares are preference shares that are issued on the terms that they are liable to be redeemed. They may be redeemable:
- (a) at a fixed time or on the happening of a particular event; or
 - (b) at the company's option; or
 - (c) at the shareholder's option.

Section 254B

Note: Redeemable preference shares are dealt with in sections 254J-254L.

254B Terms of issue

- (1) A company may determine:
- (a) the terms on which its shares are issued; and
 - (b) the rights and restrictions attaching to the shares.

Note 1: Details of any division of shares into classes or conversion of classes of shares must be given to ASIC by a notice in the prescribed form (see subsection 246F(1)).

Note 2: For public companies, any document or resolution that attaches rights to shares or varies or cancels rights attaching to shares must be lodged with ASIC (see subsection 246F(3)).

Note 3: Sections 246B-246G provide safeguards in cases where class rights are cancelled or varied.

Note 4: The company cannot issue par value shares (see section 254C) or bearer shares (see section 254F).

No liability companies—special terms of issue

- (2) A share in a no liability company is issued on the following terms:
- (a) if a no liability company is wound up and a surplus remains, it must be distributed among the parties entitled to it in proportion to the number of shares held by them, irrespective of the amounts paid up on the shares; and
 - (b) a member who is in arrears in payment of a call on a share, but whose share has not been forfeited, is not entitled to participate in the distribution on the basis of holding that share until the amount owing in respect of the call has been fully paid and satisfied.

Companies incorporated as no liability companies—special terms of issue

- (3) If a company:
- (a) either:
 - (i) is a no liability company; or
 - (ii) was initially registered as a no liability company and has changed its status under section 162 to another type of company; and
 - (b) ceases to carry on business within 12 months after its registration and is wound up;

Section 254C

shares issued for cash rank (to the extent of the capital contributed by subscribing shareholders) in the winding up in priority to shares issued to vendors or promoters, or both, for consideration other than cash.

- (4) The holders of shares issued to vendors or promoters are not entitled to preference on the winding up of a company that:
- (a) is a no liability company; or
 - (b) was initially registered as a no liability company and has changed its status under section 162 to another type of company.

This is so despite anything in the company's constitution or the terms on which the shares are on issue.

254C No par value shares

Shares of a company have no par value.

Note: The Part 10.1 transitional provisions contain provisions that deal with the introduction of no par value shares. See also subsection 169(4).

254D Pre-emption for existing shareholders on issue of shares in proprietary company (*replaceable rule—see section 135*)

- (1) Before issuing shares of a particular class, the directors of a proprietary company must offer them to the existing holders of shares of that class. As far as practicable, the number of shares offered to each shareholder must be in proportion to the number of shares of that class that they already hold.
- (2) To make the offer, the directors must give the shareholders a statement setting out the terms of the offer, including:
 - (a) the number of shares offered; and
 - (b) the period for which it will remain open.
- (3) The directors may issue any shares not taken up under the offer under subsection (1) as they see fit.
- (4) The company may by resolution passed at a general meeting authorise the directors to make a particular issue of shares without complying with subsection (1).

Section 254E

254E Court validation of issue

- (1) On application by a company, a shareholder, a creditor or any other person whose interests have been or may be affected, the Court may make an order validating, or confirming the terms of, a purported issue of shares if:
 - (a) the issue is or may be invalid for any reason; or
 - (b) the terms of the issue are inconsistent with or not authorised by:
 - (i) this Act; or
 - (ii) another law of a State or Territory; or
 - (iii) the company's constitution (if any).
- (2) On lodgment of a copy of the order with ASIC, the order has effect from the time of the purported issue.

254F Bearer shares and stock must not be issued

A company does not have the power to:

- (a) issue bearer shares; or
- (b) issue stock or convert shares into stock.

Note: The Part 10.1 transitionals contain provisions for the conversion of existing stock into shares.

254G Conversion of shares

- (1) A company may:
 - (a) convert an ordinary share into a preference share; and
 - (b) convert a preference share into an ordinary share.
- Note: The variation of class rights provisions (sections 246B-246G) will apply to the conversion.
- (2) A company can convert ordinary shares into preference shares only if the holders' rights with respect to the following matters are set out in the company's constitution (if any) or have been otherwise approved by special resolution of the company:
 - (a) repayment of capital;
 - (b) participation in surplus assets and profits;
 - (c) cumulative and non-cumulative dividends;
 - (d) voting;

Section 254H

- (e) priority of payment of capital and dividends in relation to other shares or classes of preference shares.
- (3) A share that is not a redeemable preference share when issued cannot afterwards be converted into a redeemable preference share.

254H Resolution to convert shares into larger or smaller number

- (1) A company may convert all or any of its shares into a larger or smaller number of shares by resolution passed at a general meeting.

Note: The variation of class rights provisions (sections 246B-246G) may apply to the conversion.

- (2) The conversion takes effect on:
 - (a) the day the resolution is passed; or
 - (b) a later date specified in the resolution.
- (3) Any amount unpaid on shares being converted is to be divided equally among the replacement shares.
- (4) The company must lodge a copy of the resolution with ASIC within 1 month after it is passed.
- (5) An offence based on subsection (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 2H.2—Redemption of redeemable preference shares

254J Redemption must be in accordance with terms of issue

- (1) A company may redeem redeemable preference shares only on the terms on which they are on issue. On redemption, the shares are cancelled.

Note: For the power to issue redeemable preference shares see paragraph 254A(1)(b) and subsections 254A(2) and (3).

- (2) This section does not affect the terms on which redeemable preference shares may be cancelled under a reduction of capital or a share buy-back under Part 2J.1.

254K Other requirements about redemption

A company may only redeem redeemable preference shares:

- (a) if the shares are fully paid-up; and
- (b) out of profits or the proceeds of a new issue of shares made for the purpose of the redemption.

Note: For a director's duty to prevent insolvent trading on redeeming redeemable preference shares, see section 588G.

254L Consequences of contravening section 254J or 254K

- (1) If a company redeems shares in contravention of section 254J or 254K:
 - (a) the contravention does not affect the validity of the redemption or of any contract or transaction connected with it; and
 - (b) the company is not guilty of an offence.
- (2) Any person who is involved in a company's contravention of section 254J or 254K contravenes this subsection.

Note 1: Subsection (2) is a civil penalty provision (see section 1317E).

Note 2: Section 79 defines *involved*.

Section 254L

- (3) A person commits an offence if they are involved in a company's contravention of section 254J or 254K and the involvement is dishonest.

Part 2H.3—Partly-paid shares

254M Liability on partly-paid shares

General rule about shareholder's liability for calls

- (1) If shares in a company are partly-paid, the shareholder is liable to pay calls on the shares in accordance with the terms on which the shares are on issue. This subsection does not apply to a no liability company.

Note: The shareholder may also be liable as a contributory under sections 514-529 if the company is wound up.

No liability companies

- (2) The acceptance by a person of a share in a no liability company, whether by issue or transfer, does not constitute a contract by the person to pay:
 - (a) calls in respect of the share; or
 - (b) any contribution to the debts and liabilities of the company.

254N Calls may be limited to when company is externally-administered

- (1) A limited company may provide by special resolution that the whole or a part of its unpaid share capital may be called up only if the company becomes an externally-administered body corporate.
- (2) The company must lodge with ASIC a copy of the special resolution within 14 days after it is passed.
- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

254P No liability companies—calls on shares

Making calls

- (1) A call on a share in a no liability company is not effective unless it is made payable at least 14 days after the call is made.

Section 254Q

Notice of call

- (2) At least 7 days before a call on shares in a no liability company becomes payable, the company must give the holders of the shares notice of:

- (a) the amount of the call; and
- (b) the day when it is payable; and
- (c) the place for payment.

The notice must be sent by post. If the notice is not given, the call is not payable.

- (3) A call does not have any effect on a forfeited share that is held by or in trust for the company under subsection 254Q(6). However, when the share is re-issued or sold by the company, the share may be credited as paid up to the amount determined by the company in accordance with its constitution or by resolution.

254Q No liability companies—forfeiture and sale of shares for failure to meet call

Forfeiture and sale of shares

- (1) A share in a no liability company is immediately forfeited if:
- (a) a call is made on the share; and
 - (b) the call is unpaid at the end of 14 days after it became payable.

Note: The holder of the share may redeem it under section 254R.

- (2) The forfeited share must then be offered for sale by public auction within 6 weeks after the call became payable.

Advertisement of sale

- (3) At least 14 days, and not more than 21 days, before the day of the sale, the sale must be advertised in a daily newspaper circulating generally throughout Australia. The specific number of shares to be offered need not be specified in the advertisement and it is sufficient to give notice of the sale by advertising to the effect that all shares on which a call remains unpaid will be sold.

Postponement of sale

- (4) An intended sale of forfeited shares that has been duly advertised may be postponed for not more than 21 days from the advertised date of sale. The date to which the sale is postponed must be advertised in a daily newspaper circulating generally in Australia.
- (5) There may be more than 1 postponement but the sale cannot be postponed to a date more than 90 days from the first date fixed for the intended sale.

Shares may be offered as credited to a particular amount

- (6) The share may be sold credited as paid up to the sum of:
 - (a) the amount paid upon the share at the time of forfeiture; and
 - (b) the amount of the call; and
 - (c) the amount of any other calls becoming payable on or before the day of the sale;if the company in accordance with its constitution or by ordinary resolution so determines.

Reserve price

- (7) The directors may fix a reserve price for the share that does not exceed the sum of:
 - (a) the amount of the call due and unpaid on the share at the time of forfeiture; and
 - (b) the amount of any other calls that become payable on or before the date of the sale.

Withdrawal from sale

- (8) The share may be withdrawn from sale if no bid at least equal to the reserve price is made at the sale.

Disposal of shares withdrawn from sale

- (9) If:
 - (a) no bid for the share is received at the sale; or
 - (b) the share is withdrawn from sale;the share must be held by the directors in trust for the company. It must be then disposed of in the manner determined by the

Section 254Q

company in accordance with its constitution or by resolution. Unless otherwise specifically provided by resolution, the share must first be offered to shareholders for a period of 14 days before being disposed of in any other manner.

Suspension of voting rights attached to share held in trust

- (10) At any meeting of the company, no person is entitled to any vote in respect of the shares held by the directors in trust under subsection (9).

Application of proceeds of sale

- (11) The proceeds of the sale under subsection (2) or the disposal under subsection (9) must be applied to pay:
- (a) first, the expenses of the sale; and
 - (b) then, any expenses necessarily incurred in respect of the forfeiture; and
 - (c) then, the calls on the share that are due and unpaid.

The balance (if any) must be paid to the member whose share has been sold. If there is a share certificate that relates to the share, the balance does not have to be paid until the member delivers the certificate to the company.

Validity of sale

- (12) If a sale is not held in time because of error or inadvertence, a late sale is not invalid if it is held as soon as practicable after the discovery of the error or inadvertence.

Failure to comply an offence

- (13) If there is failure to comply with subsection (2) or (3), the company and any officer of the company who is involved in the contravention are each guilty of an offence.

Strict liability offences

- (14) An offence by the company based on subsection (13) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section 254R

254R No liability companies—redemption of forfeited shares

- (1) Despite section 254Q, if a person's share has been forfeited, the person may redeem the share, at any time up to or on the last business day before the proposed sale, by paying the company:
 - (a) all calls due on the share; and
 - (b) if the company so requires:
 - (i) a portion, calculated on a *pro rata* basis, of all expenses incurred by the company in respect of the forfeiture; and
 - (ii) a portion, calculated on a *pro rata* basis, of all costs and expenses of any proceeding that has been taken in respect of the forfeiture.

On payment, the person is entitled to the share as if the forfeiture had not occurred.

- (2) On the last business day before the proposed sale, the registered office of the company must be open during the hours for which it is by this Act required to be open and accessible to the public.

Part 2H.4—Capitalisation of profits

254S Capitalisation of profits

A company may capitalise profits. The capitalisation need not be accompanied by the issue of shares.

Part 2H.5—Dividends

254T Dividends to be paid out of profits

A dividend may only be paid out of profits of the company.

Note: For a director's duty to prevent insolvent trading on payment of dividends, see section 588G.

254U Other provisions about paying dividends (*replaceable rule—see section 135*)

- (1) The directors may determine that a dividend is payable and fix:
 - (a) the amount; and
 - (b) the time for payment; and
 - (c) the method of payment.

The methods of payment may include the payment of cash, the issue of shares, the grant of options and the transfer of assets.

- (2) Interest is not payable on a dividend.

254V When does the company incur a debt?

- (1) A company does not incur a debt merely by fixing the amount or time for payment of a dividend. The debt arises only when the time fixed for payment arrives and the decision to pay the dividend may be revoked at any time before then.
- (2) However, if the company has a constitution and it provides for the declaration of dividends, the company incurs a debt when the dividend is declared.

254W Dividend rights

Shares in public companies

- (1) Each share in a class of shares in a public company has the same dividend rights unless:
 - (a) the company has a constitution and it provides for the shares to have different dividend rights; or

Section 254W

- (b) different dividend rights are provided for by special resolution of the company.

Shares in proprietary companies (replaceable rule—see section 135)

- (2) Subject to the terms on which shares in a proprietary company are on issue, the directors may pay dividends as they see fit.

No liability companies

- (3) A person is not entitled to a dividend on a share in a no liability company if a call:
 - (a) has been made on the share; and
 - (b) is due and unpaid.
- (4) Dividends are payable to the shareholders in a no liability company in proportion to the number of shares held by them, irrespective of the amount paid up, or credited as paid up, on the shares. This subsection has effect subject to any provisions in the company's constitution relating to shares that are not ordinary shares.

Part 2H.6—Notice requirements

254X Notice to ASIC of share issue

- (1) Within 28 days after issuing shares, a company must lodge with ASIC a notice in the prescribed form that sets out:
- (a) the number of shares that were issued; and
 - (b) if the company has different classes of shares—the class to which each of those shares belongs; and
 - (c) the amount (if any) paid, or agreed to be considered as paid, on each of those shares; and
 - (d) the amount unpaid (if any) on each of those shares; and
 - (e) if the company is a public company and the shares were issued for non-cash consideration—the prescribed particulars about the issue of the shares, unless the shares were issued under a written contract and a copy of the contract is lodged with the notice.

Note 1: The company must lodge information when rights attached to the shares change, or when the shares are divided or converted into new classes (see section 246F).

Note 2: A proprietary company may also have to notify certain particulars under Part 2C.2.

- (2) If the shares were issued for non-cash consideration under a contract, the company must also lodge with ASIC a certificate stating that all stamp duty payable on the contract under any applicable law relating to stamp duty has been paid. This certificate must be lodged with the subsection (1) notice or at a later time permitted by the regulations or by ASIC.
- (2A) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) The company does not have to lodge a subsection (1) notice about the issue of shares to a person on the registration of the company or on the company changing its type from a company limited by guarantee to a company limited by shares.

Section 254Y

Note: Information about shares issued in these situations will come to ASIC under subsections 5H(2), 117(2), 163(3) and 601BC(2).

254Y Notice to ASIC of share cancellation

- (1) Within 1 month after shares are cancelled, the company must lodge with ASIC a notice in the prescribed form that sets out:
- (a) the number of shares cancelled; and
 - (b) any amount paid by the company (in cash or otherwise) on the cancellation of the shares; and
 - (c) if the shares are cancelled following a share buy-back—the amount paid by the company (in cash or otherwise) on the buy-back; and
 - (d) if the company has different classes of shares—the class to which each cancelled share belonged.

Note: Provisions under which shares are cancelled include section 254J (redeemable preference shares), section 256B (capital reductions), subsection 257H(3) (shares a company has bought back), section 258D (forfeited shares), and subsections 258E(2) and (3) (shares returned to a company).

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Chapter 2J—Transactions affecting share capital

Part 2J.1—Share capital reductions and share buy-backs

256A Purpose

This Part states the rules to be followed by a company for reductions in share capital and for share buy-backs. The rules are designed to protect the interests of shareholders and creditors by:

- (a) addressing the risk of these transactions leading to the company's insolvency
- (b) seeking to ensure fairness between the company's shareholders
- (c) requiring the company to disclose all material information.

Section 256B

Division 1—Reductions in share capital not otherwise authorised by law

256B Company may make reduction not otherwise authorised

- (1) A company may reduce its share capital in a way that is not otherwise authorised by law if the reduction:
- (a) is fair and reasonable to the company's shareholders as a whole; and
 - (b) does not materially prejudice the company's ability to pay its creditors; and
 - (c) is approved by shareholders under section 256C.

A cancellation of a share for no consideration is a reduction of share capital, but paragraph (b) does not apply to this kind of reduction.

Note 1: One of the ways in which a company might reduce its share capital is cancelling uncalled capital.

Note 2: Sections 258A-258F deal with some of the other situations in which reductions of share capital are authorised. Subsection 254K(2) authorises capital reductions involved in the redemption of redeemable preference shares and subsection 257A(2) authorises reductions involved in share buy-backs.

Note 3: For a director's duty to prevent insolvent trading on reductions of share capital, see section 588G.

- (1A) To avoid doubt, a cancellation of a partly-paid share is taken to be for consideration.
- (2) The reduction is either an equal reduction or a selective reduction. The reduction is an *equal reduction* if:
- (a) it relates only to ordinary shares; and
 - (b) it applies to each holder of ordinary shares in proportion to the number of ordinary shares they hold; and
 - (c) the terms of the reduction are the same for each holder of ordinary shares.
- Otherwise, the reduction is a *selective reduction*.
- (3) In applying subsection (2), ignore differences in the terms of the reduction that are:

- (a) attributable to the fact that shares have different accrued dividend entitlements; or
- (b) attributable to the fact that shares have different amounts unpaid on them; or
- (c) introduced solely to ensure that each shareholder is left with a whole number of shares.

256C Shareholder approval

Ordinary resolution required for equal reduction

- (1) If the reduction is an equal reduction, it must be approved by a resolution passed at a general meeting of the company.

Special shareholder approval for selective reduction

- (2) If the reduction is a selective reduction, it must be approved by either:
 - (a) a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution by any person who is to receive consideration as part of the reduction or whose liability to pay amounts unpaid on shares is to be reduced, or by their associates; or
 - (b) a resolution agreed to, at a general meeting, by all ordinary shareholders.

If the reduction involves the cancellation of shares, the reduction must also be approved by a special resolution passed at a meeting of the shareholders whose shares are to be cancelled.

- (3) The company must lodge with ASIC a copy of any resolution under subsection (2) within 14 days after it is passed. The company must not make the reduction until 14 days after lodgment.

Note: A proprietary company may also have to notify certain particulars under Part 2C.2.

Information to accompany the notice of meeting

- (4) The company must include with the notice of the meeting a statement setting out all information known to the company that is material to the decision on how to vote on the resolution. However, the company does not have to disclose information if it would be

Section 256D

unreasonable to require the company to do so because the company had previously disclosed the information to its shareholders.

Documents to be lodged with ASIC

- (5) Before the notice of the meeting is sent to shareholders, the company must lodge with ASIC a copy of:
- (a) the notice of the meeting; and
 - (b) any document relating to the reduction that will accompany the notice of the meeting sent to shareholders.

256D Consequences of failing to comply with section 256B

- (1) The company must not make the reduction unless it complies with subsection 256B(1).
- (2) If the company contravenes subsection (1):
- (a) the contravention does not affect the validity of the reduction or of any contract or transaction connected with it; and
 - (b) the company is not guilty of an offence.

- (3) Any person who is involved in a company's contravention of subsection (1) contravenes this subsection.

Note 1: Subsection (3) is a civil penalty provision (see section 1317E).

Note 2: Section 79 defines *involved*.

- (4) A person commits an offence if they are involved in a company's contravention of section 256B and the involvement is dishonest.

256E Signposts to other relevant provisions

The following table lists other provisions of this Act that are relevant to reductions in share capital.

Other provisions relevant to reductions in share capital

1	section 588G	liability of directors on insolvency
	section 1317H	Under the combined operation of these sections the directors may have to compensate the company if the company is, or becomes, insolvent when the company reduces its share capital.

Section 256E

Other provisions relevant to reductions in share capital		
2	section 1324	injunctions to restrain contravention Under this section the Court may grant an injunction against conduct that constitutes or would constitute a contravention of this Act.
4	Chapter 6CA	continuous disclosure provisions Under this Chapter a disclosing entity is required to disclose information about its securities that is material and not generally available.
5	Chapter 2E	benefits to related parties to be disclosed Under this Chapter a financial benefit to a director or other related party that could adversely affect the interests of a public company's members as a whole must be approved at a general meeting before it can be given.
6	section 125	provisions in constitution This section deals with the way in which a company's constitution may restrict the exercise of the company's powers and the consequences of a failure to observe these restrictions.
7	sections 246B-246G	variation of class rights These sections deal with the variation of rights attached to a class of shares. This variation may be governed by the provisions of the company's constitution.

Section 257A

Division 2—Share buy-backs

257A The company's power to buy back its own shares

A company may buy back its own shares if:

- (a) the buy-back does not materially prejudice the company's ability to pay its creditors; and
- (b) the company follows the procedures laid down in this Division.

Note 1: If a company has a constitution, it may include provisions in the constitution that preclude the company buying back its own shares or impose restrictions on the exercise of the company's power to buy back its own shares.

Note 2: A company may buy-back redeemable preference shares and may do so on terms other than the terms on which they could be redeemed. For the redemption of redeemable preference shares, see sections 254J-254L.

257B Buy-back procedure—general

- (1) The following table specifies the steps required for, and the sections that apply to, the different types of buy-back.

Procedures [and sections applied]	minimum holding	employee share scheme		on-market		equal access scheme		selective buy-back
		within 10/12 limit	over 10/12 limit	within 10/12 limit	over 10/12 limit	within 10/12 limit	over 10/12 limit	
ordinary resolution [257C]	—	—	yes	—	yes	—	yes	—
special/unanimous resolution [257D]	—	—	—	—	—	—	—	yes
lodge offer documents with ASIC [257E]	—	—	—	—	—	yes	yes	yes
14 days notice [257F]	—	yes	yes	yes	yes	yes	yes	yes
disclose relevant information when offer made [257G]	—	—	—	—	—	yes	yes	yes

Section 257B

Procedures [and sections applied]	minimum holding	employee share scheme		on-market		equal access scheme		selective buy-back
		within 10/12 limit	over 10/12 limit	within 10/12 limit	over 10/12 limit	within 10/12 limit	over 10/12 limit	
cancel shares [257H]	yes	yes	yes	yes	yes	yes	yes	yes
notify cancellation to ASIC [254Y]	yes	yes	yes	yes	yes	yes	yes	yes

Note: Subsections (2) and (3) of this section explain what an equal access scheme is. The 10/12 limit is the 10% in 12 months limit laid down in subsections (4) and (5). Subsections (6) and (7) of this section explain what an on-market buy-back is. See section 9 for definitions of *minimum holding buy-back*, *employee share scheme buy-back* and *selective buy-back*.

Equal access scheme

- (2) An equal access scheme is a scheme that satisfies all the following conditions:
- (a) the offers under the scheme relate only to ordinary shares;
 - (b) the offers are to be made to every person who holds ordinary shares to buy back the same percentage of their ordinary shares;
 - (c) all of those persons have a reasonable opportunity to accept the offers made to them;
 - (d) buy-back agreements are not entered into until a specified time for acceptances of offers has closed;
 - (e) the terms of all the offers are the same.
- (3) In applying subsection (2), ignore:
- (a) differences in consideration attributable to the fact that the offers relate to shares having different accrued dividend entitlements;
 - (b) differences in consideration attributable to the fact that the offers relate to shares on which different amounts remain unpaid;
 - (c) differences in the offers introduced solely to ensure that each shareholder is left with a whole number of shares.

Section 257C

10/12 limit

- (4) The 10/12 limit for a company proposing to make a buy-back is 10% of the smallest number, at any time during the last 12 months, of votes attaching to voting shares of the company.

Exceeding the 10/12 limit

- (5) A proposed buy-back would exceed the 10/12 limit if the number of votes attaching to:
- (a) all the voting shares in the company that have been bought back during the last 12 months; and
 - (b) the voting shares that will be bought back if the proposed buy-back is made;
- would exceed the 10/12 limit.

On-market buy-backs

- (6) A buy-back is an on-market buy-back if it results from an offer made by a listed corporation on a prescribed financial market in the ordinary course of trading on that market.
- (7) A buy-back by a company (whether listed or not) is also an on-market buy-back if it results from an offer made in the ordinary course of trading in a financial market outside Australia which ASIC declares in writing to be an approved overseas financial market for the purposes of this subsection. A buy-back by a listed company is an on-market buy-back under this subsection only if an offer to buy-back those shares is also made on a prescribed financial market at the same time.
- (8) A declaration under paragraph (7)(b) may be subject to conditions. Notice of the making of the declaration must be published in the *Gazette*.

257C Buy-back procedure—shareholder approval if the 10/12 limit exceeded

Ordinary resolution required

- (1) If section 257B applies this section to a buy-back, the terms of the buy-back agreement must be approved before it is entered into by a

resolution passed at a general meeting of the company, or the agreement must be conditional on such an approval.

Information to accompany the notice of meeting

- (2) The company must include with the notice of the meeting a statement setting out all information known to the company that is material to the decision how to vote on the resolution. However, the company does not have to disclose information if it would be unreasonable to require the company to do so because the company had previously disclosed the information to its shareholders.

Documents to be lodged with the ASIC

- (3) Before the notice of the meeting is sent to shareholders, the company must lodge with ASIC a copy of:
 - (a) the notice of the meeting; and
 - (b) any document relating to the buy-back that will accompany the notice of the meeting sent to shareholders.

257D Buy-back procedure—special shareholder approval for selective buy-back

Selective buy-back requires special or unanimous resolution

- (1) If section 257B applies this section to a buy-back, the terms of the buy-back agreement must be approved before it is entered into by either:
 - (a) a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution by any person whose shares are proposed to be bought back or by their associates; or
 - (b) a resolution agreed to, at a general meeting, by all ordinary shareholders;or the agreement must be conditional on such an approval.

Information to accompany the notice of meeting

- (2) The company must include with the notice of the meeting a statement setting out all information known to the company that is material to the decision how to vote on the resolution. However, the company does not have to disclose information if it would be

Section 257E

unreasonable to require the company to do so because the company had previously disclosed the information to its shareholders.

Documents to be lodged with the ASIC

- (3) Before the notice of the meeting is sent to shareholders, the company must lodge with ASIC a copy of:
 - (a) the notice of the meeting; and
 - (b) any document relating to the buy-back that will accompany the notice of the meeting sent to shareholders.
- (4) ASIC may exempt a company from the operation of this section. The exemption:
 - (a) must be in writing; and
 - (b) must be granted before the buy-back agreement is entered into; and
 - (c) may be granted subject to conditions.

257E Buy-back procedure—lodgment of offer documents with ASIC

If section 257B applies this section to a buy-back, the company must lodge with ASIC, before the buy-back agreement is entered into, a copy of:

- (a) a document setting out the terms of the offer; and
- (b) any document that is to accompany the offer.

257F Notice of intended buy-back

- (1) If section 257B applies this section to a buy-back, the company must satisfy the lodgment requirement in subsection (2) at least 14 days before:
 - (a) if the buy-back agreement is conditional on the passing of a resolution under subsection 257C(1) or 257D(1)—the resolution is passed; or
 - (b) if it is not—the agreement is entered into.
- (2) The company satisfies the lodgment requirement when it lodges with ASIC:
 - (a) documents under subsection 257C(3) or 257D(3) or section 257E; or
 - (b) a notice that the company intends to carry out the buy-back.

Section 257G

- Note 1: A company that has to lodge documents under section 257C, 257D or 257E needs to lodge a notice under paragraph (2)(b) of this section only if it wants for some reason to enter into the agreement or pass the resolution less than 14 days after lodging the section 257C, 257D or 257E documents.
- Note 2: The company may specify a buy-back under paragraph (2)(b) in any way. It may, for instance, choose to lodge a notice covering buy-backs to be carried out:
- under a particular scheme; or
 - as part of particular on-market buy-back activity.

257G Buy-back procedure—disclosure of relevant information when offer made

If section 257B applies this section to a buy-back, the company must include with the offer to buy back shares a statement setting out all information known to the company that is material to the decision whether to accept the offer.

257H Acceptance of offer and transfer of shares to the company

Effect of acceptance of the buy-back offer on share rights

- (1) Once a company has entered into an agreement to buy back shares, all rights attaching to the shares are suspended. The suspension is lifted if the agreement is terminated.

Shares transferred to the company and cancelled

- (2) A company must not dispose of shares it buys back. An agreement entered into in contravention of this subsection is void.
- (3) Immediately after the registration of the transfer to the company of the shares bought back, the shares are cancelled.

Note: ASIC must be notified of the cancellation under section 254Y.

257J Signposts to other relevant provisions

The following table sets out other provisions of this Act that are relevant to buy-backs.

Section 257J

Other provisions relevant to buy-backs		
	provision	comment
1	section 588G section 1317H	liability of directors on insolvency The directors may have to compensate the company if the company is, or becomes, insolvent when the company enters into the buy-back agreement.
2	section 1324	injunctions to restrain contravention The Court may grant an injunction against conduct that constitutes, or would constitute, a contravention of this Act.
4	subsection 609(4) section 611 (item 19 of the table)	application of takeover provisions These sections deal with the application of Chapter 6 to buy-backs.
5	section 259A	consequences of failure to follow procedures—the company and the officers If a company fails to follow the procedure in this Division, the company contravenes this section and the officers who are involved in the contravention are liable to a civil penalty under Part 9.4B and may commit an offence.
6	section 256D	consequences of failure to follow procedures if reduction in share capital involved—the company and the officers If the buy-back involves a reduction in share capital and the company fails to follow the procedures in this Division, the company contravenes this section and the officers who are involved in the contravention are liable to a civil penalty under Part 9.4B and may commit an offence.
7	section 256D	consequences of failure to follow procedures if reduction in share capital involved—the transaction This section provides that a failure to follow the procedures for share capital reductions does not affect the validity of the buy-back transaction itself.
8	Chapter 6CA	continuous disclosure provisions Under this Chapter a disclosing entity is required to disclose information about its securities that is material and not generally available.
9	Chapter 2E	benefits to related parties to be disclosed Under this Chapter, a financial benefit to a director or other related party may need to be approved at a general meeting before it is given.

Other provisions relevant to buy-backs

provision		comment
10	section 125	provisions in constitution This section deals with the way in which a company's constitution may restrict the exercise of the company's powers and the consequences of a failure to observe these restrictions.
11	sections 246B-246G	variation of class rights These sections deal with the variation of rights attached to a class of shares. This variation may be governed by the provisions of a company's constitution.

Division 3—Other share capital reductions

258A Unlimited companies

An unlimited company may reduce its share capital in any way.

258B Right to occupy or use real property

- (1) If a company has a constitution, under it the company may grant to a shareholder, as a shareholder, a right to occupy or use real property that the company owns or holds under lease, whether the right is a lease or licence or a contractual right.

Note: Before the introduction of strata or unit titles systems, rights to occupy real property were sometimes based on a holding of shares in a company.

- (2) A company may transfer to a person an interest in land in exchange for, or in satisfaction of, a right to occupy or use the land of the kind referred to in subsection (1).

Example: A person has a right to occupy an apartment in a block of units because they hold shares in a company. As part of converting the block of units to strata title, the person surrenders the shares in return for a transfer of strata title over the apartment. The capital reduction involved in the transfer is authorised under this subsection.

258C Brokerage or commission

A company may pay brokerage or commission to a person in respect of that person or another person agreeing to take up shares in the company.

258D Cancellation of forfeited shares

A company may, by resolution passed at a general meeting, cancel shares that have been forfeited under the terms on which the shares are on issue.

258E Other share cancellations

- (1) Any reduction in share capital involved in:
 - (a) the redemption of redeemable preference shares out of the proceeds of a new issue of shares made for the purpose of the redemption (see section 254K); or
 - (b) a company's buying-back of its own shares under sections 257A to 257J if the shares are paid for out of share capital.is authorised by this section.
- (2) A company may cancel shares returned to it under section 651C, 724(2), 737 or 738 and any reduction in the company's share capital that is involved is authorised by this subsection.
- (3) Any reduction in a company's share capital because of an order under section 1325A is authorised by this subsection.

258F Reductions because of lost capital

A company may reduce its share capital by cancelling any paid-up share capital that is lost or is not represented by available assets. This power does not apply if the company also cancels shares.

Section 259A

Part 2J.2—Self-acquisition and control of shares

259A Directly acquiring own shares

A company must not acquire shares (or units of shares) in itself except:

- (a) in buying back shares under section 257A; or
- (b) in acquiring an interest (other than a legal interest) in fully-paid shares in the company if no consideration is given for the acquisition by the company or an entity it controls; or
- (c) under a court order; or
- (d) in circumstances covered by subsection 259B(2) or (3).

259B Taking security over own shares or shares in holding company

- (1) A company must not take security over shares (or units of shares) in itself or in a company that controls it, except as permitted by subsection (2) or (3).
- (2) A company may take security over shares in itself under an employee share scheme that has been approved by:
 - (a) a resolution passed at a general meeting of the company; and
 - (b) if the company is a subsidiary of a listed domestic corporation—a resolution passed at a general meeting of the listed domestic corporation; and
 - (c) if paragraph (b) does not apply but the company has a holding company that is a domestic corporation and that is not itself a subsidiary of a domestic corporation—a resolution passed at a general meeting of that holding company.

Special exemptions for financial institutions

- (3) A company's taking security over shares (or units of shares) in itself or in a company that controls it is exempted from subsection (1) if:
 - (a) the company's ordinary business includes providing finance; and

Section 259C

- (b) the security is taken in the ordinary course of that business and on ordinary commercial terms.
- (4) If a company acquires shares (or units of shares) in itself because it exercises rights under a security permitted by subsection (2) or (3), then, within the following 12 months, the company must cease to hold those shares (or units of shares). ASIC may extend this period of 12 months if the company applies for the extension before the end of the period.
- (5) Any voting rights attached to the shares (or units of shares) cannot be exercised while the company continues to hold them.
- (6) If, at the end of the 12 months (or extended period), the company still holds any of the shares (or units of shares), the company commits an offence for each day while that situation continues.
- (7) An offence based on subsection (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

259C Issuing or transferring shares to controlled entity

- (1) The issue or transfer of shares (or units of shares) of a company to an entity it controls is void unless:
 - (a) the issue or transfer is to the entity as a personal representative; or
 - (b) the issue or transfer is to the entity as trustee and neither the company nor any entity it controls has a beneficial interest in the trust, other than a beneficial interest that satisfies these conditions:
 - (i) the interest arises from a security given for the purposes of a transaction entered into in the ordinary course of business in connection with providing finance; and
 - (ii) that transaction was not entered into with an associate of the company or an entity it controls; or
 - (c) the issue to the entity is made as a result of an offer to all the members of the company who hold shares of the class being issued and is made on a basis that does not discriminate unfairly, either directly or indirectly, in favour of the entity; or

Section 259D

- (d) the transfer to the entity is by a wholly-owned subsidiary of a body corporate and the entity is also a wholly-owned subsidiary of that body corporate.
- (2) ASIC may exempt a company from the operation of this section. The exemption:
 - (a) must be in writing; and
 - (b) may be granted subject to conditions.
- (3) If paragraph (1)(c) or (d) applies to an issue or transfer of shares (or units of shares), section 259D applies.

259D Company controlling entity that holds shares in it

- (1) If any of the following occur:
 - (a) a company obtains control of an entity that holds shares (or units of shares) in the company;
 - (b) a company's control over an entity that holds shares (or units of shares) in the company increases;
 - (c) a company issues shares (or units of shares) to an entity it controls in the situation covered by paragraph 259C(1)(c);
 - (d) shares (or units of shares) in the company are transferred to an entity it controls in the situation covered by paragraph 259C(1)(d);then, within 12 months after it occurs either:
 - (e) the entity must cease to hold the shares (or units); or
 - (f) the company must cease to control the entity.ASIC may extend this period of 12 months if the company applies for the extension before the end of the period.
- (2) If this section applies to shares (or units of shares), it also applies to bonus shares issued in respect of those shares (or units of shares). Within the same period that applies to the shares themselves under subsection (1), either:
 - (a) the entity must cease to hold the bonus shares; or
 - (b) the company must cease to control the entity.
- (3) Any voting rights attached to the shares (or units of shares) cannot be exercised while the company continues to control the entity.
- (4) If, at the end of the 12 months (or extended period), the company still controls the entity and the entity still holds the shares (or units

Section 259E

of shares), the company commits an offence for each day while that situation continues.

- (4A) An offence based on subsection (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (5) This section does not apply to shares (or units of shares) if:
- (a) they are held by the entity as a personal representative; or
 - (b) they are held by the entity as trustee and neither the company nor any entity it controls has a beneficial interest in the trust, other than a beneficial interest that satisfies these conditions:
 - (i) the interest arises from a security given for the purposes of a transaction entered into in the ordinary course of business in connection with providing finance; and
 - (ii) that transaction was not entered into with an associate of the company or an entity it controls.
- (6) A contravention of this section does not affect the validity of any transaction.

259E When a company controls an entity

- (1) For the purposes of this Part, a company controls an entity if the company has the capacity to determine the outcome of decisions about the entity's financial and operating policies.
- (2) In determining whether a company has this capacity:
 - (a) the practical influence the company can exert (rather than the rights it can enforce) is the issue to be addressed; and
 - (b) any practice or pattern of behaviour affecting the entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (3) Merely because the company and an unrelated entity jointly have the capacity to determine the outcome of decisions about another entity's financial and operating policies, the company does not control the other entity.
- (4) A company is not taken to control an entity merely because of a capacity that it is under a legal obligation to exercise for the benefit of someone other than its shareholders.

Section 259F

Note: This situation could arise, for example, if the company holds shares as a trustee or is performing duties as a liquidator.

259F Consequences of failing to comply with section 259A or 259B

- (1) If a company contravenes section 259A or subsection 259B(1):
 - (a) the contravention does not affect the validity of the acquisition or security or of any contract or transaction connected with it; and
 - (b) the company is not guilty of an offence.
- (2) Any person who is involved in a company's contravention of section 259A or subsection 259B(1) contravenes this subsection.

Note 1: Subsection (2) is a civil penalty provision (see section 1317E).

Note 2: Section 79 defines *involved*.
- (3) A person commits an offence if they are involved in a company's contravention of section 259A or subsection 259B(1) and the involvement is dishonest.

Part 2J.3—Financial assistance

260A Financial assistance by a company for acquiring shares in the company or a holding company

- (1) A company may financially assist a person to acquire shares (or units of shares) in the company or a holding company of the company only if:
 - (a) giving the assistance does not materially prejudice:
 - (i) the interests of the company or its shareholders; or
 - (ii) the company's ability to pay its creditors; or
 - (b) the assistance is approved by shareholders under section 260B (that section also requires advance notice to ASIC); or
 - (c) the assistance is exempted under section 260C.
- (2) Without limiting subsection (1), financial assistance may:
 - (a) be given before or after the acquisition of shares (or units of shares); and
 - (b) take the form of paying a dividend.
- (3) Subsection (1) extends to the acquisition of shares (or units of shares) by:
 - (a) issue; or
 - (b) transfer; or
 - (c) any other means.

260B Shareholder approval

Approval by company's own shareholders

- (1) Shareholder approval for financial assistance by a company must be given by:
 - (a) a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution by the person acquiring the shares (or units of shares) or by their associates; or

Section 260B

- (b) a resolution agreed to, at a general meeting, by all ordinary shareholders.

Approval by shareholders of listed holding corporation

- (2) If the company will be a subsidiary of a listed domestic corporation immediately after the acquisition referred to in section 260A occurs, the financial assistance must also be approved by a special resolution passed at a general meeting of that corporation.

Approval by shareholders in ultimate Australian holding company

- (3) If, immediately after the acquisition, the company will have a holding company that:
 - (a) is a domestic corporation but not listed; and
 - (b) is not itself a subsidiary of a domestic corporation;the financial assistance must also be approved by a special resolution passed at a general meeting of the body corporate that will be the holding company.

Information to accompany the notice of meeting

- (4) A company or other body that calls a meeting for the purpose of subsection (1), (2) or (3) must include with the notice of the meeting a statement setting out all the information known to the company or body that is material to the decision on how to vote on the resolution. However, the company or body does not have to disclose information if it would be unreasonable to require the company or body to do so because the company or body had previously disclosed the information to its members.

Documents to be lodged with the ASIC before notice of meeting is sent out

- (5) Before the notice of a meeting for the purpose of subsection (1), (2) or (3) is sent to members of a company or other body, the company or body must lodge with ASIC a copy of:
 - (a) the notice of the meeting; and
 - (b) any document relating to the financial assistance that will accompany the notice of the meeting sent to the members.

Section 260C

- (6) The company must lodge with ASIC, at least 14 days before giving the financial assistance, a notice in the prescribed form stating that the assistance has been approved under this section.

Lodgment of special resolutions

- (7) A special resolution passed for the purpose of subsection (1), (2) or (3) must be lodged with ASIC by the company, listed domestic corporation or holding company within 14 days after it is passed.

260C Exempted financial assistance

General exemptions based on ordinary course of commercial dealing

- (1) Financial assistance is exempted from section 260A if it is given in the ordinary course of commercial dealing and consists of:
- (a) acquiring or creating a lien on partly-paid shares in the company for amounts payable to the company on the shares; or
 - (b) entering into an agreement with a person under which the person may make payments to the company on shares by instalments.

Special exemptions for financial institutions

- (2) Financial assistance is exempted from section 260A if:
- (a) the company's ordinary business includes providing finance; and
 - (b) the financial assistance is given in the ordinary course of that business and on ordinary commercial terms.

Special exemptions for subsidiaries of debenture issuers

- (3) Financial assistance is exempted from section 260A if:
- (a) the company is a subsidiary of a borrower in relation to debentures; and
 - (b) the financial assistance is a guarantee or other security given by the company for the repayment by the borrower of money that it is or will be liable to repay; and
 - (c) the borrower is a borrower in relation to the debentures because it is or will be liable to repay the money; and

Section 260D

- (d) the guarantee or security is given by the company in the ordinary course of commercial dealing.

Special exemption for approved employee share schemes

- (4) Financial assistance is exempted from section 260A if it is given under an employee share scheme that has been approved by:
 - (a) a resolution passed at a general meeting of the company; and
 - (b) if the company is a subsidiary of a listed domestic corporation—a resolution passed at a general meeting of the listed domestic corporation; and
 - (c) if paragraph (b) does not apply but the company has a holding company that is a domestic corporation and that is not itself a subsidiary of a domestic corporation—a resolution passed at a general meeting of that holding company.

Other exemptions

- (5) The following types of financial assistance are exempted from section 260A:
 - (a) a reduction of share capital in accordance with Division 1 of Part 2J.1;
 - (b) a share buy-back in accordance with Division 2 of Part 2J.1;
 - (c) assistance given under a court order;
 - (d) a discharge on ordinary commercial terms of a liability that the company incurred as a result of a transaction entered into on ordinary commercial terms.

260D Consequences of failing to comply with section 260A

- (1) If a company provides financial assistance in contravention of section 260A:
 - (a) the contravention does not affect the validity of the financial assistance or of any contract or transaction connected with it; and
 - (b) the company is not guilty of an offence.
- (2) Any person who is involved in a company's contravention of section 260A contravenes this subsection.

Note 1: Subsection (2) is a civil penalty provision (see section 1317E).

Section 260D

Note 2: Section 79 defines *involved*.

- (3) A person commits an offence if they are involved in a company's contravention of section 260A and the involvement is dishonest.

Part 2J.4—Interaction with general directors' duties

260E General duties still apply

A director is not relieved from any of their duties under this Act (including sections 180, 181, 182, 183 and 184), or their fiduciary duties, in connection with a transaction merely because the transaction is authorised by a provision of this Chapter or is approved by a resolution of members under a provision of this Chapter.

Chapter 2K—Charges

Part 2K.1—Preliminary

261 Interpretation and application

- (1) In this Chapter, unless the contrary intention appears:

document of title means a document:

- (a) used in the ordinary course of business as proof of possession or control, or of the right to possession or control, of property other than land; or
- (b) authorising or purporting to authorise, whether by endorsement or delivery, the possessor of the document to transfer or receive property other than land;

and includes:

- (c) a bill of lading; and
- (d) a warehousekeeper's certificate; and
- (e) a wharfinger's certificate; and
- (f) a warrant or order for the delivery of goods; and
- (g) a document that is, or evidences title to, a marketable security.

present liability, in relation to a charge, means a liability that has arisen, being a liability the extent or amount of which is fixed or capable of being ascertained, whether or not the liability is immediately due to be met.

property:

- (a) of a company—means property that is held by the company (whether or not as trustee) wherever the property is situated (whether in Australia or elsewhere); or
- (b) of a foreign company—means property that is held by the company (whether or not as trustee) and that is in this jurisdiction or in an external Territory; or
- (c) of a registrable Australian body—means property that is held by the body (whether or not as trustee) and that is in this jurisdiction and outside the body's place of origin.

Section 261

prospective liability, in relation to a charge, means any liability that may arise in the future, or any other liability, but does not include a present liability.

Register means the Australian Register of Company Charges referred to in section 265.

registrable charge means a charge in relation to which, by virtue of section 262, the provisions of this Chapter mentioned in subsection 262(1) apply.

- (2) A charge referred to in subsection 263(3) or section 264 is, until the charge is registered, treated for the purposes of this Chapter as if it were not a registrable charge but, when the charge is so registered, it has the priority accorded to a registered charge as from the time of registration.
- (3) The registration of a charge referred to in subsection 263(3) or section 264 does not prejudice any priority that would have been accorded to the charge under any other law (whether an Australian law or not) if the charge had not been registered.
- (4) For the purposes of this Chapter, a notice or other document is taken to be lodged when it is received at an office of ASIC in this jurisdiction by an officer authorised to receive it.

Part 2K.2—Registration

262 Charges required to be registered

- (1) Subject to this section, the provisions of this Chapter relating to the giving of notice in relation to, the registration of, and the priorities of, charges apply in relation to the following charges (whether legal or equitable) on property of a company and do not apply in relation to any other charges:
- (a) a floating charge on the whole or a part of the property, business or undertaking of the company;
 - (b) a charge on uncalled share capital;
 - (c) a charge on a call on shares made but not paid;
 - (d) a charge on a personal chattel, including a personal chattel that is unascertained or is to be acquired in the future, but not including a ship registered in an official register kept under an Australian law relating to title to ships;
 - (e) a charge on goodwill, on a patent or licence under a patent, on a trade mark or service mark or a licence to use a trade mark or service mark, on a copyright or a licence under a copyright or on a registered design or a licence to use a registered design;
 - (f) a charge on a book debt;
 - (g) a charge on a marketable security, not being:
 - (i) a charge created in whole or in part by the deposit of a document of title to the marketable security; or
 - (ii) a mortgage under which the marketable security is registered in the name of the chargee or a person nominated by the chargee; or
 - (iii) a charge where there is an agreement in force under which the chargee (or a person who has agreed to act on the instructions of the chargee) controls the sending of some or all electronic messages or other electronic communications by which the marketable security could be transferred;
 - (h) a lien or charge on a crop, a lien or charge on wool or a stock mortgage;

Section 262

- (j) a charge on a negotiable instrument other than a marketable security.
- (2) The provisions of this Chapter mentioned in subsection (1) do not apply in relation to:
 - (a) a charge, or a lien over property, arising by operation of law; or
 - (b) a pledge of a personal chattel or of a marketable security; or
 - (c) a charge created in relation to a negotiable instrument or a document of title to goods, being a charge by way of pledge, deposit, letter of hypothecation or trust receipt; or
 - (d) a transfer of goods in the ordinary course of the practice of any profession or the carrying on of any trade or business; or
 - (e) a dealing, in the ordinary course of the practice of any profession or the carrying on of any trade or business, in respect of goods outside Australia.
- (3) The reference in paragraph (1)(d) to a charge on a personal chattel is a reference to a charge on any article capable of complete transfer by delivery, whether at the time of the creation of the charge or at some later time, and includes a reference to a charge on a fixture or a growing crop that is charged separately from the land to which it is affixed or on which it is growing, but does not include a reference to a charge on:
 - (a) a document evidencing title to land; or
 - (b) a chattel interest in land; or
 - (c) a marketable security; or
 - (d) a document evidencing a thing in action; or
 - (e) stock or produce on a farm or land that by virtue of a covenant or agreement ought not to be removed from the farm or land where the stock or produce is at the time of the creation of the charge.
- (4) The reference in paragraph (1)(f) to a charge on a book debt is a reference to a charge on a debt due or to become due to the company at some future time on account of or in connection with a profession, trade or business carried on by the company, whether entered in a book or not, and includes a reference to a charge on a future debt of the same nature although not incurred or owing at the time of the creation of the charge, but does not include a reference to a charge on a marketable security, on a negotiable

instrument or on a debt owing in respect of a mortgage, charge or lease of land.

- (5) The reference in paragraph (1)(h) to a lien or charge on a crop, a lien or charge on wool or a stock mortgage includes a reference to a security (however described) that is registrable under a prescribed law of a State or Territory.
- (6) For the purposes of this section, a company is taken to have deposited a document of title to property with another person (in this subsection referred to as the **chargee**) in a case where the document of title is not in the possession of the company if:
 - (a) the person who holds the document of title acknowledges in writing that the person holds the document of title on behalf of the chargee; or
 - (b) a government, an authority or a body corporate that proposes to issue a document of title in relation to the property agrees, in writing, to deliver the document of title, when issued, to the chargee.
- (7) For the purposes of this section, a charge is taken to be a charge on property of a kind to which a particular paragraph of subsection (1) applies even though the instrument of charge also charges other property of the company including other property that is of a kind to which none of the paragraphs of that subsection applies.
- (8) The provisions of this Chapter mentioned in subsection (1) do not apply in relation to a charge on land.
- (9) The provisions of this Chapter mentioned in subsection (1) do not apply in relation to a charge on fixtures given by a charge on the land to which they are affixed.
- (10) The provisions of this Chapter mentioned in subsection (1) do not apply in relation to a charge created by a company in its capacity as legal personal representative of a deceased person or as trustee of the estate of a deceased person.
- (11) A charge on property of a company is not invalid merely because of the failure to lodge with ASIC, or give to the company or another person, a notice or other document that is required by this Part to be so lodged or given.

Section 263

263 Lodgment of notice of charge and copy of instrument

- (1) Where a company creates a charge, the company must ensure that there is lodged, within 45 days after the creation of the charge:
 - (a) a notice in the prescribed form setting out the following particulars:
 - (i) the name of the company and the date of the creation of the charge;
 - (ii) whether the charge is a fixed charge, a floating charge or both a fixed and floating charge;
 - (iii) if the charge is a floating charge—whether there is any provision in the resolution or instrument creating or evidencing the charge that prohibits or restricts the creation of subsequent charges;
 - (iv) a short description of the liability (whether present or prospective) secured by the charge;
 - (v) a short description of the property charged;
 - (vi) whether the charge is created or evidenced by a resolution, by an instrument or by a deposit or other conduct;
 - (vii) if the charge is constituted by the issue of a debenture or debentures—the name of the trustee (if any) for debenture holders;
 - (viii) if the charge is not constituted by the issue of a debenture or debentures or there is no trustee for debenture holders—the name of the chargee;
 - (ix) such other information as is prescribed; and
 - (b) if, pursuant to a resolution or resolutions passed by the company, the company issues a series of debentures constituting a charge to the benefit of which all the holders of debentures in the series are entitled in equal priority, and the charge is evidenced only by the resolution or resolutions and the debentures—a copy of the resolution or of each of the resolutions verified by a statement in writing to be a true copy, and a copy of the first debenture issued in the series and a statement in writing verifying the execution of that first debenture; and
 - (c) if, in a case to which paragraph (b) does not apply, the charge was created or evidenced by an instrument or instruments:
 - (i) the instrument or each of the instruments; or

- (ii) a copy of the instrument or of each of the instruments verified by a statement in writing to be a true copy, and a statement in writing verifying the execution of the instrument or of each of the instruments.
- (2) In a case to which paragraph (1)(b) applies:
 - (a) the charge is, for the purposes of subsection (1), taken to be created when the first debenture in the series of debentures is issued; and
 - (b) if, after the issue of the first debenture in the series, the company passes a further resolution authorising the issue of debentures in the series, the company must ensure that a copy of that resolution, verified by a statement in writing to be a true copy of that resolution, is lodged within 45 days after the passing of that resolution.
- (3) A body that applies for registration as a company under Part 5B.1, or for registration under Part 5B.2, must lodge with the application for registration the documents specified in subsection (4) in relation to any charge on property of the body that would be registrable under this Part if the body were already registered under Part 5B.1, or Part 5B.2, as the case may be.
- (4) The documents required to be lodged under subsection (3) in relation to a charge on property of a body are the following documents:
 - (a) a notice in the prescribed form:
 - (i) setting out the name of the body; and
 - (ii) if the charge was created by the body—specifying the date of the creation of the charge; and
 - (iii) if the charge was a charge existing on property acquired by the body—setting out the date on which the property was so acquired; and
 - (iv) otherwise complying with the requirements of paragraph (1)(a);
 - (b) if the charge was created or evidenced as mentioned in paragraph (1)(b):
 - (i) in the case of a charge created by the body—a copy of the resolution or of each of the resolutions referred to in that paragraph verified by a statement in writing to be a true copy and a copy of the first debenture issued in the

Section 263

- series referred to in that paragraph and a statement in writing verifying the execution of that first debenture; or
- (ii) in the case of a charge that existed on property acquired by the body—the copies referred to in subparagraph (i) verified by statements in writing to be true copies;
 - (c) if the charge was created or evidenced by an instrument or instruments (otherwise than as mentioned in paragraph (1)(b)):
 - (i) in the case of a charge created by the body:
 - (A) the instrument or each of the instruments; or
 - (B) a copy of the instrument or of each of the instruments verified by a statement in writing to be a true copy, and a statement in writing verifying the execution of the instrument or of each of the instruments; or
 - (ii) in the case of a charge that existed on property acquired by the body—a copy of the instrument or of each of the instruments verified by a statement in writing to be a true copy;
 - (d) if the charge was created or evidenced as mentioned in paragraph (1)(b) and, after the issue of the first debenture in the series, the body passed a further resolution or resolutions authorising the issue of debentures in the series—a copy of that resolution or of each of those resolutions verified by a statement in writing to be a true copy.
- (5) A notice in relation to a charge, being a charge in relation to which paragraph (1)(b) or (c) or (4)(b) or (c) applies, is not taken to have been lodged under subsection (1) or (3) unless the notice is accompanied by the documents specified in that paragraph.
 - (6) Where a notice with respect to an instrument creating a charge has been lodged under subsection (1) or (3), being a charge in respect of an issue of several debentures the holders of which are entitled under the instrument in equal priority to the benefit of the charge, sections 279 to 282 (inclusive) have effect as if any charges constituted by those debentures were registered at the time when the charge to which the notice relates was registered.
 - (7) Where a payment or discount has been made or allowed, either directly or indirectly, by a company or registrable body to a person in consideration of the person's subscribing or agreeing to

subscribe, whether absolutely or conditionally, for debentures, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for debentures, the notice required to be lodged under subsection (1) or (3) must include particulars as to the amount or rate per centum of the payment or discount.

- (8) Where a company or registrable body issues debentures as security for a debt of the company or registrable body, the company or registrable body is not thereby to be regarded, for the purposes of subsection (7), as having allowed a discount in respect of the debentures.

264 Acquisition of property subject to charge

- (1) Where a company acquires property that is subject to a charge, being a charge that would have been registrable when it was created if it had been created by a company, the company must, within 45 days after the acquisition of the property:
- (a) ensure that there is lodged:
 - (i) a notice in the prescribed form in relation to the charge, setting out the name of the company and the date on which the property was so acquired and otherwise complying with the requirements of paragraph 263(1)(a); and
 - (ii) if the charge was created or evidenced as mentioned in paragraph 263(1)(b)—a copy of the resolution or of each of the resolutions referred to in that paragraph verified by a statement in writing to be a true copy and a copy of the first debenture issued in the series referred to in that paragraph verified by a statement in writing to be a true copy; and
 - (iii) if the charge was created or evidenced by an instrument or instruments (otherwise than as mentioned in paragraph 263(1)(b)):
 - (A) the instrument or each of the instruments; or
 - (B) a copy of the instrument or of each of the instruments verified by a statement in writing to be a true copy; and
 - (b) give to the chargee notice that it has acquired the property and the date on which it was so acquired.

Section 265

- (2) A notice in relation to a charge, being a charge in relation to which subparagraph (1)(a)(ii) or (iii) applies, is not taken to have been lodged under subsection (1) unless it is accompanied by the documents specified in that subparagraph.

265 Registration of documents relating to charges

- (1) ASIC must keep a register to be known as the Australian Register of Company Charges.
- (2) Where a notice in respect of a charge on property of a company that is required by section 263 or 264 to be lodged is lodged (whether during or after the period within which the notice was required to be lodged) and the notice contains all the particulars required by the relevant section to be included in the notice, ASIC must as soon as practicable cause to be entered in the Register the time and date when the notice was lodged and the following particulars in relation to the charge:
 - (a) if the charge is a charge created by the company, the date of its creation or, if the charge was a charge existing on property acquired by the company, the date on which the property was so acquired;
 - (b) a short description of the liability (whether present or prospective) secured by the charge;
 - (c) a short description of the property charged;
 - (d) the name of the trustee for debenture holders or, if there is no such trustee, the name of the chargee.
- (3) Subject to subsection (9), where particulars in respect of a charge are entered in the Register in accordance with subsection (2), the charge is taken to be registered, and to have been registered from and including the time and date entered in the Register under that subsection.
- (4) Where:
 - (a) a notice in respect of a charge on property of a company is lodged under section 263 or 264 (whether during or after the period within which the notice was required to be lodged); and
 - (b) the notice is not accompanied by a certificate to the effect that all documents accompanying the notice have been duly

stamped as required by any applicable law relating to stamp duty;

ASIC must cause to be entered in the Register the time and date when the notice was lodged and the particulars referred to in paragraphs (2)(a), (b), (c) and (d), but must cause the word “provisional” to be entered in the Register in relation to the entry specifying that time and date.

(5) Where:

- (a) in accordance with subsection (4), the word “provisional” is entered in the Register in relation to an entry specifying the time and date on which a notice in respect of a charge was lodged; and
- (b) within a period of 30 days or such longer period as is prescribed after the notice was lodged, or within such further period as ASIC, if it considers it to be appropriate in a particular case, allows, a certificate to the effect set out in paragraph (4)(b) has been produced to ASIC;

ASIC must delete the word “provisional” that was so entered in relation to the entry relating to that charge, but if such a certificate is not produced within the period, or the further period, referred to in paragraph (b), ASIC must delete from the Register all the particulars that were entered in relation to the charge.

(6) Where a document that purports to be a notice in respect of a charge on property of a company for the purposes of section 263 or 264 is lodged (whether during or after the period within which the notice was required to be lodged) and the document contains the name of the company concerned and the particulars referred to in subparagraph 263(1)(a)(vii) or (viii), as the case requires, but does not contain some or all of the other particulars that are required to be included in the notice or is otherwise defective:

- (a) ASIC must cause to be entered in the Register the time and date when the document was lodged and such of the particulars referred to in paragraphs (2)(a), (b), (c) and (d) as are ascertainable from the document, but must cause the word “provisional” to be entered in the Register in relation to the entry specifying that time and date; and
- (b) ASIC must, by notice in writing to the person who lodged the document, direct the person to ensure that there is lodged, on or before the day specified in the notice, a notice in relation to the charge that complies with the requirements of

Section 265

section 263 or 264, as the case may be, but the giving by ASIC of a direction to the person under this paragraph does not affect any liability that the company may have incurred or may incur by reason of a contravention of section 263 or 264.

- (7) Where ASIC gives a direction to a person under paragraph (6)(b) in relation to a charge:
 - (a) if the direction is complied with on or before the day specified in the notice containing the direction, ASIC must:
 - (i) delete from the Register the word “provisional” that was inserted pursuant to paragraph (6)(a); and
 - (ii) cause to be entered in the Register in relation to the charge any particulars referred to in subsection (2) that have not previously been entered; and
 - (b) if the direction is not complied with on or before that day—ASIC must delete from the Register all the particulars that were entered in relation to the charge; and
 - (c) if the direction is complied with after that day—ASIC must cause to be entered in the Register in relation to the charge the time at which and day on which the direction was complied with and the particulars referred to in paragraphs (2)(a), (b), (c) and (d).
- (8) ASIC may enter in the Register in relation to a charge, in addition to the particulars expressly required by this section to be entered, such other particulars as ASIC thinks fit.
- (9) If the word “provisional” is entered in the Register in relation to an entry specifying a time and day in relation to a charge, the charge is taken not to have been registered but:
 - (a) where the word “provisional” is deleted from the Register pursuant to subsection (5) or paragraph (7)(a)—the charge is taken to be registered and to have been registered from and including the time and day specified in the Register pursuant to subsection (4) or paragraph (6)(a), as the case may be; or
 - (b) where the particulars in relation to the charge are deleted from the Register pursuant to paragraph (7)(b) and those particulars and a time and day are subsequently entered in the Register in relation to the charge pursuant to paragraph (7)(c)—the charge is taken to be registered from and including that last-mentioned time and day.

Section 265A

- (10) Where, pursuant to subsection 263(3), a registrable body lodges notices relating to 2 or more charges on the same property of the registrable body, the time and day that must be entered in the Register in relation to each of those charges are the time and day when the first notice was lodged.
- (11) Where, in accordance with subsection (10), the time and day that are entered in the Register are the same in relation to 2 or more charges on property of a registrable body, those charges have, as between themselves, the respective priorities that they would have had if they had not been registered under this Part.
- (12) Where, pursuant to section 264, a company lodges notices relating to 2 or more charges on the same property acquired by the company (being charges that are not already registered under this Part), the time and day that must be entered in the Register in relation to each of those charges are the time and day when the first notice was lodged.
- (13) Where, in accordance with subsection (12), the time and day that are entered in the Register are the same in relation to 2 or more charges on property acquired by a company, those charges have, as between themselves, the respective priorities that they would have had if they had not been registered under this Part.
- (14) Where a notice is lodged under section 268 (whether during or after the period within which it was required to be lodged), ASIC must as soon as practicable cause to be entered in the Register the time and day when the notice was so lodged and the particulars set out in the notice.

265A Standard time for the purposes of section 265

- (1) ASIC may, by *Gazette* notice, declare a specified standard time to be the standard time for the purposes of section 265.
- (2) Where a notice is in force under subsection (1) of this section, a reference in subsection 265(2) or (4), paragraph 265(6)(a) or (7)(c), or subsection 265(10), (12) or (14), to entering the time when a particular event happened is a reference to entering that time as expressed in terms of the standard time specified in the notice.

Section 266

266 Certain charges void against liquidator or administrator

- (1) Where:
- (a) an order is made, or a resolution is passed, for the winding up of a company; or
 - (b) an administrator of a company is appointed under section 436A, 436B or 436C; or
 - (ba) a company executes a deed of company arrangement; a registrable charge on property of the company is void as a security on that property as against the liquidator, the administrator of the company, or the deed's administrator, as the case may be, unless:
 - (c) a notice in respect of the charge was lodged under section 263 or 264, as the case requires:
 - (i) within the relevant period; or
 - (ii) at least 6 months before the critical day; or
 - (d) in relation to a charge other than a charge to which subsection 263(3) applies—the period within which a notice in respect of the charge (other than a notice under section 268) is required to be lodged, being the period specified in the relevant section or that period as extended by the Court under subsection (4), has not ended at the start of the critical day and the notice is lodged before the end of that period; or
 - (e) in relation to a charge to which subsection 263(3) applies—the period of 45 days after the chargee becomes aware that the registrable body has been registered as a company under Part 5B.1, or registered under Part 5B.2, has not ended at the start of the critical day and the notice is lodged before the end of that period; or
 - (f) in relation to a charge to which section 264 applies—the period of 45 days after the chargee becomes aware that the property charged has been acquired by a company has not ended at the start of the critical day and the notice is lodged before the end of that period.
- (2) The reference in paragraph (1)(c) to the relevant period is to be construed as a reference to:
- (a) in relation to a charge to which subsection 263(1) applies—the period of 45 days specified in that subsection, or that

Section 266

- period as extended by the Court under subsection (4) of this section; or
- (b) in relation to a charge to which subsection 263(3) applies—the period of 45 days after the chargee becomes aware that the registrable body has been registered as a company under Part 5B.1 or registered under Part 5B.2; or
 - (c) in relation to a charge to which section 264 applies—the period of 45 days after the chargee becomes aware that the property has been acquired by a company.
- (3) Where, after there has been a variation in the terms of a registrable charge on property of a company having the effect of increasing the amount of the debt or increasing the liabilities (whether present or prospective) secured by the charge:
- (a) an order is made, or a resolution is passed, for the winding up of the company; or
 - (b) an administrator of a company is appointed under section 436A, 436B or 436C; or
 - (ba) a company executes a deed of company arrangement;
- the registrable charge is void as a security on that property to the extent that it secures the amount of the increase in that debt or liability unless:
- (c) a notice in respect of the variation was lodged under section 268:
 - (i) within the period of 45 days specified in subsection 268(2) or that period as extended by the Court under subsection (4) of this section; or
 - (ii) not later than 6 months before the critical day; or
 - (d) the period of 45 days specified in subsection 268(2), or that period as extended by the Court under subsection (4) of this section, has not ended at the start of the critical day and the notice is lodged before the end of that period.
- (4) The Court, if it is satisfied that the failure to lodge a notice in respect of a charge, or in respect of a variation in the terms of a charge, as required by any provision of this Part:
- (a) was accidental or due to inadvertence or some other sufficient cause; or
 - (b) is not of a nature to prejudice the position of creditors or shareholders;

Section 266

or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, by order, extend the period for such further period as is specified in the order.

(5) Where:

- (a) a registrable charge (in this subsection referred to as the *later charge*) is created before the end of 45 days after the creation of an unregistered registrable charge (in this subsection referred to as the *earlier charge*); and
 - (b) the later charge relates to all or any of the property to which the earlier charge related; and
 - (c) the later charge is given as a security for the same liability as is secured by the earlier charge or any part of that liability; the later charge, to the extent to which it is a security for the same liability or part thereof, and so far as it relates to the property comprised in the earlier charge, is void as a security on that property as against a liquidator or administrator of the company, or an administrator of a deed of company arrangement executed by the company, even if a notice in respect of the later charge was lodged under section 263 within a period mentioned in paragraph (1)(c) or (d) of this section, unless it is proved to the satisfaction of the Court that the later charge was given in good faith for the purpose of correcting some material error in the earlier charge or under other proper circumstances and not for the purposes of avoiding or evading the provisions of this Part.
- (6) Nothing in subsection (1) or (3) operates to affect the title of a person to property purchased for value from a chargee or from a receiver appointed by a chargee in the exercise of powers conferred by the charge or implied by law if that person purchased the property in good faith and without notice of:
- (a) the filing of an application for an order for the winding up of the company; or
 - (b) the passing of a resolution for the voluntary winding up of the company; or
 - (c) an administrator of the company being appointed under section 436A, 436B or 436C; or
 - (d) the company executing a deed of company arrangement.

- (7) The onus of proving that a person purchased property in good faith and without notice of any of the matters referred to in paragraphs (6)(a), (b), (c) and (d) is on the person asserting that the property was so purchased.
- (8) In this section:
- critical day**, in relation to a company, means:
- (a) if the company is being wound up—the day when the winding up began; or
 - (b) if the company is under administration—the section 513C day in relation to the administration; or
 - (c) if the company has executed a deed of company arrangement—the section 513C day in relation to the administration that ended when the deed was executed.

267 Charges in favour of certain persons void in certain cases

- (1) Where:
- (a) a company creates a charge on property of the company in favour of a person who is, or in favour of persons at least one of whom is, a relevant person in relation to the charge; and
 - (b) within 6 months after the creation of the charge, the chargee purports to take a step in the enforcement of the charge without the Court having, under subsection (3), given leave for the charge to be enforced;
- the charge, and any powers purported to be conferred by an instrument creating or evidencing the charge, are, and are taken always to have been, void.
- (2) Without limiting the generality of subsection (1), a person who:
- (a) appoints a receiver of property of a company under powers conferred by an instrument creating or evidencing a charge created by the company; or
 - (b) whether directly or by an agent, enters into possession or assumes control of property of a company for the purposes of enforcing a charge created by the company;
- is taken, for the purposes of subsection (1), to take a step in the enforcement of the charge.

Section 267

- (3) On application by the chargee under a charge, the Court may, if it is satisfied that:
 - (a) immediately after the creation of the charge, the company that created the charge was solvent; and
 - (b) in all the circumstances of the case, it is just and equitable for the Court to do so;give leave for the charge to be enforced.
- (4) Nothing in subsection (1) affects a debt, liability or obligation of a company that would, if that subsection had not been enacted, have been secured by a charge created by the company.
- (5) Nothing in subsection (1) operates to affect the title of a person to property (other than the charge concerned or an interest in the charge concerned) purchased for value from a chargee under a charge, from an agent of a chargee under a charge, or from a receiver appointed by a chargee under a charge in the exercise of powers conferred by the charge or implied by law, if that person purchased the property in good faith and without notice that the charge was created in favour of a person who is, or in favour of persons at least one of whom is, as the case may be, a relevant person in relation to the charge.
- (6) The onus of proving that a person purchased property in good faith and without notice that a charge was created as mentioned in subsection (5) is on the person asserting that the property was so purchased.
- (7) In this section:
 - chargee**, in relation to a charge, means:
 - (a) in any case—the holder, or all or any of the holders, of the charge; or
 - (b) in the case of a charge that is an agreement to give or execute a charge in favour of a person or persons, whether upon demand or otherwise—that person, or all or any of those persons.

officer, in relation to a company, includes, in the case of a registered foreign company, a local agent of the foreign company.

receiver includes a receiver and manager.

relevant person, in relation to a charge created by a company, means:

- (a) a person who is at the time when the charge is created, or who has been at any time during the period of 6 months ending at that time, an officer of the company; or
- (b) a person associated, in relation to the creation of the charge, with a person of a kind referred to in paragraph (a).

268 Assignment and variation of charges

- (1) Where, after a registrable charge on property of a company has been created, a person other than the original chargee becomes the holder of the charge, the person who becomes the holder of the charge must, within 45 days after he, she or it becomes the holder of the charge:
 - (a) lodge a notice stating that he, she or it has become the holder of the charge; and
 - (b) give the company a copy of the notice.
- (2) Where, after a registrable charge on property of a company has been created, there is a variation in the terms of the charge having the effect of:
 - (a) increasing the amount of the debt or increasing the liabilities (whether present or prospective) secured by the charge; or
 - (b) prohibiting or restricting the creation of subsequent charges on the property;the company must, within 45 days after the variation occurs, ensure that there is lodged a notice setting out particulars of the variation and accompanied by the instrument (if any) effecting the variation or a certified copy of that instrument.
- (3) Where a charge created by a company secures a debt of an unspecified amount or secures a debt of a specified amount and further advances, a payment or advance made by the chargee to the company in accordance with the terms of the charge is not taken, for the purposes of subsection (2), to be a variation in the terms of the charge having the effect of increasing the amount of the charge or the liabilities (whether present or prospective) secured by the charge.

Section 269

- (4) A reference in this section to the chargee in relation to a charge is, if the charge is constituted by a debenture and debentures and there is a trustee for debenture holders, to be construed as a reference to the trustee for debenture holders.
- (5) Nothing in section 263 requires the lodgment of a notice under that section in relation to a charge merely because of the fact that the terms of the charge are varied only in a manner mentioned in this section.

269 Satisfaction of, and release of property from, charges

- (1) Where, with respect to a charge registered under this Part:
 - (a) the debt or other liability the payment or discharge of which was secured by the charge has been paid or discharged in whole or in part; or
 - (b) the property charged or part of that property is released from the charge;the person who was the holder of the charge at the time when the debt or other liability was so paid or discharged or the property or part of the property was released must, within 14 days after receipt of a request in writing made by the company on whose property the charge exists, give to the company a memorandum in the prescribed form acknowledging that the debt or other liability has been paid or discharged in whole or in part or that the property or that part of it is no longer subject to the charge, as the case may be.
- (2) The company may lodge the memorandum and, upon the memorandum being lodged, ASIC must enter in the Register particulars of the matters stated in the memorandum.
- (3) The reference in subsection (1) to the person who was the holder of a charge at the time when the debt or other liability was so paid or discharged or the property or part of the property was released is, if the charge was constituted by a debenture or debentures and there was a trustee for debenture holders, to be construed as a reference to the person who was, at that time, the trustee for debenture holders.

270 Lodgment of notices, offences etc.

- (1) Where a notice in respect of a charge on property of a company is required to be lodged under section 263 or 264 or subsection

Section 271

268(2), the notice may be lodged by the company or by any interested person.

- (2) Where default is made in complying with section 263 or 264 or subsection 268(2) in relation to a registrable charge on property of a company, the company and any officer of the company who is in default each contravene this subsection.
- (3) Where a person who becomes the holder of a registrable charge fails to comply with subsection 268(1), the person and, if the person is a body corporate, any officer of the body corporate who is in default, each contravene this subsection.
- (4) Where a document required by this Part other than subsection 268(1) to be lodged is lodged by a person other than the company concerned, that person:
 - (a) must, within 7 days after the lodgment of the document, give to the company a copy of the document; and
 - (b) is entitled to recover from the company the amount of any fees properly paid by the person on lodgment of the document.

271 Company to keep documents relating to charges and register of charges

- (1) A company must keep, at the place where the register referred to in subsection (2) is kept, a copy of:
 - (a) every document relating to a charge on property of the company that was or is lodged under this Part; and
 - (b) a copy of every document given to the company under this Part.
- (2) A company must keep a register and must, upon the creation of a charge (whether registrable or not) on property of the company, or upon the acquisition of property subject to a charge (whether registrable or not), as soon as practicable enter in the register particulars of the charge, giving in each case:
 - (a) if the charge is a charge created by the company, the date of its creation or, if the charge was a charge existing on property acquired by the company, the date on which the property was so acquired; and

Section 272

- (b) a short description of the liability (whether present or prospective) secured by the charge; and
 - (c) a short description of the property charged; and
 - (d) the name of the trustee for debenture holders or, if there is no such trustee, the name of the chargee; and
 - (e) the name of the person whom the company believes to be the holder of the charge.
- (3) A register kept by a company pursuant to subsection (2) must be open for inspection:
 - (a) by any creditor or member of the company—without charge; and
 - (b) by any other person—on payment for each inspection of such amount, not exceeding the prescribed amount, as the company requires or, where the company does not require the payment of an amount, without charge.
- (4) A person may request a company to furnish the person with a copy of the register or any part of the register and, where such a request is made, the company must send the copy to that person:
 - (a) if the company requires payment of an amount not exceeding the prescribed amount—within 21 days after payment of the amount is received by the company or within such longer period as ASIC approves; or
 - (b) in a case to which paragraph (a) does not apply—within 21 days after the request is made or within such longer period as ASIC approves.
- (5) If default is made in complying with any provision of this section, the company and any officer of the company who is in default are each guilty of an offence.

272 Certificates

- (1) Where particulars of a charge are entered in the Register in accordance with this Part, ASIC must, on request by any person, issue to that person a certificate setting out those particulars and stating the time and day when a notice in respect of the charge containing those particulars was lodged with ASIC and, if the word “provisional” appears in the Register in relation to the reference to that time and day, stating that fact.

Section 273A

- (2) A certificate issued under subsection (1) is prima facie evidence of the matters stated in the certificate.
- (3) Where particulars of a charge are entered in the Register in accordance with this Part, and the word “provisional” does not appear in the Register in relation to the reference to the time and day when a notice in respect of the charge was lodged, ASIC must, on request by any person, issue to that person a certificate stating that particulars of the charge are entered in the Register in accordance with this Part.
- (4) A certificate issued under subsection 272(3) is conclusive evidence that the requirements of Part 2K.2 as to registration (other than the requirements relating to the period after the creation of the charge within which notice in respect of the charge is required to be lodged) have been complied with.

273A Application of State and Territory laws to charges required to be registered under this Part

- (1) This section deals with how particular State or Territory laws apply to a charge if notice of the charge must be lodged under this Part (whether before or after the prescribed time). The laws are called *specified laws* and are identified in subsections (4) and (5).

Note: Section 273D provides that this section does not apply to certain joint charges.

- (2) A failure to register the charge under a specified law does not affect the validity, or limit the effect, of the charge.
- (3) The priority of the charge is to be determined under this Chapter and not under a specified law.
- (4) The *specified laws* are the State or Territory laws that are:
 - (a) specified in the following table; or
 - (b) specified by the regulations for the purposes of this section.

Specified laws for the purposes of this section		
	Law	State or Territory
1	<i>Bills of Sale Act 1898</i>	New South Wales
2	<i>Liens on Crops and Wool and Stock Mortgages Act 1898</i>	New South Wales

Section 273B

Specified laws for the purposes of this section		
	Law	State or Territory
3	<i>Instruments Act 1958</i>	Victoria
4	<i>Bills of Sale and Other Instruments Act 1955</i>	Queensland
5	<i>Liens on Crops of Sugar Cane Act 1931</i>	Queensland
6	<i>Bills of Sale Act 1886</i>	South Australia
7	<i>Liens on Fruit Act 1923</i>	South Australia
8	<i>Stock Mortgages and Wool Liens Act 1924</i>	South Australia
9	<i>Bills of Sale Act 1899</i>	Western Australia
10	<i>Bills of Sale Act 1900</i>	Tasmania
11	<i>Stock, Wool, and Crop Mortgages Act 1930</i>	Tasmania
12	<i>Instruments Act 1933</i>	Australian Capital Territory
13	<i>Instruments Act</i>	Northern Territory

- (5) The regulations may provide that a law specified in the table in subsection (4) is not a specified law for the purposes of this section.

273B Application of State and Territory laws to transfers, assignments or giving of charges registered under this Part

- (1) This section deals with how particular State and Territory laws apply to a transfer, assignment or giving of a security by a company that is registrable under those laws if:
- (a) notice in relation to the transfer, assignment or giving of security must be lodged under this Part; and
 - (b) the transfer, assignment or giving of security is registered under this Part.

The laws are called *specified laws* and are identified in subsections (3) and (4). The particular specified law under which the transfer, assignment or giving of security is registrable is called the *applicable registration law*.

Note: Section 273D provides that this section does not apply to certain joint charges.

Section 273C

- (2) The transfer, assignment or giving of security is, subject to subsection 273A(3), as valid and effectual as if it had been duly registered under the applicable registration law.
- (3) The *specified laws* are the State or Territory laws that are:
- (a) specified in the following table; or
 - (b) specified by the regulations for the purposes of this section.

Specified laws for the purposes of this section		
	Law	Jurisdiction
1	<i>Bills of Sale Act 1898</i>	New South Wales
2	<i>Bills of Sale and Other Instruments Act 1955</i> Part II	Queensland
3	<i>Bills of Sale Act 1886</i>	South Australia
4	<i>Bills of Sale Act 1899</i>	Western Australia
5	<i>Bills of Sale Act 1900</i>	Tasmania
6	<i>Instruments Act 1933</i> Part III	Australian Capital Territory
7	<i>Instruments Act</i> Part II	Northern Territory

- (4) The regulations may provide that a law specified in the table in subsection (3) is not a specified law for the purposes of this section.

273C Application of specified State and Territory laws to crop liens, wool liens and stock mortgages registered under this Part

- (1) This section deals with how particular State and Territory laws apply to a crop lien, wool lien or stock mortgage given by a company that is registrable under those laws if:
- (a) notice in relation to the lien or stock mortgage is required to be lodged under this Part; and
 - (b) the lien or mortgage is registered under this Part.

The laws are called *specified laws* and are identified in subsections (3) and (4). The particular specified law under which the lien or mortgage is registrable is called the *applicable registration law*.

Section 273C

Note: Section 273D provides that this section does not apply to certain joint charges.

- (2) The lien or mortgage is, subject to subsection 273A(3), as valid and effectual as if it had been duly registered under the applicable registration law.
- (3) The *specified laws* are the State or Territory laws that are:
- (a) specified in the following table; or
 - (b) specified by the regulations for the purposes of this section.

Specified laws for the purposes of this section		
	Law	Jurisdiction
1	<i>Liens on Crops and Wool and Stock Mortgages Act 1898</i> Parts II and III	New South Wales
2	<i>Instruments Act 1958</i> Parts VII and VIII	Victoria
3	<i>Bills of Sale and Other Instruments Act 1955</i> Part II	Queensland
4	<i>Liens on Crops of Sugar Cane Act 1931</i>	Queensland
5	<i>Liens on Fruit Act 1923</i>	South Australia
6	<i>Stock Mortgages and Wool Liens Act 1924</i>	South Australia
7	<i>Bills of Sale Act 1899</i> sections 7, 8 and 37	Western Australia
8	<i>Stock, Wool, and Crop Mortgages Act 1930</i>	Tasmania
9	<i>Instruments Act 1933</i> Parts IV and V	Australian Capital Territory
10	<i>Instruments Act</i> Parts III and IV	Northern Territory

- (4) The regulations may provide that a law specified in the table in subsection (3) is not a specified law for the purposes of this section.

273D Sections 273A to 273C do not apply to charges given by company jointly with person who is not a company

Nothing in section 273A, 273B or 273C applies in relation to a charge given by a company jointly with another person who is not, or other persons at least one of whom is not, a company.

274 Power of Court to rectify Register

Where the Court is satisfied:

- (a) that a particular with respect to a registrable charge on property of a company has been omitted from, or misstated in, the Register or a memorandum referred to in section 269; and
- (b) that the omission or misstatement:
 - (i) was accidental or due to inadvertence or to some other sufficient cause; or
 - (ii) is not of a nature to prejudice the position of creditors or shareholders; or
 - (iii) was due to a failure of an electronic system to lodge a notice in respect of a charge;

or that on other grounds it is just and equitable to grant relief; the Court may, on the application of ASIC, the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the omission or mis-statement be rectified.

277 Power to exempt from compliance with certain requirements of Division

- (1) ASIC may, by instrument in writing, exempt a person, as specified in the instrument and subject to such conditions (if any) as are specified in the instrument, from compliance with such of the requirements of section 263, 264 or 268 relating to:
 - (a) the particulars to be contained in a notice under the relevant section; or
 - (b) the documents (other than the notice) to be lodged under the relevant section; or

Section 277

- (c) the verification of any document required to be lodged under the relevant section;
as are specified in the instrument.
- (2) A person who is exempted by ASIC, subject to a condition, from compliance with a requirement of section 263, 264 or 268 must not contravene the condition.
- (3) Where a person has contravened or failed to comply with a condition to which an exemption under this section is subject, the Court may, on the application of ASIC, order the person to comply with the condition.

Part 2K.3—Order of priority

278 Definitions

- (1) In this Part:

priority time, in relation to a registered charge, means:

- (a) except as provided by paragraph (b) or (c)—the time and date appearing in the Register in relation to the charge, being a time and day entered in the Register pursuant to section 265; and
- (b) where a notice has been lodged under section 264 in relation to a charge on property, being a charge that, at the time when the notice was lodged, was already registered under Part 2K.2—the earlier or earliest time and day appearing in the Register in relation to the charge, being a time and day entered in the Register pursuant to section 264; and
- (c) to the extent that the charge has effect as varied by a variation notice of which was required to be lodged under subsection 268(2)—the time and day entered in the Register in relation to the charge pursuant to subsection 265(14).

prior registered charge, in relation to another registered charge, means a charge the priority time of which is earlier than the priority time of the other charge.

registered charge means a charge that is registered under Part K.2.

subsequent registered charge, in relation to another registered charge, means a charge the priority time of which is later than the priority time of the other registered charge.

unregistered charge means a charge that is not registered under Part 2K.2 but does not include a charge that is not a registrable charge.

- (2) A reference in this Part to a person having notice of a charge includes a reference to a person having constructive notice of the charge.

Section 279

- (3) Where, by virtue of the definition of *priority time* in subsection (1), a registered charge has 2 or more priority times each of which relates to a particular liability secured by the charge, each of those liabilities is, for the purposes of this Part, taken to be secured by a separate registered charge the priority time of which is the priority time of the first-mentioned registered charge that relates to the liability concerned.

279 Priorities of charges

- (1) Subject to this section, sections 280 to 282, inclusive, have effect with respect to the priorities, in relation to each other, of registrable charges on the property of a company.
- (2) The application, in relation to particular registrable charges, of the order of priorities of charges set out in sections 280 to 282, inclusive, is subject to:
- (a) any consent (express or implied) that varies the priorities in relation to each other of those charges, being a consent given by the holder of one of those charges, being a charge that would otherwise be entitled to priority over the other charge; and
 - (b) any agreement between those chargees that affects the priorities in relation to each other of the charges in relation to which those persons are the chargees.
- (3) The holder of a registered charge, being a floating charge, on property of a company is taken, for the purposes of subsection (2), to have consented to that charge being postponed to a subsequent registered charge, being a fixed charge that is created before the floating charge becomes fixed, on any of that property unless:
- (a) the creation of the subsequent registered charge contravened a provision of the instrument or resolution creating or evidencing the floating charge; and
 - (b) a notice in respect of the floating charge indicating the existence of the provision referred to in paragraph (a) was lodged with ASIC under section 263, 264 or 268 before the creation of the subsequent registered charge.
- (4) Where a charge relates to property of a kind or kinds to which a particular paragraph or paragraphs of subsection 262(1) applies or apply and also relates to other property, sections 280 to 282,

Section 280

inclusive, apply so as to affect the priority of the charge only in so far as it relates to the first-mentioned property and do not affect the priority of the charge in so far as it relates to the other property.

- (5) Sections 280 to 282, inclusive, do not apply so as to affect the operation of:
- (a) the *Copyright Act 1968*; or
 - (b) the *Designs Act 1906*; or
 - (c) the *Life Insurance Act 1995*; or
 - (d) the *Patents Act 1952*; or
 - (e) the *Trade Marks Act 1955*.

280 General priority rules in relation to registered charges

- (1) A registered charge on property of a company has priority over:
- (a) a subsequent registered charge on the property, unless the subsequent registered charge was created before the creation of the prior registered charge and the chargee in relation to the subsequent registered charge proves that the chargee in relation to the prior registered charge had notice of the subsequent registered charge at the time when the prior registered charge was created; and
 - (b) an unregistered charge on the property created before the creation of the registered charge, unless the chargee in relation to the unregistered charge proves that the chargee in relation to the registered charge had notice of the unregistered charge at the time when the registered charge was created; and
 - (c) an unregistered charge on the property created after the creation of the registered charge.
- (2) A registered charge on property of a company is postponed to:
- (a) a subsequent registered charge on the property, where the subsequent registered charge was created before the creation of the prior registered charge and the chargee in relation to the subsequent registered charge proves that the chargee in relation to the prior registered charge had notice of the subsequent registered charge at the time when the prior registered charge was created; and
 - (b) an unregistered charge on the property created before the creation of the registered charge, where the chargee in

Section 281

relation to the unregistered charge proves that the chargee in relation to the registered charge had notice of the unregistered charge at the time when the registered charge was created.

281 General priority rule in relation to unregistered charges

An unregistered charge on property of a company has priority over:

- (a) a registered charge on the property that was created after the creation of the unregistered charge and does not have priority over the unregistered charge under subsection 280(1); and
- (b) another unregistered charge on the property created after the first-mentioned unregistered charge.

282 Special priority rules

- (1) Except as provided by this section, any priority accorded by this Part to a charge over another charge does not extend to any liability that, at the priority time in relation to the first-mentioned charge, is not a present liability.
- (2) Where a registered charge on property of a company secures:
 - (a) a present liability and a prospective liability of an unspecified amount; or
 - (b) a prospective liability of an unspecified amount;any priority accorded by this Part to the charge over another charge of which the chargee in relation to the first-mentioned charge does not have actual knowledge extends to the prospective liability, whether the prospective liability became a present liability before or after the registration of the first-mentioned charge.
- (3) Where a registered charge on property of a company secures:
 - (a) a present liability and a prospective liability up to a specified maximum amount; or
 - (b) a prospective liability up to a specified maximum amount;and the notice lodged under section 263 or 264 in relation to the charge sets out the nature of the prospective liability and the amount so specified, then any priority accorded by this Part to the charge over another charge extends to any prospective liability secured by the first-mentioned charge to the extent of the maximum amount so specified, whether the prospective liability

became a present liability before or after the registration of the first-mentioned charge and notwithstanding that the chargee in relation to the first-mentioned charge had actual knowledge of the other charge at the time when the prospective liability became a present liability.

(4) Where:

- (a) a registered charge on property of a company secures:
 - (i) a present liability and a prospective liability up to a specified maximum amount; or
 - (ii) a prospective liability up to a specified maximum amount;

but the notice lodged under section 263 or 264 in relation to the charge does not set out the nature of the prospective liability or the maximum amount so specified; or

- (b) a registered charge on property of a company secures a prospective liability of an unspecified amount;

the following paragraphs have effect:

- (c) any priority accorded by this Part to the charge over another charge of which the chargee in relation to the first-mentioned charge has actual knowledge extends to any prospective liability secured by the first-mentioned charge that had become a present liability at the time when the chargee in relation to the first-mentioned charge first obtained actual knowledge of the other charge;
- (d) any priority accorded by this Part to the charge over another charge of which the chargee in relation to the first-mentioned charge has actual knowledge extends to any prospective liability secured by the first-mentioned charge that became a present liability, as the result of the making of an advance, after the time when the chargee in relation to the first-mentioned charge first obtained actual knowledge of the other charge if, at that time, the terms of the first-mentioned charge required the chargee in relation to that charge to make the advance after that time, and so extends to that prospective liability whether the advance was made before or after the registration of the first-mentioned charge and notwithstanding that the chargee in relation to the first-mentioned charge had actual knowledge of the other charge at the time when the advance was made.

Corporations Act 2001

Act No. 50 of 2001 as amended

This compilation was prepared on 12 January 2009
taking into account amendments up to Act No. 146 of 2008

Volume 2 includes: Table of Contents
Chapters 2L–5B (ss. 283AA – 601DJ)

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Contents

Chapter 2L—Debentures	1
Part 2L.1—Requirement for trust deed and trustee	1
283AA Requirement for trust deed and trustee	1
283AB Trust deed	2
283AC Who can be a trustee	2
283AD Existing trustee continues to act until new trustee takes office	3
283AE Replacement of trustee	3
Part 2L.2—Duties of borrower	5
283BA Duties of borrower	5
283BB General duties	5
283BC Duty to notify ASIC of name of trustee	5
283BD Duty to replace trustee	6
283BE Duty to inform trustee about charges	6
283BF Duty to give trustee and ASIC quarterly reports	6
283BG Exceptions	9
283BH How debentures may be described	9
283BI Offences for failure to comply with statutory duties	10
Part 2L.3—Duties of guarantor	11
283CA Duties of guarantor	11
283CB General duties	11
283CC Duty to inform trustee about charges	11
283CD Exceptions	12
283CE Offences for failure to comply with statutory duties	12
Part 2L.4—Trustee	13
283DA Trustee's duties	13
283DB Exemptions and indemnifications of trustee from liability	14
283DC Indemnity	15
Part 2L.5—Meetings of debenture holders	16
283EA Borrower's duty to call meeting	16
283EB Trustee's power to call meeting	17
283EC Court may order meeting	17
Part 2L.6—Civil liability	19
283F Civil liability for contravening this Chapter	19
Part 2L.7—ASIC powers	20
283GA ASIC's power to exempt and modify	20
283GB ASIC may approve body corporate to be trustee	21

Part 2L.8—Court	22
283HA General Court power to give directions and determine questions.....	22
283HB Specific Court powers	22
Part 2L.9—Location of other debenture provisions	24
283I Signpost to other debenture provisions.....	24
Chapter 2M—Financial reports and audit	25
Part 2M.1—Overview	25
285 Overview of obligations under this Chapter	25
Part 2M.2—Financial records	28
286 Obligation to keep financial records.....	28
287 Language requirements.....	28
288 Physical format.....	29
289 Place where records are kept	29
290 Director access	30
291 Signposts to other relevant provisions	30
Part 2M.3—Financial reporting	32
Division 1—Annual financial reports and directors’ reports	32
292 Who has to prepare annual financial reports and directors’ reports.....	32
293 Small proprietary company—shareholder direction	32
294 Small proprietary company—ASIC direction.....	33
295 Contents of annual financial report.....	33
295A Declaration in relation to listed entity’s financial statements by chief executive officer and chief financial officer	35
296 Compliance with accounting standards and regulations	36
297 True and fair view	37
298 Annual directors’ report.....	37
299 Annual directors’ report—general information	38
299A Annual directors’ report—additional general requirements for listed public companies.....	39
300 Annual directors’ report—specific information.....	40
300A Annual directors’ report—specific information to be provided by listed companies	46
301 Audit of annual financial report.....	50
Division 2—Half-year financial report and directors’ report	51
302 Disclosing entity must prepare half-year financial report and directors’ report	51
303 Contents of half-year financial report.....	51
304 Compliance with accounting standards and regulations	52

305	True and fair view	52
306	Half-year directors' report	53
Division 3—Audit and auditor's report		54
307	Audit.....	54
307A	Audit to be conducted in accordance with auditing standards	54
307B	Audit working papers to be retained for 7 years.....	55
307C	Auditor's independence declaration	57
308	Auditor's report on annual financial report	60
309	Auditor's report on half-year financial report.....	61
310	Auditor's power to obtain information	62
311	Reporting to ASIC	62
312	Assisting auditor.....	65
313	Special provisions on audit of debenture issuers and guarantors	66
Division 4—Annual financial reporting to members		67
314	Annual financial reporting to members	67
315	Deadline for reporting to members	69
316	Member's choices for annual financial information	70
317	Consideration of reports at AGM	71
318	Additional reporting by debenture issuers	71
Division 5—Lodging reports with ASIC		73
319	Lodgment of annual reports with ASIC.....	73
320	Lodgment of half-year reports with ASIC	73
321	ASIC power to require lodgment.....	73
322	Relodgment if financial statements or directors' reports amended after lodgment	74
Division 6—Special provisions about consolidated financial statements		75
323	Directors and officers of controlled entity to give information	75
323A	Auditor's power to obtain information from controlled entity.....	75
323B	Controlled entity to assist auditor	75
323C	Application of Division to entity that has ceased to be controlled.....	76
Division 7—Financial years and half-years		77
323D	Financial years and half-years	77
Division 8—Disclosure by listed companies of information filed overseas		79
323DA	Listed companies to disclose information filed overseas.....	79

Division 9—Reference of financial report to the Financial Reporting Panel	80
Subdivision A—Preliminary	80
323EA Financial reports to which Division applies.....	80
323EB Referral of financial report to Financial Reporting Panel	80
Subdivision B—Referral by ASIC	81
323EC ASIC may refer financial report to the Financial Reporting Panel	81
323ED ASIC to notify lodging entity of proposed referral	81
323EE Lodging entity to respond to ASIC notice	81
323EF Referral to Financial Reporting Panel	82
Subdivision C—Referral by lodging entity	83
323EG Lodging entity may refer financial report to the Financial Reporting Panel with ASIC's consent	83
323EH Lodging entity to apply to ASIC for consent to proposed referral	84
323EI Referral to Financial Reporting Panel	85
Subdivision D—Financial Reporting Panel dealing with reference	85
323EJ Financial Reporting Panel to obtain submissions from ASIC and lodging entity	85
323EK Financial Reporting Panel to consider and report on financial report referred to it under section 323EC or 323EG	86
323EL Power of Financial Reporting Panel to dismiss referral.....	87
323EM Court, or tribunal of fact, may have regard to Financial Reporting Panel report.....	87
Part 2M.4—Appointment and removal of auditors	88
Division 1—Entities that may be appointed as an auditor for a company or registered scheme	88
324AA Individual auditors, audit firms and authorised audit companies.....	88
324AB Effect of appointing firm as auditor—general	88
324AC Effect of appointing firm as auditor—reconstitution of firm	89
324AD Effect of appointing company as auditor	90
324AE Professional members of the audit team	91
324AF Lead and review auditors.....	91
Division 2—Registration requirements	92
324BA Registration requirements for appointment of individual as auditor	92
324BB Registration requirements for appointment of firm as auditor.....	92
324BC Registration requirements for appointment of company as auditor	94

324BD	Exception from registration requirement for proprietary company	95
Division 3—Auditor independence		97
Subdivision A—General requirement		97
324CA	General requirement for auditor independence—auditors	97
324CB	General requirement for auditor independence—member of audit firm	100
324CC	General requirement for auditor independence—director of audit company	103
324CD	Conflict of interest situation	107
Subdivision B—Specific requirements		108
324CE	Auditor independence—specific requirements for individual auditor	108
324CF	Auditor independence—specific requirements for audit firm.....	113
324CG	Auditor independence—specific requirements for audit company	119
324CH	Relevant relationships	126
324CI	Special rule for retiring partners of audit firms and retiring directors of authorised audit companies	132
324CJ	Special rule for retiring professional member of audit company	133
324CK	Multiple former audit firm partners or audit company directors	133
Subdivision C—Common provisions		134
324CL	People who are regarded as officers of a company for the purposes of this Division	134
Division 4—Deliberately disqualifying auditor		136
324CM	Deliberately disqualifying auditor	136
Division 5—Auditor rotation for listed companies		138
324DA	Limited term for eligibility to play significant role in audit of a listed company or listed registered scheme.....	138
324DB	Individual’s rotation obligation	139
324DC	Audit firm’s rotation obligation.....	139
324DD	Audit company’s rotation obligation	140
Division 6—Appointment, removal and fees of auditors for companies		143
Subdivision A—Appointment of company auditors		143
325	Appointment of auditor by proprietary company	143
327A	Public company auditor (initial appointment of auditor).....	143
327B	Public company auditor (annual appointments at AGMs to fill vacancies)	143
327C	Public company auditor (appointment to fill casual vacancy)	145
327D	Appointment to replace auditor removed from office.....	145

327E	ASIC may appoint public company auditor if auditor removed but not replaced	146
327F	ASIC's general power to appoint public company auditor	147
327G	Restrictions on ASIC's powers to appoint public company auditor	147
327H	Effect on appointment of public company auditor of company beginning to be controlled by a corporation	148
327I	Remaining auditors may act during vacancy	148
328A	Auditor's consent to appointment	148
328B	Nomination of auditor	149
Subdivision B—Removal and resignation of company auditors		150
329	Removal and resignation of auditors	150
330	Effect of winding up on office of auditor	152
Subdivision C—Company auditors' fees and expenses		152
331	Fees and expenses of auditors	152
Division 7—Appointment, removal and fees of auditors for registered schemes		153
Subdivision A—Appointment of registered scheme auditors		153
331AAA	Registered scheme auditor (initial appointment of auditor)	153
331AAB	Registered scheme auditor (appointment to fill vacancy)	155
331AAC	ASIC's power to appoint registered scheme auditor	155
331AAD	Remaining auditors may act during vacancy	155
Subdivision B—Removal and resignation of registered scheme auditors		155
331AC	Removal and resignation of auditors	155
331AD	Effect of winding up on office of auditor	157
Subdivision C—Fees and expenses of auditors		157
331AE	Fees and expenses of auditors	157
Part 2M.5—Accounting and auditing standards		158
334	Accounting standards	158
335	Equity accounting	158
336	Auditing standards	158
337	Interpretation of accounting and auditing standards	159
338	Evidence of text of accounting standard or auditing standard	159
Part 2M.6—Exemptions and modifications		160
340	Exemption orders—companies, registered schemes and disclosing entities	160
341	Exemption orders—class orders for companies, registered schemes and disclosing entities	160
342	Exemption orders—criteria for orders for companies, registered schemes and disclosing entities	161

342AA	Exemption orders—non-auditor members and former members of audit firms; former employees of audit companies.....	162
342AB	Exemption orders—class orders for non-auditor members etc.	163
342AC	Exemption orders—criteria for orders for non-auditor members etc.....	163
342A	ASIC’s power to modify the operation of section 324DA.....	163
342B	Auditor to notify company or registered scheme of section 342A declaration	165
343	Modification by regulations.....	165
Part 2M.7—Sanctions for contraventions of Chapter		166
344	Contravention of Part 2M.2 or 2M.3	166
Chapter 2N—Updating ASIC information about companies and registered schemes		167
Part 2N.1—Review date		167
345A	Review date	167
345B	Company or responsible entity may change review date	168
345C	When choice has effect.....	168
Part 2N.2—Extract of particulars		169
346A	ASIC must give an extract of particulars each year	169
346B	ASIC may ask questions.....	169
346C	Requirements in relation to an extract of particulars	169
Part 2N.3—Solvency resolution		171
347A	Directors must pass a solvency resolution after each review date	171
347B	Notice to ASIC	171
347C	Payment of review fee is taken to be a representation by the directors that the company is solvent.....	172
Part 2N.4—Return of particulars		173
348A	ASIC may give a return of particulars	173
348B	ASIC may ask questions.....	173
348C	ASIC may require a solvency resolution and statement	173
348D	General requirements in relation to a return of particulars	174
Part 2N.5—Notice by proprietary companies of changes to ultimate holding company		176
349A	Proprietary companies must notify ASIC of changes to ultimate holding company	176
349B	Another company becomes an ultimate holding company	176
349C	A company ceases to be an ultimate holding company	176

349D	Ultimate holding company changes its name	177
Chapter 2P—Lodgments with ASIC		178
350	Forms for documents to be lodged with ASIC	178
351	Signing documents lodged with ASIC.....	179
352	Documents lodged with ASIC electronically.....	179
353	Electronic lodgment of certain documents	179
354	Telephone notice of certain changes.....	180
Chapter 5—External administration		181
Part 5.1—Arrangements and reconstructions		181
410	Interpretation	181
411	Administration of compromises etc.....	181
412	Information as to compromise with creditors	188
413	Provisions for facilitating reconstruction and amalgamation of Part 5.1 bodies.....	190
414	Acquisition of shares of shareholders dissenting from scheme or contract approved by majority	191
415	Notification of appointment of scheme manager and power of Court to require report.....	195
Part 5.2—Receivers, and other controllers, of property of corporations		196
416	Definitions	196
417	Application of Part	196
418	Persons not to act as receivers	197
418A	Court may declare whether controller is validly acting	197
419	Liability of controller	198
419A	Liability of controller under pre-existing agreement about property used by corporation.....	199
420	Powers of receiver	200
420A	Controller's duty of care in exercising power of sale	202
420B	Court may authorise managing controller to dispose of property despite prior charge.....	202
420C	Receiver's power to carry on corporation's business during winding up.....	204
421	Managing controller's duties in relation to bank accounts and financial records	204
421A	Managing controller to report within 2 months about corporation's affairs.....	205
422	Reports by receiver or managing controller.....	206
423	Supervision of controller	207
424	Controller may apply to Court.....	208
425	Court's power to fix receiver's remuneration	209
426	Controller has qualified privilege in certain cases	211

427	Notification of matters relating to controller	211
428	Statement that receiver appointed or other controller acting	212
429	Officers to report to controller about corporation's affairs	212
430	Controller may require reports	214
431	Controller may inspect books	215
432	Lodging controller's accounts	215
433	Payment of certain debts, out of property subject to floating charge, in priority to claims under charge	217
434	Enforcing controller's duty to make returns	219
434A	Court may remove controller for misconduct	219
434B	Court may remove redundant controller	220
434C	Effect of sections 434A and 434B	221
434D	Appointment of 2 or more receivers of property of a corporation	221
434E	Appointment of 2 or more receivers and managers of property of a corporation	221
434F	Appointment of 2 or more controllers of property of a corporation	222
434G	Appointment of 2 or more managing controllers of property of a corporation	222
Part 5.3A—Administration of a company's affairs with a view to executing a deed of company arrangement		223
Division 1—Preliminary		223
435A	Object of Part	223
435B	Definitions	223
435C	When administration begins and ends	223
Division 2—Appointment of administrator and first meeting of creditors		225
436A	Company may appoint administrator if board thinks it is or will become insolvent	225
436B	Liquidator may appoint administrator	225
436C	Chargee may appoint administrator	226
436D	Company already under administration	226
436DA	Declarations by administrator—indemnities and relevant relationships	226
436E	Purpose and timing of first meeting of creditors	228
436F	Functions of committee of creditors	229
436G	Membership of committee	229
Division 3—Administrator assumes control of company's affairs		230
437A	Role of administrator	230
437B	Administrator acts as company's agent	230
437C	Powers of other officers suspended	230
437D	Only administrator can deal with company's property	231

437E	Order for compensation where officer involved in void transaction	232
437F	Effect of administration on company's members	232
Division 4—Administrator investigates company's affairs		236
438A	Administrator to investigate affairs and consider possible courses of action	236
438B	Directors to help administrator	236
438C	Administrator's rights to company's books	237
438D	Reports by administrator	238
438E	Administrator's accounts	239
Division 5—Meeting of creditors decides company's future		241
439A	Administrator to convene meeting and inform creditors	241
439B	Conduct of meeting	243
439C	What creditors may decide	243
Division 6—Protection of company's property during administration		244
440A	Winding up company	244
440B	Charge unenforceable	244
440BA	Liens and pledges	244
440BB	Distress for rent must not be carried out	245
440C	Owner or lessor cannot recover property used by company	245
440D	Stay of proceedings	245
440E	Administrator not liable in damages for refusing consent	245
440F	Suspension of enforcement process	246
440G	Duties of court officer in relation to property of company	246
440H	Lis pendens taken to exist	247
440J	Administration not to trigger liability of director or relative under guarantee of company's liability	247
440JA	Property subject to a banker's lien—exemption from this Division	248
Division 7—Rights of chargee, lienee, pledgee, owner or lessor		250
441A	Where chargee acts before or during decision period	250
441B	Where enforcement of charge begins before administration	251
441C	Charge on perishable property	251
441D	Court may limit powers of chargee etc. in relation to charged property	252
441E	Giving a notice under a charge	253
441F	Where recovery of property begins before administration	253
441G	Recovering perishable property	253
441H	Court may limit powers of receiver etc. in relation to property used by company	254
441J	Giving a notice under an agreement about property	254
441JA	Sale of property subject to a lien or pledge	254

441K	Effect of Division	255
Division 8—Powers of administrator		256
442A	Additional powers of administrator	256
442B	Dealing with property subject to a floating charge that has crystallised.....	256
442C	When administrator may dispose of encumbered property.....	256
442CA	Property subject to a lien or pledge—inspection or examination by potential purchasers etc.	258
442CB	Property subject to a lien or pledge or to a retention of title clause—administrator’s duty of care in exercising power of sale.....	258
442CC	Proceeds of sale of property	259
442D	Administrator’s powers subject to powers of chargee, receiver etc.	261
442E	Administrator has qualified privilege	261
442F	Protection of persons dealing with administrator	261
Division 9—Administrator’s liability and indemnity for debts of administration		263
Subdivision A—Liability		263
443A	General debts	263
443B	Payments for property used or occupied by, or in the possession of, the company	263
443BA	Certain taxation liabilities.....	265
443C	Administrator not otherwise liable for company’s debts	265
Subdivision B—Indemnity		265
443D	Right of indemnity.....	265
443E	Right of indemnity has priority over other debts	266
443F	Lien to secure indemnity	267
Division 10—Execution and effect of deed of company arrangement		269
444A	Effect of creditors’ resolution.....	269
444B	Execution of deed	270
444C	Creditor etc. not to act inconsistently with deed before its execution	270
444D	Effect of deed on creditors.....	271
444DA	Giving priority to eligible employee creditors.....	271
444DB	Superannuation contribution debts not admissible to proof.....	273
444E	Protection of company’s property from persons bound by deed	274
444F	Court may limit rights of secured creditor or owner or lessor	274
444G	Effect of deed on company, officers and members.....	275
444GA	Transfer of shares	276
444H	Extent of release of company’s debts	276

444J	Guarantees and indemnities.....	276
Division 11—Variation, termination and avoidance of deed		277
445A	Variation of deed by creditors	277
445B	Court may cancel variation.....	277
445C	When deed terminates	277
445CA	When creditors may terminate deed	278
445D	When Court may terminate deed	278
445E	Creditors may terminate deed and resolve that company be wound up	279
445F	Meeting of creditors to consider proposed variation or termination of deed.....	279
445FA	Notice of termination of deed	280
445G	When Court may void or validate deed	280
445H	Effect of termination or avoidance	281
Division 11A—Deed administrator’s accounts		282
445J	Deed administrator’s accounts.....	282
Division 12—Transition to creditors’ voluntary winding up		284
446A	Administrator becomes liquidator in certain cases	284
446B	Regulations may provide for transition in other cases	285
446C	Liquidator may require submission of a report about the company’s affairs	286
Division 13—Powers of Court		288
447A	General power to make orders.....	288
447B	Orders to protect creditors during administration	288
447C	Court may declare whether administrator validly appointed	289
447D	Administrator may seek directions	289
447E	Supervision of administrator of company or deed	289
447F	Effect of Division	290
Division 14—Qualifications of administrators		291
448A	Appointee must consent.....	291
448B	Administrator must be registered liquidator	291
448C	Disqualification of person connected with company	291
448D	Disqualification of insolvent under administration.....	293
Division 15—Removal, replacement and remuneration of administrator		294
449A	Appointment of administrator cannot be revoked.....	294
449B	Court may remove administrator	294
449C	Vacancy in office of administrator of company.....	294
449CA	Declarations by administrator—indemnities and relevant relationships	296
449D	Vacancy in office of administrator of deed of company arrangement.....	297

449E	Remuneration of administrator	298
Division 16—Notices about steps taken under Part		302
450A	Appointment of administrator.....	302
450B	Execution of deed of company arrangement.....	303
450C	Failure to execute deed of company arrangement.....	303
450D	Termination of deed of company arrangement	303
450E	Notice in public documents etc. of company	303
450F	Effect of contravention of this Division.....	304
Division 17—Miscellaneous		305
451A	Appointment of 2 or more administrators of company	305
451B	Appointment of 2 or more administrators of deed of company arrangement.....	305
451C	Effect of things done during administration of company.....	306
451D	Time for doing act does not run while act prevented by this Part	306
Part 5.4—Winding up in insolvency		307
Division 1—When company to be wound up in insolvency		307
459A	Order that insolvent company be wound up in insolvency	307
459B	Order made on application under section 234, 462 or 464	307
459C	Presumptions to be made in certain proceedings	307
459D	Contingent or prospective liability relevant to whether company solvent.....	308
Division 2—Statutory demand		309
459E	Creditor may serve statutory demand on company	309
459F	When company taken to fail to comply with statutory demand	310
Division 3—Application to set aside statutory demand		311
459G	Company may apply	311
459H	Determination of application where there is a dispute or offsetting claim.....	311
459J	Setting aside demand on other grounds	313
459K	Effect of order setting aside demand	313
459L	Dismissal of application	313
459M	Order subject to conditions.....	313
459N	Costs where company successful.....	313
Division 4—Application for order to wind up company in insolvency		314
459P	Who may apply for order under section 459A.....	314
459Q	Application relying on failure to comply with statutory demand	314
459R	Period within which application must be determined	315

459S	Company may not oppose application on certain grounds	315
459T	Application to wind up joint debtors in insolvency	316
Part 5.4A—Winding up by the Court on other grounds		317
461	General grounds on which company may be wound up by Court.....	317
462	Standing to apply for winding up	318
464	Application for winding up in connection with investigation under ASIC Act.....	319
Part 5.4B—Winding up in insolvency or by the Court		320
Division 1—General		320
465A	Notice of application	320
465B	Substitution of applicants	320
465C	Applicant to be given notice of grounds for opposing application	321
466	Payment of preliminary costs etc.....	321
467	Court's powers on hearing application	321
467A	Effect of defect or irregularity on application under Part 5.4 or 5.4A.....	323
467B	Court may order winding up of company that is being wound up voluntarily	323
468	Avoidance of dispositions of property, attachments etc.	323
468A	Effect of winding up on company's members	324
469	Application to be <i>lis pendens</i>	327
470	Certain notices to be lodged	327
Division 1A—Effect of winding up order		329
471	Effect on creditors and contributories.....	329
471A	Powers of other officers suspended during winding up	329
471B	Stay of proceedings and suspension of enforcement process.....	330
471C	Secured creditor's rights not affected	330
Division 2—Court-appointed liquidators		331
472	Court to appoint official liquidator	331
473	General provisions about liquidators	331
474	Custody and vesting of company's property	335
475	Report as to company's affairs to be submitted to liquidator	335
476	Preliminary report by liquidator	337
477	Powers of liquidator	337
478	Application of property; list of contributories	340
479	Exercise and control of liquidator's powers	341
480	Release of liquidator and deregistration of company.....	341
481	Orders for release or deregistration	342

Division 3—General powers of Court	344
Subdivision A—General powers	344
482 Power to stay or terminate winding up	344
483 Delivery of property to liquidator	345
484 Appointment of special manager	347
485 Claims of creditors and distribution of property	347
486 Inspection of books by creditors and contributories	347
486A Court may make order to prevent officer or related entity from avoiding liability to company	348
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	350
487 Power to arrest absconding contributory	350
488 Delegation to liquidator of certain powers of Court	351
489 Powers of Court cumulative	351
Subdivision B—Procedures relating to section 486B warrants	351
489A Arrest of person subject to warrant	351
489B Procedure after arrest	352
489C Procedure on remand on bail	352
489D Court's power to make orders under section 486A, 598 or 1323	353
489E Jurisdiction under this Subdivision	353
Part 5.5—Voluntary winding up	354
Division 1—Resolution for winding up	354
490 When company cannot wind up voluntarily	354
491 Circumstances in which company may be wound up voluntarily	354
493 Effect of voluntary winding up	354
493A Effect of voluntary winding up on company's members	354
494 Declaration of solvency	357
Division 2—Members' voluntary winding up	359
495 Liquidators	359
496 Duty of liquidator where company turns out to be insolvent	360
Division 3—Creditors' voluntary winding up	362
497 Meeting of creditors	362
498 Power to adjourn meeting	363
499 Liquidators	364
500 Execution and civil proceedings	367
Division 4—Voluntary winding up generally	368
501 Distribution of property of company	368
502 Appointment of liquidator	368

503	Removal of liquidator.....	368
504	Review of liquidator's remuneration	368
505	Acts of liquidator valid etc.	369
506	Powers and duties of liquidator	370
506A	Declarations by liquidator—relevant relationships.....	371
507	Power of liquidator to accept shares etc. as consideration for sale of property of company	372
508	Annual obligations of liquidator—meeting or report.....	374
509	Final meeting and deregistration	375
510	Arrangement: when binding on creditors	376
511	Application to Court to have questions determined or powers exercised.....	377
Part 5.6—Winding up generally		378
Division 1—Preliminary		378
513	Application of Part	378
Division 1A—When winding up taken to begin		379
513A	Winding up ordered by the Court	379
513B	Voluntary winding up.....	379
513C	Section 513C day in relation to an administration under Part 5.3A.....	380
513D	Validity of proceedings in earlier winding up	380
Division 2—Contributories		381
514	Where Division applies	381
515	General liability of contributory	381
516	Company limited by shares	381
517	Company limited by guarantee.....	381
518	Company limited both by shares and by guarantee	381
519	Exceptions for former unlimited company	382
520	Past member: later debts.....	382
521	Person ceasing to be a member a year or more before winding up.....	382
522	Present members to contribute first	382
523	Past member of former unlimited company.....	382
524	Past member of former limited company.....	383
526	Liability on certain contracts	383
527	Nature of contributory's liability	383
528	Death of contributory	383
529	Bankruptcy of contributory	383
Division 3—Liquidators		385
530	Appointment of 2 or more liquidators of a company	385
530AA	Appointment of 2 or more provisional liquidators of a company	385

530A	Officers to help liquidator.....	385
530B	Liquidator's rights to company's books	387
530C	Warrant to search for, and seize, company's property or books	388
531	Books to be kept by liquidator.....	388
532	Disqualification of liquidator.....	389
533	Reports by liquidator	391
534	Prosecution by liquidator of delinquent officers and members	392
535	When liquidator has qualified privilege.....	392
536	Supervision of liquidators.....	393
537	Notice of appointment and address of liquidator	393
538	Regulations relating to money etc. received by liquidator.....	394
539	Liquidator's accounts	395
540	Liquidator to remedy defaults.....	396
Division 4—General		398
541	Notification that company is in liquidation	398
542	Books of company	398
543	Investment of surplus funds on general account.....	399
544	Unclaimed money to be paid to ASIC	399
545	Expenses of winding up where property insufficient.....	400
546	Resolutions passed at adjourned meetings of creditors and contributories.....	401
547	Meetings to ascertain wishes of creditors or contributories	401
Division 5—Committees of inspection		402
548	Convening of meetings by liquidator for appointment of committee of inspection—company not in pooled group	402
548A	Convening of meeting for appointment of committee of inspection—pooled group.....	403
549	Proceedings of committee of inspection	404
550	Vacancies on committee of inspection	405
551	Member of committee not to accept extra benefit	406
552	Powers of Court where no committee of inspection	406
Division 6—Proof and ranking of claims		407
Subdivision A—Admission to proof of debts and claims		407
553	Debts or claims that are provable in winding up	407
553A	Member cannot prove debt unless contributions paid.....	408
553AA	Selling shareholder cannot prove debt unless documents given.....	408
553AB	Superannuation contribution debts not admissible to proof.....	408
553B	Insolvent companies—penalties and fines not generally provable.....	409
553C	Insolvent companies—mutual credit and set-off	409

553D	Debts or claims may be proved formally or informally	410
553E	Application of Bankruptcy Act to winding up of insolvent company	410
Subdivision B—Computation of debts and claims		411
554	General rule—compute amount as at relevant date	411
554A	Determination of value of debts and claims of uncertain value	411
554B	Discounting of debts payable after relevant date	412
554C	Conversion into Australian currency of foreign currency debts or claims	412
Subdivision C—Special provisions relating to secured creditors of insolvent companies		413
554D	Application of Subdivision	413
554E	Proof of debt by secured creditor	413
554F	Redemption of security by liquidator	414
554G	Amendment of valuation	415
554H	Repayment of excess	415
554J	Subsequent realisation of security	416
Subdivision D—Priorities		416
555	Debts and claims proved to rank equally except as otherwise provided	416
556	Priority payments	416
558	Debts due to employees	423
559	Debts of a class to rank equally	424
560	Advances for company to make priority payments in relation to employees	424
561	Priority of employees' claims over floating charges	424
562	Application of proceeds of contracts of insurance	425
562A	Application of proceeds of contracts of reinsurance	425
563	Provisions relating to injury compensation	427
563AA	Seller under a buy-back agreement	428
563A	Member's debts to be postponed until other debts and claims satisfied	428
563AAA	Redemption of debentures	428
Subdivision E—Miscellaneous		429
563B	Interest on debts and claims from relevant date to date of payment	429
563C	Debt subordination	429
564	Power of Court to make orders in favour of certain creditors	430
Division 7—Effect on certain transactions		431
565	Undue preference	431
566	Effect of floating charge	431
567	Liquidator's right to recover in respect of certain transactions	431

Division 7A—Disclaimer of onerous property	434
568 Disclaimer by liquidator; application to Court by party to contract	434
568A Liquidator must give notice of disclaimer	435
568B Application to set aside disclaimer before it takes effect.....	436
568C When disclaimer takes effect.....	437
568D Effect of disclaimer	438
568E Application to set aside disclaimer after it has taken effect.....	438
568F Court may dispose of disclaimed property	439
Division 7B—Effect on enforcement process against company’s property	440
569 Executions, attachments etc. before winding up.....	440
570 Duties of sheriff after receiving notice of application	441
Division 8—Pooling	444
Subdivision A—Pooling determinations	444
571 Pooling determination	444
572 Variation of pooling determination.....	447
573 Lodgment of copy of pooling determination etc.....	447
574 Eligible unsecured creditors must approve the making or variation of a pooling determination.....	447
575 Members’ voluntary winding up—copy of notice etc. to be given to each member of the company	449
576 Conduct of meeting	449
577 Eligible unsecured creditors may decide to approve the determination or variation	449
578 When pooling determination comes into force etc.	450
579 Duties of liquidator.....	451
579A Court may vary or terminate pooling determination.....	452
579B Court may cancel or confirm variation	453
579C When Court may void or validate pooling determination.....	454
579D Effect of termination or avoidance	455
Subdivision B—Pooling orders	455
579E Pooling orders.....	455
579F Variation of pooling orders.....	458
579G Court may make ancillary orders etc.	459
579H Variation of ancillary orders etc.	460
579J Notice of application for pooling order etc.....	461
579K Notice of pooling order etc.....	462
579L Consolidated meetings of creditors.....	465
Subdivision C—Other provisions	466
579M When debts or claims are provable in winding up.....	466
579N Group of companies	466

579P	Secured debt may become unsecured	467
579Q	Eligible unsecured creditor	467
Division 9—Co-operation between Australian and foreign courts in external administration matters		468
580	Definitions	468
581	Courts to act in aid of each other	468
Part 5.7—Winding up bodies other than companies		470
582	Application of Part	470
583	Winding up Part 5.7 bodies	470
585	Insolvency of Part 5.7 body	471
586	Contributories in winding up of Part 5.7 body	472
587	Power of Court to stay or restrain proceedings	472
588	Outstanding property of defunct registrable body	473
Part 5.7B—Recovering property or compensation for the benefit of creditors of insolvent company		474
Division 1—Preliminary		474
588D	Secured debt may become unsecured	474
588E	Presumptions to be made in recovery proceedings	474
588F	Certain taxation liabilities taken to be debts	476
Division 2—Voidable transactions		478
588FA	Unfair preferences	478
588FB	Uncommercial transactions	479
588FC	Insolvent transactions	479
588FD	Unfair loans to a company	480
588FDA	Unreasonable director-related transactions	480
588FE	Voidable transactions	482
588FF	Courts may make orders about voidable transactions	484
588FG	Transaction not voidable as against certain persons	486
588FGA	Directors to indemnify Commissioner of Taxation if certain payments set aside	488
588FGB	Defences in proceedings under section 588FGA	489
588FH	Liquidator may recover from related entity benefit resulting from insolvent transaction	490
588FI	Creditor who gives up benefit of unfair preference may prove for preferred debt	490
588FJ	Floating charge created within 6 months before relation-back day	491
Division 3—Director's duty to prevent insolvent trading		493
588G	Director's duty to prevent insolvent trading by company	493
588H	Defences	495

Division 4—Director liable to compensate company	497
Subdivision A—Proceedings against director	497
588J On application for civil penalty order, Court may order compensation.....	497
588K Criminal court may order compensation.....	497
588L Enforcement of order under section 588J or 588K	498
588M Recovery of compensation for loss resulting from insolvent trading	498
588N Avoiding double recovery	499
588P Effect of sections 588J, 588K and 588M.....	499
588Q Certificates evidencing contravention	499
Subdivision B—Proceedings by creditor	500
588R Creditor may sue for compensation with liquidator’s consent.....	500
588S Creditor may give liquidator notice of intention to sue for compensation.....	500
588T When creditor may sue for compensation without liquidator’s consent	501
588U Events preventing creditor from suing.....	501
Division 5—Liability of holding company for insolvent trading by subsidiary	502
588V When holding company liable	502
588W Recovery of compensation for loss resulting from insolvent trading	502
588X Defences.....	503
Division 6—Application of compensation under Division 4 or 5	505
588Y Application of amount paid as compensation	505
Division 7—Person managing a corporation while disqualified may become liable for corporation’s debts	506
588Z Court may make order imposing liability	506
Part 5.8—Offences	507
589 Interpretation and application	507
590 Offences by officers of certain companies.....	510
592 Incurring of certain debts; fraudulent conduct.....	512
593 Powers of Court.....	514
594 Certain rights not affected	515
595 Inducement to be appointed liquidator etc. of company	516
596 Frauds by officers	516
Part 5.8A—Employee entitlements	518
596AA Object and coverage of Part.....	518
596AB Entering into agreements or transactions to avoid employee entitlements	519

596AC	Person who contravenes section 596AB liable to compensate for loss	520
596AD	Avoiding double recovery	520
596AE	Effect of section 596AC	521
596AF	Employee may sue for compensation with liquidator's consent.....	521
596AG	Employee may give liquidator notice of intention to sue for compensation.....	521
596AH	When employee may sue for compensation without liquidator's consent	522
596AI	Events preventing employee from suing.....	522
Part 5.9—Miscellaneous		524
Division 1—Examining a person about a corporation		524
596A	Mandatory examination	524
596B	Discretionary examination.....	524
596C	Affidavit in support of application under section 596B	525
596D	Content of summons.....	525
596E	Notice of examination	525
596F	Court may give directions about examination	526
597	Conduct of examination.....	526
597A	When Court is to require affidavit about corporation's examinable affairs	529
597B	Costs of unnecessary examination or affidavit	530
Division 2—Orders against a person in relation to a corporation		531
598	Order against person concerned with corporation	531
Division 3—Provisions applying to various kinds of external administration		533
600A	Powers of Court where outcome of voting at creditors' meeting determined by related entity.....	533
600B	Review by Court of resolution of creditors passed on casting vote of person presiding at meeting	534
600C	Court's powers where proposed resolution of creditors lost as casting vote of person presiding at meeting	535
600D	Interim order on application under section 600A, 600B or 600C	536
600E	Order under section 600A or 600B does not affect act already done pursuant to resolution	536
600F	Limitation on right of suppliers of essential services to insist on payment as condition of supply	536
600G	Electronic methods of giving or sending certain notices etc.....	538

Chapter 5A—Deregistration, and transfer of registration, of companies	540
Part 5A.1—Deregistration	540
601AA Deregistration—voluntary	540
601AB Deregistration—ASIC initiated	541
601AC Deregistration—following amalgamation or winding up	542
601AD Effect of deregistration	542
601AE What the Commonwealth or ASIC does with the property	544
601AF The Commonwealth's and ASIC's power to fulfil outstanding obligations of deregistered company	546
601AG Claims against insurers of deregistered company	546
601AH Reinstatement	546
Part 5A.2—Transfer of registration	548
601AI Transferring registration	548
601AJ Applying to transfer registration	548
601AK ASIC makes transfer of registration declaration	548
601AL ASIC to deregister company	549
Chapter 5B—Bodies corporate registered as companies, and registrable bodies	550
Part 5B.1—Registering a body corporate as a company	550
Division 1—Registration	550
601BA Bodies corporate may be registered as certain types of companies	550
601BB Bodies registered as proprietary companies	550
601BC Applying for registration under this Part	551
601BD ASIC gives body ACN, registers as company and issues certificate	555
601BE Registered office	555
601BF Name	555
601BG Constitution	556
601BH Modifications of constitution	556
601BJ ASIC may direct company to apply for Court approval for modifications of constitution	556
601BK Establishing registers and minute books	557
601BL Registration of registered bodies	557
Division 2—Operation of this Act	558
601BM Effect of registration under this Part	558
601BN Liability of members on winding up	558
601BP Bearer shares	558

601BQ	References in pre-registration contracts and other documents to par value in existing contracts and documents.....	559
601BR	First AGM	560
601BS	Modification by regulations.....	560
Part 5B.2—Registrable bodies		561
Division 1—Registrable Australian bodies		561
601CA	When a registrable Australian body may carry on business in this jurisdiction and outside its place of origin	561
601CB	Application for registration	561
601CC	Cessation of business etc.	562
Division 2—Foreign companies		565
601CD	When a foreign company may carry on business in this jurisdiction.....	565
601CDA	Limited disclosure if place of origin is a prescribed country	565
601CE	Application for registration	565
601CF	Appointment of local agent	566
601CG	Local agent: how appointed.....	567
601CH	Local agent: how removed	568
601CJ	Liability of local agent.....	568
601CK	Balance-sheets and other documents	568
601CL	Cessation of business etc.	570
601CM	Register of members of foreign company.....	573
601CN	Register kept under section 601CM.....	574
601CP	Notifying ASIC about register kept under section 601CM.....	574
601CQ	Effect of right to acquire shares compulsorily	575
601CR	Index of members and inspection of registers	575
601CS	Certificate as to shareholding	575
Division 3—Bodies registered under this Part		576
601CTA	Limited disclosure if place of origin is a prescribed country	576
601CT	Registered office.....	576
601CU	Certificate of registration.....	577
601CV	Notice of certain changes	577
601CW	Body's name etc. must be displayed at office and place of business	578
601CX	Service of documents on registered body	578
601CY	Power to hold land.....	580
Division 4—Register of debenture holders for non-companies		581
601CZA	Certain documents are debentures	581
601CZB	Register of debenture holders to be maintained by non-companies.....	581
601CZC	Location of register.....	581
601CZD	Application of sections 173 to 177	582

Part 5B.3—Names of registrable Australian bodies and foreign companies

	583
601DA Reserving a name	583
601DB Acceptable abbreviations.....	583
601DC When a name is available	584
601DD Registered Australian bodies and registered foreign companies can carry on business with some names only.....	585
601DE Using a name and ARBN	585
601DF Exception to requirement to have ARBN on receipts.....	586
601DG Regulations may exempt from requirement to set out information on documents	586
601DH Notice of name change must be given to ASIC	587
601DJ ASIC’s power to direct a registered name be changed	587

Chapter 2L—Debentures

Part 2L.1—Requirement for trust deed and trustee

283AA Requirement for trust deed and trustee

- (1) Before a body:
- (a) makes an offer of debentures in this jurisdiction that needs disclosure to investors under Chapter 6D, or does not need disclosure to investors under Chapter 6D because of subsection 708(14) (disclosure document exclusion for debenture roll overs) or section 708A (sale offers that do not need disclosure); or
 - (b) makes an offer of debentures in this jurisdiction or elsewhere as consideration for the acquisition of securities under an off-market takeover bid; or
 - (c) issues debentures in this jurisdiction or elsewhere under a compromise or arrangement under Part 5.1 approved at a meeting held as a result of an order under subsection 411(1) or (1A);

regardless of where any resulting issue, sale or transfer occurs, the body must enter into a trust deed that complies with section 283AB and appoint a trustee that complies with section 283AC.

Note: For rules about when an offer of debentures will need disclosure to investors under Chapter 6D, see sections 706, 707, 708, 708AA and 708A.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The body may revoke the trust deed after it has repaid all amounts payable under the debentures in accordance with the debentures' terms and the trust deed.

- (3) The body must comply with this Chapter.

Note: Sections 168 and 601CZB require a register of debenture holders to be set up and kept.

Section 283AB

283AB Trust deed

- (1) The trust deed must provide that the following are held in trust by the trustee for the benefit of the debenture holders:
- (a) the right to enforce the borrower's duty to repay;
 - (b) any charge or security for repayment;
 - (c) the right to enforce any other duties that the borrower and any guarantor have under:
 - (i) the terms of the debentures; or
 - (ii) the provisions of the trust deed or this Chapter.

Note: For information about the duties that the borrower and any guarantor body have under this Chapter, see sections 283BB to 283CE.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

283AC Who can be a trustee

Who can be trustee

- (1) The trustee must be:
- (a) the Public Trustee of any State or Territory; or
 - (b) a body corporate authorised by a law of any State or Territory to take in its own name a grant of probate of the will, or letters of administration of the estate, of a deceased person; or
 - (c) a body corporate registered under the *Life Insurance Act 1995*; or
 - (d) an Australian ADI; or
 - (e) a body corporate, all of whose shares are held beneficially by a body corporate or bodies corporate of the kind referred to in paragraph (b), (c) or (d) if that body or those bodies:
 - (i) are liable for all of the liabilities incurred, or to be incurred, by the trustee as trustee; or
 - (ii) have subscribed for and beneficially hold shares in the trustee and there is an uncalled liability of at least \$500,000 in respect of those shares that can only be called up if the trustee becomes an externally-administered body corporate (see section 254N); or

Section 283AD

(f) a body corporate approved by ASIC (see section 283GB).

Note: Section 283BD provides that if the borrower becomes aware that the trustee cannot be a trustee, the trustee must be replaced.

Circumstances in which a person cannot be trustee

- (2) A person may only be appointed or act as trustee (except to the extent provided for by section 283AD) if the appointment or acting will not result in a conflict of interest or duty. This subsection is not intended to affect any rule of law or equity.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

283AD Existing trustee continues to act until new trustee takes office

An existing trustee continues to act as the trustee until a new trustee is appointed and has taken office as trustee, despite any rule of law or equity to the contrary.

Note: This section applies even if the existing trustee resigns.

283AE Replacement of trustee

Related party of existing trustee may be appointed as a new trustee

- (1) In addition to any other powers of appointment under the terms of the debentures or provisions of the trust deed, the borrower may appoint a body corporate that is related to the existing trustee as trustee in place of the existing trustee if:
 - (a) the body corporate can be a trustee under section 283AC; and
 - (b) the existing trustee consents in writing to the appointment.The appointment has effect despite any terms of the debentures or provisions of the trust deed.

Appointment by Court

- (2) The Court may:
 - (a) appoint a person who may be a trustee under section 283AC as trustee on the application of the borrower, a debenture holder or ASIC if:
 - (i) a trustee has not been validly appointed; or

Section 283AE

- (ii) the trustee has ceased to exist; or
- (b) terminate the existing trustee's appointment and appoint a person who may be a trustee under section 283AC as trustee in the existing trustee's place on the application of the borrower, the existing trustee, a debenture holder or ASIC if:
 - (i) the existing trustee cannot be trustee under section 283AC; or
 - (ii) the existing trustee fails, or refuses, to act.

Part 2L.2—Duties of borrower

283BA Duties of borrower

A borrower that is required to enter into a trust deed under section 283AA has the duties imposed by this Part.

283BB General duties

The borrower must:

- (a) carry on and conduct its business in a proper and efficient manner; and
- (b) provide a copy of the trust deed to:
 - (i) a debenture holder; or
 - (ii) the trustee;if they request a copy; and
- (c) make all of its financial and other records available for inspection by:
 - (i) the trustee; or
 - (ii) an officer or employee of the trustee authorised by the trustee to carry out the inspection; or
 - (iii) a registered company auditor appointed by the trustee to carry out the inspection;and give them any information, explanations or other assistance that they require about matters relating to those records.

Note: The borrower also has a duty to call a meeting of debenture holders in certain circumstances (see section 283EA).

283BC Duty to notify ASIC of name of trustee

The borrower must lodge with ASIC a notice of the name of a trustee within 14 days after they are appointed. The notice must be in the prescribed form.

Section 283BD

283BD Duty to replace trustee

The borrower must take all reasonable steps to replace the trustee under section 283AE as soon as practicable after the borrower becomes aware that the trustee:

- (a) has ceased to exist; or
- (b) has not been validly appointed; or
- (c) cannot be a trustee under section 283AC; or
- (d) has failed or refused to act as trustee.

283BE Duty to inform trustee about charges

If the borrower creates a charge, it must:

- (a) give the trustee written details of the charge within 21 days after it is created; and
- (b) if the total amount to be advanced on the security of the charge is indeterminate and the advances are not merged in a current account with bankers, trade creditors or anyone else—give the trustee written details of the amount of each advance within 7 days after it is made.

Note: If the advances are merged in a current account the borrower must give the trustee the details in the quarterly report (see subsection 283BF(4)).

283BF Duty to give trustee and ASIC quarterly reports

Quarterly reports

- (1) Within 1 month after the end of each quarter, the borrower must:
 - (a) give the trustee a quarterly report that sets out the information required by subsections (4), (5) and (6); and
 - (b) lodge a copy of the report with ASIC (see section 351).

First quarter

- (2) The first quarter is the period of 3 months ending on a day fixed by the borrower, by written notice to the trustee. The day must be less than 6 months after the first issue of a debenture under the trust deed.

Subsequent quarters

- (3) Each of the subsequent quarters are periods of 3 months. The trustee may allow a particular quarter to be a period of less than 3 months if the trustee is satisfied that special circumstances justify doing so.

Content of quarterly report

- (4) The report for a quarter must include details of:
- (a) any failure by the borrower and each guarantor to comply with the terms of the debentures or the provisions of the trust deed or this Chapter during the quarter; and
 - (b) any event that has happened during the quarter that has caused, or could cause, 1 or more of the following:
 - (i) any amount deposited or lent under the debentures to become immediately payable;
 - (ii) the debentures to become immediately enforceable;
 - (iii) any other right or remedy under the terms of the debenture or provisions of the trust deed to become immediately enforceable; and
 - (c) any circumstances that have occurred during the quarter that materially prejudice:
 - (i) the borrower, any of its subsidiaries, or any of the guarantors; or
 - (ii) any security or charge included in or created by the debentures or the trust deed; and
 - (d) any substantial change in the nature of the business of the borrower, any of its subsidiaries, or any of the guarantors that has occurred during the quarter; and
 - (e) any of the following events that happened in the quarter:
 - (i) the appointment of a guarantor;
 - (ii) the cessation of liability of a guarantor body for the payment of the whole or part of the money for which it was liable under the guarantee;
 - (iii) a change of name of a guarantor (if this happens, the report must also disclose the guarantor's new name); and
 - (f) the net amount outstanding on any advances at the end of the quarter if the borrower has created a charge where:

Section 283BF

- (i) the total amount to be advanced on the security of the charge is indeterminate; and
- (ii) the advances are merged in a current account with bankers, trade creditors or anyone else; and
- (g) any other matters that may materially prejudice any security or the interests of the debenture holders.

Note: Paragraph (f)—the borrower has a duty to inform the trustee about charges as they are created (see section 283BE).

- (5) If the borrower has deposited money with, or lent money to, a related body corporate during the quarter, the report must also include details of:
 - (a) the total of the money deposited with, or lent to, the related body corporate during the quarter (see subsection (7)); and
 - (b) the total amount of money owing to the borrower at the end of the quarter in respect of the deposits or loans to the related body corporate.Disregard any amount that the borrower deposits with an ADI in the normal course of the borrower's business.
- (6) If the borrower has assumed a liability of a related body corporate during the quarter, the report must also include details of the extent of the liability assumed during the quarter and the extent of the liability as at the end of the quarter.
- (7) For the purposes of subsections (5) and (6), the report:
 - (a) must distinguish between deposits, loans and assumptions of liability that are secured and those that are unsecured; and
 - (b) may exclude any deposit, loan or assumption of liability on behalf of the related body corporate if it has:
 - (i) guaranteed the repayment of the debentures of the borrower; and
 - (ii) secured the guarantee by a charge over all of its property in favour of the trustee.

Formalities

- (8) The report must:
 - (a) be made in accordance with a resolution of the directors; and
 - (b) specify the date on which the report is made.

Section 283BG

283BG Exceptions

Sections 283BE and 283BF do not apply in respect of the borrower while:

- (a) it is under external administration; or
- (b) a receiver, or a receiver and manager, of property of the borrower has been appointed and has not ceased to act under that appointment.

283BH How debentures may be described

- (1) The borrower may describe or refer to the debentures in:
- (a) any disclosure in relation to the offer of the debentures; or
 - (b) any other document constituting or relating to the offer of the debentures; or
 - (c) the debentures themselves;

only in accordance with the following table:

How debentures may be described		
Item	Description	When description may be used
1	mortgage debenture	only if the circumstances set out in subsection (2) are satisfied
2	debenture	only if the circumstances set out in subsection (2) or (3) are satisfied
3	unsecured note or unsecured deposit note	in any other case

- (1A) The borrower commits an offence if it intentionally or recklessly contravenes subsection (1).

When debentures can be called mortgage debentures or debentures

- (2) The borrower may describe or refer to the debentures as:
- (a) mortgage debentures; or
 - (b) debentures;
- if:
- (c) the repayment of all money that has been, or may be, deposited or lent under the debentures is secured by a first mortgage given to the trustee over land vested in the borrower or in any of the guarantors; and

Section 283BI

- (d) the mortgage has been registered, or is a registrable mortgage that has been lodged for registration, in accordance with the law relating to the registration of mortgages of land in the place where the land is situated; and
- (e) the total amount of that money and of all other liabilities (if any) secured by the mortgage of that land ranking equally with the liability to repay that money does not exceed 60% of the value of the borrower's or guarantor's interest in that land as shown in the valuation included in the disclosure document for the debentures.

When debentures can be called debentures

- (3) The borrower may describe or refer to the debentures as debentures if:
 - (a) the repayment of all money that has been, or may be, deposited or lent under the debentures has been secured by a charge in favour of the trustee over the whole or any part of the tangible property of the borrower or of any of the guarantors; and
 - (b) the tangible property that constitutes the security for the charge is sufficient and is reasonably likely to be sufficient to meet the liability for the repayment of all such money and all other liabilities that:
 - (i) have been or may be incurred; and
 - (ii) rank in priority to, or equally with, that liability.

283BI Offences for failure to comply with statutory duties

The borrower commits an offence if it intentionally or recklessly contravenes section 283BB, 283BC, 283BD, 283BE, 283BF or 283EA.

Part 2L.3—Duties of guarantor

283CA Duties of guarantor

If a borrower is required to enter into a trust deed under section 283AA in relation to debentures, a guarantor in respect of the debentures has the duties imposed by this Part.

283CB General duties

The guarantor must:

- (a) carry on and conduct its business in a proper and efficient manner; and
- (b) make all of its financial and other records available for inspection by:
 - (i) the trustee; or
 - (ii) an officer or employee of the trustee authorised by the trustee to carry out the inspection; or
 - (iii) a registered company auditor appointed by the trustee to carry out the inspection;

and give them any information, explanations or other assistance that they require about matters relating to those records.

283CC Duty to inform trustee about charges

If the guarantor creates a charge, it must:

- (a) give the trustee written details of the charge within 21 days after it is created; and
- (b) if the total amount to be advanced on the security of the charge is indeterminate, give the trustee written details of:
 - (i) the amount of each advance made within 7 days after it is made; or
 - (ii) where the advances are merged in a current account with bankers, trade creditors or anyone else—the net amount outstanding on the advances at the end of every 3 months.

Section 283CD

283CD Exceptions

Section 283CC does not apply in respect of the guarantor while:

- (a) it is under external administration; or
- (b) a receiver, or a receiver and manager, of property of the guarantor has been appointed and has not ceased to act under that appointment.

283CE Offences for failure to comply with statutory duties

The guarantor commits an offence if it intentionally or recklessly contravenes paragraph 283CB(b) or section 283CC.

Part 2L.4—Trustee

283DA Trustee's duties

The trustee of a trust deed entered into under section 283AA must:

- (a) exercise reasonable diligence to ascertain whether the property of the borrower and of each guarantor that is or should be available (whether by way of security or otherwise) will be sufficient to repay the amount deposited or lent when it becomes due; and
- (b) exercise reasonable diligence to ascertain whether the borrower or any guarantor has committed any breach of:
 - (i) the terms of the debentures; or
 - (ii) the provisions of the trust deed or this Chapter; and
- (c) do everything in its power to ensure that the borrower or a guarantor remedies any breach known to the trustee of:
 - (i) any term of the debentures; or
 - (ii) any provision of the trust deed or this Chapter;unless the trustee is satisfied that the breach will not materially prejudice the debenture holders' interests or any security for the debentures; and
- (d) ensure that the borrower and each guarantor complies with Part 2K to the extent that it applies to the debentures; and
- (e) notify ASIC as soon as practicable if:
 - (i) the borrower has not complied with section 283BE, 283BF or subsection 318(1) or (4); or
 - (ii) a guarantor has not complied with section 283CC; and
- (f) notify ASIC and the borrower as soon as practicable if the trustee discovers that it cannot be a trustee under section 283AC; and
- (g) give the debenture holders a statement explaining the effect of any proposal that the borrower submits to the debenture holders before any meeting that:
 - (i) the Court calls in relation to a scheme under subsection 411(1) or (1A); or
 - (ii) the trustee calls under subsection 283EB(1); and

Section 283DB

- (h) comply with any directions given to it at a debenture holders' meeting referred to in section 283EA, 283EB or 283EC unless:
 - (i) the trustee is of the opinion that the direction is inconsistent with the terms of the debentures or the provisions of the trust deed or this Act or is otherwise objectionable; and
 - (ii) has either obtained, or is in the process of obtaining, an order from the Court under section 283HA setting aside or varying the direction; and
- (i) apply to the Court for an order under section 283HB if the borrower requests it to do so.

Note 1: Paragraph (g)—Section 411 relates to compromises and arrangements.

Note 2: Section 283DC deals with indemnification in respect of a trustee's liability to the debenture holders.

283DB Exemptions and indemnifications of trustee from liability

- (1) A term of a debenture, provision of a trust deed or a term of a contract with holders of debentures secured by a trust deed, is void in so far as the term or provision would have the effect of:
 - (a) exempting a trustee from liability for breach of section 283DA for failure to show the degree of care and diligence required of it as trustee; or
 - (b) indemnifying the trustee against that liability;unless the term or provision:
 - (c) releases the trustee from liability for something done or omitted to be done before the release is given; or
 - (d) enables a meeting of debenture holders to approve the release of the trustee from liability for something done or omitted to be done before the release is given.
- (2) For the purposes of paragraph (1)(d):
 - (a) a release is approved if the debenture holders who vote for the resolution hold 75% of the nominal value of the debentures held by all the debenture holders who attend the meeting and vote on the resolution; and
 - (b) a debenture holder attends the meeting and votes on the resolution if:

Section 283DC

- (i) they attend the meeting in person and vote on the resolution; or
- (ii) if proxies are permitted—they are represented at the meeting by a proxy and the proxy votes on the resolution.

283DC Indemnity

The trustee is not liable for anything done or omitted to be done in accordance with a direction given to it by the debenture holders at any meeting called under section 283EA, 283EB or 283EC.

Part 2L.5—Meetings of debenture holders

283EA Borrower's duty to call meeting

Duty to call meeting

- (1) The borrower must call a meeting of debenture holders if:
 - (a) debenture holders who together hold 10% or more of the nominal value of the issued debentures to which the trust relates direct the borrower to do so; and
 - (b) the direction is given to the borrower in writing at its registered office; and
 - (c) the purpose of the meeting is to:
 - (i) consider the financial statements that were laid before the last AGM of the borrower; or
 - (ii) give the trustee directions in relation to the exercise of any of its powers.

Note: The trustee usually must comply with any directions given to it by the debenture holders at the meeting (see paragraph 283DA(h)).

Duty to give notification of meeting

- (2) If the borrower is required to call a meeting, it must give notice of the time and place of the meeting to:
 - (a) the trustee; and
 - (b) the borrower's auditor; and
 - (c) each of the debenture holders whose names are entered on the register of debenture holders.

Notice to joint holders of a debenture must be given to the joint holder named first in the register of debenture holders.

- (3) The borrower may give the notice to a debenture holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the debenture holder in the register of debenture holders; or
 - (c) by sending it to the fax number or electronic address (if any) nominated by the debenture holder; or

Section 283EB

- (d) by any other means that the trust deed or the terms of the debentures permit.

Note: A defect in the notice may not invalidate a meeting (see section 1322).

When notice by post or fax is given

- (4) A notice of meeting sent to a debenture holder is taken to be given:
 - (a) 3 days after it is posted, if it is posted; or
 - (b) on the business day after it is sent, if it is sent by fax or other electronic means;unless the trust deed or the terms of the debentures provide otherwise.

283EB Trustee's power to call meeting

Trustee may call meeting in event of breach

- (1) If the borrower or a guarantor fails to remedy any breach of the terms of the debentures or provisions of the trust deed or this Chapter when required by the trustee, the trustee may:
 - (a) call a meeting of debenture holders; and
 - (b) inform the debenture holders of the failure at the meeting; and
 - (c) submit proposals for protection of the debenture holders' interests to the meeting; and
 - (d) ask for directions from the debenture holders in relation to the matter.

Trustee may appoint person to chair meeting

- (2) The trustee may appoint a person to chair a meeting of debenture holders called under subsection (1). If the trustee does not exercise this power, the debenture holders present at the meeting may appoint a person to chair the meeting.

283EC Court may order meeting

- (1) Without limiting section 283HA or 283HB, the Court may make an order under either of those sections for a meeting of all or any of the debenture holders to be held to give directions to the trustee. The order may direct the trustee to:

Section 283EC

- (a) place before the debenture holders any information concerning their interests; and
 - (b) place before the debenture holders any proposals to protect their interests that the Court directs or the trustee considers appropriate; and
 - (c) obtain the debenture holders' directions concerning the protection of their interests.
- (2) The meeting is to be held and conducted in the manner the Court directs. The trustee may appoint a person to chair the meeting. If the trustee does not exercise this power, the debenture holders present at the meeting may appoint a person to chair the meeting.

Part 2L.6—Civil liability

283F Civil liability for contravening this Chapter

- (1) A person who suffers loss or damage because a person contravenes a provision of this Chapter may recover the amount of the loss or damage from:
 - (a) the person who contravened the provision; or
 - (b) a person involved in the contravention.

This is so even if the person did not commit, and was not involved in, the contravention.
- (2) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.
- (3) This Part does not affect any liability that a person has under any other law.

Part 2L.7—ASIC powers

283GA ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may do all or any of the following:
 - (a) apply to all or specified provisions of this Chapter;
 - (b) apply to all persons, specified persons, or a specified class of persons;
 - (c) relate to all debentures, specified debentures or a specified class of debentures;
 - (d) relate to any other matter generally or as specified.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.

Section 283GB

283GB ASIC may approve body corporate to be trustee

- (1) ASIC may approve a body corporate in writing to be a trustee for the purposes of paragraph 283AC(1)(f). The approval may allow the body corporate to act as trustee:
 - (a) in any circumstances; or
 - (b) in relation to a particular borrower or particular class of borrower; or
 - (c) in relation to a particular trust deed;and may be given subject to conditions.
- (2) ASIC must publish notice of the approval in the *Gazette*.

Part 2L.8—Court

283HA General Court power to give directions and determine questions

If the trustee applies to the Court for any direction in relation to the performance of the trustee's functions or to determine any question in relation to the interests of the debenture holders, the Court may give any direction and make any declaration or determination in relation to the matter that the Court considers appropriate. The Court may also make ancillary or consequential orders.

Note: Under this section, the Court may order a meeting of debenture holders to be held, see section 283EC.

283HB Specific Court powers

- (1) If the trustee or ASIC applies to the Court, the Court may make any or all of the following orders:
 - (a) an order staying an action or other civil proceedings before a court by or against the borrower or a guarantor body;
 - (b) an order restraining the borrower from paying any money to the debenture holders or any holders of any other class of debentures;
 - (c) an order that any security for the debentures be enforceable immediately or at the time the Court directs (even if the debentures are irredeemable or redeemable only on the happening of a contingency);
 - (d) an order appointing a receiver of any property constituting security for the debentures;
 - (e) an order restricting advertising by the borrower for deposits or loans;
 - (f) an order restricting borrowing by the borrower;
 - (g) any other order that the Court considers appropriate to protect the interests of existing or prospective debenture holders.
- (2) In deciding whether to make an order under subsection (1), the Court must have regard to:

Section 283HB

- (a) the ability of the borrower and each guarantor to repay the amount deposited or lent as and when it becomes due; and
- (b) any contravention of section 283GA by the borrower; and
- (c) the interests of the borrower's members and creditors; and
- (d) the interests of the members of each of the guarantors.

Note: The Court may order a meeting of debenture holders to be held (see section 283EC).

Section 283I

Part 2L.9—Location of other debenture provisions

283I Signpost to other debenture provisions

There are other rules relating to debentures in paragraph 124(1)(b) and section 563AAA.

Chapter 2M—Financial reports and audit

Part 2M.1—Overview

285 Overview of obligations under this Chapter

Obligations under this Chapter

- (1) Under this Chapter, all companies, registered schemes and disclosing entities must keep financial records (see sections 286-291)—and some must prepare financial reports (see sections 292-323D). All those that have to prepare financial reports have to prepare them annually; disclosing entities have to prepare half-year financial reports as well. The following table sets out what is involved in annual financial reporting:

Annual financial reporting		
steps	sections	comments
1 prepare financial report	s. 295	The financial report includes: <ul style="list-style-type: none">• financial statements• disclosures and notes• directors' declaration.
2 prepare directors' report	s. 298	The report has a general component (sections 299 and 299A), a specific component (section 300) and a special component for listed companies (section 300A).

Section 285

Annual financial reporting			
	steps	sections	comments
3	have the financial report audited and obtain auditor's report	s. 301, 307, 308	<p>A small proprietary company preparing a financial report in response to a shareholder direction under s. 293 only has to have an audit if the direction asks for it.</p> <p>Under s. 312, officers must assist the auditor in the conduct of the audit.</p> <p>ASIC may use its exemption powers under s. 340 and 341 to relieve large proprietary companies from the audit requirements in appropriate cases (s. 342(2) and (3)).</p>
4	provide the financial report, directors' report and auditor's report to members	s. 314	<p>A concise financial report may be provided to members instead of the full financial statements (s. 314(1)-(2)).</p> <p>For deadline see s. 315(1)-(4).</p>
5	lodge the financial report, directors' report and auditor's report with ASIC	s. 319	<p>For deadline see s. 319(3).</p> <p>Companies that have the benefit of the grandfathering in the relevant Part 10.1 transitionals do not have to lodge.</p>
6	[public companies only] lay financial report, directors' report and auditor's report before AGM	s. 317	<p>For the AGM deadline see s. 250N.</p>

Application to disclosing entities

- (2) This Chapter covers all disclosing entities:
- (a) incorporated or formed in Australia; and
 - (b) whether or not they are companies or registered schemes.

Application to registered schemes

- (3) For the purposes of applying this Chapter to a registered scheme:
- (a) the scheme's responsible entity is responsible for the performance of obligations in respect of the scheme; and
 - (b) the directors and officers of the responsible entity are taken to be the directors and officers of the scheme; and
 - (c) the debts incurred in operating the scheme are taken to be the debts of the scheme.

Part 2M.2—Financial records

286 Obligation to keep financial records

- (1) A company, registered scheme or disclosing entity must keep written financial records that:
 - (a) correctly record and explain its transactions and financial position and performance; and
 - (b) would enable true and fair financial statements to be prepared and audited.

The obligation to keep financial records of transactions extends to transactions undertaken as trustee.

Note: Section 9 defines *financial records*.

Period for which records must be retained

- (2) The financial records must be retained for 7 years after the transactions covered by the records are completed.

Strict liability offences

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

287 Language requirements

- (1) The financial records may be kept in any language.
- (2) An English translation of financial records not kept in English must be made available within a reasonable time to a person who:
 - (a) is entitled to inspect the records; and
 - (b) asks for the English translation.
- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

288 Physical format

- (1) If financial records are kept in electronic form, they must be convertible into hard copy. Hard copy must be made available within a reasonable time to a person who is entitled to inspect the records.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

289 Place where records are kept

- (1) A company, registered scheme or disclosing entity may decide where to keep the financial records.

Records kept outside this jurisdiction

- (2) If financial records about particular matters are kept outside this jurisdiction, sufficient written information about those matters must be kept in this jurisdiction to enable true and fair financial statements to be prepared. The company, registered scheme or disclosing entity must give ASIC written notice in the prescribed form of the place where the information is kept.
- (2A) An offence based on subsection (2) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (3) ASIC may direct a company, registered scheme or disclosing entity to produce specified financial records that are kept outside this jurisdiction.
- (4) The direction must:
 - (a) be in writing; and
 - (b) specify a place in this jurisdiction where the records are to be produced (the place must be reasonable in the circumstances); and
 - (c) specify a day (at least 14 days after the direction is given) by which the records are to be produced.

Section 290

290 Director access

Personal access

- (1) A director of a company, registered scheme or disclosing entity has a right of access to the financial records at all reasonable times.

Court order for inspection on director's behalf

- (2) On application by a director, the Court may authorise a person to inspect the financial records on the director's behalf.
- (3) A person authorised to inspect records may make copies of the records unless the Court orders otherwise.
- (4) The Court may make any other orders it consider appropriate, including either or both of the following:
- (a) an order limiting the use that a person who inspects the records may make of information obtained during the inspection;
 - (b) an order limiting the right of a person who inspects the records to make copies in accordance with subsection (3).

291 Signposts to other relevant provisions

The following table sets out other provisions that are relevant to access to financial records.

Other provisions relevant to access to financial records		
members		
1	section 247A	A member may apply to the Court for an order to inspect the records.
auditor		
2	section 310	The auditor has a right of access to the records.
controllers		
3	section 431	A controller of a corporation's property (for example, a receiver or receiver and manager) has a right of access to the records.

Section 291

Other provisions relevant to access to financial records

		ASIC
4	sections 28 to 39 of the ASIC Act	ASIC has power to inspect the records. It also has power under subsection 289(3) of this Act to call for the production of financial records kept outside this jurisdiction.

Part 2M.3—Financial reporting

Division 1—Annual financial reports and directors' reports

292 Who has to prepare annual financial reports and directors' reports

- (1) A financial report and a directors' report must be prepared for each financial year by:
 - (a) all disclosing entities; and
 - (b) all public companies; and
 - (c) all large proprietary companies; and
 - (d) all registered schemes.

Note: This Chapter only applies to disclosing entities incorporated or formed in Australia (see subsection 285(2)).

- (2) A small proprietary company has to prepare the financial report and directors' report only if:
 - (a) it is directed to do so under section 293 or 294; or
 - (b) it was controlled by a foreign company for all or part of the year and it is not consolidated for that period in financial statements for that year lodged with ASIC by:
 - (i) a registered foreign company; or
 - (ii) a company, registered scheme or disclosing entity.

The rest of this Part does not apply to any other small proprietary company.

293 Small proprietary company—shareholder direction

- (1) Shareholders with at least 5% of the votes in a small proprietary company may give the company a direction to:
 - (a) prepare a financial report and directors' report for a financial year; and
 - (b) send them to all shareholders.
- (2) The direction must be:
 - (a) signed by the shareholders giving the direction; and

- (b) made no later than 12 months after the end of the financial year concerned.
- (3) The direction may specify all or any of the following:
 - (a) that the financial report does not have to comply with some or all of the accounting standards;
 - (b) that a directors' report or a part of that report need not be prepared;
 - (c) that the financial report is to be audited.

294 Small proprietary company—ASIC direction

- (1) ASIC may give a small proprietary company a direction to comply with requirements of this Division and Divisions 3, 4, 5 and 6 for a financial year.
- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) The direction may be general or may specify the particular requirements that the company is to comply with.
- (3) The direction must specify the date by which the documents have to be prepared, sent or lodged. The date must be a reasonable one in view of the nature of the direction.
- (4) The direction must:
 - (a) be made in writing; and
 - (b) specify the financial year concerned; and
 - (c) be made no later than 6 years after the end of that financial year.

295 Contents of annual financial report

Basic contents

- (1) The financial report for a financial year consists of:
 - (a) the financial statements for the year; and
 - (b) the notes to the financial statements; and
 - (c) the directors' declaration about the statements and notes.

Section 295

Financial statements

- (2) The financial statements for the year are:
- (a) the financial statements in relation to the entity reported on that are required by the accounting standards; and
 - (b) if required by the accounting standards—the financial statements in relation to the consolidated entity that are required by the accounting standards.

Notes to financial statements

- (3) The notes to the financial statements are:
- (a) disclosures required by the regulations; and
 - (b) notes required by the accounting standards; and
 - (c) any other information necessary to give a true and fair view (see section 297).

Directors' declaration

- (4) The directors' declaration is a declaration by the directors:
- (c) whether, in the directors' opinion, there are reasonable grounds to believe that the company, registered scheme or disclosing entity will be able to pay its debts as and when they become due and payable; and
 - (d) whether, in the directors' opinion, the financial statement and notes are in accordance with this Act, including:
 - (i) section 296 (compliance with accounting standards); and
 - (ii) section 297 (true and fair view); and
 - (e) if the company, disclosing entity or registered scheme is listed—that the directors have been given the declarations required by section 295A.

Note: See paragraph 285(3)(c) for the reference to the debts of a registered scheme.

- (5) The declaration must:
- (a) be made in accordance with a resolution of the directors; and
 - (b) specify the date on which the declaration is made; and
 - (c) be signed by a director.

295A Declaration in relation to listed entity's financial statements by chief executive officer and chief financial officer

- (1) If the company, disclosing entity or registered scheme is listed, the directors' declaration under subsection 295(4) must be made only after each person who performs:
 - (a) a chief executive function; or
 - (b) a chief financial officer function;in relation to the company, disclosing entity or registered scheme has given the directors a declaration under subsection (2) of this section.
- (2) The declaration is a declaration whether, in the person's opinion:
 - (a) the financial records of the company, disclosing entity or registered scheme for the financial year have been properly maintained in accordance with section 286; and
 - (b) the financial statements, and the notes referred to in paragraph 295(3)(b), for the financial year comply with the accounting standards; and
 - (c) the financial statements and notes for the financial year give a true and fair view (see section 297); and
 - (d) any other matters that are prescribed by the regulations for the purposes of this paragraph in relation to the financial statements and the notes for the financial year are satisfied.
- (3) The declaration must:
 - (a) be made in writing; and
 - (b) specify the date on which the declaration is made; and
 - (c) specify the capacity in which the person is making the declaration; and
 - (d) be signed by the person making the declaration.A person who performs both a chief executive function and a chief financial officer function may make a single declaration in both capacities.
- (4) A person performs a **chief executive function** in relation to the company, disclosing entity or registered scheme if the person is the person who is primarily and directly responsible to the directors for the general and overall management of the company, disclosing entity or registered scheme.

Section 296

- (5) If there is no one person who performs a chief executive function in relation to the company, disclosing entity or registered scheme under subsection (4), a person performs a ***chief executive function*** in relation to the company, disclosing entity or registered scheme if the person is one of a number of people who together are primarily and directly responsible to the directors for the general and overall management of the company, disclosing entity or registered scheme.
- (6) A person performs a ***chief financial officer function*** in relation to the company, disclosing entity or registered scheme if that person is the person who is:
 - (a) primarily responsible for financial matters in relation to the company, disclosing entity or registered scheme; and
 - (b) directly responsible for those matters to either:
 - (i) the directors; or
 - (ii) the person or persons who perform the chief executive function in relation to the company.
- (7) If there is no one person who performs a chief financial officer function in relation to the company, disclosing entity or registered scheme under subsection (6), a person performs a ***chief financial officer function*** in relation to the company, disclosing entity or registered scheme if the person is one of a number of people who together are:
 - (a) primarily responsible for financial matters in relation to the company, disclosing entity or registered scheme; and
 - (b) directly responsible for those matters to either:
 - (i) the directors; or
 - (ii) the person or persons who perform the chief executive function in relation to the company.
- (8) Nothing in this section derogates from the responsibility that a director has for ensuring that financial statements comply with this Act.

296 Compliance with accounting standards and regulations

- (1) The financial report for a financial year must comply with the accounting standards. However, a small proprietary company's report does not have to comply with particular accounting standards if:

- (a) the report is prepared in response to a shareholder direction under section 293; and
 - (b) the direction specifies that the report does not have to comply with those accounting standards.
- (2) The financial report must comply with any further requirements in the regulations.

297 True and fair view

The financial statements and notes for a financial year must give a true and fair view of:

- (a) the financial position and performance of the company, registered scheme or disclosing entity; and
- (b) if consolidated financial statements are required—the financial position and performance of the consolidated entity.

This section does not affect the obligation under section 296 for a financial report to comply with accounting standards.

Note: If the financial statements and notes prepared in compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements under paragraph 295(3)(c).

298 Annual directors' report

- (1) The company, registered scheme or disclosing entity must prepare a directors' report for each financial year. The report must include:
 - (a) the general information required by sections 299 (all entities) and 299A (additional requirements for listed public companies); and
 - (b) the specific information required by sections 300 and 300A; and
 - (c) a copy of the auditor's declaration under section 307C in relation to the audit for the financial year.
- (1A) If the financial report for a financial year includes additional information under paragraph 295(3)(c) (information included to give true and fair view of financial position and performance), the directors' report for the financial year must also:
 - (a) set out the directors' reasons for forming the opinion that the inclusion of that additional information was necessary to give the true and fair view required by section 297; and

Section 299

- (b) specify where that additional information can be found in the financial report.
- (2) The report must:
 - (a) be made in accordance with a resolution of the directors; and
 - (b) specify the date on which the report is made; and
 - (c) be signed by a director.
- (3) A small proprietary company does not have to comply with subsection (1) for a financial year if:
 - (a) it is preparing financial statements for that year in response to a shareholder direction under section 293; and
 - (b) the direction specified that a directors' report need not be prepared.

299 Annual directors' report—general information

General information about operations and activities

- (1) The directors' report for a financial year must:
 - (a) contain a review of operations during the year of the entity reported on and the results of those operations; and
 - (b) give details of any significant changes in the entity's state of affairs during the year; and
 - (c) state the entity's principal activities during the year and any significant changes in the nature of those activities during the year; and
 - (d) give details of any matter or circumstance that has arisen since the end of the year that has significantly affected, or may significantly affect:
 - (i) the entity's operations in future financial years; or
 - (ii) the results of those operations in future financial years;or
 - (iii) the entity's state of affairs in future financial years; and
 - (e) refer to likely developments in the entity's operations in future financial years and the expected results of those operations; and
 - (f) if the entity's operations are subject to any particular and significant environmental regulation under a law of the

Section 299A

Commonwealth or of a State or Territory—give details of the entity's performance in relation to environmental regulation.

- (2) The entity reported on is:
- (a) the company, registered scheme or disclosing entity (if consolidated financial statements are not required); or
 - (b) the consolidated entity (if consolidated financial statements are required).

Prejudicial information need not be disclosed

- (3) The report may omit material that would otherwise be included under paragraph (1)(e) if it is likely to result in unreasonable prejudice to:
- (a) the company, registered scheme or disclosing entity; or
 - (b) if consolidated financial statements are required—the consolidated entity or any entity (including the company, registered scheme or disclosing entity) that is part of the consolidated entity.

If material is omitted, the report must say so.

299A Annual directors' report—additional general requirements for listed public companies

- (1) The directors' report for a financial year for a company or disclosing entity that is a listed public company must also contain information that members of the company would reasonably require to make an informed assessment of:
- (a) the operations of the entity reported on; and
 - (b) the financial position of the entity; and
 - (c) the entity's business strategies and its prospects for future financial years.
- (2) The entity reported on is:
- (a) the company or disclosing entity that is a listed public company (if consolidated financial statements are not required); or
 - (b) the consolidated entity (if consolidated financial statements are required).

Section 300

- (3) The report may omit material that would otherwise be included under paragraph (1)(c) if it is likely to result in unreasonable prejudice to:
- (a) the company or disclosing entity; or
 - (b) if consolidated financial statements are required—the consolidated entity or any entity (including the company or disclosing entity) that is part of the consolidated entity.

If material is omitted, the report must say so.

300 Annual directors' report—specific information

- (1) The directors' report for a financial year must include details of:
- (a) dividends or distributions paid to members during the year; and
 - (b) dividends or distributions recommended or declared for payment to members, but not paid, during the year; and
 - (c) the name of each person who has been a director of the company, registered scheme or disclosing entity at any time during or since the end of the year and the period for which they were a director; and
 - (ca) the name of each person who:
 - (i) is an officer of the company, registered scheme or disclosing entity at any time during the year; and
 - (ii) was a partner in an audit firm, or a director of an audit company, that is an auditor of the company, disclosing entity or registered scheme for the year; and
 - (iii) was such a partner or director at a time when the audit firm or the audit company undertook an audit of the company, disclosing entity or registered scheme; and
 - (d) options that are:
 - (i) granted over unissued shares or unissued interests during or since the end of the year; and
 - (ii) granted to any of the directors or any of the 5 most highly remunerated officers of the company (other than the directors); and
 - (iii) granted to them as part of their remuneration; (see subsections (3), (4) and (5)); and
 - (e) unissued shares or interests under option as at the day the report is made (see subsections (3) and (6)); and

- (f) shares or interests issued during or since the end of the year as a result of the exercise of an option over unissued shares or interests (see subsections (3) and (7)); and
- (g) indemnities given and insurance premiums paid during or since the end of the year for a person who is or has been an officer or auditor (see subsections (8) and (9)).

Public companies, listed companies and registered schemes must include additional information under subsections (10), (11), (11A), (11B), (12) and (13) of this section and section 300A.

- (2) Details do not have to be included in the directors' report under this section if they are included in the company's financial report for the financial year.
- (2A) If subsection (2) is relied on to not include in the directors' report for a financial year details that would otherwise be required to be included in that report under paragraph (11B)(a) or (11C)(b), that report must specify, in the section headed "Non-audit services", where those details may be found in the company's financial report for that financial year.
- (3) Paragraphs (1)(d), (e) and (f) cover:
 - (a) options over unissued shares and interests of the company, registered scheme or disclosing entity; and
 - (b) if consolidated financial statements are required—options over unissued shares and interests of any controlled entity that is a company, registered scheme or disclosing entity.

Options details

- (5) The details of an option granted are:
 - (a) the company, registered scheme or disclosing entity granting the option; and
 - (b) the name of the person to whom the option is granted; and
 - (c) the number and class of shares or interests over which the option is granted.
- (6) The details of unissued shares or interests under option are:
 - (a) the company, registered scheme or disclosing entity that will issue shares or interests when the options are exercised; and
 - (b) the number and classes of those shares or interests; and

Section 300

- (c) the issue price, or the method of determining the issue price, of those shares or interests; and
- (d) the expiry date of the options; and
- (e) any rights that option holders have under the options to participate in any share issue or interest issue of the company, registered scheme or disclosing entity or of any other body corporate or registered scheme.

Shares or interests issued as a result of exercise of option

- (7) The details of shares or interests issued as a result of the exercise of an option are:
 - (a) the company, registered scheme or disclosing entity issuing the shares or interests; and
 - (b) the number of shares or interests issued; and
 - (c) if the company, registered scheme or disclosing entity has different classes of shares or interests—the class to which each of those shares or interests belongs; and
 - (d) the amount unpaid on each of those shares or interests; and
 - (e) the amount paid, or agreed to be considered as paid, on each of those shares or interests.

Indemnities and insurance premiums for officers or auditors

- (8) The report for a company must include details of:
 - (a) any indemnity that is given to a current or former officer or auditor against a liability and that is covered by subsection 199A(2) or (3), or any relevant agreement under which an officer or auditor may be given an indemnity of that kind; and
 - (b) any premium that is paid, or agreed to be paid, for insurance against a current or former officer's or auditor's liability for legal costs.

Note: Sections 199A and 199B contain general prohibitions against giving certain indemnities and paying certain insurance premiums. This subsection requires transactions that are exceptions to these prohibitions to be reported.

- (9) The details required under subsection (8) are:
 - (a) for an officer—their name or the class of officer to which they belong or belonged; and
 - (b) for an auditor—their name; and

- (c) the nature of the liability; and
- (d) for an indemnity given—the amount the company paid and any other action the company took to indemnify the officer or auditor; and
- (e) for an agreement to indemnify—the amount that the relevant agreement requires the company to pay and any other action the relevant agreement requires the company to take to indemnify the officer or auditor; and
- (f) for an insurance premium—the amount of the premium.

The report need not give details of the nature of the liability covered by, or the amount of the premium payable under, a contract of insurance to the extent that disclosure of those details is prohibited by the insurance contract.

Special rules for public companies

- (10) The report for a public company that is not a wholly-owned subsidiary of another company must also include details of:
 - (a) each director's qualifications, experience and special responsibilities; and
 - (b) the number of meetings of the board of directors held during the year and each director's attendance at those meetings; and
 - (c) the number of meetings of each board committee held during the year and each director's attendance at those meetings; and
 - (d) the qualifications and experience of each person who is a company secretary of the company as at the end of the year.

Special rules for listed companies

- (11) The report for a listed company must also include the following details for each director:
 - (a) their relevant interests in shares of the company or a related body corporate;
 - (b) their relevant interests in debentures of, or interests in a registered scheme made available by, the company or a related body corporate;
 - (c) their rights or options over shares in, debentures of or interests in a registered scheme made available by, the company or a related body corporate;

Section 300

(d) contracts:

- (i) to which the director is a party or under which the director is entitled to a benefit; and
 - (ii) that confer a right to call for or deliver shares in, or debentures of or interests in a registered scheme made available by the company or a related body corporate;
- (e) all directorships of other listed companies held by the director at any time in the 3 years immediately before the end of the financial year and the period for which each directorship has been held.

Note: Directors must also disclose interests of these kinds to a relevant market operator under section 205G as they are acquired.

- (11A) If a registered company auditor plays a significant role in the audit of a listed company for the financial year in reliance on a declaration made under section 342A, the report for the company must also include details of the declaration.

Listed companies—non-audit services and auditor independence

- (11B) The report for a listed company must also include the following in relation to each auditor:
- (a) details of the amounts paid or payable to the auditor for non-audit services provided, during the year, by the auditor (or by another person or firm on the auditor's behalf);
 - (b) a statement whether the directors are satisfied that the provision of non-audit services, during the year, by the auditor (or by another person or firm on the auditor's behalf) is compatible with the general standard of independence for auditors imposed by this Act;
 - (c) a statement of the directors' reasons for being satisfied that the provision of those non-audit services, during the year, by the auditor (or by another person or firm on the auditor's behalf) did not compromise the auditor independence requirements of this Act.

These details and statements must be included in the directors' report under the heading "Non-audit services". If consolidated financial statements are required, the details and statements must relate to amounts paid or payable to the auditor by, and non-audit services provided to, any entity (including the company, registered scheme or disclosing entity) that is part of the consolidated entity.

- (11C) For the purposes of paragraph (11B)(a), the details of amounts paid or payable to an auditor for non-audit services provided, during the year, by the auditor (or by another person or firm on the auditor's behalf) are:
- (a) the name of the auditor; and
 - (b) the dollar amount that:
 - (i) the listed company; or
 - (ii) if consolidated financial statements are required—any entity that is part of the consolidated entity;paid, or is liable to pay, for each of those non-audit services.
- (11D) The statements under paragraphs (11B)(b) and (c) must be made in accordance with:
- (a) advice provided by the listed company's audit committee if the company has an audit committee; or
 - (b) a resolution of the directors of the listed company if paragraph (a) does not apply.
- (11E) For the purposes of subsection (11D), a statement is taken to be made in accordance with advice provided by the company's audit committee only if:
- (a) the statement is consistent with that advice and does not contain any material omission of material included in that advice; and
 - (b) the advice is endorsed by a resolution passed by the members of the audit committee; and
 - (c) the advice is written advice signed by a member of the audit committee on behalf of the audit committee and given to the directors.

Special rules for listed registered schemes

- (12) The report for a registered scheme whose interests are quoted on a prescribed financial market must also include the following details for each director of the company that is the responsible entity for the scheme:
- (a) their relevant interests in interests in the scheme;
 - (b) their rights or options over interests in the scheme;
 - (c) contracts to which the director is a party or under which the director is entitled to a benefit and that confer a right to call for or deliver interests in the scheme.

Section 300A

Special rules for registered schemes

- (13) The report for a registered scheme must also include details of:
- (a) the fees paid to the responsible entity and its associates out of scheme property during the financial year; and
 - (b) the number of interests in the scheme held by the responsible entity or its associates as at the end of the financial year; and
 - (c) interests in the scheme issued during the financial year; and
 - (d) withdrawals from the scheme during the financial year; and
 - (e) the value of the scheme's assets as at the end of the financial year, and the basis for the valuation; and
 - (f) the number of interests in the scheme as at the end of the financial year.

Proceedings on behalf of a company

- (14) The report for a company must also include the following details of any application for leave under section 237 made in respect of the company:
- (a) the applicant's name; and
 - (b) a statement whether leave was granted.
- (15) The report for a company must also include the following details of any proceedings that a person has brought or intervened in on behalf of the company with leave under section 237:
- (a) the person's name;
 - (b) the names of the parties to the proceedings;
 - (c) sufficient information to enable members to understand the nature and status of the proceedings (including the cause of action and any orders made by the court).

300A Annual directors' report—specific information to be provided by listed companies

- (1) The directors' report for a financial year for a company must also include (in a separate and clearly identified section of the report):
- (a) discussion of:
 - (i) board policy for determining, or in relation to, the nature and amount (or value, as appropriate) of remuneration of the key management personnel for the company; and

Section 300A

- (ii) if consolidated financial statements are required—board policy in relation to the nature and amount (or value, as appropriate) of remuneration of the key management personnel for the consolidated entity; and
- (b) discussion of the relationship between such policy and the company's performance; and
- (ba) if an element of the remuneration of a member of the key management personnel for the company, or if consolidated financial statements are required, for the consolidated entity is dependent on the satisfaction of a performance condition:
 - (i) a detailed summary of the performance condition; and
 - (ii) an explanation of why the performance condition was chosen; and
 - (iii) a summary of the methods used in assessing whether the performance condition is satisfied and an explanation of why those methods were chosen; and
 - (iv) if the performance condition involves a comparison with factors external to the company:
 - (A) a summary of the factors to be used in making the comparison; and
 - (B) if any of the factors relates to the performance of another company, of 2 or more other companies or of an index in which the securities of a company or companies are included—the identity of that company, of each of those companies or of the index; and
- (c) the prescribed details in relation to the remuneration of:
 - (i) if consolidated financial statements are required—each member of the key management personnel for the consolidated entity; and
 - (ii) if consolidated financial statements are not required—each member of the key management personnel for the company; and
 - (iii) if consolidated financial statements are required—each of the 5 named relevant group executives who receive the highest remuneration for that year; and
 - (iv) in any case—each of the 5 named company executives who receive the highest remuneration for that year; and

Section 300A

- (d) if an element of the remuneration of a person referred to in paragraph (c) consists of securities of a body and that element is not dependent on the satisfaction of a performance condition—an explanation of why that element of the remuneration is not dependent on the satisfaction of a performance condition; and
- (da) if an element of the remuneration of a person referred to in paragraph (c) consists of securities of a body—discussion of board policy in relation to the person limiting his or her exposure to risk in relation to the securities, and the mechanism to enforce the policy; and
- (e) for each person referred to in paragraph (c):
 - (i) an explanation of the relative proportions of those elements of the person's remuneration that are related to performance and those elements of the person's remuneration that are not; and
 - (ii) the value (worked out as at the time they are granted and in accordance with any applicable accounting standards) of options that are granted to the person during the year as part of their remuneration; and
 - (iii) the value (worked out as at the time they are exercised) of options that were granted to the person as part of their remuneration and that are exercised by the person during the year; and
 - (iv) if options granted to the person as part of their remuneration lapse during the financial year because a condition required for the options to vest was not satisfied—the value of those options (worked out as at the time the options lapse, but assuming that the condition was satisfied); and
 - (vi) the percentage of the value of the person's remuneration for the financial year that consists of options; and
 - (vii) if the person is employed by the company under a contract—the duration of the contract, the periods of notice required to terminate the contract and the termination payments provided for under the contract; and
- (f) such other matters related to the policy or policies referred to in paragraph (a) as are prescribed by the regulations.

If a person is covered by more than one subparagraph in paragraph (c), details of the person's remuneration are only required in the report under one subparagraph of that paragraph.

- (1AA) Without limiting paragraph (1)(b), the discussion under that paragraph of the company's performance must specifically deal with:
- (a) the company's earnings; and
 - (b) the consequences of the company's performance on shareholder wealth;
- in the financial year to which the report relates and in the previous 4 financial years.
- (1AB) In determining, for the purposes of subsection (1AA), the consequences of the company's performance on shareholder wealth in a financial year, have regard to:
- (a) dividends paid by the company to its shareholders during that year; and
 - (b) changes in the price at which shares in the company are traded between the beginning and the end of that year; and
 - (c) any return of capital by the company to its shareholders during that year that involves:
 - (i) the cancellation of shares in the company; and
 - (ii) a payment to the holders of those shares that exceeds the price at which shares in that class are being traded at the time when the shares are cancelled; and
 - (d) any other relevant matter.
- (1A) The material referred to in subsection (1) must be included in the directors' report under the heading "Remuneration report".
- (1AAA) For the purposes of subsection (1), **key management personnel** has the same meaning as in the accounting standards.
- (1B) For the purposes of paragraph (1)(c):
- (a) a person is a **company executive** of the company if the person is a secretary or senior manager of the company; and
 - (b) a person is a **relevant group executive** of the company if the person:
 - (i) is a group executive of the consolidated entity; and
 - (ii) is not a director of the company.

Section 301

- (1C) Without limiting paragraph (1)(c), the regulations may:
- (a) provide that the value of an element of remuneration is to be determined, for the purposes of this section, in a particular way or by reference to a particular standard; and
 - (b) provide that details to be given of an element of remuneration must relate to the remuneration provided in:
 - (i) the financial year to which the directors' report relates; and
 - (ii) the earlier financial years specified in the regulations.
- (2) This section applies to any disclosing entity that is a company.
- (3) This section applies despite anything in the company's constitution.
- (4) For the purposes of this section, if:
- (a) consolidated financial statements are required; and
 - (b) a person is a group executive who is a group executive of 2 or more entities within the consolidated entity;
- the person's remuneration is taken to include all of the person's remuneration from those entities (regardless of the capacity in which the person received the remuneration).

301 Audit of annual financial report

- (1) A company, registered scheme or disclosing entity must have the financial report for a financial year audited in accordance with Division 3 and obtain an auditor's report.
- (2) A small proprietary company's financial report for a financial year does not have to be audited if:
 - (a) the report is prepared in response to a direction under section 293; and
 - (b) the direction did not ask for the financial report to be audited.

Division 2—Half-year financial report and directors' report

302 Disclosing entity must prepare half-year financial report and directors' report

A disclosing entity must:

- (a) prepare a financial report and directors' report for each half-year; and
- (b) have the financial report audited or reviewed in accordance with Division 3 and obtain an auditor's report; and
- (c) lodge the financial report, the directors' report and the auditor's report on the financial report with ASIC;

unless the entity is not a disclosing entity when lodgment is due.

Note 1: This Chapter only applies to disclosing entities incorporated or formed in Australia (see subsection 285(2)).

Note 2: See section 320 for the time for lodgment with ASIC.

Note 3: Subsection 318(4) requires disclosing entities that are borrowers in relation to debentures to also report to the trustee for debenture holders.

303 Contents of half-year financial report

Basic contents

- (1) The financial report for a half-year consists of:
 - (a) the financial statements for the half-year; and
 - (b) the notes to the financial statements; and
 - (c) the directors' declaration about the statements and notes.

Financial statements

- (2) The financial statements for the half-year are:
 - (a) the financial statements in relation to the entity reported on that are required by the accounting standards; and
 - (b) if required by the accounting standards—the financial statements in relation to the consolidated entity that are required by the accounting standards.

Section 304

Notes to financial statements

- (3) The notes to the financial statements are:
- (a) disclosures required by the regulations; and
 - (b) notes required by the accounting standards; and
 - (c) any other information necessary to give a true and fair view (see section 305).

Directors' declaration

- (4) The directors' declaration is a declaration by the directors:
- (c) whether, in the directors' opinion, there are reasonable grounds to believe that the disclosing entity will be able to pay its debts as and when they become due and payable; and
 - (d) whether, in the directors' opinion, the financial statement and notes are in accordance with this Act, including:
 - (i) section 304 (compliance with accounting standards); and
 - (ii) section 305 (true and fair view).

Note: See paragraph 285(3)(c) for the reference to the debts of a disclosing entity that is a registered scheme.

- (5) The declaration must:
- (a) be made in accordance with a resolution of the directors; and
 - (b) specify the day on which the declaration is made; and
 - (c) be signed by a director.

304 Compliance with accounting standards and regulations

The financial report for a half-year must comply with the accounting standards and any further requirements in the regulations.

305 True and fair view

The financial statements and notes for a half-year must give a true and fair view of:

- (a) the financial position and performance of the disclosing entity; or
- (b) if consolidated financial statements are required—the financial position and performance of the consolidated entity.

This section does not affect the obligation under section 304 for financial reports to comply with accounting standards.

Note: If the financial statements prepared in compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements under paragraph 303(3)(c).

306 Half-year directors' report

- (1) The directors of the disclosing entity must prepare a directors' report for each half-year that consists of:
 - (a) a review of the entity's operations during the half-year and the results of those operations; and
 - (b) the name of each person who has been a director of the disclosing entity at any time during or since the end of the half-year and the period for which they were a director.If consolidated financial statements are required, the review under paragraph (a) must cover the consolidated entity.
- (2) The directors' report must include a copy of the auditor's declaration under section 307C in relation to the audit or review for the half-year.
- (2) If the financial report for a half-year includes additional information under paragraph 303(3)(c) (information included to give true and fair view of financial position and performance), the directors' report for the half-year must also:
 - (a) set out the directors' reasons for forming the opinion that the inclusion of that additional information was necessary to give the true and fair view required by section 305; and
 - (b) specify where that information can be found in the financial report.
- (3) The report must:
 - (a) be made in accordance with a resolution of the directors; and
 - (b) specify the date on which the report is made; and
 - (c) be signed by a director.

Division 3—Audit and auditor's report

307 Audit

An auditor who conducts an audit of the financial report for a financial year or half-year must form an opinion about:

- (a) whether the financial report is in accordance with this Act, including:
 - (i) section 296 or 304 (compliance with accounting standards); and
 - (ii) section 297 or 305 (true and fair view); and
- (aa) if the financial report includes additional information under paragraph 295(3)(c) or 303(3)(c) (information included to give true and fair view of financial position and performance)—whether the inclusion of that additional information was necessary to give the true and fair view required by section 297 or 305; and
- (b) whether the auditor has been given all information, explanation and assistance necessary for the conduct of the audit; and
- (c) whether the company, registered scheme or disclosing entity has kept financial records sufficient to enable a financial report to be prepared and audited; and
- (d) whether the company, registered scheme or disclosing entity has kept other records and registers as required by this Act.

307A Audit to be conducted in accordance with auditing standards

- (1) If an individual auditor, or an audit company, conducts:
 - (a) an audit of the financial report for a financial year; or
 - (b) an audit or review of the financial report for a half-year;the individual auditor or audit company must conduct the audit or review in accordance with the auditing standards.
- (2) If an audit firm, or an audit company, conducts:
 - (a) an audit of the financial report for a financial year; or
 - (b) an audit or review of the financial report for a half-year;the lead auditor for the audit or review must ensure that the audit or review is conducted in accordance with the auditing standards.

Section 307B

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

307B Audit working papers to be retained for 7 years*Contravention by individual auditor or audit company*

- (1) An auditor contravenes this subsection if:
- (a) the auditor is an individual auditor or an audit company; and
 - (b) the auditor conducts:
 - (i) an audit of the financial report for a financial year; or
 - (ii) an audit or review of the financial report for a half-year; and
 - (c) the auditor does not retain all audit working papers prepared by or for, or considered or used by, the auditor in accordance with the requirements of the auditing standards until:
 - (i) the end of 7 years after the date of the audit report prepared in relation to the audit or review to which the audit working papers relate; or
 - (ii) an earlier date determined for the audit working papers by ASIC under subsection (6).

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

Contravention by member of audit firm

- (3) A person (the *defendant*) contravenes this subsection if:
- (a) an audit firm conducts:
 - (i) an audit of the financial report for a financial year; or
 - (ii) an audit or review of the financial report for a half-year; and
 - (b) the audit firm fails, at a particular time, to retain all audit working papers prepared by or for, or considered or used by, the audit firm in accordance with the requirements of the auditing standards until:
 - (i) the end of 7 years after the date of the audit report prepared in relation to the audit or review to which the documents relate; or

Section 307B

- (ii) the earlier date determined by ASIC for the audit working papers under subsection (6); and
 - (c) the defendant is a member of the firm at that time.
- (4) An offence based on subsection (3) is an offence of strict liability.
 - Note 1: For *strict liability* see section 6.1 of the *Criminal Code*.
 - Note 2: Subsection (5) provides a defence.
- (5) A member of an audit firm does not commit an offence at a particular time because of a contravention of subsection (3) if the member either:
 - (a) does not know at that time of the circumstances that constitute the contravention of subsection (3); or
 - (b) knows of those circumstances at that time but takes all reasonable steps to correct the contravention as soon as possible after the member becomes aware of those circumstances.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

Earlier retention date for audit working papers

- (6) ASIC may, on application by a person, determine, in writing, an earlier date for the audit working papers for the purposes of paragraphs (1)(c) and (3)(b) if:
 - (a) the auditor is an individual auditor and the auditor:
 - (i) dies; or
 - (ii) ceases to be a registered company auditor; or
 - (b) the auditor is an audit firm and the firm is dissolved (otherwise than simply as part of a reconstitution of the firm because of the death, retirement or withdrawal of a member or members or because of the admission of a new member or members); or
 - (c) the auditor is an audit company and the company:
 - (i) is wound up; or
 - (ii) ceases to be an authorised audit company.
- (7) In deciding whether to make a determination under subsection (6), ASIC must have regard to:
 - (a) whether ASIC is inquiring into or investigating any matters in respect of:

Section 307C

- (i) the auditor; or
 - (ii) the audited body for the audit to which the documents relate; and
- (b) whether the professional accounting bodies have any investigations or disciplinary action pending in relation to the auditor; and
- (c) whether civil or criminal proceedings in relation to:
 - (i) the conduct of the audit; or
 - (ii) the contents of the financial report to which the audit working papers relate;have been, or are about to be, commenced; and
- (d) any other relevant matter.

Audit working papers kept in electronic form

- (8) For the purposes of this section, if audit working papers are in electronic form they are taken to be retained only if they are convertible into hard copy.

307C Auditor's independence declaration*Contravention by individual auditor*

- (1) If an individual auditor conducts:
 - (a) an audit of the financial report for a financial year; or
 - (b) an audit or review of the financial report for a half-year;the individual auditor must give the directors of the company, registered scheme or disclosing entity:
 - (c) a written declaration that, to the best of the individual auditor's knowledge and belief, there have been:
 - (i) no contraventions of the auditor independence requirements of this Act in relation to the audit or review; and
 - (ii) no contraventions of any applicable code of professional conduct in relation to the audit or review; or
 - (d) a written declaration that, to the best of the individual auditor's knowledge and belief, the only contraventions of:
 - (i) the auditor independence requirements of this Act in relation to the audit or review; or

Section 307C

- (ii) any applicable code of professional conduct in relation to the audit or review;

are those contraventions details of which are set out in the declaration.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

Contravention by lead auditor

- (3) If an audit firm or audit company conducts:

- (a) an audit of the financial report for a financial year; or

- (b) an audit or review of the financial report for a half-year;

the lead auditor for the audit must give the directors of the company, registered scheme or disclosing entity:

- (c) a written declaration that, to the best of the lead auditor's knowledge and belief, there have been:

- (i) no contraventions of the auditor independence requirements of this Act in relation to the audit or review; and

- (ii) no contraventions of any applicable code of professional conduct in relation to the audit or review; or

- (d) a written declaration that, to the best of the lead auditor's knowledge and belief, the only contraventions of:

- (i) the auditor independence requirements of this Act in relation to the audit or review; or

- (ii) any applicable code of professional conduct in relation to the audit or review;

are those contraventions details of which are set out in the declaration.

- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

- (5) The declaration under subsection (1) or (3):

- (a) either:

- (i) must be given when the audit report is given to the directors of the company, registered scheme or disclosing entity; or

- (ii) must satisfy the conditions in subsection (5A); and

- (b) must be signed by the person making the declaration.
- (5A) A declaration under subsection (1) or (3) in relation to a financial report for a financial year or half-year satisfies the conditions in this subsection if:
- (a) the declaration is given to the directors of the company, registered scheme or disclosing entity before the directors pass a resolution under subsection 298(2) or 306(3) (as the case requires) in relation to the directors' report for the financial year or half-year; and
 - (b) a director signs the directors' report within 7 days after the declaration is given to the directors; and
 - (c) the auditor's report on the financial report is made within 7 days after the directors' report is signed; and
 - (d) the auditor's report includes either of the following statements:
 - (i) a statement to the effect that the declaration would be in the same terms if it had been given to the directors at the time the auditor's report was made;
 - (ii) a statement to the effect that circumstances have changed since the declaration was given to the directors, and setting out how the declaration would differ if it had been given to the directors at the time the auditor's report was made.
- (5B) An individual auditor or a lead auditor is not required to give a declaration under subsection (1) or (3) in respect of a contravention if:
- (a) the contravention was a contravention by a person of subsection 324CE(2), 324CF(2) or 324CG(2); and
 - (b) the person does not commit an offence because of subsection 324CE(4), 324CF(4) or 324CG(4).

Self-incrimination

- (6) An individual is not excused from giving a declaration under subsection (1) or (3) on the ground that giving the declaration might tend to incriminate the individual or expose the individual to a penalty.

Section 308

Use/derivative use indemnity

(7) However, neither:

- (a) the information included in the declaration; nor
- (b) any information, document or thing obtained as a direct or indirect consequence of including the information in the declaration;

is admissible in evidence against the individual in any criminal proceedings, or in any proceedings that would expose the person to a penalty, other than:

- (c) proceedings for an offence against section 1308 or 1309 in relation to the declaration; or
- (d) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* (false or misleading information or documents) in relation to the declaration.

308 Auditor's report on annual financial report

(1) An auditor who audits the financial report for a financial year must report to members on whether the auditor is of the opinion that the financial report is in accordance with this Act, including:

- (a) section 296 (compliance with accounting standards); and
- (b) section 297 (true and fair view).

If not of that opinion, the auditor's report must say why.

(2) If the auditor is of the opinion that the financial report does not comply with an accounting standard, the auditor's report must, to the extent it is practicable to do so, quantify the effect that non-compliance has on the financial report. If it is not practicable to quantify the effect fully, the report must say why.

(3) The auditor's report must describe:

- (a) any defect or irregularity in the financial report; and
- (b) any deficiency, failure or shortcoming in respect of the matters referred to in paragraph 307(b), (c) or (d).

(3A) The auditor's report must include any statements or disclosures required by the auditing standards.

(3B) If the financial report includes additional information under paragraph 295(3)(c) (information included to give true and fair view of financial position and performance), the auditor's report

must also include a statement of the auditor's opinion on whether the inclusion of that additional information was necessary to give the true and fair view required by section 297.

- (3C) If the directors' report for the financial year includes a remuneration report, the auditor must also report to members on whether the auditor is of the opinion that the remuneration report complies with section 300A. If not of that opinion, the auditor's report must say why.
- (4) The report must specify the date on which it is made.
- (5) An offence based on subsection (1), (3), (3A), (3C) or (4) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

309 Auditor's report on half-year financial report

Audit of financial report

- (1) An auditor who audits the financial report for a half-year must report to members on whether the auditor is of the opinion that the financial report is in accordance with this Act, including:
 - (a) section 304 (compliance with accounting standards); and
 - (b) section 305 (true and fair view).

If not of that opinion, the auditor's report must say why.

- (2) If the auditor is of the opinion that the financial report does not comply with an accounting standard, the auditor's report must, to the extent that it is practicable to do so, quantify the effect that non-compliance has on the financial report. If it is not practicable to quantify the effect fully, the report must say why.
- (3) The auditor's report must describe:
 - (a) any defect or irregularity in the financial report; and
 - (b) any deficiency, failure or shortcoming in respect of the matters referred to in paragraph 307(b), (c) or (d).

Review of financial report

- (4) An auditor who reviews the financial report for a half-year must report to members on whether the auditor became aware of any

Section 310

matter in the course of the review that makes the auditor believe that the financial report does not comply with Division 2.

(5) A report under subsection (4) must:

- (a) describe any matter referred to in subsection (4); and
- (b) say why that matter makes the auditor believe that the financial report does not comply with Division 2.

(5A) The auditor's report must include any statements or disclosures required by the auditing standards.

(5B) If the financial report includes additional information under paragraph 303(3)(c) (information included to give true and fair view of financial position and performance), the auditor's report must also include a statement of the auditor's opinion on whether the inclusion of that additional information was necessary to give the true and fair view required by section 305.

Report to specify day made

(6) A report under subsection (1) or (4) must specify the date on which it is made.

(7) An offence based on subsection (1), (3), (4), (5), (5A) or (6) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

310 Auditor's power to obtain information

The auditor:

- (a) has a right of access at all reasonable times to the books of the company, registered scheme or disclosing entity; and
- (b) may require any officer to give the auditor information, explanations or other assistance for the purposes of the audit or review.

A request under paragraph (b) must be a reasonable one.

311 Reporting to ASIC

Contravention by individual auditor

(1) An individual auditor conducting an audit contravenes this subsection if:

- (a) the auditor is aware of circumstances that:
 - (i) the auditor has reasonable grounds to suspect amount to a contravention of this Act; or
 - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (6)); or
 - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
- (b) if subparagraph (a)(i) applies:
 - (i) the contravention is a significant one; or
 - (ii) the contravention is not a significant one and the auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
- (c) the auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the auditor becomes aware of those circumstances.

Contravention by audit company

- (2) An audit company conducting an audit contravenes this subsection if:
 - (a) the lead auditor for the audit is aware of circumstances that:
 - (i) the lead auditor has reasonable grounds to suspect amount to a contravention of this Act; or
 - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (6)); or
 - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
 - (b) if subparagraph (a)(i) applies:
 - (i) the contravention is a significant one; or
 - (ii) the contravention is not a significant one and the lead auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in

Section 311

the auditor's report or bringing it to the attention of the directors; and

- (c) the lead auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the lead auditor becomes aware of those circumstances.

Contravention by lead auditor

- (3) A person contravenes this subsection if:
 - (a) the person is the lead auditor for an audit; and
 - (b) the person is aware of circumstances that:
 - (i) the person has reasonable grounds to suspect amount to a contravention of this Act; or
 - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (6)); or
 - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
 - (c) if subparagraph (b)(i) applies:
 - (i) the contravention is a significant one; or
 - (ii) the contravention is not a significant one and the person believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
 - (d) the person does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the person becomes aware of those circumstances.

Significant contraventions

- (4) In determining for the purposes of this section whether a contravention of this Act is a significant one, have regard to:
 - (a) the level of penalty provided for in relation to the contravention; and
 - (b) the effect that the contravention has, or may have, on:
 - (i) the overall financial position of the company, registered scheme or disclosing entity; or

- (ii) the adequacy of the information available about the overall financial position of the company, registered scheme or disclosing entity; and
 - (c) any other relevant matter.
- (5) Without limiting paragraph (4)(a), a penalty provided for in relation to a contravention of a provision of Part 2M.2 or 2M.3 includes a penalty imposed on a director, because of the operation of section 344, for failing to take reasonable steps to comply with, or to secure compliance with, that provision.

Person involved in an audit

- (6) In this section:

person involved in the conduct of an audit means:

- (a) the auditor; or
- (b) the lead auditor for the audit; or
- (c) the review auditor for the audit; or
- (d) a professional member of the audit team for the audit; or
- (e) any other person involved in the conduct of the audit.

312 Assisting auditor

- (1) An officer of a company, registered scheme or disclosing entity must:
 - (a) allow the auditor access to the books of the company, scheme or entity; and
 - (b) give the auditor any information, explanation or assistance required under section 310.

Note: Books include registers and documents generally (not only the accounting “books”): see the definition of ***books*** in section 9.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Section 313

313 Special provisions on audit of debenture issuers and guarantors

Auditor to give trustee for debenture holders copies of reports, certificates etc.

- (1) The auditor of a borrower in relation to debentures must give the trustee for debenture holders:
 - (a) a copy of any report, certificate or other document that the auditor must give the borrower or its members under this Act, the debentures or the trust deed; and
 - (b) a copy of any document that accompanies it.

The copies must be given within 7 days after the auditor gives the originals to the borrower or its members.

Auditor to report on matters prejudicial to debenture holders' interests

- (2) The auditor of a borrower, or guarantor, in relation to debentures must give the borrower or guarantor a written report about any matter that:
 - (a) the auditor became aware of in conducting the audit or review; and
 - (b) in the auditor's opinion, is or is likely to be prejudicial to the interests of debenture holders; and
 - (c) in the auditor's opinion, is relevant to the exercise of the powers of the trustee for debenture holders, or the performance of the trustee's duties, under this Act or the trust deed.

The auditor must give a copy of the report to the trustee for debenture holders. The report and the copy must be given within 7 days after the auditor becomes aware of the matter.

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 4—Annual financial reporting to members

314 Annual financial reporting to members

(1) A company, registered scheme or disclosing entity must report to members for a financial year by providing either of the following in accordance with subsection (1AA) or (1AE):

- (a) all of the following reports:
 - (i) the financial report for the year;
 - (ii) the directors' report for the year (see sections 298 to 300A);
 - (iii) the auditor's report on the financial report;
- (b) a concise report for the year that complies with subsection (2).

(1AA) A company, registered scheme or disclosing entity may provide the reports, or the concise report, for a financial year by doing all of the following:

- (a) sending, to each member who has made the election referred to in paragraph (1AB)(a):
 - (i) a hard copy of the reports, or the concise report; or
 - (ii) if the member has elected to receive the reports, or the concise report, as an electronic copy in accordance paragraph (1AB)(c)—an electronic copy of the reports, or the concise reports;
- (b) making a copy of the reports, or the concise report, readily accessible on a web site;
- (c) directly notifying, in writing, all members who did not make the election referred to in paragraph (1AB)(a) that the copy is accessible on the web site, and specifying the direct address on the web site where the reports, or the concise report, may be accessed.

Note: A direct address may be specified, for example, by specifying the URL of the reports or the concise report.

Section 314

(1AB) For the purposes of paragraph (1AA)(a), a company, registered scheme or disclosing entity must, on at least one occasion, directly notify in writing each member that:

- (a) the member may elect to receive, free of charge, a copy of the reports for each financial year, or a copy of the concise report for each financial year; and
- (b) if the member does not so elect—the member may access the reports, or the concise report, on a specified web site; and
- (c) if the member does so elect and the company, scheme or entity offers to send the report either as a hard copy or an electronic copy—the member may elect to receive the copy as either a hard copy or an electronic copy.

(1AC) An election made under subsection (1AB) is a standing election for each later financial year until the member changes his, her or its election.

Note: The member may request, under section 316, the company, registered scheme or disclosing entity not to send them material under this section.

(1AD) A member may, for the purposes of paragraph (1AA)(c) or subsection (1AB), be notified by electronic means only if the member has previously nominated that means as one by which the member may be notified.

(1AE) A company, registered scheme or disclosing entity may provide the reports, or the concise report, by sending each member:

- (a) a hard copy of the reports, or the concise report; or
- (b) an electronic copy of the reports, or the concise report, if the member has nominated that means as one by which the member may be sent the reports or the concise report.

(1A) An offence based on subsection (1) or (1AB) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Concise report

(2) A concise report for a financial year consists of:

- (a) a concise financial report for the year drawn up in accordance with accounting standards made for the purposes of this paragraph; and

- (b) the directors' report for the year (see sections 298-300A); and
 - (c) a statement by the auditor:
 - (i) that the financial report has been audited; and
 - (ii) whether, in the auditor's opinion, the concise financial report complies with the accounting standards made for the purposes of paragraph (a); and
 - (d) a copy of any qualification in, and of any statements included in the emphasis of matter section of, the auditor's report on the financial report; and
 - (e) a statement that the report is a concise report and that the full financial report and auditor's report will be sent to the member free of charge if the member asks for them.
- (3) If the accounting standards made for the purposes of paragraph (2)(a) require a discussion and analysis to be included in a concise financial report:
- (a) the auditor must report on whether the discussion and analysis complies with the requirements that the accounting standards lay down for the discussion and analysis; and
 - (b) the auditor does not otherwise need to audit the statements made in the discussion and analysis.

315 Deadline for reporting to members

Public companies and disclosing entities that are not registered schemes

- (1) A public company, or a disclosing entity that is not a registered scheme, must report to members under section 314 by the earlier of:
- (a) 21 days before the next AGM after the end of the financial year; or
 - (b) 4 months after the end of the financial year.

Note: For the deadline for holding an AGM, see section 250N.

Section 316

Small proprietary companies (shareholder direction under section 293)

- (2) If a shareholder direction is given to a small proprietary company under section 293 after the end of the financial year, the company must report to members under section 314 by the later of:
 - (a) 2 months after the date on which the direction is given; and
 - (b) 4 months after the end of the financial year.

Registered schemes

- (3) A registered scheme must report to members under section 314 within 3 months after the end of the financial year.

Other proprietary companies

- (4) A proprietary company that is not covered by subsection (1) or (2) must report to members under section 314 within 4 months after the end of the financial year.
- (5) For the purposes of this section, a company, registered scheme or disclosing entity that reports in accordance with subsection 314(1AA) is taken to report at the time that the company, scheme or entity has fully complied with the requirements of that subsection.

316 Member's choices for annual financial information

- (1) A member may request the company, registered scheme or disclosing entity:
 - (a) not to send them the material required by section 314; or
 - (b) to send them a full financial report and the directors' report and auditor's report.

A request may be a standing request or for a particular financial year. The member is not entitled to a report for a financial year earlier than the one before the financial year in which the request is made.

- (2) The time for complying with a request under paragraph (1)(b) is:
 - (a) 7 days after the request is received; or
 - (b) the deadline for reporting under section 315;whichever is later.

- (3) A full financial report, directors' report and auditor's report are to be sent free of charge unless the member has already received a copy of them free of charge.
- (4) An offence based on subsection (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

317 Consideration of reports at AGM

- (1) The directors of a public company that is required to hold an AGM must lay before the AGM:
 - (a) the financial report; and
 - (b) the directors' report; and
 - (c) the auditor's report;for the last financial year that ended before the AGM.

Note 1: If the company's first AGM is held before the end of its first financial year, there will be no reports to lay before the meeting.

Note 2: A public company that has only 1 member is not required to hold an AGM (see section 250N).

Note 3: Section 250RA imposes on the auditor of a listed public company an obligation to attend or be represented at the AGM.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

318 Additional reporting by debenture issuers

- (1) A company or disclosing entity that was a borrower in relation to debentures at the end of a financial year must give a copy of the annual financial report, directors' report and auditor's report to the trustee for debenture holders by the deadline for the financial year set by section 315.
- (2) A debenture holder may ask the company or disclosing entity that issued the debenture for copies of:
 - (a) the last reports provided to members under section 314; or
 - (b) the full financial report and the directors' report and auditor's report for the last financial year.
- (3) The company or entity must give the debenture holder the copies as soon as practicable after the request and free of charge.

Section 318

- (4) A disclosing entity that was a borrower in relation to debentures at the end of a half-year must give a copy of the half-year financial report, directors' report and auditor's report to the trustee for debenture holders within 75 days after the end of the half-year.
- (5) An offence based on subsection (1), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 5—Lodging reports with ASIC

319 Lodgment of annual reports with ASIC

- (1) A company, registered scheme or disclosing entity that has to prepare or obtain a report for a financial year under Division 1 must lodge the report with ASIC. This obligation extends to a concise report provided to members under section 314.
- (1A) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) Subsection (1) does not apply to a small proprietary company that prepares a report in response to a shareholder direction under section 293 or an ASIC direction under section 294.
- (3) The time for lodgment is:
 - (a) within 3 months after the end of the financial year for a disclosing entity or registered scheme; and
 - (b) within 4 months after the end of the financial year for anyone else.
- (5A) An offence based on subsection (5) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

320 Lodgment of half-year reports with ASIC

- (1) A disclosing entity that has to prepare or obtain a report for a half-year under Division 2 must lodge the report with ASIC within 75 days after the end of the half-year.
- (2) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

321 ASIC power to require lodgment

- (1) ASIC may give a company, registered scheme or disclosing entity a direction to lodge with ASIC a copy of reports prepared or obtained by it under Division 1 or 2.

Section 322

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The direction must:

- (a) be made in writing; and
- (b) specify the period or periods concerned; and
- (c) be made no later than 6 years after the end of the period or periods; and
- (d) specify the date by which the documents have to be lodged.

The date specified under paragraph (d) must be at least 14 days after the date on which the direction is given.

322 Relodgment if financial statements or directors' reports amended after lodgment

- (1) If a financial report or directors' report is amended after it is lodged with ASIC, the company, registered scheme or disclosing entity must:
- (a) lodge the amended report with ASIC within 14 days after the amendment; and
 - (b) give a copy of the amended report free of charge to any member who asks for it.
- (2) If the amendment is a material one, the company, registered scheme or disclosing entity must also notify members as soon as practicable of:
- (a) the nature of the amendment; and
 - (b) their right to obtain a copy of the amended report under subsection (1).

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 6—Special provisions about consolidated financial statements

323 Directors and officers of controlled entity to give information

- (1) If a company, registered scheme or disclosing entity has to prepare consolidated financial statements, a director or officer of a controlled entity must give the company, registered scheme or disclosing entity all information requested that is necessary to prepare the consolidated financial statements and the notes to those statements.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

323A Auditor's power to obtain information from controlled entity

- (1) An auditor who audits or reviews a financial report that includes consolidated financial statements:
 - (a) has a right of access at all reasonable times to the books of any controlled entity; and
 - (b) may require any officer of the entity to give the auditor information, explanations or other assistance for the purposes of the audit or review.

A request under paragraph (b) must be a reasonable one.

- (2) The information, explanations or other assistance required under paragraph (1)(b) is to be given at the expense of the company, registered scheme or disclosing entity whose financial report is being audited or reviewed.

323B Controlled entity to assist auditor

- (1) If a company, registered scheme or disclosing entity has to prepare a financial report that includes consolidated financial statements, an officer or auditor of a controlled entity must:
 - (a) allow the auditor for the company, scheme or entity access to the controlled entity's books; and
 - (b) give the auditor any information, explanation or assistance required under section 323A.

Section 323C

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

323C Application of Division to entity that has ceased to be controlled

Sections 323, 323A and 323B apply to the preparation or audit of a financial report that covers a controlled entity even if the entity is no longer controlled by the company, registered scheme or disclosing entity whose financial report is being prepared or audited.

Division 7—Financial years and half-years

323D Financial years and half-years

First financial year

- (1) The first financial year for a company, registered scheme or disclosing entity starts on the day on which it is registered or incorporated. It lasts for 12 months or the period (not longer than 18 months) determined by the directors.

Financial years after first year

- (2) Subject to subsection (4), subsequent financial years must:
 - (a) start at the end of the previous financial year; and
 - (b) be 12 months long.

The directors may determine that the financial year is to be shorter or longer (but not by more than 7 days).

Synchronisation of financial years where consolidated financial statements are required

- (3) A company, registered scheme or disclosing entity that has to prepare consolidated financial statements must do whatever is necessary to ensure that the financial years of the consolidated entities are synchronised with its own financial years. It must achieve this synchronisation by the end of 12 months after the situation that calls for consolidation arises.
- (3A) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (4) To facilitate this synchronisation, the financial year for a controlled entity may be extended or shortened. The extended financial year cannot be longer than 18 months.

Half-years

- (5) A half-year for a company, registered scheme or disclosing entity is the first 6 months of a financial year. The directors may

Section 323D

determine that the half-year is to be shorter or longer (but not by more than 7 days).

Division 8—Disclosure by listed companies of information filed overseas

323DA Listed companies to disclose information filed overseas

- (1) A company that discloses information to, or as required by:
 - (a) the Securities and Exchange Commission of the United States of America; or
 - (b) the New York Stock Exchange; or
 - (c) a financial market in a foreign country if that financial market is prescribed by regulations made for the purposes of this paragraph;must disclose that information in English to each relevant market operator, if the company is listed on the next business day after doing so.
- (3) This section applies despite anything in the company's constitution.

Division 9—Reference of financial report to the Financial Reporting Panel

Subdivision A—Preliminary

323EA Financial reports to which Division applies

- (1) This Division applies to a financial report of a company, disclosing entity or registered scheme if the financial report has been lodged with ASIC.
- (2) The company, the disclosing entity or the responsible entity of the registered scheme is the ***lodging entity*** for the financial report for the purposes of this Act.

323EB Referral of financial report to Financial Reporting Panel

- (1) ASIC may refer the financial report to the Financial Reporting Panel under Subdivision B.
- (2) The lodging entity may refer the financial report to the Financial Reporting Panel under Subdivision C.

Note: The lodging entity may refer the report to the Financial Reporting Panel only with ASIC's consent.
- (3) If the financial report is referred to the Financial Reporting Panel under Subdivision B or C, the Panel must deal with the referral under Subdivision D.
- (4) To avoid doubt, the referral of the financial report to the Financial Reporting Panel does not prevent ASIC from initiating, or taking any further steps in relation to, proceedings against the lodging entity, or the lodging entity's directors, in relation to the financial report.

Subdivision B—Referral by ASIC

323EC ASIC may refer financial report to the Financial Reporting Panel

- (1) ASIC may refer the financial report to the Financial Reporting Panel if ASIC is of the opinion that the financial report does not comply with one or more of the financial reporting requirements.
- (2) In referring the financial report to the Financial Reporting Panel, ASIC must follow the procedures set out in sections 323ED and 323EF.

323ED ASIC to notify lodging entity of proposed referral

- (1) If ASIC proposes to refer the financial report to the Financial Reporting Panel, ASIC must give the lodging entity written notice of the proposed referral.
- (2) The notice must:
 - (a) identify the financial reporting requirement or requirements that, in ASIC's opinion, the financial report does not comply with; and
 - (b) set out, in relation to each of those financial reporting requirements:
 - (i) the reasons for ASIC's opinion that the financial report does not comply with that requirement; and
 - (ii) the changes that, in ASIC's opinion, would need to be made to the financial report to ensure that it does comply with that requirement; and
 - (c) include a statement setting out the effect of section 323EE; and
 - (d) be in the prescribed form.
- (3) For the purposes of this Act, the requirements referred to in paragraph (2)(a) are the *relevant financial reporting requirements* in relation to the financial report.

323EE Lodging entity to respond to ASIC notice

- (1) The lodging entity must, within 14 days after receiving the notice, give ASIC a written response that, in relation to each relevant

Section 323EF

financial reporting requirement identified under paragraph 323ED(2)(a), either:

- (a) states that the lodging entity proposes to amend the financial report to incorporate the changes referred to in subparagraph 323ED(2)(b)(ii) (the **ASIC proposed changes**); or
 - (b) states that the lodging entity:
 - (i) does not agree that the ASIC proposed changes should be made; and
 - (ii) proposes instead to amend the financial report to incorporate the changes set out in the response (the **alternative changes**);and sets out the lodging entity's reasons for its opinion that the financial report would comply with the relevant financial reporting requirement if the alternative changes were made; or
 - (c) states that the lodging entity does not agree that the ASIC proposed changes should be made and sets out the lodging entity's reasons for its opinion that the financial report as originally lodged complies with the relevant financial reporting requirement.
- (2) An offence based on subsection (1) is an offence of strict liability.
- Note: For **strict liability** see section 6.1 of the *Criminal Code*.
- (3) Evidence or information included in a response under subsection (1) is not admissible in evidence against:
- (a) the lodging entity; or
 - (b) a director of the lodging entity; or
 - (c) any other representative of the lodging entity;
- in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

323EF Referral to Financial Reporting Panel

- (1) The referral of the financial report to the Financial Reporting Panel must:
 - (a) identify the relevant financial reporting requirement or requirements that, in ASIC's opinion, the financial report does not comply with; and

- (b) set out:
 - (i) the reasons for ASIC's opinion that the financial report does not comply with that requirement or those requirements; and
 - (ii) the changes that, in ASIC's opinion, would need to be made to the financial report to ensure that it does comply with that requirement or those requirements; and
 - (c) be accompanied by a copy of:
 - (i) the notice that ASIC gave the lodging entity under section 323ED; and
 - (ii) any response that the lodging entity gave ASIC under section 323EE; and
 - (d) be made within 14 days after:
 - (i) the lodging entity gives ASIC the response under section 323EE; or
 - (ii) the time for the lodging entity to give ASIC that response ends without the lodging entity having given that response.
- (2) The referral must be made in the prescribed form.
 - (3) ASIC must give the lodging entity a copy of the referral on the day on which the referral is made.
 - (4) For the purposes of this Act, the requirements referred to in paragraph (1)(a) are the *disputed financial reporting requirements* in relation to the financial report.

Subdivision C—Referral by lodging entity

323EG Lodging entity may refer financial report to the Financial Reporting Panel with ASIC's consent

- (1) The lodging entity may refer the financial report to the Financial Reporting Panel if:
 - (a) ASIC has informed the lodging entity that, in ASIC's opinion, the financial report does not comply with one or more financial reporting requirements (the *relevant financial reporting requirements*); and

Section 323EH

- (b) the lodging entity is of the opinion that the financial report does comply with one or more of the relevant financial reporting requirements; and
 - (c) ASIC consents to the referral of the financial report to the Financial Reporting Panel.
- (2) In referring the financial report to the Financial Reporting Panel, the lodging entity must follow the procedure set out in sections 323EH and 323EI.
- (3) For the purposes of this Act, the requirements referred to in paragraph (1)(b) are the *disputed financial reporting requirements* in relation to the financial report.

323EH Lodging entity to apply to ASIC for consent to proposed referral

- (1) The lodging entity must apply to ASIC in writing for ASIC's consent to the referral.
- (2) The application must:
 - (a) identify the disputed financial reporting requirements; and
 - (b) set out, in relation to each of the disputed financial reporting requirements, the reasons for the lodging entity's opinion that the financial report does comply with that requirement.
- (3) If ASIC consents to the referral, ASIC must:
 - (a) prepare a statement that sets out, in relation to each of the disputed financial reporting requirements, the reasons for ASIC's opinion that the financial report does not comply with that requirement; and
 - (b) give the statement to the lodging entity.
- (4) Evidence or information that the lodging entity includes in the application under paragraph (2)(b) is not admissible in evidence against:
 - (a) the lodging entity; or
 - (b) a director of the lodging entity; or
 - (c) any other representative of the lodging entity;in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

323EI Referral to Financial Reporting Panel

- (1) The referral of the financial report to the Financial Reporting Panel must:
 - (a) identify the disputed financial reporting requirement or requirements; and
 - (b) set out the reasons for the lodging entity's opinion that the financial report complies with that requirement or those requirements; and
 - (c) be accompanied by a copy of the statement that ASIC gives the lodging entity under subsection 323EH(3).
- (2) The referral must be made in the prescribed form.
- (3) The lodging entity must give ASIC a copy of the referral on the day on which the referral is made.
- (4) Evidence or information that the lodging entity includes in the referral under paragraph (1)(b) is not admissible in evidence against:
 - (a) the lodging entity; or
 - (b) a director of the lodging entity; or
 - (c) any other representative of the lodging entity;in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Subdivision D—Financial Reporting Panel dealing with reference

323EJ Financial Reporting Panel to obtain submissions from ASIC and lodging entity

- (1) The Financial Reporting Panel must, within 7 days after the financial report is referred to the Panel under section 323EC or 323EG, give both the lodging entity and ASIC a written notice of the day by which they may make written submissions to the Panel on whether the financial report complies with the disputed financial reporting requirement or requirements specified in the referral under paragraph 323EF(1)(a) or 323EI(1)(a).
- (2) The day specified in the notice must be not less than 14 days after the day on which the notice is given.

Section 323EK

323EK Financial Reporting Panel to consider and report on financial report referred to it under section 323EC or 323EG

- (1) The Financial Reporting Panel must:
 - (a) consider the financial report; and
 - (b) prepare a report that states, in relation to each of the referred financial reporting requirements, whether, in the Panel's opinion, the financial report complies with that requirement.
- (2) If:
 - (a) the referral was made under section 323EC; and
 - (b) the Panel determines that the financial report does not, in the Panel's opinion, comply with a referred financial reporting requirement;the Financial Reporting Panel's report must also set out the changes that, in the Panel's opinion, would need to be made to the financial report to ensure that it does comply with that requirement.
- (3) If:
 - (a) the referral was made under section 323EG; and
 - (b) the Panel determines that the financial report does not, in the Panel's opinion, comply with a referred financial reporting requirement;the Financial Reporting Panel's report may also set out the changes that, in the Panel's opinion, would need to be made to the financial report to ensure that it does comply with that requirement.
- (4) The Financial Reporting Panel's report must not disclose any confidential commercial information obtained by the Panel in the course of its consideration of the financial report.
- (5) The Financial Reporting Panel must give a copy of its report to:
 - (a) the lodging entity; and
 - (b) ASIC; and
 - (c) the relevant market operator if the financial report referred to the Panel was one of a listed company or listed registered scheme.Subject to subsection (6), the copies must be given within 60 days after the day on which the financial statement is referred to the Panel (the *referral day*).

Section 323EL

- (6) The copies may be given more than 60 days after the referral day, but not more than 90 days after the referral day, if the Financial Reporting Panel gives notice to the lodging entity and ASIC of the extension within 60 days after the referral day.
- (7) ASIC must take such steps as it considers reasonable and appropriate to publicise:
 - (a) the Financial Reporting Panel's report; and
 - (b) if the Financial Reporting Panel's report sets out changes that, in the Panel's opinion, would need to be made to the financial report to ensure that it complies with a financial reporting requirement—whether the lodging entity has amended, or indicated that it intends to amend, the financial report to incorporate those changes.Without limiting this, ASIC may make the report and the information referred to in paragraph (7)(b) available on the Internet.
- (8) If a copy of the Financial Reporting Panel's report is given to the relevant market operator under paragraph (5)(c), the relevant market operator must take such steps as it considers reasonable and appropriate to make the report available to the users of the market.
- (9) This section has effect subject to section 323EL.

323EL Power of Financial Reporting Panel to dismiss referral

- (1) The Financial Reporting Panel may, at any stage of the proceeding, dismiss the referral.
- (2) Without limiting subsection (1), the Financial Reporting Panel may dismiss the referral if it is satisfied that the disputed financial reporting requirement or requirements are being dealt with or are going to be dealt with in proceedings before a court.

323EM Court, or tribunal of fact, may have regard to Financial Reporting Panel report

A Court, or a tribunal of fact, may have regard to the Financial Reporting Panel's report in determining whether the financial report complied with the referred financial reporting requirements.

Part 2M.4—Appointment and removal of auditors

Division 1—Entities that may be appointed as an auditor for a company or registered scheme

324AA Individual auditors, audit firms and authorised audit companies

Subject to this Part, the following may be appointed as auditor for a company or a registered scheme for the purposes of this Act:

- (a) an individual;
- (b) a firm;
- (c) a company.

The company or registered scheme may have more than one auditor.

324AB Effect of appointing firm as auditor—general

- (1) The appointment of a firm as auditor of a company or registered scheme is taken to be an appointment of all persons who, at the date of the appointment, are:
 - (a) members of the firm; and
 - (b) registered company auditors.This is so whether or not those persons are resident in Australia.
- (2) The appointment of the members of a firm as auditors of a company or registered scheme that is taken by subsection (1) to have been made because of the appointment of the firm as auditor of the company or scheme is not affected by the dissolution of the firm. This subsection has effect subject to section 324AC.
- (3) A report or notice that purports to be made or given by a firm appointed as auditor of a company or registered scheme is not taken to be duly made or given unless it is signed by a member of the firm who is a registered company auditor both:
 - (a) in the firm name; and
 - (b) in his or her own name.

Section 324AC

- (4) A notice required or permitted to be given to an audit firm under the Corporations legislation may be given to the firm by giving the notice to a member of the firm.
- (5) For the purposes of criminal proceedings under this Act against a member of an audit firm, an act or omission by:
 - (a) a member of the firm; or
 - (b) an employee or agent of the audit firm;acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is also to be attributed to the audit firm.

324AC Effect of appointing firm as auditor—reconstitution of firm

Reconstitution of firm

- (1) This section deals with the situation in which:
 - (a) a firm is appointed as auditor of a company or registered scheme; and
 - (b) the firm is reconstituted because of either or both of the following:
 - (i) the death, retirement or withdrawal of a member or members; or
 - (ii) the admission of a new member or new members.

Retiring or withdrawing member

- (2) A person who:
 - (a) is taken under subsection 324AB(1) to be an auditor of the company; and
 - (b) retires or withdraws from the firm as previously constituted as mentioned in subparagraph (1)(b)(i) of this section;is taken to resign as auditor of the company as from the day of his or her retirement or withdrawal.
- (3) Section 329 does not apply to the resignation that is taken to occur under subsection (2) unless:
 - (a) the person who is taken to have resigned was the only member of the firm who was a registered company auditor; and

Section 324AD

- (b) there is no member of the firm who is a registered company auditor after that person retires or withdraws from the firm.

New member

- (4) A person who:
 - (a) is a registered company auditor; and
 - (b) is admitted to the firm as mentioned in subparagraph (1)(b)(ii);is taken to have been appointed as an auditor of the company or registered scheme as from the day of his or her admission to the firm.

Appointments of continuing members not affected

- (5) The reconstitution of the firm does not affect the appointment of the continuing members of the firm who are registered company auditors as auditors of the company or registered scheme.
- (6) Nothing in this section affects the operation of section 324BB.

324AD Effect of appointing company as auditor

- (1) A report or notice that purports to be made or given by an audit company appointed as auditor of a company or registered scheme is not taken to be duly made or given unless it is signed by a director of the audit company (or the lead auditor or review auditor for the audit) both:
 - (a) in the audit company's name; and
 - (b) in his or her own name.
- (2) For the purposes of criminal proceedings under this Act against a director of an audit company, an act or omission by:
 - (a) an officer of the audit company; or
 - (b) an employee or agent of the audit company;acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is also to be attributed to the audit company.

324AE Professional members of the audit team

If an individual auditor, audit firm or audit company conducts an audit of a company or registered scheme, the *professional members of the audit team* are:

- (a) any registered company auditor who participates in the conduct of the audit; and
- (b) any other person who participates in the conduct of the audit and, in the course of doing so, exercises professional judgment in relation to the application of or compliance with:
 - (i) accounting standards; or
 - (ii) auditing standards; or
 - (iii) the provisions of this Act dealing with financial reporting and the conduct of audits; and
- (c) any other person who is in a position to directly influence the outcome of the audit because of the role they play in the design, planning, management, supervision or oversight of the audit; and
- (d) any person who recommends or decides what the lead auditor is to be paid in connection with the performance of the audit; and
- (e) any person who provides, or takes part in providing, quality control for the audit.

324AF Lead and review auditors

Lead auditor

- (1) If an audit firm or audit company conducts an audit of a company or registered scheme, the *lead auditor* for the audit is the registered company auditor who is primarily responsible to the audit firm or the audit company for the conduct of the audit.

Review auditor

- (2) If an individual auditor, audit firm or audit company conducts an audit of a company or registered scheme, the *review auditor* for the audit is the registered company auditor (if any) who is primarily responsible to the individual auditor, the audit firm or the audit company for reviewing the conduct of the audit.

Section 324BA

Division 2—Registration requirements

324BA Registration requirements for appointment of individual as auditor

Subject to section 324BD, an individual contravenes this section if:

- (a) the individual:
 - (i) consents to be appointed as auditor of a company or registered scheme; or
 - (ii) acts as auditor of a company or registered scheme; or
 - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
- (b) the person is not a registered company auditor.

324BB Registration requirements for appointment of firm as auditor

Contraventions by members of firm

- (1) A person (the *defendant*) contravenes this subsection if:
 - (a) at a particular time, a firm:
 - (i) consents to be appointed as auditor of a company or registered scheme; or
 - (ii) acts as auditor of a company or registered scheme; or
 - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
 - (b) at that time, the firm:
 - (i) does not satisfy subsection (5); or
 - (ii) does not satisfy subsection (6); and
 - (c) the defendant is a member of the firm at that time; and
 - (d) the defendant is aware of the circumstances referred to in paragraphs (a) and (b) at that time.
- (2) A person (the *defendant*) contravenes this subsection if:
 - (a) at a particular time, a firm:

Section 324BB

- (i) consents to be appointed as auditor of a company or registered scheme; or
 - (ii) acts as auditor of a company or registered scheme; or
 - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
 - (b) at that time, the firm:
 - (i) does not satisfy subsection (5); or
 - (ii) does not satisfy subsection (6); and
 - (c) the defendant is a member of the firm at that time.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a) and (b).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (4) provides a defence.

- (4) A member of an audit firm does not commit an offence at a particular time because of a contravention of subsection (2) if the member either:
- (a) does not know at that time of the circumstances that constitute the contravention of subsection (2); or
 - (b) does know of those circumstances at that time but takes all reasonable steps to correct the contravention as soon as possible after the member becomes aware of those circumstances.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

Registered company auditor requirement

- (5) The firm satisfies this subsection if at least 1 member of the firm is a registered company auditor who is ordinarily resident in Australia.

Business name or members names requirement

- (6) The firm satisfies this subsection if:
- (a) the business name under which the firm is carrying on business is registered under a law of a State or Territory relating to the registration of business names; or

Section 324BC

- (b) a return in the prescribed form has been lodged showing, in relation to each member of the firm, the member's full name and address as at the time when the firm so consents, acts or prepares a report.

324BC Registration requirements for appointment of company as auditor

Contravention by company

- (1) A company contravenes this subsection if:
 - (a) the company:
 - (i) consents to be appointed as auditor of a company or registered scheme; or
 - (ii) acts as auditor of a company or registered scheme; or
 - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
 - (b) the company is not an authorised audit company.

Contraventions by directors of company

- (2) A person (the *defendant*) contravenes this subsection if:
 - (a) at a particular time, a company:
 - (i) consents to be appointed as auditor of a company or registered scheme; or
 - (ii) acts as auditor of a company or registered scheme; or
 - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
 - (b) at that time, the company is not an authorised audit company; and
 - (c) the defendant is a director of the company at that time; and
 - (d) the defendant is aware of the circumstances referred to in paragraphs (a) and (b) at that time.
- (3) A person (the *defendant*) contravenes this subsection if:
 - (a) at a particular time, a company:
 - (i) consents to be appointed as auditor of a company or registered scheme; or

Section 324BD

- (ii) acts as auditor of a company or registered scheme; or
 - (iii) prepares a report required by this Act to be prepared by a registered company auditor or by an auditor of a company or registered scheme; and
 - (b) at that time, the company is not an authorised audit company; and
 - (c) the defendant is a director of the company at that time.
- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical elements of the offence specified in paragraphs (3)(a) and (b).
- Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.
- Note 2: Subsection (5) provides a defence.
- (5) A director of a company does not commit an offence at a particular time because of a contravention of subsection (3) if the director either:
- (a) does not know at that time of the circumstances that constitute the contravention of subsection (3); or
 - (b) knows of those circumstances at that time but takes all reasonable steps to correct the contravention of subsection (3) as soon as possible after the director becomes aware of those circumstances.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

324BD Exception from registration requirement for proprietary company

- (1) An individual who is not a registered company auditor may be appointed as auditor of a proprietary company if:
- (a) ASIC is satisfied that it is impracticable for a proprietary company to obtain the services of:
 - (i) an individual who could be appointed as auditor consistently with section 324BA; or
 - (ii) a firm that could be appointed as auditor consistently with section 324BB; or
 - (iii) a company that could be appointed consistently with section 324BC;

Section 324BD

because of the place where the company carries on business;
and

- (b) ASIC is satisfied that the individual is suitably qualified or experienced; and
- (c) ASIC approves the individual for the purposes of this Act in relation to the audit of the company's financial reports.

The appointment is subject to such terms and conditions as are specified in the approval under paragraph (c).

- (2) If an individual is appointed in accordance with subsection (1):
 - (a) the individual is taken to be a registered company auditor in relation to the auditing of any of the company's financial reports; and
 - (b) the provisions of this Act apply, with the necessary modifications, in relation to the individual accordingly.

Paragraph (a) has effect subject to the terms and conditions of the approval under subsection (1).

- (3) If an individual approved by ASIC under subsection (1) is acting as auditor of a company, ASIC may at any time, by notice in writing given to the company:
 - (a) amend, revoke or vary the terms and conditions of its approval; or
 - (b) terminate the appointment of that individual as auditor of the company.
- (4) A notice under subsection (3) terminating the appointment of an individual as auditor of a company takes effect as if, on the date on which the notice is received by the company, the company had received from the individual notice of the individual's resignation as auditor taking effect from that date.

Division 3—Auditor independence

Subdivision A—General requirement

324CA General requirement for auditor independence—auditors

Contravention by individual auditor or audit company

- (1) An individual auditor or audit company contravenes this subsection if:
- (a) the individual auditor or audit company engages in audit activity in relation to an audited body at a particular time; and
 - (b) a conflict of interest situation exists in relation to the audited body at that time; and
 - (c) at that time:
 - (i) in the case of an individual auditor—the individual auditor is aware that the conflict of interest situation exists; or
 - (ii) in the case of an audit company—the audit company is aware that the conflict of interest situation exists; and
 - (d) the individual auditor or audit company does not, as soon as possible after the individual auditor or the audit company becomes aware that the conflict of interest situation exists, take all reasonable steps to ensure that the conflict of interest situation ceases to exist.

Note: For *conflict of interest situation*, see section 324CD.

Individual auditor or audit company to notify ASIC

- (1A) An individual auditor or audit company contravenes this subsection if:
- (a) the individual auditor or audit company is the auditor of an audited body; and
 - (b) a conflict of interest situation exists in relation to the audited body while the individual auditor or audit company is the auditor of the audited body; and

Section 324CA

- (c) on a particular day (the *start day*):
 - (i) in the case of an individual auditor—the individual auditor becomes aware that the conflict of interest situation exists; or
 - (ii) in the case of an audit company—the audit company becomes aware that the conflict of interest situation exists; and
- (d) at the end of the period of 7 days from the start day:
 - (i) the conflict of interest situation remains in existence; and
 - (ii) the individual auditor or audit company has not informed ASIC in writing that the conflict of interest situation exists.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2A) or (2C) (public company) or 331AAA(2A) or (2C) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) A person is not excused from informing ASIC under subsection (1A) that a conflict of interest situation exists on the ground that the information might tend to incriminate the person or expose the person to a penalty.
- (1C) However, if the person is a natural person:
 - (a) the information; and
 - (b) the giving of the information;are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.
- (1D) If the individual auditor or audit company gives ASIC a notice under paragraph (1A)(d), ASIC must, as soon as practicable after the notice has been received, give a copy of the notice to the audited body.

Section 324CA

Conflict of interest situation of which individual auditor or audit company is not aware

- (2) An individual auditor or audit company contravenes this subsection if:
- (a) the individual auditor or audit company engages in audit activity in relation to an audited body at a particular time; and
 - (b) a conflict of interest situation exists in relation to the audited body at the time; and
 - (c) at that time:
 - (i) in the case of an individual auditor—the individual auditor is not aware that the conflict of interest situation exists; or
 - (ii) in the case of an audit company—the audit company is not aware that the conflict of interest situation exists; and
 - (d) the individual auditor or the audit company would have been aware of the existence of the conflict of interest situation at that time if the individual auditor or audit company had had in place a quality control system reasonably capable of making the individual auditor or audit company aware of the existence of such a conflict of interest situation.

Note: For *conflict of interest situation*, see section 324CD.

- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical element of the offence specified in paragraph (2)(b).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsections (4) and (5) provide defences.

- (4) An individual auditor does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by the auditor at a particular time if the individual auditor has reasonable grounds to believe that the individual auditor had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the individual auditor) that the individual auditor and the individual auditor's employees complied with the requirements of this Subdivision.

Section 324CB

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

- (5) An audit company does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by the audit company at a particular time if the audit company has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit company) that the audit company and the audit company's employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

Relationship between obligations under this section and other obligations

- (6) The obligations imposed by this section are in addition to, and do not derogate from, any obligation imposed by:
- (a) another provision of this Act; or
 - (b) a code of professional conduct.

Note: Paragraph (a)—see, for example, the specific obligations imposed by Subdivision B.

324CB General requirement for auditor independence—member of audit firm

Contravention by member of audit firm

- (1) A person (the ***defendant***) contravenes this subsection if:
- (a) an audit firm engages in audit activity in relation to an audited body at a particular time; and
 - (b) a conflict of interest situation exists in relation to the audited body at that time; and
 - (c) the defendant is a member of the audit firm at that time; and
 - (d) the defendant is or becomes aware of the circumstances referred to in paragraphs (a) and (b); and
 - (e) the defendant does not, as soon as possible after the defendant becomes aware of those circumstances, take reasonable steps to ensure that the conflict of interest situation ceases to exist.

Section 324CB

Note: For *conflict of interest situation*, see section 324CD.

Member of audit firm to notify ASIC

- (1A) A person (the **defendant**) contravenes this subsection if:
- (a) an audit firm is the auditor of an audited body; and
 - (b) a conflict of interest situation exists in relation to the audited body while the audit firm is the auditor of the audited body; and
 - (c) the defendant is a member of the audit firm at a time when the conflict of interest situation exists; and
 - (d) on a particular day (the **start day**), the defendant becomes aware of the circumstances referred to in paragraphs (a) and (b); and
 - (e) at the end of the period of 7 days from the start day:
 - (i) the conflict of interest situation remains in existence; and
 - (ii) ASIC has not been informed in writing by the defendant, by another member of the audit firm or by someone else on behalf of the audit firm that the conflict of interest situation exists.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2B) (public company) or 331AAA(2B) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) A person is not excused from informing ASIC under subsection (1A) that a conflict of interest situation exists on the ground that the information might tend to incriminate the person or expose the person to a penalty.

- (1C) However:

- (a) the information; and
- (b) the giving of the information;

are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.

Section 324CB

- (1D) If ASIC is given a notice under paragraph (1A)(e), ASIC must, as soon as practicable after the notice is received, give a copy of the notice to the audited body.

Conflict of interest situation of which another member of audit firm is aware

- (2) A person contravenes this subsection if:
- (a) an audit firm engages in audit activity in relation to an audited body at a particular time; and
 - (b) a conflict of interest situation exists in relation to the audited body at the time; and
 - (c) the person is a member of the audit firm at that time; and
 - (d) at that time, another member of the audit firm is aware that the conflict of interest situation exists; and
 - (e) the audit firm does not, as soon as possible after the member referred to in paragraph (d) becomes aware that the conflict of interest situation exists, take all reasonable steps to ensure that the conflict of interest situation ceases to exist.

Note: For *conflict of interest situation*, see section 324CD.

- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a), (b), (d) and (e).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (6) provides a defence.

Conflict of interest situation of which members are not aware

- (4) A person contravenes this subsection if:
- (a) an audit firm engages in audit activity in relation to an audited body at a particular time; and
 - (b) a conflict of interest situation exists in relation to the audited body at the time; and
 - (c) the person is a member of the audit firm at that time; and
 - (d) at that time none of the members of the audit firm is aware that the conflict of interest situation exists; and
 - (e) a member of the audit firm would have been aware of the existence of the conflict of interest situation if the audit firm had in place a quality control system reasonably capable of

Section 324CC

making the audit firm aware of the existence of such a conflict of interest situation.

Note: For *conflict of interest situation*, see section 324CD.

- (5) For the purposes of an offence based on subsection (4), strict liability applies to the physical elements of the offence specified in paragraphs (4)(a), (b), (d) and (e).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (6) provides a defence.

Defence

- (6) A person does not commit an offence because of a contravention of subsection (2) or (4) in relation to audit activity engaged in by an audit firm at a particular time if the person has reasonable grounds to believe that the audit firm had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit firm) that the audit firm and its employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

Relationship between obligations under this section and other obligations

- (7) The obligations imposed by this section are in addition to, and do not derogate from, any obligation imposed by:
- (a) another provision of this Act; or
 - (b) a code of professional conduct.

Note: Paragraph (a)—see, for example, the specific obligations imposed by Subdivision B.

324CC General requirement for auditor independence—director of audit company

Contravention by director of audit company

- (1) A person (the *defendant*) contravenes this subsection if:
- (a) an audit company engages in audit activity in relation to an audited body at a particular time; and

Section 324CC

- (b) a conflict of interest situation exists in relation to the audited body at that time; and
- (c) the defendant is a director of the audit company at that time; and
- (d) the defendant is or becomes aware of the circumstances referred to in paragraphs (a) and (b); and
- (e) the defendant does not, as soon as possible after the defendant becomes aware of those circumstances, take reasonable steps to ensure that the conflict of interest situation ceases to exist.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: The audit company itself will commit an offence based on the contravention of subsection 324AA(1).

Director of audit company to notify ASIC

- (1A) A person (the *defendant*) contravenes this subsection if:
- (a) an audit company is the auditor of an audited body; and
 - (b) a conflict of interest situation exists in relation to the audited body while the audit company is the auditor of the audited body; and
 - (c) the defendant is a director of the audit company at a time when the conflict of interest situation exists; and
 - (d) on a particular day (the *start day*), the defendant becomes aware of the circumstances referred to in paragraphs (a) and (b); and
 - (e) at the end of the period of 7 days from the start day:
 - (i) the conflict of interest situation remains in existence; and
 - (ii) ASIC has not been informed in writing by the defendant, by another director of the audit company or by the audit company that the conflict of interest situation exists.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2C) (public company) or 331AAA(2C) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) A person is not excused from informing ASIC under subsection (1A) that a conflict of interest situation exists on the ground that the information might tend to incriminate the person or expose the person to a penalty.
- (1C) However, if the person is a natural person:
- (a) the information; and
 - (b) the giving of the information;
- are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.
- (1D) If ASIC is given a notice under paragraph (1A)(e), ASIC must, as soon as practicable after the notice is received, give a copy of the notice to the audited body.

Conflict of interest situation of which another director of audit company aware

- (2) A person contravenes this subsection if:
- (a) an audit company engages in audit activity in relation to an audited body at a particular time; and
 - (b) a conflict of interest situation exists in relation to the audited body at the time; and
 - (c) the person is a director of the audit company at that time; and
 - (d) at that time, another director of the audit company is aware that the conflict of interest situation exists; and
 - (e) the audit company does not, as soon as possible after the director referred to in paragraph (d) becomes aware that the conflict of interest situation exists, take all reasonable steps to ensure that the conflict of interest situation ceases to exist.

Note 1: For ***conflict of interest situation***, see section 324CD.

Note 2: The company itself will commit an offence based on the contravention of subsection 324AA(1).

- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a), (b), (d) and (e).

Note 1: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (6) provides a defence.

Section 324CC

Conflict of interest situation of which directors of audit company not aware

- (4) A person contravenes this subsection if:
- (a) an audit company engages in audit activity in relation to an audited body at a particular time; and
 - (b) a conflict of interest situation exists in relation to the audited body at the time; and
 - (c) the person is a director of the audit company at that time; and
 - (d) at that time none of the directors of the audit company is aware that the conflict of interest situation exists; and
 - (e) a director of the audit company would have been aware of the existence of the conflict of interest situation if the audit company had in place a quality control system reasonably capable of making the audit company aware of the existence of such a conflict of interest situation.

Note 1: For *conflict of interest situation*, see section 324CD.

Note 2: The company itself will commit an offence based on the contravention of subsection 324AA(2).

- (5) For the purposes of an offence based on subsection (4), strict liability applies to the physical elements of the offence specified in paragraphs (4)(a), (b), (d) and (e).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (6) provides a defence.

Defence

- (6) A person does not commit an offence because of a contravention of subsection (2) or (4) in relation to audit activity engaged in by an audit company at a particular time if the person has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit company) that the audit company and its employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

Section 324CD

Relationship between obligations under this section and other obligations

- (7) The obligations imposed by this section are in addition to, and do not derogate from, any obligation imposed by:
- (a) another provision of this Act; or
 - (b) a code of professional conduct.

Note: Paragraph (a)—see, for example, the specific obligations imposed by Subdivision B.

324CD Conflict of interest situation

- (1) For the purposes of sections 324CA, 324CB and 324CC, a ***conflict of interest situation*** exists in relation to an audited body at a particular time if, because of circumstances that exist at that time:
- (a) the auditor, or a professional member of the audit team, is not capable of exercising objective and impartial judgment in relation to the conduct of the audit of the audited body; or
 - (b) a reasonable person, with full knowledge of all relevant facts and circumstances, would conclude that the auditor, or a professional member of the audit team, is not capable of exercising objective and impartial judgment in relation to the conduct of the audit of the audited body.
- (2) Without limiting subsection (1), have regard to circumstances arising from any relationship that exists, has existed, or is likely to exist, between:
- (a) the individual auditor; or
 - (b) the audit firm or any current or former member of the firm; or
 - (c) the audit company, any current or former director of the audit company or any person currently or formerly involved in the management of the audit company;
- and any of the persons and bodies set out in the following table:

Section 324CE

Relevant relationships		
Item	If the audited body is...	have regard to any relationship with...
1	a company	the company; or a current or former director of the company; or a person currently or formerly involved in the management of the company.
2	a disclosing entity	the entity; or a current or former director of the entity; or a person currently or formerly involved in the management of the entity.
3	a registered scheme	the responsible entity for the registered scheme; or a current or former director of the responsible entity; or a person currently or formerly involved in the management of the scheme; or a person currently or formerly involved in the management of the responsible entity.

Subdivision B—Specific requirements

324CE Auditor independence—specific requirements for individual auditor

Specific independence requirements for individual auditor

- (1) An individual auditor contravenes this subsection if:
- (a) the individual auditor engages in audit activity at a particular time; and
 - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (5) of this section; and

- (c) the individual auditor is or becomes aware of the circumstances referred to in paragraph (b); and
- (d) the individual auditor does not, as soon as possible after the individual auditor becomes aware of those circumstances, take all reasonable steps to ensure that the individual auditor does not continue to engage in audit activity in those circumstances.

Individual auditor to notify ASIC

- (1A) An individual auditor contravenes this subsection if:
- (a) the individual auditor is the auditor of an audited body; and
 - (b) a relevant item of the table in subsection 324CH(1) applies to a person or entity covered by subsection (5) of this section while the individual auditor is the auditor of the audited body; and
 - (c) on a particular day (the *start day*), the individual auditor becomes aware of the circumstances referred to in paragraph (b); and
 - (d) at the end of the period of 7 days from the start day:
 - (i) those circumstances remain in existence; and
 - (ii) the individual auditor has not informed ASIC in writing of those circumstances.

Note: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2A) (public company) or 331AAA(2A) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) A person is not excused from informing ASIC under subsection (1A) that the circumstances referred to in paragraph (1A)(b) exist on the ground that the information might tend to incriminate the person or expose the person to a penalty.

- (1C) However:
- (a) the information; and
 - (b) the giving of the information;
- are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty,

Section 324CE

other than proceedings for an offence based on the information given being false or misleading.

- (1D) If the individual auditor gives ASIC a notice under paragraph (1A)(d), ASIC must, as soon as practicable after the notice has been received, give a copy of the notice to the audited body.

Strict liability contravention of specific independence requirements by individual auditor

- (2) An individual auditor contravenes this subsection if:
- (a) the individual auditor engages in audit activity at a particular time; and
 - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (5) of this section.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraph (2)(b).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (4) provides a defence.

- (4) An individual auditor does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by the individual auditor at a particular time if the individual auditor has reasonable grounds to believe that the individual auditor had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the individual auditor) that the individual auditor and the individual auditor's employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

People and entities covered

- (5) The following table sets out:
- (a) the persons and entities covered by this subsection in relation to audit activity engaged in by an individual auditor; and

Section 324CE

- (b) the items of the table in subsection 324CH(1) that are the relevant items for each of those persons and entities:

Individual auditor		
Item	For this person or entity...	the relevant items of the table in subsection 324CH(1) are...
1	the individual auditor	1 to 19
2	a service company or trust acting for, or on behalf of, the individual auditor, or another entity performing a similar function	1 to 19
3	a professional member of the audit team conducting the audit of the audited body	1 to 6 8 to 19
4	an immediate family member of a professional member of the audit team conducting the audit of the audited body	1 and 2 10 to 19
5	a person who is a non-audit services provider and who does not satisfy the maximum hours test in subsection (6)	10 to 12
6	an immediate family member of a person who is a non-audit services provider and who does not satisfy the maximum hours test in subsection (6)	10 to 12
7	an entity that the auditor (or a service company or trust acting for, or on behalf of, the individual auditor, or another entity performing a similar function) controls	15
8	a body corporate in which the auditor (or a service company or trust acting for, or on behalf of, the individual auditor, or another entity performing a similar function) has a substantial holding	15
9	a person who: (a) is a former professional employee of the auditor; and (b) does not satisfy the independence test in subsection (7)	1 and 2

Section 324CE

Individual auditor		
Item	For this person or entity...	the relevant items of the table in subsection 324CH(1) are...
10	an individual who: (a) is the former owner of the individual auditor's business; and (b) does not satisfy the independence test in subsection (7)	1 and 2

Maximum hours test

- (6) A non-audit services provider satisfies the maximum hours test in this subsection if:
- (a) the number of hours for which the person provides services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the period to which the audit relates does not exceed 10 hours; and
 - (b) the number of hours for which the person provides services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the 12 months immediately before the beginning of the period to which the audit relates does not exceed 10 hours.

In a prosecution for an offence based on subsection (1) or (2), the prosecution must prove that the non-audit services provider did not satisfy the maximum hours test in this subsection.

Independence test

- (7) A person satisfies the independence test in this subsection in relation to an individual auditor if the person:
- (a) does not influence the operations or financial policies of the accounting and audit practice conducted by the auditor; and
 - (b) does not participate, or appear to participate, in the business or professional activities of the accounting and audit practice conducted by the auditor; and
 - (c) does not have any rights against the auditor in relation to the accounting and audit practice conducted by the auditor in relation to the termination of the person's former employment by the auditor; and

Section 324CF

- (d) has no financial arrangements with the auditor in relation to the accounting and audit practice conducted by the auditor, other than:
 - (i) an arrangement providing for regular payments of a fixed pre-determined dollar amount which is not dependent, directly or indirectly, on the revenues, profits or earnings of the auditor; or
 - (ii) an arrangement providing for regular payments of a dollar amount where the method of calculating the dollar amount is fixed and is not dependent, directly or indirectly, on the revenues, profits or earnings of the auditor; and
- (e) without limiting paragraph (d), has no financial arrangement with the auditor to receive a commission or similar payment in relation to business generated by the person for the accounting and audit practice conducted by the auditor.

In a prosecution for an offence based on subsection (1) or (2), the prosecution must prove that the person did not satisfy the independence test in this subsection in relation to the individual auditor.

- (8) In applying subsection (7), disregard any rights that the person has against the auditor by way of an indemnity for, or contribution in relation to, liabilities incurred by the person when the person was an employee of the auditor or the owner of the auditor's business.

324CF Auditor independence—specific requirements for audit firm

Contraventions by members of audit firm

- (1) A person (the **defendant**) contravenes this subsection if:
 - (a) an audit firm engages in audit activity at a particular time; and
 - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (5) of this section; and
 - (c) the defendant is a member of the audit firm at that time; and
 - (d) the defendant is or becomes aware of the circumstances referred to in paragraphs (a) and (b); and
 - (e) the defendant does not, as soon as possible after the defendant becomes aware of those circumstances, take all

Section 324CF

reasonable steps to ensure that the audit firm does not continue to engage in audit activity in those circumstances.

Member of audit firm to notify ASIC

- (1A) A person (the **defendant**) contravenes this subsection if:
- (a) an audit firm is the auditor of an audited body; and
 - (b) a relevant item of the table in subsection 324CH(1) applies to a person or entity covered by subsection (5) of this section while the audit firm is the auditor of the audited body; and
 - (c) the defendant is a member of the audit firm at a time when the circumstances referred to in paragraph (b) exist; and
 - (d) on a particular day (the **start day**), the defendant becomes aware of the circumstances referred to in paragraphs (a) and (b); and
 - (e) at the end of the period of 7 days from the start day:
 - (i) the circumstances referred to in paragraph (b) remain in existence; and
 - (ii) ASIC has not been informed in writing of those circumstances by the defendant, by another member of the audit firm or by someone else on behalf of the audit firm.

Note: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2B) (public company) or 331AAA(2B) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) A person is not excused from informing ASIC under subsection (1A) that the circumstances referred to in paragraph (1A)(b) exist on the ground that the information might tend to incriminate the person or expose the person to a penalty.
- (1C) However:
- (a) the information; and
 - (b) the giving of the information;
- are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.

Section 324CF

- (1D) If ASIC is given a notice under paragraph (1A)(e), ASIC must, as soon as practicable after the notice is received, give a copy of the notice to the audited body.

Contravention of independence requirements by members of audit firm

- (2) A person (the **defendant**) contravenes this subsection if:
- (a) an audit firm engages in audit activity at a particular time; and
 - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (5) of this section; and
 - (c) the defendant is a member of the audit firm at that time.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a) and (b).

Note 1: For **strict liability**, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (4) provides a defence.

- (4) A person does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by an audit firm at a particular time if the person has reasonable grounds to believe that the audit firm had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit firm) that the audit firm and its employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

People and entities covered

- (5) The following table sets out:
- (a) the persons and entities covered by this subsection in relation to audit activity engaged in by an audit firm; and
 - (b) the items of the table in subsection 324CH(1) that are the relevant items for each of those persons and entities:

Section 324CF

Audit firm		
Item	For this person or entity...	the relevant items of the table in subsection 324CH(1) are...
1	the firm	4 7 10 to 19
2	a service company or trust acting for, or on behalf of, the firm, or another entity performing a similar function	4 7 10 to 19
3	a member of the firm	1 to 7 9 15
4	a professional member of the audit team conducting the audit of the audited body	1 to 6 8 to 19
5	an immediate family member of a professional member of the audit team conducting the audit of the audited body	1 and 2 10 to 19
6	a person who: (a) is a non-audit services provider; and (b) does not satisfy the maximum hours test in subsection (6)	10 to 12
7	an immediate family member of a person who: (a) is a non-audit services provider; and (b) does not satisfy the maximum hours test in subsection (6)	10 to 12
8	an entity that the firm (or a service company or trust acting for, or on behalf of, the firm, or another entity performing a similar function) controls	15

Section 324CF

Audit firm		
Item	For this person or entity...	the relevant items of the table in subsection 324CH(1) are...
9	a body corporate in which the firm (or a service company or trust acting for, or on behalf of, the firm, or another entity performing a similar function) has a substantial holding	15
10	an entity that a member of the firm controls or a body corporate in which a member of the firm has a substantial holding	15
11	a person who: (a) is a former member of the firm; and (b) does not satisfy the independence test in subsection (7)	1 and 2
12	a person who: (a) is a former professional employee of the firm; and (b) does not satisfy the independence test in subsection (7)	1 and 2

Maximum hours test

- (6) A non-audit services provider satisfies the maximum hours test in this subsection if:
- (a) the number of hours for which the person provides services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the period to which the audit relates does not exceed 10 hours; and
 - (b) the number of hours for which the person provided services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the 12 months immediately before the beginning of the period to which the audit relates does not exceed 10 hours.

In a prosecution for an offence based on subsection (1) or (2), the prosecution must prove that the non-audit services provider did not satisfy the maximum hours test in this subsection.

Section 324CF

Independence test

- (7) A person satisfies the independence test in this subsection in relation to a firm if the person:
- (a) does not influence the operations or financial policies of the accounting and audit practice conducted by the firm; and
 - (b) does not participate, or appear to participate, in the business or professional activities of the accounting and audit practice conducted by the firm; and
 - (c) does not have any rights against the firm, or the members of the firm, in relation to the accounting and audit practice conducted by the firm in relation to the termination of, or the value of, the person's former partnership interest in the firm; and
 - (d) has no financial arrangements with the firm in relation to the accounting and audit practice conducted by the firm, other than:
 - (i) an arrangement providing for regular payments of a fixed pre-determined dollar amount which is not dependent, directly or indirectly, on the revenues, profits or earnings of the firm; or
 - (ii) an arrangement providing for regular payments of a dollar amount where the method of calculating the dollar amount is fixed and is not dependent, directly or indirectly, on the revenues, profits or earnings of the firm; and
 - (e) without limiting paragraph (d), has no financial arrangement with the firm to receive a commission or similar payment in relation to business generated by the person for the accounting and audit practice conducted by the firm.
- In a prosecution for an offence based on subsection (1) or (2), the prosecution must prove that the person did not satisfy the independence test in this subsection in relation to the firm.
- (8) In applying subsection (7), disregard any rights that the person has against the firm, or the members of the firm, by way of an indemnity for, or contribution in relation to, liabilities incurred by the person when the person was a member or employee of the firm.

Meaning of holding by firm in body corporate

- (9) For the purposes of item 9 in the table in subsection (5), a firm is taken to have a holding in a body corporate if the holding is one of the firm's partnership assets.

324CG Auditor independence—specific requirements for audit company

Specific independence requirements for audit company

- (1) An audit company contravenes this subsection if:
- (a) the audit company engages in audit activity at a particular time; and
 - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (9) of this section; and
 - (c) the audit company is or becomes aware of the circumstances referred to in paragraph (b); and
 - (d) the audit company does not, as soon as possible after the audit company becomes aware of those circumstances, take all reasonable steps to ensure that the audit company does not continue to engage in audit activity in those circumstances.

Audit company to notify ASIC

- (1A) An audit company contravenes this subsection if:
- (a) the audit company is the auditor of an audited body; and
 - (b) a relevant item of the table in subsection 324CH(1) applies to a person or entity covered by subsection (9) of this section while the audit company is the auditor of the audited body; and
 - (c) on a particular day (the **start day**), the audit company becomes aware of the circumstances referred to in paragraph (b); and
 - (d) at the end of the period of 7 days from the start day:
 - (i) those circumstances remain in existence; and
 - (ii) the audit company has not informed ASIC in writing of those circumstances.

Section 324CG

Note: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2C) (public company) or 331AAA(2C) (registered scheme) within the period of 21 days (or a longer period that has been approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (1B) If the audit company gives ASIC a notice under paragraph (1A)(d), ASIC must, as soon as practicable after the notice has been received, give a copy of the notice to the audited body.

Strict liability contravention of specific independence requirements by audit company

- (2) An audit company contravenes this subsection if:
- (a) the audit company engages in audit activity at a particular time; and
 - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (9) of this section.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraph (2)(b).

Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (4) provides a defence.

- (4) An audit company does not commit an offence because of a contravention of subsection (2) in relation to audit activity engaged in by the audit company at a particular time if the audit company has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit company) that the audit company and the audit company's employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

Contraventions by directors of audit company

- (5) A person (the ***defendant***) contravenes this subsection if:
- (a) an audit company engages in audit activity at a particular time; and
 - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (9) of this section; and
 - (c) the defendant is a director of the audit company at that time; and
 - (d) the defendant is or becomes aware of the circumstances referred to in paragraphs (a) and (b); and
 - (e) the defendant does not, as soon as possible after the defendant becomes aware of those circumstances, take all reasonable steps to ensure that the audit company does not continue to engage in audit activity in those circumstances.

Director of audit company to notify ASIC

- (5A) A person (the ***defendant***) contravenes this subsection if:
- (a) an audit company is the auditor of an audited body; and
 - (b) a relevant item of the table in subsection 324CH(1) applies to a person or entity covered by subsection (9) of this section while the audit company is the auditor of the audited body; and
 - (c) the defendant is a director of the audit company at a time when the circumstances referred to in paragraph (b) exist; and
 - (d) on a particular day (the ***start day***), the defendant becomes aware of the circumstances referred to in paragraphs (a) and (b); and
 - (e) at the end of the period of 7 days from the start day:
 - (i) the circumstances referred to in paragraph (b) remain in existence; and
 - (ii) ASIC has not been informed in writing of those circumstances by the defendant, by another director of the company or by the audit company.

Note: If the audited body is a public company or a registered scheme and the notice under this subsection is not followed up by a notice under subsection 327B(2C) (public company) or 331AAA(2C) (registered scheme) within the period of 21 days (or a longer period that has been

Section 324CG

approved by ASIC) from the day the notice under this subsection is given, the audit appointment will be terminated at the end of that period.

- (5B) A person is not excused from informing ASIC under subsection (5A) that the circumstances referred to in paragraph (5A)(b) exist on the ground that the information might tend to incriminate the person or expose the person to a penalty.
- (5C) However, if the person is a natural person:
- (a) the information; and
 - (b) the giving of the information;
- are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty, other than proceedings for an offence based on the information given being false or misleading.
- (5D) If ASIC is given a notice under paragraph (5A)(e), ASIC must, as soon as practicable after the notice is received, give a copy of the notice to the audited body.

Strict liability contravention of specific independence requirements by director of audit company

- (6) A person (the **defendant**) contravenes this subsection if:
- (a) an audit company engages in audit activity at a particular time; and
 - (b) a relevant item of the table in subsection 324CH(1) applies at that time to a person or entity covered by subsection (9) of this section; and
 - (c) the defendant is a director of the audit company at that time.
- (7) For the purposes of an offence based on subsection (6), strict liability applies to the physical elements of the offence specified in paragraphs (6)(a) and (b).

Note 1: For **strict liability**, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (8) provides a defence.

- (8) A person does not commit an offence because of a contravention of subsection (6) in relation to audit activity engaged in by an audit company at a particular time if the person has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into

Section 324CG

account the size and nature of the audit practice of the audit company) that the audit company and its employees complied with the requirements of this Subdivision.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

People and entities covered

- (9) The following table sets out:
- (a) the persons and entities covered by this subsection in relation to audit activity engaged in by an audit company; and
 - (b) the items of the table in subsection 324CH(1) that are the relevant items for each of those persons and entities:

Audit company		
Item	For this person or entity...	the relevant items of the table in subsection 324CH(1) are...
1	the audit company	4 7 10 to 19
2	a service company or trust acting for, or on behalf of, the audit company, or another entity performing a similar function	4 7 10 to 19
3	a director or senior manager of the audit company	1 to 7 9 15
4	a professional member of the audit team conducting the audit of the audited body	1 to 6 8 to 19
5	an immediate family member of a professional member of the audit team conducting the audit of the audited body	1 and 2 10 to 19
6	a person who: (a) is a non-audit services provider; and (b) does not satisfy the maximum hours test in subsection (10)	10 to 12

Section 324CG

Audit company		
Item	For this person or entity...	the relevant items of the table in subsection 324CH(1) are...
7	an immediate family member of a person who: (a) is a non-audit services provider; and (b) does not satisfy the maximum hours test in subsection (10)	10 to 12
8	an entity that the audit company (or a service company or trust acting for, or on behalf of, the audit company, or another entity performing a similar function) controls	15
9	a body corporate in which the audit company (or a service company or trust acting for, or on behalf of, the audit company, or another entity performing a similar function) has a substantial holding	15
10	an entity that an officer of the audit company controls or a body corporate in which an officer of the audit company has a substantial holding	16
11	a person who: (a) is a former officer of the audit company; and (b) does not satisfy the independence test in subsection (11)	1 and 2
12	a person who: (a) is a former professional employee of the audit company; and (b) does not satisfy the independence test in subsection (11)	1 and 2

Maximum hours test

- (10) A non-audit services provider satisfies the maximum hours test in this subsection if:

- (a) the number of hours for which the person provides services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the period to which the audit relates does not exceed 10 hours; and
- (b) the number of hours for which the person provided services (other than services related to the conduct of an audit) to the audited body on behalf of the auditor during the 12 months immediately before the beginning of the period to which the audit relates does not exceed 10 hours.

In a prosecution for an offence based on subsection (1), (2), (5) or (6), the prosecution must prove that the non-audit services provider did not satisfy the maximum hours test in this subsection.

Independence test

- (11) A person satisfies the independence test in this subsection in relation to an audit company if the person:
 - (a) does not influence the operations or financial policies of the accounting and audit practice conducted by the audit company; and
 - (b) does not participate, or appear to participate, in the business or professional activities of the accounting and audit practice conducted by the audit company; and
 - (c) does not have any rights against the audit company in relation to the accounting and audit practice conducted by the audit company in relation to the termination of the person's former position as an officer of the audit company; and
 - (d) has no financial arrangements with the audit company in relation to the accounting and audit practice conducted by the audit company, other than:
 - (i) an arrangement providing for regular payments of a fixed pre-determined dollar amount which is not dependent, directly or indirectly, on the revenues, profits or earnings of the audit company; or
 - (ii) an arrangement providing for regular payments of a dollar amount where the method of calculating the dollar amount is fixed and is not dependent, directly or indirectly, on the revenues, profits or earnings of the audit company; and
 - (e) without limiting paragraph (d), has no financial arrangement with the audit company to receive a commission or similar

Section 324CH

payment in relation to business generated by the person for the accounting and audit practice conducted by the audit company.

In a prosecution for an offence based on subsection (1), (2), (5) or (6), the prosecution must prove that the person did not satisfy the independence test in this subsection in relation to the audit company.

- (12) In applying subsection (11), disregard any rights that the person has against the audit company by way of an indemnity for, or contribution in relation to, liabilities incurred by the person when the person was an officer or employee of the audit company.

324CH Relevant relationships

Table of relevant relationships

- (1) The following table lists the relationships between:
- (a) a person or a firm; and
 - (b) the audited body for an audit;
- that are relevant for the purposes of sections 324CE, 324CF and 324CG:

Relevant relationships	
Item	This item applies to a person (or, if applicable, to a firm) at a particular time if at that time the person (or firm)...
1	is an officer of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
2	is an audit-critical employee of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
3	is a partner of: (a) an officer of the audited body; or (b) an audit-critical employee of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
4	is an employer of: (a) an officer of the audited body; or

Relevant relationships	
Item	This item applies to a person (or, if applicable, to a firm) at a particular time if at that time the person (or firm)...
	(b) an audit-critical employee of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
5	is an employee of: (a) an officer of the audited body; or (b) an audit-critical employee of the audited body This item does not apply if the audited body is a small proprietary company for the relevant financial year.
6	is a partner or employee of an employee of: (a) an officer of the company; or (b) an audit-critical employee of the company This item does not apply if the audited body is a small proprietary company for the relevant financial year.
7	provides remuneration to: (a) an officer of the audited body; or (b) an audit-critical employee of the audited body; for acting as a consultant to the person This item does not apply if the audited body is a small proprietary company for the relevant financial year.
8	was an officer of the audited body at any time during: (a) the period to which the audit relates; or (b) the 12 months immediately preceding the beginning of the period to which the audit relates; or (c) the period during which the audit is being conducted or the audit report is being prepared This item does not apply if the audited body is a small proprietary company for the relevant financial year.
9	was an audit-critical employee of the audited body at any time during: (a) the period to which the audit relates; or (b) the 12 months immediately preceding the beginning of the period to which the audit relates; or (c) the period during which the audit is being conducted or the

Section 324CH

Relevant relationships	
Item	This item applies to a person (or, if applicable, to a firm) at a particular time if at that time the person (or firm)...
	audit report is being prepared
	This item does not apply if the audited body is a small proprietary company for the relevant financial year.
10	has an asset that is an investment in the audited body
11	has an asset that is a beneficial interest in an investment in the audited body and has control over that asset
12	has an asset that is a beneficial interest in an investment in the audited body that is a material interest
13	has an asset that is a material investment in an entity that has a controlling interest in the audited body
14	has an asset that is a material beneficial interest in an investment in an entity that has a controlling interest in the audited body
15	owes an amount to: (a) the audited body; or (b) a related body corporate; or (c) an entity that the audited body controls; unless the debt is disregarded under subsection (5), (5A) or (5B)
16	is owed an amount by: (a) the audited body; or (b) a related body corporate; or (c) an entity that the audited body controls; under a loan that is not disregarded under subsection (6) or (6A)
17	is liable under a guarantee of a loan made to: (a) the audited body; or (b) a related body corporate; or (c) an entity that the audited body controls
19	is entitled to the benefit of a guarantee given by: (a) the audited body; or (b) a related body corporate; or (c) an entity that the audited body controls in relation to a loan unless the guarantee is disregarded under subsection (8)

Applying table if audited body is registered scheme

- (2) If the audited body is a registered scheme, apply the table in subsection (1) as if:
- (a) references to the audited body in items 1 to 9, and items 15 to 19, in the table were references to the responsible entity for the registered scheme; and
 - (b) references to an interest in the audited body in items 10 to 12 in the table were references to an interest in either:
 - (i) the registered scheme; or
 - (ii) the responsible entity for the registered scheme; and
 - (c) references to an investment in an entity that has a controlling interest in the audited body in items 13 and 14 of the table were references to an investment in an entity that has a controlling interest in the responsible entity for the registered scheme.

Applying table if audited body is listed entity (other than registered scheme)

- (3) If the audited body is a listed entity (other than a registered scheme), apply the table in subsection (1) as if references in the table to the audited body included references to an associated entity of the audited body.

Note: See section 50AAA for the definition of *associated entity*.

Firm assets

- (4) For the purpose of applying items 10 to 14 in the table in subsection (1) to an audit firm, the firm is taken to have a particular asset if the asset is one of the firm's partnership assets.

Housing loan exception

- (5) For the purposes of item 15 of the table in subsection (1), disregard a debt owed by an individual to a body corporate or entity if:
- (a) the body corporate or entity is:
 - (i) an Australian ADI; or
 - (ii) a body corporate registered under the *Life Insurance Act 1995*; and

Section 324CH

- (b) the debt arose because of a loan that the body corporate or entity made to the person in the ordinary course of its ordinary business; and
- (c) the person used the amount of the loan to pay the whole or part of the purchase price of premises that the person uses as their principal place of residence.

Goods and services exception

- (5A) For the purposes of item 15 of the table in subsection (1), disregard a debt owed by a person or firm to a body corporate or entity if:
- (a) the debt arises from the acquisition of goods or services from:
 - (i) the audited body; or
 - (ii) an entity that the audited body controls; or
 - (iii) a related body corporate; and
 - (b) the acquisition of goods and services was on the terms and conditions that would normally apply to goods or services acquired from the body, entity or related body corporate; and
 - (c) the debt is owed on the terms and conditions that would normally apply to a debt owing to the body, entity or related body corporate; and
 - (d) the goods or services will be used by the person or firm:
 - (i) for the personal use of the person or firm; or
 - (ii) in the ordinary course of business of the person or firm.

Ordinary commercial loan exception

- (5B) For the purposes of item 15 of the table in subsection (1), disregard a debt owed under a loan that:
- (a) is made or given in the ordinary course of business of:
 - (i) the audited body; or
 - (ii) the related body corporate; or
 - (iii) the controlled entity; and
 - (b) is made or given on the terms and conditions that would normally apply to a loan made or given by the audited body, the related body corporate or the controlled entity.

Loans by immediate family members in ordinary business dealing with client

- (6) For the purposes of item 16 of the table in subsection (1), disregard a debt owed to a person by a body corporate or entity if:
 - (a) the item applies to the person because the person is an immediate family member of:
 - (i) a professional member of the audit team conducting the audit of the audited body; or
 - (ii) a non-audit services provider; and
 - (b) the debt is incurred in the ordinary course of business of the body corporate or entity.
- (6A) For the purposes of item 16 in the table in subsection (1), disregard an amount owed under a loan to a person or firm by the audited body, a related body corporate or an entity that the audited body controls if:
 - (a) the body, body corporate or entity is an Australian ADI; and
 - (b) the amount is deposited in a basic deposit product (within the meaning of section 761A) provided by the body, body corporate or entity; and
 - (c) the amount was deposited, in the ordinary course of business of the audited body, body corporate or entity, on the terms and conditions that would normally apply to a basic deposit product provided by the body, body corporate or entity.

Ordinary commercial guarantee exception

- (8) For the purposes of item 19 of the table in subsection (1), disregard any guarantee that:
 - (a) is made or given in the ordinary course of the business of:
 - (i) the audited body; or
 - (ii) the related body corporate; or
 - (iii) the controlled entity; and
 - (b) is made or given on the terms and conditions that would normally apply to a guarantee made or given by the audited body, the related body corporate or the controlled entity.

Section 324CI

Future debts and liabilities

(8A) In this section:

- (a) a reference to a debt or amount that is owed by one entity to another entity includes a reference to a debt or amount that will (or may) be owed by the first entity to the other entity under an existing agreement between the entities; and
- (b) a reference to a liability under a guarantee of a loan includes a reference to a liability that will arise under the guarantee if the loan is not repaid.

Relevant financial year

(9) In this section:

relevant financial year, in relation to audit activities undertaken in relation to an audit of a financial report for a financial year or an audit or review of a financial report for a half-year in a financial year, means the financial year immediately before that financial year.

324CI Special rule for retiring partners of audit firms and retiring directors of authorised audit companies

A person contravenes this section if:

- (a) the person ceases to be:
 - (i) a member of an audit firm; or
 - (ii) a director of an audit company;at a particular time (the **departure time**); and
- (b) at any time before the departure time, the audit firm or audit company has engaged in an audit of an audited body; and
- (c) the person was a professional member of the audit team for the audit; and
- (d) within the period of 2 years starting on the date the report under section 308 or 309 was made on the latest audit to which paragraphs (b) and (c) apply, the person becomes, or continues to be, an officer of the audited body; and
- (e) the audited body is not a small proprietary company for the most recently ended financial year.

If the audited body is a listed entity (other than a registered scheme), apply paragraph (d) as if references in that paragraph to

the audited body included references to a related body corporate of the audited body.

324CJ Special rule for retiring professional member of audit company

A person contravenes this section if:

- (a) the person who is not a director of an audit company ceases to be a professional employee of the audit company at a particular time (the *departure time*); and
- (b) at any time before the departure time, the audit company has engaged in an audit of an audited body; and
- (c) the person was a lead auditor or review auditor for the audit; and
- (d) within the period of 2 years starting on the date the report under section 308 or 309 was made on the latest audit to which paragraphs (b) and (c) apply, the person becomes, or continues to be, an officer of the audited body; and
- (e) the audited body is not a small proprietary company for the most recently ended financial year.

If the audited body is a listed entity (other than a registered scheme), apply paragraph (d) as if references in that paragraph to the audited body included references to a related body corporate of the audited body.

324CK Multiple former audit firm partners or audit company directors

A person contravenes this section if:

- (a) an audit firm, or audit company, is an auditor of an audited body for a financial year; and
- (b) the person has at any time been a member of the audit firm or a director of the audit company; and
- (c) the person becomes an officer of the audited body within a period of 5 years after the person ceased (or last ceased) to be a member of the audit firm or a director of the audit company (as the case may be); and
- (d) at the time when paragraph (c) is satisfied another person who is or who also has at any time been a member of the audit firm, or a director of the audit company, at a time when

Section 324CL

the audit firm, or audit company, undertook an audit of the audited body is also an officer of the audited body; and

- (e) the audited body is not a small proprietary company for the most recently ended financial year.

If the audited body is a listed entity (other than a registered scheme), apply paragraphs (c) and (d) as if references in those paragraphs to the audited body included references to a related body corporate of the audited body.

Subdivision C—Common provisions

324CL People who are regarded as officers of a company for the purposes of this Division

- (1) For the purposes of this Division, a person is taken to be an officer of a company if:
 - (a) the person is an officer of:
 - (i) a related body corporate; or
 - (ii) an entity that the company controls; or
 - (b) the person has, at any time within the immediately preceding period of 12 months, been an officer or promoter of:
 - (i) the company; or
 - (ii) a related body corporate; or
 - (iii) an entity that the company controlled at that time.
- (2) Paragraph (b) does not apply if ASIC directs that it does not apply in relation to the person in relation to the company. ASIC may give the direction only if ASIC thinks that it is appropriate to do so in the circumstances of the case.
- (3) For the purposes of this Division, a person is not taken to be an officer of a company by reason only of being, or having been, the liquidator of:
 - (a) the company; or
 - (b) a related body corporate; or
 - (c) an entity that the company controls or has controlled.
- (4) For the purposes of this Division, a person is not taken to be an officer of a company merely because of one or more of the following:
 - (a) having been appointed as auditor of:

- (i) the company; or
 - (ii) a related body corporate; or
 - (iii) an entity that the company controls or has controlled;
- (b) having been appointed, for any purpose relating to taxation, as public officer of:
 - (i) a body corporate; or
 - (ii) an unincorporated body; or
 - (iii) a trust estate;
- (c) being or having been authorised to accept service of process or notices on behalf of:
 - (i) the company; or
 - (ii) a related body corporate; or
 - (iii) an entity that the company controls or has controlled.

Division 4—Deliberately disqualifying auditor

324CM Deliberately disqualifying auditor

Individual auditor

- (1) An individual contravenes this subsection if:
- (a) the individual is appointed auditor of a company or registered scheme; and
 - (b) while the appointment continues, the individual brings about a state of affairs; and
 - (c) the individual cannot, while that state of affairs continues, act as auditor of the company or scheme without contravening Division 2 or 3.

Audit firm

- (2) A member of a firm contravenes this subsection if:
- (a) the firm is appointed auditor of a company or a registered scheme; and
 - (b) while the appointment continues, the member brings about a state of affairs; and
 - (c) the firm cannot, while that state of affairs continues, act as auditor of the company or scheme without a person contravening Division 2 or 3.

Audit company

- (3) A person who is:
- (a) a member of a company; or
 - (b) a director of a company; or
 - (c) a lead auditor in relation to an audit conducted by a company;
- contravenes this subsection if:
- (d) the company is appointed auditor of a company or a registered scheme; and
 - (e) while the appointment continues, the person brings about a state of affairs; and

- (f) the company cannot, while that state of affairs continues, act as auditor of the company or scheme without contravening Division 2 or 3.

Division 5—Auditor rotation for listed companies

324DA Limited term for eligibility to play significant role in audit of a listed company or listed registered scheme

- (1) If an individual plays a significant role in the audit of a listed company or listed registered scheme for 5 successive financial years (the *extended audit involvement period*), the individual is not eligible to play a significant role in the audit of the company or the scheme for a later financial year (the *subsequent financial year*) unless:
 - (a) the individual has not played a significant role in the audit of the company or the scheme for at least 2 successive financial years (the *intervening financial years*); and
 - (b) the intervening financial years:
 - (i) commence after the end of the extended audit involvement period; and
 - (ii) end before the beginning of the subsequent financial year.

Note: *Play a significant role* in an audit is defined in section 9.

- (2) An individual is not eligible to play a significant role in the audit of a listed company or listed registered scheme for a financial year if, were the individual to do so, the individual would play a significant role in the audit of the company or scheme for more than 5 out of 7 successive financial years.
- (3) For the purposes of subsection (2), disregard an individual's playing of a significant role in the audit of a company or scheme for a financial year if:
 - (a) ASIC makes a declaration under paragraph 342A(1)(a) in relation to the individual; and
 - (b) because of the declaration, subsection (1) of this section does not operate to make the individual not eligible to play a significant role in the audit of the company or scheme for that financial year.

324DB Individual's rotation obligation

An individual contravenes this section if the individual:

- (a) plays a significant role in the audit of a listed company or listed registered scheme for a financial year; and
- (b) is not eligible to play that role.

324DC Audit firm's rotation obligation

Contraventions by members of audit firm

- (1) A person (the *defendant*) contravenes this subsection if:
 - (a) an audit firm consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
 - (b) an individual acts, on behalf of the firm, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
 - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year; and
 - (d) the defendant is a member of the firm; and
 - (e) the defendant is not the individual and is or becomes aware that the individual is not eligible to play that role; and
 - (f) the defendant fails to take the necessary steps, as soon as possible after the defendant becomes aware that the individual is not eligible to play that role, either:
 - (i) to ensure that the audit firm resigns as auditor of the company or scheme; or
 - (ii) to ensure that the individual ceases to act, on behalf of the audit firm, as a lead or review auditor in relation to the audit of the company or scheme for that financial year.
- (2) A person (the *defendant*) contravenes this subsection if:
 - (a) an audit firm consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
 - (b) an individual acts, on behalf of the firm, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
 - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year; and

Section 324DD

- (d) the defendant is a member of the firm.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical elements of the offence specified in paragraphs (2)(a), (b) and (c).
- Note 1: For *strict liability*, see section 6.1 of the *Criminal Code*.
- Note 2: Subsection (4) provides a defence.
- (4) A person does not commit an offence because of a contravention of subsection (2) in relation to an individual acting as lead or review auditor on behalf of an audit firm at a particular time if the person has reasonable grounds to believe that the audit firm had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit firm) that the audit firm and its employees complied with the requirements of this Division.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

324DD Audit company's rotation obligation

Contravention by audit company

- (1) An audit company contravenes this subsection if:
- (a) the audit company consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
 - (b) an individual acts, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
 - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year; and
 - (d) a director of the audit company (other than the individual) is aware that the individual is not eligible to play that role; and
 - (e) the audit company fails to take the necessary steps, as soon as possible after the director becomes aware that the individual is not eligible to play that role, either:
 - (i) to resign as auditor of the company or scheme; or
 - (ii) to ensure that the individual ceases to act, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company or scheme for that financial year.

Contraventions by directors of audit company

- (2) A person (the ***defendant***) contravenes this subsection if:
- (a) an audit company consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
 - (b) an individual acts, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
 - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year; and
 - (d) the defendant is a director of the audit company; and
 - (e) the defendant is not the individual and is or becomes aware that the individual is not eligible to play that role; and
 - (f) the defendant fails to take the necessary steps, as soon as possible after the defendant becomes aware that the individual is not eligible to play that role, either:
 - (i) to ensure that the audit company resigns as auditor of the company or scheme; or
 - (ii) to ensure that the individual ceases to act, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company or scheme for that financial year.
- (3) A person (the ***defendant***) contravenes this subsection if:
- (a) an audit company consents to act as a listed company's or listed registered scheme's auditor for a financial year; and
 - (b) an individual acts, on behalf of the audit company, as a lead or review auditor in relation to the audit of the company's or scheme's financial report for that financial year; and
 - (c) the individual is not eligible to play a significant role in the audit of the company or scheme for that financial year; and
 - (d) the defendant is a director of the audit company.
- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical elements of the offence specified in paragraphs (3)(a), (b) and (c).

Note 1: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Note 2: Subsection (5) provides a defence.

Section 324DD

- (5) A person does not commit an offence because of a contravention of subsection (3) in relation to an individual acting as lead or review auditor on behalf of an audit company at a particular time if the person has reasonable grounds to believe that the audit company had in place at that time a quality control system that provided reasonable assurance (taking into account the size and nature of the audit practice of the audit company) that the audit company and its employees complied with the requirements of this Division.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

Division 6—Appointment, removal and fees of auditors for companies

Subdivision A—Appointment of company auditors

325 Appointment of auditor by proprietary company

The directors of a proprietary company may appoint an auditor for the company if an auditor has not been appointed by the company in general meeting.

327A Public company auditor (initial appointment of auditor)

- (1) The directors of a public company must appoint an auditor of the company within 1 month after the day on which a company is registered as a company unless the company at a general meeting has appointed an auditor.
- (2) Subject to this Part, an auditor appointed under subsection (1) holds office until the company's first AGM.
- (3) A director of a company must take all reasonable steps to comply with, or to secure compliance with, subsection (1).

327B Public company auditor (annual appointments at AGMs to fill vacancies)

- (1) A public company must:
 - (a) appoint an auditor of the company at its first AGM; and
 - (b) appoint an auditor of the company to fill any vacancy in the office of auditor at each subsequent AGM.
- (2) An auditor appointed under subsection (1) holds office until the auditor:
 - (a) dies; or
 - (b) is removed, or resigns, from office in accordance with section 329; or
 - (c) ceases to be capable of acting as auditor because of Division 2 of this Part; or
 - (d) ceases to be auditor under subsection (2A), (2B) or (2C).

Section 327B

- (2A) An individual auditor ceases to be auditor of a company under this subsection if:
- (a) on a particular day (the *start day*), the individual auditor:
 - (i) informs ASIC of a conflict of interest situation in relation to the company under subsection 324CA(1A); or
 - (ii) informs ASIC of particular circumstances in relation to the company under subsection 324CE(1A); and
 - (b) the individual auditor does not give ASIC a notice, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the *remedial period*) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2B) An audit firm ceases to be auditor of a company under this subsection if:
- (a) on a particular day (the *start day*), ASIC is:
 - (i) informed of a conflict of interest situation in relation to the company under subsection 324CB(1A); or
 - (ii) informed of particular circumstances in relation to the company under subsection 324CF(1A); and
 - (b) ASIC has not been given a notice on behalf of the audit firm, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the *remedial period*) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2C) An audit company ceases to be auditor of a company under this subsection if:
- (a) on a particular day (the *start day*), ASIC is:
 - (i) informed of a conflict of interest situation in relation to the company under subsection 324CB(1A) or 324CC(1A); or
 - (ii) informed of particular circumstances in relation to the company under subsection 324CF(1A) or 324CG(1A) or (5A); and
 - (b) ASIC has not been given a notice on behalf of the audit company, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those

circumstances have, ceased to exist before the end of the period (the **remedial period**) of 21 days, or such longer period as ASIC approves in writing, from the start day.

- (2D) The **notification day** is:
- (a) the last day of the remedial period; or
 - (b) such later day as ASIC approves in writing (whether before or after the remedial period ends).
- (3) A director of a company must take all reasonable steps to comply with, or to secure compliance with, subsection (1).
- (4) If an audit firm ceases to be the auditor of a company under subsection (2) at a particular time, each member of the firm who:
- (a) is taken to have been appointed as an auditor of the company under subsection 324AB(1) or 324AC(4); and
 - (b) is an auditor of the company immediately before that time; ceases to be an auditor of the company at that time.

327C Public company auditor (appointment to fill casual vacancy)

- (1) If:
- (a) a vacancy occurs in the office of auditor of a public company; and
 - (b) the vacancy is not caused by the removal of an auditor from office; and
 - (c) there is no surviving or continuing auditor of the company; the directors must, within 1 month after the vacancy occurs, appoint an auditor to fill the vacancy unless the company at a general meeting has appointed an auditor to fill the vacancy.
- (2) An auditor appointed under subsection (1) holds office, subject to this Part, until the company's next AGM.
- (3) A director of a public company must take all reasonable steps to comply with, or to secure compliance with, subsection (1).

327D Appointment to replace auditor removed from office

- (1) This section deals with the situation in which an auditor of a company is removed from office at a general meeting in accordance with section 329.

Section 327E

- (2) The company may at that general meeting (without adjournment), by special resolution immediately appoint an individual, firm or company as auditor of the company if a copy of the notice of nomination has been sent to the individual, firm or company under subsection 328B(3).
- (3) If a special resolution under subsection (2):
 - (a) is not passed; or
 - (b) could not be passed merely because a copy of the notice of nomination has not been sent to an individual, firm or company under subsection 328B(3);the general meeting may be adjourned and the company may, at the adjourned meeting, by ordinary resolution appoint an individual, firm or company as auditor of the company if:
 - (c) a member of the company gives the company notice of the nomination of the individual, firm or company for appointment as auditor; and
 - (d) the company receives the notice at least 14 clear days before the day to which the meeting is adjourned.
- (4) The day to which the meeting is adjourned must be:
 - (a) not earlier than 20 days after the day of the meeting; and
 - (b) not later than 30 days after the day of the meeting.
- (5) Subject to this Part, an auditor appointed under subsection (2) or (3) holds office until the company's next AGM.

327E ASIC may appoint public company auditor if auditor removed but not replaced

- (1) This section deals with the situation in which a public company fails to appoint an auditor under subsection 327D(2) or (3). The failure is referred to as the *auditor replacement failure*.
- (2) The company must give ASIC written notice of the auditor replacement failure within the period of 7 days commencing on the day of the auditor replacement failure (the *notification period*).
- (3) If the company gives ASIC the notice required by subsection (2), ASIC must appoint an auditor of the company as soon as practicable after receiving the notice. This subsection has effect subject to section 327G.

- (4) If the company does not give ASIC the notice required by subsection (2), ASIC may appoint an auditor of the company at any time:

- (a) after the end of the notification period; and
- (b) before ASIC receives notice of the auditor replacement failure from the company.

This subsection has effect subject to section 327G.

- (5) If the company:

- (a) does not give ASIC the notice required by subsection (2); and
- (b) gives ASIC notice of the auditor replacement failure after the end of the notification period;

ASIC must appoint an auditor of the company as soon as practicable after receiving the notice. This subsection has effect subject to section 327G.

- (6) Subject to this Part, an auditor appointed under this section holds office until the company's next AGM.

327F ASIC's general power to appoint public company auditor

- (1) ASIC may appoint an auditor of a public company if:

- (a) the company does not appoint an auditor when required by this Act to do so; and
- (b) a member of the company applies to ASIC in writing for the appointment of an auditor under this section.

This subsection has effect subject to section 327G.

- (2) An individual, firm or company appointed as auditor of a company under subsection (1) holds office, subject to this Part, until the next AGM of the company.

327G Restrictions on ASIC's powers to appoint public company auditor

- (1) ASIC may appoint an individual, firm or company as auditor of a company under section 327E or 327F only if the individual, firm or company consents to being appointed.
- (2) ASIC must not appoint an auditor of a company under section 327E or 327F if:

Section 327H

- (a) there is another auditor of the company (the *continuing auditor*); and
 - (b) ASIC is satisfied that the continuing auditor is able to carry out the responsibilities of auditor alone; and
 - (c) the continuing auditor agrees to continue as auditor.
- (3) ASIC must not appoint an auditor of a company under section 327E or 327F if:
 - (a) the company does not give ASIC the notice required by subsection 327E(2) before the end of the notification period; and
 - (b) ASIC has already appointed an auditor of the company under section 327E after the end of the notification period.

327H Effect on appointment of public company auditor of company beginning to be controlled by a corporation

An auditor of a public company that begins to be controlled by a corporation:

- (a) must retire at the AGM of the company next held after the company begins to be controlled by the corporation unless the auditor vacates that office before then; and
- (b) is, subject to this Part, eligible for re-appointment.

This section has effect notwithstanding subsection 327B(2).

327I Remaining auditors may act during vacancy

While a vacancy in the office of auditor of a company continues, the surviving or continuing auditor or auditors (if any) may act as auditors of the company.

328A Auditor's consent to appointment

- (1) A company, the directors of a company or the responsible entity of a registered scheme must not appoint an individual, firm or company as auditor of the company unless that individual, firm or company:
 - (a) has consented, before the appointment, to act as auditor; and
 - (b) has not withdrawn that consent before the appointment is made.

For the purposes of this section, a consent, or the withdrawal of a consent, must be given by written notice to the company, the directors or the responsible entity of the scheme.

- (2) A notice under subsection (1) given by a firm must be signed by a member of the firm who is a registered company auditor both:
 - (a) in the firm name; and
 - (b) in his or her own name.
- (3) A notice under subsection (1) given by a company must be signed by a director or senior manager of the company both:
 - (a) in the company's name; and
 - (b) in his or her own name.
- (4) If a company, the directors of a company or the responsible entity of a registered scheme appoints an individual, firm or company as auditor of a company in contravention of subsection (1):
 - (a) the purported appointment does not have any effect; and
 - (b) the company or responsible entity, and any officer of the company or responsible entity who is in default, are each guilty of an offence.

328B Nomination of auditor

- (1) Subject to this section, a company may appoint an individual, firm or company as auditor of the company at its AGM only if a member of the company gives the company written notice of the nomination of the individual, firm or company for appointment as auditor:
 - (a) before the meeting was convened; or
 - (b) not less than 21 days before the meeting.

This subsection does not apply if an auditor is removed from office at the AGM.
- (2) If a company purports to appoint an individual, firm or company as auditor of the company in contravention of subsection (1):
 - (a) the purported appointment is of no effect; and
 - (b) the company and any officer of the company who is in default are each guilty of an offence.

Section 329

- (3) If a member gives a company notice of the nomination of an individual, firm or company for appointment as auditor of the company, the company must send a copy of the notice to:
- (a) each individual, firm or company nominated; and
 - (b) each auditor of the company; and
 - (c) each person entitled to receive notice of general meetings of the company.

This is so whether the appointment is to be made at a meeting or an adjourned meeting referred to in section 327D or at an AGM.

- (4) The copy of the notice of nomination must be sent:
- (a) not less than 7 days before the meeting; or
 - (b) at the time notice of the meeting is given.

Subdivision B—Removal and resignation of company auditors

329 Removal and resignation of auditors

- (1) An auditor of a company may be removed from office by resolution of the company at a general meeting of which notice under subsection (1A) has been given, but not otherwise.
- (1A) Notice of intention to move the resolution must be given to the company at least 2 months before the meeting is to be held. However, if the company calls a meeting after the notice of intention is given under this subsection, the meeting may pass the resolution even though the meeting is held less than 2 months after the notice of intention is given.

Note: Short notice of the meeting cannot be given for this resolution (see subsection 249H(4)).

- (2) Where notice under subsection (1A) of a resolution to remove an auditor is received by a company, it must as soon as possible send a copy of the notice to the auditor and lodge a copy of the notice.
- (3) Within 7 days after receiving a copy of the notice, the auditor may make representations in writing, not exceeding a reasonable length, to the company and request that, before the meeting at which the resolution is to be considered, a copy of the representations be sent by the company at its expense to every member of the company to whom notice of the meeting is sent.

- (4) Unless ASIC on the application of the company otherwise orders, the company must send a copy of the representations in accordance with the auditor's request, and the auditor may, without prejudice to his or her right to be heard orally or, where a firm is the auditor, to have a member of the firm heard orally on its behalf, require that the representations be read out at the meeting.
- (5) An auditor of a company may, by notice in writing given to the company, resign as auditor of the company if:
 - (a) the auditor has, by notice in writing given to ASIC, applied for consent to the resignation and stated the reasons for the application and, at or about the same time as the notice was given to ASIC, notified the company in writing of the application to ASIC; and
 - (b) the consent of ASIC has been given.
- (6) ASIC must, as soon as practicable after receiving a notice from an auditor under subsection (5), notify the auditor and the company whether it consents to the resignation of the auditor.
- (7) A statement made by an auditor in an application to ASIC under subsection (5) or in answer to an inquiry by ASIC relating to the reasons for the application:
 - (a) is not admissible in evidence in any civil or criminal proceedings against the auditor; and
 - (b) may not be made the ground of a prosecution, action or suit against the auditor;and a certificate by ASIC that the statement was made in the application or in the answer to the inquiry by ASIC is conclusive evidence that the statement was so made.
- (8) Subject to subsection (9), the resignation of an auditor takes effect:
 - (a) on the day (if any) specified for the purpose in the notice of resignation; or
 - (b) on the day on which ASIC gives its consent to the resignation; or
 - (c) on the day (if any) fixed by ASIC for the purpose;whichever last occurs.

Section 330

- (9) The resignation of an auditor of a proprietary company does not require the consent of ASIC under subsection (5), and takes effect:
 - (a) on the day (if any) specified for the purpose in the notice of resignation; or
 - (b) on the day on which the notice is received by the company; whichever is the later.
- (10) Where on the retirement or withdrawal from a firm of a member the firm will no longer be capable, by reason of the provisions of subparagraph 324BB(1)(b)(i) or (2)(b)(i) of acting as auditor of a company, the member so retiring or withdrawing is (if not disqualified from acting as auditor of the company) taken to be the auditor of the company until he or she obtains the consent of ASIC to his or her retirement or withdrawal.
- (11) Within 14 days after:
 - (a) the removal from office of an auditor of a company; or
 - (b) the receipt of a notice of resignation from an auditor of a company;the company must:
 - (c) lodge with ASIC a notice of the removal or resignation in the prescribed form; and
 - (d) where there is a trustee for the holders of debentures of the company—give to the trustee a copy of the notice lodged with ASIC.

330 Effect of winding up on office of auditor

An auditor of a company ceases to hold office if:

- (a) a special resolution is passed for the voluntary winding up of the company; or
- (b) in a case to which paragraph (a) does not apply—an order is made by the Court for the winding up of the company.

Subdivision C—Company auditors' fees and expenses

331 Fees and expenses of auditors

The reasonable fees and expenses of an auditor of a company are payable by the company.

Division 7—Appointment, removal and fees of auditors for registered schemes

Subdivision A—Appointment of registered scheme auditors

331AAA Registered scheme auditor (initial appointment of auditor)

- (1) The responsible entity of a registered scheme must appoint an auditor of the registered scheme within 1 month after the day on which the scheme is registered.
- (2) An auditor appointed under subsection (1) holds office until the auditor:
 - (a) dies; or
 - (b) is removed, or resigns, from office in accordance with section 331AC; or
 - (c) ceases to be capable of acting as an auditor because of Division 2 of this Part; or
 - (d) ceases to be auditor under subsection (2A), (2B) or (2C).
- (2A) An individual auditor ceases to be auditor of a registered scheme under this subsection if:
 - (a) on a particular day (the **start day**), the individual auditor:
 - (i) informs ASIC of a conflict of interest situation in relation to the scheme under subsection 324CA(1A); or
 - (ii) informs ASIC of particular circumstances in relation to the scheme under subsection 324CE(1A); and
 - (b) the individual auditor does not give ASIC a notice, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the **remedial period**) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2B) An audit firm ceases to be auditor of a registered scheme under this subsection if:
 - (a) on a particular day (the **start day**), ASIC is:
 - (i) informed of a conflict of interest situation in relation to the scheme under subsection 324CB(1A); or

Section 331AAA

- (ii) informed of particular circumstances in relation to the scheme under subsection 324CF(1A); and
 - (b) ASIC has not been given a notice on behalf of the audit firm, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the **remedial period**) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2C) An audit company ceases to be auditor of a registered scheme under this subsection if:
 - (a) on a particular day (the **start day**), ASIC is:
 - (i) informed of a conflict of interest situation in relation to the scheme under subsection 324CB(1A) or 324CC(1A); or
 - (ii) informed of particular circumstances in relation to the scheme under subsection 324CF(1A) or 324CG(1A) or (5A); and
 - (b) ASIC has not been given a notice on behalf of the audit company, before the notification day (see subsection (2D)), that that conflict of interest situation has, or those circumstances have, ceased to exist before the end of the period (the **remedial period**) of 21 days, or such longer period as ASIC approves in writing, from the start day.
- (2D) The **notification day** is:
 - (a) the last day of the remedial period; or
 - (b) such later day as ASIC approves in writing (whether before or after the remedial period ends).
- (3) A director of the responsible entity of a registered scheme must take all reasonable steps to secure compliance with subsection (1).
- (4) If an audit firm ceases to be the auditor of a registered scheme under subsection (2) at a particular time, each member of the firm who:
 - (a) is taken to have been appointed as an auditor of the scheme under subsection 324AB(1) or 324AC(4); and
 - (b) is an auditor of the scheme immediately before that time; ceases to be an auditor of the scheme at that time.

331AAB Registered scheme auditor (appointment to fill vacancy)

- (1) If:
 - (a) a vacancy occurs in the office of auditor of a registered scheme; and
 - (b) there is no surviving or continuing auditor of the scheme; the responsible entity must, within 1 month after the vacancy occurs, appoint an auditor to fill the vacancy.
- (2) A director of the responsible entity of a registered scheme must take all reasonable steps to secure compliance with subsection (1).

331AAC ASIC's power to appoint registered scheme auditor

- (1) ASIC may appoint an auditor of a registered scheme if:
 - (a) the responsible entity of the scheme does not appoint an auditor when required by this Act to do so; and
 - (b) a member of the scheme applies to ASIC in writing for the appointment of an auditor under this section.
- (2) ASIC may only appoint an individual, firm or company as auditor under subsection (1) if the individual, firm or company consents to being appointed.

331AAD Remaining auditors may act during vacancy

While a vacancy in the office of auditor of a registered scheme continues, the surviving or continuing auditor or auditors (if any) may act as auditors of the company.

Subdivision B—Removal and resignation of registered scheme auditors

331AC Removal and resignation of auditors

- (1) The responsible entity of a registered scheme may, with ASIC's consent, remove the auditor of the scheme from office.
- (2) An auditor of a registered scheme may, by notice in writing given to the responsible entity, resign as auditor of the scheme if:
 - (a) the auditor:

Section 331AC

- (i) has, by notice in writing given to ASIC, applied for consent to the resignation and stated the reasons for the application; and
 - (ii) has, at or about the same time as giving the notice to ASIC, given the responsible entity notice in writing of the application to ASIC; and
 - (b) ASIC has given its consent.
- (3) As soon as practicable after ASIC receives a notice from an auditor under subsection (2), ASIC must notify the auditor, and the responsible entity of the registered scheme, whether it consents to the resignation.
- (4) A statement made by an auditor in an application to ASIC under subsection (2) or in answer to an inquiry by ASIC relating to the reasons for the application:
- (a) is not admissible in evidence in any civil or criminal proceedings against the auditor; and
 - (b) must not be made the ground of a prosecution, action or suit against the auditor.
- A certificate by the ASIC that the statement was made in the application or in answer to the inquiry by ASIC is conclusive evidence that the statement was so made.
- (5) The resignation of an auditor takes effect:
- (a) on the day (if any) specified for the purpose in the notice of resignation; or
 - (b) on the day on which ASIC gives its consent to the resignation; or
 - (c) on the day (if any) fixed by ASIC for the purpose; whichever occurs last.
- (6) If, on the retirement or withdrawal of a member of a firm, the firm will no longer be capable of acting as auditor of a registered scheme because of subparagraph 324BB(1)(b)(i) or (2)(b)(i), the member is (if not disqualified from acting as auditor of the scheme) taken to be the auditor of the scheme until he or she obtains the consent of ASIC to his or her retirement or withdrawal.
- (7) Within 14 days after:
- (a) the removal from office of an auditor of a registered scheme; or

- (b) the receipt of a notice of resignation from an auditor of a registered scheme;

the responsible entity must lodge with ASIC a notice of the removal or resignation in the prescribed form.

331AD Effect of winding up on office of auditor

An auditor of a registered scheme ceases to hold office if:

- (a) the scheme's constitution provides that the scheme is to be wound up at a specified time, in specified circumstances or on the happening of a specified event, and that time is reached, those circumstances occur or that event occurs; or
- (b) the members pass a resolution directing the responsible entity to wind up the scheme; or
- (c) the Court makes an order directing the responsible entity to wind up the scheme; or
- (d) the members pass a resolution to remove the responsible entity but do not, at the same meeting, pass a resolution choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

Subdivision C—Fees and expenses of auditors

331AE Fees and expenses of auditors

The reasonable fees and expenses of an auditor of a registered scheme are payable by the responsible entity.

Part 2M.5—Accounting and auditing standards

334 Accounting standards

AASB's power to make accounting standards

- (1) The AASB may, by legislative instrument, make accounting standards for the purposes of this Act. The standards must not be inconsistent with this Act or the regulations.
- (4) An accounting standard applies to:
 - (a) periods ending after the commencement of the standard; or
 - (b) periods ending, or starting, on or after a later date specified in the standard.
- (5) A company, registered scheme or disclosing entity may elect to apply the accounting standard to an earlier period unless the standard says otherwise. The election must be made in writing by the directors.

335 Equity accounting

This Chapter (and, in particular, the provisions on consolidation of financial statements) does not prevent accounting standards from incorporating equity accounting principles.

336 Auditing standards

AUASB's power to make auditing standards

- (1) The AUASB may, by legislative instrument, make auditing standards for the purposes of this Act. The standards must not be inconsistent with this Act or the regulations.
- (3) An auditing standard applies to financial reports in relation to:
 - (a) periods ending after the commencement of the standard; or
 - (b) periods ending, or starting, on or after a later date specified in the standard.

- (4) If:
- (a) the AUASB makes an auditing standard; and
 - (b) the standard applies to financial reports in relation to particular periods under subsection (3); and
 - (c) an auditor is conducting an audit of a financial report in relation to a period that occurs before the start of the earliest of those periods;
- the auditor may elect to apply the auditing standard to that audit unless the standard says otherwise. The election must be recorded in the audit report.

337 Interpretation of accounting and auditing standards

In interpreting an accounting or auditing standard, unless the contrary intention appears:

- (a) expressions used in the standard have the same meanings as they have in this Chapter; and
- (b) the provisions of Part 1.2 apply as if the standard's provisions were provisions of this Chapter.

338 Evidence of text of accounting standard or auditing standard

- (1) This section applies to a document that purports to be published by, or on behalf of, the AASB or the AUASB and to set out the text of:
- (a) a specified standard as in force at a specified time under section 334 or 336; or
 - (b) a specified provision of a standard of that kind.
- It also applies to a copy of a document of that kind.
- (2) In the absence of evidence to the contrary, a document to which this section applies is proof in proceedings under this Act that:
- (a) the specified standard was in force at that time under that section; and
 - (b) the text set out in the document is the text of the standard referred to in paragraph (1)(a) or the provision referred to in paragraph (1)(b).

Part 2M.6—Exemptions and modifications

340 Exemption orders—companies, registered schemes and disclosing entities

- (1) On an application made in accordance with subsection (3) in relation to a company, registered scheme or disclosing entity, ASIC may make an order in writing relieving any of the following from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4):
 - (a) the directors;
 - (b) the company, scheme or entity;
 - (c) the auditor.

Note: For the criteria for making orders under this section, see section 342.

- (2) The order may:
 - (a) be expressed to be subject to conditions; and
 - (b) be indefinite or limited to a specified period.
- (3) The application must be:
 - (a) authorised by a resolution of the directors; and
 - (b) in writing and signed by a director; and
 - (c) lodged with ASIC.
- (4) ASIC must give the applicant written notice of the making, revocation or suspension of the order.

341 Exemption orders—class orders for companies, registered schemes and disclosing entities

- (1) ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving any of the following from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4):
 - (a) directors;
 - (b) the companies, registered schemes or disclosing entities themselves;

Section 342

- (c) auditors of the companies, registered schemes or disclosing entities.

Note: For the criteria for making orders under this section, see section 342.

- (2) The order may:
 - (a) be expressed to be subject to conditions; and
 - (b) be indefinite or limited to a specified period.
- (3) Notice of the making, revocation or suspension of the order must be published in the *Gazette*.

342 Exemption orders—criteria for orders for companies, registered schemes and disclosing entities

- (1) To make an order under section 340 or 341, ASIC must be satisfied that complying with the relevant requirements of Parts 2M.2, 2M.3 and 2M.4 would:
 - (a) make the financial report or other reports misleading; or
 - (b) be inappropriate in the circumstances; or
 - (c) impose unreasonable burdens.
- (2) In deciding for the purposes of subsection (1) whether the audit requirements for a proprietary company, or a class of proprietary companies, would impose an unreasonable burden on the company or companies, ASIC is to have regard to:
 - (a) the expected costs of complying with the audit requirements; and
 - (b) the expected benefits of having the company or companies comply with the audit requirements; and
 - (c) any practical difficulties that the company or companies face in complying effectively with the audit requirements (in particular, any difficulties that arise because a financial year is the first one for which the audit requirements apply or because the company or companies are likely to move frequently between the small and large proprietary company categories from one financial year to another); and
 - (d) any unusual aspects of the operation of the company or companies during the financial year concerned; and
 - (e) any other matters that ASIC considers relevant.

Section 342AA

- (3) In assessing expected benefits under subsection (2), ASIC is to take account of:
 - (a) the number of creditors and potential creditors; and
 - (b) the position of creditors and potential creditors (in particular, their ability to independently obtain financial information about the company or companies); and
 - (c) the nature and extent of the liabilities of the company or companies.

342AA Exemption orders—non-auditor members and former members of audit firms; former employees of audit companies

- (1) On an application made in accordance with subsection (3) by any of the following, ASIC may make an order in writing relieving the applicant from all or specified requirements of Division 3 of Part 2M.4 (auditor independence):
 - (a) a member of the firm who is not a registered company auditor;
 - (b) a person who has ceased to be:
 - (i) a member of an audit firm; or
 - (ii) a director of an audit company; or
 - (iii) a professional employee of an audit company.

Note: For the criteria for making orders under this section, see section 342AC.

- (2) The order may:
 - (a) be expressed to be subject to conditions; and
 - (b) be indefinite or limited to a specified period.
- (3) The application must be:
 - (a) in writing and signed by the applicant; and
 - (b) lodged with ASIC.
- (4) ASIC must give the applicant written notice of the making, revocation or suspension of the order.
- (5) An order under subsection (1) is not a legislative instrument.

Section 342AB

342AB Exemption orders—class orders for non-auditor members etc.

- (1) ASIC may make an order in writing in respect of a specified class of audit firms or audit companies, relieving any of the following from all or specified requirements of Division 3 of Part 2M.4 (auditor independence):
 - (a) members of firms who are not registered company auditors;
 - (b) persons who have ceased to be:
 - (i) members of audit firms; or
 - (ii) directors of audit companies; or
 - (iii) professional employees of audit companies.
- Note: For the criteria for making orders under this section, see section 342AC.
- (2) The order may:
 - (a) be expressed to be subject to conditions; and
 - (b) be indefinite or limited to a specified period.
- (3) An order under subsection (1) is a legislative instrument.

342AC Exemption orders—criteria for orders for non-auditor members etc.

To make an order under section 342AA or 342AB, ASIC must be satisfied that complying with the relevant requirements of Division 3 of Part 2M.4 would:

- (a) make the financial report or other reports misleading; or
- (b) be inappropriate in the circumstances; or
- (c) impose unreasonable burdens.

342A ASIC's power to modify the operation of section 324DA

- (1) On an application made in accordance with this section, ASIC may:
 - (a) declare that subsection 324DA(1) applies to a registered company auditor, in relation to the audit of an audited body or a class of audited bodies, as if the references in that subsection to 5 successive financial years were references to:
 - (i) 6 successive financial years; or
 - (ii) 7 successive financial years; or

Section 342A

- (b) declare that subsection 324DA(2) applies to a registered company auditor, in relation to the audit of an audited body or a class of audited bodies during a particular period of 7 successive financial years, as if the reference in that subsection to 5 out of 7 successive financial years were a reference to 6 out of 7 successive financial years.
- (2) The following persons may apply for the declaration:
 - (a) the registered company auditor;
 - (b) a firm or company on whose behalf the registered company auditor acts or would act in relation to the audit or audits.

If the application is made by a firm or company, the declaration has effect only in relation to activities undertaken by the registered company auditor on behalf of that firm or company.
- (3) The application must be:
 - (a) in writing; and
 - (b) signed by the applicant; and
 - (c) lodged with ASIC.
- (4) If the application is made by a registered company auditor who engages, or is to engage, in audit activities on behalf of a firm or company, the application must include the firm's or company's written consent to the application.
- (5) If the application is made by a firm or company in relation to a registered company auditor, the application must include the registered company auditor's written consent to the application.
- (6) To make a declaration under subsection (1), ASIC must be satisfied that, without the modification, Division 4 of Part 2M.4 would impose an unreasonable burden on:
 - (a) a registered company auditor; or
 - (b) a firm or company that is applying for the declaration; or
 - (c) the audited body or bodies in relation to which the application was made.
- (7) In deciding for the purposes of subsection (6) whether, without the modification, Division 4 of Part 2M.4 would impose an unreasonable burden on a person referred to in that subsection, ASIC is to have regard to:

Section 342B

- (a) the nature of the audited body or bodies, including whether the activity in which the audited body or bodies engage is such that specialist knowledge about that activity is necessary to carry out the audit properly; and
 - (b) the availability of other registered company auditors capable of providing satisfactory audit services for the audited body or bodies; and
 - (c) any other matters which ASIC considers relevant.
- (8) ASIC must give the applicant written notice of the making, revocation or suspension of the declaration.

342B Auditor to notify company or registered scheme of section 342A declaration

- (1) If a registered company auditor plays a significant role in the audit of a company or registered scheme in reliance on a declaration by ASIC under section 342A, the auditor must give the company or the responsible entity for the registered scheme written notice of the declaration.
- (2) The notice must specify:
 - (a) the name of the registered company auditor; and
 - (b) the additional financial years for which the registered company auditor is, because of the declaration under section 342A, eligible to play a significant role in the audit of the company or registered scheme.
- (3) The notice must be given:
 - (a) as soon as practicable after the declaration is made if the auditor has been appointed before the declaration is made; or
 - (b) before the auditor is appointed if the declaration is made before the auditor is appointed.

343 Modification by regulations

The regulations may modify the operation of this Chapter in relation to:

- (a) a specified company, registered scheme or disclosing entity; or
- (b) all companies, registered schemes or disclosing entities of a specified kind.

Part 2M.7—Sanctions for contraventions of Chapter

344 Contravention of Part 2M.2 or 2M.3

- (1) A director of a company, registered scheme or disclosing entity contravenes this section if they fail to take all reasonable steps to comply with, or to secure compliance with, Part 2M.2 or 2M.3.
Note: This section is a civil penalty provision (see section 1317E).
- (2) A person commits an offence if they contravene subsection (1) and the contravention is dishonest.
- (3) Subsection (1) does not apply to section 310, 312, 323A or 323B.
- (4) This section does not affect the application of the provisions of Part 2M.2 or 2M.3 to a director as an officer.

Chapter 2N—Updating ASIC information about companies and registered schemes

Part 2N.1—Review date

345A Review date

- (1) The *review date* for a company is:
 - (a) either:
 - (i) if the company became registered as a company after the commencement of this Act—the anniversary of the company’s registration as a company under this Act; or
 - (ii) otherwise—the date of the company’s incorporation or registration as a company, as recorded in a register maintained by ASIC under section 1274; or
 - (b) if a choice of a different date has effect under section 345C—that different date.
- (1A) If:
 - (a) a company was incorporated as a company or became registered as a company before the commencement of this Act; and
 - (b) there is no date of incorporation of the company as a company or registration of the company as a company recorded in a register maintained by ASIC under section 1274; and
 - (c) paragraph (1)(b) does not apply to the company;the *review date* for the company is the date determined by ASIC and notified to the company.
- (1B) If, apart from this subsection, the review date for a company would be February 29, the *review date* for the company is February 28.
- (2) The *review date* for a registered scheme is:
 - (a) the anniversary of the scheme’s registration as a registered scheme; or

Section 345B

- (b) if a choice of a different date has effect under section 345C—that different date.

345B Company or responsible entity may change review date

- (1) With ASIC's approval, a company may choose as its review date a date that is different from the anniversary of its registration.
- (2) With ASIC's approval, the responsible entity of a registered scheme may choose as the review date for the scheme a date that is different from the anniversary of its registration.
- (3) If ASIC approves the choice, ASIC must notify the company or responsible entity in writing.

345C When choice has effect

If ASIC notifies the company or responsible entity of its approval under section 345B, the choice has effect:

- (a) if the different date occurs before the next review date for the company or scheme—at the time that ASIC notifies its approval; or
- (b) otherwise—immediately after the next review date for the company or scheme.

Part 2N.2—Extract of particulars

346A ASIC must give an extract of particulars each year

- (1) ASIC must, within 2 weeks after each review date for a company or a registered scheme, give to the company or responsible entity of the scheme an extract of particulars for the company or scheme.
- (2) If an agreement or approval under subsection 352(1) covers the lodgment of a response to an extract of particulars for a company, ASIC may satisfy subsection (1) by making the extract available to the company or its agent by electronic means.
- (3) An extract of particulars must specify the date of issue.

346B ASIC may ask questions

ASIC may include, in an extract of particulars for a company or a registered scheme, a requirement that the company or responsible entity of the scheme provide a particular prescribed by the regulations for the purposes of this section.

346C Requirements in relation to an extract of particulars

Respond if a particular is incorrect

- (1) A company, or responsible entity of a registered scheme, must respond to an extract of particulars that it receives if any particular set out in the extract is not correct as at the date of receipt. The response must comply with subsection (3).

Respond if required to provide a particular

- (2) A company, or responsible entity of a registered scheme, must respond to an extract of particulars that it receives if the extract includes a requirement to provide a particular under section 346B. The response must comply with subsection (3).

Section 346C

Contents of response

- (3) The response to an extract of particulars by a company, or by the responsible entity of a registered scheme:
- (a) must be lodged within 28 days after the date of issue of the extract; and
 - (b) must be in the prescribed form; and
 - (c) must be signed or authenticated; and
 - (d) if subsection (1) applies—must be such that the particulars set out in the extract, taken together with the response, are correct as at the date the response is signed or authenticated; and
 - (e) if subsection (2) applies—must provide the required particular, correct as at the date the response is signed or authenticated.

Response satisfies other requirements to notify

- (4) If a company responds to an extract of particulars:
- (a) correcting a particular; or
 - (b) providing a particular;
- in accordance with subsection (3), any requirement elsewhere in this Act to lodge a prescribed form in relation to the particular is satisfied by the response.
- (5) Subsection (4) does not affect the company's liability for late lodgment fees incurred before the response to the extract of particulars is lodged or continuing offences committed before that time.

Strict liability offences

- (6) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 2N.3—Solvency resolution

347A Directors must pass a solvency resolution after each review date

- (1) The directors of a company must pass a solvency resolution within 2 months after each review date for the company.
- (2) Subsection (1) does not apply to the directors of a company that has lodged a financial report with ASIC under Chapter 2M within the period of 12 months before the review date.

Note: The defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

- (3) An offence based on this section is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

347B Notice to ASIC

- (1) If the directors of a company pass a negative solvency resolution under section 347A, the company must notify ASIC of that fact, in the prescribed form, within 7 days after the resolution is passed.
- (2) If:
 - (a) subsection 347A(1) applies to the directors of a company; and
 - (b) the directors have not passed a solvency resolution under section 347A within 2 months after a review date;the company must notify ASIC of that fact, in the prescribed form, within 7 days after the end of the 2 month period following the review date.

- (3) An offence based on this section is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section 347C

347C Payment of review fee is taken to be a representation by the directors that the company is solvent

(1) If:

- (a) a company has paid its review fee in respect of a review date; and
- (b) the company has not lodged a notice under section 347B within 7 days after the end of the 2 month period following the review date; and
- (c) the company has not lodged a financial report with ASIC under Chapter 2M within the period of 12 months before the review date;

the directors of the company are taken to have represented to ASIC, as at the end of the 2 month period following the company's review date, that, in their opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable.

Note: Directors are not taken to have passed a solvency resolution for the purposes of section 347A merely because they are taken, under this subsection, to have made a representation to ASIC.

- (2) Subsection (1) does not apply if the directors prove that they made a positive solvency resolution under section 347A within 2 months after the end of the review date.

Part 2N.4—Return of particulars

348A ASIC may give a return of particulars

- (1) ASIC may give to a company or responsible entity of a registered scheme a return of particulars for the company or scheme if ASIC suspects or believes that particulars recorded in relation to the company or scheme in a register maintained by ASIC under subsection 1274(1) are not correct.
- (2) If an agreement or approval under subsection 352(1) covers the lodgment of a response to a return of particulars for a company, ASIC may satisfy subsection (1) by making the return available to the company or its agent by electronic means.
- (3) A return of particulars must specify the date of issue.

348B ASIC may ask questions

ASIC may include, in a return of particulars for a company or a registered scheme, a requirement that the company or responsible entity of the scheme provide a particular prescribed by the regulations for the purposes of this section.

348C ASIC may require a solvency resolution and statement

- (1) ASIC may include, in a return of particulars for a company, a requirement that the company comply with subsection (2) or subsection (3). The company may choose which subsection to comply with.
- (2) The company complies with this subsection if:
 - (a) before the company lodges a response to the return of particulars, the directors of the company pass a solvency resolution; and
 - (b) the response to the return of particulars states whether the resolution passed was a positive solvency resolution or a negative solvency resolution.

Section 348D

- (3) The company complies with this subsection if the response to the return of particulars states the date on which the directors passed a positive solvency resolution under section 347A in respect of the company's most recent review date.

348D General requirements in relation to a return of particulars

Response is required

- (1) A company, or responsible entity of a registered scheme, must respond to a return of particulars that it receives. The response must comply with subsection (2).

Contents of response

- (2) The response to a return of particulars by a company, or by the responsible entity of a registered scheme:
- (a) must be lodged with ASIC within 2 months after the date of issue of the return; and
 - (b) must be in the prescribed form; and
 - (c) must be signed or authenticated; and
 - (d) if, as at the date that the response is signed or authenticated, any particular set out in the return is not correct—must be such that the particulars set out in the return, taken together with the response, are correct as at the date the response is signed or authenticated; and
 - (e) if the return includes a requirement that the company or responsible entity of the scheme provide a particular under section 348B—must provide the required particular, correct as at the date the response is signed or authenticated; and
 - (f) if the return includes a requirement to comply with a subsection of section 348C—must include the statement required by the subsection that the company chooses to comply with.

Response satisfies other requirements to notify

- (3) If a company responds to a return of particulars:
- (a) correcting a particular; or
 - (b) providing a particular;

Section 348D

in accordance with subsection (2), any requirement elsewhere in this Act to lodge a prescribed form in relation to the particular is satisfied by the response.

- (4) Subsection (3) does not affect the company's liability for late lodgment fees incurred before the response to the return of particulars is lodged or continuing offences committed before that time.

Strict liability offences

- (5) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section 349A

Part 2N.5—Notice by proprietary companies of changes to ultimate holding company

349A Proprietary companies must notify ASIC of changes to ultimate holding company

- (1) If an event mentioned in section 349B, 349C or 349D happens in relation to a proprietary company, the proprietary company must notify ASIC, in the prescribed form and within 28 days after the event, of the details required by that section.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

349B Another company becomes an ultimate holding company

If another company becomes an ultimate holding company in relation to a proprietary company, the proprietary company must notify ASIC of:

- (a) the other company's name; and
- (b) either:
 - (i) if the other company is registered in Australia—its ABN, ACN or ARBN; or
 - (ii) if the other company is not registered in Australia—the place at which it was incorporated or formed; and
- (c) the date on which the other company became an ultimate holding company in relation to the proprietary company.

349C A company ceases to be an ultimate holding company

If a company ceases to be an ultimate holding company in relation to a proprietary company, the proprietary company must notify ASIC of:

- (a) the name of the company that ceased to be an ultimate holding company in relation to the proprietary company; and
- (b) the date the cessation occurred.

349D Ultimate holding company changes its name

If an ultimate holding company in relation to a proprietary company changes its name, the proprietary company must notify ASIC of the new name of the ultimate holding company.

Chapter 2P—Lodgments with ASIC

350 Forms for documents to be lodged with ASIC

- (1) A document that this Act requires to be lodged with ASIC in a prescribed form must:
 - (a) if a form for the document is prescribed in the regulations:
 - (i) be in the prescribed form; and
 - (ii) include the information, statements, explanations or other matters required by the form; and
 - (iii) be accompanied by any other material required by the form; or
 - (b) if a form for the document is not prescribed in the regulations but ASIC has approved a form for the document:
 - (i) be in the approved form; and
 - (ii) include the information, statements, explanations or other matters required by the form; and
 - (iii) be accompanied by any other material required by the form.
- (2) A reference in this Act to a document that has been lodged (being a document to which subsection (1) applies), includes, unless a contrary intention appears, a reference to any other material lodged with the document as required by the relevant form.
- (3) If:
 - (a) this Act requires a document to be lodged with ASIC in a prescribed form; and
 - (b) a provision of this Act either specifies, or provides for regulations to specify, information, statements, explanations or other matters that must be included in the document, or other material that must accompany the document;that other provision is not taken to exclude or limit the operation of subsection (1) in relation to the prescribed form (and so the prescribed form may also require information etc. to be included in the form or material to accompany the form).

351 Signing documents lodged with ASIC

- (1) A document lodged with ASIC in writing by, or on behalf of, a body or a registered scheme must be signed by a director or secretary of the body or of the responsible entity of the registered scheme. If the body is a foreign company, it may be signed by:
 - (a) its local agent; or
 - (b) if the local agent is a company—a director or secretary of the company.
- (2) An individual who lodges a document with ASIC in writing must sign it.
- (3) The person's name must be printed next to the signature.

352 Documents lodged with ASIC electronically

- (1) A document may be lodged with ASIC electronically only if:
 - (a) ASIC and the person seeking to lodge it (either on their own behalf or as agent) have agreed, in writing, that it may be lodged electronically; or
 - (b) ASIC has approved, in writing, the electronic lodgment of documents of that kind.

The document is taken to be lodged with ASIC if it is lodged in accordance with the agreement or approval (including any requirements of the agreement or approval as to authentication).

- (1A) For the purposes of paragraph (1)(b), ASIC may approve:
 - (a) a particular kind of document; or
 - (b) documents in a particular class of documents.
- (2) Subsection (1) does not apply to a document covered by section 353 or a notice lodged under subsection 1015D(2).

353 Electronic lodgment of certain documents

- (1) ASIC may determine conditions in relation to the electronic lodgment of documents:
 - (a) that must be given to a relevant market operator under section 205G; or
 - (b) that must be given to ASIC under section 792C.

Section 354

- (2) The electronic lodgment of a document covered by a determination under subsection (1) is only effective if the lodgment complies with the conditions determined.
- (3) ASIC must publish in the *Gazette* a copy of any determination under subsection (1).

354 Telephone notice of certain changes

- (1) ASIC may, in its discretion, accept telephone notice of a change to a particular in relation to a company or a registered scheme if:
 - (a) either:
 - (i) the change relates to a misspelling or other minor typographical error; or
 - (ii) the change is to a particular included on a list published by ASIC on the Internet for the purposes of this section; and
 - (b) the notice satisfies the authentication requirements published by ASIC on the Internet for the purposes of this section.
- (2) If ASIC accepts telephone notice of a change to a particular under subsection (1), any obligation elsewhere in this Act to lodge a prescribed form in relation to the change is satisfied by the telephone notice. However, this does not affect the company's liability for late lodgment fees incurred before the notice is given or continuing offences committed before that time.

Chapter 5—External administration

Part 5.1—Arrangements and reconstructions

410 Interpretation

A reference in this Part, in relation to a Part 5.1 body, to the directors is a reference to the directors of the body or any one or more of them.

411 Administration of compromises etc.

- (1) Where a compromise or arrangement is proposed between a Part 5.1 body and its creditors or any class of them or between a Part 5.1 body and its members or any class of them, the Court may, on the application in a summary way of the body or of any creditor or member of the body, or, in the case of a body being wound up, of the liquidator, order a meeting or meetings of the creditors or class of creditors or of the members of the body or class of members to be convened in such manner, and to be held in such place or places (in this jurisdiction or elsewhere), as the Court directs and, where the Court makes such an order, the Court may approve the explanatory statement required by paragraph 412(1)(a) to accompany notices of the meeting or meetings.

(1A) Where:

- (a) a compromise or arrangement is proposed:
 - (i) between 30 or more Part 5.1 bodies that are wholly-owned subsidiaries of a holding company and the creditors or a class of the creditors of each of those subsidiaries; and
 - (ii) between the holding company and the creditors or a class of the creditors of the holding company; and
- (b) the proposed compromise or arrangement in relation to each subsidiary includes a term that orders will be sought under section 413 transferring the whole of the undertaking and of the property and liabilities of the subsidiary to the holding company; and
- (c) the Court is satisfied, on the application in a summary way:

Section 411

(i) of the holding company or of a creditor of the holding company; or

(ii) if the holding company is being wound up—of the liquidator;

that the number of meetings that would be required between creditors in order to consider the proposed compromises or arrangements would be so great as to result in a significant impediment to the timely and effective consideration by those creditors of the terms of the compromises or arrangements;

the Court may order a meeting or meetings, on a consolidated basis, of the creditors of the holding company and of each of the subsidiaries or of such class or classes of those creditors as the Court determines and, where the Court makes such an order, the Court may approve the explanatory statement required by paragraph 412(1)(a) to accompany notices of the meeting or meetings.

(1B) Where:

(a) there are fewer than 30 wholly-owned subsidiaries of the holding company but the matters referred to in paragraphs (1A)(b) and (c) are satisfied; and

(b) the Court considers that circumstances exist that would justify its doing so;

the Court may make an order under subsection (1A) in relation to the proposed compromise or arrangement.

(1C) Where an order is made under subsection (1A) in relation to a proposed compromise or arrangement, the succeeding provisions of this Part apply to the compromise or arrangement as if:

(a) references in this Part to a company included references to all of the Part 5.1 bodies to which the order relates; and

(b) references in this Part to creditors of a company included references to the creditors of all the Part 5.1 bodies to which the order relates; and

(c) references in this Part to a class of the creditors of a company were references to the relevant class of creditors of all of the Part 5.1 bodies to which the order relates.

Section 411

- (2) The Court must not make an order pursuant to an application under subsection (1) or (1A) unless:
 - (a) 14 days notice of the hearing of the application, or such lesser period of notice as the Court or ASIC permits, has been given to ASIC; and
 - (b) the Court is satisfied that ASIC has had a reasonable opportunity:
 - (i) to examine the terms of the proposed compromise or arrangement to which the application relates and a draft explanatory statement relating to the proposed compromise or arrangement; and
 - (ii) to make submissions to the Court in relation to the proposed compromise or arrangement and the draft explanatory statement.
- (3) In subsection (2), ***draft explanatory statement***, in relation to a proposed compromise or arrangement between a body and its creditors or any class of them or between a body and its members or any class of them, means a statement:
 - (a) explaining the effect of the proposed compromise or arrangement and, in particular, stating any material interests of the directors of the body, whether as directors, as members or creditors of the body or otherwise, and the effect on those interests of the proposed compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons; and
 - (b) setting out such information as is prescribed and any other information that is material to the making of a decision by a creditor or member of the body whether or not to agree to the proposed compromise or arrangement, being information that is within the knowledge of the directors of the body and has not previously been disclosed to the creditors or members of the body.
- (3A) In considering whether to make an order under subsection (1) or (1A) for a meeting to be held outside this jurisdiction, the Court must have regard to where the creditors or members, or the creditors or members included in the class concerned, as the case requires, reside.
- (4) A compromise or arrangement is binding on the creditors, or on a class of creditors, or on the members, or on a class of members, as

Section 411

the case may be, of the body and on the body or, if the body is in the course of being wound up, on the liquidator and contributories of the body, if, and only if:

- (a) at a meeting convened in accordance with an order of the Court under subsection (1) or (1A):
 - (i) in the case of a compromise or arrangement between a body and its creditors or a class of creditors—the compromise or arrangement is agreed to by a majority in number of the creditors, or of the creditors included in that class of creditors, present and voting, either in person or by proxy, being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting in person or by proxy, or of the creditors included in that class present and voting in person or by proxy, as the case may be; and
 - (ii) in the case of a compromise or arrangement between a body and its members or a class of members—a resolution in favour of the compromise or arrangement is:
 - (A) unless the Court orders otherwise—passed by a majority in number of the members, or members in that class, present and voting (either in person or by proxy); and
 - (B) if the body has a share capital—passed by 75% of the votes cast on the resolution; and
 - (b) it is approved by order of the Court.
- (5) Where the Court orders 2 or more meetings of creditors or of a class of creditors, or 2 or more meetings of members or of a class of members, to be held in relation to the proposed compromise or arrangement:
- (a) in the case of meetings of creditors—the meetings are, for the purposes of subsection (4), taken together to constitute a single meeting and the votes in favour of the proposed compromise or arrangement cast at each of the meetings are to be aggregated, and the votes against the proposed compromise or arrangement cast at each of the meetings are to be aggregated, accordingly; or

Section 411

- (b) in the case of meetings of members—the meetings are, for the purposes of subsection (4), taken together to constitute a single meeting and the votes in favour of the proposed compromise or arrangement cast at each of the meetings is to be aggregated, and the votes against the proposed compromise or arrangement cast at each of the meetings is to be aggregated, accordingly.
 - (6) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.
 - (6A) If:
 - (a) the Court has granted its approval to a compromise or arrangement subject to an alteration or condition; and
 - (b) the body concerned contravenes:
 - (i) in the case of an alteration—the provision or provisions of the compromise or arrangement to which the alteration relates; or
 - (ii) in the case of a condition—the condition; and
 - (c) the Court is satisfied that a person suffered loss or damage as a result of the contravention;the Court may make such order as it thinks just.
 - (6B) The Court may make either or both of the following orders under subsection (6A):
 - (a) an order that the body concerned pay compensation to the person of such amount as the order specifies;
 - (b) an order directing the body concerned to comply with:
 - (i) in the case of an alteration—the provision or provisions of the compromise or arrangement to which the alteration relates; or
 - (ii) in the case of a condition—the condition.
 - (6C) Subsection (6B) does not limit subsection (6A).
 - (7) Except with the leave of the Court, a person must not be appointed to administer, and must not administer, a compromise or arrangement approved under this Act between a body and its creditors or any class of them or between a body and its members or any class of them, whether by the terms of that compromise or arrangement or pursuant to a power given by the terms of a compromise or arrangement, if the person:
-

Section 411

- (a) is a mortgagee of any property of the body; or
 - (b) is an auditor of the body; or
 - (ba) is a director, secretary, senior manager or employee of the body; or
 - (c) is a director, secretary, senior manager or employee of a body corporate that is a mortgagee of property of the body; or
 - (d) is not a registered liquidator; or
 - (e) is a director, secretary, senior manager or employee of a body corporate related to the body; or
 - (f) unless ASIC directs in writing that this paragraph does not apply in relation to the person in relation to the body—has at any time within the last 12 months been an officer or promoter of the body or of a related body corporate.
- (8) Paragraph (7)(d) does not apply in relation to a body corporate authorised by or under a law of a State or Territory in this jurisdiction to administer the compromise or arrangement concerned.
- (8A) Subsection (7) does not disqualify a person from administering a compromise or arrangement under an appointment validly made before 1 January 1991.
- (9) Where a person is or persons are appointed by, or under a power given by, the terms of a compromise or arrangement, to administer the compromise or arrangement:
 - (a) section 425, subsections 427(2) and (4) and sections 428, 432 and 434 apply in relation to that person or those persons as if:
 - (i) the appointment of the person or persons to administer the compromise or arrangement were an appointment of the person or persons as a receiver and manager, or as receivers and managers, of property of the body; and
 - (ii) a reference in any of those sections or subsections to a receiver, or to a receiver of property, of a corporation were a reference to that person or to those persons; and
 - (b) section 536 applies in relation to that person or those persons as if:
 - (i) the appointment of the person or persons to administer the compromise or arrangement were an appointment of the person or persons as a liquidator of the body; and

Section 411

- (ii) a reference in that section to a liquidator were a reference to that person or to those persons.
- (10) An order of the Court made for the purposes of paragraph (4)(b) does not have any effect until an office copy of the order is lodged with ASIC, and upon being so lodged, the order takes effect, or is taken to have taken effect, on and from the date of lodgment or such earlier date as the Court determines and specifies in the order.
- (11) Subject to subsection (12), a copy of every order of the Court made for the purposes of paragraph (4)(b) must be annexed to every copy of the constitution of the body issued after the order has been made.
- (12) The Court may, by order, exempt a body from compliance with subsection (11) or determine the period during which the body must comply with that subsection.
- (13) Where a compromise or arrangement referred to in subsection (1) or (1A) (whether or not for the purposes of or in connection with a scheme for the reconstruction of a body or bodies or the amalgamation of any 2 or more bodies) has been proposed, the directors of the body must:
 - (a) if a meeting of the members of the body by resolution so directs—instruct such accountants or solicitors or both as are named in the resolution to report on the proposals and send their report or reports to the directors as soon as practicable; and
 - (b) if a report or reports is or are obtained pursuant to paragraph (a)—make the report or reports available at the registered office of the body for inspection by the shareholders and creditors of the body at least 7 days before the day of the meeting ordered by the Court to be convened as provided in subsection (1) or (1A), as the case may be.
- (14) If default is made in complying with subsection (11), the body contravenes this subsection.
- (15) If default is made in complying with subsection (13), each director of the body contravenes this subsection.
- (16) Where no order has been made or resolution passed for the winding up of a Part 5.1 body and a compromise or arrangement has been proposed between the body and its creditors or any class

Section 412

of them, the Court may, in addition to exercising any of its other powers, on the application in a summary way of the body or of any member or creditor of the body, restrain further proceedings in any action or other civil proceeding against the body except by leave of the Court and subject to such terms as the Court imposes.

- (17) The Court must not approve a compromise or arrangement under this section unless:
- (a) it is satisfied that the compromise or arrangement has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Chapter 6; or
 - (b) there is produced to the Court a statement in writing by ASIC stating that ASIC has no objection to the compromise or arrangement;
- but the Court need not approve a compromise or arrangement merely because a statement by ASIC stating that ASIC has no objection to the compromise or arrangement has been produced to the Court as mentioned in paragraph (b).

412 Information as to compromise with creditors

- (1) Where a meeting is convened under section 411, the body must:
- (a) with every notice convening the meeting that is sent to a creditor or member, send a statement (in this section called the *explanatory statement*):
 - (i) explaining the effect of the compromise or arrangement and, in particular, stating any material interests of the directors, whether as directors, as members or creditors of the body or otherwise, and the effect on those interests of the compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons; and
 - (ii) setting out such information as is prescribed and any other information that is material to the making of a decision by a creditor or member whether or not to agree to the compromise or arrangement, being information that is within the knowledge of the directors and has not previously been disclosed to the creditors or members; and
 - (b) in every notice convening the meeting that is given by advertisement, include either a copy of the explanatory

Section 412

statement or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of the explanatory statement.

- (2) In the case of a creditor whose debt does not exceed \$200, paragraph (1)(a) does not apply unless the Court otherwise orders but the notice convening the meeting that is sent to such a creditor must specify a place at which a copy of the explanatory statement can be obtained on request and, where the creditor makes such a request, the body must as soon as practicable comply with the request.
- (3) Where the compromise or arrangement affects the rights of debenture holders, the explanatory statement must specify any material interests of the trustees for the debenture holders, whether as such trustees, as members or creditors of the body or otherwise, and the effect on those interests of the compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons.
- (4) Where a notice given by advertisement includes a notification that copies of the explanatory statement can be obtained in a particular manner, every creditor or member entitled to attend the meeting must, on making application in that matter, be furnished by the body free of charge with a copy of the explanatory statement.
- (5) Each person who is a director or trustee for debenture holders must give notice to the body of such matters relating to the person as are required to be included in the explanatory statement.
- (6) In the case of a compromise or arrangement that is not, or does not include, a compromise or arrangement between a Part 5.1 body and its creditors or any class of them, the body must not send out an explanatory statement pursuant to subsection (1) unless a copy of that statement has been registered by ASIC.
- (7) Where an explanatory statement sent out under subsection (1) is not required by subsection (6) to be registered by ASIC, the Court must not make an order approving the compromise or arrangement unless it is satisfied that ASIC has had a reasonable opportunity to examine the explanatory statement and to make submissions to the Court in relation to that statement.

Section 413

- (8) Where a copy of an explanatory statement is lodged with ASIC for registration under subsection (6), ASIC must not register the copy of the statement unless the statement appears to comply with this Act and ASIC is of the opinion that the statement does not contain any matter that is false in a material particular or materially misleading in the form or context in which it appears.
- (9) Where a body contravenes this section, a person involved in the contravention contravenes this subsection.
- (10) It is a defence to a prosecution for a contravention of this section if it is proved that the contravention was due to the failure of a person (other than the defendant), being a director of the body or a trustee for debenture holders of the body, to supply for the purposes of the explanatory statement particulars of the person's interests.

413 Provisions for facilitating reconstruction and amalgamation of Part 5.1 bodies

- (1) Where an application is made to the Court under this Part for the approval of a compromise or arrangement and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of a Part 5.1 body or Part 5.1 bodies or the amalgamation of 2 or more Part 5.1 bodies and that, under the scheme, the whole or any part of the undertaking or of the property of a body concerned in the scheme (in this section called the *transferor body*) is to be transferred to a company (in this section called the *transferee company*), the Court may, either by the order approving the compromise or arrangement or by a later order, provide for all or any of the following matters:
 - (a) the transfer to the transferee company of the whole or a part of the undertaking and of the property or liabilities of the transferor body;
 - (b) the allotting or appropriation by the transferee company of shares, debentures, policies or other interests in that company that, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;
 - (c) the continuation by or against the transferee company of any legal proceedings pending by or against the transferor body;
 - (d) if the transferor body is a company—the deregistration by ASIC, without winding up, of the transferor body;

Section 414

- (e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement;
 - (f) the transfer or allotment of any interest in property to any person concerned in the compromise or arrangement;
 - (g) such incidental, consequential and supplemental matters as are necessary to ensure that the reconstruction or amalgamation is fully and effectively carried out.
- (2) Where an order made under this section provides for the transfer of property or liabilities, then, by virtue of the order, that property is transferred to and vests in, and those liabilities are transferred to and become the liabilities of, the transferee company, free, in the case of any particular property if the order so directs, from any charge that is, by virtue of the compromise or arrangement, to cease to have effect.
- (3) Where an order is made under this section, each body to which the order relates must, within 14 days after the making of the order, lodge with ASIC an office copy of the order.
- (4) In this section:

liabilities includes duties of any description, including duties that are of a personal character or are incapable under the general law of being assigned or performed vicariously.

property includes rights and powers of any description, including rights and powers that are of a personal character and are incapable under the general law of being assigned or performed vicariously.

414 Acquisition of shares of shareholders dissenting from scheme or contract approved by majority

- (1) In this section:

dissenting shareholder, in relation to a scheme or contract, means a shareholder who has not assented to the scheme or contract or who has failed to transfer his, her or its shares in accordance with the scheme or contract.

excluded shares, in relation to a scheme or contract involving a transfer to a person of shares in a class of shares in a company,

Section 414

means shares in that class that, when the offer relating to the scheme or contract is made, are held by:

- (a) in any case—the person or a nominee of the person; or
 - (b) if the person is a body corporate—a subsidiary of the body.
- (2) Where a scheme or contract (not being a scheme or contract arising out of the making of offers under a takeover bid) involving a transfer of shares in a class of shares in a company (in this section called the *transferor company*) to a person (in this section called the *transferee*) has, within 4 months after the making of the offer relating to the scheme or contract by the transferee, been approved by members holding shares in that class carrying at least 90% of the votes attached to shares in that class (other than excluded shares), the transferee may, within 2 months after the offer has been so approved, give notice as prescribed to a dissenting shareholder that the transferee wishes to acquire the shares held by that shareholder.
- (3) Where such a notice is given, then, unless the Court orders otherwise on an application by a dissenting shareholder made within one month after the day on which the notice was given or within 14 days after a statement is supplied under subsection (7) to a dissenting shareholder, whichever is the later, the transferee is entitled and bound, subject to this section, to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee.
- (4) Where alternative terms were offered to the approving shareholders, the dissenting shareholder is entitled to elect not later than the end of one month after the date on which the notice is given under subsection (2) or 14 days after a statement is supplied under subsection (7), whichever is the later, which of those terms he, she or it prefers and, if he, she or it fails to make the election within the time allowed by this subsection, the transferee may, unless the Court otherwise orders, determine which of those terms is to apply to the acquisition of the shares of the dissenting shareholder.
- (5) Despite subsections (3) and (4), if the number of votes attached to the excluded shares is more than 10% of the votes attached to the excluded shares and the shares (other than excluded shares) to be transferred under the scheme or contract, those subsections do not apply unless:

Section 414

- (a) the transferee offers the same terms to all holders of the shares (other than excluded shares) to be transferred under the scheme or contract; and
 - (b) the holders who approve the scheme or contract hold shares to which are attached at least 90% of the votes attached to the shares (other than excluded shares) to be transferred under the scheme or contract and are also at least 75% in number of the holders of those shares.
- (6) For the purposes of paragraph (5)(b), 2 or more persons registered as holding shares jointly are to be counted as one person.
- (7) When a notice is given under subsection (2), the dissenting shareholder may, by written notice given to the transferee within one month after the day on which the notice was given under subsection (2), ask for a statement in writing of the names and addresses of all other dissenting shareholders as shown in the register of members.
- (8) Where a notice is given under subsection (7), the transferee must comply with it.
- (9) Where, under a scheme or contract referred to in subsection (2), the transferee becomes beneficially entitled to shares in the transferor company which, together with any other shares in the transferor company to which the transferee or, where the transferee is a body corporate, a body corporate related to the transferee is beneficially entitled, have attached to them at least 90% of the votes attached to the shares included in the class of shares concerned, then:
 - (a) the transferee must, within one month after the date on which he, she or it becomes beneficially entitled to those shares (unless in relation to the scheme or contract he, she or it has already complied with this requirement), give notice of the fact as prescribed to the holders of the remaining shares included in that class who, when the notice was given, had not assented to the scheme or contract or been given notice by the transferee under subsection (2); and
 - (b) such a holder may, within 3 months after the giving of the notice to him, her or it by notice to the transferee, require the transferee to acquire his, her or its share and, where alternative terms were offered to the approving shareholders, elect which of those terms he, she or it will accept.

Section 414

- (10) Where a shareholder gives notice under paragraph (9)(b) with respect to his, her or its shares, the transferee is entitled and bound to acquire those shares:
 - (a) on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to him, her or it and, where alternative terms were offered to those shareholders, on the terms for which the shareholder has elected, or where he, she or it has not so elected, for whichever of the terms the transferee determines; or
 - (b) on such other terms as are agreed or as the Court, on the application of the transferee or of the shareholder, thinks fit to order.
- (11) Subsections (12) and (13) apply where a notice has been given under subsection (1) unless the Court, on an application made by the dissenting shareholder, orders to the contrary.
- (12) The transferee must, within 14 days after:
 - (a) the end of one month after the day on which the notice was given; or
 - (b) the end of 14 days after a statement under subsection (7) is supplied; or
 - (c) if an application has been made to the Court by a dissenting shareholder—the application is disposed of;whichever last happens:
 - (d) send a copy of the notice to the transferor company together with an instrument of transfer that relates to the shares that the transferee is entitled to acquire under this section and is executed, on the shareholder's behalf, by a person appointed by the transferee and, on the transferee's own behalf, by the transferee; and
 - (e) pay, allot or transfer to the transferor company the consideration for the shares.
- (13) When the transferee has complied with subsection (12), the transferor company must register the transferee as the holder of the shares.
- (14) All sums received by the transferor company under this section must be paid into a separate bank account and those sums, and any other consideration so received, must be held by that company in

trust for the several persons entitled to the shares in respect of which they were respectively received.

- (15) Where a sum or other property received by a company under this section has been held in trust by the company for a person for at least 2 years (whether or not that period began before the commencement of this Act), the company must, before the end of 10 years after the day on which the sum was paid, or the consideration was allotted or transferred, to the company, pay the sum or transfer the consideration, and any accretions to it and any property that may become substituted for it or for part of it, to ASIC to be dealt with under Part 9.7.

415 Notification of appointment of scheme manager and power of Court to require report

- (1) Within 14 days after being appointed to administer a compromise or arrangement approved under this Part, a person must lodge a notice in writing of the appointment.
- (2) Where an application is made to the Court under this Part in relation to a proposed compromise or arrangement, the Court may:
- (a) before making any order on the application, require ASIC or another person specified by the Court to give to the Court a report as to the terms of the compromise or arrangement or of the scheme for the purposes of or in connection with which the compromise or arrangement has been proposed, the conduct of the officers of the body or bodies concerned and any other matters that, in the opinion of ASIC or that person, ought to be brought to the attention of the Court;
 - (b) in deciding the application, have regard to anything contained in the report; and
 - (c) make such order or orders as to the payment of the costs of preparing and giving the report as the Court thinks fit.

Part 5.2—Receivers, and other controllers, of property of corporations

416 Definitions

In this Part, unless the contrary intention appears:

officer, in relation to a registered foreign company, includes a local agent of the foreign company.

property, in relation to a corporation, means property:

- (a) in the case of a company—in Australia or outside Australia; or
- (b) in the case of a registered foreign company—in this jurisdiction or an external Territory; or
- (c) in the case of a registrable Australian body—in this jurisdiction but outside the body's place of origin.

receiver, in relation to property of a corporation, includes a receiver and manager.

417 Application of Part

- (1) Except so far as the contrary intention appears in this Part or Part 11.2, this Part applies in relation to a receiver of property of a corporation who is appointed after 1 January 1991, even if the appointment arose out of a transaction entered into, or an act or thing done, before 1 January 1991.
- (2) To avoid doubt, this Part does not apply, of its own force, to the property of a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note 1: The definition of **property** in section 416 does not define that term in relation to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note 2: Section 516-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* applies this Part to a corporation that is an Aboriginal and Torres Strait Islander corporation with the modifications provided for in that section.

418 Persons not to act as receivers

- (1) A person is not qualified to be appointed, and must not act, as receiver of property of a corporation if the person:
 - (a) is a mortgagee of property of the corporation; or
 - (b) is an auditor or a director, secretary, senior manager or employee of the corporation; or
 - (c) is a director, secretary, senior manager or employee of a body corporate that is a mortgagee of property of the corporation; or
 - (d) is not a registered liquidator; or
 - (e) is a director, secretary, senior manager or employee of a body corporate related to the corporation; or
 - (f) unless ASIC directs in writing that this paragraph does not apply in relation to the person in relation to the corporation—has at any time within the last 12 months been a director, secretary, senior manager, employee or promoter of the corporation or of a related body corporate.
- (3) Paragraph (1)(d) does not apply in relation to a body corporate authorised by or under a law of the Commonwealth, of a State or of a Territory to act as receiver of property of the corporation concerned.

418A Court may declare whether controller is validly acting

- (1) Where there is doubt, on a specific ground, about:
 - (a) whether a purported appointment of a person, after 23 June 1993, as receiver of property of a corporation is valid; or
 - (b) whether a person who has entered into possession, or assumed control, of property of a corporation after 23 June 1993 did so validly under the terms of a charge on that property;the person, the corporation or any of the corporation's creditors may apply to the Court for an order under subsection (2).
- (2) On an application, the Court may make an order declaring whether or not:
 - (a) the purported appointment was valid; or

Section 419

- (b) the person entered into possession, or assumed control, validly under the terms of the charge;
as the case may be, on the ground specified in the application or on some other ground.

419 Liability of controller

- (1) A receiver, or any other authorised person, who, whether as agent for the corporation concerned or not, enters into possession or assumes control of any property of a corporation for the purpose of enforcing any charge is, notwithstanding any agreement to the contrary, but without prejudice to the person's rights against the corporation or any other person, liable for debts incurred by the person in the course of the receivership, possession or control for services rendered, goods purchased or property hired, leased, used or occupied.
- (2) Subsection (1) does not constitute the person entitled to the charge a mortgagee in possession.
- (3) Where:
 - (a) a person (in this subsection called the *controller*) enters into possession or assumes control of property of a corporation; and
 - (b) the controller purports to have been properly appointed as a receiver in respect of that property under a power contained in an instrument, but has not been properly so appointed; and
 - (c) civil proceedings in an Australian court arise out of an act alleged to have been done by the controller;the court may, if it is satisfied that the controller believed on reasonable grounds that the controller had been properly so appointed, order that:
 - (d) the controller be relieved in whole or in part of a liability that the controller has incurred but would not have incurred if the controller had been properly so appointed; and
 - (e) a person who purported to appoint the controller as receiver be liable in respect of an act, matter or thing in so far as the controller has been relieved under paragraph (d) of liability in respect of that act, matter or thing.

419A Liability of controller under pre-existing agreement about property used by corporation

- (1) This section applies if:
 - (a) under an agreement made before the control day in relation to a controller of property of a corporation, the corporation continues after that day to use or occupy, or to be in possession of, property (*the third party property*) of which someone else is the owner or lessor; and
 - (b) the controller is controller of the third party property.
- (2) Subject to subsections (4) and (7), the controller is liable for so much of the rent or other amounts payable by the corporation under the agreement as is attributable to a period:
 - (a) that begins more than 7 days after the control day; and
 - (b) throughout which:
 - (i) the corporation continues to use or occupy, or to be in possession of, the third party property; and
 - (ii) the controller is controller of the third party property.
- (3) Within 7 days after the control day, the controller may give to the owner or lessor a notice that specifies the third party property and states that the controller does not propose to exercise rights in relation to that property as controller of the property, whether on behalf of the corporation or anyone else.
- (4) Despite subsection (2), the controller is not liable for so much of the rent or other amounts payable by the corporation under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the corporation.
- (5) A notice under subsection (3) ceases to have effect if:
 - (a) the controller revokes it by writing given to the owner or lessor; or
 - (b) the controller exercises, or purports to exercise, a right in relation to the third party property as controller of the property, whether on behalf of the corporation or anyone else.
- (6) For the purposes of subsection (5), the controller does not exercise, or purport to exercise, a right as mentioned in paragraph (5)(b)

Section 420

merely because the controller continues to be in possession, or to have control, of the third party property, unless the controller:

- (a) also uses the property; or
 - (b) asserts a right, as against the owner or lessor, so to continue.
- (7) Subsection (2) does not apply in so far as a court, by order, excuses the controller from liability, but an order does not affect a liability of the corporation.
- (8) The controller is not taken because of subsection (2):
- (a) to have adopted the agreement; or
 - (b) to be liable under the agreement otherwise than as mentioned in subsection (2).

420 Powers of receiver

- (1) Subject to this section, a receiver of property of a corporation has power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed.
- (2) Without limiting the generality of subsection (1), but subject to any provision of the court order by which, or the instrument under which, the receiver was appointed, being a provision that limits the receiver's powers in any way, a receiver of property of a corporation has, in addition to any powers conferred by that order or instrument, as the case may be, or by any other law, power, for the purpose of attaining the objectives for which the receiver was appointed:
- (a) to enter into possession and take control of property of the corporation in accordance with the terms of that order or instrument; and
 - (b) to lease, let on hire or dispose of property of the corporation; and
 - (c) to grant options over property of the corporation on such conditions as the receiver thinks fit; and
 - (d) to borrow money on the security of property of the corporation; and
 - (e) to insure property of the corporation; and
 - (f) to repair, renew or enlarge property of the corporation; and

Section 420

- (g) to convert property of the corporation into money; and
- (h) to carry on any business of the corporation; and
- (j) to take on lease or on hire, or to acquire, any property necessary or convenient in connection with the carrying on of a business of the corporation; and
- (k) to execute any document, bring or defend any proceedings or do any other act or thing in the name of and on behalf of the corporation; and
- (m) to draw, accept, make and indorse a bill of exchange or promissory note; and
- (n) to use a seal of the corporation; and
- (o) to engage or discharge employees on behalf of the corporation; and
- (p) to appoint a solicitor, accountant or other professionally qualified person to assist the receiver; and
- (q) to appoint an agent to do any business that the receiver is unable to do, or that it is unreasonable to expect the receiver to do, in person; and
- (r) where a debt or liability is owed to the corporation—to prove the debt or liability in a bankruptcy, insolvency or winding up and, in connection therewith, to receive dividends and to assent to a proposal for a composition or a scheme of arrangement; and
- (s) if the receiver was appointed under an instrument that created a charge on uncalled share capital of the corporation:
 - (i) to make a call in the name of the corporation for the payment of money unpaid on the corporation's shares; or
 - (ii) on giving a proper indemnity to a liquidator of the corporation—to make a call in the liquidator's name for the payment of money unpaid on the corporation's shares; and
- (t) to enforce payment of any call that is due and unpaid, whether the calls were made by the receiver or otherwise; and
- (u) to make or defend an application for the winding up of the corporation; and
- (w) to refer to arbitration any question affecting the corporation.

Section 420A

- (3) The conferring by this section on a receiver of powers in relation to property of a corporation does not affect any rights in relation to that property of any other person other than the corporation.
- (4) In this section, a reference, in relation to a receiver, to property of a corporation is, unless the contrary intention appears, a reference to the property of the corporation in relation to which the receiver was appointed.

420A Controller's duty of care in exercising power of sale

- (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
 - (a) if, when it is sold, it has a market value—not less than that market value; or
 - (b) otherwise—the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.
- (2) Nothing in subsection (1) limits the generality of anything in section 180, 181, 182, 183 or 184.

420B Court may authorise managing controller to dispose of property despite prior charge

- (1) On the application of a managing controller of property of a corporation, the Court may by order authorise the controller to sell, or to dispose of in some other specified way, specified property of the corporation, even though it is subject to a charge (in this section called the *prior charge*) that has priority over a charge (in this section called the *controller's charge*) on that property that the controller is enforcing.
- (2) However, the Court may only make an order if satisfied that:
 - (a) apart from the existence of the prior charge, the controller would have power to sell, or to so dispose of, the property; and
 - (b) the controller has taken all reasonable steps to obtain the consent of the holder of the prior charge to the sale or disposal, but has not obtained that consent; and

Section 420B

- (c) sale or disposal of the property under the order is in the best interests of the corporation's creditors and of the corporation; and
 - (d) sale or disposal of the property under the order will not unreasonably prejudice the rights or interests of the holder of the prior charge.
- (3) The Court is to have regard to the need to protect adequately the rights and interests of the holder of the prior charge.
- (4) If the property would be sold or disposed of together with other property that is subject to the controller's charge, the Court may have regard to:
 - (a) the amount (if any) by which it is reasonable to expect that the net proceeds of selling or disposing of that other property otherwise than together with the first-mentioned property would be less than so much of the net proceeds of selling or disposing of all the property together as would be attributable to that other property; and
 - (b) the amount (if any) by which it is reasonable to expect that the net proceeds of selling or disposing of the first-mentioned property otherwise than together with the other property would be greater than so much of the net proceeds of selling or disposing of all the property together as would be attributable to the first-mentioned property.
- (5) Nothing in subsection (3) or (4) limits the matters to which the Court may have regard for the purposes of subsection (2).
- (6) An order may be made subject to conditions, for example (but without limitation):
 - (a) a condition that:
 - (i) the net proceeds of the sale or disposal; and
 - (ii) the net proceeds of the sale or disposal of such other property (if any) as is specified in the condition and is subject to the controller's charge;or a specified part of those net proceeds, be applied in payment of specified amounts secured by the prior charge; or
 - (b) a condition that the controller apply a specified amount in payment of specified amounts secured by the prior charge.

Section 420C

420C Receiver's power to carry on corporation's business during winding up

- (1) A receiver of property of a corporation that is being wound up may:
 - (a) with the written approval of the corporation's liquidator or with the approval of the Court, carry on the corporation's business either generally or as otherwise specified in the approval; and
 - (b) do whatever is necessarily incidental to carrying on that business under paragraph (a).
- (2) Subsection (1) does not:
 - (a) affect a power that the receiver has otherwise than under that subsection; or
 - (b) empower the receiver to do an act that he or she would not have power to do if the corporation were not being wound up.
- (3) A receiver of property of a corporation who carries on the corporation's business under subsection (1) does so:
 - (a) as agent for the corporation; and
 - (b) in his or her capacity as receiver of property of the corporation.
- (4) The consequences of subsection (3) include, but are not limited to, the following:
 - (a) for the purposes of subsection 419(1), a debt that the receiver incurs in carrying on the business as mentioned in subsection (3) of this section is incurred in the course of the receivership;
 - (b) a debt or liability that the receiver incurs in so carrying on the business is not a cost, charge or expense of the winding up.

421 Managing controller's duties in relation to bank accounts and financial records

- (1) A managing controller of property of a corporation must:
 - (a) open and maintain an account, with an Australian ADI, bearing:
 - (i) the managing controller's own name; and

Section 421A

- (ii) in the case of a receiver of the property—the title “receiver”; and
 - (iii) otherwise—the title “managing controller”; and
 - (iv) the corporation’s name;
 - or 2 or more such accounts; and
 - (b) within 3 business days after money of the corporation comes under the control of the managing controller, pay that money into such an account that the managing controller maintains; and
 - (c) ensure that no such account that the managing controller maintains contains money other than money of the corporation that comes under the control of the managing controller; and
 - (d) keep such financial records as correctly record and explain all transactions that the managing controller enters into as the managing controller.
- (2) Any director, creditor or member of a corporation may, unless the Court otherwise orders, personally or by an agent, inspect records kept by a managing controller of property of the corporation for the purposes of paragraph (1)(d).

421A Managing controller to report within 2 months about corporation’s affairs

- (1) A managing controller of property of a corporation must prepare a report about the corporation’s affairs that is in the prescribed form and is made up to a day not later than 30 days before the day when it is prepared.
- (2) The managing controller must prepare and lodge the report within 2 months after the control day.
- (4) If, in the managing controller’s opinion, it would seriously prejudice:
 - (a) the corporation’s interests; or

Section 422

- (b) the achievement of the objectives for which the controller was appointed, or entered into possession or assumed control of property of the corporation, as the case requires; if particular information that the controller would otherwise include in the report were made available to the public, the controller need not include the information in the report.
- (5) If the managing controller omits information from the report as permitted by subsection (4), the controller must include instead a notice:
 - (a) stating that certain information has been omitted from the report; and
 - (b) summarising what the information is about, but without disclosing the information itself.

422 Reports by receiver or managing controller

- (1) If it appears to the receiver or managing controller of property of a corporation that:
 - (a) a past or present officer or employee, or a member, of the corporation may have been guilty of an offence in relation to the corporation; or
 - (b) a person who has taken part in the formation, promotion, administration, management or winding up of the corporation:
 - (i) may have misapplied or retained, or may have become liable or accountable for, any money or property (whether the property is in Australia or elsewhere) of the corporation; or
 - (ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the corporation;the receiver or managing controller must:
 - (c) lodge as soon as practicable a report about the matter; and
 - (d) give to ASIC such information, and such access to and facilities for inspecting and taking copies of any documents, as ASIC requires.
- (2) The receiver or managing controller may also lodge further reports specifying any other matter that, in the opinion of the receiver or managing controller, it is desirable to bring to the notice of ASIC.

(3) If it appears to the Court:

- (a) that a past or present officer or employee, or a member, of a corporation in respect of property of which a receiver has been appointed has been guilty of an offence in relation to the corporation; or
- (b) that a person who has taken part in the formation, promotion, administration, management or winding up of a corporation in respect of property of which a receiver has been appointed has engaged in conduct referred to in paragraph (1)(b) in relation to the corporation;

and that the receiver has not lodged a report about the matter, the Court may, on the application of a person interested in the appointment of the receiver, direct the receiver to lodge such a report.

(4) If:

- (a) there is a managing controller in relation to property of a corporation; and
- (b) it appears to the Court that:
 - (i) a past or present officer or employee, or a member, of the corporation has been guilty of an offence in relation to the corporation; or
 - (ii) a person who has taken part in the formation, promotion, administration, management or winding up of the corporation has engaged in conduct referred to in paragraph (1)(b) in relation to the corporation; and
- (c) it appears to the Court that the managing controller has not lodged a report about the matter;

the Court may, on the application of a person interested in the appointment of the managing controller, direct the managing controller to lodge such a report.

423 Supervision of controller

(1) If:

- (a) it appears to the Court or to ASIC that a controller of property of a corporation has not faithfully performed, or is not faithfully performing, the controller's functions or has not observed, or is not observing, a requirement of:
 - (i) in the case of a receiver—the order by which, or the instrument under which, the receiver was appointed; or

Section 424

- (ii) otherwise—an instrument under which the controller entered into possession, or took control, of that property; or
 - (iii) in any case—the Court; or
 - (iv) in any case—this Act, the regulations or the rules; or
- (b) a person complains to the Court or to ASIC about an act or omission of a controller of property of a corporation in connection with performing or exercising any of the controller's functions and powers;
the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.
- (2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of a controller of property of a corporation and the Court may order the controller to make good any loss that the estate of the corporation has sustained thereby and may make such other order or orders as it thinks fit.
- (3) The Court may at any time:
 - (a) require a controller of property of a corporation to answer questions about the performance or exercise of any of the controller's functions and powers as controller; or
 - (b) examine a person about the performance or exercise by such a controller of any of the controller's functions and powers as controller; or
 - (c) direct an investigation to be made of such a controller's books.

424 Controller may apply to Court

- (1) A controller of property of a corporation may apply to the Court for directions in relation to any matter arising in connection with the performance or exercise of any of the controller's functions and powers as controller.
- (2) In the case of a receiver of property of a corporation, subsection (1) applies only if the receiver was appointed under a power contained in an instrument.

425 Court's power to fix receiver's remuneration

- (1) The Court may by order fix the amount to be paid by way of remuneration to any person who, under a power contained in an instrument, has been appointed as receiver of property of a corporation.
- (2) The power of the Court to make an order under this section:
 - (a) extends to fixing the remuneration for any period before the making of the order or the application for the order; and
 - (b) is exercisable even if the receiver has died, or ceased to act, before the making of the order or the application for the order; and
 - (c) if the receiver has been paid or has retained for the receiver's remuneration for any period before the making of the order any amount in excess of that fixed for that period—extends to requiring the receiver or the receiver's personal representatives to account for the excess or such part of the excess as is specified in the order.
- (3) The power conferred by paragraph (2)(c) must not be exercised in respect of any period before the making of the application for the order unless, in the opinion of the Court, there are special circumstances making it proper for the power to be so exercised.
- (4) The Court may from time to time vary or amend an order under this section.
- (5) An order under this section may be made, varied or amended on the application of:
 - (a) a liquidator of the corporation; or
 - (b) an administrator of the corporation; or
 - (c) an administrator of a deed of company arrangement executed by the corporation; or
 - (d) ASIC.
- (6) An order under this section may be varied or amended on the application of the receiver concerned.
- (7) An order under this section may be made, varied or amended only as provided in subsections (5) and (6).

Section 425

- (8) In exercising its powers under this section, the Court must have regard to whether the remuneration is reasonable, taking into account any or all of the following matters:
- (a) the extent to which the work performed by the receiver was reasonably necessary;
 - (b) the extent to which the work likely to be performed by the receiver is likely to be reasonably necessary;
 - (c) the period during which the work was, or is likely to be, performed by the receiver;
 - (d) the quality of the work performed, or likely to be performed, by the receiver;
 - (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the receiver;
 - (f) the extent (if any) to which the receiver was, or is likely to be, required to deal with extraordinary issues;
 - (g) the extent (if any) to which the receiver was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
 - (h) the value and nature of any property dealt with, or likely to be dealt with, by the receiver;
 - (i) whether the receiver was, or is likely to be, required to deal with:
 - (i) one or more other receivers; or
 - (ii) one or more receivers and managers; or
 - (iii) one or more liquidators; or
 - (iv) one or more administrators; or
 - (v) one or more administrators of deeds of company arrangement;
 - (j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors;
 - (k) if the remuneration is ascertained, in whole or in part, on a time basis:
 - (i) the time properly taken, or likely to be properly taken, by the receiver in performing the work; and
 - (ii) whether the total remuneration payable to the receiver is capped;
 - (l) any other relevant matters.

426 Controller has qualified privilege in certain cases

A controller of property of a corporation has qualified privilege in respect of:

- (a) a matter contained in a report that the controller lodges under section 421A or 422; or
- (b) a comment that the controller makes under paragraph 429(2)(c).

427 Notification of matters relating to controller

(1) A person who:

- (a) obtains an order for the appointment of a receiver of property of a corporation; or
- (b) appoints such a receiver under a power contained in an instrument;

must, within 7 days after obtaining the order or making the appointment, lodge notice that the order has been obtained, or that the appointment has been made, as the case may be.

(1A) A person who appoints another person to enter into possession, or take control, of property of a corporation (whether or not as agent for the corporation) for the purpose of enforcing a charge otherwise than as receiver of that property must, within 7 days after making the appointment, lodge notice of the appointment.

(1B) A person who enters into possession, or takes control, as mentioned in subsection (1A) must, within 7 days after entering into possession or taking control, lodge notice that the person has done so, unless another person:

- (a) appointed the first-mentioned person so to enter into possession or take control; and
- (b) complies with subsection (1A) in relation to the appointment.

(2) Within 14 days after becoming a controller of property of a corporation, a person must lodge notice in the prescribed form of the address of the person's office.

(3) A controller of property of a corporation must, within 14 days after a change in the situation of the controller's office, lodge notice in the prescribed form of the change.

Section 428

- (4) A person who ceases to be a controller of property of a corporation must, within 7 days after so ceasing, lodge notice that the person has so ceased.

428 Statement that receiver appointed or other controller acting

- (1) Where a receiver of property (whether in or outside this jurisdiction or in or outside Australia) of a corporation has been appointed, the corporation must set out, in every public document, and in every negotiable instrument, of the corporation, after the name of the corporation where it first appears, a statement that a receiver, or a receiver and manager, as the case requires, has been appointed.
- (2) Where there is a controller (other than a receiver) of property (whether in Australia or elsewhere) of a corporation, the corporation must set out, in every public document, and in every negotiable instrument, of the corporation, after the corporation's name where it first appears, a statement that a controller is acting.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

429 Officers to report to controller about corporation's affairs

- (1) In this section:
 - reporting officer*, in relation to a corporation in respect of property of which a person is controller, means a person who was:
 - (a) in the case of a company or registrable Australian body—a director or secretary of the company or registrable Australian body; or
 - (b) in the case of a foreign company—a local agent of the foreign company;on the control day.
- (2) Where a person becomes a controller of property of a corporation:
 - (a) the person must serve on the corporation as soon as practicable notice that the person is a controller of property of the corporation; and

- (b) within 14 days after the corporation receives the notice, the reporting officers must make out and submit to the person a report in the prescribed form about the affairs of the corporation as at the control day; and
 - (c) the person must, within one month after receipt of the report:
 - (i) lodge a copy of the report and a notice setting out any comments the person sees fit to make relating to the report or, if the person does not see fit to make any comment, a notice stating that the person does not see fit to make any comment; and
 - (ii) send to the corporation a copy of the notice lodged in accordance with subparagraph (i); and
 - (iii) if the person became a controller of the property:
 - (A) because of an appointment as receiver of the property that was made by or on behalf of the holder of debentures of the corporation; or
 - (B) by entering into possession, or taking control, of the property for the purpose of enforcing a charge securing such debentures;and there are trustees for the holders of those debentures—send to those trustees a copy of the report and a copy of the notice lodged under subparagraph (i).
 - (3) Where notice has been served on a corporation under paragraph (2)(a), the reporting officers may apply to the controller or to the Court to extend the period within which the report is to be submitted and:
 - (a) if application is made to the controller—if the controller believes that there are special reasons for so doing, the controller may, by notice in writing given to the reporting officers, extend that period until a specified day; and
 - (b) if application is made to the Court—if the Court believes that there are special reasons for so doing, the Court may, by order, extend that period until a specified day.
 - (4) As soon as practicable after granting an extension under paragraph (3)(a), the controller must lodge a copy of the notice.
 - (5) As soon as practicable after the Court grants an extension under paragraph (3)(b), the reporting officers must lodge a copy of the order.
-

Section 430

- (6) Subsections (2), (3) and (4) do not apply in a case where a person becomes a controller of property of a corporation:
 - (a) to act with an existing controller of property of the corporation; or
 - (b) in place of a controller of such property who has died or ceased to be a controller of such property.
- (6A) However, if subsection (2) applies in a case where a controller of property of a corporation dies, or ceases to be a controller of property of the corporation, before subsection (2) is fully complied with, then:
 - (a) the references in paragraphs (2)(b) and (c) to the person; and
 - (b) the references in subsections (3) and (4) to the controller;include references to the controller's successor and to any continuing controller.
- (7) Where a corporation is being wound up, this section (including subsection (6A)) and section 430 apply even if the controller and the liquidator are the same person, but with any necessary modifications arising from that fact.

430 Controller may require reports

- (1) A controller of property of a corporation may, by notice given to the person or persons, require one or more persons included in one or more of the following classes of persons to make out as required by the notice, verify by a statement in writing in the prescribed form, and submit to the controller, a report, containing such information as is specified in the notice as to the affairs of the corporation or as to such of those affairs as are specified in the notice, as at a date specified in the notice:
 - (a) persons who are or have been officers of the corporation;
 - (b) where the corporation was incorporated within one year before the control day—persons who have taken part in the formation of the corporation;
 - (c) persons who are employed by the corporation or have been so employed within one year before the control day and are, in the opinion of the controller, capable of giving the information required;

Section 431

- (d) persons who are, or have been within one year before the control day, officers of, or employed by, a corporation that is, or within that year was, an officer of the corporation.
- (2) Without limiting the generality of subsection (1), a notice under that subsection may specify the information that the controller requires as to affairs of the corporation by reference to information that this Act requires to be included in any other report, statement or notice under this Act.
- (3) A person making a report and verifying it as required by subsection (1) must, subject to the regulations, be allowed, and must be paid by the controller (or the controller's successor) out of the controller's receipts, such costs and expenses incurred in and about the preparation and making of the report and the verification of the report as the controller (or the controller's successor) considers reasonable.
- (4) A person must comply with a requirement made under subsection (1).
- (5) A reference in this section to the controller's successor includes a reference to a continuing controller.

431 Controller may inspect books

A controller of property of a corporation is entitled to inspect at any reasonable time any books of the corporation that relate to that property and a person must not fail to allow the controller to inspect such books at such a time.

432 Lodging controller's accounts

- (1) A controller of property of a corporation must lodge an account:
 - (a) within one month after the end of:
 - (i) 6 months, or such shorter period as the controller determines, after the day when the controller became a controller of property of the corporation; and
 - (ii) each subsequent period of 6 months throughout which the controller is a controller of property of the corporation; and
 - (b) within one month after the controller ceases to be a controller of property of the corporation.

Section 432

- (1A) An account must be in the prescribed form and show:
- (a) the controller's receipts and payments during:
 - (i) in the case of an account under paragraph (1)(a)—the 6 months or shorter period, as the case requires; or
 - (ii) in the case of an account under paragraph (1)(b)—the period beginning at the end of the period to which the last account related, or on the control day, as the case requires, and ending on the day when the controller so ceased; and
 - (b) except in the case of an account lodged under subparagraph (1)(a)(i)—the respective aggregates of the controller's receipts and payments since the control day; and
 - (c) in the case of:
 - (i) a receiver appointed under a power contained in an instrument; or
 - (ii) anyone else who is in possession, or has control, of property of the corporation for the purpose of enforcing a charge;
the following:
 - (iii) the amount (if any) owing under that instrument or charge:
 - (A) in the case of an account lodged under subparagraph (1)(a)(i)—at the end of the control day and at the end of the period to which the account relates; or
 - (B) otherwise—at the end of the period to which the account relates;
 - (iv) the controller's estimate of the total value, at the end of the period to which the account relates, of the property of the corporation that is subject to the instrument or charge.
- (2) ASIC may, of its own motion or on the application of the corporation or a creditor of the corporation, cause the accounts lodged in accordance with subsection (1) to be audited by a registered company auditor appointed by ASIC and, for the purpose of the audit, the controller must furnish the auditor with such books and information as the auditor requires.
- (3) Where ASIC causes the accounts to be audited on the request of the corporation or a creditor, ASIC may require the corporation or
-

creditor, as the case may be, to give security for the payment of the cost of the audit.

- (4) The costs of an audit under subsection (2) must be fixed by ASIC and ASIC may if it thinks fit make an order declaring that, for the purposes of subsection 419(1), those costs are taken to be a debt incurred by the controller as mentioned in subsection 419(1) and, where such an order is made, the controller is liable accordingly.
- (5) A person must comply with a requirement made under this section.

433 Payment of certain debts, out of property subject to floating charge, in priority to claims under charge

- (2) This section applies where:
 - (a) a receiver is appointed on behalf of the holders of any debentures of a company or registered body that are secured by a floating charge, or possession is taken or control is assumed, by or on behalf of the holders of any debentures of a company or registered body, of any property comprised in or subject to a floating charge; and
 - (b) at the date of the appointment or of the taking of possession or assumption of control (in this section called the *relevant date*):
 - (i) the company or registered body has not commenced to be wound up voluntarily; and
 - (ii) the company or registered body has not been ordered to be wound up by the Court.
- (3) In the case of a company, the receiver or other person taking possession or assuming control of property of the company must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:
 - (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
 - (b) next, if an auditor of the company had applied to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and ASIC had refused that consent before the relevant date—the reasonable fees and expenses of the auditor incurred during the period beginning on the day of the refusal and ending on the relevant date;

Section 433

- (c) subject to subsections (6) and (7), next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.
- (4) In the case of a registered body, the receiver or other person taking possession or assuming control of property of the registered body must pay, out of the property of the registered body coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:
 - (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
 - (b) next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.
- (5) The receiver or other person taking possession or assuming control of property must pay debts and amounts payable pursuant to paragraph (3)(c) or (4)(b) in the same order of priority as is prescribed by Division 6 of Part 5.6 in respect of those debts and amounts.
- (6) In the case of a company, if an auditor of the company had applied to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and ASIC had, before the relevant date, refused that consent, a receiver must, when property comes to the receiver's hands, before paying any debt or amount referred to in paragraph (3)(c), make provision out of that property for the reasonable fees and expenses of the auditor incurred after the relevant date but before the date on which the property comes into the receiver's hands, being fees and expenses in respect of which provision has not already been made under this subsection.
- (7) If an auditor of the company applies to ASIC under subsection 329(6) for consent to his, her or its resignation as auditor and, after the relevant date, ASIC refuses that consent, the receiver must, in relation to property that comes into the receiver's hands after the refusal, before paying any debt or amount referred to in paragraph (3)(c), make provision out of that property for the reasonable fees and expenses of the auditor incurred after the refusal and before the date on which the property comes into the receiver's hands, being fees and expenses in respect of which provision has not already been made under this subsection.

- (8) A receiver must make provision in respect of reasonable fees and expenses of an auditor in respect of a particular period as required by subsection (6) or (7) whether or not the auditor has made a claim for fees and expenses for that period, but where the auditor has not made a claim, the receiver may estimate the reasonable fees and expenses of the auditor for that period and make provision in accordance with the estimate.
- (9) For the purposes of this section, the references in Division 6 of Part 5.6 to the relevant date are to be read as references to the date of the appointment of the receiver, or of possession being taken or control being assumed, as the case may be.

434 Enforcing controller's duty to make returns

- (1) If a controller of property of a corporation:
 - (a) who has made default in making or lodging any return, account or other document or in giving any notice required by law fails to make good the default within 14 days after the service on the controller, by any member or creditor of the corporation or trustee for debenture holders, of a notice requiring the controller to do so; or
 - (b) who has become a controller of property of the corporation otherwise than by being appointed a receiver of such property by a court and who has, after being required at any time by the liquidator of the corporation so to do, failed to render proper accounts of, and to vouch, the controller's receipts and payments and to pay over to the liquidator the amount properly payable to the liquidator;the Court may make an order directing the controller to make good the default within such time as is specified in the order.
- (2) An application under subsection (1) may be made:
 - (a) if paragraph (1)(a) applies—by a member or creditor of the corporation or by a trustee for debenture holders; and
 - (b) if paragraph (1)(b) applies—by the liquidator of the corporation.

434A Court may remove controller for misconduct

Where, on the application of a corporation, the Court is satisfied that a controller of property of the corporation has been guilty of

Section 434B

misconduct in connection with performing or exercising any of the controller's functions and powers, the Court may order that, on and after a specified day, the controller cease to act as receiver or give up possession or control, as the case requires, of property of the corporation.

434B Court may remove redundant controller

- (1) The Court may order that, on and after a specified day, a controller of property of a corporation:
 - (a) cease to act as receiver, or give up possession or control, as the case requires, of property of the corporation; or
 - (b) act as receiver, or continue in possession or control, as the case requires, only of specified property of the corporation.
- (2) However, the Court may only make an order under subsection (1) if satisfied that the objectives for which the controller was appointed, or entered into possession or took control of property of the corporation, as the case requires, have been achieved, so far as is reasonably practicable, except in relation to any property specified in the order under paragraph (1)(b).
- (3) For the purposes of subsection (2), the Court must have regard to:
 - (a) the corporation's interests; and
 - (b) the interests of the holder of the charge that the controller is enforcing; and
 - (c) the interests of the corporation's other creditors; and
 - (d) any other relevant matter.
- (4) The Court may only make an order under subsection (1) on the application of a liquidator appointed for the purposes of winding up the corporation in insolvency.
- (5) An order under subsection (1) may also prohibit the holder of the charge from doing any or all of the following, except with the leave of the Court:
 - (a) appointing a person as receiver of property of the corporation under a power contained in an instrument relating to the charge;
 - (b) entering into possession, or taking control, of such property for the purpose of enforcing the charge;

Section 434C

- (c) appointing a person so to enter into possession or take control (whether as agent for the chargee or for the corporation).

434C Effect of sections 434A and 434B

- (1) Except as expressly provided in section 434A or 434B, an order under that section does not affect a charge on property of a corporation.
- (2) Nothing in section 434A or 434B limits any other power of the Court to remove, or otherwise deal with, a controller of property of a corporation (for example, the Court's powers under section 423).

434D Appointment of 2 or more receivers of property of a corporation

If 2 or more persons have been appointed as receivers of property of a corporation:

- (a) a function or power of a receiver of property of the corporation may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or instrument appointing them otherwise provides; and
- (b) a reference in this Act to a receiver, or to the receiver, of property of a corporation is, in the case of the first-mentioned corporation, a reference to whichever one or more of those receivers the case requires.

434E Appointment of 2 or more receivers and managers of property of a corporation

If 2 or more persons have been appointed as receivers and managers of property of a corporation:

- (a) a function or power of a receiver and manager of property of the corporation may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or instrument appointing them otherwise provides; and
- (b) a reference in this Act to a receiver and manager, or to the receiver and manager, of property of a corporation is, in the case of the first-mentioned corporation, a reference to

Section 434F

whichever one or more of those receivers and managers the case requires.

434F Appointment of 2 or more controllers of property of a corporation

If 2 or more persons have been appointed as controllers of property of a corporation:

- (a) a function or power of a controller of property of the corporation may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or instrument appointing them otherwise provides; and
- (b) a reference in this Act to a controller, or to the controller, of property of a corporation is, in the case of the first-mentioned corporation, a reference to whichever one or more of those controllers the case requires.

434G Appointment of 2 or more managing controllers of property of a corporation

If 2 or more persons have been appointed as managing controllers of property of a corporation:

- (a) a function or power of a managing controller of property of the corporation may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or instrument appointing them otherwise provides; and
- (b) a reference in this Act to a managing controller, or to the managing controller, of property of a corporation is, in the case of the first-mentioned corporation, a reference to whichever one or more of those managing controllers the case requires.

Part 5.3A—Administration of a company's affairs with a view to executing a deed of company arrangement

Division 1—Preliminary

435A Object of Part

The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence—results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

435B Definitions

In this Part, unless the contrary intention appears:

receiver includes a receiver and manager.

435C When administration begins and ends

- (1) The administration of a company:
 - (a) begins when an administrator of the company is appointed under section 436A, 436B or 436C; and
 - (b) ends on the happening of whichever event of a kind referred to in subsection (2) or (3) happens first after the administration begins.
- (2) The normal outcome of the administration of a company is that:
 - (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

Section 435C

- (c) the company's creditors resolve under paragraph 439C(c) that the company be wound up.
- (3) However, the administration of a company may also end because:
 - (a) the Court orders, under section 447A or otherwise, that the administration is to end, for example, because the Court is satisfied that the company is solvent; or
 - (b) the convening period, as fixed by subsection 439A(5), for a meeting of the company's creditors ends:
 - (i) without the meeting being convened in accordance with section 439A; and
 - (ii) without an application being made for the Court to extend under subsection 439A(6) the convening period for the meeting; or
 - (c) an application for the Court to extend under subsection 439A(6) the convening period for such a meeting is finally determined or otherwise disposed of otherwise than by the Court extending the convening period; or
 - (d) the convening period, as extended under subsection 439A(6), for such a meeting ends without the meeting being convened in accordance with section 439A; or
 - (e) such a meeting convened under section 439A ends (whether or not it was earlier adjourned) without a resolution under section 439C being passed at the meeting; or
 - (f) the company contravenes subsection 444B(2) by failing to execute a proposed deed of company arrangement; or
 - (g) the Court appoints a provisional liquidator of the company, or orders that the company be wound up; or
 - (h) management of the general insurer vests in a judicial manager of the company appointed by the Federal Court under Part VB of the *Insurance Act 1973* or Part 8 of the *Life Insurance Act 1995*.
- (4) During the administration of a company, the company is taken to be under administration.

Division 2—Appointment of administrator and first meeting of creditors

436A Company may appoint administrator if board thinks it is or will become insolvent

- (1) A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that:
 - (a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and
 - (b) an administrator of the company should be appointed.
- (2) Subsection (1) does not apply to a company if a person holds an appointment as liquidator, or provisional liquidator, of the company.

436B Liquidator may appoint administrator

- (1) A liquidator or provisional liquidator of a company may by writing appoint an administrator of the company if he or she thinks that the company is insolvent, or is likely to become insolvent at some future time.
- (2) A liquidator or provisional liquidator of a company must not appoint any of the following persons under subsection (1):
 - (a) himself or herself;
 - (b) if he or she is a partner of a partnership—a partner or employee of the partnership;
 - (c) if he or she is an employee—his or her employer;
 - (d) if he or she is an employer—his or her employee;
 - (e) if he or she is a director, secretary, employee or senior manager of a corporation—a director, secretary, employee or senior manager of the corporation;unless:
 - (f) at a meeting of the company's creditors, the company's creditors pass a resolution approving the appointment; or
 - (g) the appointment is made with the leave of the Court.

Section 436C

436C Chargee may appoint administrator

- (1) A person who is entitled to enforce a charge on the whole, or substantially the whole, of a company's property may by writing appoint an administrator of the company if the charge has become, and is still, enforceable.
- (2) Subsection (1) does not apply to a company if a person holds an appointment as liquidator, or provisional liquidator, of the company.

436D Company already under administration

An administrator cannot be appointed under section 436A, 436B or 436C if the company is already under administration.

436DA Declarations by administrator—indemnities and relevant relationships

Scope

- (1) This section applies to an administrator appointed under section 436A, 436B or 436C.

Declaration of relationships and indemnities

- (2) As soon as practicable after being appointed, the administrator must make:
 - (a) a declaration of relevant relationships; and
 - (b) a declaration of indemnities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Notification of creditors

- (3) The administrator must:
 - (a) give a copy of each declaration under subsection (2) to as many of the company's creditors as reasonably practicable; and
 - (b) do so at the same time as the administrator gives those creditors notice of the meeting referred to in section 436E.

Section 436DA

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The administrator must table a copy of each declaration under subsection (2) at the meeting referred to in section 436E.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Updating of declaration

- (5) If:

- (a) at a particular time, the administrator makes:
 - (i) a declaration of relevant relationships; or
 - (ii) a declaration of indemnities;under subsection (2) or this subsection; and
- (b) at a later time:
 - (i) the declaration has become out-of-date; or
 - (ii) the administrator becomes aware of an error in the declaration;

the administrator must, as soon as practicable, make:

- (c) if subparagraph (a)(i) applies—a replacement declaration of relevant relationships; or
- (d) if subparagraph (a)(ii) applies—a replacement declaration of indemnities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) The administrator must table a copy of a replacement declaration under subsection (5):

- (a) if:
 - (i) there is a committee of creditors; and
 - (ii) the next meeting of the committee of creditors occurs before the next meeting of the company's creditors; at the next meeting of the committee of creditors; or
- (b) in any other case—at the next meeting of the company's creditors.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 436E

Defence

- (7) In a prosecution for an offence constituted by a failure to include a particular matter in a declaration under this section, it is a defence if the defendant proves that:
- (a) the defendant made reasonable enquiries; and
 - (b) after making these enquiries, the defendant had no reasonable grounds for believing that the matter should have been included in the declaration.

436E Purpose and timing of first meeting of creditors

- (1) The administrator of a company under administration must convene a meeting of the company's creditors in order to determine:
- (a) whether to appoint a committee of creditors; and
 - (b) if so, who are to be the committee's members.
- (2) The meeting must be held within 8 business days after the administration begins.
- (3) The administrator must convene the meeting by:
- (a) giving written notice of the meeting to as many of the company's creditors as reasonably practicable; and
 - (b) causing notice of the meeting to be published:
 - (i) in a national newspaper; or
 - (ii) in each State or Territory in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that State or Territory;
- at least 5 business days before the meeting.

Note: For electronic notification under paragraph (a), see section 600G.

- (3A) A notice under paragraph (3)(b) that relates to a company may be combined with a notice under paragraph 450A(1)(b) that relates to the company.
- (4) At the meeting, the company's creditors may also pass a resolution:
- (a) removing the administrator from office; and
 - (b) appointing someone else as administrator of the company.

436F Functions of committee of creditors

- (1) The functions of a committee of creditors of a company under administration are:
 - (a) to consult with the administrator about matters relating to the administration; and
 - (b) to receive and consider reports by the administrator.
- (2) A committee cannot give directions to the administrator, except as provided in subsection (3).
- (3) As and when a committee reasonably requires, the administrator must report to the committee about matters relating to the administration.

436G Membership of committee

- (1) A person can be a member of a committee of creditors of a company under administration if, and only if, the person is:
 - (a) a creditor of the company; or
 - (b) the attorney of such a creditor because of a general power of attorney; or
 - (c) authorised in writing by such a creditor to be such a member.
- (2) If a member of such a committee is a body corporate, the member may be represented at meetings of the committee by:
 - (a) an officer or employee of the member; or
 - (b) an individual authorised in writing by the member for the purposes of this subsection.

Section 437A

Division 3—Administrator assumes control of company's affairs

437A Role of administrator

- (1) While a company is under administration, the administrator:
 - (a) has control of the company's business, property and affairs; and
 - (b) may carry on that business and manage that property and those affairs; and
 - (c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and
 - (d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.
- (2) Nothing in subsection (1) limits the generality of anything else in it.

437B Administrator acts as company's agent

When performing a function, or exercising a power, as administrator of a company under administration, the administrator is taken to be acting as the company's agent.

437C Powers of other officers suspended

- (1) While a company is under administration, a person (other than the administrator) cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer or provisional liquidator of the company.
- (1A) Subsection (1) does not apply to the extent that the performance or exercise, or purported performance or exercise, is with the administrator's written approval.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.
- (1B) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section 437D

- (2) Subsection (1) does not remove an officer or provisional liquidator of a company from his or her office.
- (3) Section 437D does not limit the generality of subsection (1) of this section.

437D Only administrator can deal with company's property

- (1) This section applies where:
 - (a) a company under administration purports to enter into; or
 - (b) a person purports to enter into, on behalf of a company under administration;a transaction or dealing affecting property of the company.
- (2) The transaction or dealing is void unless:
 - (a) the administrator entered into it on the company's behalf; or
 - (b) the administrator consented to it in writing before it was entered into; or
 - (c) it was entered into under an order of the Court.
- (3) Subsection (2) does not apply to a payment made:
 - (a) by an Australian ADI out of an account kept by the company with the ADI; and
 - (b) in good faith and in the ordinary course of the ADI's banking business; and
 - (c) after the administration began and on or before the day on which:
 - (i) the administrator gives to the ADI (under subsection 450A(3) or otherwise) written notice of the appointment that began the administration; or
 - (ii) the administrator complies with paragraph 450A(1)(b) in relation to that appointment;whichever happens first.
- (4) Subsection (2) has effect subject to an order that the Court makes after the purported transaction or dealing.
- (5) If, because of subsection (2), the transaction or dealing is void, or would be void apart from subsection (4), an officer or employee of the company who:

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 3 Administrator assumes control of company's affairs

Section 437E

- (a) purported to enter into the transaction or dealing on the company's behalf; or
 - (b) was in any other way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the transaction or dealing;
- contravenes this subsection.

437E Order for compensation where officer involved in void transaction

(1) Where:

- (a) a court finds a person guilty of an offence constituted by a contravention of subsection 437D(5) (including such an offence that is taken to have been committed because of section 5 of the *Crimes Act 1914*); and
- (b) the court is satisfied that the company or another person has suffered loss or damage because of the act or omission constituting the offence;

the court may (whether or not it imposes a penalty) order the first-mentioned person to pay compensation to the company or other person, as the case may be, of such amount as the order specifies.

Note: Section 73A defines when a court is taken to find a person guilty of an offence.

- (2) An order under subsection (1) may be enforced as if it were a judgment of the court.
- (3) The power of a court under section 1318 to relieve a person from liability as mentioned in that section extends to relieving a person from liability to be ordered under this section to pay compensation.

437F Effect of administration on company's members

Transfer of shares

- (1) A transfer of shares in a company that is made during the administration of the company is void except if:
 - (a) both:
 - (i) the administrator gives written consent to the transfer;
 - and

Section 437F

- (ii) that consent is unconditional; or
 - (b) all of the following subparagraphs apply:
 - (i) the administrator gives written consent to the transfer;
 - (ii) that consent is subject to one or more specified conditions;
 - (iii) those conditions have been satisfied; or
 - (c) the Court makes an order under subsection (4) authorising the transfer.
- (2) The administrator may only give consent under paragraph (1)(a) or (b) if he or she is satisfied that the transfer is in the best interests of the company's creditors as a whole.
- (3) If the administrator refuses to give consent under paragraph (1)(a) or (b) to a transfer of shares in the company:
- (a) the prospective transferor; or
 - (b) the prospective transferee; or
 - (c) a creditor of the company;
- may apply to the Court for an order authorising the transfer.
- (4) If the Court is satisfied, on an application under subsection (3), that the transfer is in the best interests of the company's creditors as a whole, the Court may, by order, authorise the transfer.
- (5) If the administrator gives consent under paragraph (1)(b) to a transfer of shares in the company:
- (a) the prospective transferor; or
 - (b) the prospective transferee; or
 - (c) a creditor of the company;
- may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.
- (6) If the Court is satisfied, on an application under subsection (5), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (7) The administrator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (3) or (5).

Section 437F

Alteration in the status of members

- (8) An alteration in the status of members of a company that is made during the administration of the company is void except if:
 - (a) both:
 - (i) the administrator gives written consent to the alteration; and
 - (ii) that consent is unconditional; or
 - (b) all of the following subparagraphs apply:
 - (i) the administrator gives written consent to the alteration;
 - (ii) that consent is subject to one or more specified conditions;
 - (iii) those conditions have been satisfied; or
 - (c) the Court makes an order under subsection (12) authorising the alteration.
- (9) The administrator may only give consent under paragraph (8)(a) or (b) if he or she is satisfied that the alteration is in the best interests of the company's creditors as a whole.
- (10) The administrator must refuse to give consent under paragraph (8)(a) or (b) if the alteration would contravene Part 2F.2.
- (11) If the administrator refuses to give consent under paragraph (8)(a) or (b) to an alteration in the status of members of a company:
 - (a) a member of the company; or
 - (b) a creditor of the company;may apply to the Court for an order authorising the alteration.
- (12) If the Court is satisfied, on an application under subsection (11), that:
 - (a) the alteration is in the best interests of the company's creditors as a whole; and
 - (b) the alteration does not contravene Part 2F.2;the Court may, by order, authorise the alteration.
- (13) If the administrator gives consent under paragraph (8)(b) to an alteration in the status of members of a company:
 - (a) a member of the company; or
 - (b) a creditor of the company;

Section 437F

may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.

- (14) If the Court is satisfied, on an application under subsection (13), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (15) The administrator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (11) or (13).

Section 438A

Division 4—Administrator investigates company's affairs

438A Administrator to investigate affairs and consider possible courses of action

As soon as practicable after the administration of a company begins, the administrator must:

- (a) investigate the company's business, property, affairs and financial circumstances; and
- (b) form an opinion about each of the following matters:
 - (i) whether it would be in the interests of the company's creditors for the company to execute a deed of company arrangement;
 - (ii) whether it would be in the creditors' interests for the administration to end;
 - (iii) whether it would be in the creditors' interests for the company to be wound up.

438B Directors to help administrator

- (1) As soon as practicable after the administration of a company begins, each director must:
 - (a) deliver to the administrator all books in the director's possession that relate to the company, other than books that the director is entitled, as against the company and the administrator, to retain; and
 - (b) if the director knows where other books relating to the company are—tell the administrator where those books are.
- (2) Within 5 business days after the administration of a company begins or such longer period as the administrator allows, the directors must give to the administrator a statement about the company's business, property, affairs and financial circumstances.
- (3) A director of a company under administration must:
 - (a) attend on the administrator at such times; and
 - (b) give the administrator such information about the company's business, property, affairs and financial circumstances; as the administrator reasonably requires.

Section 438C

- (4) A person must not fail to comply with subsection (1), (2) or (3).
- (5) An offence based on subsection (4) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (6) Subsection (4) does not apply to the extent that the person has a reasonable excuse.
Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.

438C Administrator's rights to company's books

- (1) A person is not entitled, as against the administrator of a company under administration:
 - (a) to retain possession of books of the company; or
 - (b) to claim or enforce a lien on such books;but such a lien is not otherwise prejudiced.
- (2) Paragraph (1)(a) does not apply in relation to books of which a secured creditor of the company is entitled to possession otherwise than because of a lien, but the administrator is entitled to inspect, and make copies of, such books at any reasonable time.
- (3) The administrator of a company under administration may give to a person a written notice requiring the person to deliver to the administrator, as specified in the notice, books so specified that are in the person's possession.
- (4) A notice under subsection (3) must specify a period of at least 3 business days as the period within which the notice must be complied with.
- (5) A person must comply with a notice under subsection (3).
- (6) Subsection (5) does not apply to the extent that the person is entitled, as against the company and the administrator, to retain possession of the books.
Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.
- (7) An offence based on subsection (5) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section 438D

438D Reports by administrator

- (1) If it appears to the administrator of a company under administration that:
 - (a) a past or present officer or employee, or a member, of the company may have been guilty of an offence in relation to the company; or
 - (b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:
 - (i) may have misapplied or retained, or may have become liable or accountable for, money or property (in Australia or elsewhere) of the company; or
 - (ii) may have been guilty of negligence, default, breach of duty or breach of trust in relation to the company;the administrator must:
 - (c) lodge a report about the matter as soon as practicable; and
 - (d) give ASIC such information, and such access to and facilities for inspecting and taking copies of documents, as ASIC requires.
- (2) The administrator may also lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to ASIC's notice.
- (3) If it appears to the Court:
 - (a) that a past or present officer or employee, or a member, of a company under administration has been guilty of an offence in relation to the company; or
 - (b) that a person who has taken part in the formation, promotion, administration, management or winding up of a company under administration has engaged in conduct of a kind referred to in paragraph (1)(b) in relation to the company;and that the administrator has not lodged a report about the matter, the Court may, on the application of an interested person, direct the administrator to lodge such a report.

438E Administrator's accounts

Accounts to be lodged

- (1) The administrator of a company under administration must, within one month after:
 - (a) the end of the 6-month period beginning on the date of his or her appointment; and
 - (b) the end of each subsequent 6-month period during which he or she is the administrator of the company;lodge an account that:
 - (c) is in the prescribed form; and
 - (d) is verified by a written statement; and
 - (e) shows his or her receipts and payments during the relevant 6-month period; and
 - (f) in the case of the second or subsequent account lodged under this subsection—also shows the aggregate amount of receipts and payments during all preceding 6-month periods since his or her appointment.
- (2) A person who ceases to be the administrator of a company under administration must, within one month after the cessation, lodge an account that:
 - (a) is in the prescribed form; and
 - (b) is verified by a written statement; and
 - (c) if he or she has previously been required to lodge an account under subsection (1)—shows his or her receipts and payments during the period:
 - (i) beginning at the end of the 6-month period to which the most recent account under subsection (1) related; and
 - (ii) ending at the cessation; and
 - (d) if he or she has previously been required to lodge an account under subsection (1)—also shows the aggregate amount of receipts and payments during all previous 6-month periods since his or her appointment; and
 - (e) if he or she has not previously been required to lodge an account under subsection (1)—shows his or her receipts and payments during the period beginning on:
 - (i) the date of his or her appointment; and
 - (ii) ending at the cessation.

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 4 Administrator investigates company's affairs

Section 438E

Audit

- (3) If an account is lodged under subsection (1) or (2), ASIC may cause the account to be audited by a registered company auditor.
- (4) The auditor must prepare a report on the account.
- (5) For the purposes of the audit under subsection (3), the administrator or former administrator must give the auditor such books and information as the auditor requires.
- (6) If ASIC causes an account to be audited under subsection (3):
 - (a) ASIC must give the administrator or former administrator a copy of the report by the auditor; and
 - (b) subsection 1289(5) applies in relation to the report prepared by the auditor as if it were a document required to be lodged.
- (7) The costs of an audit under this section are to be fixed by ASIC and form part of the expenses of administration.

Division 5—Meeting of creditors decides company's future

439A Administrator to convene meeting and inform creditors

- (1) The administrator of a company under administration must convene a meeting of the company's creditors within the convening period as fixed by subsection (5) or extended under subsection (6).

Note: For body corporate representatives' powers at a meeting of the company's creditors, see section 250D.

- (2) The meeting must be held within 5 business days before, or within 5 business days after, the end of the convening period.
- (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 State or Territory in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that State or Territory;
- at least 5 business days before the meeting.

Note: For electronic notification under paragraph (a), see section 600G.

- (4) The notice given to a creditor under paragraph (3)(a) must be accompanied by a copy of:
- (a) a report by the administrator about the company's business, property, affairs and financial circumstances; and
 - (b) a statement setting out the administrator's opinion about each of the following matters:
 - (i) whether it would be in the creditors' interests for the company to execute a deed of company arrangement;
 - (ii) whether it would be in the creditors' interests for the administration to end;
 - (iii) whether it would be in the creditors' interests for the company to be wound up;
- and also setting out:

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 5 Meeting of creditors decides company's future

Section 439A

- (iv) his or her reasons for those opinions; and
- (v) such other information known to the administrator as will enable the creditors to make an informed decision about each matter covered by subparagraph (i), (ii) or (iii); and
- (c) if a deed of company arrangement is proposed—a statement setting out details of the proposed deed.

Note: For electronic notification, see section 600G.

- (5) The convening period is:
 - (a) if the day after the administration begins is in December, or is less than 25 business days before Good Friday—the period of 25 business days beginning on:
 - (i) that day; or
 - (ii) if that day is not a business day—the next business day; or
 - (b) otherwise—the period of 20 business days beginning on:
 - (i) the day after the administration begins; or
 - (ii) if that day is not a business day—the next business day.
- (6) The Court may extend the convening period on an application made during or after the period referred to in paragraph (5)(a) or (b), as the case requires.
- (7) If an application is made under subsection (6) after the period referred to in paragraph (5)(a) or (b), as the case may be, the Court may only extend the convening period if the Court is satisfied that it would be in the best interests of the creditors if the convening period were extended in accordance with the application.
- (8) If an application is made under subsection (6) after the period referred to in paragraph (5)(a) or (b), as the case may be, then, in making an order about the costs of the application, the Court must have regard to:
 - (a) the fact that the application was made after that period; and
 - (b) any other conduct engaged in by the administrator; and
 - (c) any other relevant matters.

439B Conduct of meeting

- (1) At a meeting convened under section 439A, the administrator is to preside.
- (2) A meeting convened under section 439A may be adjourned from time to time, but the period of the adjournment, or the total of the periods of adjournment, must not exceed 45 business days.

439C What creditors may decide

At a meeting convened under section 439A, the creditors may resolve:

- (a) that the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any) details of which accompanied the notice of meeting); or
- (b) that the administration should end; or
- (c) that the company be wound up.

Section 440A

Division 6—Protection of company's property during administration

440A Winding up company

- (1) A company under administration cannot be wound up voluntarily, except as provided by section 446A.
- (2) The Court is to adjourn the hearing of an application for an order to wind up a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up.
- (3) The Court is not to appoint a provisional liquidator of a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than have a provisional liquidator appointed.

440B Charge unenforceable

During the administration of a company, a person cannot enforce a charge on property of the company, except:

- (a) with the administrator's written consent; or
- (b) with the leave of the Court.

440BA Liens and pledges

If:

- (a) a company is under administration; and
- (b) property of the company is subject to a lien or pledge; and
- (c) the property is in the lawful possession of the holder of the lien or pledge;

then, during the administration of the company, the holder of the lien or pledge:

- (d) may continue to possess the property; and
- (e) cannot sell the property, or otherwise enforce the lien or pledge, except:

Section 440BB

- (i) with the administrator's written consent; or
- (ii) with the leave of the Court.

440BB Distress for rent must not be carried out

If:

- (a) a company is under administration; and
 - (b) the company is the lessee of property;
- then, during the administration of the company, distress for rent must not be carried out against the property, except:
- (c) with the administrator's written consent; or
 - (d) with the leave of the Court.

440C Owner or lessor cannot recover property used by company

During the administration of a company, the owner or lessor of property that is used or occupied by, or is in the possession of, the company cannot take possession of the property or otherwise recover it, except:

- (a) with the administrator's written consent; or
- (b) with the leave of the Court.

440D Stay of proceedings

- (1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:
 - (a) with the administrator's written consent; or
 - (b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- (2) Subsection (1) does not apply to:
 - (a) a criminal proceeding; or
 - (b) a prescribed proceeding.

440E Administrator not liable in damages for refusing consent

A company's administrator is not liable to an action or other proceeding for damages in respect of a refusal to give an approval or consent for the purposes of this Division.

Section 440F

440F Suspension of enforcement process

During the administration of a company, no enforcement process in relation to property of the company can be begun or proceeded with, except:

- (a) with the leave of the Court; and
- (b) in accordance with such terms (if any) as the Court imposes.

440G Duties of court officer in relation to property of company

- (1) This section applies where an officer of a court (in this section called the *court officer*), being:
 - (a) a sheriff; or
 - (b) the registrar or other appropriate officer of the court; receives written notice of the fact that a company is under administration.
- (2) During the administration, the court officer cannot:
 - (a) take action to sell property of the company under a process of execution; or
 - (b) pay to a person (other than the administrator):
 - (i) proceeds of selling property of the company (at any time) under a process of execution; or
 - (ii) money of the company seized (at any time) under a process of execution; or
 - (iii) money paid (at any time) to avoid seizure or sale of property of the company under a process of execution; or
 - (c) take action in relation to the attachment of a debt due to the company; or
 - (d) pay to a person (other than the administrator) money received because of the attachment of such a debt.
- (3) The court officer must deliver to the administrator any property of the company that is in the court officer's possession under a process of execution (whenever begun).
- (4) The court officer must pay to the administrator all proceeds or money of a kind referred to in paragraph (2)(b) or (d) that:
 - (a) are in the court officer's possession; or

Section 440H

- (b) have been paid into the court and have not since been paid out.
- (5) The costs of the execution or attachment are a first charge on property delivered under subsection (3) or proceeds or money paid under subsection (4).
- (6) In order to give effect to a charge under subsection (5) on proceeds or money, the court officer may retain, on behalf of the person entitled to the charge, so much of the proceeds or money as the court officer thinks necessary.
- (7) The Court may, if it is satisfied that it is appropriate to do so, permit the court officer to take action, or to make a payment, that subsection (2) would otherwise prevent.
- (8) A person who buys property in good faith under a sale under a process of execution gets a good title to the property as against the company and the administrator, despite anything else in this section.

440H Lis pendens taken to exist

- (1) This section has effect only for the purposes of a law about the effect of a lis pendens on purchasers or mortgagees.
- (2) During the administration of a company, an application to wind up the company is taken to be pending.
- (3) An application that is taken because of subsection (2) to be pending constitutes a lis pendens.

440J Administration not to trigger liability of director or relative under guarantee of company's liability

- (1) During the administration of a company:
 - (a) a guarantee of a liability of the company cannot be enforced, as against:
 - (i) a director of the company who is a natural person; or
 - (ii) a spouse or relative of such a director; and

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 6 Protection of company's property during administration

Section 440JA

- (b) without limiting paragraph (a), a proceeding in relation to such a guarantee cannot be begun against such a director, spouse or relative;
- except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- (2) While subsection (1) prevents a person (*the creditor*) from:
- (a) enforcing as against another person (*the guarantor*) a guarantee of a liability of a company; or
 - (b) beginning a proceeding against another person (*the guarantor*) in relation to such a guarantee;
- section 1323 applies in relation to the creditor and the guarantor as if:
- (c) a civil proceeding against the guarantor had begun under this Act; and
 - (d) the creditor were the only person of a kind referred to in that section as an aggrieved person.
- Note: Under section 1323 the Court can make a range of orders to ensure that a person can meet the person's liabilities.
- (3) The effect that section 1323 has because of a particular application of subsection (2) is additional to, and does not prejudice, the effect the section otherwise has.
- (4) In this section:
- guarantee*, in relation to a liability of a company, includes a relevant agreement (as defined in section 9) because of which a person other than the company has incurred, or may incur, whether jointly with the company or otherwise, a liability in respect of the liability of the company.

liability means a debt, liability or other obligation.

440JA Property subject to a banker's lien—exemption from this Division

If:

- (a) a company is under administration; and
- (b) property of the company consists of:
 - (i) cash in the form of notes or coins; or

Section 440JA

- (ii) a negotiable instrument; or
 - (iii) a security (as defined by subsection 92(1)); or
 - (iv) a derivative (as defined in Chapter 7); and
 - (c) the property is subject to a lien or pledge; and
 - (d) the holder of the lien or pledge is:
 - (i) an ADI (within the meaning of the *Banking Act 1959*);
or
 - (ii) the operator of a clearing and settlement facility (within
the meaning of section 768A);
- this Division does not apply to the property.

Section 441A

Division 7—Rights of chargee, lienee, pledgee, owner or lessor

441A Where chargee acts before or during decision period

- (1) This section applies where:
 - (a) the whole, or substantially the whole, of the property of a company under administration is subject to a charge; and
 - (b) before or during the decision period, the chargee enforced the charge in relation to all property of the company subject to the charge, whether or not the charge was enforced in the same way in relation to all that property.
- (2) This section also applies where:
 - (a) a company is under administration; and
 - (b) the same person is the chargee in relation to each of 2 or more charges on property of the company; and
 - (c) the property of the company (in this subsection called the **charged property**) subject to the respective charges together constitutes the whole, or substantially the whole, of the company's property; and
 - (d) before or during the decision period, the chargee enforced the charges in relation to all the charged property:
 - (i) whether or not the charges were enforced in the same way in relation to all the charged property; and
 - (ii) whether or not any of the charges was enforced in the same way in relation to all the property of the company subject to that charge; and
 - (iii) in so far as the charges were enforced in relation to property of the company in a way referred to in paragraph (a), (b) or (d) of the definition of **enforce** in section 9—whether or not the same person was appointed in respect of all of the last-mentioned property.
- (3) Nothing in section 437C, 440B, 440F or 440G, 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;

Section 441B

- (b) a receiver or person appointed as mentioned in paragraph (a), (b) or (d) of the definition of *enforce* in section 9 as that definition applies in relation to the charge, or any of the charges (even if appointed after the decision period).
- (4) Section 437D does not apply in relation to a transaction or dealing that affects property of the company and is entered into by:
 - (a) the chargee; or
 - (b) a receiver or person of a kind referred to in paragraph (3)(b) of this section;in the performance or exercise of a function or power as chargee, or as such a receiver or person, as the case may be.

441B Where enforcement of charge begins before administration

- (1) This section applies if, before the beginning of the administration of a company, a chargee, receiver or other person:
 - (a) entered into possession, or assumed control, of property of the company; or
 - (b) entered into an agreement to sell such property; or
 - (c) made arrangements for such property to be offered for sale by public auction; or
 - (d) publicly invited tenders for the purchase of such property; or
 - (e) exercised any other power in relation to such property;for the purpose of enforcing a charge on that property.
- (2) Nothing in section 437C, 440B, 440F or 440G prevents the chargee, receiver or other person from enforcing the charge in relation to that property.
- (3) Section 437D does not apply in relation to a transaction or dealing that affects that property and is entered into:
 - (a) in the exercise of a power of the chargee as chargee; or
 - (b) in the performance or exercise of a function or power of the receiver or other person;as the case may be.

441C Charge on perishable property

- (1) This section applies where perishable property of a company under administration is subject to a charge.

Section 441D

- (2) Nothing in section 437C or 440B prevents:
- (a) the chargee; or
 - (b) a receiver or person appointed (at any time) as mentioned in paragraph (a), (b) or (d) of the definition of *enforce* in section 9;
- from enforcing the charge, so far as it is a charge on perishable property.
- (3) Section 437D does not apply in relation to a transaction or dealing that affects perishable property of the company and is entered into by:
- (a) the chargee; or
 - (b) a receiver or person appointed (at any time) as mentioned in paragraph (a), (b) or (d) of the definition of *enforce* in section 9;
- in the performance or exercise of a function or power as chargee, or as such a receiver or person, as the case may be.

441D Court may limit powers of chargee etc. in relation to charged property

- (1) This section applies if:
- (a) for the purpose of enforcing a charge on property of a company, the chargee, or a receiver or other person, does or proposes to do 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 or proposes to do the act, or the company later begins to be under administration;
- but does not apply in a case where section 441A applies.
- (2) On application by the administrator, the Court may order the chargee, receiver or other person not to perform specified functions, or exercise specified powers, except as permitted by the order.
- (3) The Court may only make an order if satisfied that what the administrator proposes to do during the administration will adequately protect the chargee's interests.

Section 441E

- (4) An order may only be made, and only has effect, during the administration.
- (5) An order has effect despite sections 441B and 441C.

441E Giving a notice under a charge

Nothing in section 437C or 440B prevents a person from giving a notice under the provisions of a charge.

441F Where recovery of property begins before administration

- (1) This section applies if, before the beginning of the administration of a company, a receiver or other person:
 - (a) entered into possession, or assumed control, of property used or occupied by, or in the possession of, the company; or
 - (b) exercised any other power in relation to such property; for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it.
- (2) Nothing in section 437C or 440C prevents the receiver or other person from performing a function, or exercising a power, in relation to the property.
- (3) Section 437D does not apply in relation to a transaction or dealing that affects the property and is entered into in the performance or exercise of a function or power of the receiver or other person.

441G Recovering perishable property

- (1) Nothing in section 437C or 440C prevents a person from taking possession of, or otherwise recovering, perishable property.
- (2) Section 437D does not apply in relation to a transaction or dealing that affects perishable property and is entered into for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it.

Section 441H

441H Court may limit powers of receiver etc. in relation to property used by company

- (1) This section applies if:
 - (a) for the purpose of enforcing a right of the owner or lessor of property used or occupied by, or in the possession of, a company to take possession of the property or otherwise recover it, a person:
 - (i) enters into possession, or assumes control, of the property; or
 - (ii) exercises any other power in relation to the property; and
 - (b) the company is under administration when the person does so, or the company later begins to be under administration.
- (2) On application by the administrator, the Court may order the person not to perform specified functions, or exercise specified powers, in relation to the property, except as permitted by the order.
- (3) The Court may only make an order if satisfied that what the administrator proposes to do during the administration will adequately protect the interests of the owner or lessor.
- (4) An order may only be made, and only has effect, during the administration.
- (5) An order has effect despite sections 441F and 441G.

441J Giving a notice under an agreement about property

Nothing in section 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.

441JA Sale of property subject to a lien or pledge

- If:
- (a) a company is under administration; and
 - (b) property of the company is subject to a lien or pledge; and
 - (c) the property is in the possession of the holder of the lien or pledge; and
-

Section 441K

- (d) either:
 - (i) there is no other security over the property; or
 - (ii) there are one or more other securities over the property, but none of the debts secured by those other securities has a priority that is equal to or higher than the priority of the debt secured by the lien or pledge; and
 - (e) the holder of the lien or pledge sells the property;
- then:
- (f) if the net proceeds of sale equals the debt secured by the lien or pledge—the holder is entitled to retain the net proceeds; or
 - (g) if the net proceeds of sale exceeds the debt secured by the lien or pledge—the holder is entitled to retain so much of the net proceeds as equals the amount of the debt secured by the lien or pledge, but must pay the excess to the administrator on behalf of the company; or
 - (h) if the net proceeds of sale fall short of the debt secured by the lien or pledge—the holder is entitled to retain the net proceeds.

441K Effect of Division

Except as expressly provided, nothing in this Division limits the generality of anything else in it.

Division 8—Powers of administrator

442A Additional powers of administrator

Without limiting section 437A, the administrator of a company under administration has power to do any of the following:

- (a) remove from office a director of the company;
- (b) appoint a person as such a director, whether to fill a vacancy or not;
- (c) execute a document, bring or defend proceedings, or do anything else, in the company's name and on its behalf;
- (d) whatever else is necessary for the purposes of this Part.

442B Dealing with property subject to a floating charge that has crystallised

- (1) This section applies where a charge on property of a company under administration was a floating charge when created but has since become a fixed or specific charge.
- (2) Subject to sections 442C and 442D, the administrator may deal with any of that property as if the charge were still a floating charge.

442C When administrator may dispose of encumbered property

- (1) The administrator of a company under administration or of a deed of company arrangement must not dispose of:
 - (a) property of the company that is subject to a charge, lien or pledge; or
 - (b) property that is used or occupied by, or is in the possession of, the company but of which someone else is the owner or lessor.
- (2) Subsection (1) does not prevent a disposal:
 - (a) in the ordinary course of the company's business; or
 - (b) with the written consent of the chargee, lienee, pledgee, owner or lessor, as the case may be; or
 - (c) with the leave of the Court.

Section 442C

- (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, lienee, pledgee, owner or lessor, as the case may be.
- (4) If the administrator proposes to dispose of property of the company under paragraph (2)(a), the Court may, by order, direct the administrator not to carry out that proposal.
- (5) The Court may only make an order under subsection (4) on the application of:
 - (a) if paragraph (1)(a) applies—the chargee, lienee or pledgee, as the case may be; or
 - (b) if paragraph (1)(b) applies—the owner or lessor, as the case may be.
- (6) The Court may only make an order under subsection (4) if it is not satisfied that arrangements have been made to protect adequately the interests of the applicant for the order.
- (7) If:
 - (a) a company is under administration or is subject to a deed of company arrangement; and
 - (b) property of the company is subject to a charge, lien or pledge; and
 - (c) the administrator disposes of the property;
the disposal extinguishes the charge, lien or pledge.
- (8) For the purposes of paragraph (2)(a), if:
 - (a) property is used or occupied by, or is in the possession of, a company; and
 - (b) another person is the owner of the property; and
 - (c) the property is subject to a retention of title clause under a contract; and
 - (d) the owner demands the return of the property;
a disposal of the property that occurs after the demand is made does not mean that the disposal is not in the ordinary course of the company's business.

Section 442CA

442CA Property subject to a lien or pledge—inspection or examination by potential purchasers etc.

(1) If:

- (a) a company is under administration; and
- (b) property of the company is subject to a lien or pledge; and
- (c) the administrator is entitled to dispose of the property by way of sale;

the holder of the lien or pledge must, if requested to do so by the administrator, give potential purchasers a reasonable opportunity to inspect or examine the property.

(2) If:

- (a) a company is under administration; and
- (b) property of the company is subject to a lien or pledge; and
- (c) the administrator disposes of the property by way of sale;

the administrator is entitled to obtain possession of the property in order to effect the sale.

442CB Property subject to a lien or pledge or to a retention of title clause—administrator's duty of care in exercising power of sale

(1) If:

- (a) a company is under administration; and
- (b) property of the company is subject to a lien or pledge; and
- (c) the administrator is entitled to dispose of the property by way of sale;

then, in exercising a power of sale in respect of the property, the administrator must act reasonably.

(2) If:

- (a) a company is under administration; and
- (b) property is used or occupied by, or is in the possession of, the company; and
- (c) another person is the owner of the property; and
- (d) the property is subject to a retention of title clause under a contract; and
- (e) the administrator is entitled to dispose of the property by way of sale;

Section 442CC

then, in exercising a power of sale in respect of the property, the administrator must act reasonably.

- (3) Subsections (1) and (2) do not limit section 180, 181, 182, 183 or 184.

442CC Proceeds of sale of property

Property subject to a lien or pledge

- (1) If:

- (a) a company is under administration; and
- (b) property of the company is subject to a lien or pledge; and
- (c) the administrator disposes of the property by way of sale;

then:

- (d) if the net proceeds of sale equals or exceeds the total of the debts secured by:
 - (i) the lien or pledge; and
 - (ii) any other security over the property, where the debt secured by the security has a priority that is equal to or higher than the priority of the debt secured by the lien or pledge;

the administrator must:

- (iii) set aside so much of the net proceeds as equals the total of those debts; and
- (iv) apply the amount so set aside in paying those debts; or
- (e) if the net proceeds of sale fall short of the total of the debts secured by:
 - (i) the lien or pledge; and
 - (ii) any other security over the property, where the debt secured by the security has a priority that is equal to or higher than the priority of the debt secured by the lien or pledge;

then:

- (iii) the administrator must set aside the net proceeds; and
- (iv) the administrator must apply the amount so set aside in paying those debts in order of priority, on the basis that if the amount is insufficient to fully pay debts of the same priority, they must be paid proportionately; and

Section 442CC

- (v) if any of those debts is not fully paid—so much of the debt as remains unpaid may be recovered from the company as an unsecured debt.

Property subject to a retention of title clause

(2) If:

- (a) a company is under administration; and
- (b) property is used or occupied by, or is in the possession of, the company; and
- (c) another person is the owner of the property; and
- (d) the property is subject to a retention of title clause under a contract (the ***original contract***); and
- (e) the administrator disposes of the property by way of sale;

then:

- (f) if the net proceeds of sale equals or exceeds the total of:
 - (i) so much of the purchase price, or other amount, under the original contract as remains unpaid; and
 - (ii) if there are one or more securities over the property—the debts secured by the securities;

the administrator must:

- (iii) set aside so much of the net proceeds as equals that total; and
 - (iv) apply the amount so set aside in paying that total; or
- (g) if the net proceeds of sale fall short of the total of:
 - (i) so much of the purchase price, or other amount, under the original contract as remains unpaid; and
 - (ii) if there are one or more securities over the property—the debts secured by the securities;

then:

- (iii) the administrator must set aside the net proceeds; and
 - (iv) the administrator must apply the amount so set aside in paying those debts in order of priority, on the basis that if the amount is insufficient to fully pay debts of the same priority, they must be paid proportionately; and
- (v) if any of those debts is not fully paid—so much of the debt as remains unpaid may be recovered from the company as an unsecured debt.

442D Administrator's powers subject to powers of chargee, receiver etc.

- (1) Where section 441A applies, the administrator's functions and powers are subject to the functions and powers of a person as:
 - (a) the chargee; or
 - (b) a receiver or person of a kind referred to in paragraph 441A(3)(b) (even if appointed after the decision period).
- (2) Where section 441C applies, then, so far as concerns perishable property of the company, the administrator's functions and powers are subject to the functions and powers of a person as:
 - (a) the chargee; or
 - (b) a receiver or person appointed (at any time) as mentioned in paragraph (a), (b) or (d) of the definition of *enforce* in section 9.
- (3) Where section 441B, 441F or 441G applies, then, so far as concerns the property referred to in subsection 441B(1), 441F(1) or 441G(1), the administrator's functions and powers are subject to the functions and powers of the chargee, receiver or other person.

442E Administrator has qualified privilege

A person who is or has been the administrator of a company under administration has qualified privilege in respect of a statement that he or she has made, whether orally or in writing, in the course of performing or exercising any of his or her functions and powers as administrator of the company.

442F Protection of persons dealing with administrator

- (1) Sections 128 and 129 apply in relation to a company under administration as if:
 - (a) a reference in those sections to the company, or to an officer of the company, included a reference to the administrator; and
 - (b) a reference in those sections to an assumption referred to in section 129 included a reference to an assumption that the administrator is:

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 8 Powers of administrator

Section 442F

- (i) acting within his or her functions and powers as administrator; and
 - (ii) in particular, is complying with this Act.
- (2) The effect that sections 128 and 129 have because of subsection (1) of this section is additional to, and does not prejudice, the effect that sections 128 and 129 otherwise have in relation to a company under administration.

Division 9—Administrator's liability and indemnity for debts of administration

Subdivision A—Liability

443A General debts

- (1) The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for:
 - (a) services rendered; or
 - (b) goods bought; or
 - (c) property hired, leased, used or occupied; or
 - (d) the repayment of money borrowed; or
 - (e) interest in respect of money borrowed; or
 - (f) borrowing costs.
- (2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator's rights against the company or anyone else.

443B Payments for property used or occupied by, or in the possession of, the company

- (1) This section applies if, under an agreement made before the administration of a company began, the company continues to use or occupy, or to be in possession of, property of which someone else is the owner or lessor.
- (2) Subject to this section, the administrator is liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period:
 - (a) that begins more than 5 business days after the administration began; and
 - (b) throughout which:
 - (i) the company continues to use or occupy, or to be in possession of, the property; and
 - (ii) the administration continues.

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 9 Administrator's liability and indemnity for debts of administration

Section 443B

- (3) Within 5 business days after the beginning of the administration, the administrator may give to the owner or lessor a notice that specifies the property and states that the company does not propose to exercise rights in relation to the property.
- (4) Despite subsection (2), the administrator is not liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the company.
- (5) A notice under subsection (3) ceases to have effect if:
 - (a) the administrator revokes it by writing given to the owner or lessor; or
 - (b) the company exercises, or purports to exercise, a right in relation to the property.
- (6) For the purposes of subsection (5), the company does not exercise, or purport to exercise, a right in relation to the property merely because the company continues to occupy, or to be in possession of, the property, unless the company:
 - (a) also uses the property; or
 - (b) asserts a right, as against the owner or lessor, so to continue.
- (7) Subsection (2) does not apply in relation to so much of a period as elapses after:
 - (a) a receiver of the property is appointed; or
 - (b) a chargee appoints an agent, under the provisions of a charge on the property, to enter into possession, or to assume control, of the property; or
 - (c) a chargee takes possession, or assumes control, of the property under the provisions of a charge on the property;but this subsection does not affect a liability of the company.
- (8) Subsection (2) does not apply in so far as a court, by order, excuses the administrator from liability, but an order does not affect a liability of the company.
- (9) The administrator is not taken because of subsection (2):
 - (a) to have adopted the agreement; or
 - (b) to be liable under the agreement otherwise than as mentioned in subsection (2).

443BA Certain taxation liabilities

- (1) The administrator of a company is liable to pay to the Commissioner of Taxation:
- (a) each amount payable under a remittance provision because of a deduction made by the administrator; and
 - (b) without limiting paragraph (a), so much of each amount payable under a remittance provision because of a deduction made by the company during the administration as equals so much of the deduction as is attributable to a period throughout which the administration continued;
- even if the amount became payable after the end of the administration.

- (2) In this section:

remittance provision means any of the following former provisions of the *Income Tax Assessment Act 1936*:

- (aa) section 220AAE, 220AAM or 220AAR;
- (a) section 221F (except subsection 221F(12)) or section 221G (except subsection 221G(4A));
- (b) subsection 221YHDC(2);
- (c) subsection 221YHZD(1) or (1A);
- (d) subsection 221YN(1);

and any of the provisions of Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*.

unpaid amount, in relation to an estimate, has the same meaning as in Division 8 of Part VI of the *Income Tax Assessment Act 1936*.

443C Administrator not otherwise liable for company's debts

The administrator of a company under administration is not liable for the company's debts except under this Subdivision.

Subdivision B—Indemnity

443D Right of indemnity

The administrator of a company under administration is entitled to be indemnified out of the company's property for:

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 9 Administrator's liability and indemnity for debts of administration

Section 443E

- (a) debts for which the administrator is liable under Subdivision A or a remittance provision as defined in subsection 443BA(2); and
- (aa) any other debts or liabilities incurred, or damages or losses sustained, in good faith and without negligence, by the administrator in the performance or exercise, or purported performance or exercise, of any of his or her functions or powers as administrator; and
- (b) his or her remuneration as fixed under section 449E.

443E Right of indemnity has priority over other debts

- (1) Subject to section 556, a right of indemnity under section 443D has priority over:
 - (a) all the company's unsecured debts; and
 - (b) subject to subsections (2), (3) and (4) of this section, debts of the company secured by a floating charge on property of the company.
- (2) Where:
 - (a) debts of a company under administration are secured by a floating charge on property of the company; and
 - (b) before the beginning of the administration, the chargee:
 - (i) appointed a receiver of property of the company under a power contained in an instrument relating to the charge; or
 - (ii) obtained an order for the appointment of a receiver of property of the company for the purpose of enforcing the charge; or
 - (iii) entered into possession, or assumed control, of property of the company for that purpose; or
 - (iv) appointed a person so to enter into possession or assume control (whether as agent for the chargee or for the company); and
 - (c) the receiver or person is still in office, or the chargee is still in possession or control of the property;the right of indemnity of the administrator under section 443D does not have priority over those debts, except so far as the chargee agrees.

Section 443F

(3) Where:

- (a) debts of a company under administration are secured by a floating charge on property of the company; and
- (b) during the administration, the chargee, consistently with this Part:
 - (i) appoints a receiver of property of the company under a power contained in an instrument relating to the charge; or
 - (ii) obtains an order for the appointment of a receiver of property of the company for the purpose of enforcing the charge; or
 - (iii) enters into possession, or assumes control, of property of the company for that purpose; or
 - (iv) appoints a person so to enter into possession or assume control (whether as agent for the chargee or for the company);

the right of indemnity of the administrator under section 443D has priority over those debts only in so far as it is a right of indemnity for debts incurred, or remuneration accruing, before written notice of the appointment, or of the entering into possession or assuming of control, as the case may be, was given to the administrator.

(4) If:

- (a) debts of a company under administration are secured by a floating charge on property of the company; and
- (b) the administrator has a right of indemnity under section 443D;

the right of indemnity, to the extent to which it relates to debts incurred for:

- (c) the repayment of money borrowed; or
- (d) interest in respect of money borrowed; or
- (e) borrowing costs;

does not have priority over the debts mentioned in paragraph (a), except so far as the chargee consents in writing.

443F Lien to secure indemnity

- (1) To secure a right of indemnity under section 443D, the administrator has a lien on the company's property.

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 9 Administrator's liability and indemnity for debts of administration

Section 443F

- (2) A lien under subsection (1) has priority over a charge only in so far as the right of indemnity under section 443D has priority over debts secured by the charge.

Division 10—Execution and effect of deed of company arrangement

444A Effect of creditors' resolution

- (1) This section applies where, at a meeting convened under section 439A, a company's creditors resolve that the company execute a deed of company arrangement.
- (2) The administrator of the company is to be the administrator of the deed, unless the creditors, by resolution passed at the meeting, appoint someone else to be administrator of the deed.
- (3) The administrator of the company must prepare an instrument setting out the terms of the deed.
- (4) The instrument must also specify the following:
 - (a) the administrator of the deed;
 - (b) the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to pay creditors' claims;
 - (c) the nature and duration of any moratorium period for which the deed provides;
 - (d) to what extent the company is to be released from its debts;
 - (e) the conditions (if any) for the deed to come into operation;
 - (f) the conditions (if any) for the deed to continue in operation;
 - (g) the circumstances in which the deed terminates;
 - (h) the order in which proceeds of realising the property referred to in paragraph (b) are to be distributed among creditors bound by the deed;
 - (i) the day (not later than the day when the administration began) on or before which claims must have arisen if they are to be admissible under the deed.
- (5) The instrument is taken to include the prescribed provisions, except so far as it provides otherwise.

Section 444B

444B Execution of deed

- (1) This section applies where an instrument is prepared under section 444A.
- (2) The company must execute the instrument within:
 - (a) 15 business days after the end of the meeting of creditors; or
 - (b) such further period as the Court allows on an application made within those 15 business days.
- (3) The board of the company may, by resolution, authorise the instrument to be executed by or on behalf of the company.
- (4) Subsection (3) has effect despite section 437C, but does not limit the functions and powers of the administrator of the company.
- (5) The proposed administrator of the deed must execute the instrument before, or as soon as practicable after, the company executes it.
- (6) When executed by both the company and the deed's proposed administrator, the instrument becomes a deed of company arrangement.
- (7) Division 12 provides for consequences of the company contravening subsection (2).

444C Creditor etc. not to act inconsistently with deed before its execution

- (1) Where, at a meeting convened under section 439A, a company's creditors resolve that the company execute a deed of company arrangement, this section applies until:
 - (a) the deed is executed by both the company and the deed's administrator; or
 - (b) the period within which subsection 444B(2) requires the company to execute the deed ends;whichever happens sooner.
- (2) In so far as a person would be bound by the deed if it had already been so executed, the person:
 - (a) must not do anything inconsistent with the deed, except with the leave of the Court; and

(b) is subject to section 444E.

444D Effect of deed on creditors

- (1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i).
- (2) Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security, except so far as:
 - (a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the company executed the deed; or
 - (b) the Court orders under subsection 444F(2).
- (3) Subsection (1) does not affect a right that an owner or lessor of property has in relation to that property, except so far as:
 - (a) the deed so provides in relation to an owner or lessor of property who voted in favour of the resolution of creditors because of which the company executed the deed; or
 - (b) the Court orders under subsection 444F(4).
- (4) Section 231 does not prevent a creditor of the company from becoming a member of the company as a result of the deed requiring the creditor to accept an offer of shares in the company.

444DA Giving priority to eligible employee creditors

- (1) A deed of company arrangement must contain a provision to the effect that, for the purposes of the application by the administrator of the property of the company coming under his or her control under the deed, any eligible employee creditors will be entitled to a priority at least equal to what they would have been entitled if the property were applied in accordance with sections 556, 560 and 561.
- (2) However, the rule in subsection (1) does not apply if:
 - (a) at a meeting of eligible employee creditors held before the meeting convened under section 439A, the eligible employee creditors pass a resolution agreeing to the non-inclusion of such a provision; or

Section 444DA

- (b) the Court makes an order under subsection (5) approving the non-inclusion of such a provision.

Meeting of eligible employee creditors

- (3) The administrator of the company must convene a meeting under paragraph (2)(a) by giving written notice of the meeting to as many of the eligible employee creditors as reasonably practicable at least 5 business days before the meeting.
- (4) A notice under subsection (3) must be accompanied by a copy of a statement setting out:
 - (a) the administrator's opinion whether the non-inclusion of such a provision would be likely to result in the same or a better outcome for eligible employee creditors as a whole than would result from an immediate winding up of the company; and
 - (b) his or her reasons for that opinion; and
 - (c) such other information known to the administrator as will enable the eligible employee creditors to make an informed decision about the matter covered by paragraph (a).

Court approval

- (5) The Court may approve the non-inclusion of such a provision if the Court is satisfied that the non-inclusion of the provision would be likely to result in the same or a better outcome for eligible employee creditors as a whole than would result from an immediate winding up of the company.
- (6) The Court may only make an order under subsection (5) on the application of:
 - (a) the administrator, or proposed administrator, of the deed; or
 - (b) an eligible employee creditor; or
 - (c) any interested person.
- (7) The Court may make an order under subsection (5) before or after the meeting convened under section 439A.

444DB Superannuation contribution debts not admissible to proof

Whole of superannuation contribution debt

- (1) A deed of company arrangement must contain a provision to the effect that the administrator of the deed must determine that the whole of a debt by way of a superannuation contribution is not admissible to proof against the company if:
 - (a) a debt by way of superannuation guarantee charge:
 - (i) has been paid; or
 - (ii) is, or is to be, admissible to proof against the company; and
 - (b) the administrator of the deed is satisfied that the superannuation guarantee charge is attributable to the whole of the first-mentioned debt.
- (2) If the administrator of a deed of company arrangement determines, under a provision covered by subsection (1), that the whole of a debt is not admissible to proof against the company, the whole of the debt is extinguished.

Part of superannuation contribution debt

- (3) A deed of company arrangement must contain a provision to the effect that the administrator of the deed must determine that a particular part of a debt by way of a superannuation contribution is not admissible to proof against the company if:
 - (a) a debt by way of superannuation guarantee charge:
 - (i) has been paid; or
 - (ii) is, or is to be, admissible to proof against the company; and
 - (b) the administrator of the deed is satisfied that the superannuation guarantee charge is attributable to that part of the first-mentioned debt.
- (4) If the administrator of a deed of company arrangement determines, under a provision covered by subsection (3), that a part of a debt is not admissible to proof against the company, that part of the debt is extinguished.

Section 444E

Definition

- (5) In this section:

superannuation contribution has the same meaning as in section 556.

444E Protection of company's property from persons bound by deed

- (1) Until a deed of company arrangement terminates, this section applies to a person bound by the deed.
- (2) The person cannot:
- (a) make an application for an order to wind up the company; or
 - (b) proceed with such an application made before the deed became binding on the person.
- (3) The person cannot:
- (a) begin or proceed with a proceeding against the company or in relation to any of its property; or
 - (b) begin or proceed with enforcement process in relation to property of the company;
- except:
- (c) with the leave of the Court; and
 - (d) in accordance with such terms (if any) as the Court imposes.
- (4) In subsection (3):

property, in relation to the company, includes property used or occupied by, or in the possession of, the company.

444F Court may limit rights of secured creditor or owner or lessor

- (1) This section applies where:
- (a) at a meeting convened under section 439A, a company's creditors have resolved that the company execute a deed of company arrangement; or
 - (b) a company has executed such a deed.
- (2) Subject to subsection 441A(3), the Court may order a secured creditor of the company not to realise or otherwise deal with the security, except as permitted by the order.

Section 444G

- (3) The Court may only make an order under subsection (2) if satisfied that:
 - (a) for the creditor to realise or otherwise deal with the security would have a material adverse effect on achieving the purposes of the deed; and
 - (b) having regard to:
 - (i) the terms of the deed; and
 - (ii) the terms of the order; and
 - (iii) any other relevant matter;the creditor's interests will be adequately protected.
- (4) The Court may order the owner or lessor of property that is used or occupied by, or is in the possession of, the company not to take possession of the property or otherwise recover it.
- (5) The Court may only make an order under subsection (4) if satisfied that:
 - (a) for the owner or lessor to take possession of the property or otherwise recover it would have a material adverse effect on achieving the purposes of the deed; and
 - (b) having regard to:
 - (i) the terms of the deed; and
 - (ii) the terms of the order; and
 - (iii) any other relevant matter;the interests of the owner or lessor will be adequately protected.
- (6) An order under this section may be made subject to conditions.
- (7) An order under this section may only be made on the application of:
 - (a) if paragraph (1)(a) applies—the administrator of the company; or
 - (b) if paragraph (1)(b) applies—the deed's administrator.

444G Effect of deed on company, officers and members

A deed of company arrangement also binds:

- (a) the company; and
- (b) its officers and members; and

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 10 Execution and effect of deed of company arrangement

Section 444GA

- (c) the deed's administrator.

444GA Transfer of shares

- (1) The administrator of a deed of company arrangement may transfer shares in the company if the administrator has obtained:
 - (a) the written consent of the owner of the shares; or
 - (b) the leave of the Court.
- (2) A person is not entitled to oppose an application for leave under subsection (1) unless the person is:
 - (a) a member of the company; or
 - (b) a creditor of the company; or
 - (c) any other interested person; or
 - (d) ASIC.
- (3) The Court may only give leave under subsection (1) if it is satisfied that the transfer would not unfairly prejudice the interests of members of the company.

444H Extent of release of company's debts

A deed of company arrangement releases the company from a debt only in so far as:

- (a) the deed provides for the release; and
- (b) the creditor concerned is bound by the deed.

444J Guarantees and indemnities

Section 444H does not affect a creditor's rights under a guarantee or indemnity.

Division 11—Variation, termination and avoidance of deed

445A Variation of deed by creditors

A deed of company arrangement may be varied by a resolution passed at a meeting of the company's creditors convened under section 445F, but only if the variation is not materially different from a proposed variation set out in the notice of the meeting.

445B Court may cancel variation

- (1) Where a deed of company arrangement is varied under section 445A, a creditor of the company may apply to the Court for an order cancelling the variation.
- (2) On an application, the Court:
 - (a) may make an order cancelling the variation, or confirming it, either wholly or in part, on such conditions (if any) as the order specifies; and
 - (b) may make such other orders as it thinks appropriate.

445C When deed terminates

A deed of company arrangement terminates when:

- (a) the Court makes under section 445D an order terminating the deed; or
- (b) the company's creditors pass a resolution terminating the deed at a meeting that was convened under section 445F by a notice setting out the proposed resolution; or
- (c) if the deed specifies circumstances in which it is to terminate—those circumstances exist; or
- (d) the administrator of the deed executes a notice of termination of the deed in accordance with section 445FA;

whichever happens first.

Section 445CA

445CA When creditors may terminate deed

The creditors are not entitled to pass a resolution under paragraph 445C(b) unless:

- (a) there has been a breach of the deed; and
- (b) the breach has not been rectified before the resolution is passed.

445D When Court may terminate deed

- (1) The Court may make an order terminating a deed of company arrangement if satisfied that:
 - (a) information about the company's business, property, affairs or financial circumstances that:
 - (i) was false or misleading; and
 - (ii) can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed;was given to the administrator of the company or to such creditors; or
 - (b) such information was contained in a report or statement under subsection 439A(4) that accompanied a notice of the meeting at which the resolution was passed; or
 - (c) there was an omission from such a report or statement and the omission can reasonably be expected to have been material to such creditors in so deciding; or
 - (d) there has been a material contravention of the deed by a person bound by the deed; or
 - (e) effect cannot be given to the deed without injustice or undue delay; or
 - (f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:
 - (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or
 - (ii) contrary to the interests of the creditors of the company as a whole; or
 - (g) the deed should be terminated for some other reason.

Section 445E

- (2) An order may be made on the application of:
- (a) a creditor of the company; or
 - (b) the company; or
 - (ba) ASIC; or
 - (c) any other interested person.

445E Creditors may terminate deed and resolve that company be wound up

Where:

- (a) at a meeting convened under section 445F, the company's creditors pass a resolution terminating the deed; and
 - (b) the notice of the meeting set out a proposed resolution that the company be wound up;
- the creditors may also resolve at the meeting that the company be wound up.

445F Meeting of creditors to consider proposed variation or termination of deed

- (1) The administrator of a deed of company arrangement:
- (a) may at any time convene a meeting of the company's creditors; and
 - (b) must convene such a meeting if so requested in writing by creditors the value of whose claims against the company is not less than 10% of the value of all the creditors' claims against the company.
- (2) The deed's administrator must convene the meeting by giving written notice of the meeting:
- (a) to as many of the company's creditors as reasonably practicable; and
 - (b) at least 5 business days before the meeting.

Note: For electronic notification, see section 600G.

- (3) The notice given to a creditor under subsection (2) 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

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 11 Variation, termination and avoidance of deed

Section 445FA

- (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.

445FA Notice of termination of deed

- (1) If a company is subject to a deed of company arrangement, and:
 - (a) the administrator of the deed has applied all of the proceeds of the realisation of the assets available for the payment of creditors; or
 - (b) the administrator of the deed has paid to the creditors:
 - (i) the sum of 100 cents in the dollar; or
 - (ii) any lesser sum determined by the creditors at a general meeting; or
 - (c) all of the following conditions are satisfied:
 - (i) the company's obligations under the deed have been fulfilled;
 - (ii) the obligations of any other party to the deed have been fulfilled;
 - (iii) creditors' claims under the deed have been dealt with in accordance with the deed;the administrator of the deed must:
 - (d) certify to that effect in writing; and
 - (e) within 28 days, lodge with ASIC a notice of termination of the deed.

- (2) The notice of termination must be in the prescribed form.

Note: For termination of the deed, see section 445C.

445G When Court may void or validate deed

- (1) Where there is doubt, on a specific ground, whether a deed of company arrangement was entered into in accordance with this Part or complies with this Part, the administrator of the deed, a

Section 445H

member or creditor of the company, or ASIC, may apply to the Court for an order under this section.

- (2) On an application, the Court may make an order declaring the deed, or a provision of it, to be void or not to be void, as the case requires, on the ground specified in the application or some other ground.
- (3) On an application, the Court may declare the deed, or a provision of it, to be valid, despite a contravention of a provision of this Part, if the Court is satisfied that:
 - (a) the provision was substantially complied with; and
 - (b) no injustice will result for anyone bound by the deed if the contravention is disregarded.
- (4) Where the Court declares a provision of a deed of company arrangement to be void, the Court may by order vary the deed, but only with the consent of the deed's administrator.

445H Effect of termination or avoidance

The termination or avoidance, in whole or in part, of a deed of company arrangement does not affect the previous operation of the deed.

Division 11A—Deed administrator's accounts

445J Deed administrator's accounts

Accounts to be lodged

- (1) The administrator of a deed of company arrangement must, within one month after:
 - (a) the end of the 6-month period beginning on the date of his or her appointment; and
 - (b) the end of each subsequent 6-month period during which he or she is the administrator of the deed;lodge an account that:
 - (c) is in the prescribed form; and
 - (d) is verified by a written statement; and
 - (e) shows his or her receipts and payments during the relevant 6-month period; and
 - (f) in the case of the second or subsequent account lodged under this subsection—also shows the aggregate amount of receipts and payments during all preceding 6-month periods since his or her appointment.
- (2) A person who ceases to be the administrator of a deed of company arrangement must, within one month after the cessation, lodge an account that:
 - (a) is in the prescribed form; and
 - (b) is verified by a written statement; and
 - (c) if he or she has previously been required to lodge an account under subsection (1)—shows his or her receipts and payments during the period:
 - (i) beginning at the end of the 6-month period to which the most recent account under subsection (1) related; and
 - (ii) ending at the cessation; and
 - (d) if he or she has previously been required to lodge an account under subsection (1)—also shows the aggregate amount of receipts and payments during all previous 6-month periods since his or her appointment; and

Section 445J

- (e) if he or she has not previously been required to lodge an account under subsection (1)—shows his or her receipts and payments during the period beginning on:
 - (i) the date of his or her appointment; and
 - (ii) ending at the cessation.

Audit

- (3) If an account is lodged under subsection (1) or (2), ASIC may cause the account to be audited by a registered company auditor.
- (4) The auditor must prepare a report on the account.
- (5) For the purposes of the audit under subsection (3), the administrator or former administrator must give the auditor such books and information as the auditor requires.
- (6) If ASIC causes an account to be audited under subsection (3):
 - (a) ASIC must give the administrator or former administrator a copy of the report by the auditor; and
 - (b) subsection 1289(5) applies in relation to the report prepared by the auditor as if it were a document required to be lodged.
- (7) The costs of an audit under this section are to be fixed by ASIC, and are payable by the company.

Division 12—Transition to creditors' voluntary winding up

446A Administrator becomes liquidator in certain cases

- (1) This section applies if:
 - (a) the creditors of a company under administration resolve at a particular time under paragraph 439C(c) that the company be wound up; or
 - (b) a company under administration contravenes subsection 444B(2) at a particular time; or
 - (c) at a meeting convened under section 445F, a company's creditors:
 - (i) pass a resolution terminating a deed of company arrangement executed by the company; and
 - (ii) also resolve at a particular time under section 445E that the company be wound up.
- (2) The company is taken:
 - (a) to have passed, at the time referred to in paragraph (1)(a) or (b) or subparagraph (1)(c)(ii), as the case may be, a special resolution under section 491 that the company be wound up voluntarily; and
 - (b) to have done so without a declaration having been made and lodged under section 494.
- (3) Section 497 is taken to have been complied with in relation to the winding up.
- (5) The liquidator must:
 - (a) within 5 business days after the day on which the company is taken to have passed the resolution, lodge a written notice stating that the company is taken because of this section to have passed such a resolution and specifying that day; and
 - (b) cause a notice of that kind to be published, within 15 business days after that day:
 - (i) in a national newspaper; or
 - (ii) in each State or Territory in which the company has its registered office or carries on business, in a daily

Section 446B

newspaper that circulates generally in that State or Territory.

- (6) Section 482 applies in relation to the winding up as if it were a winding up in insolvency or by the Court.

Note: Section 482 empowers the Court to stay or terminate a winding up and give consequential directions.

- (7) An application under section 482 as applying because of subsection (6) may be made:

- (a) despite subsection 499(4), by the company pursuant to a resolution of the board; or
- (b) by the liquidator; or
- (c) by a creditor; or
- (d) by a contributory.

Note: See also section 499 (appointment of liquidator).

446B Regulations may provide for transition in other cases

- (1) The regulations may prescribe cases where:
 - (a) a company under administration; or
 - (b) a company that has executed a deed of company arrangement (even if the deed has terminated);is taken to have passed a special resolution under section 491 that the company be wound up voluntarily.
- (2) The regulations may provide for Part 5.5 to apply with prescribed modifications in cases prescribed for the purposes of subsection (1).
- (3) Without limiting subsection (2), the regulations may provide, in relation to such cases, for matters of a kind provided for by any of subsections 446A(2) to (7), inclusive.
- (4) Regulations in force for the purposes of this section have effect accordingly.

Section 446C

446C Liquidator may require submission of a report about the company's affairs

Scope

- (1) This section applies if:
 - (a) at a particular time (the *liquidation time*), a company resolves by special resolution that it be wound up voluntarily; and
 - (b) immediately before the liquidation time:
 - (i) the company was under administration; or
 - (ii) the company was subject to a deed of company arrangement.

Report

- (2) The liquidator may, by written notice given to a person who is or has been an officer of the company, require the person to:
 - (a) give the liquidator a report containing such information as is specified in the notice about:
 - (i) the affairs of the company, as at a date specified in the notice; or
 - (ii) if one or more of the affairs of the company are specified in the notice—those affairs, as at a date specified in the notice; and
 - (b) verify the report by a statement in writing in the prescribed form.
- (3) The following provisions have effect:
 - (a) if subparagraph (1)(b)(i) applies—the date specified in the subsection (2) notice must not be earlier than the beginning of the administration;
 - (b) if subparagraph (1)(b)(ii) applies—the date specified in the subsection (2) notice must not be earlier than the beginning of the administration that ended when the deed was executed.

Deadline for giving report to liquidator

- (4) If a person is given a notice under subsection (2), the person must give the liquidator the report required by the notice:
 - (a) within 14 days after the notice was given; or

Section 446C

- (b) if the liquidator, by written notice given to the person, allows a longer period—within that longer period.
- (5) The liquidator may allow a longer period under paragraph (4)(b) only on written application made within the period of 14 days mentioned in paragraph (4)(a).
- (6) The liquidator may allow a longer period under paragraph (4)(b) only if the liquidator believes there are special reasons for doing so.

Report to be lodged with ASIC

- (7) The liquidator must, within 7 days after receiving a report under subsection (2), lodge a copy of the report with ASIC.

Cost of preparation of report

- (8) If:
 - (a) a person is required to give a report under subsection (2); and
 - (b) the person incurs costs or expenses in relation to the preparation or giving of the report;the person is entitled to be paid by the liquidator out of the property of the company, so much of those costs and expenses as the liquidator considers reasonable.

Reasonable excuse

- (9) Subsection (4) does not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (9), see subsection 13.3(3) of the *Criminal Code*.

Strict liability

- (10) An offence against subsection 1311(1) that relates to subsection (4) of this section is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 13—Powers of Court

447A General power to make orders

- (1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.
- (2) For example, if the Court is satisfied that the administration of a company should end:
 - (a) because the company is solvent; or
 - (b) because provisions of this Part are being abused; or
 - (c) for some other reason;the Court may order under subsection (1) that the administration is to end.
- (3) An order may be made subject to conditions.
- (4) An order may be made on the application of:
 - (a) the company; or
 - (b) a creditor of the company; or
 - (c) in the case of a company under administration—the administrator of the company; or
 - (d) in the case of a company that has executed a deed of company arrangement—the deed's administrator; or
 - (e) ASIC; or
 - (f) any other interested person.

447B Orders to protect creditors during administration

- (1) On the application of ASIC, the Court may make such order as it thinks necessary to protect the interests of a company's creditors while the company is under administration.
- (2) On the application of a creditor of a company, the Court may make such order as it thinks necessary to protect the creditor's interests while the company is under administration.
- (3) An order may be made subject to conditions.

447C Court may declare whether administrator validly appointed

- (1) If there is doubt, on a specific ground, about whether a purported appointment of a person as administrator of a company, or of a deed of company arrangement, is valid, the person, the company or any of the company's creditors may apply to the Court for an order under subsection (2).
- (2) On an application, the Court may make an order declaring whether or not the purported appointment was valid on the ground specified in the application or on some other ground.

447D Administrator may seek directions

- (1) The administrator of a company under administration, or of a deed of company arrangement, may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers.
- (2) The administrator of a deed of company arrangement may apply to the Court for directions about a matter arising in connection with the operation of, or giving effect to, the deed.

447E Supervision of administrator of company or deed

- (1) Where the Court is satisfied that the administrator of a company under administration, or of a deed of company arrangement:
 - (a) has managed, or is managing, the company's business, property or affairs in a way that is prejudicial to the interests of some or all of the company's creditors or members; or
 - (b) has done an act, or made an omission, or proposes to do an act, or to make an omission, that is or would be prejudicial to such interests;the Court may make such order as it thinks just.
- (2) Where the Court is satisfied that:
 - (a) a company is under administration but:
 - (i) there is a vacancy in the office of administrator of the company; or
 - (ii) no administrator of the company is acting; or

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 13 Powers of Court

Section 447F

- (b) a deed of company arrangement has not yet terminated but:
 - (i) there is a vacancy in the office of administrator of the deed; or
 - (ii) no administrator of the deed is acting;the Court may make such order as it thinks just.
- (3) An order may only be made on the application of ASIC or of a creditor or member of the company.

447F Effect of Division

Nothing in this Division limits the generality of anything else in it.

Division 14—Qualifications of administrators

448A Appointee must consent

A person cannot be appointed as administrator of a company or of a deed of company arrangement unless:

- (a) the person has consented in writing to the appointment; and
- (b) as at the time of the appointment, the person has not withdrawn the consent.

448B Administrator must be registered liquidator

- (1) A person must not consent to be appointed, and must not act, as administrator of a company or of a deed of company arrangement.
- (2) Subsection (1) does not apply if the person is a registered liquidator.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2), see subsection 13.3(3) of the *Criminal Code*.

- (3) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

448C Disqualification of person connected with company

- (1) Subject to this section, a person must not, except with the leave of the Court, seek or consent to be appointed as, or act as, administrator of a company or of a deed of company arrangement if:
 - (a) the person, or a body corporate in which the person has a substantial holding, is indebted in an amount exceeding \$5,000 to the company or to a body corporate related to the company; or
 - (b) the person is, otherwise than in a capacity as administrator or liquidator of, or as administrator of a deed of company arrangement executed by, the company or a related body corporate, a creditor of the company or of a related body corporate in an amount exceeding \$5,000; or
 - (c) the person is a director, secretary, senior manager or employee of the company; or

Section 448C

- (d) the person is a director, secretary, senior manager or employee of a body corporate that is a mortgagee of property of the company; or
 - (e) the person is an auditor of the company; or
 - (f) the person is a partner or employee of an auditor of the company; or
 - (g) the person is a partner, employer or employee of an officer of the company; or
 - (h) the person is a partner or employee of an employee of an officer of the company.
- (1A) An offence based on subsection (1) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) For the purposes of paragraph (1)(a), disregard a debt owed by a natural person to a body corporate if:
- (a) the body corporate is:
 - (i) an Australian ADI; or
 - (ii) a body corporate registered under the *Life Insurance Act 1995*; and
 - (b) the debt arose because of a loan that the body corporate or entity made to the person in the ordinary course of its ordinary business; and
 - (c) the person used the amount of the loan to pay the whole or part of the purchase price of premises that the person uses as their principal place of residence.
- (3) For the purposes of this section, a person is taken to be a director, secretary, senior manager, employee or auditor of a company if:
- (a) the person is or has, within the last 2 years, been a director, secretary, senior manager, employee, auditor or promoter of the company or a related body corporate; and
 - (b) ASIC has not directed that the person not be taken to be a director, secretary, senior manager, employee or auditor for the purposes of this section.
- ASIC may give a direction under paragraph (b) only if it thinks fit in the circumstances of the case.
- (4) For the purposes of paragraphs (1)(g) and (h), ***officer*** does not include liquidator.

448D Disqualification of insolvent under administration

A person must not consent to be appointed, and must not act, as administrator of a company or of a deed of company arrangement if he or she is an insolvent under administration.

Section 449A

Division 15—Removal, replacement and remuneration of administrator

449A Appointment of administrator cannot be revoked

The appointment of a person as administrator of a company or of a deed of company arrangement cannot be revoked.

449B Court may remove administrator

On the application of ASIC or of a creditor, liquidator or provisional liquidator of the company concerned, the Court may:

- (a) remove from office the administrator of a company under administration or of a deed of company arrangement; and
- (b) appoint someone else as administrator of the company or deed.

449C Vacancy in office of administrator of company

- (1) Where the administrator of a company under administration:

- (a) dies; or
- (b) becomes prohibited from acting as administrator of the company; or
- (c) resigns by notice in writing given to his or her appointer and to the company;

his or her appointer may appoint someone else as administrator of the company.

- (2) In subsection (1):

appointer, in relation to the administrator of a company under administration, means:

- (a) if the administrator was appointed by the Court under section 449B or subsection (6) of this section—the Court; or
- (b) otherwise:
 - (i) if the administration began because of an appointment under section 436A—the company; or

Section 449C

- (ii) if the administration began because of an appointment under section 436B—a liquidator or provisional liquidator of the company; or
 - (iii) if the administration began because of an appointment under section 436C—a person who is entitled, or would apart from section 440B or 441D be entitled, to enforce the charge.
- (3) An appointment under subsection (1) by the company under administration must be made pursuant to a resolution of the board.
- (4) Within 5 business days after being appointed under subsection (1) as administrator of a company otherwise than by the Court, a person must convene a meeting of the company's creditors so that they may:
 - (a) determine whether to remove the person from office; and
 - (b) if so, appoint someone else as administrator of the company.
- (5) A person must convene a meeting under subsection (4) by:
 - (a) giving written notice of the meeting to as many of the company's creditors as reasonably practicable; and
 - (b) causing notice of the meeting to be published:
 - (i) in a national newspaper; or
 - (ii) in each State or Territory in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that State or Territory;at least 2 business days before the meeting.
- Note: For electronic notification under paragraph (a), see section 600G.
- (6) Where a company is under administration, but for some reason no administrator is acting, the Court may appoint a person as administrator on the application of ASIC or of an officer, member or creditor of the company.
- (7) Subsections (3) and (6) have effect despite section 437C.

Section 449CA

449CA Declarations by administrator—indemnities and relevant relationships

Scope

- (1) This section applies to an administrator appointed under subsection 449C(1) otherwise than by the Court.

Declaration of relationships and indemnities

- (2) As soon as practicable after being appointed, the administrator must make:
- (a) a declaration of relevant relationships; and
 - (b) a declaration of indemnities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Notification of creditors

- (3) The administrator must:
- (a) give a copy of each declaration under subsection (2) to as many of the company's creditors as reasonably practicable; and
 - (b) do so at the same time as the administrator gives those creditors notice of the meeting convened under subsection 449C(4).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The administrator must table a copy of each declaration under subsection (2) at the meeting convened under subsection 449C(4).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Updating of declaration

- (5) If:
- (a) at a particular time, the administrator makes:
 - (i) a declaration of relevant relationships; or
 - (ii) a declaration of indemnities;
- under subsection (2) or this subsection; and

Section 449D

- (b) at a later time:
 - (i) the declaration has become out-of-date; or
 - (ii) the administrator becomes aware of an error in the declaration;

the administrator must, as soon as practicable, make:

- (c) if subparagraph (a)(i) applies—a replacement declaration of relevant relationships; or
- (d) if subparagraph (a)(ii) applies—a replacement declaration of indemnities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) The administrator must table a copy of a replacement declaration under subsection (5):

- (a) if:
 - (i) there is a committee of creditors; and
 - (ii) the next meeting of the committee of creditors occurs before the next meeting of the company's creditors; or
- at the next meeting of the committee of creditors; or
- (b) in any other case—at the next meeting of the company's creditors.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Defence

- (7) In a prosecution for an offence constituted by a failure to include a particular matter in a declaration under this section, it is a defence if the defendant proves that:
 - (a) the defendant made reasonable enquiries; and
 - (b) after making these enquiries, the defendant had no reasonable grounds for believing that the matter should have been included in the declaration.

449D Vacancy in office of administrator of deed of company arrangement

- (1) Where the administrator of a deed of company arrangement:
 - (a) dies; or

Section 449E

- (b) becomes prohibited from acting as administrator of the deed;
or
 - (c) resigns by notice in writing given to the company;the Court may appoint someone else as administrator of the deed.
- (2) Where a deed of company arrangement has not yet terminated, but for some reason no administrator of the deed is acting, the Court may appoint a person as administrator of the deed.
- (3) An appointment may be made on the application of ASIC or of an officer, member or creditor of the company.

449E Remuneration of administrator

- (1) The administrator of a company under administration is entitled to receive such remuneration as is determined:
 - (a) by agreement between the administrator and the committee of creditors (if any); or
 - (b) by resolution of the company's creditors; or
 - (c) if there is no such agreement or resolution—by the Court.
 - (1A) The administrator of a company under a deed of company arrangement is entitled to receive such remuneration as is determined:
 - (a) by agreement between the administrator and the committee of inspection (if any); or
 - (b) by resolution of the company's creditors; or
 - (c) if there is no such agreement or resolution—by the Court.
 - (1B) To be effective, a resolution under paragraph (1)(b) or (1A)(b) must deal exclusively with remuneration of the administrator.

Note: This means that the resolution must not be bundled with any other resolution.
 - (1C) The Court may determine remuneration under paragraph (1)(c) even if:
 - (a) there has been no meeting of the committee of creditors; or
 - (b) there has been no meeting of the company's creditors.
 - (1D) The Court may determine remuneration under paragraph (1A)(c) even if:
 - (a) there has been no meeting of the committee of inspection; or
-

Section 449E

- (b) there has been no meeting of the company's creditors.
- (2) Where remuneration is determined under paragraph (1)(a) or (b) or paragraph (1A)(a) or (b), the Court may, on the application of ASIC, of the administrator or of an officer, member or creditor of the company:
 - (a) review the remuneration; and
 - (b) confirm, increase or reduce it.
- (3) Subsection (2) has effect despite section 437C.
- (4) In exercising its powers under subsection (1), (1A) or (2), the Court must have regard to whether the remuneration is reasonable, taking into account any or all of the following matters:
 - (a) the extent to which the work performed by the administrator was reasonably necessary;
 - (b) the extent to which the work likely to be performed by the administrator is likely to be reasonably necessary;
 - (c) the period during which the work was, or is likely to be, performed by the administrator;
 - (d) the quality of the work performed, or likely to be performed, by the administrator;
 - (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the administrator;
 - (f) the extent (if any) to which the administrator was, or is likely to be, required to deal with extraordinary issues;
 - (g) the extent (if any) to which the administrator was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
 - (h) the value and nature of any property dealt with, or likely to be dealt with, by the administrator;
 - (i) whether the administrator was, or is likely to be, required to deal with:
 - (i) one or more receivers; or
 - (ii) one or more receivers and managers;
 - (j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors;
 - (k) if the remuneration is ascertained, in whole or in part, on a time basis:

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 15 Removal, replacement and remuneration of administrator

Section 449E

- (i) the time properly taken, or likely to be properly taken, by the administrator in performing the work; and
 - (ii) whether the total remuneration payable to the administrator is capped;
 - (l) any other relevant matters.
 - (5) Before remuneration is determined under paragraph (1)(a), the administrator must:
 - (a) prepare a report setting out:
 - (i) such matters as will enable the committee of creditors to make an informed assessment as to whether the proposed remuneration is reasonable; and
 - (ii) a summary description of the major tasks performed, or likely to be performed, by the administrator; and
 - (iii) the costs associated with each of those major tasks; and
 - (b) give a copy of the report to each member of the committee of creditors at the same time as the member is notified of the relevant meeting of the committee.
 - (6) Before remuneration is determined under paragraph (1A)(a), the administrator must:
 - (a) prepare a report setting out:
 - (i) such matters as will enable the committee of inspection to make an informed assessment as to whether the proposed remuneration is reasonable; and
 - (ii) a summary description of the major tasks performed, or likely to be performed, by the administrator; and
 - (iii) the costs associated with each of those major tasks; and
 - (b) give a copy of the report to each member of the committee of inspection at the same time as the member is notified of the relevant meeting of the committee.
 - (7) Before remuneration is determined under paragraph (1)(b) or (1A)(b), the administrator must:
 - (a) prepare a report setting out:
 - (i) such matters as will enable the company's creditors to make an informed assessment as to whether the proposed remuneration is reasonable; and
 - (ii) a summary description of the major tasks performed, or likely to be performed, by the administrator; and
-

Section 449E

- (iii) the costs associated with each of those major tasks; and
- (b) give a copy of the report to each of the company's creditors at the same time as the creditor is notified of the relevant meeting of creditors.

Division 16—Notices about steps taken under Part

450A Appointment of administrator

- (1) Where an administrator of a company is appointed under section 436A, 436B or 436C, the administrator must:
 - (a) lodge a notice of the appointment before the end of the next business day after the appointment; and
 - (b) cause such a notice to be published, within 3 business days after the appointment:
 - (i) in a national newspaper; or
 - (ii) in each State or Territory in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that State or Territory.
- (1A) A notice under paragraph (1)(b) that relates to a company may be combined with a notice under paragraph 436E(3)(b) that relates to the company.
- (2) As soon as practicable, and in any event before the end of the next business day, after appointing an administrator of a company under section 436C, a person must give to the company a written notice of the appointment.
- (3) As soon as practicable, and in any event before the end of the next business day, after an administrator of a company is appointed under section 436A, 436B or 436C, he or she must give a written notice of the appointment to:
 - (a) each person who holds a charge on the whole, or substantially the whole, of the company's property; and
 - (b) each person who holds 2 or more charges on property of the company where the property of the company subject to the respective charges together constitutes the whole, or substantially the whole, of the company's property.

Note: For electronic notification, see section 600G.
- (4) An administrator need not give a notice under subsection (3) to the person who appointed the administrator.

Section 450B

450B Execution of deed of company arrangement

As soon as practicable after a deed of company arrangement is executed, the deed's administrator must:

- (a) send to each creditor of the company a written notice of the execution of the deed; and
- (c) lodge a copy of the deed.

Note: For electronic notification under paragraph (a), see section 600G.

450C Failure to execute deed of company arrangement

As soon as practicable after a company contravenes subsection 444B(2), the deed's administrator must:

- (a) lodge a notice that the company has failed to execute the instrument within the required period; and
- (b) send such a notice to each of the company's creditors.

Note: For electronic notification under paragraph (b), see section 600G.

450D Termination of deed of company arrangement

Where a deed of company arrangement terminates because of paragraph 445C(b), the deed's administrator must:

- (a) lodge a notice of the termination; and
- (b) send such a notice to each of the company's creditors.

Note: For electronic notification under paragraph (b), see section 600G.

450E Notice in public documents etc. of company

- (1) A company under administration must set out, in every public document, and in every negotiable instrument, of the company, after the company's name where it first appears, the expression ("administrator appointed").
- (2) Except with the leave of the Court, until a deed of company arrangement terminates, the company must set out, in every public document, and in every negotiable instrument, of the company, after the company's name where it first appears, the expression ("subject to deed of company arrangement").
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 16 Notices about steps taken under Part

Section 450F

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (4) The Court may only grant leave under subsection (2) on the application of:
 - (a) the administrator of the deed of company arrangement; or
 - (b) any interested person.
- (5) The Court may only grant leave under subsection (2) if it is satisfied that the granting of leave will not result in any significant risk to the interests of the company's creditors (including contingent or prospective creditors) as a whole.

450F Effect of contravention of this Division

A contravention of this Division does not affect the validity of anything done or omitted under this Part, except so far as the Court otherwise orders.

Division 17—Miscellaneous

451A Appointment of 2 or more administrators of company

- (1) Where a provision of this Act provides for an administrator of a company to be appointed, 2 or more persons may be appointed as administrators of the company.
- (2) Where, because of subsection (1), there are 2 or more administrators of a company:
 - (a) a function or power of an administrator of the company may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the instrument or resolution appointing them otherwise provides; and
 - (b) a reference in this Act to an administrator, or to the administrator, of a company is, in the case of the first-mentioned company, a reference to whichever one or more of those administrators the case requires.

451B Appointment of 2 or more administrators of deed of company arrangement

- (1) Where a provision of this Act provides for an administrator of a deed of company arrangement to be appointed, 2 or more persons may be appointed as administrators of the deed.
- (2) Where, because of subsection (1), there are 2 or more administrators of a deed of company arrangement:
 - (a) a function or power of an administrator of the deed may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the deed, or the resolution or instrument appointing them, otherwise provides; and
 - (b) a reference in this Act to an administrator, or to the administrator, of a deed of company arrangement is, in the case of the first-mentioned deed, a reference to whichever one or more of those administrators the case requires.

Section 451C

451C Effect of things done during administration of company

A payment made, transaction entered into, or any other act or thing done, in good faith, by, or with the consent of, the administrator of a company under administration:

- (a) is valid and effectual for the purposes of this Act; and
- (b) is not liable to be set aside in a winding up of the company.

451D Time for doing act does not run while act prevented by this Part

Where:

- (a) for any purpose (for example, the purposes of a law, agreement or instrument) an act must or may be done within a particular period or before a particular time; and
- (b) this Part prevents the act from being done within that period or before that time;

the period is extended, or the time is deferred, because of this section, according to how long this Part prevented the act from being done.

Part 5.4—Winding up in insolvency

Division 1—When company to be wound up in insolvency

459A Order that insolvent company be wound up in insolvency

On an application under section 459P, the Court may order that an insolvent company be wound up in insolvency.

459B Order made on application under section 234, 462 or 464

Where, on an application under section 234, 462 or 464, the Court is satisfied that the company is insolvent, the Court may order that the company be wound up in insolvency.

459C Presumptions to be made in certain proceedings

- (1) This section has effect for the purposes of:
 - (a) an application under section 234, 459P, 462 or 464; or
 - (b) an application for leave to make an application under section 459P.
- (2) The Court must presume that the company is insolvent if, during or after the 3 months ending on the day when the application was made:
 - (a) the company failed (as defined by section 459F) to comply with a statutory demand; or
 - (b) execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of the company was returned wholly or partly unsatisfied; or
 - (c) a receiver, or receiver and manager, of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property; or
 - (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

Section 459D

- (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.

459D Contingent or prospective liability relevant to whether company solvent

- (1) In determining, for the purposes of an application of a kind referred to in subsection 459C(1), whether or not the company is solvent, the Court may take into account a contingent or prospective liability of the company.
- (2) Subsection (1) does not limit the matters that may be taken into account in determining, for a particular purpose, whether or not a company is solvent.

Division 2—Statutory demand

459E Creditor may serve statutory demand on company

- (1) A person may serve on a company a demand relating to:
 - (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or
 - (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.
- (2) The demand:
 - (a) if it relates to a single debt—must specify the debt and its amount; and
 - (b) if it relates to 2 or more debts—must specify the total of the amounts of the debts; and
 - (c) must require the company to pay the amount of the debt, or the total of the amounts of the debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within 21 days after the demand is served on the company; and
 - (d) must be in writing; and
 - (e) must be in the prescribed form (if any); and
 - (f) must be signed by or on behalf of the creditor.
- (3) Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:
 - (a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and
 - (b) complies with the rules.
- (4) A person may make a demand under this section relating to a debt even if the debt is owed to the person as assignee.
- (5) A demand under this section may relate to a liability under any of the following provisions of the *Income Tax Assessment Act 1936*:
 - (aa) former section 220AAE, 220AAM or 220AAR;

Section 459F

- (a) former section 221F (except subsection 221F(12)), former former section 221G (except subsection 221G(4A)) or former section 221P;
 - (b) former subsection 221YHDC(2);
 - (c) former subsection 221YHZD(1) or (1A);
 - (d) former subsection 221YN(1);
 - (e) section 222AHA;
- and any of the provisions of Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*, even if the liability arose before 1 January 1991.
- (6) Subsection (5) is to avoid doubt and is not intended to limit the generality of a reference in this Act to a debt.

459F When company taken to fail to comply with statutory demand

- (1) If, as at the end of the period for compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to fail to comply with the demand at the end of that period.
- (2) The period for compliance with a statutory demand is:
 - (a) if the company applies in accordance with section 459G for an order setting aside the demand:
 - (i) if, on hearing the application under section 459G, or on an application by the company under this paragraph, the Court makes an order that extends the period for compliance with the demand—the period specified in the order, or in the last such order, as the case requires, as the period for such compliance; or
 - (ii) otherwise—the period beginning on the day when the demand is served and ending 7 days after the application under section 459G is finally determined or otherwise disposed of; or
 - (b) otherwise—21 days after the demand is served.

Division 3—Application to set aside statutory demand

459G Company may apply

- (1) A company may apply to the Court for an order setting aside a statutory demand served on the company.
- (2) An application may only be made within 21 days after the demand is so served.
- (3) An application is made in accordance with this section only if, within those 21 days:
 - (a) an affidavit supporting the application is filed with the Court; and
 - (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

459H Determination of application where there is a dispute or offsetting claim

- (1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:
 - (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
 - (b) that the company has an offsetting claim.
- (2) The Court must calculate the substantiated amount of the demand in accordance with the formula:

Admitted total – Offsetting total

where:

admitted total means:

- (a) the admitted amount of the debt; or
- (b) the total of the respective admitted amounts of the debts; as the case requires, to which the demand relates.

Section 459H

offsetting total means:

- (a) if the Court is satisfied that the company has only one offsetting claim—the amount of that claim; or
 - (b) if the Court is satisfied that the company has 2 or more offsetting claims—the total of the amounts of those claims; or
 - (c) otherwise—a nil amount.
- (3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.
- (4) If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:
- (a) varying the demand as specified in the order; and
 - (b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.
- (5) In this section:

admitted amount, in relation to a debt, means:

- (a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt—a nil amount; or
- (b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt—so much of that amount as the Court is satisfied is not the subject of such a dispute; or
- (c) otherwise—the amount of the debt.

offsetting claim means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).

respondent means the person who served the demand on the company.

- (6) This section has effect subject to section 459J.

459J Setting aside demand on other grounds

- (1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
 - (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
 - (b) there is some other reason why the demand should be set aside.
- (2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect.

459K Effect of order setting aside demand

A statutory demand has no effect while there is in force under section 459H or 459J an order setting aside the demand.

459L Dismissal of application

Unless the Court makes, on an application under section 459J, an order under section 459H or 459J, the Court is to dismiss the application.

459M Order subject to conditions

An order under section 459H or 459J may be made subject to conditions.

459N Costs where company successful

Where, on an application under section 459G, the Court sets aside the demand, it may order the person who served the demand to pay the company's costs in relation to the application.

Division 4—Application for order to wind up company in insolvency

459P Who may apply for order under section 459A

- (1) Any one or more of the following may apply to the Court for a company to be wound up in insolvency:
 - (a) the company;
 - (b) a creditor (even if the creditor is a secured creditor or is only a contingent or prospective creditor);
 - (c) a contributory;
 - (d) a director;
 - (e) a liquidator or provisional liquidator of the company;
 - (f) ASIC;
 - (g) a prescribed agency.
- (2) An application by any of the following, or by persons including any of the following, may only be made with the leave of the Court:
 - (a) a person who is a creditor only because of a contingent or prospective debt;
 - (b) a contributory;
 - (c) a director;
 - (d) ASIC.
- (3) The Court may give leave if satisfied that there is a prima facie case that the company is insolvent, but not otherwise.
- (4) The Court may give leave subject to conditions.
- (5) Except as permitted by this section, a person cannot apply for a company to be wound up in insolvency.

459Q Application relying on failure to comply with statutory demand

If an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the application:

Section 459R

- (a) must set out particulars of service of the demand on the company and of the failure to comply with the demand; and
- (b) must have attached to it:
 - (i) a copy of the demand; and
 - (ii) if the demand has been varied by an order under subsection 459H(4)—a copy of the order; and
- (c) unless the debt, or each of the debts, to which the demand relates is a judgment debt—must be accompanied by an affidavit that:
 - (i) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and
 - (ii) complies with the rules.

459R Period within which application must be determined

- (1) An application for a company to be wound up in insolvency is to be determined within 6 months after it is made.
- (2) The Court may by order extend the period within which an application must be determined, but only if:
 - (a) the Court is satisfied that special circumstances justify the extension; and
 - (b) the order is made within that period as prescribed by subsection (1), or as last extended under this subsection, as the case requires.
- (3) An application is, because of this subsection, dismissed if it is not determined as required by this section.
- (4) An order under subsection (2) may be made subject to conditions.

459S Company may not oppose application on certain grounds

- (1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground:
 - (a) that the company relied on for the purposes of an application by it for the demand to be set aside; or
 - (b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).

Section 459T

- (2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent.

459T Application to wind up joint debtors in insolvency

- (1) A single application may be made for 2 or more companies to be wound up in insolvency if they are joint debtors, whether partners or not.
- (2) On such an application, the Court may order that one or more of the companies be wound up in insolvency, even if it dismisses the application in so far as it relates to another or others.

Part 5.4A—Winding up by the Court on other grounds

461 General grounds on which company may be wound up by Court

- (1) The Court may order the winding up of a company if:
 - (a) the company has by special resolution resolved that it be wound up by the Court; or
 - (c) the company does not commence business within one year from its incorporation or suspends its business for a whole year; or
 - (d) the company has no members; or
 - (e) directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members; or
 - (f) affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole; or
 - (g) an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole; or
 - (h) ASIC has stated in a report prepared under Division 1 of Part 3 of the ASIC Act that, in its opinion:
 - (i) the company cannot pay its debts and should be wound up; or
 - (ii) it is in the interests of the public, of the members, or of the creditors, that the company should be wound up; or
 - (k) the Court is of opinion that it is just and equitable that the company be wound up.

Section 462

- (2) A company must lodge a copy of a special resolution referred to in paragraph (1)(a) with ASIC within 14 days after the resolution is passed.

462 Standing to apply for winding up

- (1) A reference in this section to an order to wind up a company is a reference to an order to wind up the company on a ground provided for by section 461.
- (2) Subject to this section, any one or more of the following may apply for an order to wind up a company:
 - (a) the company; or
 - (b) a creditor (including a contingent or prospective creditor) of the company; or
 - (c) a contributory; or
 - (d) the liquidator of the company; or
 - (e) ASIC pursuant to section 464; or
 - (f) ASIC (in the circumstances set out in subsection (2A)); or
 - (h) APRA.
- (2A) ASIC may apply for an order to wind up a company under paragraph (2)(f) only if:
 - (a) the company has no members; and
 - (b) ASIC has given the company at least 1 month's written notice of its intention to apply for the order.
- (4) The Court must not hear an application by a person being, or persons including, a contingent or prospective creditor of a company for an order to wind up the company unless and until:
 - (a) such security for costs has been given as the Court thinks reasonable; and
 - (b) a prima facie case for winding up the company has been established to the Court's satisfaction.
- (5) Except as permitted by this section, a person is not entitled to apply for an order to wind up a company.

464 Application for winding up in connection with investigation under ASIC Act

- (1) Where ASIC is investigating, or has investigated, under Division 1 of Part 3 of the ASIC Act:
 - (a) matters being, or connected with, affairs of a company; or
 - (b) matters including such matters;ASIC may apply to the Court for the winding up of the company.
- (2) For the purposes of an application under subsection (1), this Act applies, with such modifications as the circumstances require, as if a winding up application had been made by the company.
- (3) ASIC must give a copy of an application made under subsection (1) to the company.

Part 5.4B—Winding up in insolvency or by the Court

Division 1—General

465A Notice of application

A person who applies under section 459P, 462 or 464 for a company to be wound up must:

- (a) lodge notice in the prescribed form that the application has been made; and
- (b) within 14 days after the application is made, serve a copy of it on the company; and
- (c) advertise the application as prescribed by the rules.

465B Substitution of applicants

- (1) The Court may by order substitute, as applicant or applicants in an application under section 459P, 462 or 464 for a company to be wound up, a person or persons who might otherwise have so applied for the company to be wound up.
- (2) The Court may only make an order if the Court thinks it appropriate to do so:
 - (a) because the application is not being proceeded with diligently enough; or
 - (b) for some other reason.
- (3) The substituted applicant may be, or the substituted applicants may be or include, the person who was the applicant, or any of the persons who were the applicants, before the substitution.
- (4) After an order is made, the application may proceed as if the substituted applicant or applicants had been the original applicant or applicants.

465C Applicant to be given notice of grounds for opposing application

On the hearing of an application under section 459P, 462 or 464, a person may not, without the leave of the Court, oppose the application unless, within the period prescribed by the rules, the person has filed, and served on the applicant:

- (a) notice of the grounds on which the person opposes the application; and
- (b) an affidavit verifying the matters stated in the notice.

466 Payment of preliminary costs etc.

- (1) The persons, other than the company itself or the liquidator of the company, on whose application any winding up order is made must, at their own cost, prosecute all proceedings in the winding up until a liquidator has been appointed under this Part.
- (2) The liquidator must, unless the Court orders otherwise, reimburse the applicant out of the property of the company the taxed costs incurred by the applicant in any such proceedings.
- (3) Where the company has no property or does not have sufficient property and, in the opinion of ASIC, a fraud has been committed by any person in the promotion or formation of the company or by any officer or employee of the company in relation to the company since its formation, the taxed costs or so much of them as is not reimbursed under subsection (2) may be reimbursed by ASIC to an amount not exceeding \$1,000.
- (4) Where any winding up order is made upon the application of the company or a liquidator of the company, the costs incurred must, subject to any order of the Court, be paid out of the property of the company in like manner as if they were the costs of any other applicant.

467 Court's powers on hearing application

- (1) Subject to subsection (2) and section 467A, on hearing a winding up application the Court may:
 - (a) dismiss the application with or without costs, even if a ground has been proved on which the Court may order the company to be wound up on the application; or

Section 467

- (b) adjourn the hearing conditionally or unconditionally; or
 - (c) make any interim or other order that it thinks fit.
- (2) The Court must not refuse to make a winding up order merely because:
 - (a) the property of the company has been mortgaged to an amount equal to or greater than the value or amount of that property; or
 - (b) the company has no property.
- (3) The Court may, on the application coming on for hearing or at any time at the request of the applicant, the company or any person who has given notice of intention to appear on the hearing of the application:
 - (a) direct that any notices be given or any steps be taken before or after the hearing of the application; and
 - (b) dispense with any notices being given or steps being taken that are required by this Act, or by the rules, or by any prior order of the Court; and
 - (c) direct that oral evidence be taken on the application or any matter relating to the application; and
 - (d) direct a speedy hearing or trial of the application or of any issue or matter; and
 - (e) allow the application to be amended or withdrawn; and
 - (f) give such directions as to the proceedings as the Court thinks fit.
- (4) Where the application is made by members as contributories on the ground that it is just and equitable that the company should be wound up or that the directors have acted in a manner that appears to be unfair or unjust to other members, the Court, if it is of the opinion that:
 - (a) the applicants are entitled to relief either by winding up the company or by some other means; and
 - (b) in the absence of any other remedy it would be just and equitable that the company should be wound up;must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

Section 467A

- (5) Notwithstanding any rule of law to the contrary, the Court must not refuse to make an order for winding up on the application of a contributory on the ground that, if the order were made, no property of the company would be available for distribution among the contributories.
- (7) At any time after the filing of a winding up application and before a winding up order has been made, the company or any creditor or contributory may, where any action or other civil proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

467A Effect of defect or irregularity on application under Part 5.4 or 5.4A

An application under Part 5.4 or 5.4A must not be dismissed merely because of one or more of the following:

- (a) in any case—a defect or irregularity in connection with the application;
- (b) in the case of an application for a company to be wound up in insolvency—a defect in a statutory demand;

unless the Court is satisfied that substantial injustice has been caused that cannot otherwise be remedied (for example, by an adjournment or an order for costs).

467B Court may order winding up of company that is being wound up voluntarily

The Court may make an order under section 233, 459A, 459B or 461 even if the company is already being wound up voluntarily.

468 Avoidance of dispositions of property, attachments etc.

- (1) Any disposition of property of the company, other than an exempt disposition, made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void.
- (2) In subsection (1), *exempt disposition*, in relation to a company that has commenced to be wound up by the Court, means:

Section 468A

- (a) a disposition made by the liquidator, or by a provisional liquidator, of the company pursuant to a power conferred on him or her by:
 - (i) this Act; or
 - (ii) rules of the Court that appointed him or her; or
 - (iii) an order of the Court; or
 - (aa) a disposition made in good faith by, or with the consent of, an administrator of the company; or
 - (ab) a disposition under a deed of company arrangement executed by the company; or
 - (b) a payment of money by an Australian ADI out of an account maintained by the company with the Australian ADI, being a payment made by the Australian ADI:
 - (i) on or before the day on which the Court makes the order for the winding up of the company; and
 - (ii) in good faith and in the ordinary course of the banking business of the Australian ADI.
- (3) Notwithstanding subsection (1), the Court may, where an application for winding up has been filed but a winding up order has not been made, by order:
- (a) validate the making, after the filing of the application, of a disposition of property of the company; or
 - (b) permit the business of the company or a portion of the business of the company to be carried on, and such acts as are incidental to the carrying on of the business or portion of the business to be done, during the period before a winding up order (if any) is made;
- on such terms as it thinks fit.
- (4) Any attachment, sequestration, distress or execution put in force against the property of the company after the commencement of the winding up by the Court is void.

468A Effect of winding up on company's members

Transfer of shares

- (1) A transfer of shares in a company that is made after the commencement of the winding up by the Court is void except if:
 - (a) both:
-

Section 468A

- (i) the liquidator gives written consent to the transfer; and
 - (ii) that consent is unconditional; or
 - (b) all of the following subparagraphs apply:
 - (i) the liquidator gives written consent to the transfer;
 - (ii) that consent is subject to one or more specified conditions;
 - (iii) those conditions have been satisfied; or
 - (c) the Court makes an order under subsection (4) authorising the transfer.
- (2) The liquidator may only give consent under paragraph (1)(a) or (b) if he or she is satisfied that the transfer is in the best interests of the company's creditors as a whole.
- (3) If the liquidator refuses to give consent under paragraph (1)(a) or (b) to a transfer of shares in the company:
- (a) the prospective transferor; or
 - (b) the prospective transferee; or
 - (c) a creditor of the company;
- may apply to the Court for an order authorising the transfer.
- (4) If the Court is satisfied, on an application under subsection (3), that the transfer is in the best interests of the company's creditors as a whole, the Court may, by order, authorise the transfer.
- (5) If the liquidator gives consent under paragraph (1)(b) to a transfer of shares in the company:
- (a) the prospective transferor; or
 - (b) the prospective transferee; or
 - (c) a creditor of the company;
- may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.
- (6) If the Court is satisfied, on an application under subsection (5), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (7) The liquidator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (3) or (5).

Section 468A

Alteration in the status of members

- (8) An alteration in the status of members of a company that is made after the commencement of the winding up by the Court is void except if:
- (a) both:
 - (i) the liquidator gives written consent to the alteration; and
 - (ii) that consent is unconditional; or
 - (b) all of the following subparagraphs apply:
 - (i) the liquidator gives written consent to the alteration;
 - (ii) that consent is subject to one or more specified conditions;
 - (iii) those conditions have been satisfied; or
 - (c) the Court makes an order under subsection (12) authorising the alteration.
- (9) The liquidator may only give consent under paragraph (8)(a) or (b) if he or she is satisfied that the alteration is in the best interests of the company's creditors as a whole.
- (10) The liquidator must refuse to give consent under paragraph (8)(a) or (b) if the alteration would contravene Part 2F.2.
- (11) If the liquidator refuses to give consent under paragraph (8)(a) or (b) to an alteration in the status of members of a company:
- (a) a member of the company; or
 - (b) a creditor of the company;
- may apply to the Court for an order authorising the alteration.
- (12) If the Court is satisfied, on an application under subsection (11), that:
- (a) the alteration is in the best interests of the company's creditors as a whole; and
 - (b) the alteration does not contravene Part 2F.2;
- the Court may, by order, authorise the alteration.
- (13) If the liquidator gives consent under paragraph (8)(b) to an alteration in the status of members of a company:
- (a) a member of the company; or
 - (b) a creditor of the company;

may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.

- (14) If the Court is satisfied, on an application under subsection (13), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (15) The liquidator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (11) or (13).

469 Application to be lis pendens

An application for winding up a company constitutes a lis pendens for the purposes of any law relating to the effect of a lis pendens upon purchasers or mortgagees.

470 Certain notices to be lodged

- (1) An applicant (other than ASIC) for the winding up of a company must:
 - (a) lodge, not later than 10.30 am on the next business day after the filing of the application, notice of the filing of the application and of the date on which the application was filed; and
 - (b) after an order for winding up is made—lodge, within 2 business days after the making of the order, notice of the making of the order, of the date on which the order was made and of the name and address of the liquidator; and
 - (c) if the application is withdrawn or dismissed—lodge, within 2 business days after the withdrawal or dismissal of the application, notice of the withdrawal or dismissal of the application and of the date on which the application was withdrawn or dismissed.
- (2) The applicant must, within 7 days after the passing and entering of a winding up order:
 - (a) except where the applicant is ASIC—lodge an office copy of the order; and
 - (b) serve an office copy of the order on the company or such other person as the Court directs; and

Section 470

- (c) deliver to the liquidator an office copy of the order together with a statement that the order has been served as mentioned in paragraph (b).
- (3) Where ASIC applies for the winding up of a company, ASIC must enter in its records particulars of the application and, after the passing and entering of a winding up order, an office copy of the order, and subsection 1274(2) applies in relation to the document containing those particulars and to the office copy as if they were documents lodged with ASIC.

Division 1A—Effect of winding up order

471 Effect on creditors and contributories

An order for winding up a company operates in favour of all the creditors and contributories of the company as if it had been made on the joint application of all the creditors and contributories.

471A Powers of other officers suspended during winding up

- (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.
 - (1A) Subsection (1) does not apply to the extent that the performance or exercise, or purported performance or exercise, is:
 - (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.
- Note: A defendant bears an evidential burden in relation to the matters in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.
- (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.
 - (2A) Subsection (2) does not apply to the extent that the performance or exercise, or purported performance or exercise, is:
 - (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.

Section 471B

Note: A defendant bears an evidential burden in relation to the matters in subsection (2A), see subsection 13.3(3) of the *Criminal Code*.

- (2B) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) 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 a receiver and manager, appointed under a power contained in an instrument, of property of the company.

471B Stay of proceedings and suspension of enforcement process

While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

- (a) a proceeding in a court against the company or in relation to property of the company; or
 - (b) enforcement process in relation to such property;
- except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

471C Secured creditor's rights not affected

Nothing in section 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security.

Division 2—Court-appointed liquidators

472 Court to appoint official liquidator

- (1) On an order being made for the winding up of a company, the Court may appoint an official liquidator to be liquidator of the company.
- (2) The Court may appoint an official liquidator provisionally at any time after the filing of a winding up application and before the making of a winding up order or, if there is an appeal against a winding up order, before a decision in the appeal is made.
- (3) A liquidator appointed provisionally has or may exercise such functions and powers:
 - (a) as are conferred on him or her by this Act or by rules of the Court that appointed him or her; or
 - (b) as the Court specifies in the order appointing him or her.
- (4) A liquidator of a company appointed provisionally also has:
 - (a) power to carry on the company's business; and
 - (b) the powers that a liquidator of the company would have under paragraph 477(1)(d), subsection 477(2) (except paragraph 477(2)(m)) and subsection 477(3) if the company were being wound up in insolvency or by the Court.
- (5) Subsections 477(2A) and (2B) apply in relation to a company's provisional liquidator, with such modifications (if any) as the circumstances require, as if he or she were a liquidator appointed for the purposes of a winding up in insolvency or by the Court.
- (6) 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 ASIC, may apply to the Court in relation to the exercise or proposed exercise of any of those powers.

473 General provisions about liquidators

- (1) A liquidator appointed by the Court may resign or, on cause shown, be removed by the Court.

Section 473

- (2) A provisional liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined by the Court.
- (3) A liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined:
 - (a) if there is a committee of inspection—by agreement between the liquidator and the committee of inspection; or
 - (b) if there is no committee of inspection or the liquidator and the committee of inspection fail to agree:
 - (i) by resolution of the creditors; or
 - (ii) if no such resolution is passed—by the Court.

Note: See also section 579L (consolidated meetings of creditors—pooled groups).

- (4) A meeting of creditors for the purposes of subsection (3) must be convened by the liquidator by sending to each creditor a notice and a statement of all receipts and expenditure by the liquidator and of the amount of remuneration sought by him or her.

Note: For electronic notification, see section 600G.

(4A) If:

- (a) no remuneration has been fixed under paragraph (3)(a) or (b); and
- (b) a meeting of the company's creditors is convened; and
- (c) a resolution under subparagraph (3)(b)(i) cannot be passed because of the lack of a quorum; and
- (d) there has been no previous application of this subsection to the remuneration of the liquidator;

the creditors are taken to have passed a resolution under subparagraph (3)(b)(i) determining that the liquidator is entitled to remuneration of:

- (e) whichever is the greater of the following amounts:
 - (i) \$5,000;
 - (ii) if an amount is specified in regulations for the purposes of this subparagraph—that amount; or
- (f) if the liquidator determines a lesser amount—that lesser amount.

- (4B) Subsection (4A) does not limit the Court's powers under subsection (6).

- (5) Where the remuneration of a liquidator is determined in the manner specified in paragraph (3)(a), the Court may, on the application of:
- (a) a member or members whose shareholding or shareholdings represents or represent in the aggregate at least 10% of the issued capital of the company; or
 - (b) a creditor or creditors whose debts against the company that have been admitted to proof amount in the aggregate to at least 10% of the total amount of the debts of the creditors of the company that have been admitted to proof; or
 - (c) ASIC;
- review the liquidator's remuneration and may confirm, increase or reduce that remuneration.
- (6) Where the remuneration of a liquidator is determined in the manner specified in subparagraph (3)(b)(i) the Court may, on the application of the liquidator or of a member or members referred to in subsection (5), review the liquidator's remuneration and may confirm, increase or reduce that remuneration.
- (7) A vacancy in the office of a liquidator appointed by the Court must be filled by the Court.
- (8) If more than one liquidator is appointed by the Court, the Court must declare whether anything that is required or authorised by this Act to be done by the liquidator is to be done by all or any one or more of the persons appointed.
- (9) Subject to this Act, the acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his or her appointment or qualification.
- (10) In exercising its powers under subsection (3), (5) or (6), the Court must have regard to whether the remuneration is reasonable, taking into account any or all of the following matters:
- (a) the extent to which the work performed by the liquidator was reasonably necessary;
 - (b) the extent to which the work likely to be performed by the liquidator is likely to be reasonably necessary;
 - (c) the period during which the work was, or is likely to be, performed by the liquidator;
 - (d) the quality of the work performed, or likely to be performed, by the liquidator;

Section 473

- (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the liquidator;
 - (f) the extent (if any) to which the liquidator was, or is likely to be, required to deal with extraordinary issues;
 - (g) the extent (if any) to which the liquidator was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
 - (h) the value and nature of any property dealt with, or likely to be dealt with, by the liquidator;
 - (i) whether the liquidator was, or is likely to be, required to deal with:
 - (i) one or more receivers; or
 - (ii) one or more receivers and managers;
 - (j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors;
 - (k) if the remuneration is ascertained, in whole or in part, on a time basis:
 - (i) the time properly taken, or likely to be properly taken, by the liquidator in performing the work; and
 - (ii) whether the total remuneration payable to the liquidator is capped;
 - (l) any other relevant matters.
- (11) Before remuneration is determined under paragraph (3)(a), the liquidator must:
- (a) prepare a report setting out:
 - (i) such matters as will enable the committee of inspection to make an informed assessment as to whether the proposed remuneration is reasonable; and
 - (ii) a summary description of the major tasks performed, or likely to be performed, by the liquidator; and
 - (iii) the costs associated with each of those major tasks; and
 - (b) give a copy of the report to each member of the committee of inspection at the same time as the member is notified of the relevant meeting of the committee.
- (12) Before remuneration is determined under subparagraph (3)(b)(i), the liquidator must:
- (a) prepare a report setting out:

- (i) such matters as will enable the company's creditors to make an informed assessment as to whether the proposed remuneration is reasonable; and
- (ii) a summary description of the major tasks performed, or likely to be performed, by the liquidator; and
- (iii) the costs associated with each of those major tasks; and
- (b) give a copy of the report to each of the company's creditors at the same time as the creditor is notified of the relevant meeting of creditors.

474 Custody and vesting of company's property

- (1) If a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company has been appointed, the liquidator or provisional liquidator must take into his or her custody or under his or her control all the property to which the company is or appears to be entitled, and, if there is no liquidator, all the property of the company is to be in the custody of the Court.
- (2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of the company vests in the liquidator and thereupon the property to which the order relates vests accordingly and the liquidator may, after giving such indemnity (if any) as the Court directs, bring, or may defend, any action or other legal proceeding that relates to that property or that it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.
- (3) Where an order is made under this section, the liquidator of the company to which the order relates must, within 14 days after the making of the order, lodge with ASIC an office copy of the order.

475 Report as to company's affairs to be submitted to liquidator

- (1A) In this section:

liquidator includes a provisional liquidator.

- (1) There must be made out and verified by a statement in writing in the prescribed form, and submitted to the liquidator, by the persons who were, at the date of the winding up order or, if the liquidator specifies an earlier date, that earlier date, the directors and

Section 475

secretary of the company a report in the prescribed form as to the affairs of the company as at the date concerned.

- (2) The liquidator may, by notice in writing served personally or by post addressed to the last known address of the person, require one or more persons included in one or more of the following classes of persons to make out as required by the notice, verify by a statement in writing in the prescribed form, and submit to him or her, a report, containing such information as is specified in the notice as to the affairs of the company or as to such of those affairs as are specified in the notice, as at a date specified in the notice:
 - (a) persons who are or have been officers of the company;
 - (b) where the company was formed within one year before the date of the winding up order—persons who have taken part in the formation of the company;
 - (c) persons who are employed by the company or have been employed by the company within one year before the date of the winding up order and are, in the opinion of the liquidator, capable of giving the information required;
 - (d) persons who are, or have been within one year before the date of the winding up order, officers of, or employed by, a body corporate that is, or within that year was, an officer of the company to the affairs of which the report relates;
 - (e) a person who was a provisional liquidator of the company.
- (3) The liquidator may, in a notice under subsection (2), specify the information that he or she requires as to affairs of the company by reference to information required by this Act or the regulations to be included in any other report, statement or notice under this Act.
- (4) A report referred to in subsection (1) must, subject to subsection (6), be submitted to the liquidator not later than 14 days after the making of the winding up order.
- (5) A person required to submit a report referred to in subsection (2) must, subject to subsection (6), submit it not later than 14 days after the liquidator serves notice of the requirement.
- (6) Where the liquidator believes there are special reasons for so doing, he or she may, on an application in writing made to him or her before the end of the time limited by subsection (4) or (5) for the submission by the applicant of a report under subsection (1) or (2), grant, by notice in writing, an extension of that time.

- (7) A liquidator:
 - (a) must, within 7 days after receiving a report under subsection (1) or (2), cause a copy of the report to be filed with the Court and a copy to be lodged; and
 - (b) must, where he or she gives a notice under subsection (6), as soon as practicable lodge a copy of the notice.
- (8) A person making or concurring in making a report required by this section and verifying it as required by this section must, subject to the rules, be allowed, and must be paid by the liquidator out of the property of the company, such costs and expenses incurred in and about the preparation and making of the report and the verification of that report as the liquidator considers reasonable.
- (9) A person must not contravene a provision of this section.
- (10) An offence based on subsection (9) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (11) Subsection (9) does not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (11), see subsection 13.3(3) of the *Criminal Code*.

476 Preliminary report by liquidator

A liquidator of a company must, within 2 months, or such longer period (if any) as ASIC allows, after receiving a report referred to in subsection 475(1) or (2), lodge a preliminary report:

- (a) in the case of a company having a share capital—as to the amount of capital issued, subscribed and paid up; and
- (b) as to the estimated amounts of assets and liabilities of the company; and
- (c) if the company has failed—as to the causes of the failure; and
- (d) as to whether, in his or her opinion, further inquiry is desirable with respect to a matter relating to the promotion, formation or insolvency of the company or the conduct of the business of the company.

477 Powers of liquidator

- (1) Subject to this section, a liquidator of a company may:
-

Section 477

- (a) carry on the business of the company so far as is necessary for the beneficial disposal or winding up of that business; and
 - (b) subject to the provisions of section 556, pay any class of creditors in full; and
 - (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging that they have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or whereby the company may be rendered liable; and
 - (d) compromise any calls, liabilities to calls, debts, liabilities capable of resulting in debts and any claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the property or the winding up of the company, on such terms as are agreed, and take any security for the discharge of, and give a complete discharge in respect of, any such call, debt, liability or claim.
- (2) Subject to this section, a liquidator of a company may:
- (a) bring or defend any legal proceeding in the name and on behalf of the company; and
 - (b) appoint a solicitor to assist him or her in his or her duties; and
 - (c) sell or otherwise dispose of, in any manner, all or any part of the property of the company; and
 - (ca) exercise the Court's powers under subsection 483(3) (except paragraph 483(3)(b)) in relation to calls on contributories; and
 - (d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary a seal of the company; and
 - (e) subject to the *Bankruptcy Act 1966*, prove in the bankruptcy of any contributory or debtor of the company or under any deed executed under that Act; and
 - (f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company; and

- (g) obtain credit, whether on the security of the property of the company or otherwise; and
 - (h) take out letters of administration of the estate of a deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor, or his or her estate, that cannot be conveniently done in the name of the company; and
 - (k) appoint an agent to do any business that the liquidator is unable to do, or that it is unreasonable to expect the liquidator to do, in person; and
 - (m) do all such other things as are necessary for winding up the affairs of the company and distributing its property.
- (2A) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not compromise a debt to the company if the amount claimed by the company is more than:
 - (a) if an amount greater than \$20,000 is prescribed—the prescribed amount; or
 - (b) otherwise—\$20,000.
- (2B) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf (for example, but without limitation, a lease or a charge) if:
 - (a) without limiting paragraph (b), the term of the agreement may end; or
 - (b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance; more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.
- (3) A liquidator of a company is entitled to inspect at any reasonable time any books of the company and a person who refuses or fails to allow the liquidator to inspect such books at such a time is guilty of an offence.
- (4) If:
 - (a) a company is being wound up under a creditors' voluntary winding up; and
 - (b) the meeting of creditors has not been held under section 497;

Section 478

the liquidator of the company must not exercise a power conferred by paragraph (1)(b) or (c) or (2)(m), except with the leave of the Court.

- (5) For the purpose of enabling the liquidator to take out letters of administration or recover money as mentioned in paragraph (2)(h), the money due is taken to be due to the liquidator.
- (6) The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and any creditor or contributory, or ASIC, may apply to the Court with respect to any exercise or proposed exercise of any of those powers.
- (7) This section does not apply to calls on shares in a no liability company.

478 Application of property; list of contributories

- (1) As soon as practicable after the Court orders that a company be wound up, the liquidator must:
 - (a) cause the company's property to be collected and applied in discharging the company's liabilities; and
 - (b) consider whether subsection (1A) requires him or her to settle a list of contributories.
- (1A) A liquidator of a company that is being wound up in insolvency or by the Court must settle a list of contributories if it appears to him or her likely that:
 - (a) either:
 - (i) there are persons liable as members or past members to contribute to the company's property on the winding up; or
 - (ii) there will be a surplus available for distribution; and
 - (b) it will be necessary:
 - (i) to make calls on contributories; or
 - (ii) to adjust the rights of the contributories among themselves.
- (1B) A liquidator of such a company may rectify the register of members so far as required under this Part.
- (3) In settling the list of contributories the liquidator must distinguish between persons who are contributories in their own right and

persons who are contributories by virtue of representing, or being liable for the debts of, other persons.

- (4) The list of contributories, when settled in accordance with the regulations, is prima facie evidence of the liabilities of the persons named in the list as contributories.
- (5) Paragraph (1)(b) and subsections (1A), (1B), (3) and (4) do not apply to a no liability company.

479 Exercise and control of liquidator's powers

- (1) Subject to this Part, the liquidator must, in the administration of the property of the company and in the distribution of the property among its creditors, have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and, in case of conflict, any directions so given by the creditors or contributories override any directions given by the committee of inspection.
- (2) The liquidator may convene general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he or she must convene meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by at least one-tenth in value of the creditors or contributories.
- (3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.
- (4) Subject to this Part, the liquidator must use his or her own discretion in the management of affairs and property of the company and the distribution of its property.

480 Release of liquidator and deregistration of company

When the liquidator:

- (a) has realised all the property of the company or so much of that property as can in his or her opinion be realised without needlessly protracting the winding up, and has distributed a final dividend (if any) to the creditors and adjusted the rights of the contributories among themselves and made a final return (if any) to the contributories; or

Section 481

- (b) has resigned or has been removed from office;
he or she may apply to the Court:
- (c) for an order that he or she be released; or
- (d) for an order that he or she be released and that ASIC
deregister the company.

481 Orders for release or deregistration

- (1) The Court:
 - (a) may cause a report on the accounts of the liquidator to be prepared by the auditor appointed by ASIC under section 539 or by some other registered company auditor appointed by the Court; and
 - (b) on the liquidator complying with all the requirements of the Court—must take into consideration the report and any objection against the release of the liquidator that is made by the auditor or by any creditor, contributory or other person interested; and
 - (c) must either grant or withhold the release accordingly.
- (2) Where the release of a liquidator is withheld and the Court is satisfied that the liquidator has been guilty of default, negligence, breach of trust or breach of duty, the Court may order the liquidator to make good any loss that the company has sustained by reason of the default, negligence, breach of trust or breach of duty and may make such other order as it thinks fit.
- (3) An order of the Court releasing the liquidator discharges him or her from all liability in respect of any act done or default made by him or her in the administration of the affairs of the company or otherwise in relation to his or her conduct as liquidator, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.
- (4) Where the liquidator has not previously resigned or been removed, his or her release operates as a removal from office.
- (5) Where the Court has made:
 - (a) an order that the liquidator be released; or

(b) an order that the liquidator be released and that ASIC deregister the company;
the liquidator must, within 14 days after the making of the order, lodge an office copy of the order.

Division 3—General powers of Court

Subdivision A—General powers

482 Power to stay or terminate winding up

- (1) At any time during the winding up of a company, the Court may, on application, make an order staying the winding up either indefinitely or for a limited time or terminating the winding up on a day specified in the order.
- (1A) An application may be made by:
 - (a) in any case—the liquidator, or a creditor or contributory, of the company; or
 - (b) in the case of a company registered under the *Life Insurance Act 1995*—APRA; or
 - (c) in the case of a company subject to a deed of company arrangement—the administrator of the deed.
- (2) On such an application, the Court may, before making an order, direct the liquidator to give a report with respect to a relevant fact or matter.
- (2A) If such an application is made in relation to a company subject to a deed of company arrangement, then, in determining the application, the Court must have regard to all of the following matters:
 - (a) any report that has been given to the Court by:
 - (i) the administrator, or a former administrator, of the company; or
 - (ii) the liquidator, or a former liquidator, of the company; or
 - (iii) ASIC;and that contains an allegation that an officer of the company has engaged in misconduct;
 - (b) any report that has been lodged with ASIC by:
 - (i) the administrator, or a former administrator, of the company; or
 - (ii) the liquidator, or a former liquidator, of the company;

- and that contains an allegation that an officer of the company has engaged in misconduct;
- (c) the decision of the company's creditors to resolve that the company execute a deed of company arrangement;
 - (d) the statement that was given under paragraph 439A(4)(b) when the company was under administration;
 - (e) whether the deed of company arrangement is likely to result in the company becoming or remaining insolvent;
 - (f) any other relevant matters.
- (3) Where the Court has made an order terminating the winding up, the Court may give such directions as it thinks fit for the resumption of the management and control of the company by its officers, including directions for the convening of a general meeting of members of the company to elect directors of the company to take office upon the termination of the winding up.
 - (4) The costs of proceedings before the Court under this section and the costs incurred in convening a meeting of members of the company in accordance with an order of the Court under this section, if the Court so directs, forms part of the costs, charges and expenses of the winding up.
 - (5) Where an order is made under this section, the company must lodge an office copy of the order within 14 days after the making of the order.

483 Delivery of property to liquidator

- (1) The Court may require a person who is a contributory, trustee, receiver, banker, agent, officer or employee of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator, as soon as practicable or within a specified period, any money, property or books in the person's hands to which the company is prima facie entitled.
- (2) The Court may make an order directing any contributory for the time being on the list of contributories to pay to the company in the manner directed by the order any money due from the contributory or from the estate of the person whom the contributory represents, exclusive of any money payable by the contributory or the estate by virtue of any call pursuant to this Act, and may:

Section 483

- (a) in the case of an unlimited company—allow to the contributory by way of set-off any money due to the contributory or to the estate that the contributory represents from the company on any independent dealing or contract but not any money due to the contributory as a member of the company in respect of any dividend or profit; and
 - (b) in the case of a limited company—make to any director whose liability is unlimited or to such a director's estate the like allowance;
- and, in the case of any company whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him, her or it by way of set-off against any subsequent call.
- (3) The Court may, either before or after it has ascertained the sufficiency of the property of the company:
 - (a) make calls on all or any of the contributories for the time being on the list of contributories, to the extent of their liability, for payment of any money that the Court considers necessary to satisfy the debts and liabilities of the company and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves; and
 - (b) make an order for payment of any calls made by the Court or the company's liquidator;
- and, in making a call, may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.
- (3A) Subsection (3) does not apply to a no liability company.
- (4) The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the amount due into a bank named in the order to the account of the liquidator instead of to the liquidator, and any such order may be enforced in the same manner as if it had directed payment to the liquidator.
- (5) All money and securities paid or delivered into any bank under this Division are subject in all respects to orders of the Court.
- (6) An order made by the Court under this section is, subject to any right of appeal, conclusive evidence that the money (if any)

thereby appearing to be due or ordered to be paid is due, and all other pertinent matters stated in the order are taken to be truly stated as against all persons and in all proceedings.

484 Appointment of special manager

- (1) The liquidator may, if satisfied that the nature of the property or business of the company, or the interests of the creditors or contributories generally, requires or require the appointment of a special manager of the property or business of the company other than himself or herself, apply to the Court, and the Court may appoint a special manager of the property or business to act during such time as the Court directs with such powers, including any of the powers of a receiver or manager, as are entrusted to him or her by the Court.
- (2) The special manager:
 - (a) must give such security and account in such manner as the Court directs; and
 - (b) must receive such remuneration as is fixed by the Court; and
 - (c) may at any time resign by notice in writing addressed to the liquidator or may, on cause shown, be removed by the Court.

485 Claims of creditors and distribution of property

- (1) The Court may fix a day on or before which creditors are to prove their debts or claims or after which they will be excluded from the benefit of any distribution made before those debts are proved.
- (2) The Court must adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled to it.
- (3) The Court may, in the event of the property being insufficient to satisfy the liabilities, make an order as to the payment out of the property of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.

486 Inspection of books by creditors and contributories

The Court may make such order for inspection of the books of the company by creditors and contributories as the Court thinks just, and any books in the possession of the company may be inspected

Section 486A

by creditors or contributories accordingly, but not further or otherwise.

486A Court may make order to prevent officer or related entity from avoiding liability to company

- (1) The Court may make one or more of the following:
 - (a) an order prohibiting, either absolutely or subject to conditions, an officer, employee or related entity of a company from taking or sending out of this jurisdiction, or out of Australia, money or other property of the company or of the officer, employee or related entity;
 - (b) an order appointing:
 - (i) a receiver or trustee, with specified powers, of property of an officer or employee of a company, or of property of a related entity of a company that is a natural person; or
 - (ii) a receiver, or a receiver and manager, with specified powers, of property of a related entity of a company that is not a natural person;
 - (c) an order requiring an officer or employee of a company, or a related entity of a company that is a natural person, to surrender to the Court his or her passport and any other specified documents;
 - (d) an order prohibiting an officer or employee of a company, or a related entity of a company that is a natural person, from leaving this jurisdiction, or Australia, without the Court's consent.
- (2) The Court may only make an order under subsection (1) if:
 - (a) the company is being wound up in insolvency or by the Court, or an application has been made for the company to be so wound up; and
 - (b) the Court is satisfied that there is at least a prima facie case that the officer, employee or related entity is or will become liable:
 - (i) to pay money to the company, whether in respect of a debt, by way of damages or compensation or otherwise; or
 - (ii) to account for property of the company; and

Section 486A

- (c) the Court is also satisfied that there is substantial evidence that the officer, employee or related entity:
 - (i) has concealed or removed money or other property, has tried to do so, or intends to do so; or
 - (ii) has tried to leave this jurisdiction or Australia, or intends to do so;in order to avoid that liability or its consequences; and
 - (d) the Court thinks it necessary or desirable to make the order in order to protect the company's rights against the officer, employee or related entity.
- (2A) An order under subsection (1) may only be made on the application of:
- (a) a liquidator or provisional liquidator of the company; or
 - (b) ASIC.
- (3) On hearing an application for an order under subsection (1), the Court must have regard to any relevant application under section 1323.
- (4) Before considering an application for an order under subsection (1), the Court may, if in the Court's opinion it is desirable to do so, grant an interim order of the kind applied for that is expressed to have effect until the application is determined.
- (5) The Court must not require an applicant for an order under subsection (1) or any other person, as a condition of granting an interim order under subsection (4), to give an undertaking as to damages.
- (6) On the application of a person who applied for, or is affected by, an order under this section, the Court may make a further order discharging or varying the first-mentioned order.
- (7) An order under subsection (1) may be expressed to operate for a specified period or until it is discharged by a further order.
- (8) A person must not intentionally or recklessly contravene an order under this section that is applicable to the person.
- (9) This section has effect subject to the *Bankruptcy Act 1966*.
- (10) Nothing in this section affects any other powers of the Court.
-

Section 486B

486B Warrant to arrest person who is absconding, or who has dealt with property or books, in order to avoid obligations in connection with winding up

- (1) The Court may issue a warrant for a person to be arrested and brought before the Court if:
 - (a) a company is being wound up in insolvency or by the Court, or an application has been made for a company to be so wound up; and
 - (b) the Court is satisfied that the person:
 - (i) is about to leave this jurisdiction, or Australia, in order to avoid:
 - (A) paying money payable to the company; or
 - (B) being examined about the company's affairs; or
 - (C) complying with an order of the Court, or some other obligation, under this Chapter in connection with the winding up; or
 - (ii) has concealed or removed property of the company in order to prevent or delay the taking of the property into the liquidator's custody or control; or
 - (iii) has destroyed, concealed or removed books of the company or is about to do so.
- Note: For procedures relating to such a warrant, see Subdivision B.
- (2) A warrant under subsection (1) may also provide for property or books of the company in the person's possession to be seized and delivered into the custody of a specified person.
- (3) A warrant under subsection (1) may only be issued on the application of:
 - (a) a liquidator or provisional liquidator of the company; or
 - (b) ASIC.

487 Power to arrest absconding contributory

The Court, at any time before or after making a winding up order, on proof of probable cause for believing that a contributory is about to leave this jurisdiction, or Australia, or otherwise to abscond or to remove or conceal any of his or her property for the purpose of evading payment of calls or of avoiding examination respecting affairs of the company, may cause the contributory to be

arrested and held in custody and the books and movable personal property of the contributory to be seized and safely kept until such time as the Court orders.

488 Delegation to liquidator of certain powers of Court

- (1) Provision may be made by rules or regulations for enabling or requiring all or any of the powers and duties conferred and imposed on the Court by this Part in respect of:
 - (a) the holding and conducting of meetings to ascertain the wishes of creditors and contributories; and
 - (b) the paying, delivery, conveyance, surrender or transfer of money, property or books to the liquidator; and
 - (c) the adjusting of the rights of contributories among themselves and the distribution of any surplus among the persons entitled to it; and
 - (d) the fixing of a time within which debts and claims must be proved;to be exercised or performed by the liquidator as an officer of the Court and subject to the control of the Court.
- (2) Despite anything in rules or regulations made for the purposes of subsection (1), a liquidator may distribute a surplus only with the Court's special leave.

489 Powers of Court cumulative

Any powers conferred on the Court by this Act are in addition to, and not in derogation of, any existing powers of instituting proceedings against any contributory or debtor of the company or the property of any contributory or debtor for the recovery of any call or other sums.

Subdivision B—Procedures relating to section 486B warrants

489A Arrest of person subject to warrant

- If:
- (a) the Court issues a section 486B warrant for a person to be arrested and brought before the Court; and
 - (b) the person is not in prison;

Section 489B

the person named in the section 486B warrant may be arrested by:

- (c) an officer of the police force of the State or Territory in which the person is found; or
- (d) the Sheriff of that State or Territory, or any of the Sheriff's officers; or
- (e) a member or special member of the Australian Federal Police.

489B Procedure after arrest

- (1) As soon as practicable after being arrested, the person is to be taken before the Court that issued the section 486B warrant.
- (2) The Court must order:
 - (a) that the person be remanded on bail on condition that the person appear at the Court at such time and place as the Court specifies; or
 - (b) that the person be remanded in such custody or otherwise as the Court specifies, pending the person's appearance at the Court at such time and place as the Court specifies; or
 - (c) that the person be released.
- (3) An order under this section may be subject to other specified conditions.

489C Procedure on remand on bail

- (1) If the Court has made an order under section 489B remanding the person (the *warrant person*) on bail, the Court must prepare, or cause to be prepared, an instrument setting out the conditions to which the grant of bail is subject.
- (2) The instrument must be signed by:
 - (a) a judge of the Court, or the person who prepared the instrument; and
 - (b) the warrant person.
- (3) The warrant person must be given a copy of the instrument.
- (4) The Court must revoke the order, and make an order remanding the warrant person in custody, if that person:
 - (a) refuses to sign the instrument; or

Section 489D

- (b) does not comply with a condition to which the grant of bail is subject and that condition is a condition precedent to that person's release on bail.

489D Court's power to make orders under section 486A, 598 or 1323

- (1) To avoid doubt, the Court may make an order under section 486A, 598 or 1323 in relation to a person appearing before the Court under:
 - (a) a section 486B warrant; or
 - (b) section 489B.
- (2) Subsection (1) does not limit section 486A, 598 or 1323.

489E Jurisdiction under this Subdivision

To avoid doubt, a matter arising under this Subdivision is a civil matter for the purposes of Part 9.6A.

Part 5.5—Voluntary winding up

Division 1—Resolution for winding up

490 When company cannot wind up voluntarily

Except with the leave of the Court, a company cannot resolve that it be wound up voluntarily if:

- (a) an application for the company to be wound up in insolvency has been filed; or
- (b) the Court has ordered that the company be wound up in insolvency, whether or not the order was made on such an application.

491 Circumstances in which company may be wound up voluntarily

- (1) Subject to section 490, a company may be wound up voluntarily if the company so resolves by special resolution.
- (2) A company must:
 - (a) within 7 days after the passing of a resolution for voluntary winding up, lodge a printed copy of the resolution; and
 - (b) within 21 days after the passing of the resolution, cause notice of the resolution to be published in the *Gazette*.

493 Effect of voluntary winding up

The company must, from the passing of the resolution, cease to carry on its business except so far as is in the opinion of the liquidator required for the beneficial disposal or winding up of that business, but the corporate state and corporate powers of the company, notwithstanding anything to the contrary in its constitution, continue until it is deregistered.

493A Effect of voluntary winding up on company's members

Transfer of shares

- (1) A transfer of shares in a company that is made after the passing of the resolution is void except if:

Section 493A

- (a) both:
 - (i) the liquidator gives written consent to the transfer; and
 - (ii) that consent is unconditional; or
 - (b) all of the following subparagraphs apply:
 - (i) the liquidator gives written consent to the transfer;
 - (ii) that consent is subject to one or more specified conditions;
 - (iii) those conditions have been satisfied; or
 - (c) the Court makes an order under subsection (4) authorising the transfer.
- (2) The liquidator may only give consent under paragraph (1)(a) or (b) if he or she is satisfied that the transfer is in the best interests of the company's creditors as a whole.
- (3) If the liquidator refuses to give consent under paragraph (1)(a) or (b) to a transfer of shares in the company:
 - (a) the prospective transferor; or
 - (b) the prospective transferee; or
 - (c) a creditor of the company;may apply to the Court for an order authorising the transfer.
- (4) If the Court is satisfied, on an application under subsection (3), that the transfer is in the best interests of the company's creditors as a whole, the Court may, by order, authorise the transfer.
- (5) If the liquidator gives consent under paragraph (1)(b) to a transfer of shares in the company:
 - (a) the prospective transferor; or
 - (b) the prospective transferee; or
 - (c) a creditor of the company;may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.
- (6) If the Court is satisfied, on an application under subsection (5), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (7) The liquidator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (3) or (5).

Section 493A

Alteration in the status of members

- (8) An alteration in the status of members of a company that is made after the passing of the resolution is void except if:
 - (a) both:
 - (i) the liquidator gives written consent to the alteration; and
 - (ii) that consent is unconditional; or
 - (b) all of the following subparagraphs apply:
 - (i) the liquidator gives written consent to the alteration;
 - (ii) that consent is subject to one or more specified conditions;
 - (iii) those conditions have been satisfied; or
 - (c) the Court makes an order under subsection (12) authorising the alteration.
- (9) The liquidator may only give consent under paragraph (8)(a) or (b) if he or she is satisfied that the alteration is in the best interests of the company's creditors as a whole.
- (10) The liquidator must refuse to give consent under paragraph (8)(a) or (b) if the alteration would contravene Part 2F.2.
- (11) If the liquidator refuses to give consent under paragraph (8)(a) or (b) to an alteration in the status of members of a company:
 - (a) a member of the company; or
 - (b) a creditor of the company;may apply to the Court for an order authorising the alteration.
- (12) If the Court is satisfied, on an application under subsection (11), that:
 - (a) the alteration is in the best interests of the company's creditors as a whole; and
 - (b) the alteration does not contravene Part 2F.2;the Court may, by order, authorise the alteration.
- (13) If the liquidator gives consent under paragraph (8)(b) to an alteration in the status of members of a company:
 - (a) a member of the company; or
 - (b) a creditor of the company;may apply to the Court for an order setting aside any or all of the conditions to which the consent is subject.

- (14) If the Court is satisfied, on an application under subsection (13), that any or all of the conditions covered by the application are not in the best interests of the company's creditors as a whole, the Court may, by order, set aside any or all of the conditions.
- (15) The liquidator is entitled to be heard in a proceeding before the Court in relation to an application under subsection (11) or (13).

494 Declaration of solvency

- (1) Where it is proposed to wind up a company voluntarily, a majority of the directors may, before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a written declaration to the effect that they have made an inquiry into the affairs of the company and that, at a meeting of directors, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.
- (2) There must be attached to the declaration a statement of affairs of the company showing, in the prescribed form:
 - (a) the property of the company, and the total amount expected to be realised from that property; and
 - (b) the liabilities of the company; and
 - (c) the estimated expenses of winding up;made up to the latest practicable date before the making of the declaration.
- (3) A declaration so made has no effect for the purposes of this Act unless:
 - (a) the declaration is made at the meeting of directors referred to in subsection (1); and
 - (b) the declaration is lodged before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out or such later date as ASIC, whether before, on or after the first-mentioned date, allows; and
 - (c) the resolution for voluntary winding up is passed within the period of 5 weeks after the making of the declaration or within such further period after the making of that

Section 494

declaration as ASIC, whether before or after the end of that period of 5 weeks, allows.

- (4) A director who makes a declaration under this section (including a declaration that has no effect for the purposes of this Act by reason of subsection (3)) without having reasonable grounds for his or her opinion that the company will be able to pay its debts in full within the period stated in the declaration is guilty of an offence.
- (5) If the company is wound up pursuant to a resolution for voluntary winding up passed within the period of 5 weeks after the making of the declaration or, if pursuant to paragraph (3)(c) ASIC has allowed a further period after the end of that period of 5 weeks, within that further period, but its debts are not paid or provided for in full within the period stated in the declaration, it is to be presumed, unless the contrary is shown, that a director who made the declaration did not have reasonable grounds for his or her opinion.

Division 2—Members' voluntary winding up

495 Liquidators

- (1) The company in general meeting must appoint a liquidator or liquidators for the purpose of winding up the affairs and distributing the property of the company and may fix the remuneration to be paid to him, her or them.
- (2) On the appointment of a liquidator, all the powers of the directors cease except so far as the liquidator, or the company in general meeting with the consent of the liquidator, approves the continuance of any of those powers.
- (3) If a vacancy occurs by death, resignation or otherwise in the office of a liquidator, the company in general meeting may fill the vacancy by the appointment of a liquidator and fix the remuneration to be paid to him or her, and for that purpose a general meeting may be convened by any contributory or, if there were 2 or more liquidators, by the continuing liquidators.
- (4) The meeting must be held in the manner provided by this Act or by the company's constitution or in such manner as is, on application by any contributory or by the continuing liquidators, determined by the Court.
- (5) Before remuneration is fixed under subsection (1), the liquidator or liquidators, or the proposed liquidator or proposed liquidators, must:
 - (a) prepare a report setting out:
 - (i) such matters as will enable the members to make an informed assessment as to whether the proposed remuneration is reasonable; and
 - (ii) a summary description of the major tasks likely to be performed by the liquidator or liquidators, or the proposed liquidator or proposed liquidators, as the case may be; and
 - (iii) the costs associated with each of those major tasks; and
 - (b) table the report at the relevant general meeting.

496 Duty of liquidator where company turns out to be insolvent

- (1) Where a declaration has been made under section 494 and the liquidator is at any time of the opinion that the company will not be able to pay or provide for the payment of its debts in full within the period stated in the declaration, he or she must do one of the following as soon as practicable:
 - (a) apply under section 459P for the company to be wound up in insolvency;
 - (b) appoint an administrator of the company under section 436B;
 - (c) convene a meeting of the company's creditors;and if he or she convenes such a meeting, the following subsections apply.
- (2) The liquidator must send to each creditor with the notice convening the meeting a list setting out the names of all creditors, the addresses of those creditors and the estimated amounts of their claims, as shown in the records of the company.

Note: For electronic notification, see section 600G.
- (3) Unless the Court otherwise orders, nothing in subsection (2) requires the liquidator to send, to a creditor whose debt does not exceed \$1,000, a list of creditors referred to in that subsection, but the notice convening the meeting that is sent to a creditor to whom the liquidator is not required to send such a list must specify a place at which copies of the list referred to in that subsection can be obtained on request made orally or in writing and, where such a creditor so requests, the liquidator must as soon as practicable comply with the request.
- (4) The liquidator must lay before the meeting a statement of the assets and liabilities of the company and the notice convening the meeting must draw the attention of the creditors to the right conferred upon them by subsection (5).
- (5) The creditors may, at the meeting convened under subsection (1), appoint some other person to be liquidator for the purpose of winding up the affairs and distributing the property of the company instead of the liquidator appointed by the company.
- (6) If the creditors appoint some other person under subsection (5), the winding up must thereafter proceed as if the winding up were a creditors' voluntary winding up.

- (7) The liquidator or, if another person is appointed by the creditors to be liquidator, the person so appointed must, within 7 days after a meeting has been held pursuant to subsection (1), lodge a notice in the prescribed form.
- (8) Where the liquidator has convened a meeting under subsection (1) and the creditors do not appoint a liquidator instead of the liquidator appointed by the company, the winding up must thereafter proceed as if the winding up were a creditors' voluntary winding up, but the liquidator is not required to convene an annual meeting of creditors at the end of the first year from the commencement of the winding up if the meeting held under subsection (1) was held less than 3 months before the end of that year.
- (9) An offence based on subsection (2), (3), (4), (5), (6), (7) or (8) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 3—Creditors' voluntary winding up

497 Meeting of creditors

- (1) The liquidator of the company must cause a meeting of the company's creditors to be convened within 11 days after the day of the meeting of the company at which the resolution for voluntary winding up is passed.
- (2) The liquidator must convene the meeting of the company's creditors at a date, time and place convenient to the majority in value of the creditors and must:
 - (a) give to the creditors at least 7 days notice of the meeting; and
 - (b) send to each creditor with the notice:
 - (i) a summary of the affairs of the company in the prescribed form; and
 - (ii) a list setting out the names of all creditors, the addresses of those creditors and the estimated amounts of their claims, as shown in the records of the company;
 - (c) lodge, not less than 7 days before the day fixed for the holding of the meeting, a copy of the notice given under paragraph (a) and of the documents that accompanied that notice in accordance with paragraph (b); and
 - (d) publish, not less than 7 days, nor more than 14 days, before the day fixed for the holding of the meeting, a copy of the notice given or to be given under paragraph (a) in each State, Territory or external Territory in which the company carries on business or has carried on business at any time during the 2 years immediately preceding that day in a daily newspaper circulating generally in that State, Territory or external Territory.

Note: For electronic notification under paragraph (a), see section 600G.

- (3) Unless the Court otherwise orders, nothing in subsection (2) requires the liquidator to send, to a creditor whose debt does not exceed \$1,000, a list of creditors referred to in subparagraph (2)(b)(ii), but the notice convening the meeting that is sent to a creditor to whom the liquidator is not required to send such a list must specify a place at which copies of the list referred to in that subparagraph can be obtained on request made orally or

in writing and, where such a creditor so requests, the liquidator must as soon as practicable comply with the request.

- (5) Within 7 days after the day of the meeting of the company at which the resolution for voluntary winding up is passed, the directors of the company must give the liquidator a statement, in the prescribed form, about the company's business, property, affairs and financial circumstances.
- (7A) An offence based on subsection (5) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (8) The creditors may appoint one of their number or the liquidator to preside at the meeting.
- (9) The chair must, at the meeting, determine whether the meeting has been held at a date, time and place convenient to the majority in value of the creditors and his or her decision is final.
- (10) At a meeting of creditors held under this section the creditors may determine the matters referred to in paragraphs 548(1)(a) and (b) and, where the creditors so determine those matters, a meeting of the creditors for the purposes of section 548 is taken to have been held and the determinations are taken to have been made under that section.
- (11) At a meeting of creditors held under this section, the creditors may, by resolution:
- (a) remove the liquidator from office; and
 - (b) appoint another person as liquidator instead.

498 Power to adjourn meeting

- (1) A meeting convened under section 497 may by resolution be adjourned from time to time to a time and day specified in the resolution but must not be adjourned to a day later than 21 days after the day for which the meeting was originally convened.
- (2) Where a meeting is adjourned, the adjourned meeting must, unless it is otherwise provided by the resolution by which it is adjourned, be held at the same place as the original meeting.
- (3) Where a meeting is adjourned to a day more than 8 days after the passing of the resolution by which it is adjourned, the company

Section 499

must cause notice of the day, time and place of the resumption of the meeting to be published, in a daily newspaper circulating generally in the State or Territory in which the resumed meeting is to be held, at least 7 days before that day.

- (4) If the meeting of the company is adjourned and the resolution for winding up is passed at an adjourned meeting, any resolution passed at the meeting of the creditors has effect as if it had been passed immediately after the passing of the resolution for winding up.

499 Liquidators

- (1) The company in general meeting must appoint a liquidator for the purpose of winding up the affairs and distributing the property of the company.
- (2) However, subsection (1) does not apply to the company if section 446A applies in relation to the company.
- (2A) If section 446A applies in relation to the company because of paragraph 446A(1)(a):
- (a) the company's creditors may, at the meeting at which the resolution referred to in that paragraph is passed, appoint a person to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and
 - (b) if an appointment is not made under paragraph (a) of this subsection before the end of the meeting at which the resolution referred to in paragraph 446A(1)(a) is passed:
 - (i) the company's creditors are taken to have appointed the administrator of the company to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and
 - (ii) the appointment under subparagraph (i) of this paragraph takes effect at the end of that meeting.
- (2B) If section 446A applies in relation to the company because of paragraph 446A(1)(b):
- (a) the company's creditors are taken to have appointed the administrator of the company to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and

- (b) the appointment takes effect at the time referred to in that paragraph.
- (2C) If section 446A applies in relation to the company because of paragraph 446A(1)(c):
- (a) the company's creditors may, at the meeting at which the resolution referred to in subparagraph 446A(1)(c)(ii) is passed, appoint a person to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and
 - (b) if an appointment is not made under paragraph (a) of this subsection before the end of the meeting at which the resolution referred to in subparagraph 446A(1)(c)(ii) is passed:
 - (i) the company's creditors are taken to have appointed the administrator of the deed to be liquidator for the purpose of winding up the affairs and distributing the property of the company; and
 - (ii) the appointment under subparagraph (i) of this paragraph takes effect at the end of that meeting.
- (3) The remuneration to be paid to the liquidator may be fixed:
- (a) if there is a committee of inspection—by that committee; or
 - (b) by resolution of the creditors.
- (3A) If:
- (a) no remuneration has been fixed under subsection (3); and
 - (b) a meeting of the company's creditors is convened; and
 - (c) a resolution under paragraph (3)(b) cannot be passed because of the lack of a quorum; and
 - (d) there has been no previous application of this subsection to the remuneration of the liquidator;
- the creditors are taken to have passed a resolution under paragraph (3)(b) determining that the liquidator is entitled to remuneration of:
- (e) whichever is the greater of the following amounts:
 - (i) \$5,000;
 - (ii) if an amount is specified in regulations for the purposes of this subparagraph—that amount; or

Section 499

- (f) if the liquidator determines a lesser amount—that lesser amount.
- (4) On the appointment of a liquidator, the powers of the directors cease except so far as the committee of inspection, or, if there is no such committee, the creditors, approve the continuance of any of those powers.
- (5) If a liquidator, other than a liquidator appointed by or by the direction of the Court, dies, resigns or otherwise vacates his or her office, the creditors may fill the vacancy and, for the purpose of so doing, a meeting of the creditors may be convened by any 2 of their number.
- (6) Before remuneration is fixed under subsection (3) by the committee of inspection, the liquidator must:
 - (a) prepare a report setting out:
 - (i) such matters as will enable the members of the committee to make an informed assessment as to whether the proposed remuneration is reasonable; and
 - (ii) a summary description of the major tasks performed, or likely to be performed, by the liquidator; and
 - (iii) the costs associated with each of those major tasks; and
 - (b) give a copy of the report to each member of the committee at the same time as the member is notified of the relevant meeting of the committee.
- (7) Before remuneration is fixed under subsection (3) by resolution of the creditors, the liquidator must:
 - (a) prepare a report setting out:
 - (i) such matters as will enable the creditors to make an informed assessment as to whether the proposed remuneration is reasonable; and
 - (ii) a summary description of the major tasks performed, or likely to be performed, by the liquidator; and
 - (iii) the costs associated with each of those major tasks; and
 - (b) give a copy of the report to each of the creditors at the same time as the creditor is notified of the relevant meeting of creditors.

500 Execution and civil proceedings

- (1) Any attachment, sequestration, distress or execution put in force against the property of the company after the passing of the resolution for voluntary winding up is void.
- (2) After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.
- (3) The Court may require any contributory, trustee, receiver, banker, agent, officer or employee of the company to pay, deliver, convey, surrender or transfer forthwith or within such time as the Court directs to the liquidator any money, property or books in his, her or its hands to which the company is prima facie entitled.

Division 4—Voluntary winding up generally

501 Distribution of property of company

Subject to the provisions of this Act as to preferential payments, the property of a company must, on its winding up, be applied in satisfaction of its liabilities equally and, subject to that application, must, unless the company's constitution otherwise provides, be distributed among the members according to their rights and interests in the company.

502 Appointment of liquidator

If from any cause there is no liquidator acting, the Court may appoint a liquidator.

503 Removal of liquidator

The Court may, on cause shown, remove a liquidator and appoint another liquidator.

504 Review of liquidator's remuneration

- (1) Any member or creditor, or the liquidator, may at any time before the deregistration of the company apply to the Court to review the amount of the remuneration of the liquidator, and the decision of the Court is final and conclusive.
- (2) In exercising its powers under subsection (1), the Court must have regard to whether the remuneration is reasonable, taking into account any or all of the following matters:
 - (a) the extent to which the work performed by the liquidator was reasonably necessary;
 - (b) the extent to which the work likely to be performed by the liquidator is likely to be reasonably necessary;
 - (c) the period during which the work was, or is likely to be, performed by the liquidator;
 - (d) the quality of the work performed, or likely to be performed, by the liquidator;

- (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the liquidator;
- (f) the extent (if any) to which the liquidator was, or is likely to be, required to deal with extraordinary issues;
- (g) the extent (if any) to which the liquidator was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
- (h) the value and nature of any property dealt with, or likely to be dealt with, by the liquidator;
- (i) whether the liquidator was, or is likely to be, required to deal with:
 - (i) one or more receivers; or
 - (ii) one or more receivers and managers;
- (j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors;
- (k) if the remuneration is ascertained, in whole or in part, on a time basis:
 - (i) the time properly taken, or likely to be properly taken, by the liquidator in performing the work; and
 - (ii) whether the total remuneration payable to the liquidator is capped;
- (l) any other relevant matters.

505 Acts of liquidator valid etc.

- (1) The acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his or her appointment or qualification.
- (2) A conveyance, assignment, transfer, mortgage, charge or other disposition of a company's property made by a liquidator is, notwithstanding any defect or irregularity affecting the validity of the winding up or the appointment of the liquidator, valid in favour of any person taking such property in good faith and for value and without actual knowledge of the defect or irregularity.
- (3) A person making or permitting a disposition of property to a liquidator is to be protected and indemnified in so doing notwithstanding any defect or irregularity affecting the validity of the winding up or the appointment of the liquidator that is not then known to that person.

Section 506

- (4) For the purposes of this section, a disposition of property is taken to include a payment of money.

506 Powers and duties of liquidator

- (1) The liquidator may:
- (b) exercise any of the powers that this Act confers on a liquidator in a winding up in insolvency or by the Court; or
 - (c) exercise the power under section 478 of a liquidator appointed by the Court to settle a list of contributories; or
 - (d) exercise the Court's powers under subsection 483(3) (except paragraph 483(3)(b)) in relation to calls on contributories; or
 - (e) exercise the power of the Court of fixing a time within which debts and claims must be proved; or
 - (f) convene a general meeting of the company for the purpose of obtaining the sanction of the company by special resolution in respect of any matter or for any other purpose he or she thinks fit.
- (1A) Subsections 477(2A) and (2B) apply in relation to the liquidator as if:
- (a) he or she were a liquidator in a winding up in insolvency or by the Court; and
 - (b) in the case of a members' voluntary winding up—a reference in those subsections to an approval were a reference to the approval of a special resolution of the company.
- (1B) The company must lodge a copy of a special resolution referred to in paragraph (1A)(b) with ASIC within 14 days after the resolution is passed.
- (2) A list of contributories settled in accordance with paragraph (1)(c) is prima facie evidence of the liability of the persons named in the list to be contributories.
- (3) The liquidator must pay the debts of the company and adjust the rights of the contributories among themselves.

506A Declarations by liquidator—relevant relationships

Scope

- (1) This section applies if the liquidator of a company is required to convene a meeting under section 497.

Declaration of relevant relationships

- (2) Before convening the meeting, the liquidator must make a declaration of relevant relationships.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Notification of creditors

- (3) The liquidator must:
- (a) give a copy of each declaration under subsection (2) to as many of the company's creditors as reasonably practicable; and
 - (b) do so at the same time as the liquidator gives those creditors notice of the meeting.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The liquidator must table a copy of each declaration under subsection (2) at the meeting.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Updating of declaration

- (5) If:
- (a) at a particular time, the liquidator makes a declaration of relevant relationships under subsection (2) or this subsection; and
 - (b) at a later time:
 - (i) the declaration has become out-of-date; or
 - (ii) the liquidator becomes aware of an error in the declaration;
- the liquidator must, as soon as practicable, make a replacement declaration of relevant relationships.

Section 507

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) The liquidator must table a copy of a replacement declaration under subsection (4):
- (a) if:
 - (i) there is a committee of inspection; and
 - (ii) the next meeting of the committee of inspection occurs before the next meeting of the company's creditors; or
 - (b) in any other case—at the next meeting of the company's creditors.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Defence

- (7) In a prosecution for an offence constituted by a failure to include a particular matter in a declaration under this section, it is a defence if the defendant proves that:
- (a) the defendant made reasonable enquiries; and
 - (b) after making these enquiries, the defendant had no reasonable grounds for believing that the matter should have been included in the declaration.

507 Power of liquidator to accept shares etc. as consideration for sale of property of company

- (1) This section applies where it is proposed to transfer or sell to a body corporate the whole or a part of the business or property of a company.
- (2) The liquidator of the company may, with the sanction of a special resolution of the company conferring on the liquidator either a general authority or an authority in respect of a particular arrangement, enter into an arrangement under which, in compensation or part compensation for the transfer or sale:
 - (a) the liquidator is to receive shares, debentures, policies or other like interests in the body corporate for distribution among the members of the company; or
 - (b) the members of the company may, instead of, or as well as, receiving cash, shares, debentures, policies or other like

interests in the body corporate, participate in the profits of, or receive any other benefit from, the body corporate.

- (3) A transfer, sale or arrangement under this section is binding on the members of the company.
- (4) If a member of the company who did not vote in favour of a special resolution expresses dissent from the resolution in writing addressed to the liquidator and left at the office of the liquidator within 7 days after the passing of the resolution, the member may require the liquidator either to abstain from carrying the resolution into effect or to purchase the member's interest at a price to be determined by agreement or by arbitration under this section.
- (5) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is deregistered and be raised by the liquidator in such manner as is determined by special resolution.
- (6) A special resolution is not invalid for the purposes of this section because it is passed before, or concurrently with, a resolution for voluntary winding up or for appointing liquidators but, if an order for winding up the company by the Court is made within 1 year after the passing of the resolution, the resolution is not valid unless sanctioned by the Court.
- (7) For the purposes of an arbitration under this section, the agreed arbitration law applies as if there were a submission for reference to 2 arbitrators, one to be appointed by each party.
- (7A) Parties to the arbitration may agree on the State or Territory in this jurisdiction whose law is to govern the arbitration. The ***agreed arbitration law*** is the law of that State or Territory relating to commercial arbitration.
- (8) The appointment of an arbitrator may be made in writing signed by:
 - (a) if there is only one liquidator—the liquidator; or
 - (b) if there is more than one liquidator—any 2 or more of the liquidators.
- (9) The Court may give any directions necessary for the initiation and conduct of the arbitration and any such direction is binding on the parties.

Section 508

- (10) In the case of a creditors' voluntary winding up, the powers of the liquidator under this section must not be exercised except with the approval of the Court or the committee of inspection.
- (11) The company must lodge a copy of a special resolution referred to in subsection (2) or (5) with ASIC within 14 days after the resolution is passed.

508 Annual obligations of liquidator—meeting or report

- (1) If the winding up continues for more than 1 year, the liquidator must:
 - (a) in the case of a members' voluntary winding up—convene a general meeting of the company; or
 - (b) in the case of a creditors' voluntary winding up:
 - (i) convene a meeting of the creditors; or
 - (ii) prepare a report that complies with subsection (3), and lodge a copy of the report with ASIC;within 3 months after the end of the first year beginning on the day on which the company resolved that it be wound up voluntarily and the end of each succeeding year.
- (2) The liquidator must lay before a meeting convened under paragraph (1)(a) or subparagraph (1)(b)(i) an account of:
 - (a) the liquidator's acts and dealings; and
 - (b) the conduct of the winding up;during that first year or that succeeding year, as the case may be.
- (3) A report referred to in subparagraph (1)(b)(ii) must set out:
 - (a) an account of:
 - (i) the liquidator's acts and dealings; and
 - (ii) the conduct of the winding up;during that first year or that succeeding year, as the case may be; and
 - (b) a description of the acts and dealings that remain to be carried out by the liquidator in order to complete the winding up; and
 - (c) an estimate of when the winding up is likely to be completed.
- (4) If a liquidator prepares a report under subparagraph (1)(b)(ii), the liquidator must, within 14 days of lodging a copy of the report with

ASIC, give each creditor of the company a written notice stating that:

- (a) the liquidator has decided not to convene a meeting of the creditors under subparagraph (1)(b)(i); and
- (b) the liquidator has:
 - (i) prepared a report under subparagraph (1)(b)(ii); and
 - (ii) lodged a copy of the report with ASIC; and
- (c) if the creditor requests the liquidator to give the creditor a copy of the report free of charge, the liquidator will comply with the request.

Note: For electronic notification under this subsection, see section 600G.

- (5) If a request is made as mentioned in paragraph (4)(c), the liquidator must comply with the request as soon as practicable.

509 Final meeting and deregistration

- (1) As soon as the affairs of the company are fully wound up, the liquidator must make up an account showing how the winding up has been conducted and the property of the company has been disposed of and, when the account is so made up, he or she must convene a general meeting of the company, or, in the case of a creditors' voluntary winding up, a meeting of the creditors and members of the company, for the purpose of laying before it the account and giving any explanation of the account.
- (2) The meeting must be convened by an advertisement published in the *Gazette* at least 1 month before the meeting specifying the date, time, place and purpose of the meeting.
- (3) The liquidator must, within 7 days after the meeting, lodge a return of the holding of the meeting and of its date with a copy of the account attached to the return.
- (4) At a meeting of the company, 2 members constitute a quorum and, at a meeting of the creditors and members of the company, 2 creditors and 2 members constitute a quorum and, if a quorum is not present at the meeting, the liquidator must, in place of the return mentioned in subsection (3), lodge a return (with account attached) stating that the meeting was duly convened and that no quorum was present and, upon such a return being lodged, the

Section 510

provisions of that subsection as to the lodging of the return are taken to have been complied with.

ASIC must deregister at the end of 3 month period

- (5) ASIC must deregister the company at the end of the 3 month period after the return was lodged.

ASIC must deregister on a day specified by the Court

- (6) On application by the liquidator or any other interested party, the Court may make an order that ASIC deregister the company on a specified day. The Court must make the order before the end of the 3 month period after the return was lodged.
- (7) The person on whose application an order of the Court under this section is made must, within 14 days after the making of the order, lodge an office copy of the order.

510 Arrangement: when binding on creditors

- (1) An arrangement entered into between a company about to be, or in the course of being, wound up and its creditors is, subject to subsection (4):
- (a) binding on the company if sanctioned by a special resolution; and
 - (b) binding on the creditors if sanctioned by a resolution of the creditors.
- (1A) The company must lodge a copy of a special resolution referred to in paragraph (1)(a) with ASIC within 14 days after the resolution is passed.
- (2) A creditor must be accounted a creditor for value for such sum as upon an account fairly stated, after allowing the value of security or liens held by the creditor and the amount of any debt or set-off owing by the creditor to the company, appears to be the balance due to the creditor.
- (3) A dispute about the value of any such security or lien or the amount of any such debt or set-off may be settled by the Court on the application of the company, the liquidator or the creditor.

- (4) A creditor or contributory may, within 3 weeks after the completion of the arrangement, appeal to the Court in respect of the arrangement, and the Court may confirm, set aside or modify the arrangement and make such further order as it thinks just.

511 Application to Court to have questions determined or powers exercised

- (1) The liquidator, or any contributory or creditor, may apply to the Court:
 - (a) to determine any question arising in the winding up of a company; or
 - (b) to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.
- (1A) APRA may apply to the Court under subsection (1) in relation to a company that is a friendly society within the meaning of the *Life Insurance Act 1995* and which may be wound up voluntarily under subsection 180(2) of that Act.
- (2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

Part 5.6—Winding up generally

Division 1—Preliminary

513 Application of Part

Except so far as the contrary intention appears, the provisions of this Act about winding up apply in relation to the winding up of a company whether in insolvency, by the Court or voluntarily.

Division 1A—When winding up taken to begin

513A Winding up ordered by the Court

If the Court orders under section 233, 459A, 459B or 461 that a company be wound up, the winding up is taken to have begun or commenced:

- (a) if, when the order was made, a winding up of the company was already in progress—when the last-mentioned winding up is taken because of this Division to have begun or commenced; or
- (b) if, immediately before the order was made, the company was under administration—on the section 513C day in relation to the administration; or
- (c) if:
 - (i) when the order was made, a provisional liquidator of the company was acting; and
 - (ii) immediately before the provisional liquidator was appointed, the company was under administration; on the section 513C day in relation to the administration; or
- (d) if, immediately before the order was made, a deed of company arrangement had been executed by the company and had not yet terminated—on the section 513C day in relation to the administration that ended when the deed was executed; or
- (e) otherwise—on the day when the order was made.

513B Voluntary winding up

Where a company resolves by special resolution that it be wound up voluntarily, the winding up is taken to have begun or commenced:

- (a) if, when the resolution was passed, a winding up of the company was already in progress—when the last-mentioned winding up is taken because of this Division to have begun or commenced; or
- (b) if, immediately before the resolution was passed, the company was under administration—on the section 513C day in relation to the administration; or

Section 513C

- (c) if, immediately before the resolution was passed, a deed of company arrangement had been executed by the company but had not yet terminated—on the section 513C day in relation to the administration that ended when the deed was executed; or
- (d) if the resolution is taken to have been passed because, 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
 - (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.

513C Section 513C day in relation to an administration under Part 5.3A

The section 513C day in relation to the administration of a company is:

- (a) if, when the administration began, a winding up of the company was in progress—the day on which the winding up is taken because of this Division to have begun; or
- (b) otherwise—the day on which the administration began.

513D Validity of proceedings in earlier winding up

Where, at the time when:

- (a) the Court orders under section 233, 459A, 459B or 461 that a company be wound up; or
- (b) a company resolves by special resolution that it be wound up voluntarily;

a winding up of the company is already in progress, all proceedings in the last-mentioned winding up are taken to have been valid, except so far as the Court otherwise orders because fraud or mistake has been proved.

Division 2—Contributories

514 Where Division applies

- (1) This Division applies where a company is wound up.
- (2) This Division does not apply to the winding up of a no liability company.

515 General liability of contributory

Subject to this Division, a present or past member is liable to contribute to the company's property to an amount sufficient:

- (a) to pay the company's debts and liabilities and the costs, charges and expenses of the winding up; and
- (b) to adjust the rights of the contributories among themselves.

516 Company limited by shares

Subject to sections 518 and 519, if the company is a company limited by shares, a member need not contribute more than the amount (if any) unpaid on the shares in respect of which the member is liable as a present or past member.

517 Company limited by guarantee

Subject to sections 518 and 519, if the company is a company limited by guarantee, a member need not contribute more than the amount the member has undertaken to contribute to the company's property if the company is wound up.

518 Company limited both by shares and by guarantee

Subject to section 519, if the company is a company limited both by shares and by guarantee, neither of sections 516 and 517 applies but the member need not contribute more than the aggregate of the following:

- (a) the amount (if any) unpaid on shares in respect of which the member is liable as a present or past member;

Section 519

- (b) the amount that the member has undertaken to contribute to the company's property if the company is wound up.

519 Exceptions for former unlimited company

Despite sections 516, 517 and 518, if the company is a limited company and became a limited company by virtue of a change of status, the amount that a member at the time of the change of status, or a person who at that time was a past member, is liable to contribute in respect of the company's debts and liabilities contracted before that time is unlimited.

520 Past member: later debts

A past member need not contribute in respect of a debt or liability of the company contracted after the past member ceased to be a member.

521 Person ceasing to be a member a year or more before winding up

Subject to section 523, a past member need not contribute if he, she or it was a member at no time during the year ending on the day of the commencement of the winding up.

522 Present members to contribute first

Subject to paragraph 523(b), a past member need not contribute unless it appears to the Court that the existing members are unable to satisfy the contributions they are liable to make under this Act.

523 Past member of former unlimited company

If an unlimited company changes to a limited company under section 164, a past member who was a member at the time of the change is liable:

- (a) despite section 521; and
- (b) if no person who was a member at that time is a member at the commencement of the winding up—despite section 522; to contribute in respect of the company's debts and liabilities contracted before that time.

524 Past member of former limited company

If a limited company changes to an unlimited company under section 164, a person who, at the time when the company applied for the change, was a past member and did not again become a member after that time need not contribute more than they would have been liable to contribute if the company had not changed type.

526 Liability on certain contracts

Nothing in this Act invalidates a provision, in a policy of insurance or other contract, whereby the liability of individual members on the policy or contract is restricted or whereby the funds of the company are alone made liable in respect of the policy or contract.

527 Nature of contributory's liability

A contributory's liability is of the nature of a specialty debt according to the law of the Capital Territory accruing due from the contributory when the contributory's liability commenced but payable at the times when calls are made for enforcing the liability.

528 Death of contributory

If a contributory dies, whether before or after being placed on the list of contributories:

- (a) his or her personal representatives are liable in due course of administration to contribute to the company's property in discharge of his or her liability to contribute and are contributories accordingly; and
- (b) if his or her personal representatives default in paying any money that they are ordered to pay—proceedings may be taken for administering his or her estate and for compelling payment, out of the assets of that estate, of the money due.

529 Bankruptcy of contributory

If a contributory becomes an insolvent under administration, or assigns his or her estate for the benefit of his or her creditors, whether before or after being placed on the list of contributories:

Section 529

- (a) his or her trustee is to represent him or her for the purposes of the winding up and is to be a contributory accordingly; and
- (b) calls already made, and the estimated value of his or her liability to future calls, may be proved against his or her estate.

Division 3—Liquidators

530 Appointment of 2 or more liquidators of a company

If 2 or more persons have been appointed as liquidators of a company:

- (a) a function or power of a liquidator of the company may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order or resolution appointing them otherwise provides; and
- (b) a reference in this Act to a liquidator, or to the liquidator, of a company is, in the case of the first-mentioned company, a reference to whichever one or more of those liquidators the case requires.

530AA Appointment of 2 or more provisional liquidators of a company

If 2 or more persons have been appointed as provisional liquidators of a company:

- (a) a function or power of a provisional liquidator of the company may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the order appointing them otherwise provides; and
- (b) a reference in this Act to a provisional liquidator, or to the provisional liquidator, of a company is, in the case of the first-mentioned company, a reference to whichever one or more of those provisional liquidators the case requires.

530A Officers to help liquidator

- (1) As soon as practicable after the Court orders that a company be wound up or appoints a provisional liquidator of a company, or a company resolves that it be wound up, each officer of the company must:
 - (a) deliver to the liquidator appointed for the purposes of the winding up, or to the provisional liquidator, as the case may be, all books in the officer's possession that relate to the company, other than books possession of which the officer is

Section 530A

- entitled, as against the company and the liquidator or provisional liquidator, to retain; and
- (b) if the officer knows where other books relating to the company are—tell the liquidator or provisional liquidator where those books are.
- (2) Where a company is being wound up, or a provisional liquidator of a company is acting, an officer of the company must:
- (a) attend on the liquidator or provisional liquidator at such times; and
- (b) give the liquidator or provisional liquidator such information about the company's business, property, affairs and financial circumstances; and
- (c) attend such meetings of the company's creditors or members; as the liquidator or provisional liquidator reasonably requires.
- (3) An officer of a company that is being wound up must do whatever the liquidator reasonably requires the officer to do to help in the winding up.
- (4) An officer of a company must do whatever a provisional liquidator of the company reasonably requires the officer to do to help in the performance or exercise of any of the provisional liquidator's functions and powers.
- (5) The liquidator or provisional liquidator of a company may require an officer of the company:
- (a) to tell the liquidator the officer's residential address and work or business address; or
- (b) to keep the liquidator informed of any change in either of those addresses that happens during the winding up.
- (6) A person must not fail to comply with subsection (1), (2), (3) or (4), or with a requirement under subsection (5).
- (6A) An offence based on subsection (6) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (6B) Subsection (6) does not apply to the extent that the person has a reasonable excuse.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (6B), see subsection 13.3(3) of the *Criminal Code*.
-

Section 530B

- (7) For the purposes of this section, *officer* includes a former officer.
- (9) Nothing in this section limits the generality of anything else in it.

530B Liquidator's rights to company's books

- (1) A person is not entitled, as against the liquidator of a company:
 - (a) to retain possession of books of the company; or
 - (b) to claim or enforce a lien on such books;but such a lien is not otherwise prejudiced.
- (2) Paragraph (1)(a) does not apply in relation to books of which a secured creditor of the company is entitled to possession otherwise than because of a lien, but the liquidator is entitled to inspect, and make copies of, such books at any reasonable time.
- (3) A person must not engage in conduct that results in the hindering or obstruction of a liquidator of a company in obtaining possession of books of the company.
- (3A) Subsection (3) does not apply if the person is entitled, as against the company and the liquidator, to retain possession of the books.
 - Note: A defendant bears an evidential burden in relation to the matter in subsection (3A), see subsection 13.3(3) of the *Criminal Code*.
- (4) The liquidator of a company may give to a person a written notice requiring the person to deliver to the liquidator, as specified in the notice, books so specified that are in the person's possession.
- (5) A notice under subsection (4) must specify a period of at least 3 days as the period within which the notice must be complied with.
- (6) A person must comply with a notice under subsection (4).
- (6A) Subsection (6) does not apply to the extent that the person is entitled, as against the company and the liquidator, to retain possession of the books.
 - Note: A defendant bears an evidential burden in relation to the matter in subsection (6A), see subsection 13.3(3) of the *Criminal Code*.
- (6B) An offence based on subsection (6) is an offence of strict liability.
 - Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section 530C

(7) In this section:

liquidator includes a provisional liquidator.

530C Warrant to search for, and seize, company's property or books

- (1) The Court may issue a warrant under subsection (2) if:
 - (a) a company is being wound up or a provisional liquidator of a company is acting; and
 - (b) on application by the liquidator or provisional liquidator, as the case may be, or by ASIC, the Court is satisfied that a person:
 - (i) has concealed or removed property of the company with the result that the taking of the property into the custody or control of the liquidator or provisional liquidator will be prevented or delayed; or
 - (ii) has concealed, destroyed or removed books of the company or is about to do so.
- (2) The warrant may authorise a specified person, with such help as is reasonably necessary:
 - (a) to search for and seize property or books of the company in the possession of the person referred to in subsection (1); and
 - (b) to deliver, as specified in the warrant, property or books seized under it.
- (3) In order to seize property or books under the warrant, the specified person may break open a building, room or receptacle where the property is or the books are, or where the person reasonably believes the property or books to be.
- (4) A person who has custody of property or a book because of the execution of the warrant must retain it until the Court makes an order for its disposal.

531 Books to be kept by liquidator

A liquidator or provisional liquidator must keep proper books in which he or she must cause to be made entries or minutes of proceedings at meetings and of such other matters as are

prescribed, and any creditor or contributory may, unless the Court otherwise orders, personally or by an agent inspect them.

532 Disqualification of liquidator

(1A) In this section:

liquidator includes a provisional liquidator.

- (1) Subject to this section, a person must not consent to be appointed, and must not act, as liquidator of a company unless he or she is:
 - (a) a registered liquidator; or
 - (b) registered as a liquidator of that company under subsection 1282(3).
- (2) Subject to this section, a person must not, except with the leave of the Court, seek to be appointed, or act, as liquidator of a company:
 - (a) if the person, or a body corporate in which the person has a substantial holding, is indebted in an amount exceeding \$5,000 to the company or a body corporate related to the company; or
 - (b) if the person is, otherwise than in his or her capacity as liquidator, a creditor of the company or of a related body corporate in an amount exceeding \$5,000; or
 - (c) if:
 - (i) the person is an officer or employee of the company (otherwise than by reason of being a liquidator of the company or of a related body corporate); or
 - (ii) the person is an officer or employee of any body corporate that is a mortgagee of property of the company; or
 - (iii) the person is an auditor of the company; or
 - (iv) the person is a partner or employee of an auditor of the company; or
 - (v) the person is a partner, employer or employee of an officer of the company; or
 - (vi) the person is a partner or employee of an employee of an officer of the company.

Section 532

- (3) For the purposes of paragraph (2)(a), disregard a debt owed by a natural person to a body corporate if:
 - (a) the body corporate is:
 - (i) an Australian ADI; or
 - (ii) a body corporate registered under the *Life Insurance Act 1995*; and
 - (b) the debt arose because of a loan that the body corporate or entity made to the person in the ordinary course of its ordinary business; and
 - (c) the person used the amount of the loan to pay the whole or part of the purchase price of premises that the person uses as their principal place of residence.
- (4) Subsection (1) and paragraph (2)(c) do not apply to a members' voluntary winding up of a proprietary company.
- (5) Paragraph (2)(c) does not apply to a creditors' voluntary winding up if, by a resolution of the creditors passed at a meeting of the creditors of which 7 days notice has been given to every creditor stating the purpose of the meeting, it is determined that that paragraph does not so apply.
- (6) For the purposes of subsection (2), a person is taken to be an officer, employee or auditor of a company if:
 - (a) the person is an officer, employee or auditor of a related body corporate; or
 - (b) except where ASIC, if it thinks fit in the circumstances of the case, directs that this paragraph does not apply in relation to the person—the person has, at any time within the immediately preceding period of 2 years, been an officer, employee, auditor or promoter of the company or of a related body corporate.
- (7) A person must not consent to be appointed, and must not act, as liquidator of a company if he or she is an insolvent under administration.
- (8) A person must not consent to be appointed, and must not act, as liquidator of a company that is being wound up by order of the Court unless he or she is an official liquidator.

- (9) A person must not be appointed as liquidator of a company unless the person has, before his or her appointment, consented in writing to act as liquidator of the company.
- (10) An offence based on subsection (1), (2), (7), (8) or (9) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

533 Reports by liquidator

- (1) If it appears to the liquidator of a company, in the course of a winding up of the company, that:
 - (a) a past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or
 - (b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:
 - (i) may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or
 - (ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company; or
 - (c) the company may be unable to pay its unsecured creditors more than 50 cents in the dollar;the liquidator must:
 - (d) as soon as practicable, and in any event within 6 months, after it so appears to him or her, lodge a report with respect to the matter and state in the report whether he or she proposes to make an application for an examination or order under section 597; and
 - (e) give ASIC such information, and give to it such access to and facilities for inspecting and taking copies of any documents, as ASIC requires.
- (2) The liquidator may also, if he or she thinks fit, lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to the notice of ASIC.
- (3) If it appears to the Court, in the course of winding up a company:

Section 534

- (a) that a past or present officer or employee, or a contributory or member, of the company has been guilty of an offence under a law referred to in paragraph (1)(a) in relation to the company; or
- (b) that a person who has taken part in the formation, promotion, administration, management or winding up of the company has engaged in conduct referred to in paragraph (1)(b) in relation to the company;

and that the liquidator has not lodged with ASIC a report with respect to the matter, the Court may, on the application of a person interested in the winding up, direct the liquidator so to lodge such a report.

534 Prosecution by liquidator of delinquent officers and members

- (1) Where:
 - (a) a report has been lodged under section 533; and
 - (b) it appears to ASIC that the matter is not one in respect of which a prosecution ought to be begun;it must inform the liquidator accordingly, and the liquidator may begin a prosecution for any offence referred to in the report.
- (2) ASIC may direct that the whole or a specified part of the costs and expenses properly incurred by a liquidator in proceedings under this section must be paid out of money of ASIC.
- (3) Subject to a direction under subsection (2), to any charges on the property of the company and to any debts to which this Act gives priority, all such costs and expenses are payable out of that property as part of the costs of the winding up.

535 When liquidator has qualified privilege

- (1) A liquidator has qualified privilege in respect of a statement that he or she makes, whether orally or in writing, in the course of his or her duties as liquidator.
- (2) In this section:
liquidator includes a provisional liquidator.

536 Supervision of liquidators

(1A) In this section:

liquidator includes a provisional liquidator.

(1) Where:

- (a) it appears to the Court or to ASIC that a liquidator has not faithfully performed or is not faithfully performing his or her duties or has not observed or is not observing:
 - (i) a requirement of the Court; or
 - (ii) a requirement of this Act, of the regulations or of the rules; or
- (b) a complaint is made to the Court or to ASIC by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties;

the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.

- (2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit.
- (3) The Court may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator.

537 Notice of appointment and address of liquidator

(1A) In this section:

liquidator includes a provisional liquidator.

- (1) A liquidator must, within 14 days after his or her appointment, lodge notice in the prescribed form of his or her appointment and of the address of his or her office and, in the event of any change in the situation of his or her office, must, within 14 days after the change, lodge notice in the prescribed form of the change.

Section 538

- (2) A liquidator must, within 14 days after his or her resignation or removal from office, lodge notice of the resignation or removal in the prescribed form.

538 Regulations relating to money etc. received by liquidator

- (1A) In this section:

liquidator includes a provisional liquidator.

- (1) The regulations may:

- (a) require a liquidator to pay, into such bank and account, in such manner and at such times as are prescribed, money received by him or her; and
- (b) prescribe the circumstances and manner in which money paid into such an account is to be paid out; and
- (c) require a liquidator of a company to deposit, in such bank, in such manner and at such times as are prescribed, bills, notes or other securities payable to the company or its liquidator; and
- (d) prescribe the circumstances and manner in which bills, notes or other securities so deposited are to be delivered out; and
- (e) make provision in relation to the giving by the Court of directions with respect to the payment, deposit or custody of money payable to or into the possession of a liquidator, or of bills, notes or other securities so payable; and
- (f) provide for:
 - (i) the payment by a liquidator of interest at such rate, on such amount and in respect of such period as is prescribed; and
 - (ii) disallowance of all or of such part as is prescribed of the remuneration of a liquidator; and
 - (iii) the removal from office of a liquidator by the Court; and
 - (iv) the payment by a liquidator of any expenses occasioned by reason of his or her default;where a liquidator contravenes or fails to comply with regulations made under this section.

- (2) Regulations made under this section may apply generally or in relation to a specified class of windings up.

- (3) Regulations made for the purposes of this section may apply in relation to the winding up of a company that is subject to:
 - (a) a pooling determination; or
 - (b) a pooling order.
- (4) Subsection (3) does not limit subsection (2).

539 Liquidator's accounts

- (1A) In this section:

liquidator includes a provisional liquidator.

- (1) A liquidator must, within 1 month after the end of the period of 6 months from the date of his or her appointment and of every subsequent period of 6 months during which he or she acts as liquidator and within 1 month after he or she ceases to act as liquidator, lodge:
 - (a) an account in the prescribed form and verified by a statement in writing showing:
 - (i) his or her receipts and his or her payments during each such period or, where he or she ceases to act as liquidator, during the period from the end of the period to which the last preceding account related or from the date of his or her appointment, as the case requires, up to the date of his or her so ceasing to act; and
 - (ii) in the case of the second account lodged under this subsection and all subsequent accounts—the aggregate amount of receipts and payments during all preceding periods since his or her appointment; and
 - (b) in the case of a liquidator other than a provisional liquidator—a statement in the prescribed form relating to the position in the winding up, verified by a statement in writing.
- (2) ASIC may cause the account and, where a statement of the position in the winding up has been lodged, that statement to be audited by a registered company auditor, who must prepare a report on the account and the statement (if any).
- (3) For the purposes of the audit under subsection (2) the liquidator must give the auditor such books and information as the auditor requires.

Section 540

- (4) Where ASIC causes an account, or an account and a statement, to be audited under subsection (2):
 - (a) ASIC must give to the liquidator a copy of the report prepared by the auditor; and
 - (b) subsection 1289(5) applies in relation to the report prepared by the auditor as if it were a document required to be lodged.
- (5) The liquidator must give notice that the account has been made up to every creditor and contributory when next forwarding any report, notice of meeting, notice of call or dividend.

Note: For electronic notification, see section 600G.

- (6) The costs of an audit under this section must be fixed by ASIC and form part of the expenses of winding up.
- (7) If:
 - (a) a pooling determination is in force in relation to a group of 2 or more companies; or
 - (b) a pooling order is in force in relation to a group of 2 or more companies;then:
 - (c) the accounts under subsection (1) for the companies in the group may be set out in the same document; and
 - (d) the statements under subsection (1) for the companies in the group may be set out in the same document.

540 Liquidator to remedy defaults

- (1A) In this section:

liquidator includes a provisional liquidator.

- (1) If any liquidator who has made any default in lodging or making any application, return, account or other document, or in giving any notice that he or she is by law required to lodge, make or give, fails to make good the default within 14 days after the service on him or her of a notice requiring him or her to do so, the Court may, on the application of any contributory or creditor of the company or ASIC, make an order directing the liquidator to make good the default within such time as is specified in the order.

Section 540

- (2) Any order made under subsection (1) may provide that all costs of and incidental to the application must be borne by the liquidator.
- (3) Nothing in subsection (1) prejudices the operation of any law imposing penalties on a liquidator in respect of any such default.

Division 4—General

541 Notification that company is in liquidation

- (1) A company that is being wound up must set out, in every public document, and in every negotiable instrument, of the company, after the name of the company where it first appears, the expression *in liquidation*.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

542 Books of company

- (1) Where a company is being wound up, all books of the company and of the liquidator that are relevant to affairs of the company at or subsequent to the commencement of the winding up of the company are, as between the contributories of the company, prima facie evidence of the truth of all matters purporting to be recorded in those books.
- (2) If a company has been wound up, the liquidator must retain the books referred to in subsection (1) for a period of 5 years from the date of deregistration of the company and, subject to section 262A of the *Income Tax Assessment Act 1936*, may, at the end of that period, destroy them.
- (3) Despite subsection (2) but subject to subsection (4), when a company has been wound up, the books referred to in subsection (1) may be destroyed within a period of 5 years after the deregistration of the company:
 - (a) in the case of a winding up by the Court—in accordance with the directions of the Court given pursuant to an application of which at least 14 days notice has been given to ASIC; and
 - (b) in the case of a members' voluntary winding up—as the company by resolution directs; and
 - (c) in the case of a creditors' voluntary winding up—as the committee of inspection directs, or, if there is no such committee, as the creditors of the company by resolution direct.

- (4) The liquidator is not entitled to destroy books as mentioned in paragraph (3)(b) or (c) unless ASIC consents to the destruction of those books.

543 Investment of surplus funds on general account

- (1) Whenever the cash balance standing to the credit of a company that is in the course of being wound up is in excess of the amount that, in the opinion of the committee of inspection, or, if there is no committee of inspection, of the liquidator, is required for the time being to answer demands in respect of the property of the company, the liquidator, if so directed in writing by the committee of inspection, or, if there is not committee of inspection, the liquidator himself or herself, may, unless the Court on application by any creditor thinks fit to order otherwise and so orders, invest the sum or any part of the sum:
 - (a) in any manner in which trustees are for the time being authorised by law to invest trust funds; or
 - (b) on deposit with an eligible money market dealer; or
 - (c) on deposit at interest with any bank;and any interest received in respect of that money so invested forms part of the property of the company.
- (2) Whenever any part of the money so invested is, in the opinion of the committee of inspection, or, if there is no committee of inspection, of the liquidator, required to answer any demands in respect of the property of the company, the committee of inspection may direct, or, if there is no committee of inspection, the liquidator may arrange for, the sale or realisation of such part of the securities as is necessary.

544 Unclaimed money to be paid to ASIC

- (1) Where a liquidator of a company has in his or her hands or under his or her control:
 - (a) any amount being a dividend or other money that has remained unclaimed for more than 6 months after the day when the dividend or other money became payable; or

Section 545

- (b) after making a final distribution, any unclaimed or undistributed amount of money arising from the property of the company;
he or she must forthwith pay that money to ASIC to be dealt with under Part 9.7.
- (1A) If a liquidator has, or has control of, the money of a company that has no members, the liquidator must pay it to ASIC as soon as practicable for it to be dealt with under Part 9.7.
- (2) The Court may at any time, on the application of ASIC:
 - (a) order a liquidator of a company to submit to it an account, verified by affidavit, of any unclaimed or undistributed funds, dividends or other money in his or her hands or under his or her control; and
 - (b) direct an audit of accounts submitted to it in accordance with paragraph (a); and
 - (c) direct a liquidator of a company to pay any money referred to in paragraph (a) to ASIC to be dealt with under Part 9.7.
- (3) Where a liquidator of a company pays money to ASIC pursuant to subsection (1) or (1A) or an order of the Court made under paragraph (2)(c), the liquidator is entitled to a receipt for the money so paid and the giving of that receipt discharges the liquidator from any liability in respect of the money.
- (4) For the purposes of this section the Court may exercise all the powers conferred by this Act with respect to the discovery and realisation of the property of a company and the provisions of this Act with respect to the exercise of those powers apply, with such adaptations as are prescribed, to proceedings under this section.
- (5) The provisions of this section do not, except as expressly declared in this Act, deprive a person of any other right or remedy to which the person is entitled against the liquidator or another person.

545 Expenses of winding up where property insufficient

- (1) Subject to this section, a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property.

- (2) The Court or ASIC may, on the application of a creditor or a contributory, direct a liquidator to incur a particular expense on condition that the creditor or contributory indemnifies the liquidator in respect of the recovery of the amount expended and, if the Court or ASIC so directs, gives such security to secure the amount of the indemnity as the Court or ASIC thinks reasonable.
- (3) Nothing in this section is taken to relieve a liquidator of any obligation to lodge a document (including a report) with ASIC under any provision of this Act by reason only that he or she would be required to incur expense in order to perform that obligation.

546 Resolutions passed at adjourned meetings of creditors and contributories

Subject to subsection 498(4), where a resolution is passed at an adjourned meeting of any creditors or contributories of a company, the resolution is, for all purposes, treated as having been passed on the date on which it was in fact passed and not on any earlier date.

547 Meetings to ascertain wishes of creditors or contributories

- (1) The Court may, as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence and may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be convened, held and conducted in such manner as the Court directs, and may appoint a person to act as chair of any such meeting and to report the result of the meeting to the Court.
- (2) In the case of creditors, regard is to be had to the value of each creditor's debt.
- (3) In the case of contributories, regard is to be had to the number of votes conferred on each contributory by this Act or the company's constitution.

Division 5—Committees of inspection

548 Convening of meetings by liquidator for appointment of committee of inspection—company not in pooled group

- (1) The liquidator of a company must, if so requested by a creditor or contributory, convene separate meetings of the creditors and contributories for the purpose of determining:
 - (a) whether a committee of inspection should be appointed; and
 - (b) where a committee of inspection is to be appointed:
 - (i) the numbers of members to represent the creditors and the contributories, respectively; and
 - (ii) the persons who are to be members of the committee representing creditors and contributories, respectively.
- (2) If there is a difference between the determination of the meeting of creditors and the determination of the meeting of contributories, the Court may resolve the difference and make such order as it thinks proper.
- (3) A person is not eligible to be appointed a member of a committee of inspection as a result of a determination under subsection (1) unless the person is:
 - (a) in the case of an appointment by creditors of the company:
 - (i) a creditor of the company; or
 - (ii) the attorney of a creditor of the company by virtue of a general power of attorney given by the creditor; or
 - (iii) a person authorised in writing by a creditor of the company to be a member of the committee of inspection; or
 - (b) in the case of an appointment by the contributories of the company:
 - (i) a contributory of the company; or
 - (ii) the attorney of a contributory of the company by virtue of a general power of attorney given by the contributory; or
 - (iii) a person authorised in writing by a contributory of the company to be a member of the committee of inspection.

Section 548A

- (4) This section does not apply in relation to a company if:
- (a) either:
 - (i) a pooling determination is in force in relation to a group of 2 or more companies; or
 - (ii) a pooling order is in force in relation to a group of 2 or more companies; and
 - (b) the company is in the group.

548A Convening of meeting for appointment of committee of inspection—pooled group

- (1) If:
- (a) either:
 - (i) a pooling determination is in force in relation to a group of 2 or more companies; or
 - (ii) a pooling order is in force in relation to a group of 2 or more companies; and
 - (b) each company in the group is being wound up;
the liquidator or liquidators must, if requested by a creditor of a company in the group, convene a meeting, on a consolidated basis, of the creditors of the companies in the group for the purposes of determining:
 - (c) whether a committee of inspection should be appointed for the group; and
 - (d) if a committee of inspection is to be appointed:
 - (i) the number of members to represent the creditors of the companies in the group; and
 - (ii) the persons who are to be members of the committee representing the creditors of the companies in the group.
- (2) The regulations may make provision for or in relation to:
- (a) the convening of, conduct of, and procedure and voting at, consolidated meetings of creditors; and
 - (b) the number of persons required to constitute a quorum at any such meeting; and
 - (c) the sending of notices of meetings to persons entitled to attend any such meeting; and
 - (d) the lodging of copies of notices of, and of resolutions passed at, any such meeting; and

Section 549

- (e) generally regulating the conduct of, and procedure at, any such meeting.
- (3) A person is not eligible to be appointed as a member of a committee of inspection as a result of a determination under subsection (1) unless the person is an eligible unsecured creditor (within the meaning of Division 8) of a company in the group.
Note: For *eligible unsecured creditor*, see section 579Q.
- (4) A committee of inspection for a group of 2 or more companies is taken to be a committee of inspection for each company in the group.
- (5) If:
 - (a) a determination is made under subsection (1); and
 - (b) immediately before the determination was made, a committee of inspection was in existence for a company in the group;the committee mentioned in paragraph (b) ceases to exist when the determination is made.

549 Proceedings of committee of inspection

- (1) A committee of inspection must meet at such times and places as its members from time to time appoint.
- (2) In the case of a committee of inspection appointed as a result of a determination under subsection 548(1), the liquidator or a member of the committee may convene a meeting of the committee.
- (2A) In the case of a committee of inspection appointed as a result of a determination under subsection 548A(1), either:
 - (a) the liquidator or liquidators of the companies in the group concerned; or
 - (b) a member of the committee;may convene a meeting of the committee.
- (3) A committee may act by a majority of its members present at a meeting, but must not act unless a majority of its members are present.
- (4) If a member of the committee is a body corporate, the member may be represented at meetings of the committee by:
 - (a) an officer or employee of the member; or

- (b) an individual authorised in writing by the member for the purposes of this subsection.

550 Vacancies on committee of inspection

- (1) A member of a committee may resign by notice in writing signed by the member and delivered to the liquidator.
- (2) If a member of a committee:
 - (a) becomes an insolvent under administration; or
 - (b) is absent from 5 consecutive meetings of the committee without the leave of those members who together with himself or herself represent the creditors or contributories, as the case may be;his or her office becomes vacant.
- (3) A member of the committee who represents creditors may be removed by a resolution at a meeting of creditors of which 7 days' notice has been given stating the object of the meeting, and a member of the committee who represents contributories may be removed by a resolution at a meeting of contributories of which such notice has been given.

Note: For electronic notification, see section 600G.
- (4) A meeting referred to in subsection (3) may appoint a person to fill a vacancy caused by the removal of a member of the committee.
- (5) A vacancy in the committee may be filled by the appointment of a person by a resolution at a meeting of the creditors or of the contributories, as the case may be, of which 7 days' notice has been given.
- (6) A vacancy in the committee that is not filled as provided by subsection (4) or (5) may be filled by the appointment of a person by the committee and a person so appointed represents the creditors, or the contributories, as the case may be.
- (7) Notwithstanding a vacancy in the committee, the continuing members of the committee may act provided they are not less than 2 in number.

Section 551

551 Member of committee not to accept extra benefit

- (1) A member of a committee of inspection must not, while acting as such a member, except as provided by this Act or with the leave of the Court:
 - (a) make an arrangement for receiving, or accept, from the company or any other person, in connection with the winding up, a gift, remuneration or pecuniary or other consideration or benefit; or
 - (b) directly or indirectly derive any profit or advantage from a transaction, sale or purchase for or on account of the company or any gift, profit or advantage from a creditor; or
 - (c) directly or indirectly become the purchaser of any property of the company.
- (2) A transaction entered into in contravention of subsection (1) may be set aside by the Court on the application of a creditor or member of the company.

552 Powers of Court where no committee of inspection

Where there is no committee of inspection, the Court may, on the application of the liquidator, do any thing and give any direction or permission that is by this Part authorised or required to be done or given by the committee.

Division 6—Proof and ranking of claims

Subdivision A—Admission to proof of debts and claims

553 Debts or claims that are provable in winding up

- (1) Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.
- (1A) Even though the circumstances giving rise to a debt payable by the company, or a claim against the company, occur on or after the relevant date, the debt or claim is admissible to proof against the company in the winding up if:
- (a) the circumstances occur at a time when the company is under a deed of company arrangement; and
 - (b) the company is under the deed immediately before the resolution or court order that the company be wound up.

This subsection has effect subject to the other sections in this Division.

Note 1: See Division 10 of Part 5.3A (sections 444A-444H) for the provisions dealing with deeds of company arrangement.

Note 2: See paragraph 513A(d) for deeds that are followed immediately by court ordered winding up. See paragraphs 513B(c) and (d) for deeds that are followed immediately by voluntary winding up. Subsection 446A(2) and section 446B provide that companies are taken in certain circumstances to have passed resolutions that they be wound up.

Note 3: A debt or claim admissible to proof under subsection (1A) will only be covered by paragraph 556(1)(a) if the administrator of the deed is personally liable for the debt or claim (see subsection 556(1AA)).

- (1B) For the purpose of applying the other sections of this Division to a debt or claim that is admissible to proof under subsection (1A), the relevant date for the debt or claim is the date on which the deed terminates.
- (2) Where, after the relevant date, an order is made under section 91 of the ASIC Act against a company that is being wound up, the

Section 553A

amount that, pursuant to the order, the company is liable to pay is admissible to proof against the company.

553A Member cannot prove debt unless contributions paid

A debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is not admissible to proof against the company unless the person has paid to the company or the liquidator all amounts that the person is liable to pay as a member of the company.

553AA Selling shareholder cannot prove debt unless documents given

The selling shareholder in a share buy-back may claim in a winding up of the company but is not entitled to a distribution of money or property unless the shareholder has discharged the shareholder's obligations to give documents in connection with the buy-back.

Note: The selling shareholder's claim ranks after those of non-member creditors and before those of other member creditors (see section 563AA).

553AB Superannuation contribution debts not admissible to proof

Whole of superannuation contribution debt

- (1) In a winding up, the liquidator must determine that the whole of a debt by way of a superannuation contribution is not admissible to proof against the company if:
 - (a) a debt by way of superannuation guarantee charge:
 - (i) has been paid; or
 - (ii) is, or is to be, admissible to proof against the company; and
 - (b) the liquidator is satisfied that the superannuation guarantee charge is attributable to the whole of the first-mentioned debt.
- (2) If the liquidator determines, under subsection (1), that the whole of a debt is not admissible to proof against the company, the whole of the debt is extinguished.

Section 553B

Part of superannuation contribution debt

- (3) In a winding up, the liquidator must determine that a particular part of a debt by way of a superannuation contribution is not admissible to proof against the company if:
 - (a) a debt by way of superannuation guarantee charge:
 - (i) has been paid; or
 - (ii) is, or is to be, admissible to proof against the company; and
 - (b) the liquidator is satisfied that the superannuation guarantee charge is attributable to that part of the first-mentioned debt.
- (4) If the liquidator determines, under subsection (3), that a part of a debt is not admissible to proof against the company, that part of the debt is extinguished.

Definition

- (5) In this section:

superannuation contribution has the same meaning as in section 556.

553B Insolvent companies—penalties and fines not generally provable

- (1) Subject to subsection (2), penalties or fines imposed by a court in respect of an offence against a law are not admissible to proof against an insolvent company.
- (2) An amount payable under a pecuniary penalty order, or an interstate pecuniary penalty order, within the meaning of the *Proceeds of Crime Act 1987*, is admissible to proof against an insolvent company.

553C Insolvent companies—mutual credit and set-off

- (1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:
 - (a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and

Section 553D

- (b) the sum due from the one party is to be set off against any sum due from the other party; and
 - (c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.
- (2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

553D Debts or claims may be proved formally or informally

- (1) A debt or claim must be proved formally if the liquidator, in accordance with the regulations, requires it to be proved formally.
- (2) A debt or claim that is not required to be proved formally:
 - (a) may be proved formally; or
 - (b) may be proved in some other way, subject to compliance with the requirements of the regulations (if any) relating to the informal proof of debts and claims.
- (3) A debt or claim is proved formally if it satisfies the requirements of the regulations relating to the formal proof of debts and claims.

553E Application of Bankruptcy Act to winding up of insolvent company

Subject to this Division and to section 279, in the winding up of an insolvent company the same rules are to prevail and be observed with regard to debts provable as are in force for the time being under the *Bankruptcy Act 1966* in relation to the estates of bankrupt persons (except the rules in sections 82 to 94 (inclusive) and 96 of that Act), and all persons who in any such case would be entitled to prove for and receive dividends out of the property of the company may come in under the winding up and make such claims against the company as they respectively are entitled to because of this section.

Subdivision B—Computation of debts and claims

554 General rule—compute amount as at relevant date

- (1) The amount of a debt or claim of a company (including a debt or claim that is for or includes interest) is to be computed for the purposes of the winding up as at the relevant date.
- (2) Subsection (1) does not apply to an amount admissible to proof under subsection 553(2).

554A Determination of value of debts and claims of uncertain value

- (1) This section applies where, in the winding up of a company, the liquidator admits a debt or claim that, as at the relevant date, did not bear a certain value.
- (2) The liquidator must:
 - (a) make an estimate of the value of the debt or claim as at the relevant date; or
 - (b) refer the question of the value of the debt or claim to the Court.
- (3) A person who is aggrieved by the liquidator's estimate of the value of the debt or claim may, in accordance with the regulations, appeal to the Court against the liquidator's estimate.
- (4) If:
 - (a) the liquidator refers the question of the value of the debt or claim to the Court; or
 - (b) a person appeals to the Court against the liquidator's estimate of the value of the debt or claim;the Court must:
 - (c) make an estimate of the value of the debt or claim as at the relevant date; or
 - (d) determine a method to be applied by the liquidator in working out the value of the debt or claim as at the relevant date.
- (5) If the Court determines a method to be applied by the liquidator in working out the value of the debt or claim, the liquidator must

Section 554B

work out the value of the debt or claim as at the relevant date in accordance with that method.

- (6) If:
- (a) the Court has determined a method to be applied by the liquidator in working out the value of the debt or claim as at the relevant date; and
 - (b) a person is aggrieved by the way in which that method has been applied by the liquidator in working out that value;
- the person may, in accordance with the regulations, appeal to the Court against the way in which the method was applied.
- (7) If:
- (a) a person appeals to the Court against the way in which the liquidator, in working out the value of the debt or claim, applied a method determined by the court; and
 - (b) the Court is satisfied that the liquidator did not correctly apply that method;
- the Court must work out the value of the debt or claim as at the relevant date in accordance with that method.
- (8) For the purposes of this Division, the amount of the debt or claim that is admissible to proof is the value as estimated or worked out under this section.

554B Discounting of debts payable after relevant date

The amount of a debt that is admissible to proof but that, as at the relevant date, was not payable by the company until an ascertained or ascertainable date (the *future date*) after the relevant date is the amount payable on the future date reduced by the amount of the discount worked out in accordance with the regulations.

554C Conversion into Australian currency of foreign currency debts or claims

- (1) This section applies if the amount of a debt or claim admissible to proof against a company would, apart from this section, be an amount of foreign currency.
- (2) If the company and the creditor or claimant have, in an instrument created before the relevant date, agreed on a method to be applied

Section 554D

for the purpose of converting the company's liability in respect of the debt or claim into Australian currency, the amount of the debt or claim that is admissible to proof is the equivalent in Australian currency of the amount of foreign currency, worked out as at the relevant date and in accordance with the agreed method.

- (3) If subsection (2) does not apply, the amount of the debt or claim that is admissible to proof is the equivalent in Australian currency of the amount of foreign currency, worked out by reference to the opening carded on demand airmail buying rate in relation to the foreign currency available at the Commonwealth Bank of Australia on the relevant date.

Subdivision C—Special provisions relating to secured creditors of insolvent companies

554D Application of Subdivision

- (1) This Subdivision applies in relation to the proof of a secured debt in the winding up of an insolvent company.
- (2) For the purposes of the application of this Subdivision in relation to a secured debt of an insolvent company that is being wound up, the amount of the debt is taken to be the amount of the debt as at the relevant date (as worked out in accordance with Subdivision B).

554E Proof of debt by secured creditor

- (1) In the winding up of an insolvent company, a secured creditor is not entitled to prove the whole or a part of the secured debt otherwise than in accordance with this section and with any other provisions of this Act or the regulations that are applicable to proving the debt.
- (2) The creditor's proof of debt must be in writing.
- (3) If the creditor surrenders the security 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

Section 554F

liquidator is not satisfied that the realisation has been effected in good faith and in a proper manner.

- (5) If the creditor has not realised or surrendered the security, the creditor may:
 - (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.

554F Redemption of security by liquidator

- (1) This section applies where a secured creditor's proof of debt is in respect of the balance due after deducting the creditor's estimate of the value of the security.
- (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.
- (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.
- (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:
 - (a) the liquidator is not entitled to exercise it; and
 - (b) subject to subsection (6), any equity of redemption or other interest in the property comprised in the security that is vested in the company or the liquidator vests in the creditor; and

Section 554G

- (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.
- (6) The vesting of an equity of redemption or other interest in property because of paragraph (5)(b) is subject to compliance with any law requiring the transmission of such interests in property to be registered.

554G Amendment of valuation

- (1) If a secured creditor's proof of debt is in respect of the balance due after deducting the creditor's estimate of the value of the security, 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
 - (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.

554H Repayment of excess

- (1) Where a creditor who has amended a proof of debt under section 554G has received, in the winding up of the debtor company, an amount in excess of the amount to which the creditor would have been entitled under the amended proof of debt, the 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

Section 554J

future distributions, but the creditor is not entitled to affect a distribution made before the amendment of the proof of debt.

554J Subsequent realisation of security

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:
 - (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

555 Debts and claims proved to rank equally except as otherwise provided

Except as otherwise provided by this Act, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately.

556 Priority payments

- (1) Subject to this Division, in the winding up of a company the following debts and claims must be paid in priority to all other unsecured debts and claims:
 - (a) first, expenses (except deferred expenses) properly incurred by a relevant authority in preserving, realising or getting in property of the company, or in carrying on the company's business;
 - (b) if the Court ordered the winding up—next, the costs in respect of the application for the order (including the applicant's taxed costs payable under section 466);
 - (ba) if:
 - (i) during the period of 12 months ending when the winding up commenced, an application (the *first*

application) was made under section 459P for the company to be wound up in insolvency; and

- (ii) when the first application was made, the company was not under administration; and
- (iii) the company began to be under administration at a time after the first application was made; and
- (iv) the first application was not withdrawn or dismissed before the administration began; and
- (v) the Court did not, in response to the first application, make an order under section 459A that the company be wound up in insolvency;

next, the costs in respect of the first application;

- (c) next, the debts for which paragraph 443D(a) or (aa) entitles an administrator of the company to be indemnified (even if the administration ended before the relevant date), except expenses covered by paragraph (a) of this subsection and deferred expenses;
- (da) if the Court ordered the winding up—next, costs and expenses that are payable under subsection 475(8) out of the company's property;
- (daa) if the company resolved by special resolution that it be wound up voluntarily—next, costs and expenses that are payable under subsection 446C(8) out of the company's property;
- (db) next, costs that form part of the expenses of the winding up because of subsection 539(6);
- (dd) next, any other expenses (except deferred expenses) properly incurred by a relevant authority;
- (de) next, the deferred expenses;
- (df) if a committee of inspection has been appointed for the purposes of the winding up—next, expenses incurred by a person as a member of the committee;
- (e) subject to subsection (1A)—next, wages, superannuation contributions and superannuation guarantee charge payable by the company in respect of services rendered to the company by employees before the relevant date;
- (f) next, amounts due in respect of injury compensation, being compensation the liability for which arose before the relevant date;

Section 556

- (g) subject to subsection (1B)—next, all amounts due:
 - (i) on or before the relevant date; and
 - (ii) because of an industrial instrument; and
 - (iii) to, or in respect of, employees of the company; and
 - (iv) in respect of leave of absence;
 - (h) subject to subsection (1C)—next, retrenchment payments payable to employees of the company.
- (1AA) Paragraph (1)(a) does not apply to expenses:
- (a) incurred by the administrator of a deed of company arrangement; and
 - (b) relating to a debt or claim admissible to proof under subsection 553(1A);
- unless the administrator is personally liable for the expenses.
- (1A) The amount or total paid under paragraph (1)(e) to, or in respect of, an excluded employee of the company must be such that so much (if any) of it as is attributable to non-priority days does not exceed \$2,000.
- (1AB) For the purposes of paragraph (1)(e), if:
- (a) the company has a superannuation guarantee shortfall for a quarter; and
 - (b) the shortfall relates to one or more employees; and
 - (c) the quarter ends before the relevant date;
- superannuation guarantee charge in respect of the quarter is taken to be payable by the company in respect of services rendered to the company by those employees before the relevant date.
- (1AC) If:
- (a) the company has a superannuation guarantee shortfall for a quarter; and
 - (b) the shortfall relates to one or more employees; and
 - (c) the relevant date occurs during the quarter; and
 - (d) the relevant date is not the first day of the quarter;
- then:
- (e) for the purposes of paragraph (1)(e), so much of the superannuation guarantee charge in respect of the quarter as is attributable to the period before the relevant date is taken to be payable by the company in respect of services rendered

to the company by those employees before the relevant date;
and

- (f) the remainder of the superannuation guarantee charge in respect of the quarter is taken:
 - (i) to be an expense referred to in paragraph (1)(a); and
 - (ii) not to be an amount of superannuation guarantee charge referred in paragraph (1)(e).

(1AD) If:

- (a) the company has a superannuation guarantee shortfall for a quarter; and
 - (b) the shortfall relates to one or more employees; and
 - (c) the relevant date is the first day of the quarter;
- the superannuation guarantee charge in respect of the quarter is taken:
- (d) to be an expense referred to in paragraph (1)(a); and
 - (e) not to be an amount of superannuation guarantee charge referred in paragraph (1)(e).

(1AE) For the purposes of paragraph (1)(e), if:

- (a) the company has a superannuation guarantee shortfall for a quarter; and
- (b) the shortfall relates to one or more employees; and
- (c) the quarter begins after the relevant date; and
- (d) one or more payments were made by the company during the quarter on account of wages payable to those employees in respect of services rendered to the company by those employees before the relevant date; and
- (e) those payments were made as a result of an advance of money by a person after the relevant date for the purpose of making those payments;

then:

- (f) for the purposes of paragraph (1)(e), so much of the superannuation guarantee charge in respect of the quarter as is attributable to those payments is taken to be payable by the company in respect of services rendered to the company by those employees before the relevant date; and
- (g) the remainder of the superannuation guarantee charge in respect of the quarter is taken:
 - (i) to be an expense referred to in paragraph (1)(a); and

Section 556

- (ii) not to be an amount of superannuation guarantee charge referred in paragraph (1)(e).

(1AF) If:

- (a) the company has a superannuation guarantee shortfall for a quarter; and
- (b) the shortfall relates to one or more employees; and
- (c) the relevant date occurs during the quarter; and
- (d) one or more payments were made by the company during the quarter on account of wages payable to those employees in respect of services rendered to the company by those employees before the relevant date; and
- (e) those payments were made as a result of an advance of money by a person after the relevant date for the purpose of making those payments;

then:

- (f) for the purposes of paragraph (1)(e), so much of the superannuation guarantee charge in respect of the quarter as is attributable to either or both of the following:
 - (i) those payments;
 - (ii) the period before the relevant date;is taken to be payable by the company in respect of services rendered to the company by those employees before the relevant date; and
- (g) the remainder of the superannuation guarantee charge in respect of the quarter is taken:
 - (i) to be an expense referred to in paragraph (1)(a); and
 - (ii) not to be an amount of superannuation guarantee charge referred in paragraph (1)(e); and
- (h) subsections (1AC) and (1AD) do not apply to the superannuation guarantee charge in respect of the quarter.

(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.

(1C) A payment under paragraph (1)(h) to an excluded employee of the company must not include an amount attributable to non-priority days.

(2) In this section:

company means a company that is being wound up.

deferred expenses, in relation to a company, means expenses properly incurred by a relevant authority, in so far as they consist of:

- (a) remuneration, or fees for services, payable to the relevant authority; or
- (b) expenses incurred by the relevant authority in respect of the supply of services to the relevant authority by:
 - (i) a partnership of which the relevant authority is a member; or
 - (ii) an employee of the relevant authority; or
 - (iii) a member or employee of such a partnership; or
- (c) expenses incurred by the relevant authority in respect of the supply to the relevant authority of services that it is reasonable to expect could have instead been supplied by:
 - (i) the relevant authority; or
 - (ii) a partnership of which the relevant authority is a member; or
 - (iii) an employee of the relevant authority; or
 - (iv) a member or employee of such a partnership.

employee, in relation to a company, means a person:

- (a) who has been or is an employee of the company, whether remunerated by salary, wages, commission or otherwise; and
- (b) whose employment by the company commenced before the relevant date.

excluded employee, in relation to a company, means:

- (a) an employee of the company who has been:
 - (i) at any time during the period of 12 months ending on the relevant date; or
 - (ii) at any time since the relevant date;or who is, a director of the company;
- (b) an employee of the company who has been:
 - (i) at any time during the period of 12 months ending on the relevant date; or

Section 556

- (ii) at any time since the relevant date;
or who is, the spouse of an employee of the kind referred to in paragraph (a); or
- (c) an employee of the company who is a relative (other than a spouse) of an employee of the kind referred to in paragraph (a).

non-priority day, in relation to an excluded employee of a company, means a day on which the employee was:

- (a) if paragraph (a) of the definition of **excluded employee** applies—a director of the company; or
- (b) if paragraph (b) of that definition applies—a spouse of an employee of the kind referred to in paragraph (a) of that definition; or
- (c) if paragraph (c) of that definition applies—a relative (other than a spouse) of an employee of the kind referred to in paragraph (a) of that definition;

even if the day was more than 12 months before the relevant date.

quarter has the same meaning as in the *Superannuation Guarantee (Administration) Act 1992*.

relevant authority, in relation to a company, means any of the following:

- (a) in any case—a liquidator or provisional liquidator of the company;
- (c) in any case—an administrator of the company, even if the administration ended before the winding up began;
- (d) in any case—an administrator of a deed of company arrangement executed by the company, even if the deed terminated before the winding up began.

retrenchment payment, in relation to an employee of a company, means an amount payable by the company to the employee, by virtue of an industrial instrument, in respect of the termination of the employee's employment by the company, whether the amount becomes payable before, on or after the relevant date.

superannuation contribution, in relation to a company, means a contribution by the company to a fund for the purposes of making provision for, or obtaining, superannuation benefits for an employee of the company, or for dependants of such an employee.

558 Debts due to employees

- (1) Where a contract of employment with a company being wound up was subsisting immediately before the relevant date, the employee under the contract is, whether or not he or she is a person referred to in subsection (2), entitled to payment under section 556 as if his or her services with the company had been terminated by the company on the relevant date.
- (2) Where, for the purposes of the winding up of a company, a liquidator employs a person whose services with the company had been terminated by reason of the winding up, that person is, for the purpose of calculating any entitlement to payment for leave of absence, or any entitlement to a retrenchment amount in respect of employment, taken, while the liquidator employs him or her for those purposes, to be employed by the company.
- (3) Subject to subsection (4), where, after the relevant date, an amount in respect of long service leave or extended leave, or a retrenchment amount, becomes payable to a person referred to in subsection (2) in respect of the employment so referred to, the amount is a cost of the winding up.
- (4) Where, at the relevant date, the length of qualifying service of a person employed by a company that is being wound up is insufficient to entitle him or her to any amount in respect of long service leave or extended leave, or to any retrenchment amount in respect of employment by the company, but, by the operation of subsection (2) he or she becomes entitled to such an amount after that date, that amount:
 - (a) is a cost of the winding up to the extent of an amount that bears to that amount the same proportion as the length of his or her qualifying service after that relevant date bears to the total length of his or her qualifying service; and
 - (b) is, to the extent of the balance of that amount, taken, for the purposes of section 556, to be an amount referred to in paragraph 556(1)(g), or a retrenchment payment payable to the person, as the case may be.
- (5) In this section, **retrenchment amount**, in relation to employment of a person, means an amount payable to the person, by virtue of an industrial instrument, in respect of termination of the employment.

Section 559

559 Debts of a class to rank equally

The debts of a class referred to in each of the paragraphs of subsection 556(1) rank equally between themselves and must be paid in full, unless the property of the company is insufficient to meet them, in which case they must be paid proportionately.

560 Advances for company to make priority payments in relation to employees

If:

- (a) a payment has been made by a company:
 - (i) on account of wages; or
 - (ii) on account of superannuation contributions (within the meaning of section 556); or
 - (iii) in respect of leave of absence, or termination of employment, under an industrial instrument; and
- (b) the payment was made as a result of an advance of money by a person (whether before, on or after the relevant date) for the purpose of making the payment;

then:

- (c) the person by whom the money was advanced has the same rights under this Chapter as a creditor of the company; and
- (d) subject to paragraph (e), the person by whom the money was advanced has, in the winding up of the company, the same right of priority of payment in respect of the money so advanced and paid as the person who received the payment would have had if the payment had not been made; and
- (e) the right of priority conferred by paragraph (d) is not to exceed the amount by which the sum in respect of which the person who received the payment would have been entitled to priority in the winding up has been diminished by reason of the payment.

561 Priority of employees' claims over floating charges

So far as the property of a company available for payment of creditors other than secured creditors is insufficient to meet payment of:

- (a) any debt referred to in paragraph 556(1)(e), (g) or (h); and

Section 562

- (b) any amount that pursuant to subsection 558(3) or (4) is a cost of the winding up, being an amount that, if it had been payable on or before the relevant date, would have been a debt referred to in paragraph 556(1)(e), (g) or (h); and
- (c) any amount in respect of which a right of priority is given by section 560;

payment of that debt or amount must be made in priority over the claims of a chargee in relation to a floating charge created by the company and may be made accordingly out of any property comprised in or subject to that charge.

562 Application of proceeds of contracts of insurance

- (1) Where a company is, under a contract of insurance (not being a contract of reinsurance) entered into before the relevant date, insured against liability to third parties, then, if such a liability is incurred by the company (whether before or after the relevant date) and an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, the amount must, after deducting any expenses of or incidental to getting in that amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability, or any part of that liability remaining undischarged, in priority to all payments in respect of the debts mentioned in section 556.
- (2) If the liability of the insurer to the company is less than the liability of the company to the third party, subsection (1) does not limit the rights of the third party in respect of the balance.
- (3) This section has effect notwithstanding any agreement to the contrary.

562A Application of proceeds of contracts of reinsurance

- (1) This section applies where:
 - (a) a company is insured, under a contract of reinsurance entered into before the relevant date, against liability to pay amounts in respect of a relevant contract of insurance or relevant contracts of insurance; and

Section 562A

- (b) an amount in respect of that liability has been or is received by the company or the liquidator under the contract of reinsurance.
- (2) Subject to subsection (4), if the amount received, after deducting expenses of or incidental to getting in that amount, equals or exceeds the total of all the amounts that are payable by the company under relevant contracts of insurance, the liquidator must, out of the amount received and in priority to all payments in respect of the debts mentioned in section 556, pay the amounts that are so payable under those contracts of insurance.
- (3) Subject to subsection (4), if subsection (2) does not apply, the liquidator must, out of the amount received and in priority to all payments in respect of the debts mentioned in section 556, pay to each person to whom an amount is payable by the company under a relevant contract of insurance an amount calculated in accordance with the formula:

$$\frac{\text{Particular amount owed}}{\text{Total amount owed}} \times \text{Reinsurance payment}$$

where:

particular amount owed means the amount payable to the person under the relevant contract of insurance.

reinsurance payment means the amount received under the contract of reinsurance, less any expenses of or incidental to getting in that amount.

total amount owed means the total of all the amounts payable by the company under relevant contracts of insurance.

- (4) The Court may, on application by a person to whom an amount is payable under a relevant contract of insurance, make an order to the effect that subsections (2) and (3) do not apply to the amount received under the contract of reinsurance and that that amount must, instead, be applied by the liquidator in the manner specified in the order, being a manner that the Court considers just and equitable in the circumstances.
- (5) The matters that the Court may take into account in considering whether to make an order under subsection (4) include, but are not limited to:

- (a) whether it is possible to identify particular relevant contracts of insurance as being the contracts in respect of which the contract of reinsurance was entered into; and
 - (b) whether it is possible to identify persons who can be said to have paid extra in order to have particular relevant contracts of insurance protected by reinsurance; and
 - (c) whether particular relevant contracts of insurance include statements to the effect that the contracts are to be protected by reinsurance; and
 - (d) whether a person to whom an amount is payable under a relevant contract of insurance would be severely prejudiced if subsections (2) and (3) applied to the amount received under the contract of reinsurance.
- (6) If receipt of a payment under this section only partially discharges a liability of the company to a person, nothing in this section affects the rights of the person in respect of the balance of the liability.
- (7) This section has effect despite any agreement to the contrary.
- (8) In this section:

relevant contract of insurance means a contract of insurance entered into by the company, as insurer, before the relevant date.

563 Provisions relating to injury compensation

- (1) Notwithstanding anything in section 556, paragraph 556(1)(f) does not apply in relation to the winding up of a company in any case where:
- (a) the company is being wound up voluntarily merely for the purpose of reconstruction or of amalgamation with another company and the right to the injury compensation has, on the reconstruction or amalgamation, been preserved to the person entitled to it; or
 - (b) the company has entered into a contract with an insurer in respect of any liability for injury compensation.
- (2) Where injury compensation is payable by way of periodical payments, the amount of that compensation is, for the purposes of paragraph 556(1)(f), taken to be the lump sum for which those

Section 563AA

periodical payments could, if redeemable, be redeemed under the law under which the periodical payments are made.

563AA Seller under a buy-back agreement

- (1) The selling shareholder's claim under a buy-back agreement is postponed until all debts owed to people otherwise than as members of the company have been satisfied.
- (2) The shareholder's claim is not a debt owed by the company to the seller in the shareholder's capacity as a member of the company for the purposes of section 563A.

563A Member's debts to be postponed until other debts and claims satisfied

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.

563AAA Redemption of debentures

Priorities

- (1) Debentures of a company under a trust deed that are issued in place of debentures under that deed that have been redeemed have the priority that the redeemed debentures would have had if they had never been redeemed.

Deposit of debentures to secure advance

- (2) Debentures of a company are not to be taken to be redeemed merely because:
 - (a) the debentures secure advances on current account or otherwise; and
 - (b) the company's account ceases to be in debit while those debentures remain available.

Subdivision E—Miscellaneous

563B Interest on debts and claims from relevant date to date of payment

- (1) If, in the winding up of a company, the liquidator pays an amount in respect of an admitted debt or claim, there is also payable to the debtor or claimant, as a debt payable in the winding up, interest, at the prescribed rate, on the amount of the payment in respect of the period starting on the relevant date and ending on the day on which the payment is made.
- (2) Subject to subsection (3), payment of the interest is to be postponed until all other debts and claims in the winding up have been satisfied, other than debts owed to members of the company as members of the company (whether by way of dividends, profits or otherwise).
- (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
 - (b) the future date, within the meaning of section 554B.

563C Debt subordination

- (1) Nothing in this Division renders a debt subordination by a creditor of a company unlawful or unenforceable, except so far as the debt subordination would disadvantage any creditor of the company who was not a party to, or otherwise concerned in, the debt subordination.
- (2) In this section:

debt subordination means an agreement or declaration by a creditor of a company, however expressed, to the effect that, in specified circumstances:

- (a) a specified debt that the company owes the creditor; or
- (b) a specified part of such a debt;

will not be repaid until other specified debts that the company owes are repaid to a specified extent.

Section 564

564 Power of Court to make orders in favour of certain creditors

Where in any winding up:

- (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or
- (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;

the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

Division 7—Effect on certain transactions

565 Undue preference

- (1) A settlement, a conveyance or transfer of property, a charge on property, a payment made, or an obligation incurred, before 23 June 1993, by a company that, if it had been made or incurred by a natural person, would, in the event of his or her becoming a bankrupt, be void as against the trustee in the bankruptcy, is, in the event of the company being wound up, void as against the liquidator.
- (2) For the purposes of subsection (1), the date that corresponds with the date of presentation of the petition in bankruptcy in the case of a natural person is the relation-back day.
- (3) For the purposes of this section, the date that corresponds with the date on which a person becomes a bankrupt is the relation-back day.
- (4) Subject to Part 5.3A, a transfer or assignment by a company of all its property to trustees for the benefit of all its creditors is void.

566 Effect of floating charge

A floating charge on the undertaking or property of the company created before 23 June 1993 and within 6 months before the relation-back day is, unless it is proved that the company immediately after the creation of the charge was solvent, invalid except to the amount of any money paid to the company at the time of or subsequently to the creation of and in consideration for the charge together with interest on that amount at the rate of 8% per annum or at such other rate as is prescribed.

567 Liquidator's right to recover in respect of certain transactions

- (1) Where any property, business or undertaking has been acquired by a company for a cash consideration before 23 June 1993 and within 4 years before the relation-back day in relation to a winding up of the company:

Section 567

- (a) from a promoter of the company or a spouse of such a promoter, or from a relative of such a promoter or spouse; or
- (b) from a person who was, at the time of the acquisition, a director of the company, from a spouse of such a director, or from a relative of such a person or spouse; or
- (c) from a body corporate that was, at the time of the acquisition, related to the company; or
- (d) from a person who was, at the time of the acquisition, a director of a body corporate that was related to the company, from a spouse of such a person, or from a relative of such a person or spouse;

the liquidator may recover from the person or body corporate from which the property, business or undertaking was acquired any amount by which the cash consideration for the acquisition exceeded the value of the property, business or undertaking at the time of its acquisition.

- (2) Where any property, business or undertaking has been sold by a company for a cash consideration before 23 June 1993 and within 4 years before the relation-back day in relation to a winding up of the company:
 - (a) to a promoter of the company or a spouse of such a promoter, or to a relative of such a promoter or spouse; or
 - (b) to a person who was, at the time of the sale, a director of the company, to a spouse of such a director, or to a relative of such a person or spouse; or
 - (c) to a body corporate that was, at the time of the sale, related to the company; or
 - (d) to a person who was, at the time of the sale, a director of a body corporate that was related to the company, to a spouse of such a director, or to a relative of such a person or spouse;

the liquidator may recover from the person or body corporate to which the property, business or undertaking was sold any amount by which the value of the property, business or undertaking at the time of the sale exceeded the cash consideration.

- (3) For the purposes of this section, the value of the property, business or undertaking includes the value of any goodwill, profits or gain that might have been made from the property, business or undertaking.

- (4) In this section, ***cash consideration*** means any consideration payable otherwise than by the issue of shares in the company.
- (5) Where:
- (a) a disposition of property is made by a company before 23 June 1993 and within 6 months before the relation-back day in relation to a winding up of the company; and
 - (b) the disposition of property confers a preference upon a creditor of the company; and
 - (c) the disposition of property has the effect of discharging an officer of the company from a liability (whether under a guarantee or otherwise and whether contingent or otherwise);
- the liquidator:
- (d) in a case to which paragraph (e) does not apply—may recover from that officer an amount equal to the value of the relevant property, as the case may be; or
 - (e) where the liquidator has recovered from the creditor in respect of the disposition of the relevant property:
 - (i) an amount equal to part of the value of the relevant property; or
 - (ii) part of the relevant property;may recover from that officer an amount equal to the amount by which the value of the relevant property exceeds the sum of any amounts recovered as mentioned in subparagraph (i) and the amount of the value of any property recovered as mentioned in subparagraph (ii).
- (6) Where:
- (a) a liquidator recovers an amount of money from an officer of a company in respect of a disposition of property to a creditor as mentioned in subsection (5); and
 - (b) the liquidator subsequently recovers from that creditor an amount equal to the whole or part of the value of the property disposed of;
- the officer may recover from the liquidator an amount equal to the amount so recovered or the value of the property so recovered.

Division 7A—Disclaimer of onerous property

568 Disclaimer by liquidator; application to Court by party to contract

- (1) Subject to this section, a liquidator of a company may at any time, on the company's behalf, by signed writing disclaim property of the company that consists of:
 - (a) land burdened with onerous covenants; or
 - (b) shares; or
 - (c) property that is unsaleable or is not readily saleable; or
 - (d) property that may give rise to a liability to pay money or some other onerous obligation; or
 - (e) property where it is reasonable to expect that the costs, charges and expenses that would be incurred in realising the property would exceed the proceeds of realising the property; or
 - (f) a contract; whether or not:
 - (g) except in the case of a contract—the liquidator has tried to sell the property, has taken possession of it or exercised an act of ownership in relation to it; or
 - (h) in the case of a contract—the company or the liquidator has tried to assign, or has exercised rights in relation to, the contract or any property to which it relates.
- (1AA) This section does not apply to an agreement by the company to buy back its own shares.
- (1A) A liquidator cannot disclaim a contract (other than an unprofitable contract or a lease of land) except with the leave of the Court.
- (1B) On an application for leave under subsection (1A), the Court may:
 - (a) grant leave subject to such conditions; and
 - (b) make such orders in connection with matters arising under, or relating to, the contract;as the Court considers just and equitable.

Section 568A

- (8) Where:
- (a) an application in writing has been made to the liquidator by a person interested in property requiring the liquidator to decide whether he or she will disclaim the property; and
 - (b) the liquidator has, for the period of 28 days after the receipt of the application, or for such extended period as is allowed by the Court, declined or neglected to disclaim the property;
- the liquidator is not entitled to disclaim the property under this section and, in the case of a contract, he or she is taken to have adopted it.
- (9) The Court may, on the application of a person who is, as against the company, entitled to the benefit or subject to the burden of a contract made with the company, make an order:
- (a) discharging the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as the Court thinks proper; or
 - (b) rescinding the contract on such terms as to restitution by or to either party, or otherwise, as the Court thinks proper.
- (10) Amounts payable pursuant to an order under subsection (9) may be proved as a debt in the winding up.
- (13) For the purpose of determining whether property of a company is of a kind to which subsection (1) applies, the liquidator may, by notice served on a person claiming to have an interest in the property, require the person to give to the liquidator within such period, not being less than 14 days, as is specified in the notice, a statement of the interest claimed by the person and the person must comply with the requirement.

568A Liquidator must give notice of disclaimer

- (1) As soon as practicable after disclaiming property, a liquidator must:
- (a) lodge a written notice of the disclaimer; and
 - (b) give written notice of the disclaimer to each person who appears to the liquidator to have, or to claim to have, an interest in the property; and
 - (c) if the liquidator has reason to suspect that some person or persons may have, or may claim to have, an interest or interests in the property, but either does not know who, or

Section 568B

does not know where, the person is or the persons are—
comply with subsection (2); and

- (d) if a law of the Commonwealth or of a State or Territory requires the transfer or transmission of the property to be registered—give written notice of the disclaimer to the registrar or other person who has the function under that law of registering the transfer or transmission of the property.

Note: For electronic notification under paragraph (b), see section 600G.

- (2) If paragraph (1)(c) applies, the liquidator must cause notice of the disclaimer to be published:
 - (a) if the property is situated in a State or Territory and a daily newspaper circulates generally in that State or Territory—in a daily newspaper that so circulates; and
 - (b) in each State and Territory in which:
 - (i) the company has carried on business during or after the period of 6 months ending when the winding up began; and
 - (ii) a daily newspaper circulates generally;
in a daily newspaper that circulates generally in that State or Territory;

whether on the same or different days.

568B Application to set aside disclaimer before it takes effect

- (1) A person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer before it takes effect, but may only do so within 14 days after:
 - (a) if the liquidator gives to the person notice of the disclaimer, because of paragraph 568A(1)(b), before the end of 14 days after the liquidator lodges such notice—the liquidator gives such notice to the person; or
 - (b) if paragraph (a) does not apply but notice of the disclaimer is published under subsection 568A(2) before the end of the 14 days referred to in that paragraph—the last such notice to be so published is so published; or
 - (c) otherwise—the liquidator lodges notice of the disclaimer.

Section 568C

- (2) On an application under subsection (1), the Court:
 - (a) may by order set aside the disclaimer; and
 - (b) if it does so—may make such further orders as it thinks appropriate.
- (3) However, the Court may set aside a disclaimer under this section only if satisfied that the disclaimer would cause, to persons who have, or claim to have, interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the company's creditors.

568C When disclaimer takes effect

- (1) A disclaimer takes effect if, and only if:
 - (a) in a case where only one application under section 568B for an order setting aside the disclaimer, or each of 2 or more such applications, is made within the period that that section prescribes for making the application—the application, or each of the applications, is unsuccessful; or
 - (b) no such application is so made.
- (2) For the purposes of subsection (1), an application under section 568B is successful if, and only if, the result of the application, and all appeals (if any) arising out of the application, being finally determined or otherwise disposed of is an order setting aside the disclaimer (whether or not further orders are also made).
- (3) A disclaimer that takes effect because of subsection (1) is taken to have taken effect on the day after:
 - (a) if:
 - (i) the liquidator gave to a person notice of the disclaimer because of paragraph 568A(1)(b); or
 - (ii) notice of the disclaimer was published under subsection 568A(2);before the end of 14 days after the liquidator lodged notice of the disclaimer—the last day when the liquidator so gave such notice or such notice was so published; or
 - (b) otherwise—the day when the liquidator lodged notice of the disclaimer.

Section 568D

568D Effect of disclaimer

- (1) A disclaimer is taken to have terminated, as from the day on which it is taken because of subsection 568C(3) to take effect, the company's rights, interests, liabilities and property in or in respect of the disclaimed property, but does not affect any other person's rights or liabilities except so far as necessary in order to release the company and its property from liability.
- (2) A person aggrieved by the operation of a disclaimer is taken to be a creditor of the company to the extent of any loss suffered by the person because of the disclaimer and may prove such a loss as a debt in the winding up.

568E Application to set aside disclaimer after it has taken effect

- (1) With the leave of the Court, a person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer after it has taken effect.
- (2) The Court may give leave only if it is satisfied that it is unreasonable in all the circumstances to expect the person to have applied for an order setting aside the disclaimer before it took effect.
- (3) The Court may give leave subject to conditions.
- (4) On an application under subsection (1), the Court:
 - (a) may by order set aside the disclaimer; and
 - (b) if it does so—may make such further orders as it thinks appropriate, including orders necessary to put the company, the liquidator or anyone else in the same position, as nearly as practicable, as if the disclaimer had never taken effect.
- (5) However, the Court may set aside a disclaimer only if satisfied that the disclaimer has caused, or would cause, to persons who have, or claim to have, interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer (and making any further orders) would cause to:
 - (a) the company's creditors; and
 - (b) persons who have changed their position in reliance on the disclaimer taking effect.

568F Court may dispose of disclaimed property

- (1) The Court may order that disclaimed property vest in, or be delivered to:
 - (a) a person entitled to the property; or
 - (b) a person in or to whom it seems to the Court appropriate that the property be vested or delivered; or
 - (c) a person as trustee for a person of a kind referred to in paragraph (a) or (b).
- (2) The Court may make an order under subsection (1):
 - (a) on the application of a person who claims an interest in the property, or is under a liability in respect of the property that this Act has not discharged; and
 - (b) after hearing such persons as it thinks appropriate.
- (3) Subject to subsection (4), where an order is made under subsection (1) vesting property, the property vests immediately, for the purposes of the order, without any conveyance, transfer or assignment.
- (4) Where:
 - (a) a law of the Commonwealth or of a State or Territory requires the transfer of property vested by an order under subsection (1) to be registered; and
 - (b) that law enables the order to be registered;the property vests in equity because of the order but does not vest at law until that law has been complied with.

Division 7B—Effect on enforcement process against company's property

569 Executions, attachments etc. before winding up

(1) Where:

- (a) a creditor has issued execution against property of a company, or instituted proceedings to attach a debt due to a company or to enforce a charge or a charging order against property of a company, within 6 months immediately before the commencement of the winding up; and
- (b) the company commences to be wound up;

the creditor must pay to the liquidator an amount equal to the amount (if any) received by the creditor as a result of the execution, attachment or enforcement of the charge or the charging order, less an amount in respect of the costs of the execution, attachment or enforcement of the charge or the charging order, being an amount agreed between the creditor and the liquidator or, if no agreement is reached, an amount equal to the taxed cost of that execution, attachment or enforcement.

(2) Where the creditor has paid to the liquidator an amount in accordance with subsection (1), the creditor may prove in the winding up for the creditor's debt as an unsecured creditor as if the execution or attachment or the enforcement of the charge or the charging order, as the case may be, had not taken place.

(3) Subject to subsections (4) and (5), where a creditor of a company receives:

- (a) notice in writing of an application to the Court for the winding up of the company; or
- (b) notice in writing of the convening of a meeting of the company to consider a resolution that the company be wound up voluntarily;

it is not competent for the creditor to take any action, or any further action, as the case may be, to attach a debt due to the company or to enforce a charge or a charging order against property of the company.

- (4) Subsection (3) does not affect the right of a creditor to take action or further action if:
 - (a) in a case to which paragraph (3)(a) applies—the application has been withdrawn or dismissed; or
 - (b) in a case to which paragraph (3)(b) applies—the meeting of the company has refused to pass the resolution.
- (5) Subsection (3) does not prevent a creditor from performing a binding contract for the sale of property entered into before the creditor received a notice referred to in that subsection.
- (6) Notwithstanding anything contained in this Division, a person who purchases property in good faith:
 - (a) under a sale by the sheriff in consequence of the issue of execution against property of a company that, after the sale, commences to be wound up; or
 - (b) under a sale in consequence of the enforcement by a creditor of a charge or a charging order against property of a company that, after the sale, commences to be wound up;acquires a good title to it as against the liquidator and the company.
- (7) In this section:

charge means a charge created by a law upon registration of a judgment in a registry.

charging order means a charging order made by a court in respect of a judgment.

570 Duties of sheriff after receiving notice of application

- (1) Subject to this section, where a sheriff:
 - (a) receives notice in writing of an application to the Court for the winding up of a company; or
 - (b) receives notice in writing of the convening of a meeting of a company to consider a resolution that the company be wound up voluntarily;it is not competent for the sheriff to:
 - (c) take any action to sell property of the company pursuant to any process of execution issued by or on behalf of a creditor; or

Section 570

- (d) pay to the creditor by whom or on whose behalf the process of execution was issued or to any person on the creditor's behalf the proceeds of the sale of property of the company that has been sold pursuant to such a process or any money seized, or paid to avoid seizure or sale of property of the company, under such a process.
- (2) Subsection (1) does not affect the power of the sheriff to take any action or make any payment if:
 - (a) in a case to which paragraph (1)(a) applies—the application has been withdrawn or dismissed; or
 - (b) in a case to which paragraph (1)(b) applies—the meeting of the company has refused to pass the resolution.
- (3) Subject to this section, where the registrar or other appropriate officer of a court to which proceeds of the sale of property of a company or other money has been paid by a sheriff pursuant to a process of execution issued by or on behalf of a creditor of the company:
 - (a) receives notice in writing of an application to the Court for the winding up of the company; or
 - (b) receives notice in writing of the convening of a meeting of the company to consider a resolution that the company be wound up voluntarily;any of those proceeds or money not paid out of court must not be paid to the creditor or to any person on behalf of the creditor.
- (4) Subsection (3) does not prevent the making of a payment if:
 - (a) in a case to which paragraph (3)(a) applies—the application has been withdrawn or dismissed; or
 - (b) in a case to which paragraph (3)(b) applies—the meeting of the company has refused to pass the resolution.
- (5) Where a company is being wound up, the liquidator may serve notice in writing of that fact on a sheriff or the registrar or other appropriate officer of a court.
- (6) Upon such a notice being so served:
 - (a) the sheriff must deliver or pay to the liquidator:
 - (i) any property of the company in the sheriff's possession under a process of execution issued by or on behalf of a creditor; and

- (ii) any proceeds of the sale of property of the company or other money in the sheriff's possession, being proceeds of the sale of property sold, whether before or after the commencement of the winding up, pursuant to such a process or money seized, or paid to avoid seizure or sale of property of the company, whether before or after the commencement of the winding up, under such a process; or
 - (b) the registrar or other officer of the court must pay to the liquidator any proceeds of the sale of property of the company or other money in court, being proceeds of sale or other money paid into court, whether before or after the commencement of the winding up, by a sheriff pursuant to a process of execution issued by or on behalf of a creditor; as the case requires.
- (7) Where:
 - (a) property is, or proceeds of the sale of property or other money are, required by subsection (6) to be delivered or paid to a liquidator; or
 - (b) a sheriff has, pursuant to subsection (1), refrained from taking action to sell property of a company, being land, and that company is being wound up under an order made on the application referred to in that subsection;the costs of the execution are a first charge on that property or on those proceeds of sale or other money.
- (8) For the purpose of giving effect to the charge referred to in subsection (7), the sheriff, registrar or other officer may retain, on behalf of the creditor entitled to the benefit of the charge, such amount from the proceeds of sale or other money referred to in that subsection as he or she thinks necessary for the purpose.
- (9) The Court may, if in a particular case it considers it is proper to do so:
 - (a) permit a sheriff to take action to sell property or make a payment that the sheriff could not, by reason of subsection (1), otherwise validly take; or
 - (b) permit the making of a payment the making of which would, by reason of subsection (3), otherwise be prohibited.

Division 8—Pooling

Subdivision A—Pooling determinations

571 Pooling determination

Making of pooling determination

- (1) If the following conditions are satisfied in relation to a group of 2 or more companies:
 - (a) each company in the group is being wound up;
 - (b) any of the following subparagraphs applies:
 - (i) each company in the group is a related body corporate of each other company in the group;
 - (ii) apart from this section, the companies in the group are jointly liable for one or more debts or claims;
 - (iii) the companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;
 - (iv) one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;
- the liquidator or liquidators of the companies may, by writing:
- (c) determine that the group is a pooled group for the purposes of this section; and
 - (d) if the liquidator or liquidators consider that it is just and equitable, as between the various creditors of the companies in the group, to do so—determine that any or all of the following provisions:
 - (i) subsection (2);
 - (ii) subsection (3);
 - (iii) subsection (4);
 - (iv) subsection (5);
 - (v) subsection (6);

(vi) subsection (7);
are modified, as set out in the determination, in their
application to the companies in the group.

Note 1: Section 9 provides that *pooling determination* means a determination under subsection (1) of this section.

Note 2: A pooling determination comes into force when it is approved by the eligible unsecured creditors of each of the companies in the group—see section 578.

Consequences of pooling determination

- (2) If a determination under paragraph (1)(c) comes into force in relation to a group of 2 or more companies:
 - (a) each company in the group is taken to be jointly and severally liable for each debt payable by, and each claim against, each other company in the group; and
 - (b) each debt payable by a company or companies in the group to any other company or companies in the group is extinguished; and
 - (c) each claim that a company or companies in the group has against any other company or companies in the group is extinguished.
- (3) Subsection (2) applies to a debt or claim:
 - (a) whether present or future; and
 - (b) whether certain or contingent; and
 - (c) whether ascertained or sounding only in damages.
- (4) Subsection (2) does not apply to a debt payable by, or a claim against, a company in the group unless the debt or claim is admissible to proof against the company.
- (5) If a determination under paragraph (1)(c) comes into force in relation to a group of 2 or more companies, the order of priority applicable under sections 556, 560 and 561 is not altered for a company in the group.
- (6) If:
 - (a) a determination under paragraph (1)(c) comes into force in relation to a group of 2 or more companies; and

Section 571

(b) a secured creditor of a company in the group surrenders the relevant security to the liquidator of the company for the benefit of creditors of the companies in the group generally; the debt may be recovered as a debt that is jointly and severally payable by the companies in the group.

(7) If:

(a) a determination under paragraph (1)(c) comes into force in relation to a group of 2 or more companies; and

(b) a secured creditor of a company in the group realises the security;

so much of the debt as remains after deducting the net amount realised may be recovered as a debt that is jointly and severally payable by the companies in the group.

(8) The following provisions have effect subject to any modifications under paragraph (1)(d):

(a) subsection (2);

(b) subsection (3);

(c) subsection (4);

(d) subsection (5);

(e) subsection (6);

(f) subsection (7).

(9) Subsection (2) does not apply in relation to a secured creditor unless the relevant debt is payable by a company or companies in the group to any other company or companies in the group.

(10) If:

(a) a pooling determination comes into force in relation to a group of 2 or more companies; and

(b) there are one or more eligible employee creditors of a company in the group;

those eligible employee creditors are entitled to a priority at least equal to what they would have been entitled if the determination had not been made.

Section 477 not limited

(11) This section does not limit section 477.

572 Variation of pooling determination

If a pooling determination is in force in relation to a group of 2 or more companies, the liquidator or liquidators of the companies may, by writing, vary the determination.

Note: A variation of a pooling determination comes into force when it is approved by the creditors of the companies in the group—see section 578.

573 Lodgment of copy of pooling determination etc.

Pooling determination

- (1) Within 7 days after a pooling determination comes into force in relation to a group of 2 or more companies, the liquidator or liquidators of the companies in the group must lodge a copy of the determination with ASIC.

Note: A pooling determination comes into force when it is approved by the eligible unsecured creditors of each of the companies in the group—see section 578.

Variation of pooling determination

- (2) Within 7 days after a variation of a pooling determination comes into force in relation to a group of 2 or more companies, the liquidator or liquidators of the companies in the group must lodge a copy of the variation with ASIC.

Note: A variation of a pooling determination comes into force when it is approved by the eligible unsecured creditors of each of the companies in the group—see section 578.

574 Eligible unsecured creditors must approve the making or variation of a pooling determination

Convening of meetings of creditors

- (1) Within 5 business days after the liquidator or liquidators of a group of 2 or more companies:
 - (a) make a pooling determination in relation to the group; or
 - (b) vary a pooling determination in force in relation to the group;the liquidator or liquidators must convene separate meetings of the eligible unsecured creditors of each of the companies in the group.

Section 574

Note: For *eligible unsecured creditor*, see section 579Q.

Notice of meeting

- (2) A liquidator of a company must convene a meeting of the eligible unsecured creditors of the company by giving written notice of the meeting to the company's eligible unsecured creditors at least 5 business days before the meeting.

Note: For electronic notification under this subsection, see section 600G.

- (3) The notice given to an eligible unsecured creditor under subsection (2) must be accompanied by:
- (a) a copy of the determination or variation; and
 - (b) a written statement:
 - (i) identifying each of the companies in the group; and
 - (ii) setting out the opinion of the liquidator about each of the matters specified in subsection (4), and the reasons of the liquidator for those opinions; and
 - (iii) if the liquidator considers that any eligible unsecured creditors are likely to be disadvantaged by the coming into force of the determination or variation—the reasons (if any) why the liquidator considers that those disadvantaged eligible unsecured creditors should vote for a resolution approving the making of the determination or variation; and
 - (iv) setting out such other information known to the liquidator as will enable the eligible unsecured creditors to make an informed decision about whether to approve the making of the determination or variation.

Note: For electronic notification under this subsection, see section 600G.

- (4) For the purposes of subparagraph (3)(b)(ii), the matters are as follows:
- (a) whether it would be in the eligible unsecured creditors' interests generally for the determination or variation to come into force;
 - (b) the extent to which particular eligible unsecured creditors are likely to be disadvantaged by the coming into force of the determination or variation;

- (c) the extent to which particular companies in the group are likely to be disadvantaged by the coming into force of the determination or variation;
- (d) the likely return to eligible unsecured creditors if the determination or variation were to come into force;
- (e) the likely return to eligible unsecured creditors if the determination or variation were not to come into force.

575 Members' voluntary winding up—copy of notice etc. to be given to each member of the company

If:

- (a) a company is being wound up under a members' voluntary winding up; and
- (b) the liquidator of the company convenes a meeting of the eligible unsecured creditors of the company under section 574;

the liquidator must, within 5 business days after convening the meeting, give a copy of:

- (c) the subsection 574(2) notice; and
- (d) the paragraph 574(3)(b) statement;

to each member of the company, so long as the member is not a company in the group concerned.

576 Conduct of meeting

- (1) At a meeting convened under section 574, the liquidator is to preside.
- (2) A meeting convened under section 574 may be adjourned from time to time.

577 Eligible unsecured creditors may decide to approve the determination or variation

- (1) At a meeting convened under section 574, the eligible unsecured creditors may resolve to approve the making of the determination or variation.

Note: For *eligible unsecured creditor*, see section 579Q.

Section 578

- (2) A resolution under subsection (1) must be agreed to by a majority in number of the eligible unsecured creditors present and voting, either in person or by proxy, being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the eligible unsecured creditors present and voting in person or by proxy.
- (3) If, at a meeting convened under section 574, the eligible unsecured creditors do not resolve to approve the making of the determination or variation:
 - (a) the determination or variation is cancelled at the end of the meeting; and
 - (b) if, as at the end of the meeting, a corresponding resolution has not been considered at another meeting convened under section 574 of the eligible unsecured creditors of another company in the group—that other meeting is cancelled.

578 When pooling determination comes into force etc.

Pooling determination

- (1) If:
 - (a) a pooling determination is made in relation to a group of 2 or more companies; and
 - (b) meetings are convened under section 574 of the eligible unsecured creditors of each company in the group; and
 - (c) at each meeting, the eligible unsecured creditors pass a resolution, in accordance with section 577, approving the making of the determination;then:
 - (d) if all the resolutions were passed at the same time—the determination comes into force immediately after the resolutions were passed; or
 - (e) if the resolutions were passed at different times—the determination comes into force immediately after the last of those times.

Note: For *eligible unsecured creditor*, see section 579Q.

Variation of pooling determination

- (2) If:
- (a) a pooling determination is in force in relation to a group of 2 or more companies; and
 - (b) the pooling determination is varied; and
 - (c) meetings are convened under section 574 of the eligible unsecured creditors of each company in the group; and
 - (d) at each meeting, the eligible unsecured creditors pass a resolution, in accordance with section 577, approving the making of the variation;
- then:
- (e) if all the resolutions were passed at the same time—the variation comes into force immediately after the resolutions were passed; or
 - (f) if the resolutions were passed at different times—the variation comes into force immediately after the last of those times.

Note: For *eligible unsecured creditor*, see section 579Q.

579 Duties of liquidator

- (1) This section applies if:
- (a) the liquidator or liquidators of a group of 2 or more companies exercise a power conferred by section 571 or 574; and
 - (b) the liquidator or liquidators, in the exercise of that power, acted:
 - (i) with due care; and
 - (ii) in good faith; and
 - (iii) for the benefit of the creditors of the companies in the group, considered as a whole.
- (2) The liquidator or liquidators are taken not to be in breach of:
- (a) any duty to a company in the group concerned (whether under section 180, 181, 182, 183 or 184 or otherwise and whether of a fiduciary nature or not); or
 - (b) any duty to the creditors of a company in the group concerned (whether of a fiduciary nature or not);
- in connection with the exercise of that power.

Section 579A

579A Court may vary or terminate pooling determination

- (1) If a pooling determination is in force in relation to a group of 2 or more companies, the Court may make an order varying or terminating the pooling determination if the Court is satisfied that:
- (a) information that was about the business, property, affairs or financial circumstances of a company in the group, and that:
 - (i) was false or misleading; and
 - (ii) can reasonably be expected to have been material to eligible unsecured creditors of a company in the group in deciding whether to vote in favour of a resolution to approve the making of the pooling determination;was given to:
 - (iii) the liquidator of a company in the group; or
 - (iv) eligible unsecured creditors of a company in the group;or
 - (b) information that was about the business, property, affairs or financial circumstances of a company in the group, and that:
 - (i) was false or misleading; and
 - (ii) can reasonably be expected to have been material to eligible unsecured creditors of a company in the group in deciding whether to vote in favour of a resolution to approve the making of the pooling determination;was contained in a statement under paragraph 574(3)(b) that accompanied a notice of the meeting at which the resolution was passed; or
 - (c) there was an omission from such a statement, and the omission can reasonably be expected to have been material to any of those eligible unsecured creditors in deciding whether to vote in favour of a resolution to approve the making of the pooling determination; or
 - (d) effect cannot be given to the pooling determination without injustice or undue delay; or
 - (e) the pooling determination would materially disadvantage an eligible unsecured creditor who is an applicant for the order; or
 - (f) the pooling determination would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, an applicant for the order who is an eligible unsecured creditor of a company in the group; or

Section 579B

- (g) the pooling determination would be contrary to the interests of the creditors of the companies in the group, considered as a whole; or
- (h) in a case where a company in the group is being wound up under a members' voluntary winding up:
 - (i) the pooling determination would materially disadvantage a member of the company who is an applicant for the order; or
 - (ii) the pooling determination would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such members; or
 - (iii) the pooling determination would be contrary to the interests of the members of the company as a whole; or
- (i) the pooling determination should be varied or terminated for some other reason.

Note: For *eligible unsecured creditor*, see section 579Q.

- (2) An order may only be made on the application of:
 - (a) a creditor of a company in the group; or
 - (b) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group; or
 - (c) any other interested person.

579B Court may cancel or confirm variation

- (1) If:
 - (a) a pooling determination is in force in relation to a group of 2 or more companies; and
 - (b) the determination is varied; and
 - (c) the variation has come into force;either of the following persons may apply to the Court for an order cancelling the variation:
 - (d) a creditor of a company in the group;
 - (e) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.

Section 579C

- (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.

579C When Court may void or validate pooling determination

- (1) If there is doubt, on a specific ground, whether a pooling determination that relates to a group of 2 or more companies:
 - (a) was made, varied or approved in accordance with this Division; or
 - (b) complies with this Division;any of the following persons may apply to the Court for an order under this section:
 - (c) the liquidator of a company in the group;
 - (d) a creditor of a company in the group;
 - (e) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group;
 - (f) ASIC.
- (2) On an application, the Court may make an order declaring the pooling determination, or a provision of it, to be void or not to be void, as the case requires, on the ground specified in the application or some other ground.
- (3) On an application, the Court may declare the pooling determination, or a provision of it, to be valid, despite a contravention of a provision of this Division, if the Court is satisfied that:
 - (a) the provision was substantially complied with; and
 - (b) no injustice will result for anyone affected by the pooling determination if the contravention is disregarded.
- (4) If the Court declares a provision of a pooling determination to be void, the Court may, by order, vary the pooling determination.

579D Effect of termination or avoidance

The termination or avoidance, in whole or in part, of a pooling determination does not affect the previous operation of:

- (a) the pooling determination; or
- (b) this Division in so far as it relates to the pooling determination.

Subdivision B—Pooling orders**579E Pooling orders***Making of pooling order*

- (1) If it appears to the Court that the following conditions are satisfied in relation to a group of 2 or more companies:
- (a) each company in the group is being wound up;
 - (b) any of the following subparagraphs applies:
 - (i) each company in the group is a related body corporate of each other company in the group;
 - (ii) apart from this section, the companies in the group are jointly liable for one or more debts or claims;
 - (iii) the companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;
 - (iv) one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;

the Court may, if the Court is satisfied that it is just and equitable to do so, by order, determine that the group is a pooled group for the purposes of this section.

Note 1: Section 9 provides that **pooling order** means an order under subsection (1) of this section.

Note 2: See also subsection (12) (just and equitable criteria).

Section 579E

Consequences of pooling order

- (2) If a pooling order comes into force in relation to a group of 2 or more companies:
- (a) each company in the group is taken to be jointly and severally liable for each debt payable by, and each claim against, each other company in the group; and
 - (b) each debt payable by a company or companies in the group to any other company or companies in the group is extinguished; and
 - (c) each claim that a company or companies in the group has against any other company or companies in the group is extinguished.

Note: For exemptions, see paragraph 579G(1)(a).

- (3) Subsection (2) applies to a debt or claim:
- (a) whether present or future; and
 - (b) whether certain or contingent; and
 - (c) whether ascertained or sounding only in damages.
- (4) Subsection (2) does not apply to a debt payable by, or a claim against, a company in the group unless the debt or claim is admissible to proof against the company.
- (5) If a pooling order comes into force in relation to a group of 2 or more companies, the order of priority applicable under sections 556, 560 and 561 is not altered for a company in the group.
- (6) If:
- (a) a pooling order comes into force in relation to a group of 2 or more companies; and
 - (b) a secured creditor of a company in the group surrenders the relevant security to the liquidator of the company for the benefit of creditors of the companies in the group generally;
- the debt may be recovered as a debt that is jointly and severally payable by the companies in the group.
- (7) If:
- (a) a pooling order comes into force in relation to a group of 2 or more companies; and

Section 579E

- (b) a secured creditor of a company in the group realises the security;
so much of the debt as remains after deducting the net amount realised may be recovered as a debt that is jointly and severally payable by the companies in the group.
- (8) The following provisions have effect subject to any modifications under paragraph 579G(1)(d):
 - (a) subsection (2);
 - (b) subsection (3);
 - (c) subsection (4);
 - (d) subsection (5);
 - (e) subsection (6);
 - (f) subsection (7).
- (9) Subsection (2) does not apply in relation to a secured creditor unless the relevant debt is payable by a company or companies in the group to any other company or companies in the group.
- (10) The Court must not make a pooling order in relation to a group of 2 or more companies if:
 - (a) both:
 - (i) the Court is satisfied the order would materially disadvantage an eligible unsecured creditor of a company in the group; and
 - (ii) the eligible unsecured creditor has not consented to the making of the order; or
 - (b) all of the following conditions are satisfied:
 - (i) a company in the group is being wound up under a members' voluntary winding up;
 - (ii) the Court is satisfied that the order would materially disadvantage a member of that company;
 - (iii) the member is not a company in the group;
 - (iv) the member has not consented to the making of the order.

Note: For *eligible unsecured creditor*, see section 579Q.

Standing

- (11) The Court may only make a pooling order on the application of the liquidator or liquidators of the companies in the group.

Section 579F

Just and equitable criteria

- (12) In determining whether it is just and equitable to make a pooling order, the Court must have regard to all of the following matters:
- (a) the extent to which:
 - (i) a company in the group; and
 - (ii) the officers or employees of a company in the group; were involved in the management or operations of any of the other companies in the group;
 - (b) the conduct of:
 - (i) a company in the group; and
 - (ii) the officers or employees of a company in the group; towards the creditors of any of the other companies in the group;
 - (c) the extent to which the circumstances that gave rise to the winding up of any of the companies in the group are directly or indirectly attributable to the acts or omissions of:
 - (i) any of the other companies in the group; or
 - (ii) the officers or employees of any of the other companies in the group;
 - (d) the extent to which the activities and business of the companies in the group have been intermingled;
 - (e) the extent to which creditors of any of the companies in the group may be advantaged or disadvantaged by the making of the order;
 - (f) any other relevant matters.

Lodgment of pooling order

- (13) A pooling order must be lodged with ASIC.

579F Variation of pooling orders

- (1) The Court may, by order, vary a pooling order if the Court is of the opinion that it is just and equitable to do so.
- (2) A pooling order may only be varied on the application of:
 - (a) the liquidator of a company in the group; or
 - (b) a creditor of a company in the group; or

Section 579G

- (c) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.

Lodgment of order

- (3) An order under subsection (1) must be lodged with ASIC.

579G Court may make ancillary orders etc.

- (1) If the Court makes a pooling order in relation to a group of 2 or more companies, the Court may, if the Court is of the opinion that it is just and equitable to do so, do any or all of the following things:
 - (a) by order, exempt:
 - (i) a specified debt or claim; or
 - (ii) a specified class of debts or claims;from the application of subsection 579E(2) to the group;
 - (b) by order, transfer, or direct the transfer, of:
 - (i) specified property; or
 - (ii) a specified class of property;from a company in the group to another company in the group;
 - (c) by order, transfer, or direct the transfer, of liability for:
 - (i) a specified debt or claim; or
 - (ii) a specified class of debts or claims;from a company in the group to another company in the group;
 - (d) by order, modify the application of this Act in relation to the winding up of the companies in the group;
 - (e) make such other orders, and give such directions, in relation to the winding up of the companies in the group, as the Court thinks fit.

Standing

- (2) An order or direction under subsection (1) may only be made or given on the application of:
 - (a) the liquidator of a company in the group; or

Section 579H

- (b) a creditor of a company in the group; or
- (c) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.

Conditional orders etc.

- (3) An order or direction under subsection (1) may be made or given subject to conditions.
- (4) An order or direction under subsection (1) may provide for different returns for different creditors or classes of creditors.
- (5) An order or direction under subsection (1) may provide for the subordination of the debts and claims of specified creditors or classes of creditors to those of other creditors.
- (6) Subsections (4) and (5) do not limit subsection (1) or (3).

Rights of secured creditors

- (7) An order or direction under subsection (1) does not affect the rights of a secured creditor, unless the relevant debt is payable by a company or companies in the group to any other company or companies in the group.

Lodgment of order or direction

- (8) An order or direction under subsection (1) must be lodged with ASIC.

579H Variation of ancillary orders etc.

Variation of ancillary order

- (1) The Court may, by order, vary an order made under subsection 579G(1) if the Court is of the opinion that it is just and equitable to do so.
- (2) An order made under subsection 579G(1) may only be varied on the application of:
 - (a) the liquidator of a company in the group; or

Section 579J

- (b) a creditor of a company in the group, so long as the creditor is not a company in the group; or
- (c) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.

Variation of direction

- (3) The Court may vary a direction given under subsection 579G(1) if the Court is of the opinion that it is just and equitable to do so.
- (4) A direction given under subsection 579G(1) may only be varied on the application of:
 - (a) the liquidator of a company in the group; or
 - (b) a creditor of a company in the group; or
 - (c) in a case where a company in the group is being wound up under a members' voluntary winding up—a member of the company, so long as the member is not a company in the group.

Lodgment of order or direction

- (5) An order under subsection (1) must be lodged with ASIC.
- (6) A variation of a direction given under subsection 579G(1) must be lodged with ASIC.

579J Notice of application for pooling order etc.

- (1) If the liquidator or liquidators of the companies in a group apply for a pooling order, the liquidator or liquidators must give written notice of:
 - (a) the application; or
 - (b) an Internet site where persons can view a copy of the application;to:
 - (c) each eligible unsecured creditor of each company in the group; and
 - (d) in a case where a company in the group is being wound up under a members' voluntary winding up—each member of

Section 579K

the company, so long as the member is not a company in the group; and

- (e) such other persons (if any) as the Court directs.

Note 1: For *eligible unsecured creditor*, see section 579Q.

Note 2: For electronic notification under this subsection, see section 600G.

- (2) If:

- (a) a pooling order is made in relation to a group of 2 or more companies; and
- (b) the liquidator of a company in the group applies for:
- (i) an order under subsection 579F(1); or
 - (ii) an order under subsection 579G(1); or
 - (iii) an order under subsection 579H(1); or
 - (iv) a direction under subsection 579G(1); or
 - (v) a variation of a direction given under subsection 579G(1);

the liquidator must give written notice of:

- (c) the application; or
- (d) an Internet site where persons can view a copy of the application;

to:

- (e) each eligible unsecured creditor of each company in the group; and
- (f) in a case where a company in the group is being wound up under a members' voluntary winding up—each member of the company, so long as the member is not a company in the group; and
- (g) such other persons (if any) as the Court directs.

Note 1: For *eligible unsecured creditor*, see section 579Q.

Note 2: For electronic notification under this subsection, see section 600G.

579K Notice of pooling order etc.

Notice of pooling order

- (1) If a pooling order is made in relation to a group of 2 or more companies, the liquidator or liquidators of the companies in the group must:

Section 579K

- (a) give each eligible unsecured creditor of each company in the group a written notice setting out:
 - (i) the order; and
 - (ii) a summary description of the order; or
- (b) give each eligible unsecured creditor of each company in the group a written notice of an Internet site where persons can view a copy of:
 - (i) the order; and
 - (ii) a summary description of the order.

Note 1: For *eligible unsecured creditor*, see section 579Q.

Note 2: For electronic notification under this subsection, see section 600G.

(2) If:

- (a) a pooling order is made in relation to a group of 2 or more companies; and
- (b) a company in the group is being wound up under a members' voluntary winding up;

the liquidator or liquidators of the companies in the group must:

- (c) give each member of that company a written notice setting out:
 - (i) the order; and
 - (ii) a summary description of the order;
 so long as the member is not a company in the group; or
- (d) give each member of that company a written notice of an Internet site where persons can view a copy of:
 - (i) the order; and
 - (ii) a summary description of the order;
 so long as the member is not a company in the group.

Note: For electronic notification under this subsection, see section 600G.

Notice of application by liquidator

(3) If:

- (a) a pooling order is made in relation to a group of 2 or more companies; and
- (b) the Court does any of the following on the application of a liquidator of a company in the group:
 - (i) makes an order under subsection 579F(1);
 - (ii) makes an order under subsection 579G(1);

Section 579K

- (iii) makes an order under subsection 579H(1);
- (iv) gives a direction under subsection 579G(1);
- (v) varies a direction given under subsection 579G(1);

the liquidator must:

- (c) give each eligible unsecured creditor of each company in the group a written notice setting out:
 - (i) the order, direction or variation; and
 - (ii) a summary description of the order, direction or variation; or
- (d) give each eligible unsecured creditor of each company in the group a written notice of an Internet site where persons can view a copy of:
 - (i) the order, direction or variation; and
 - (ii) a summary description of the order, direction or variation.

Note 1: For *eligible unsecured creditor*, see section 579Q.

Note 2: For electronic notification under this subsection, see section 600G.

(4) If:

- (a) a pooling order is made in relation to a group of 2 or more companies; and
- (b) the Court does any of the following on the application of a liquidator of a company in the group:
 - (i) makes an order under subsection 579F(1);
 - (ii) makes an order under subsection 579G(1);
 - (iii) makes an order under subsection 579H(1);
 - (iv) gives a direction under subsection 579G(1);
 - (v) varies a direction given under subsection 579G(1); and
- (c) a company in the group is being wound up under a members' voluntary winding up;

the liquidator must:

- (d) give each member of that company a written notice setting out:
 - (i) the order, direction or variation; and
 - (ii) a summary description of the order, direction or variation;
- so long as the member is not a company in the group; or

Section 579L

- (e) give each member of that company a written notice of an Internet site where persons can view a copy of:
 - (i) the order, direction or variation; and
 - (ii) a summary description of the order, direction or variation;
- so long as the member is not a company in the group.

Note: For electronic notification under this subsection, see section 600G.

579L Consolidated meetings of creditors

- (1) If:
 - (a) either:
 - (i) a pooling determination is in force in relation to a group of 2 or more companies; or
 - (ii) a pooling order is in force in relation to a group of 2 or more companies; and
 - (b) each company in the group is being wound up;then, unless the Court otherwise orders:
 - (c) instead of convening separate meetings under or for the purposes of a particular provision of this Act, the liquidator or liquidators may convene a meeting under or for the purposes of that provision, on a consolidated basis, of the creditors of the companies in the group; and
 - (d) a resolution passed at a consolidated meeting by those creditors is taken to have been passed by the creditors of each of the companies in the group; and
 - (e) if there are 2 or more liquidators—one of those liquidators is to preside at a consolidated meeting; and
 - (f) notice of a consolidated meeting may be given by the liquidator or liquidators.

Note: See also section 548A (committee of inspection).

- (2) The regulations may make provision for or in relation to:
 - (a) the convening of, conduct of, and procedure and voting at, consolidated meetings of creditors; and
 - (b) the number of persons required to constitute a quorum at any such meeting; and
 - (c) the sending of notices of meetings to persons entitled to attend any such meeting; and

Section 579M

- (d) the lodging of copies of notices of, and of resolutions passed at, any such meeting; and
- (e) generally regulating the conduct of, and procedure at, any such meeting.

Subdivision C—Other provisions

579M When debts or claims are provable in winding up

If a debt or claim becomes a debt payable by, or a claim against, a company under any of the following provisions:

- (a) subsection 571(2) (including that subsection as modified by a determination under paragraph 571(1)(d));
- (b) subsection 571(6) (including that subsection as modified by a determination under paragraph 571(1)(d));
- (c) subsection 571(7) (including that subsection as modified by a determination under paragraph 571(1)(d));
- (d) subsection 579E(2) (including that subsection as modified by an order under paragraph 579G(1)(d));
- (e) subsection 579E(6) (including that subsection as modified by an order under paragraph 579G(1)(d));
- (f) subsection 579E(7) (including that subsection as modified by an order under paragraph 579G(1)(d));
- (g) subsection 579G(1);

then, in the winding up of the company, the debt or claim is admissible to proof against the company.

579N Group of companies

To avoid doubt, for the purposes of:

- (a) this Division; or
- (b) any other provision of this Act to the extent to which it relates to this Division;

a group of 2 or more companies need not be associated with each other in any way (other than a way described in paragraph 571(1)(b) or 579E(1)(b)).

579P Secured debt may become unsecured

For the purposes of this Division, a secured debt becomes an unsecured debt to the extent that the creditor proves for the debt as an unsecured creditor.

579Q Eligible unsecured creditor

- (1) Subject to subsection (2), for the purposes of the application of this Division to a group of 2 or more companies, a creditor of a company in the group is an ***eligible unsecured creditor*** of that company if:
- (a) both:
 - (i) the creditor's debt or claim is unsecured; and
 - (ii) the creditor is not a company in the group; or
 - (b) the creditor is specified in the regulations.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (2) The regulations may provide that, for the purposes of the application of this Division to a group of 2 or more companies, a specified creditor of a company in the group is not an ***eligible unsecured creditor*** of that company.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

Division 9—Co-operation between Australian and foreign courts in external administration matters

580 Definitions

In this Division:

external administration matter means a matter relating to:

- (a) winding up, under this Chapter, a company or a Part 5.7 body; or
- (b) winding up, outside Australia, a body corporate or a Part 5.7 body; or
- (c) the insolvency of a body corporate or of a Part 5.7 body.

prescribed country means:

- (a) a country prescribed for the purposes of this definition; or
- (b) a colony, overseas territory or protectorate of a country so prescribed.

581 Courts to act in aid of each other

- (1) All courts having jurisdiction in matters arising under this Act, the Judges of those courts and the officers of, or under the control of, those courts must severally act in aid of, and be auxiliary to, each other in all external administration matters.
- (2) In all external administration matters, the Court:
 - (a) must act in aid of, and be auxiliary to, the courts of:
 - (i) external Territories; and
 - (ii) States that are not in this jurisdiction; and
 - (iii) prescribed countries;that have jurisdiction in external administration matters; and
 - (b) may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters.
- (3) Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in an external administration matter is filed in the Court, the Court may exercise

Section 581

such powers with respect to the matter as it could exercise if the matter had arisen in its own jurisdiction.

- (4) The Court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in external administration matters to act in aid of, and be auxiliary to, it in an external administration matter.

Part 5.7—Winding up bodies other than companies

582 Application of Part

- (1) This Part has effect in addition to, and not in derogation of, sections 601CC and 601CL and any provisions contained in this Act or any other law with respect to the winding up of bodies, and the liquidator or Court may exercise any powers or do any act in the case of Part 5.7 bodies that might be exercised or done by him, her or it in the winding up of companies.
- (2) Nothing in this Part affects the operation of the *Bankruptcy Act 1966*.
- (3) A Part 5.7 body may be wound up under this Part notwithstanding that it is being wound up or has been dissolved, deregistered or has otherwise ceased to exist as a body corporate under or by virtue of the laws of the place under which it was incorporated.

583 Winding up Part 5.7 bodies

Subject to this Part, a Part 5.7 body may be wound up under this Chapter and this Chapter applies accordingly to a Part 5.7 body with such adaptations as are necessary, including the following adaptations:

- (a) the principal place of business of a Part 5.7 body in this jurisdiction is taken, for all the purposes of the winding up, to be the registered office of the Part 5.7 body;
- (b) a Part 5.7 body is not to be wound up voluntarily under this Chapter;
- (c) the circumstances in which a Part 5.7 body may be wound up are as follows:
 - (i) if the Part 5.7 body is unable to pay its debts, has been dissolved or deregistered, has ceased to carry on business in this jurisdiction or has a place of business in this jurisdiction only for the purpose of winding up its affairs;
 - (ii) if the Court is of opinion that it is just and equitable that the Part 5.7 body should be wound up;

- (iii) if ASIC has stated in a report prepared under Division 1 of Part 3 of the ASIC Act that, in its opinion:
 - (A) the Part 5.7 body cannot pay its debts and should be wound up; or
 - (B) it is in the interests of the public, of the members, or of the creditors, that the Part 5.7 body should be wound up;
- (d) if the Part 5.7 body is a registrable Australian body—the winding up must deal only with the affairs of the body outside its place of origin.

585 Insolvency of Part 5.7 body

For the purposes of this Part, a Part 5.7 body is taken to be unable to pay its debts if:

- (a) a creditor, by assignment or otherwise, to whom the Part 5.7 body is indebted in a sum exceeding the statutory minimum then due has served on the Part 5.7 body, by leaving at its principal place of business in this jurisdiction or by delivering to the secretary or a director or senior manager of the Part 5.7 body or by otherwise serving in such manner as the Court approves or directs, a demand, signed by or on behalf of the creditor, requiring the body to pay the sum so due and the body has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the satisfaction of the creditor; or
- (b) an action or other proceeding has been instituted against any member for any debt or demand due or claimed to be due from the Part 5.7 body or from the member as such and, notice in writing of the institution of the action or proceeding having been served on the body by leaving it at its principal place of business in this jurisdiction or by delivering it to the secretary or a director or senior manager of the Part 5.7 body or by otherwise serving it in such manner as the Court approves or directs, the Part 5.7 body has not, within 10 days after service of the notice, paid, secured or compounded for the debt or demand or procured the action or proceeding to be stayed or indemnified the defendant to his, her or its reasonable satisfaction against the action or proceeding and against all costs, damages and expenses to be incurred by him, her or it by reason of the action or proceeding; or

Section 586

- (c) execution or other process issued on a judgment, decree or order obtained in a court (whether an Australian court or not) in favour of a creditor against the Part 5.7 body or a member of the Part 5.7 body as such, or a person authorised to be sued as nominal defendant on behalf of the Part 5.7 body, is returned unsatisfied; or
- (d) it is otherwise proved to the satisfaction of the Court that the Part 5.7 body is unable to pay its debts.

586 Contributories in winding up of Part 5.7 body

- (1) On a Part 5.7 body being wound up, every person who:
 - (a) in any case—is liable to pay or contribute to the payment of:
 - (i) a debt or liability of the Part 5.7 body; or
 - (ii) any sum for the adjustment of the rights of the members among themselves; or
 - (iii) the costs and expenses of winding up; or
 - (b) if the Part 5.7 body has been dissolved or deregistered in its place of origin—was so liable immediately before the dissolution or deregistration;is a contributory and every contributory is liable to contribute to the property of the Part 5.7 body all sums due from the contributory in respect of any such liability.
- (2) On the death or bankruptcy of a contributory, the provisions of this Act with respect to the personal representatives of deceased contributories or the assignees and trustees of bankrupt contributories, as the case may be, apply.

587 Power of Court to stay or restrain proceedings

- (1) The provisions of this Act with respect to staying and restraining actions and other civil proceedings against a company at any time after the filing of an application for winding up and before the making of a winding up order extend, in the case of a Part 5.7 body where the application to stay or restrain is by a creditor, to actions and other civil proceedings against a contributory of the Part 5.7 body.
- (2) Where an order has been made for winding up a Part 5.7 body, no action or other civil proceeding is to be proceeded with or commenced against a contributory of the Part 5.7 body in respect

of a debt of the Part 5.7 body except by leave of the Court and subject to such terms as the Court imposes.

588 Outstanding property of defunct registrable body

- (1) This section applies if, after the dissolution or deregistration of a registrable body, outstanding property of the body remains:
 - (a) in this jurisdiction; and
 - (b) outside the body's place of origin.
- (2) The estate and interest in the property, at law or in equity, of the body or its liquidator at that time, together with all claims, rights and remedies that the body or its liquidator then had in respect of the property, vests by force of this section in:
 - (a) if the body was incorporated in Australia or an external Territory—the person entitled to the property under the law of the body's place of origin; or
 - (b) if paragraph (a) does not apply and the property was held by the body or liquidator on trust—the Commonwealth; or
 - (c) otherwise—ASIC.
- (3) Where any claim, right or remedy of a liquidator may under this Act be made, exercised or availed of only with the approval or concurrence of the Court or some other person, the Commonwealth or ASIC may, for the purposes of this section, make, exercise or avail itself of the claim, right or remedy without such approval or concurrence.
- (4) Section 601AE applies to:
 - (a) property that vests in the Commonwealth under paragraph (2)(b) of this section as if the property were vested in the Commonwealth under subsection 601AD(1A); and
 - (b) property that vests in ASIC under paragraph (2)(c) of this section as if the property were vested in ASIC under subsection 601AD(2).

Part 5.7B—Recovering property or compensation for the benefit of creditors of insolvent company

Division 1—Preliminary

588D Secured debt may become unsecured

For the purposes of this Part, a secured debt becomes an unsecured debt to the extent that the creditor proves for the debt as an unsecured creditor.

588E Presumptions to be made in recovery proceedings

(1) In this section:

recovery proceeding, in relation to a company, means:

- (a) an application under section 588FF by the company's liquidator; or
 - (b) proceedings begun under subsection 588FH(2) by the company's liquidator; or
 - (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
 - (d) proceedings begun under subsection 588FJ(6) by the company's liquidator; or
 - (e) proceedings for a contravention of subsection 588G(2) in relation to the incurring of a debt by the company (including proceedings under section 588M in relation to the incurring of the debt but not including proceedings for an offence); or
 - (f) proceedings under section 588W in relation to the incurring of a debt by the company.
- (2) Subsections (3) to (9), inclusive, have effect for the purposes of a recovery proceeding in relation to a company.

Section 588E

- (3) If:
 - (a) the company is being wound up; and
 - (b) it is proved, or because of subsection (4) or (8) it must be presumed, that the company was insolvent at a particular time during the 12 months ending on the relation-back day;
it must be presumed that the company was insolvent throughout the period beginning at that time and ending on that day.
- (4) Subject to subsections (5) to (7), if it is proved that the company:
 - (a) has failed to keep financial records in relation to a period as required by subsection 286(1); or
 - (b) has failed to retain financial records in relation to a period for the 7 years required by subsection 286(2);
the company is to be presumed to have been insolvent throughout the period.
- (5) Paragraph (4)(a) does not apply in relation to a contravention of subsection 286(1) that is only minor or technical.
- (6) Subsection (4) does not have effect, in so far as it would prejudice a right or interest of a person for the company to be presumed insolvent because of a contravention of subsection 286(2), if it is proved that:
 - (a) the contravention was due solely to someone destroying, concealing or removing financial records of the company; and
 - (b) none of those financial records was destroyed, concealed or removed by the first-mentioned person; and
 - (c) the person was not in any way, by act or omission, directly or indirectly, knowingly or recklessly, concerned in, or party to, destroying, concealing or removing any of those financial records.
- (7) If the recovery proceeding is an application under section 588FF, subsection (4) of this section does not have effect for the purposes of proving, for the purposes of the application, that an unfair preference given by the company to a creditor of the company is an insolvent transaction, unless it is proved, for the purposes of the application, that a related entity of the company was a party to the unfair preference.

Section 588F

- (8) If, for the purposes of another recovery proceeding in relation to the company, there has been proved:
- (a) if the other proceeding is of the kind referred to in paragraph (1)(a) of this section—a matter of the kind referred to in a paragraph of section 588FC or of subsection 588FG(2); or
 - (b) if the other proceeding is of the kind referred to in paragraph (1)(b) of this section—a matter of the kind referred to in a paragraph of section 588FC or of subsection 588FG(2) or 588FH(1), or a defence under subsection 588FH(3); or
 - (c) if the other proceeding is of the kind referred to in paragraph (1)(c) or (d) of this section—a matter of the kind referred to in subsection 588FJ(3); or
 - (d) if the other proceeding is of the kind referred to in paragraph (1)(e) of this section—a matter of the kind referred to in a paragraph of section 588G, or a defence under section 588H; or
 - (e) if the other proceeding is of the kind referred to in paragraph (1)(f) of this section—a matter of the kind referred to in a paragraph of subsection 588V(1), or a defence under section 588X;
- it must be presumed that that matter was the case, or that the matters constituting that defence were the case.
- (9) A presumption for which this section provides operates except so far as the contrary is proved for the purposes of the proceeding concerned.

588F Certain taxation liabilities taken to be debts

- (1) For the purposes of this Part, a company's liability under a remittance provision to pay to the Commissioner of Taxation an amount equal to a deduction made by the company, after 1 July 1993, from a payment:
- (a) is taken to be a debt; and
 - (b) is taken to have been incurred when the deduction was made.
- (2) In this section:

remittance provision means any of the following former provisions of the *Income Tax Assessment Act 1936*:

Section 588F

- (aa) section 220AAE, 220AAM or 220AAR;
 - (a) section 221F (except subsection 221F(12)) or section 221G (except subsection 221G(4A));
 - (b) subsection 221YHDC(2);
 - (c) subsection 221YHZD(1) or (1A);
 - (d) subsection 221YN(1);
- or any of the provisions of Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*.
- (3) This section is not intended to limit the generality of a reference in this Act to a debt or to incurring a debt.

Division 2—Voidable transactions

588FA Unfair preferences

- (1) A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
 - (a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
 - (b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.
- (2) For the purposes of subsection (1), a secured debt is taken to be unsecured to the extent of so much of it (if any) as is not reflected in the value of the security.
- (3) Where:
 - (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including such a relationship to which other persons are parties); and
 - (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;then:
 - (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
 - (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

Section 588FB

paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.

588FB Uncommercial transactions

- (1) A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
 - (a) the benefits (if any) to the company of entering into the transaction; and
 - (b) the detriment to the company of entering into the transaction; and
 - (c) the respective benefits to other parties to the transaction of entering into it; and
 - (d) any other relevant matter.
- (2) A transaction may be an uncommercial transaction of a company because of subsection (1):
 - (a) whether or not a creditor of the company is a party to the transaction; and
 - (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

588FC Insolvent transactions

A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and:

- (a) any of the following happens at a time when the company is insolvent:
 - (i) the transaction is entered into; or
 - (ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction; or
- (b) the company becomes insolvent because of, or because of matters including:
 - (i) entering into the transaction; or

Section 588FD

- (ii) a person doing an act, or making an omission, for the purpose of giving effect to the transaction.

588FD Unfair loans to a company

- (1) A loan to a company is unfair if, and only if:
 - (a) the interest on the loan was extortionate when the loan was made, or has since become extortionate because of a variation; or
 - (b) the charges in relation to the loan were extortionate when the loan was made, or have since become extortionate because of a variation;even if the interest is, or the charges are, no longer extortionate.
- (2) In determining:
 - (a) whether interest on a loan was or became extortionate at a particular time as mentioned in paragraph (1)(a); or
 - (b) whether charges in relation to a loan were or became extortionate at a particular time as mentioned in paragraph (1)(b);regard is to be had to the following matters as at that time:
 - (c) the risk to which the lender was exposed; and
 - (d) the value of any security in respect of the loan; and
 - (e) the term of the loan; and
 - (f) the schedule for payments of interest and charges and for repayments of principal; and
 - (g) the amount of the loan; and
 - (h) any other relevant matter.

588FDA Unreasonable director-related transactions

- (1) A transaction of a company is an *unreasonable director-related transaction* of the company if, and only if:
 - (a) the transaction is:
 - (i) a payment made by the company; or
 - (ii) a conveyance, transfer or other disposition by the company of property of the company; or
 - (iii) the issue of securities by the company; or

Section 588FDA

- (iv) the incurring by the company of an obligation to make such a payment, disposition or issue; and
- (b) the payment, disposition or issue is, or is to be, made to:
 - (i) a director of the company; or
 - (ii) a close associate of a director of the company; or
 - (iii) a person on behalf of, or for the benefit of, a person mentioned in subparagraph (i) or (ii); and
- (c) it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
 - (i) the benefits (if any) to the company of entering into the transaction; and
 - (ii) the detriment to the company of entering into the transaction; and
 - (iii) the respective benefits to other parties to the transaction of entering into it; and
 - (iv) any other relevant matter.

The obligation referred to in subparagraph (a)(iv) may be a contingent obligation.

Note: Subparagraph (a)(iv)—This would include, for example, granting options over shares in the company.

- (2) To avoid doubt, if:
 - (a) the transaction is a payment, disposition or issue; and
 - (b) the transaction is entered into for the purpose of meeting an obligation the company has incurred;the test in paragraph (1)(c) applies to the transaction taking into account the circumstances as they exist at the time when the transaction is entered into (rather than as they existed at the time when the obligation was incurred).
- (3) A transaction may be an unreasonable director-related transaction because of subsection (1):
 - (a) whether or not a creditor of the company is a party to the transaction; and
 - (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

Section 588FE

588FE Voidable transactions

- (1) If a company is being wound up:
 - (a) a transaction of the company may be voidable because of any one or more of subsections (2) to (6) if the transaction was entered into on or after 23 June 1993; and
 - (b) a transaction of the company may be voidable because of subsection (6A) if the transaction was entered into on or after the commencement of the *Corporations Amendment (Repayment of Directors' Bonuses) Act 2003*.
- (2) The transaction is voidable if:
 - (a) it is an insolvent transaction of the company; and
 - (b) it was entered into, or an act was done for the purpose of giving effect to it:
 - (i) during the 6 months ending on the relation-back day; or
 - (ii) after that day but on or before the day when the winding up began.
- (2A) The transaction is voidable if:
 - (a) the transaction is:
 - (i) an uncommercial transaction of the company; or
 - (ii) an unfair preference given by the company to a creditor of the company; or
 - (iii) an unfair loan to the company; or
 - (iv) an unreasonable director-related transaction of the company; and
 - (b) the company was under administration immediately before:
 - (i) the company resolved by special resolution that it be wound up voluntarily; or
 - (ii) the Court ordered that the company be wound up; and
 - (c) the transaction was entered into, or an act was done for the purpose of giving effect to it, during the period beginning at the start of the relation-back day and ending:
 - (i) when the company made the special resolution that it be wound up voluntarily; or
 - (ii) when the Court made the order that the company be wound up; and
 - (d) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done, on behalf of the

Section 588FE

company by, or under the authority of, the administrator of the company.

(2B) The transaction is voidable if:

- (a) the transaction is:
 - (i) an uncommercial transaction of the company; or
 - (ii) an unfair preference given by the company to a creditor of the company; or
 - (iii) an unfair loan to the company; or
 - (iv) an unreasonable director-related transaction of the company; and
- (b) the company was subject to a deed of company arrangement immediately before:
 - (i) the company resolved by special resolution that it be wound up voluntarily; or
 - (ii) the Court ordered that the company be wound up; and
- (c) the transaction was entered into, or an act was done for the purpose of giving effect to it, during the period beginning at the start of the relation-back day and ending:
 - (i) when the company made the special resolution that it be wound up voluntarily; or
 - (ii) when the Court made the order that the company be wound up; and
- (d) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done, on behalf of the company by, or under the authority of:
 - (i) the administrator of the deed; or
 - (ii) the administrator of the company.

(3) The transaction is voidable if:

- (a) it is an insolvent transaction, and also an uncommercial transaction, of the company; and
- (b) it was entered into, or an act was done for the purpose of giving effect to it, during the 2 years ending on the relation-back day.

(4) The transaction is voidable if:

- (a) it is an insolvent transaction of the company; and
- (b) a related entity of the company is a party to it; and

Section 588FF

- (c) it was entered into, or an act was done for the purpose of giving effect to it, during the 4 years ending on the relation-back day.
- (5) The transaction is voidable if:
 - (a) it is an insolvent transaction of the company; and
 - (b) the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and
 - (c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.
- (6) The transaction is voidable if it is an unfair loan to the company made at any time on or before the day when the winding up began.
- (6A) The transaction is voidable if:
 - (a) it is an unreasonable director-related transaction of the company; and
 - (b) it was entered into, or an act was done for the purposes of giving effect to it:
 - (i) during the 4 years ending on the relation-back day; or
 - (ii) after that day but on or before the day when the winding up began.
- (7) A reference in this section to doing an act includes a reference to making an omission.

588FF Courts may make orders about voidable transactions

- (1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:
 - (a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;
 - (b) an order directing a person to transfer to the company property that the company has transferred under the transaction;

Section 588FF

- (c) an order requiring a person to pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction;
 - (d) an order requiring a person to transfer to the company property that, in the court's opinion, fairly represents the application of either or both of the following:
 - (i) money that the company has paid under the transaction;
 - (ii) proceeds of property that the company has transferred under the transaction;
 - (e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;
 - (f) if the transaction is an unfair loan and such a debt, security or guarantee has been assigned—an order directing a person to indemnify the company in respect of some or all of its liability to the assignee;
 - (g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;
 - (h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;
 - (i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time;
 - (j) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable.
- (2) Nothing in subsection (1) limits the generality of anything else in it.
- (3) An application under subsection (1) may only be made:
- (a) during the period beginning on the relation-back day and ending:
 - (i) 3 years after the relation-back day; or

Section 588FG

- (ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;
whichever is the later; or
 - (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.
- (4) If the transaction is a voidable transaction solely because it is an unreasonable director-related transaction, the court may make orders under subsection (1) only for the purpose of recovering for the benefit of the creditors of the company the difference between:
 - (a) the total value of the benefits provided by the company under the transaction; and
 - (b) the value (if any) that it may be expected that a reasonable person in the company's circumstances would have provided having regard to the matters referred to in paragraph 588FDA(1)(c).

588FG Transaction not voidable as against certain persons

- (1) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person other than a party to the transaction if it is proved that:
 - (a) the person received no benefit because of the transaction; or
 - (b) in relation to each benefit that the person received because of the transaction:
 - (i) the person received the benefit in good faith; and
 - (ii) at the time when the person received the benefit:
 - (A) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and
 - (B) a reasonable person in the person's circumstances would have had no such grounds for so suspecting.
- (2) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and it is proved that:

Section 588FG

- (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
 - (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and
 - (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.
- (3) For the purposes of paragraph (2)(c), if an amount has been paid or applied towards discharging to a particular extent a liability to pay tax, the discharge is valuable consideration provided:
- (a) by the person to whom the tax is payable; and
 - (b) under any transaction that consists of, or involves, the payment or application.
- (4) In subsection (3):
- tax** means tax (however described) payable under a law of the Commonwealth or of a State or Territory, and includes, for example, a levy, a charge, and municipal or other rates.
- (5) For the purposes of paragraph (2)(c), if an amount has been paid or applied towards discharging to a particular extent a liability to the Commonwealth, or to the Commissioner of Taxation, that arose under or because of an Act of which the Commissioner has the general administration, the discharge is valuable consideration provided by the Commonwealth, or by the Commissioner, as the case requires, under any transaction that consists of, or involves, the payment or application.
- (6) Subsections (3) and (5):
- (a) are to avoid doubt and are not intended to limit the cases where a person may be taken to have provided valuable consideration under a transaction; and
 - (b) apply to an amount even if it was paid or applied before the commencement of this Act.

Section 588FGA

588FGA Directors to indemnify Commissioner of Taxation if certain payments set aside

- (1) This section applies if the Court makes an order under section 588FF against the Commissioner of Taxation because of the payment of an amount in respect of a liability under any of the following provisions of the *Income Tax Assessment Act 1936*:
 - (aa) former section 220AAE, 220AAM or 220AAR;
 - (a) former section 221F (except subsection 221F(12)), former section 221G (except subsection 221G(4A)) or former section 221P;
 - (b) former subsection 221YHDC(2);
 - (c) former subsection 221YHZD(1) or (1A);
 - (d) former subsection 221YN(1);
 - (e) section 222AHA;or under a provision of Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*.
- (2) Each person who was a director of the company when the payment was made is liable to indemnify the Commissioner in respect of any loss or damage resulting from the order.
- (3) An amount payable to the Commissioner under subsection (2):
 - (a) is a debt due to the Commonwealth and payable to the Commissioner; and
 - (b) may be recovered in a court of competent jurisdiction by the Commissioner, or a Deputy Commissioner of Taxation, suing in his or her official name.
- (4) The Court may, in the proceedings in which it made the order against the Commissioner, order a person to pay to the Commissioner an amount payable by the person under subsection (2).
- (5) A person who pays an amount under subsection (2) has the same rights:
 - (a) whether by way of indemnity, subrogation, contribution or otherwise; and
 - (b) against the company or anyone else;as if the payment had been made under a guarantee:
 - (c) of the liability referred to in subsection (1); and

Section 588FGB

- (d) under which the person and every other person who was a director of the company as mentioned in subsection (2) were jointly and severally liable as guarantors.

588FGB Defences in proceedings under section 588FGA

- (1) This section has effect for the purposes of:
- (a) proceedings to recover from a person an amount payable under subsection 588FGA(2); and
 - (b) proceedings under subsection 588FGA(5) against a person of the kind referred to in paragraph 588FGA(5)(d).
- (2) The time when the payment referred to in subsection 588FGA(1) was made is called *the payment time*.
- (3) It is a defence if it is proved that, at the payment time, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it made the payment.
- (4) Without limiting the generality of subsection (3), it is a defence if it is proved that, at the payment time, the person:
- (a) had reasonable grounds to believe, and did believe:
 - (i) that a competent and reliable person (*the other person*) was responsible for providing to the first-mentioned person adequate information about whether the company was solvent; and
 - (ii) that the other person was fulfilling that responsibility; and
 - (b) expected, on the basis of information provided to the first-mentioned person by the other person, that the company was solvent at that time and would remain solvent even if it made the payment.
- (5) It is a defence if it is proved that, because of illness or for some other good reason, the person did not take part in the management of the company at the payment time.
- (6) It is a defence if it is proved that:
- (a) the person took all reasonable steps to prevent the company from making the payment; or
 - (b) there were no such steps the person could have taken.

Section 588FH

- (7) In determining whether a defence under subsection (6) has been proved, the matters to which regard is to be had include, but are not limited to:
- (a) any action the person took with a view to appointing an administrator of the company; and
 - (b) when that action was taken; and
 - (c) the results of that action.

588FH Liquidator may recover from related entity benefit resulting from insolvent transaction

- (1) This section applies where a company is being wound up and a transaction of the company:
- (a) is an insolvent transaction of the company; and
 - (b) is voidable under section 588FE; and
 - (c) has had the effect of discharging, to the extent of a particular amount, a liability (whether under a guarantee or otherwise and whether contingent or otherwise) of a related entity of the company.
- (2) The company's liquidator may recover from the related entity, as a debt due to the company, an amount equal to the amount referred to in paragraph (1)(c).
- (3) In deciding what orders (if any) to make under section 588FF on an application relating to the transaction, a court must take into account any amount recovered under subsection (2) of this section.
- (4) If the liquidator recovers an amount under subsection (2) from the related entity, the related entity has the same rights:
- (a) whether by way of indemnity, subrogation, contribution or otherwise; and
 - (b) against the company or anyone else;
- as if the related entity had paid the amount in discharging, to the extent of that amount, the liability referred to in paragraph (1)(c).

588FI Creditor who gives up benefit of unfair preference may prove for preferred debt

- (1) This section applies where:
-

Section 588FJ

- (a) a transaction is an unfair preference given by a company to a creditor of the company after 23 June 1993; and
 - (b) at the request of the company's liquidator, because of an order under section 588FF, or for any other reason, the creditor has put the company in the same position as if the transaction had not been entered into.
- (2) A court must not make under section 588FF, on an application relating to the transaction, an order prejudicing a right or interest of the creditor.
- (3) The creditor may prove in the winding up as if the transaction had not been entered into.

588FJ Floating charge created within 6 months before relation-back day

- (1) This section applies if:
- (a) a company is being wound up in insolvency; and
 - (b) the company created a floating charge on property of the company at a particular time that is at or after 23 June 1993 and:
 - (i) during the 6 months ending on the relation-back day; or
 - (ii) after that day but on or before the day when the winding up began.
- (2) The charge is void, as against the company's liquidator, except so far as it secures:
- (a) an advance paid to the company, or at its direction, at or after that time and as consideration for the 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
 - (d) an amount payable for property or services supplied to the company at or after that time; or
 - (e) interest on an amount so payable.
- (3) Subsection (2) does not apply if it is proved that the company was solvent immediately after that time.

Section 588FJ

- (4) Paragraphs (2)(a) and (b) do not apply in relation to an advance so far as it was applied to discharge, directly or indirectly, an unsecured debt, whether contingent or otherwise, that the company owed to:
- (a) the 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.
- (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 court of competent jurisdiction, recover from the chargee, as a debt due to the company, the amount worked out in accordance with the formula:
- $$\text{Unsecured amount} - \text{Realisation costs}$$
- where:
- realisation costs*** means so much (if any) of the costs and expenses of enforcing the charge as is attributable to realising the realised amount.
- unsecured amount*** means so much of the realised amount as does not exceed so much of the debt as would, if the debt had not been so discharged, have been unsecured, as against the liquidator, because of subsection (2).

Division 3—Director's duty to prevent insolvent trading

588G Director's duty to prevent insolvent trading by company

- (1) This section applies if:
- (a) a person is a director of a company at the time when the company incurs a debt; and
 - (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
 - (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
 - (d) that time is at or after the commencement of this Act.

- (1A) For the purposes of this section, if a company takes action set out in column 2 of the following table, it incurs a debt at the time set out in column 3.

When debts are incurred		[operative table]
Action of company	When debt is incurred	
1 paying a dividend	when the dividend is paid or, if the company has a constitution that provides for the declaration of dividends, when the dividend is declared	
2 making a reduction of share capital to which Division 1 of Part 2J.1 applies (other than a reduction that consists only of the cancellation of a share or shares for no consideration)	when the reduction takes effect	
3 buying back shares (even if the consideration is not a sum certain in money)	when the buy-back agreement is entered into	
4 redeeming redeemable preference shares that are redeemable at its option	when the company exercises the option	

Chapter 5 External administration

Part 5.7B Recovering property or compensation for the benefit of creditors of insolvent company

Division 3 Director's duty to prevent insolvent trading

Section 588G

When debts are incurred		[operative table]
Action of company	When debt is incurred	
5	issuing redeemable preference shares that are redeemable otherwise than at its option	when the shares are issued
6	financially assisting a person to acquire shares (or units of shares) in itself or a holding company	when the agreement to provide the assistance is entered into or, if there is no agreement, when the assistance is provided
7	entering into an uncommercial transaction (within the meaning of section 588FB) other than one that a court orders, or a prescribed agency directs, the company to enter into	when the transaction is entered into

(2) By failing to prevent the company from incurring the debt, the person contravenes this section if:

- (a) the person is aware at that time that there are such grounds for so suspecting; or
- (b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

Note: This subsection is a civil penalty provision (see subsection 1317E(1)).

(3) A person commits an offence if:

- (a) a company incurs a debt at a particular time; and
- (aa) at that time, a person is a director of the company; and
- (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
- (c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and
- (d) the person's failure to prevent the company incurring the debt was dishonest.

(3A) For the purposes of an offence based on subsection (3), absolute liability applies to paragraph (3)(a).

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

Section 588H

- (3B) For the purposes of an offence based on subsection (3), strict liability applies to paragraphs (3)(aa) and (b).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (4) The provisions of Division 4 of this Part are additional to, and do not derogate from, Part 9.4B as it applies in relation to a contravention of this section.

588H Defences

- (1) This section has effect for the purposes of proceedings for a contravention of subsection 588G(2) in relation to the incurring of a debt (including proceedings under section 588M in relation to the incurring of the debt).
- (2) It is a defence if it is proved that, at the time when the debt was incurred, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.
- (3) Without limiting the generality of subsection (2), it is a defence if it is proved that, at the time when the debt was incurred, the person:
 - (a) had reasonable grounds to believe, and did believe:
 - (i) that a competent and reliable person (the *other person*) was responsible for providing to the first-mentioned person adequate information about whether the company was solvent; and
 - (ii) that the other person was fulfilling that responsibility; and
 - (b) expected, on the basis of information provided to the first-mentioned person by the other person, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.
- (4) If the person was a director of the company at the time when the debt was incurred, it is a defence if it is proved that, because of illness or for some other good reason, he or she did not take part at that time in the management of the company.

Chapter 5 External administration

Part 5.7B Recovering property or compensation for the benefit of creditors of insolvent company

Division 3 Director's duty to prevent insolvent trading

Section 588H

- (5) It is a defence if it is proved that the person took all reasonable steps to prevent the company from incurring the debt.
- (6) In determining whether a defence under subsection (5) has been proved, the matters to which regard is to be had include, but are not limited to:
 - (a) any action the person took with a view to appointing an administrator of the company; and
 - (b) when that action was taken; and
 - (c) the results of that action.

Division 4—Director liable to compensate company

Subdivision A—Proceedings against director

588J On application for civil penalty order, Court may order compensation

- (1) Where, on an application for a civil penalty order against a person in relation to a contravention of subsection 588G(2), the Court is satisfied that:
 - (a) the person committed the contravention in relation to the incurring of a debt by a company; and
 - (b) the debt is wholly or partly unsecured; and
 - (c) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency;the Court may (whether or not it makes a pecuniary penalty order under section 1317G or an order under section 206C disqualifying a person from managing corporations) order the first-mentioned person to pay to the company compensation equal to the amount of that loss or damage.
- (2) A company's liquidator may intervene in an application for a civil penalty order against a person in relation to a contravention of subsection 588G(2).
- (3) A company's liquidator who so intervenes is entitled to be heard:
 - (a) only if the Court is satisfied that the person committed the contravention in relation to the incurring of a debt by that company; and
 - (b) only on the question whether the Court should order the person to pay compensation to the company.

588K Criminal court may order compensation

If:

- (a) a court finds a person guilty of an offence under subsection 588G(3) in relation to the incurring of a debt by a company; and

Section 588L

(b) the court is satisfied that:

- (i) the debt is wholly or partly unsecured; and
- (ii) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency;

the court may (whether or not it imposes a penalty) order the first-mentioned person to pay to the company compensation equal to the amount of that loss or damage.

Note: Section 73A defines when a court is taken to find a person guilty of an offence.

588L Enforcement of order under section 588J or 588K

An order to pay compensation that a court makes under section 588J or 588K may be enforced as if it were a judgment of the court.

588M Recovery of compensation for loss resulting from insolvent trading

(1) This section applies where:

- (a) a person (in this section called the *director*) has contravened subsection 588G(2) or (3) in relation to the incurring of a debt by a company; and
- (b) the person (in this section called the *creditor*) to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and
- (c) the debt was wholly or partly unsecured when the loss or damage was suffered; and
- (d) the company is being wound up;

whether or not:

- (e) the director has been convicted of an offence in relation to the contravention; or
- (f) a civil penalty order has been made against the director in relation to the contravention.

(2) The company's liquidator may recover from the director, as a debt due to the company, an amount equal to the amount of the loss or damage.

Section 588N

- (3) The creditor may, as provided in Subdivision B but not otherwise, recover from the director, as a debt due to the creditor, an amount equal to the amount of the loss or damage.
- (4) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

588N Avoiding double recovery

An amount recovered in proceedings under section 588M in relation to the incurring of a debt by a company is to be taken into account in working out the amount (if any) recoverable in:

- (a) any other proceedings under that section in relation to the incurring of the debt; and
- (b) proceedings under section 596AC in relation to a contravention of section 596AB that is linked to the incurring of the debt.

588P Effect of sections 588J, 588K and 588M

Sections 588J, 588K and 588M:

- (a) have effect in addition to, and not in derogation of, any rule of law about the duty or liability of a person because of the person's office or employment in relation to a company; and
- (b) do not prevent proceedings from being instituted in respect of a breach of such a duty or in respect of such a liability.

588Q Certificates evidencing contravention

For the purposes of this Part, a certificate that:

- (a) purports to be signed by the Registrar or other proper officer of an Australian court; and
- (b) states:
 - (i) that that court has declared that a specified person has, by failing to prevent a specified company from incurring a specified debt, contravened subsection 588G(3) in relation to the company; or
 - (ii) that a specified person was convicted by that court for an offence constituted by a contravention of section 588G in relation to the incurring of a specified debt by a specified company; or

Chapter 5 External administration

Part 5.7B Recovering property or compensation for the benefit of creditors of insolvent company

Division 4 Director liable to compensate company

Section 588R

- (iii) that a specified person charged before that court with such an offence was found in that court to have committed the offence but that the court did not proceed to convict the person of the offence;

is, unless it is proved that the declaration, conviction or finding was set aside, quashed or reversed, conclusive evidence:

- (c) that the declaration was made, that the person was convicted of the offence, or that the person was so found, as the case may be; and
- (d) that the person committed the contravention.

Subdivision B—Proceedings by creditor

588R Creditor may sue for compensation with liquidator's consent

- (1) A creditor of a company that is being wound up may, with the written consent of the company's liquidator, begin proceedings under section 588M in relation to the incurring by the company of a debt that is owed to the creditor.
- (2) Subsection (1) has effect despite section 588T, but subject to section 588U.

588S Creditor may give liquidator notice of intention to sue for compensation

After the end of 6 months beginning when a company begins to be wound up, a creditor of the company may give to the company's liquidator a written notice:

- (a) stating that the creditor intends to begin proceedings under section 588M in relation to the incurring by the company of a specified debt that is owed to the creditor; and
- (b) asking the liquidator to give to the creditor, within 3 months after receiving the notice:
 - (i) a written consent to the creditor beginning the proceedings; or
 - (ii) a written statement of the reasons why the liquidator thinks that proceedings under section 588M in relation to the incurring of that debt should not be begun.

588T When creditor may sue for compensation without liquidator's consent

- (1) This section applies where a notice is given under section 588S.
- (2) The creditor may begin proceedings in a court under section 588M in relation to the incurring by the company of the debt specified in the notice if:
 - (a) as at the end of 3 months after the liquidator receives the notice, he or she has not consented to the creditor beginning such proceedings; and
 - (b) on an application made after those 3 months, the court has given leave for the proceedings to begin.
- (3) If:
 - (a) during those 3 months, the liquidator gives to the creditor a written statement of the reasons why the liquidator thinks that such proceedings should not be begun; and
 - (b) the creditor applies for leave under paragraph (2)(b);then:
 - (c) the creditor must file the statement with the court when so applying; and
 - (d) in determining the application, the court is to have regard to the reasons set out in the statement.

588U Events preventing creditor from suing

- (1) A creditor of a company that is being wound up cannot begin proceedings under section 588M in relation to the incurring of a debt by the company if:
 - (a) the company's liquidator has applied under section 588FF in relation to the debt, or in relation to a transaction under which the debt was incurred; or
 - (b) the company's liquidator has begun proceedings under section 588M in relation to the incurring of the debt; or
 - (c) the company's liquidator has intervened in an application for a civil penalty order against a person in relation to a contravention of subsection 588G(2) in relation to the incurring of the debt.
- (2) Subsection (1) has effect despite sections 588R and 588T.

Section 588V

Division 5—Liability of holding company for insolvent trading by subsidiary

588V When holding company liable

- (1) A corporation contravenes this section if:
- (a) the corporation is the holding company of a company at the time when the company incurs a debt; and
 - (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
 - (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
 - (d) one or both of the following subparagraphs applies:
 - (i) the corporation, or one or more of its directors, is or are aware at that time that there are such grounds for so suspecting;
 - (ii) having regard to the nature and extent of the corporation's control over the company's affairs and to any other relevant circumstances, it is reasonable to expect that:
 - (A) a holding company in the corporation's circumstances would be so aware; or
 - (B) one or more of such a holding company's directors would be so aware; and
 - (e) that time is at or after the commencement of this Act.
- (2) A corporation that contravenes this section is not guilty of an offence.

588W Recovery of compensation for loss resulting from insolvent trading

- (1) Where:
- (a) a corporation has contravened section 588V in relation to the incurring of a debt by a company; and

Section 588X

- (b) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and
 - (c) the debt was wholly or partly unsecured when the loss or damage was suffered; and
 - (d) the company is being wound up;
- the company's liquidator may recover from the corporation, as a debt due to the company, an amount equal to the amount of the loss or damage.
- (2) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

588X Defences

- (1) This section has effect for the purposes of proceedings under section 588W.
- (2) It is a defence if it is proved that, at the time when the debt was incurred, the corporation, and each relevant director (if any), had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.
- (3) Without limiting the generality of subsection (2), it is a defence if it is proved that, at the time when the debt was incurred, the corporation, and each relevant director (if any):
 - (a) had reasonable grounds to believe, and did believe:
 - (i) that a competent and reliable person was responsible for providing to the corporation adequate information about whether the company was solvent; and
 - (ii) that the person was fulfilling that responsibility; and
 - (b) expected, on the basis of the information provided to the corporation by the person, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.
- (4) If it is proved that, because of illness or for some other good reason, a particular relevant director did not take part in the management of the corporation at the time when the company incurred the debt, the fact that the director was aware as mentioned in subparagraph 588V(1)(d)(i) is to be disregarded.

Chapter 5 External administration

Part 5.7B Recovering property or compensation for the benefit of creditors of insolvent company

Division 5 Liability of holding company for insolvent trading by subsidiary

Section 588X

(5) It is a defence if it is proved that the corporation took all reasonable steps to prevent the company from incurring the debt.

(6) In subsections (2), (3) and (4):

relevant director means a director of the corporation who was aware as mentioned in subparagraph 588V(1)(d)(i).

Division 6—Application of compensation under Division 4 or 5

588Y Application of amount paid as compensation

- (1) An amount paid to a company under section 588J, 588K, 588M or 588W is not available to pay a secured debt of the company unless all the company's unsecured debts have been paid in full.
- (2) Where:
 - (a) under section 588J or 588K, or in proceedings under section 588M or 588W, a court orders a person to pay to the company compensation, or an amount, equal to the amount of loss or damage suffered by a person in relation to a debt because of the company's insolvency; and
 - (b) the court is satisfied that, at the time when the company incurred the debt, the person who suffered the loss or damage knew that the company was insolvent at that time or would become insolvent by incurring the debt, or by incurring at that time debts including the debt, as the case requires;the court may order that the compensation or amount paid to the company is not available to pay that debt unless all the company's unsecured debts (other than debts to which orders under this subsection relate) have been paid in full.
- (3) Subsection (2) does not apply in relation to proceedings under section 588M in relation to the incurring of a debt by a company if the proceedings are begun by a creditor of the company (as provided for in Subdivision B of Division 4).
- (4) Subsection (2) does not apply in relation to a liability that is taken to be a debt because of section 588F.

Chapter 5 External administration

Part 5.7B Recovering property or compensation for the benefit of creditors of insolvent company

Division 7 Person managing a corporation while disqualified may become liable for corporation's debts

Section 588Z

Division 7—Person managing a corporation while disqualified may become liable for corporation's debts

588Z Court may make order imposing liability

Where:

- (a) a company is being wound up; and
- (b) on or after 23 June 1993 and within 4 years before the relation-back day, a person contravened section 206A by managing the company;

the Court may, on the application of the company's liquidator, order that the person is personally liable for so much of the company's debts and liabilities as does not exceed an amount specified in the order.

Part 5.8—Offences

589 Interpretation and application

- (1) Sections 590 to 593 (inclusive) apply to a company:
 - (a) that has been wound up or is in the course of being wound up; or
 - (b) that has been in the course of being wound up, where the winding up has been stayed or terminated by an order under section 482; or
 - (ba) of which a provisional liquidator has been appointed; or
 - (c) that is or has been under administration; or
 - (ca) that has executed a deed of company arrangement, even if the deed has since terminated; or
 - (d) affairs of which are or have been under investigation; or
 - (e) in respect of property of which a receiver, or a receiver and manager, has at any time been appointed, whether by the Court or under a power contained in an instrument, whether or not the appointment has been terminated; or
 - (f) that has ceased to carry on business or is unable to pay its debts; or
 - (g) that has entered into a compromise or arrangement with its creditors.
- (2) For the purposes of this Part, affairs of a company are or have been under investigation if, and only if:
 - (a) ASIC is investigating, or has at any time investigated, under Division 1 of Part 3 of the ASIC Act:
 - (i) matters being, or connected with, affairs of the company; or
 - (ii) matters including such matters; or
 - (b) affairs of the company have at any time been under investigation under:
 - (i) Part VII of the *Companies Act 1981*; or
 - (ii) the provisions of a previous law of a State or Territory that correspond to that Part.

Section 589

- (3) For the purposes of this Part, a company is taken to have ceased to carry on business only if:
 - (a) ASIC has published in the *Gazette* a notice of the proposed deregistration of the company under subsection 601AA(4) or 601AB(3); and
 - (b) if the notice was published under subsection 601AA(4) or under subsection 601AB(3) because of a decision under subsection 601AB(1)—2 months have passed since the notice was published and ASIC has not been informed that the company is carrying on business.
- (4) For the purposes of this Part, a company is taken to be unable to pay its debts if, and only if, execution or other process issued on a judgment, decree or order of a court (whether or not an Australian court) in favour of a creditor of the company is returned unsatisfied in whole or in part.
- (5) In this Part:
appropriate officer means:
 - (a) in relation to a company that has been, has been being or is being wound up—the liquidator; and
 - (aa) in relation to a company of which a provisional liquidator has been appointed—the provisional liquidator; and
 - (b) in relation to a company that is or has been under administration—the administrator; and
 - (ba) in relation to a company that has executed a deed of company arrangement—the deed’s administrator; and
 - (c) in relation to a company affairs of which are or have been under investigation—ASIC or the NCSC, as the case requires; and
 - (d) in relation to a company in respect of property of which a receiver, or a receiver and manager, has been appointed—the receiver or the receiver and manager; and
 - (e) in relation to a company that has ceased to carry on business or is unable to pay its debts—ASIC or the NCSC, as the case requires; and
 - (f) in relation to a company that has entered into a compromise or arrangement with its creditors—the person appointed by the Court to administer the compromise or arrangement.

relevant day means the day on which:

- (a) in relation to a company that has been wound up, has been in the course of being wound up, or is being wound up:
 - (i) if, because of Division 1A of Part 5.6, the winding up is taken to have begun on the day when an order that the company be wound up was made—the application for the order was filed; or
 - (ii) otherwise—the winding up is taken because of Division 1A of Part 5.6 to have begun;
 - (aa) in relation to a company of which a provisional liquidator has been appointed—the provisional liquidator was appointed;
 - (b) in relation to a company that is or has been under administration—the administration began;
 - (ba) in relation to a company that has executed a deed of company arrangement—the deed was executed;
 - (c) in relation to a company affairs of which are or have been under investigation:
 - (i) if paragraph (2)(a) applies—the investigation began; or
 - (ii) if paragraph (2)(b) applies—a direction was given to the NCSC to arrange for the investigation;
 - (d) in relation to a company in respect of property of which a receiver, or a receiver and manager, has been appointed—the receiver, or the receiver and manager, was appointed;
 - (e) in relation to a company that is unable to pay its debts—the execution or other process was returned unsatisfied in whole or in part;
 - (f) in relation to a company that has ceased to carry on business—a notice was first published in relation to the company under subsection 601AA(4) or 601AB(3);
 - (g) in relation to a company that has entered into a compromise or arrangement with its creditors—the compromise or arrangement was approved by the Court.
- (6) This Part applies in relation to a company that was first incorporated other than under this Act:
- (a) as if, in this Part (other than section 595) as so applying:
 - (i) a reference to the company included a reference to the company as it existed at a time before its registration day (including a time before the commencement of this Act); and

Section 590

- (iii) a reference, in relation to a provision of this Act, to ASIC included a reference to the NCSC (if relevant); and
- (b) with such other modifications as the circumstances require.

590 Offences by officers of certain companies

- (1) A person who, being a past or present officer or employee of a company to which this section applies:
 - (a) does not disclose to the appropriate officer all the property of the company, and how and to whom and for what consideration and when any part of the property of the company was disposed of within 10 years next before the relevant day, except such part as has been disposed of in the ordinary course of the business of the company; or
 - (c) has, within 10 years next before the relevant day or at a time on or after that day:
 - (i) engaged in conduct that resulted in the fraudulent concealment or removal of any part of the property of the company to the value of \$100 or more; or
 - (ii) engaged in conduct that resulted in the concealment of any debt due to or by the company; or
 - (iii) engaged in conduct that resulted in the fraudulent parting with, alteration or making of any omission in, or being privy to fraudulent parting with, altering or making any omission in, any book affecting or relating to affairs of the company; or
 - (iv) by any false representation or other fraud, obtained on credit, for or on behalf of the company, any property that the company has not subsequently paid for; or
 - (v) engaged in conduct that resulted in the fraudulent pawning, pledging or disposal of, otherwise than in the ordinary course of the business of the company, property of the company that has been obtained on credit and has not been paid for;
 - (d) fraudulently makes any material omission in any statement or report relating to affairs of the company; or
 - (f) engaged in conduct that prevented the production to the appropriate officer of any book affecting or relating to affairs of the company; or

Section 590

- (g) has, within 10 years next before the relevant day or at a time on or after that day, attempted to account for any part of the property of the company by making entries in the books of the company showing fictitious transactions, losses or expenses; or
 - (h) has, within 10 years next before the relevant day or at a time on or after that day, been guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to affairs of the company or to the winding up; contravenes this subsection.
- (2) Absolute liability applies to so much of an offence based on paragraph (1)(c), (g) or (h) as requires that an event occur within 10 years next before the relevant day or at a time on or after that day.

Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (3) Paragraph (1)(a) does not apply to the extent that the person is not capable of disclosing the information referred to in that paragraph.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3), see subsection 13.3(3) of the *Criminal Code*.
- (4) A person who, being a past or present officer or employee of a company to which this section applies, does not deliver up to, or in accordance with the directions of, the appropriate officer:
 - (a) all the property of the company in the person's possession; or
 - (b) all books in the person's possession belonging to the company (except books of which the person is entitled, as against the company and the appropriate officer, to retain possession);contravenes this subsection.
- (4A) A person who, being a past or present officer or employee of a company and knowing or believing that a false debt has been proved by a person, fails for a period of one month to inform the appropriate officer of his or her knowledge or belief contravenes this subsection.
- (4B) A person must not intentionally or recklessly fail to comply with subsection (4) or (4A).

Section 592

- (5) Where a person pawns, pledges or disposes of any property in circumstances that amount to a contravention by virtue of subparagraph (1)(c)(v), a person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in those circumstances contravenes this subsection.
- (6) A person who takes in pawn or pledge or otherwise receives property in circumstances mentioned in subsection (5) and with the knowledge mentioned in that subsection is taken to hold the property as trustee for the company concerned and is liable to account to the company for the property.
- (7) Where, in proceedings under subsection (6), it is necessary to establish that a person has taken property in pawn or pledge, or otherwise received property:
 - (a) in circumstances mentioned in subsection (5); and
 - (b) with the knowledge mentioned in that subsection;the matter referred to in paragraph (b) of this subsection may be established on the balance of probabilities.

592 Incurring of certain debts; fraudulent conduct

- (1) Where:
 - (a) a company has incurred a debt before 23 June 1993; and
 - (b) immediately before the time when the debt was incurred:
 - (i) there were reasonable grounds to expect that the company will not be able to pay all its debts as and when they become due; or
 - (ii) there were reasonable grounds to expect that, if the company incurs the debt, it will not be able to pay all its debts as and when they become due; and
 - (c) the company was, at the time when the debt was incurred, or becomes at a later time, a company to which this section applies;any person who was a director of the company, or took part in the management of the company, at the time when the debt was incurred contravenes this subsection and the company and that person or, if there are 2 or more such persons, those persons are jointly and severally liable for the payment of the debt.

Section 592

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) In any proceedings against a person under subsection (1), it is a defence if it is proved:
- (a) that the debt was incurred without the person's express or implied authority or consent; or
 - (b) that at the time when the debt was incurred, the person did not have reasonable cause to expect:
 - (i) that the company would not be able to pay all its debts as and when they became due; or
 - (ii) that, if the company incurred that debt, it would not be able to pay all its debts as and when they became due.

Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (2), see section 13.4 of the *Criminal Code*.

- (3) Proceedings may be brought under subsection (1) for the recovery of a debt whether or not the person against whom the proceedings are brought, or any other person, has been convicted of an offence under subsection (1) in respect of the incurring of that debt.
- (4) In proceedings brought under subsection (1) for the recovery of a debt, the liability of a person under that subsection in respect of the debt may be established on the balance of probabilities.
- (5) Where subsection (1) renders a person or persons liable to pay a debt incurred by a company, the payment by that person or either or any of those persons of the whole or any part of that debt does not render the company liable to the person concerned in respect of the amount so paid.
- (6) Where:
- (a) a company has done an act (including the making of a contract or the entering into of a transaction) with intent to defraud creditors of the company or of any other person or for any other fraudulent purpose; and
 - (b) the company was at the time when it does the act, or becomes at a later time, a company to which this section applies;
- any person who was knowingly concerned in the doing of the act with that intent or for that purpose contravenes this subsection.

Section 593

- (6A) For the purposes of an offence based on subsection (6), absolute liability applies to paragraph (6)(b).

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

- (7) A certificate issued by the proper officer of an Australian court stating that a person specified in the certificate:
- (a) was convicted of an offence under subsection (1) in relation to a debt specified in the certificate incurred by a company so specified; or
 - (b) was convicted of an offence under subsection (6) in relation to a company specified in the certificate;
- is, in any proceedings, prima facie evidence of the matters stated in the certificate.
- (8) A document purporting to be a certificate issued under subsection (7) is, unless the contrary is established, taken to be such a certificate and to have been duly issued.

593 Powers of Court

- (1) Where a person has been convicted of an offence under subsection 592(1) in respect of the incurring of a debt, the Court, on the application of ASIC or the person to whom the debt is payable, may, if it thinks it proper to do so, declare that the first-mentioned person is personally responsible without any limitation of liability for the payment to the person to whom the debt is payable of an amount equal to the whole of the debt or such part of it as the Court thinks proper.
- (2) Where a person has been convicted of an offence under subsection 592(6), the Court, on the application of ASIC or of a prescribed person, may, if it thinks it proper to do so, declare that the first-mentioned person is personally responsible without any limitation of liability for the payment to the company of the amount required to satisfy so much of the debts of the company as the Court thinks proper.
- (3) In relation to a company in respect of which a conviction referred to in subsection (2) relates:
 - (a) the appropriate officer; and
 - (b) a creditor or contributory of the company authorised by ASIC to make an application under that subsection; and

Section 594

- (c) if the company was a company to which section 592 applied by reason of paragraph 589(1)(c)—a member of the company;
are prescribed persons for the purposes of that subsection.
- (4) Where the Court makes a declaration under subsection (1) in relation to a person, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.
- (5) In particular, the Court may order that the liability of the person under the declaration is a charge:
- (a) on a debt or obligation due from the company to the person;
or
 - (b) on a right or interest under a charge on any property of the company held by or vested in the person or a person on the person's behalf, or a person claiming as assignee from or through the person liable or a person acting on the person's behalf.
- (6) The Court may, from time to time, make such further order as it thinks proper for the purpose of enforcing a charge imposed under subsection (5).
- (7) For the purpose of subsection (5), *assignee* includes a person to whom or in whose favour, by the directions of the person liable, the debt, obligation or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without actual knowledge of any of the matters upon which the conviction or declaration was made.
- (8) On the hearing of an application under subsection (1) or (2), the appropriate officer or other applicant may give evidence or call witnesses.

594 Certain rights not affected

Except as provided by subsection 592(4) nothing in subsection 592(1) or 593(1) or (2) affects any rights of a person to indemnity, subrogation or contribution.

Section 595

595 Inducement to be appointed liquidator etc. of company

- (1) A person must not give, or agree or offer to give, to another person any valuable consideration with a view to securing the first-mentioned person's own appointment or nomination, or to securing or preventing the appointment or nomination of a third person, as:
- (a) a liquidator or provisional liquidator of a company; or
 - (b) an administrator of a company; or
 - (c) an administrator of a deed of company arrangement executed, or to be executed, by a company; or
 - (d) a receiver, or a receiver and manager, of property of a company; or
 - (e) a trustee or other person to administer a compromise or arrangement made between a company and any other person or persons.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

596 Frauds by officers

- (1) A person who, while an officer or employee of a company:
- (a) by false pretences or by means of any other fraud, induces a person to give credit to the company or to a related body corporate; or
 - (b) with intent to defraud the company or a related body corporate, or members or creditors of the company or of a related body corporate, makes or purports to make, or causes to be made or to be purported to be made, any gift or transfer of, or charge on, or causes or connives at the levying of any execution against, property of the company or of a related body corporate; or
 - (c) with intent to defraud the company or a related body corporate, or members or creditors of the company or of a related body corporate, engages in conduct that results in the concealment or removal of any part of the property of the company or of a related body corporate after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or a related body corporate;

Section 596

contravenes this section.

- (2) Absolute liability applies to so much of an offence based on paragraph (1)(c) as requires that an event occur after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or a related body corporate.

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

Part 5.8A—Employee entitlements

596AA Object and coverage of Part

Object

- (1) The object of this Part is to protect the entitlements of a company's employees from agreements and transactions that are entered into with the intention of defeating the recovery of those entitlements.

Employee entitlements

- (2) The **entitlements** of an employee of a company that are protected under this Part are:
 - (a) wages payable by the company for services rendered to the company by the employee; and
 - (b) superannuation contributions (that is, contributions by the company to a fund for the purposes of making provision for, or obtaining, superannuation benefits for the employee, or for dependants of the employee) payable by the company in respect of services rendered to the company by the employee; and
 - (c) amounts due in respect of injury compensation in relation to the employee; and
 - (d) amounts due under an industrial instrument in respect of the employee's leave of absence; and
 - (e) retrenchment payments for the employee (that is, amounts payable by the company to the employee, under an industrial instrument, in respect of the termination of the employee's employment by the company).

An entitlement of an employee need not be owed to the employee. It might, for example, be an amount owed to the employee's dependants or a superannuation contribution payable to a fund in respect of services rendered by the employee.

- (3) The entitlements of an excluded employee (within the meaning of section 556) are protected under this Part only to the extent to which they have priority under paragraph 556(1)(e), (f), (g) or (h).

Section 596AB

Employees

- (4) For the purposes of this Part, a person is an **employee** of a company if the person is, or has been, an employee of the company (whether remunerated by salary, wages, commission or otherwise).
- (5) If an entitlement of an employee of a company is owed to a person other than the employee, this Part applies to the entitlement as if a reference to the **employee** included a reference to the person to whom the entitlement is owed.

596AB Entering into agreements or transactions to avoid employee entitlements

- (1) A person must not enter into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of:
 - (a) preventing the recovery of the entitlements of employees of a company; or
 - (b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.
- (2) Subsection (1) applies even if:
 - (a) the company is not a party to the agreement or transaction; or
 - (b) the agreement or transaction is approved by a court.
- (3) A reference in this section to a **relevant agreement or a transaction** includes a reference to:
 - (a) a relevant agreement and a transaction; and
 - (b) a series or combination of:
 - (i) relevant agreements or transactions; or
 - (ii) relevant agreements; or
 - (iii) transactions.
- (4) If a person contravenes this section by incurring a debt (within the meaning of section 588G), the incurring of the debt and the contravention are **linked** for the purposes of this Act.

Section 596AC

596AC Person who contravenes section 596AB liable to compensate for loss

- (1) A person is liable to pay compensation under subsection (2) or (3) if:
- (a) the person contravenes section 596AB in relation to the entitlements of employees of a company; and
 - (b) the company is being wound up; and
 - (c) the employees suffer loss or damage because of:
 - (i) the contravention; or
 - (ii) action taken to give effect to an agreement or transaction involved in the contravention.

The person is liable whether or not the person has been convicted of an offence in relation to the contravention.

- (2) The company's liquidator may recover from the person an amount equal to the loss or damage as a debt due to the company.

Note: Because employee entitlements are priority payments under paragraphs 556(1)(e) to (h), employees have priority to any compensation recovered by the liquidator in proceedings brought under this section.

- (3) If an employee of the company has suffered loss or damage because of:
- (a) the contravention; or
 - (b) action taken to give effect to an agreement or transaction involved in the contravention;

the employee may, as provided in section 596AF to 596AI (but not otherwise), recover from the person, as a debt due to the employee, an amount equal to the amount of the loss or damage. Any amount recovered by the employee under this subsection is to be taken into account in working out the amount for which the employee may prove in the liquidation of the company.

- (4) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

596AD Avoiding double recovery

An amount recovered in proceedings under section 596AC in relation to a contravention of section 596AB is to be taken into account in working out the amount (if any) recoverable in:

Section 596AE

- (a) any other proceedings under that section in relation to the contravention; and
- (b) proceedings under section 588M in relation to the incurring of a debt that is linked to the contravention.

596AE Effect of section 596AC

Section 596AC:

- (a) has effect in addition to, and not in derogation of, any rule of law about the duty or liability of a person because of the person's office or employment in relation to a company; and
- (b) does not prevent proceedings from being instituted in respect of a breach of such a duty or in respect of such a liability.

596AF Employee may sue for compensation with liquidator's consent

- (1) If a company is being wound up, an employee of the company may, with the written consent of the company's liquidator, begin proceedings under section 596AC in relation to a contravention of section 596AB in relation to an entitlement of the employee.
- (2) Subsection (1) has effect despite section 596AH, but subject to section 596AI.

596AG Employee may give liquidator notice of intention to sue for compensation

An employee of a company that is being wound up may give the company's liquidator a written notice:

- (a) stating that the employee intends to begin proceedings under section 596AC in relation to a contravention of section 596AB in relation to an entitlement of the employee; and
- (b) specifying the contravention of section 596AB and the entitlement to which the proposed proceedings relate; and
- (c) asking the liquidator to give the employee, within 3 months after receiving the notice:
 - (i) a written consent to the employee beginning the proceedings; or

Section 596AH

- (ii) a written statement of the reasons why the liquidator thinks that proceedings under section 596AC in relation to the contravention should not be begun.

The notice may be given only after the end of 6 months beginning when the company begins to be wound up.

596AH When employee may sue for compensation without liquidator's consent

- (1) This section applies if an employee of a company gives a notice under section 596AG in relation to a contravention of section 569AB and to an entitlement.
- (2) The employee may begin proceedings in a court under section 596AC in relation to the contravention and the entitlement if:
 - (a) as at the end of 3 months after the liquidator receives the notice, he or she has not consented to the employee beginning such proceedings; and
 - (b) on an application made after those 3 months, the court has given leave for the proceedings to begin.
- (3) If:
 - (a) during those 3 months, the liquidator gives to the employee a written statement of the reasons why the liquidator thinks that such proceedings should not be begun; and
 - (b) the employee applies for leave under paragraph (2)(b);then:
 - (c) the employee must file the statement with the court when so applying; and
 - (d) in determining the application, the court is to have regard to the reasons set out in the statement.

596AI Events preventing employee from suing

- (1) An employee of a company that is being wound up cannot begin proceedings under section 596AC in relation to a contravention in relation to an entitlement of the employee if:
 - (a) the company's liquidator has applied under section 588FF in relation to a transaction that constituted, or was part of, the contravention; or

Section 596AI

- (b) the company's liquidator has begun proceedings under section 596AC in relation to the contravention; or
 - (c) the company's liquidator has begun proceedings under section 588M in relation to the incurring of the debt that is linked to the contravention; or
 - (d) the company's liquidator has intervened in an application for a civil penalty order against a person in relation to a contravention of section 588G in relation to the incurring of the debt that is linked to the contravention.
- (2) Subsection (1) has effect despite sections 596AF and 596AH.

Part 5.9—Miscellaneous

Division 1—Examining a person about a corporation

596A Mandatory examination

The Court is to summon a person for examination about a corporation's examinable affairs if:

- (a) an eligible applicant applies for the summons; and
- (b) the Court is satisfied that the person is an officer or provisional liquidator of the corporation or was such an officer or provisional liquidator during or after the 2 years ending:
 - (i) if the corporation is under administration—on the section 513C day in relation to the administration; or
 - (ii) if the corporation has executed a deed of company arrangement that has not yet terminated—on the section 513C day in relation to the administration that ended when the deed was executed; or
 - (iii) if the corporation is being, or has been, wound up—when the winding up began; or
 - (iv) otherwise—when the application is made.

596B Discretionary examination

- (1) The Court may summon a person for examination about a corporation's examinable affairs if:
 - (a) an eligible applicant applies for the summons; and
 - (b) the Court is satisfied that the person:
 - (i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or
 - (ii) may be able to give information about examinable affairs of the corporation.
- (2) This section has effect subject to section 596A.

596C Affidavit in support of application under section 596B

- (1) A person who applies under section 596B must file an affidavit that supports the application and complies with the rules.
- (2) The affidavit is not available for inspection except so far as the Court orders.

596D Content of summons

- (1) A summons to a person under section 596A or 596B is to require the person to attend before the Court:
 - (a) at a specified place and at a specified time on a specified day, being a place, time and day that are reasonable in the circumstances; and
 - (b) to be examined on oath about the corporation's examinable affairs.
- (2) A summons to a person under section 596A or 596B may require the person to produce at the examination specified books that:
 - (a) are in the person's possession; and
 - (b) relate to the corporation or to any of its examinable affairs.
- (3) A summons under section 596A is to require under subsection (2) of this section the production of such of the books requested in the application for the summons as the summons may so require.

596E Notice of examination

If the Court summons a person for examination, the person who applied for the summons must give written notice of the examination to:

- (a) as many of the corporation's creditors as reasonably practicable; and
- (b) each eligible applicant in relation to the corporation, except:
 - (i) the person who applied for the examination; and
 - (ii) if a person authorised by ASIC applied for the examination—ASIC; and
 - (iii) a person who is such an eligible applicant only because the person is authorised by ASIC.

Section 596F

596F Court may give directions about examination

- (1) Subject to section 597, the Court may at any time give one or more of the following:
 - (a) a direction about the matters to be inquired into at an examination;
 - (b) a direction about the procedure to be followed at an examination;
 - (c) a direction about who may be present at an examination while it is being held in private;
 - (d) a direction that a person be excluded from an examination, even while it is being held in public;
 - (e) a direction about access to records of the examination;
 - (f) a direction prohibiting publication or communication of information about the examination (including questions asked, and answers given, at the examination);
 - (g) a direction that a document that relates to the examination and was created at the examination be destroyed.
- (2) The Court may give a direction under paragraph (1)(e), (f) or (g) in relation to all or part of an examination even if the examination, or that part, was held in public.
- (3) A person must not contravene a direction under subsection (1).

597 Conduct of examination

- (4) An examination is to be held in public except to such extent (if any) as the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private.
- (5A) Any of the following may take part in an examination:
 - (a) ASIC;
 - (b) any other eligible applicant in relation to the corporation; and for that purpose may be represented by a lawyer or by an agent authorised in writing for the purpose.
- (5B) The Court may put, or allow to be put, to a person being examined such questions about the corporation or any of its examinable affairs as the Court thinks appropriate.

- (6) A person who is summoned under section 596A or 596B to attend before the Court must not intentionally or recklessly:
- (a) fail to attend as required by the summons; or
 - (b) fail to attend from day to day until the conclusion of the examination.
- (6A) Subsection (6) does not apply to the extent that the person has a reasonable excuse.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (6A), see subsection 13.3(3) of the *Criminal Code*.
- (7) A person who attends before the Court for examination must not:
- (a) without reasonable excuse, refuse or fail to take an oath or make an affirmation; or
 - (b) without reasonable excuse, refuse or fail to answer a question that the Court directs him or her to answer; or
 - (c) make a statement that is false or misleading in a material particular; or
 - (d) without reasonable excuse, refuse or fail to produce books that the summons requires him or her to produce.
- (9) The Court may direct a person to produce, at an examination of that or any other person, books that are in the first-mentioned person's possession and are relevant to matters to which the examination relates or will relate.
- (9A) A person may comply with a direction under subsection (9) by causing the books to be produced at the examination.
- (10) Where the Court so directs a person to produce any books and the person has a lien on the books, the production of the books does not prejudice the lien.
- (10A) A person must not refuse, or intentionally or recklessly fail, to comply with a direction under subsection (9).
- (11) Subsection (10A) does not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (11), see subsection 13.3(3) of the *Criminal Code*.

Section 597

- (12) A person is not excused from answering a question put to the person at an examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty.
- (12A) Where:
- (a) before answering a question put to a person (other than a body corporate) at an examination, the person claims that the answer might tend to incriminate the person or make the person liable to a penalty; and
 - (b) the answer might in fact tend to incriminate the person or make the person so liable;
- the answer is not admissible in evidence against the person in:
- (c) a criminal proceeding; or
 - (d) a proceeding for the imposition of a penalty;
- other than a proceeding under this section, or any other proceeding in respect of the falsity of the answer.
- (13) The Court may order the questions put to a person and the answers given by him or her at an examination to be recorded in writing and may require him or her to sign that written record.
- (14) Subject to subsection (12A), any written record of an examination so signed by a person, or any transcript of an examination of a person that is authenticated as provided by the rules, may be used in evidence in any legal proceedings against the person.
- (14A) A written record made under subsection (13):
- (a) is to be open for inspection, without fee, by:
 - (i) the person who applied for the examination; or
 - (ii) an officer of the corporation; or
 - (iii) a creditor of the corporation; and
 - (b) is to be open for inspection by anyone else on paying the prescribed fee.
- (15) An examination under this Division may, if the Court so directs and subject to the rules, be held before such other court as is specified by the Court and the powers of the Court under this Division may be exercised by that other court.
- (16) A person ordered to attend before the Court or another court for examination under this Division may, at his or her own expense, employ a solicitor, or a solicitor and counsel, and the solicitor or

Section 597A

counsel, as the case may be, may put to the person such questions as the Court, or the other court, as the case may be, considers just for the purpose of enabling the person to explain or qualify any answers or evidence given by the person.

- (17) The Court or another court before which an examination under this Division takes place may, if it thinks fit, adjourn the examination from time to time.

597A When Court is to require affidavit about corporation's examinable affairs

- (1) The Court is to require a person to file an affidavit about a corporation's examinable affairs if:
- (a) an eligible applicant applies for the requirement to be made; and
 - (b) the Court is satisfied that the person is an officer or provisional liquidator of the corporation or was such an officer or provisional liquidator during or after the 2 years ending:
 - (i) if the corporation is under administration—on the section 513C day in relation to the administration; or
 - (ii) if the corporation has executed a deed of company arrangement that has not yet terminated—on the section 513C day in relation to the administration that ended when the deed was executed; or
 - (iii) if the corporation is being, or has been, wound up—when the winding up began; or
 - (iv) otherwise—when the application is made;
- even if the person has been summoned under section 596A or 596B for examination about those affairs.
- (2) The requirement is to:
- (a) specify such of the information requested in the application as relates to examinable affairs of the corporation; and
 - (b) require the affidavit to set out the specified information; and
 - (c) require the affidavit to be filed on or before a specified day that is reasonable in the circumstances.

Section 597B

- (3) A person must not refuse, or intentionally or recklessly fail, to comply with a requirement made of the person under subsection (1).

- (3A) Subsection (3) does not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3A), see subsection 13.3(3) of the *Criminal Code*.

- (4) The Court may excuse a person from answering a question at an examination about a corporation's examinable affairs if the person has already filed an affidavit under this section about that corporation's examinable affairs that sets out information that answers the question.

597B Costs of unnecessary examination or affidavit

Where the Court is satisfied that a summons to a person under section 596A or 596B, or a requirement made of a person under section 597A, was obtained without reasonable cause, the Court may order some or all of the costs incurred by the person because of the summons or requirement to be paid by:

- (a) in any case—the applicant for the summons or requirement;
or
- (b) in the case of a summons—any person who took part in the examination.

Division 2—Orders against a person in relation to a corporation

598 Order against person concerned with corporation

- (2) Subject to subsection (3), where, on application by an eligible applicant, the Court is satisfied that:
- (a) a person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation to a corporation; and
 - (b) the corporation has suffered, or is likely to suffer, loss or damage as a result of the fraud, negligence, default, breach of trust or breach of duty;

the Court may make such order or orders as it thinks appropriate against or in relation to the person (including either or both of the orders specified in subsection (4)) and may so make an order against or in relation to a person even though the person may have committed an offence in respect of the matter to which the order relates.

- (3) The Court must not make an order against a person under subsection (2) unless the Court has given the person the opportunity:
- (a) to give evidence; and
 - (b) to call witnesses to give evidence; and
 - (c) to bring other evidence in relation to the matters to which the application relates; and
 - (d) to employ, at the person's own expense, a solicitor, or a solicitor and counsel, to put to the person, or to any other witness, such questions as the Court considers just for the purpose of enabling the person to explain or qualify any answers or evidence given by the person.
- (4) The orders that may be made under subsection (2) against a person include:
- (a) an order directing the person to pay money or transfer property to the corporation; and
 - (b) an order directing the person to pay to the corporation the amount of the loss or damage.

Section 598

- (5) Nothing in this section prevents any person from instituting any other proceedings in relation to matters in respect of which an application may be made under this section.

Division 3—Provisions applying to various kinds of external administration

600A Powers of Court where outcome of voting at creditors' meeting determined by related entity

- (1) Subsection (2) applies where, on the application of a creditor of a company or Part 5.1 body, the Court is satisfied:
 - (a) that a proposed resolution has been voted on at:
 - (i) in the case of a company—a meeting of creditors of the company held:
 - (A) under Part 5.3A or a deed of company arrangement executed by the company; or
 - (B) in connection with winding up the company; or
 - (ii) in the case of a Part 5.1 body—a meeting of creditors, or of a class of creditors, of the body held under Part 5.1; and
 - (b) that, if the vote or votes that a particular related creditor, or particular related creditors, of the company or body cast on the proposed resolution had been disregarded for the purposes of determining whether or not the proposed resolution was passed, the proposed resolution:
 - (i) if it was in fact passed—would not have been passed; or
 - (ii) if in fact it was not passed—would have been passed;or the question would have had to be decided on a casting vote; and
 - (c) that the passing of the proposed resolution, or the failure to pass it, as the case requires:
 - (i) is contrary to the interests of the creditors as a whole or of that class of creditors as a whole, as the case may be; or
 - (ii) has prejudiced, or is reasonably likely to prejudice, the interests of the creditors who voted against the proposed resolution, or for it, as the case may be, to an extent that is unreasonable having regard to:
 - (A) the benefits resulting to the related creditor, or to some or all of the related creditors, from the

Section 600B

resolution, or from the failure to pass the proposed resolution, as the case may be; and

- (B) the nature of the relationship between the related creditor and the company or body, or of the respective relationships between the related creditors and the company or body; and
- (C) any other relevant matter.

(2) The Court may make one or more of the following:

- (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:
 - (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:

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.

600B Review by Court of resolution of creditors passed on casting vote of person presiding at meeting

- (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.

- (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.
- (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.
- (4) On and after the making of an order varying the resolution, the resolution has effect as varied by the order.

600C Court's powers where proposed resolution of creditors lost as casting vote of person presiding at meeting

- (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:
 - (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.
- (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.

Section 600D

- (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:
 - (i) if the order specifies a time when the proposed resolution is 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.

600D Interim order on application under section 600A, 600B or 600C

- (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.
- (2) An interim order must be expressed to apply until the application is determined, but may be varied or discharged.

600E Order under section 600A or 600B does not affect act already done pursuant to resolution

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.

600F Limitation on right of suppliers of essential services to insist on payment as condition of supply

- (1) If:
 - (a) a relevant authority of an eligible company requests, or authorises someone else to request, a person or authority (*the supplier*) to supply an essential service to the company in Australia; and

(b) the company owes an amount to the supplier in respect of the supply of the essential service before the effective day;

the supplier must not:

(c) refuse to comply with the request for the reason only that the amount is owing; or

(d) make it a condition of the supply of the essential service pursuant to the request that the amount is to be paid.

(2) In this section:

effective day, in relation to a relevant authority of an eligible company, means the day when the relevant authority became a relevant authority of the company, even if that day began before this Act commenced.

eligible company means a company:

(a) that is being wound up; or

(b) a provisional liquidator of which is acting; or

(c) that is under administration; or

(d) that has executed a deed of company arrangement that has not yet terminated; or

(e) a receiver, or receiver and manager, of property of which is acting.

essential service means:

(a) electricity; or

(b) gas; or

(c) water; or

(d) a carriage service (within the meaning of the *Telecommunications Act 1997*).

relevant authority, in relation to an eligible company, means:

(a) the liquidator; or

(b) the provisional liquidator; or

(c) the administrator of the company; or

(d) the administrator of the deed of company arrangement; or

(e) the receiver, or receiver and manager;

as the case requires.

Section 600G

600G Electronic methods of giving or sending certain notices etc.

- (1) This section applies if a person (the *notifier*) is authorised or required to give or send a notice, or other document, to a person (the *recipient*) under any of the following provisions:
 - (a) paragraph 436E(3)(a);
 - (b) paragraph 439A(3)(a);
 - (c) subsection 439A(4);
 - (d) subsection 445F(2);
 - (e) paragraph 449C(5)(a);
 - (f) subsection 450A(3);
 - (g) paragraph 450B(a);
 - (h) paragraph 450C(b);
 - (i) paragraph 450D(b);
 - (j) subsection 473(4);
 - (k) subsection 496(2);
 - (l) paragraph 497(2)(a);
 - (m) subsection 508(4);
 - (n) subsection 539(5);
 - (o) subsection 550(3);
 - (p) paragraph 568A(1)(b);
 - (q) subsection 574(2);
 - (r) subsection 574(3);
 - (s) subsection 579J(1);
 - (t) subsection 579J(2);
 - (u) subsection 579K(1);
 - (v) subsection 579K(2);
 - (w) subsection 579K(3);
 - (x) subsection 579K(4).
- (2) If the recipient nominates a fax number, or electronic address, by which the recipient may be notified of such notices or documents, the notifier may give or send the notice or document to the recipient by sending it to that fax number or electronic address.
- (3) If the recipient nominates any other electronic means by which the recipient may be notified of such notices or documents, the notifier may give or send the notice or document to the recipient by using that electronic means.

- (4) If the recipient nominates:
 - (a) an electronic means (the *nominated notification means*) by which the recipient may be notified that such notices or documents are available; and
 - (b) an electronic means (the *nominated access means*) the recipient may use to access such notices or documents; the notifier may give or send the document to the recipient by notifying the recipient (using the nominated notification means):
 - (c) that the notice or document is available; and
 - (d) how the recipient may use the nominated access means to access the notice or document.
- (5) A notice or document sent to a fax number or electronic address, or by other electronic means, is taken to be given or sent on the business day after it is sent.
- (6) A notice or document given or sent under subsection (4) is taken to be given or sent on the business day after the day on which the recipient is notified that the notice or document is available.
- (7) Subsections (2), (3) and (4) do not limit the provisions mentioned in subsection (1).

Chapter 5A—Deregistration, and transfer of registration, of companies

Part 5A.1—Deregistration

601AA Deregistration—voluntary

Who may apply for deregistration

- (1) An application to deregister a company may be lodged with ASIC by:
 - (a) the company; or
 - (b) a director or member of the company; or
 - (c) a liquidator of the company.

If the company lodges the application, it must nominate a person to be given notice of the deregistration.

Circumstances in which application can be made

- (2) A person may apply only if:
 - (a) all the members of the company agree to the deregistration; and
 - (b) the company is not carrying on business; and
 - (c) the company's assets are worth less than \$1,000; and
 - (d) the company has paid all fees and penalties payable under this Act; and
 - (e) the company has no outstanding liabilities; and
 - (f) the company is not a party to any legal proceedings.

ASIC may ask for information about officers

- (3) The applicant must give ASIC any information that ASIC requests about the current and former officers of the company.

Deregistration procedure

- (4) If ASIC is not aware of any failure to comply with subsections (1) to (3), it must give notice of the proposed deregistration:

Section 601AB

- (a) on ASIC database; and
- (b) in the *Gazette*.

When 2 months have passed since the *Gazette* notice, ASIC may deregister the company.

- (5) ASIC must give notice of the deregistration to:
 - (a) the applicant; or
 - (b) the person nominated in the application to be given the notice.

601AB Deregistration—ASIC initiated

Circumstances in which the ASIC may deregister

- (1) ASIC may decide to deregister a company if:
 - (a) the response to a return of particulars given to the company is at least 6 months late; and
 - (b) the company has not lodged any other documents under this Act in the last 18 months; and
 - (c) ASIC has no reason to believe that the company is carrying on business.
- (1A) ASIC may also decide to deregister a company if the company's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment.
- (2) ASIC may also decide to deregister a company if the company is being wound up and ASIC has reason to believe that:
 - (a) the liquidator is no longer acting; or
 - (b) the company's affairs have been fully wound up and a return that the liquidator should have lodged is at least 6 months late; or
 - (c) the company's affairs have been fully wound up under Part 5.4 and the company has no property or not enough property to cover the costs of obtaining a Court order for the company's deregistration.

Deregistration procedure

- (3) If ASIC decides to deregister a company under this section, it must give notice of the proposed deregistration:
 - (a) to the company; and

Section 601AC

- (b) to the company's liquidator (if any); and
- (c) to the company's directors; and
- (d) on ASIC database; and
- (e) in the *Gazette*.

When 2 months have passed since the *Gazette* notice, ASIC may deregister the company.

- (4) ASIC does not have to give a person notice under subsection (3) if ASIC does not have the necessary information about the person's identity or address.
- (5) ASIC must give notice of the deregistration to everyone who was notified of the proposed deregistration under paragraph (3)(b) or (c).

601AC Deregistration—following amalgamation or winding up

- (1) ASIC must deregister a company if the Court orders the deregistration of the company under:
 - (a) paragraph 413(1)(d) (reconstruction and amalgamation of Part 5.1 bodies); or
 - (b) paragraph 481(5)(b) (release of liquidator); or
 - (c) subsection 509(6) (liquidator's return following winding up).
- (2) ASIC must deregister a company if:
 - (a) 3 months have passed since the company's liquidator lodged a return under section 509; and
 - (b) no order under subsection 509(6) has been made during that period.

601AD Effect of deregistration

Company ceases to exist

- (1) A company ceases to exist on deregistration.

Note: Despite the deregistration, officers of the company may still be liable for things done before the company was deregistered.

Trust property vests in the Commonwealth

- (1A) On deregistration, all property that the company held on trust immediately before deregistration vests in the Commonwealth. If

Section 601AD

property is vested in a liquidator on trust immediately before deregistration, that property vests in the Commonwealth. This subsection extends to property situated outside this jurisdiction.

Other company property vests in ASIC

- (2) On deregistration, all the company's property (other than any property held by the company on trust) vests in ASIC. If company property is vested in a liquidator (other than any company property vested in a liquidator on trust) immediately before deregistration, that property vests in ASIC. This subsection extends to property situated outside this jurisdiction.

Rights and powers in respect of property

- (3) Under subsection (1A) or (2), the Commonwealth or ASIC takes only the same property rights that the company itself held. If the company held particular property subject to a security or other interest or claim, the Commonwealth or ASIC takes the property subject to that interest or claim.

Note: See also subsection 601AE(3)—which deals with liabilities that a law imposes on the property (particularly liabilities such as rates, taxes and other charges).

- (3A) The Commonwealth has, subject to its obligations as trustee of the trust, all the powers of an owner over property vested in it under subsection (1A).

Note: Section 601AF confers additional powers on the Commonwealth to fulfil outstanding obligations of the deregistered company.

- (4) ASIC has all the powers of an owner over property vested in it under subsection (2).

Note: Section 601AF confers additional powers on ASIC to fulfil outstanding obligations of the deregistered company.

Company books to be kept by former directors

- (5) The directors of the company immediately before deregistration must keep the company's books for 3 years after the deregistration.
- (6) Subsection (5) does not apply to books that a liquidator has to keep under subsection 542(2).

Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.

Section 601AE

Strict liability offences

- (7) An offence based on subsection (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

601AE What the Commonwealth or ASIC does with the property

Trust property vested in the Commonwealth

- (1) If property vests in the Commonwealth under subsection 601AD(1A), the Commonwealth may:

- (a) continue to act as trustee; or
- (b) apply to a court for the appointment of a new trustee.

Note: Under paragraph (1)(a), the Commonwealth may be able to transfer the property to a new trustee chosen in accordance with the trust instrument.

- (1A) If the Commonwealth continues to act as trustee in respect of the property, subject to its obligations as trustee, the Commonwealth:

- (a) in the case of money—must credit the amount of the money to a Special Account (within the meaning of section 5 of the *Financial Management and Accountability Act 1997*); or
- (b) otherwise:
 - (i) may sell or dispose of the property as it thinks fit; and
 - (ii) if the Commonwealth does so—must credit the amount of the proceeds to a Special Account (within the meaning of section 5 of the *Financial Management and Accountability Act 1997*).

Note: ASIC may, for and on behalf of the Commonwealth, perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to property held on trust by the Commonwealth (see subsection 8(6) of the ASIC Act).

Property vested in ASIC

- (2) If property vests in ASIC under subsection 601AD(2), ASIC may:
- (a) dispose of or deal with the property as it sees fit; and
 - (b) apply any money it receives to:
 - (i) defray expenses incurred by ASIC in exercising its powers in relation to the company under this Chapter; and
 - (ii) make payments authorised by subsection (3).

Section 601AE

ASIC must deal with the rest (if any) under Part 9.7.

Obligations attaching to property vested in the Commonwealth

- (2A) For the purposes of subsection (3), if any liability is imposed on property under a law of the Commonwealth immediately before the property vests in the Commonwealth under subsection 601AD(1A), then:
- (a) immediately after that time, the liability applies to the Commonwealth as if the Commonwealth were a body corporate; and
 - (b) the Commonwealth is liable to make notional payments to discharge that liability.

Obligations attaching to property

- (3) Any property that vests in the Commonwealth or ASIC under subsection 601AD(1A) or (2) remains subject to all liabilities imposed on the property under a law and does not have the benefit of any exemption that the property might otherwise have because it is vested in the Commonwealth or ASIC. These liabilities include a liability that:
- (a) is a charge or claim on the property; and
 - (b) arises under a law that imposes rates, taxes or other charges.

Extent of Commonwealth's and ASIC's obligation

- (4) The Commonwealth's or ASIC's obligation under subsection (2A) or (3) is limited to satisfying the liabilities out of the company's property to the extent that the property is properly available to satisfy those liabilities.

Accounts

- (5) The Commonwealth or ASIC (as the case requires) must keep:
- (a) a record of property that it knows is vested in it under this Chapter; and
 - (b) a record of its dealings with that property; and
 - (c) accounts of all money received from those dealings; and
 - (d) all accounts, vouchers, receipts and papers relating to the property and that money.

Section 601AF

**601AF The Commonwealth's and ASIC's power to fulfil
outstanding obligations of deregistered company**

The Commonwealth or ASIC may do an act on behalf of the company or its liquidator if the Commonwealth or ASIC is satisfied that the company or liquidator would be bound to do the act if the company still existed.

Note: This power is a general one and is not limited to acts in relation to property vested in the Commonwealth under subsection 601AD(1A), or ASIC under subsection 601AD(2). The Commonwealth or ASIC has all the powers that automatically flow from the vesting of property under that subsection (see subsections 601AD(3A) and (4)) and may exercise those powers whether or not the company was bound to do so.

601AG Claims against insurers of deregistered company

A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:

- (a) the company had a liability to the person; and
- (b) the insurance contract covered that liability immediately before deregistration.

601AH Reinstatement

Reinstatement by ASIC

- (1) ASIC may reinstate the registration of a company if ASIC is satisfied that the company should not have been deregistered.

Reinstatement by Court

- (2) The Court may make an order that ASIC reinstate the registration of a company if:
 - (a) an application for reinstatement is made to the Court by:
 - (i) a person aggrieved by the deregistration; or
 - (ii) a former liquidator of the company; and
 - (b) the Court is satisfied that it is just that the company's registration be reinstated.

Section 601AH

- (3) If the Court makes an order under subsection (2), it may:
- (a) validate anything done between the deregistration of the company and its reinstatement; and
 - (b) make any other order it considers appropriate.

Note: For example, the Court may direct ASIC to transfer to another person property vested in ASIC under subsection 601AD(2).

ASIC to give notice of reinstatement

- (4) ASIC must give notice of a reinstatement in the *Gazette*. If ASIC exercises its power under subsection (1) in response to an application by a person, ASIC must also give notice of the reinstatement to the applicant.

Effect of reinstatement

- (5) If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC reverts in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim.

Section 601AI

Part 5A.2—Transfer of registration

601AI Transferring registration

A company may transfer its registration to registration under a law of the Commonwealth, or of a State or Territory, by:

- (a) passing a special resolution resolving to transfer its registration to registration under that law; and
- (b) complying with sections 601AJ and 601AK.

The company may transfer its registration to registration under the law of a State or Territory only if the State or Territory is the one in which it is taken to be registered.

Note 1: Section 119A tells you which State or Territory the company is taken to be registered in.

Note 2: In order to be registered under the State or Territory law, the company may need to amend its constitution, or adopt a new one, and the provisions of this Act (including the class rights provisions in Part 2F.2) will apply to the amendment or adoption.

601AJ Applying to transfer registration

- (1) To transfer its registration, a company must lodge an application with ASIC together with:
 - (a) a copy of the special resolution that resolves to change the company's registration to a registration under the law of the Commonwealth or of the State or Territory; and
 - (b) a statement signed by the directors of the company that in their opinion the company's creditors are not likely to be materially prejudiced by the change and sets out their reasons for that opinion.
- (2) The application must be in the prescribed form.

601AK ASIC makes transfer of registration declaration

ASIC may make a transfer of registration declaration in relation to the company under this section if ASIC is satisfied that:

- (a) the application complies with section 601AJ; and

Section 601AL

- (b) the company's creditors are not likely to be materially prejudiced by the transfer of the company's registration; and
- (c) the law of the Commonwealth or of the State or Territory concerned adequately provides for:
 - (i) the continuation of the company's legal personality after the transfer; and
 - (ii) the preservation of any rights or claims against the company (other than the right of a member as a member) that accrued while the company was registered under this Act.

601AL ASIC to deregister company

- (1) ASIC must deregister the company if:
 - (a) ASIC makes a transfer of registration declaration in relation to the company; and
 - (b) the company is registered under the law of the Commonwealth or of the State or Territory.

Note: Despite the deregistration, officers of the company may still be liable for things done before the company was deregistered.

- (2) Sections 601AD, 601AE, 601AF and 601AG do not apply to the deregistration of a company under this section.

Chapter 5B—Bodies corporate registered as companies, and registrable bodies

Part 5B.1—Registering a body corporate as a company

Division 1—Registration

601BA Bodies corporate may be registered as certain types of companies

- (1) A body corporate that is not a company or corporation sole may be registered under this Act as a company of one of the following types:
 - (a) a proprietary company limited by shares;
 - (b) an unlimited proprietary company with share capital;
 - (c) a public company limited by shares;
 - (d) a company limited by guarantee;
 - (e) an unlimited public company with share capital;
 - (f) a no liability company.
- (2) A body corporate may be registered as a no liability company only if:
 - (a) the body has a share capital; and
 - (b) the body's constitution states that its sole objects are mining purposes; and
 - (c) under the constitution the body has no contractual right to recover calls made on its shares from a member who fails to pay them.

Note: Section 9 defines *mining purposes* and *minerals*.

601BB Bodies registered as proprietary companies

- (1) The body must have no more than 50 non-employee shareholders if it is to be registered as a proprietary company under this Part.

- (2) In applying subsection (1):
- (a) count joint holders of a particular parcel of shares as 1 person; and
 - (b) an employee shareholder is:
 - (i) a shareholder who is an employee of the body or of a subsidiary of the body; or
 - (ii) a shareholder who was an employee of the body, or of a subsidiary of the body, when they became a shareholder.

601BC Applying for registration under this Part

- (1) To register the body as a company under this Part, a person must lodge an application with ASIC.

Note 1: For the types of companies that can be registered under this Part, see section 601BA.

Note 2: A name may be reserved for a company to be registered under this Part before the application is lodged (see Part 2B.6).

- (2) The application must state the following:
- (a) the type of company that the body is proposed to be registered as under this Act;
 - (b) the name of the body;
 - (c) if the body is a registered body—its ARBN;
 - (d) the proposed name under which the body is to be registered (unless the ACN is to be used);
 - (e) the name and address of each member of the body;
 - (f) the present given and family name, all former given and family names and the date and place of birth of each person who consents in writing to become a director;
 - (g) the present given and family name, all former given and family names and the date and place of birth of each person who consents in writing to become a company secretary;
 - (h) the address of each person who consents in writing to become a director or company secretary;
 - (i) the address of the body's proposed registered office;
 - (j) for a body proposed to be registered as a public company—the proposed opening hours of its registered office (if they are not the standard opening hours);

Section 601BC

- (k) the address of the body's proposed principal place of business (if it is not the address of the proposed registered office);
- (l) for a body proposed to be registered as a company limited by shares or an unlimited company—the following:
 - (i) the number and class of shares each member already holds or has agreed, in writing, to take up;
 - (ii) the amount each member has already paid or agreed, in writing, to pay for each share;
 - (ia) whether the shares each member already holds or has agreed, in writing, to take up will be fully paid on registration;
 - (iii) the amount unpaid on each share;
 - (iv) whether or not the shares each member agrees in writing to take up will be beneficially owned by the member on registration;
 - (v) on registration, the classes into which shares will be divided;
 - (vi) for each class of share on issue on registration—the number of shares in the class on registration;
 - (vii) for each class of share on issue on registration—the total amount paid up for the class on registration;
 - (viii) for each class of share on issue on registration—the total amount unpaid for the class on registration;
- (la) whether or not, on registration, the company will have an ultimate holding company;
- (lb) if, on registration, the company will have an ultimate holding company—the following:
 - (i) the name of the ultimate holding company;
 - (ii) if the ultimate holding company is registered in Australia—its ABN, ACN or ARBN;
 - (iii) if the ultimate holding company is not registered in Australia—the place at which it was incorporated or formed;
- (lc) for a body proposed to be registered as a company limited by shares or an unlimited company—the top 20 members of each class (worked out according to the number and class of shares each member holds and has agreed, in writing, to take up);

Note: See also section 107.

- (m) for a body proposed to be registered as a public company, if shares have been issued for non-cash consideration—the prescribed particulars about the issue of the shares, unless the shares were issued under a written contract and a copy of the contract is lodged with the application;
- (n) for a body proposed to be registered as a company limited by guarantee—the amount of the guarantee that each member has agreed to in writing;
- (o) the State or Territory in this jurisdiction in which the company is to be taken to be registered.

Note 1: Paragraph (h)—the address that must be stated is usually the residential address, although an alternative address can sometimes be stated instead (see section 205D).

Note 2: Paragraph (i)—if the body when it is registered under this Part is not to be the occupier of premises at the address of its registered office, the application must state that the occupier has consented to the address being specified in the application and has not withdrawn that consent (see section 100).

- (3) If the body is proposed to be registered as a public company, the application must be accompanied by a copy of each document (including an agreement or consent) or resolution that is necessary to ascertain the rights attached to issued or unissued shares of the body.
- (4) The application must be in the prescribed form.
- (5) An applicant must have the consents and agreements referred to in subsection (2) when the application is lodged. After the body is registered as a company, the applicant must give the consents and agreements to the company. The company must keep the consents and agreements.
- (5A) An offence based on subsection (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (6) The following documents must be lodged with the application:
 - (a) a certified copy of a current certificate of the body's incorporation in its place of origin, or of a document that has a similar effect;
 - (b) a certified printed copy of the body's constitution (if any);

Section 601BC

- (c) for a body that is not a registered body—the documents required by subsection 263(3) in relation to existing charges on the property of the body;
- (d) any other documents that are prescribed;
- (e) any other documents that ASIC requires by written notice given to the body.

A document need not be lodged if ASIC already has the document and agrees not to require its lodgment.

Note: Subsection 263(3) requires documents relating to charges on the property of the body to be lodged with the application.

- (7) The application must be accompanied by evidence that:
 - (a) the body is not an externally-administered body corporate; and
 - (b) no application to wind up the body has been made to a court (in Australia or elsewhere) that has not been dealt with; and
 - (c) no application to approve a compromise or arrangement between the body and another person has been made to a court (in Australia or elsewhere) that has not been dealt with.
- (8) The application must be accompanied by evidence that under the law of the body's place of origin:
 - (a) the body's type is the same or substantially the same as the proposed type specified in the application; and
 - (b) if the members of the body have limited liability—the body's constitution defines how and to what extent that liability is limited; and
 - (d) the transfer of the body's incorporation is authorised; and
 - (e) the body has complied with the requirements (if any) of that law for the transfer of its incorporation; and
 - (f) if those requirements do not include consent to the transfer by the members of the body—the members:
 - (i) have consented to the transfer by a resolution that has been passed at a meeting by at least 75% of the votes cast by members entitled to vote on the resolution; and
 - (ii) were given at least 21 days notice of the meeting and the proposed resolution.
- (9) The evidence lodged in accordance with subsections (7) and (8) must be satisfactory proof to ASIC of the matters referred to in those subsections.

Note: Section 1304 requires documents that are not in English to be translated into English.

601BD ASIC gives body ACN, registers as company and issues certificate

Registration

- (1) If an application is lodged under section 601BC, ASIC may:
- (a) give the body an ACN; and
 - (b) register the body as a company of the proposed type specified in the application; and
 - (c) issue a certificate that states:
 - (i) the company's name; and
 - (ii) the company's ACN; and
 - (iii) the company's type; and
 - (iv) that the company is registered as a company under this Act; and
 - (v) the State or Territory in which the company is taken to be registered; and
 - (vi) the date of registration.

Note: For the evidentiary value of a certificate of registration, see subsection 1274(7A).

ASIC must keep record of registration

- (2) ASIC must keep a record of the registration. Subsections 1274(2) and (5) apply to the record as if it were a document lodged with ASIC.

601BE Registered office

The address specified in the application as the body's proposed registered office becomes the address of its registered office as a company on registration.

601BF Name

A company registered under this Part has a name on registration that is:

- (a) an available name; or

Section 601BG

- (b) the expression “Australian Company Number” followed by the company’s ACN.

The name must also include the words required by subsection 148(2) or 148(3).

601BG Constitution

- (1) The constitution on registration (if any) of a company registered under this Part is the constitution lodged with the application.
- (2) If any text in a constitution lodged with the application is not in English, the English translation of that text lodged with the application for registration is taken to be the relevant text in the constitution on registration.

601BH Modifications of constitution

- (1) A company registered under this Part must modify its constitution within 3 months after registration to give effect to this Part.
- (2) If the constitution specifies amounts of money expressed in foreign currency, the company must:
 - (a) fix a single rate of conversion by resolution; and
 - (b) modify its constitution by special resolution to convert those amounts into Australian currency using that rate.The modification must be made within 3 months after registration.
- (2A) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) An amendment of a company’s constitution under this section does not affect the number and class of shares held by each member.

601BJ ASIC may direct company to apply for Court approval for modifications of constitution

- (1) ASIC may give the company a written direction to apply to the Court within a specified period for an order approving the modified constitution.

- (2) The Court may make an order:
 - (a) declaring that the company has complied with section 601BH; or
 - (b) declaring that the company will comply with section 601BH if it makes further modifications of its constitution as specified in the order.
- (3) The company must lodge a copy of the order with ASIC within 14 days after the order is made.
- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

601BK Establishing registers and minute books

- (1) A company registered under this Part must, within 14 days after registration:
 - (a) set up the registers required by sections 168 and 271; and
 - (b) include in those registers the information that is required to be included in those registers and that is available to the company on registration; and
 - (c) set up the minute books required by section 251A.
 - (1A) An offence based on subsection (1) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) During the 14 days the company need not comply with a person's request to inspect or obtain a copy of:
 - (a) information in a register; or
 - (b) a minute of a general meeting.

However, the period within which the company must comply with the request begins at the end of the 14 days.

601BL Registration of registered bodies

- (1) If a registered body becomes registered as a company under this Part, it ceases to be a registered body. ASIC must remove the body's name from the appropriate register kept for the purposes of Division 1 or 2 of Part 5B.2.
- (2) ASIC may keep any of the documents relating to the company that were lodged because the company used to be a registered body.

Division 2—Operation of this Act

601BM Effect of registration under this Part

- (1) Registration under this Part does not:
 - (a) create a new legal entity; or
 - (b) affect the body's existing property, rights or obligations (except as against the members of the body in their capacity as members); or
 - (c) render defective any legal proceedings by or against the body or its members.
- (2) This Part and sections 263, 266 and 276 set out special provisions for companies registered under this Part.

601BN Liability of members on winding up

A person who stopped being a member of the body before it was registered as a company under this Part is to be treated as a past member of the company in applying Division 2 of Part 5.6 to a winding up of the company. However, the person's liability to contribute to the company's property is further limited by this section to an amount sufficient for the following:

- (a) payment of debts and liabilities contracted by the company before the day on which the company was registered under this Part;
- (b) payment of the costs, charges and expenses of winding up the company, so far as those costs, charges and expenses relate to those debts and liabilities;
- (c) the adjustment of the rights between the contributories, so far as the adjustment relates to those debts and liabilities.

601BP Bearer shares

- (1) A bearer of a bearer share in a company registered under this Part may surrender the share to the company. The company must:
 - (a) cancel the share; and
 - (b) include the bearer's name in the company's register of members.

Section 601BQ

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The company is liable to compensate anyone who suffers a loss because the company includes the bearer's name in the company's register of members despite the fact that:
- (a) the share was not surrendered to the company; or
 - (b) the company failed to cancel the share.
- (3) Subject to this section, the constitution of a company registered under this Part may provide that the bearer of a bearer share in the company is taken to be a member of the company for all purposes or for specified purposes.

Note: A body must not issue bearer shares after it is registered as a company under this Part (see paragraph 254F(a)).

601BQ References in pre-registration contracts and other documents to par value in existing contracts and documents

- (1) This section applies in relation to a company registered under this Part for the purpose of interpreting and applying after registration:
- (a) a contract entered into before the registration; or
 - (b) a trust deed or other document executed before the registration.
- (2) A reference to the par value of a share is taken to be a reference to the par value of the share immediately before the registration, or the par value that the share would have had if it had been issued then.
- (3) A reference to a right to a return of capital on a share is taken to be a reference to a right to a return of capital of a value equal to the amount paid before the registration in respect of the share's par value, or the par value that the share would have had if it had been issued then.
- (4) A reference to the aggregate par value of the company's issued share capital is taken to be a reference to that aggregate as it existed immediately before the registration.

Section 601BR

601BR First AGM

- (1) Despite subsection 250N(1), a public company registered under this Part must hold its first AGM after registration in the calendar year of its registration.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

601BS Modification by regulations

The regulations may modify the operation of this Part in relation to a company registered under this Part.

Part 5B.2—Registrable bodies

Division 1—Registrable Australian bodies

601CA When a registrable Australian body may carry on business in this jurisdiction and outside its place of origin

A registrable Australian body must not carry on business in a State or Territory in this jurisdiction unless:

- (a) that State or Territory is its place of origin; or
- (b) it has its head office or principal place of business in that State or Territory; or
- (c) it is registered under this Division; or
- (d) it has applied to be so registered and the application has not been dealt with.

601CB Application for registration

Subject to this Part, where a registrable Australian body lodges an application for registration under this Division that is in the prescribed form and is accompanied by:

- (a) a certified copy of a current certificate of its incorporation or registration in its place of origin, or a document of similar effect; and
- (b) a certified copy of its constitution; and
- (c) a list of its directors containing personal details of those directors that are equivalent to the personal details of directors referred to in subsection 242(2); and
- (d) in relation to each existing charge on property of the body that would be a registrable charge within the meaning of Chapter 2K if the body were a registered Australian body, the documents that subsection 263(3) requires to be lodged; and
- (e) notice of the address of:
 - (i) if it has in its place of origin a registered office for the purposes of a law (other than this Act) there in force—that office; or
 - (ii) otherwise—its principal place of business in its place of origin; and

Section 601CC

- (f) notice of the address of its registered office under section 601CT;

ASIC must:

- (g) grant the application and register the body under this Division by entering the body's name in a register kept for the purposes of this Division; and
- (h) allot to the body an ARBN distinct from the ARBN or ACN of each body corporate (other than the body) already registered as a company or registered body under this Act.

601CC Cessation of business etc.

- (1) Within 7 days after ceasing to carry on business interstate, a registered Australian body must lodge written notice that it has so ceased.
- (1A) For the purposes of this section, a body *carries on business interstate* if, and only if, the body carries on business at a place that is in this jurisdiction and outside the body's place of origin.
- (2) Where ASIC has reasonable cause to believe that a registered Australian body does not carry on business interstate, ASIC may send to the body in the prescribed manner a letter to that effect and stating that, if no answer showing cause to the contrary is received within one month from the date of the letter, a notice will be published in the *Gazette* with a view to striking the body's name off the register.
- (3) Unless ASIC receives, within one month after the date of the letter, an answer to the effect that the body is still carrying on business interstate, it may publish in the *Gazette*, and send to the body in the prescribed manner, a notice that, at the end of 3 months after the date of the notice, the body's name will, unless cause to the contrary is shown, be struck off the register.
- (4) At the end of the period specified in a notice sent under subsection (3), ASIC may, unless cause to the contrary has been shown, strike the body's name off the register and must publish in the *Gazette* notice of the striking off.
- (5) Nothing in subsection (4) affects the power of the Court to wind up a body whose name has been struck off the register.

Section 601CC

- (6) Where a body's name is struck off the register under subsection (4), the body ceases to be registered under this Division.
- (7) If ASIC is satisfied that a body's name was struck off the register as a result of an error on ASIC's part, ASIC may restore the body's name to the register, and thereupon the body's name is taken never to have been struck off and the body is taken never to have ceased to be registered under this Division.
- (8) A person who is aggrieved by a body's name having been struck off the register may, within 15 years after the striking off, apply to the Court for the body's name to be restored to the register.
- (9) If, on an application under subsection (8), the Court is satisfied that:
 - (a) at the time of the striking off, the body was carrying on business interstate; or
 - (b) it is otherwise just for the body's name to be restored to the register;the Court may, by order:
 - (c) direct the body's name to be restored to the register; and
 - (d) give such directions, and make such provisions, as it thinks just for placing the body and all other persons in the same position, as nearly as practicable, as if the body's name had never been struck off.
- (10) On the lodging of an office copy of an order under subsection (9), the body's name is taken never to have been struck off.
- (11) Where a body's name is restored to the register under subsection (7) or (9), ASIC must cause notice of that fact to be published in the *Gazette*.
- (12) Where a body ceases to be registered under this Division, an obligation to lodge a document that this Act imposes on the body by virtue of the doing of an act or thing, or the occurrence of an event, at or before the time when the body so ceased, being an obligation not discharged at or before that time, continues to apply in relation to the body even if the period prescribed for lodging the document has not ended at or before that time.
- (13) Where a registered Australian body commences to be wound up, or is dissolved or deregistered, in its place of origin, the Court must,

Section 601CC

on application by the person who is the liquidator for the body's place of origin, or by ASIC, appoint a liquidator of the body.

- (14) A liquidator of a registered Australian body who is appointed by the Court:
- (a) must, before any distribution of the body's property is made, by advertisement in a daily newspaper circulating generally in each State or Territory where the body carried on business at any time during the 6 years before the liquidation, invite all creditors to make their claims against the body within a reasonable time before the distribution; and
 - (b) must not, without obtaining an order of the Court, pay out a creditor of the body to the exclusion of another creditor of the body; and
 - (c) must, unless the Court otherwise orders, recover and realise the property of the body that is located:
 - (i) in this jurisdiction; and
 - (ii) outside the body's place of origin;and must pay the net amount so recovered and realised to the liquidator of the body for its place of origin.
- (15) If a registered Australian body has been wound up so far as its property located:
- (a) in this jurisdiction; and
 - (b) outside its place of origin;
- is concerned and there is no liquidator for its place of origin, the liquidator may apply to the Court for directions about the disposal of the net amount recovered under subsection (14).

Division 2—Foreign companies

601CD When a foreign company may carry on business in this jurisdiction

- (1) A foreign company must not carry on business in this jurisdiction unless:
 - (a) it is registered under this Division; or
 - (b) it has applied to be so registered and the application has not been dealt with.
- (2) For the purposes of this Division, a foreign company carries on business in this jurisdiction if it:
 - (a) offers debentures in this jurisdiction; or
 - (b) is a guarantor body for debentures offered in this jurisdiction; and Part 2L.1 applies to the debentures.

601CDA Limited disclosure if place of origin is a prescribed country

A foreign company is not required to lodge information or a copy of a document with ASIC under this Division if:

- (a) the company's place of origin is a country prescribed by the regulations; and
- (b) the company has given the information or a copy of the document to an authority in that country whose functions under the law of the country include functions equivalent to any of those of ASIC under this Act.

601CE Application for registration

Subject to this Part, where a foreign company lodges an application for registration under this Division that is in the prescribed form and is accompanied by:

- (a) a certified copy of a current certificate of its incorporation or registration in its place of origin, or a document of similar effect; and
- (b) a certified copy of its constitution; and

Section 601CF

- (c) a list of its directors containing personal details of those directors that are equivalent to the personal details of directors referred to in subsection 205B(3); and
 - (d) if that list includes directors who are:
 - (i) resident in Australia; and
 - (ii) members of a local board of directors;a memorandum that is duly executed by or on behalf of the foreign company and states the powers of those directors; and
 - (e) in relation to each existing charge on property of the foreign company that would be a registrable charge within the meaning of Chapter 2K if the foreign company were a registered foreign company, the documents that subsection 263(3) requires to be lodged; and
 - (f) notice of the address of:
 - (i) if it has in its place of origin a registered office for the purposes of a law there in force—that office; or
 - (ii) otherwise—its principal place of business in its place of origin; and
 - (g) notice of the address of its registered office under section 601CT;
- ASIC must:
- (h) grant the application and register the foreign company under this Division by entering the foreign company's name in a register kept for the purposes of this Division; and
 - (j) allot to the foreign company an ARBN distinct from the ARBN or ACN of each body corporate (other than the foreign company) already registered as a company or registered body under this Act.

601CF Appointment of local agent

- (1) A foreign company may at any time appoint a person as a local agent.
- (2) ASIC must not register a foreign company under this Division unless the foreign company has at least one local agent in relation to whom the foreign company has complied with section 601CG.

- (3) Where:
- (a) because a person ceased on a particular day to be a local agent of the foreign company, a registered foreign company has no local agent; and
 - (b) the foreign company carries on business, or has a place of business, in this jurisdiction;
- the foreign company must, within 21 days after that day, appoint a person as a local agent.

601CG Local agent: how appointed

- (1) A foreign company that lodges a memorandum of appointment, or a power of attorney, that is duly executed by or on behalf of the foreign company and states the name and address of a person who is:
 - (a) a natural person or a company; and
 - (b) resident in this jurisdiction; and
 - (c) authorised to accept on the foreign company's behalf service of process and notices;is taken to appoint that person as a local agent.
- (2) Where a memorandum of appointment, or a power of attorney, lodged under subsection (1) is executed on the foreign company's behalf, the foreign company must, unless it has already done so, lodge a copy, verified in writing in the prescribed form to be a true copy, of the document authorising the execution.
- (3) A copy lodged under subsection (2) is taken for all purposes to be the original of the document.
- (4) A foreign company that appoints a local agent must lodge a written statement that is in the prescribed form and is made by the local agent.
- (5) A person whom a foreign company appoints as a local agent is a local agent of the foreign company until the person:
 - (a) ceases by virtue of section 601CH to be such a local agent; or
 - (b) dies or ceases to exist.

Section 601CH

601CH Local agent: how removed

- (1) Where a person is a local agent of a foreign company, the foreign company or the person may lodge a written notice stating that the person's appointment as a local agent has terminated, or will terminate, on a specified day.
- (2) Where a notice is lodged under subsection (1), the person ceases to be a local agent of the foreign company at the end of:
 - (a) the period of 21 days beginning on the day of lodgment; or
 - (b) the day specified in the notice;whichever is the later.

601CJ Liability of local agent

A local agent of a registered foreign company:

- (a) is answerable for the doing of all acts, matters and things that the foreign company is required by or under this Act to do; and
- (b) is personally liable to a penalty imposed on the foreign company for a contravention of this Act if the court or tribunal hearing the matter is satisfied that the local agent should be so liable.

601CK Balance-sheets and other documents

- (1) Subject to this section, a registered foreign company must, at least once in every calendar year and at intervals of not more than 15 months, lodge a copy of its balance-sheet made up to the end of its last financial year, a copy of its cash flow statement for its last financial year and a copy of its profit and loss statement for its last financial year, in such form and containing such particulars and including copies of such documents as the company is required to prepare by the law for the time being applicable to that company in its place of origin, together with a statement in writing in the prescribed form verifying that the copies are true copies of the documents so required.
- (2) ASIC may extend the period within which subsection (1) requires a balance-sheet, profit and loss statement, cash flow statement or other document to be lodged.

Section 601CK

- (3) ASIC may, if it is of the opinion that the balance-sheet, the profit and loss statement and the other documents referred to in subsection (1) do not sufficiently disclose the company's financial position:
- (a) require the company to lodge a balance-sheet; or
 - (b) require the company to lodge an audited balance-sheet; or
 - (ba) require the company to lodge a cash flow statement; or
 - (bb) require the company to lodge an audited cash flow statement; or
 - (c) require the company to lodge a profit and loss statement; or
 - (d) require the company to lodge an audited profit and loss statement;
- within such period, in such form, containing such particulars and including such documents as ASIC by notice in writing to the company requires, but this subsection does not authorise ASIC to require a balance-sheet or a profit and loss statement to contain any particulars or include any documents that would not be required to be given if the company were a public company within the meaning of this Act.
- (4) The registered foreign company must comply with the requirements set out in the notice.
- (5) Where a registered foreign company is not required by the law of the place of its incorporation or formation to prepare a balance-sheet, the company must prepare and lodge a balance-sheet, or, if ASIC so requires, an audited balance-sheet, within such period, in such form and containing such particulars and including such documents as the company would have been required to prepare if the company were a public company incorporated under this Act.
- (5A) If a registered foreign company is not required by the law of the place of its incorporation or formation to prepare a cash flow statement, the company must prepare and lodge a cash flow statement, or, if ASIC so requires, an audited cash flow statement, within the period, in the form, containing the particulars and including the documents that the company would have been required to prepare if the company were a public company registered under this Act.
-

Section 601CL

- (6) Where a registered foreign company is not required by the law of its place of origin to prepare a profit and loss statement, the company must prepare and lodge a profit and loss statement or, if ASIC so requires, an audited profit and loss statement, within such period, in such form, containing such particulars and including such documents as the company would have been required to prepare if the company were a public company incorporated under this Act.
- (7) ASIC may, by *Gazette* notice, declare that this section does not apply to specified foreign companies.
- (8) Subsections (1) to (6), inclusive, do not apply in relation to a foreign company in relation to which a notice is in force under subsection (7).
- (9) A registered foreign company in relation to which a notice is in force under subsection (7) must, at least once in every calendar year, lodge with ASIC a return in the prescribed form made up to the date of its annual general meeting.
- (10) The return must be lodged within 1 month after the date to which it is made up, or within such further period as ASIC, in special circumstances, allows.

601CL Cessation of business etc.

- (1) Within 7 days after ceasing to carry on business in this jurisdiction, a registered foreign company must lodge written notice that it has so ceased.
- (2) Where ASIC receives notice from a local agent of a registered foreign company that the foreign company has been dissolved or deregistered, ASIC must remove the foreign company's name from the register.
- (3) Where ASIC has reasonable cause to believe that a registered foreign company does not carry on business in this jurisdiction, ASIC may send to the foreign company in the prescribed manner a letter to that effect and stating that, if no answer showing cause to the contrary is received within one month from the date of the letter, a notice will be published in the *Gazette* with a view to striking the foreign company's name off the register.

Section 601CL

- (4) Unless ASIC receives, within one month after the date of the letter, an answer to the effect that the foreign company is still carrying on business in this jurisdiction, it may publish in the *Gazette*, and send to the foreign company in the prescribed manner, a notice that, at the end of 3 months after the date of the notice, the foreign company's name will, unless cause to the contrary is shown, be struck off the register.
 - (5) At the end of the period specified in a notice sent under subsection (4), ASIC may, unless cause to the contrary has been shown, strike the foreign company's name off the register and must publish in the *Gazette* notice of the striking off.
 - (6) Nothing in subsection (5) affects the power of the Court to wind up a foreign company whose name has been struck off the register.
 - (7) Where a foreign company's name is struck off the register under subsection (5), the foreign company ceases to be registered under this Division.
 - (8) If ASIC is satisfied that a foreign company's name was struck off the register as a result of an error on ASIC's part, ASIC may restore the foreign company's name to the register, and thereupon the foreign company's name is taken never to have been struck off and the foreign company is taken never to have ceased to be registered under this Division.
 - (9) A person who is aggrieved by a foreign company's name having been struck off the register may, within 15 years after the striking off, apply to the Court for the foreign company's name to be restored to the register.
 - (10) If, on an application under subsection (9), the Court is satisfied that:
 - (a) at the time of the striking off, the foreign company was carrying on business in this jurisdiction; or
 - (b) it is otherwise just for the foreign company's name to be restored to the register;the Court may, by order:
 - (c) direct the foreign company's name to be restored to the register; and
 - (d) give such directions, and make such provision, as it thinks just for placing the foreign company and all other persons in
-

Section 601CL

the same position, as nearly as practicable, as if the foreign company's name had never been struck off.

- (11) On the lodging of an office copy of an order under subsection (10), the foreign company's name is taken never to have been struck off.
- (12) Where a foreign company's name is restored to the register under subsection (8) or (10), ASIC must cause notice of that fact to be published in the *Gazette*.
- (13) Where a foreign company ceases to be registered under this Division, an obligation to lodge a document that this Act imposes on the foreign company by virtue of the doing of an act or thing, or the occurrence of an event, at or before the time when the foreign company so ceased, being an obligation not discharged at or before that time, continues to apply in relation to the foreign company even if the period prescribed for lodging the document has not ended at or before that time.
- (14) Where a registered foreign company commences to be wound up, or is dissolved or deregistered, in its place of origin:
 - (a) each person who, on the day when the winding up proceedings began, was a local agent of the foreign company must, within the period of 1 month after that day or within that period as extended by ASIC in special circumstances, lodge or cause to be lodged notice of that fact and, when a liquidator is appointed, notice of the appointment; and
 - (b) the Court must, on application by the person who is the liquidator for the foreign company's place of origin, or by ASIC, appoint a liquidator of the foreign company.
- (15) A liquidator of a registered foreign company who is appointed by the Court:
 - (a) must, before any distribution of the foreign company's property is made, by advertisement in a daily newspaper circulating generally in each State or Territory where the foreign company carried on business at any time during the 6 years before the liquidation, invite all creditors to make their claims against the foreign company within a reasonable time before the distribution; and
 - (b) must not, without obtaining an order of the Court, pay out a creditor of the foreign company to the exclusion of another creditor of the foreign company; and

Section 601CM

- (c) must, unless the Court otherwise orders, recover and realise the property of the foreign company in this jurisdiction and must pay the net amount so recovered and realised to the liquidator of the foreign company for its place of origin.
- (16) Where a registered foreign company has been wound up so far as its property in this jurisdiction is concerned and there is no liquidator for its place of origin, the liquidator may apply to the Court for directions about the disposal of the net amount recovered under subsection (15).

601CM Register of members of foreign company

- (1) A registered foreign company that has a share capital may cause a branch register of members to be kept in this jurisdiction.
- (2) If a member of a registered foreign company is resident in this jurisdiction and requests the foreign company in writing to register in a branch register kept under subsection (1) shares held by the member, then:
 - (a) if the foreign company already keeps a register under subsection (1)—the foreign company must register in that register the shares held by the member; or
 - (b) otherwise—the foreign company must, within 1 month after receiving the request:
 - (i) keep at its registered office or at some other place in this jurisdiction a branch register of members; and
 - (ii) register in that register the shares held by the member.
- (3) Subsection (2) does not apply in relation to a foreign company whose constitution prohibits any invitation to the public to subscribe for, and any offer to the public to accept subscriptions for, shares in the foreign company.
- (4) Subject to this section, a registered foreign company may discontinue a register kept under subsection (1) and must, if it does so, transfer all entries in that register to a register of members kept outside Australia.
- (5) If shares held by a member of a registered foreign company who is resident in this jurisdiction are registered in a register kept by the foreign company under subsection (1), the foreign company must

Section 601CN

not discontinue that register without that member's written consent.

601CN Register kept under section 601CM

- (1) This section has effect where a registered foreign company keeps a register under section 601CM.
- (2) The foreign company must keep the register in the same manner as this Act requires a company to keep its register of members.
- (3) Subject to subsection (2), the foreign company must register a transaction in the register in the same way, and at the same charge, as it would have registered the transaction in the register of members that the foreign company keeps in its place of origin.
- (4) A transfer of shares in the foreign company that is lodged at the foreign company's registered office, or at the place where the register is kept, is binding on the foreign company.
- (5) The Court has the same powers in relation to correction of the register as it has in relation to correction of a company's register of members.
- (6) The register is taken to be part of the foreign company's register of members.
- (7) At the written request of a member who holds shares registered in the register, the foreign company must remove the shares from the register and register them in such other register as is specified in the request.
- (8) The register is prima facie evidence of matters that this Act requires or authorises to be entered in the register.

601CP Notifying ASIC about register kept under section 601CM

Within 14 days after:

- (a) beginning to keep a register under section 601CM; or
- (b) changing the place where a register is so kept; or

Section 601CQ

(c) discontinuing a register under section 601CM;
a registered foreign company must lodge a written notice of that fact specifying, if paragraph (a) or (b) applies, the address or new address, as the case may be, where the register is kept.

601CQ Effect of right to acquire shares compulsorily

Where:

- (a) a law of the place of origin of a foreign company that corresponds to section 414, 661A or 664A entitles a person to give notice to another person that the first-mentioned person wishes to acquire shares in the foreign company that the other person holds; and
- (b) some or all of those shares are registered in a register kept under section 601CM;

sections 601CM, 601CN and 601CP cease to apply in relation to the foreign company until the first-mentioned person acquires, or ceases to be entitled to acquire, the shares so registered.

601CR Index of members and inspection of registers

Subsection 169(2) and sections 173, 174 and 177 apply in relation to a register kept under section 601CM.

601CS Certificate as to shareholding

A certificate under the seal of a foreign company specifying shares held by a member of that company and registered in a register kept under section 601CM is prima facie evidence of the title of the member to the shares and of the fact that the shares are registered in the register.

Division 3—Bodies registered under this Part

601CTA Limited disclosure if place of origin is a prescribed country

A foreign company is not required to lodge information or a copy of a document with ASIC under this Division if:

- (a) the company's place of origin is a country prescribed by regulations made for the purposes of section 601CDA; and
- (b) the company has given the information or a copy of the document to an authority in that country whose functions under the law of the country include functions equivalent to any of those of ASIC under this Act.

601CT Registered office

- (1) A registered body must have a registered office in this jurisdiction to which all communications and notices may be addressed and that must be open:
 - (a) if the body has:
 - (i) lodged a notice under subsection (2); or
 - (ii) lodged a notice under subsection (2) and a notice or notices under subsection (4);for such hours (being not fewer than 3) between 9 am and 5 pm on each business day as are specified in that notice, or in the later or last of those notices, as the case may be; or
 - (b) otherwise—each business day from at least 10 am to 12 noon and from at least 2 pm to 4 pm;and at which a representative of the body is present at all times when the office is open.
- (2) A registered body may lodge written notice of the hours (being not fewer than 3) between 9 am and 5 pm on each business day during which the body's registered office is open.
- (3) Within 7 days after a change in the situation of its registered office, a registered body must lodge a written notice of the change and of the new address of that office.

Section 601CU

- (4) A registered body that has lodged a notice under subsection (2) must, within 7 days after a change in the hours during which its registered office is open, lodge a notice, in the prescribed form, of the change.

601CU Certificate of registration

- (1) On registering a body corporate under Division 1 or 2 or registering under section 601DH or 601DJ a change in a registered body's name, ASIC must issue to the body a certificate, under ASIC's common seal and in the prescribed form, of the body's registration under that Division.
- (2) A certificate under subsection (1) is prima facie evidence of the matters stated in it.

601CV Notice of certain changes

- (1) A registered body must, within 1 month after a change in:
- (b) its constitution or any other document lodged in relation to the body; or
 - (c) its directors; or
 - (d) if the body is a foreign company;
 - (i) the powers of any directors who are resident in Australia and members of an Australian board of directors of the foreign company; or
 - (ii) a local agent or local agents; or
 - (iii) the name or address of a local agent; or
 - (e) the situation of:
 - (i) if it has in its place of origin a registered office for the purposes of a law (other than this Act) there in force—that office; or
 - (ii) otherwise—its principal place of business in its place of origin;
- lodge a written notice of particulars of the change, together with such documents (if any) as the regulations require.
- (2) ASIC may in special circumstances extend the period within which subsection (1) requires a notice or document to be lodged.

Section 601CW

601CW Body's name etc. must be displayed at office and place of business

- (1) Subject to subsection (2), this section applies to a registrable body.
- (2) If the registrable body is a registrable Australian body, this section does not apply to a place at which the body carries on business if the place is in the body's place of origin.
- (9) Unless the body is an Australian ADI, it must paint or affix and keep painted or affixed, in a conspicuous position and in letters easily legible, on the outside of every office and place (including its registered office) that is in this jurisdiction, at which its business is carried on and that is open and accessible to the public:
 - (a) its name and the name of its place of origin; and
 - (b) if the liability of its members is limited and the last word of its name is neither the word "Limited" nor the abbreviation "Ltd."—notice of the fact that the liability of its members is limited; and
 - (c) in the case of its registered office—the expression "Registered Office".
- (10) If the body is an Australian ADI, it must paint or affix its name, and must keep its name painted or affixed, in a conspicuous position and in letters easily legible, on the outside of every office or place (including its registered office) that is in this jurisdiction, at which its business is carried on and that is open and accessible to the public.
- (11) An offence based on subsection (9) or (10) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

601CX Service of documents on registered body

- (1) A document may be served on a registered body:
 - (a) by leaving it at, or by sending it by post to, the registered office of the body; or
 - (b) in the case of a registered foreign company—by leaving it at, or by sending it by post to, the address of a local agent of the foreign company, being:

Section 601CX

- (i) in a case to which subparagraph (ii) does not apply—an address notice of which has been lodged under subsection 601CG(1); or
 - (ii) if a notice or notices of a change or alteration in that address has or have been lodged under subsection 601CV(1)—the address shown in that last-mentioned notice or the later or latest of those last-mentioned notices.
- (2) For the purposes of subsection (1), the situation of the registered office of a registered body:
 - (a) in a case to which neither paragraph (b) nor paragraph (c) applies—is taken to be the place notice of the address of which has been lodged under paragraph 601CB(e) or 601CE(g); or
 - (b) if only one notice of a change in the situation of the registered office has been lodged with ASIC under subsection 601CT(3)—is, on and from:
 - (i) the day that is 7 days after the day on which the notice was lodged; or
 - (ii) the day that is specified in the notice as the day from which the change is to take effect;whichever is later, taken to be the place the address of which is specified in the notice; or
 - (c) if 2 or more notices of a change in the situation of the registered office have been lodged under subsection 601CT(3)—is, on and from:
 - (i) the day that is 7 days after the day on which the later or latest of those notices was lodged; or
 - (ii) the day that is specified in the later or latest of those notices as the day from which the change is to take effect;whichever is later, taken to be the place the address of which is specified in the relevant notice;and is so taken to be that place irrespective of whether the address of a different place is shown as the address of the registered office of the registered body in a return or other document (not being a notice under subsection 601CT(3)) lodged after the notice referred to in paragraph (a) or (b), or the later or latest of the notices referred to in paragraph (c), was lodged.

Section 601CY

- (3) Without limiting the operation of subsection (1), if 2 or more directors of a registered body reside in Australia or an external Territory, a document may be served on the body by delivering a copy of the document personally to each of 2 of those directors.
- (3A) Without limiting the operation of subsection (1), a document may be served on a registered body that is registered as a proprietary company and has only one director by delivering a copy personally to that director.
- (4) Where a liquidator of a registered body has been appointed, a document may be served on the body by leaving it at, or by sending it by post to, the last address of the office of the liquidator notice of which has been lodged.
- (5) Nothing in this section affects the power of the Court to authorise a document to be served on a registered body in a manner not provided for by this section.
- (6) Subject to subsection 8(4), subsection 8(3) applies in relation to a reference in this section.

601CY Power to hold land

A registered body has power to hold land in this jurisdiction.

Division 4—Register of debenture holders for non-companies

601CZA Certain documents are debentures

For the purposes of this Division, choses in action (including an undertaking) that fall into one of the exceptions in paragraphs (a), (b), (e) and (f) of the definition of *debenture* in section 9 must also be entered into the register of debenture holders.

601CZB Register of debenture holders to be maintained by non-companies

- (1) A body that is not a company must set up and maintain a register of debenture holders if it issues debentures covered by Chapter 2L.

Note 1: Companies have to keep a register of debenture holders under sections 168 and 171.

Note 2: The register may be kept on computer (see section 1306).

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The register must contain the following information about each debenture holder:
- (a) their name and address;
 - (b) the amount of the debentures held.
- (3) A body's failure to comply with this section in relation to a debenture does not affect the debenture itself.

601CZC Location of register

- (1) The register must be kept at:
- (a) the body's registered office; or
 - (b) the body's principal place of business in this jurisdiction; or
 - (c) a place in this jurisdiction (whether of the body or of someone else) where the work involved in maintaining the register is done; or
 - (d) another place approved by ASIC.

Section 601CZD

- (2) The body must lodge with ASIC a notice of the address at which the register is kept within 7 days after the register is:
- (a) established at an office that is neither the body's registered office nor at its principal place of business; or
 - (b) moved from one office to another.
- Notice is not required for moving the register between the registered office and an office at the principal place of business.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

601CZD Application of sections 173 to 177

Sections 173 to 177 apply to a register kept under this Division as if it were kept under Chapter 2C.

Note: Sections 173 to 177 deal with rights to inspect the register and get copies, the obligations of agents who maintain the register, correction of the register, the evidential value of the register and the use of information on the register.

Part 5B.3—Names of registrable Australian bodies and foreign companies

601DA Reserving a name

- (1) A person may lodge an application in the prescribed form with ASIC to reserve a name for a registrable Australian body or a foreign company. If the name is available, ASIC must reserve it.

Note: For available names, see section 601DC.

- (2) The reservation lasts for 2 months from the date when the application was lodged. An applicant may ask ASIC in writing for an extension of the reservation during a period that the name is reserved, and ASIC may extend the reservation for 2 months.
- (3) ASIC must cancel a reservation if the applicant asks ASIC in writing to do so.

601DB Acceptable abbreviations

- (1) The abbreviations set out in the following table may be used:
- (a) instead of words that this Act requires to be part of a registrable Australian body's or foreign company's name or to be included in a document; and
 - (b) instead of words that are part of a registrable Australian body's or foreign company's name; and
 - (c) with or without full stops.

Acceptable abbreviations		[operative table]
Word		Abbreviation
1	Company	Co or Coy
2	Proprietary	Pty
3	Limited	Ltd
4	Australian	Aust
5	Number	No
6	and	&

Section 601DC

Acceptable abbreviations		[operative table]
Word	Abbreviation	
7	Australian Registered Body Number	ARBN
8	Registered	Regd

- (2) If a registrable Australian body's or foreign company's name includes any of these abbreviations, the word corresponding to the abbreviation may be used instead.

601DC When a name is available

Name is available unless identical or unacceptable

- (1) A name is available to a registrable Australian body or a foreign company unless the name is:
- (a) identical (under rules set out in the regulations) to a name that is reserved or registered under this Act for another body; or
 - (b) identical (under rules set out in the regulations) to a name that is included on the national business names register in respect of another individual or body who is not the person applying to have the name; or
 - (c) unacceptable for registration under the regulations.

Minister may consent to a name being available

- (2) The Minister may consent in writing to a name being available to a registrable Australian body or foreign company even if the name is:
- (a) identical to a name that is reserved or registered under this Act for another body; or
 - (b) unacceptable for registration under the regulations.
- (3) The Minister's consent may be given subject to conditions.

Note: If the body or company breaches a condition, ASIC may direct it to change its name under section 601DJ.

- (4) The regulations may specify that a particular unacceptable name is available to a registrable Australian body or foreign company if:

Section 601DD

- (a) a specified public authority, or an instrumentality or agency of the Crown in right of the Commonwealth, a State or an internal Territory has consented to the body or company using or assuming the name; or
- (b) the body or company is otherwise permitted to use or assume the name by or under a specified provision of an Act of the Commonwealth, a State or an internal Territory.

The consent of the authority, instrumentality or agency may be given subject to conditions.

Note: If the consent is withdrawn, the body or company ceases to be permitted or it breaches a condition, ASIC may direct it to change its name under section 601DJ.

601DD Registered Australian bodies and registered foreign companies can carry on business with some names only

- (1) A registered Australian body or registered foreign company must not carry on business under a name in this jurisdiction unless subsection (2) or (3) authorises the body or company to use the name.
- (1A) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) The body or company may use the name if the company or body is registered under that name under Part 5B.2.
- (3) A registered Australian body may use a name in the State or Territory that is its place of origin if the use of that name is authorised by a law of that State or Territory that deals with business names.

601DE Using a name and ARBN

Requirements for bodies that are not Australian ADIs

- (1) Subject to sections 601DF and 601DG, a registered Australian body or registered foreign company must set out the following on all its public documents and negotiable instruments published or signed in this jurisdiction:
 - (a) its name;
 - (b) either:

Section 601DF

- (i) the expression “Australian Registered Body Number” followed by the body’s ARBN; or
- (ii) if the last 9 digits of the body’s ABN are the same, and in the same order, as the last 9 digits of its ARBN—the words “Australian Business Number” followed by the body’s ABN;
- (c) its place of origin;
- (d) if the liability of its members is limited and this is not apparent from its name—notice of the limited liability of its members.

Paragraphs (c) and (d) do not apply to an Australian ADI.

Note: In any case where the body’s ARBN would be used, the body’s ABN may be used instead if section 1344 is satisfied.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Where information to be set out

- (2) Subject to sections 601DF and 601DG, the information required by paragraph (1)(b) must be set out with the company’s or body’s name, or 1 of the references to its name in the document or instrument. If the name appears on 2 or more pages of the document or instrument, this must be done on the first of those pages.

601DF Exception to requirement to have ARBN on receipts

A registered Australian body or a registered foreign company does not have to set out the expression “Australian Registered Body Number” followed by its ARBN on a receipt (for example, a cash register receipt) that sets out information recorded in the machine that produced the receipt.

601DG Regulations may exempt from requirement to set out information on documents

The regulations may exempt a specified registered Australian body or registered foreign company, or a class of those bodies or companies, from the requirement in paragraphs 601DE(1)(b), (c) and (d) to set out information on its public documents and

Section 601DH

negotiable instruments. The exemption may relate to specified documents or instruments, or a class of documents or instruments.

601DH Notice of name change must be given to ASIC

- (1) A registered Australian body or a registered foreign company must give ASIC written notice of a change to its name within 14 days after the date the change occurred.
- (1A) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) If the proposed name is available, ASIC must alter the details of the body's or foreign company's registration to reflect the change. For the purposes of this Act (other than subsection (1)), the change of name takes effect when ASIC alters the details of the body's or foreign company's registration.

Note 1: For the reservation of names, see section 601DA.

Note 2: For available names, see section 601DC.

Note 3: ASIC must issue a new certificate reflecting the name change (see section 601CU).

601DJ ASIC's power to direct a registered name be changed

- (1) ASIC may direct a registered Australian body or registered foreign company in writing to change the name under which the body or company is registered within 2 months if:
 - (a) the name should not have been registered; or
 - (b) the body or company has breached a condition under subsection 601DC(3) on the availability of the name; or
 - (c) a consent given under subsection 601DC(4) to use or assume the name has been withdrawn; or
 - (d) the body or company has breached a condition on a consent given under subsection 601DC(4); or
 - (e) the body or company ceases to be permitted to use or assume the name (as referred to in paragraph 601DC(4)(b)).
- (2) The body or company must comply with the direction within 2 months after being given it by doing everything necessary to change its name for the purposes of this Act under section 601DH.

Section 601DJ

- (3) If the body or company does not comply with subsection (2), ASIC may change the body's or company's name to a name that includes its ARBN by altering the details of the body's or company's registration to reflect the change.
- (4) For the purposes of this Act, a change of name under subsection (3) takes effect when ASIC alters the details of the body's or foreign company's registration.

Note: ASIC must issue a new certificate reflecting the name change (see section 601CU).

Corporations Act 2001

Act No. 50 of 2001 as amended

This compilation was prepared on 12 January 2009
taking into account amendments up to Act No. 146 of 2008

Volume 3 includes: Table of Contents
Chapters 5C–6D (ss. 601EA – 742)

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Contents

Chapter 5C—Managed investment schemes	1
Part 5C.1—Registration of managed investment schemes	1
601EA Applying for registration	1
601EB Registration of managed investment scheme.....	1
601EC All documents etc. lodged with ASIC to bear ARSN or ABN	2
601ED When a managed investment scheme must be registered	2
601EE Unregistered schemes may be wound up.....	4
Part 5C.2—The responsible entity	5
Division 1—Responsibilities and powers	5
601FA Responsible entity to be public company and hold Australian financial services licence	5
601FB Responsible entity to operate scheme	5
601FC Duties of responsible entity	6
601FD Duties of officers of responsible entity	7
601FE Duties of employees of responsible entity	8
601FF Surveillance checks by ASIC	9
601FG Acquisition of interest in scheme by responsible entity.....	9
601FH Liquidator etc. of responsible entity entitled to exercise indemnity rights.....	10
Division 2—Changing the responsible entity	11
601FJ Changes only take effect when ASIC alters record of registration.....	11
601FK Requirements of section 601FA must be met	11
601FL Retirement of responsible entity	11
601FM Removal of responsible entity by members	12
601FN ASIC or scheme member may apply to Court for appointment of temporary responsible entity.....	13
601FP Appointment of temporary responsible entity by Court	13
601FQ Temporary responsible entity to take steps for appointment of new responsible entity	13
Division 3—Consequences of change of responsible entity	15
601FR Former responsible entity to hand over books and provide reasonable assistance	15
601FS Rights, obligations and liabilities of former responsible entity.....	15
601FT Effect of change of responsible entity on documents etc. to which former responsible entity is party.....	15

Part 5C.3—The constitution	17
601GA Contents of the constitution.....	17
601GB Constitution must be legally enforceable.....	18
601GC Changing the constitution.....	18
Part 5C.4—The compliance plan	19
601HA Contents of the compliance plan.....	19
601HB Compliance plan may incorporate provisions from another scheme’s plan	20
601HC Directors must sign lodged copy of compliance plan	20
601HD ASIC may require further information about compliance plan.....	20
601HE Changing the compliance plan.....	20
601HF ASIC may require consolidation of compliance plan to be lodged	21
601HG Audit of compliance plan	21
601HH Removal and resignation of auditors	26
601HI Action on change of auditor of compliance plan	27
Part 5C.5—The compliance committee	28
601JA When is a compliance committee required?	28
601JB Membership of compliance committee.....	29
601JC Functions of compliance committee	30
601JD Duties of members.....	30
601JE Compliance committee members have qualified privilege in certain cases.....	31
601JF When can responsible entity indemnify compliance committee members?.....	31
601JG When can responsible entity pay insurance premiums for compliance committee members?.....	32
601JH Proceedings of compliance committee	33
601JJ Disclosure of interests	33
Part 5C.6—Members’ rights to withdraw from a scheme	34
601KA Members’ rights to withdraw.....	34
601KB Non-liquid schemes—offers	35
601KC Non-liquid schemes—only one withdrawal offer to be open at any time	36
601KD Non-liquid schemes—how payments are to be made	36
601KE Non-liquid schemes—responsible entity may cancel withdrawal offer	36
Part 5C.7—Related party transactions	37
601LA Chapter 2E applies with modifications	37
601LB Replacement section 207	37
601LC Replacement section 208	37

601LD	Omission of sections 213, 214 and 224	39
601LE	Modification of section 225.....	39
Part 5C.8—Effect of contraventions (civil liability and voidable contracts)		40
601MA	Civil liability of responsible entity to members.....	40
601MB	Voidable contracts where subscription offers and invitations contravene this Act.....	40
Part 5C.9—Winding up		42
601NA	Winding up required by scheme’s constitution.....	42
601NB	Winding up at direction of members	42
601NC	Winding up if scheme’s purpose accomplished or cannot be accomplished	42
601ND	Winding up ordered by Court	43
601NE	The winding up of the scheme.....	43
601NF	Other orders about winding up	44
601NG	Unclaimed money to be paid to ASIC	45
Part 5C.10—Deregistration		46
601PA	Deregistration—voluntary	46
601PB	Deregistration by ASIC	46
601PC	Reinstatement	48
Part 5C.11—Exemptions and modifications		49
601QA	ASIC’s power to make exemption and modification orders	49
601QB	Modification by regulations.....	50
Chapter 6—Takeovers		51
602	Purposes of Chapter.....	51
602A	Substantial interest concept	52
603	Chapter extends to some listed bodies that are not companies	52
604	Chapter extends to listed managed investment schemes.....	52
605	Classes of securities.....	53
Part 6.1—Prohibited acquisitions of relevant interests in voting shares		54
606	Prohibition on certain acquisitions of relevant interests in voting shares.....	54
607	Effect on transactions	56
608	Relevant interests in securities.....	57
609	Situations not giving rise to relevant interests	59
610	Voting power in a body or managed investment scheme.....	62

Part 6.2—Exceptions to the prohibition	64
611 Exceptions to the prohibition.....	64
612 Effect of non-compliance with takeover rules for exceptions 1 to 4.....	69
613 Bidder not to exercise voting rights if failure to send bids for off-market acquisition—exception 2 or 3	69
615 Treatment of foreign holders under equal access issue— exception 10	69
Part 6.3—The different types of takeover bid	71
616 Off-market bids and market bids	71
Part 6.4—Formulating the takeover offer	72
Division 1—General	72
617 Securities covered by the bid.....	72
618 Offers must be for all or a proportion of securities in the bid class	72
619 General terms of the offer.....	73
620 Off-market bid (offer formalities).....	74
Division 2—Consideration for the offer	76
621 Consideration offered	76
622 Escalation agreements	77
623 Collateral benefits not allowed	78
Division 3—The offer period	80
624 Offer period	80
Division 4—Conditional offers	81
625 Conditional offers—general	81
626 Maximum acceptance conditions in off-market bids	81
627 Discriminatory conditions not allowed for off-market bids	82
628 Conditions requiring payments to officers of target not allowed in off-market bids.....	82
629 Conditions turning on bidder’s or associate’s opinion not allowed in off-market bids.....	83
630 Defeating conditions.....	83
Part 6.5—The takeover procedure	86
Division 1—The overall procedure	86
631 Proposing or announcing a bid	86
632 Overview of steps in an off-market bid	87
633 Detailed steps in an off-market bid.....	87
634 Overview of steps in a market bid	91
635 Detailed steps in a market bid.....	92

Division 2—The bidder’s statement	96
636 Bidder’s statement content	96
637 Bidder’s statement formalities	99
Division 3—The target’s response	101
638 Target’s statement content	101
639 Target’s statement formalities	102
640 Expert’s report to accompany target’s statement if bidder connected with target.....	103
641 Target must inform bidder about securities holdings.....	104
642 Expenses of directors of target companies.....	105
Division 4—Updating and correcting the bidder’s statement and target’s statement	106
643 Supplementary bidder’s statement.....	106
644 Supplementary target’s statement.....	106
645 Form of supplementary statement	107
646 Consequences of lodging a supplementary statement.....	108
647 To whom supplementary statement must be sent	108
Division 5—General rules on takeover procedure	110
Subdivision A—Experts’ reports	110
648A Experts’ reports	110
Subdivision B—Sending documents to holders of securities	111
648B Address at which bidder may send documents to holders of securities.....	111
648C Manner of sending documents to holders of securities	111
Subdivision C—Effect of proportional takeover approval provisions	111
648D Constitution may contain proportional takeover approval provisions	111
648E Resolution to be put if proportional bid made	112
648F Effect of rejection of approval resolution	113
648G Including proportional takeover provisions in constitution	114
648H Effect of Subdivision	117
Part 6.6—Variation of offers	118
Division 1—Market bids	118
649A General	118
649B Market bids—raising bid price	118
649C Market bids—extending the offer period.....	118
Division 2—Off-market bids (express variation by bidder)	120
650A General	120
650B Off-market bids—consideration offered.....	120

650C	Off-market bids—extension of offer period	122
650D	Off-market bids—method of making variation	122
650E	Right to withdraw acceptance.....	123
650F	Freeing off-market bids from defeating conditions	125
650G	Contracts and acceptances void if defeating condition not fulfilled.....	125
Division 3—Off-market bids (automatic variations)		126
651A	Off-market bid—effect on bid consideration of purchases made outside bid.....	126
651B	How to make an election for new forms of consideration	127
651C	Returning securities as part of election.....	128
Part 6.7—Withdrawal and suspension of offers		129
652A	Withdrawal of unaccepted offers under takeover bid	129
652B	Withdrawal of takeover offers with ASIC consent	129
652C	Withdrawal of market bids	129
Part 6.8—Acceptances		131
653A	Acceptance of offers made under off-market bid	131
653B	Acceptances by transferees and nominees of offers made under off-market bid.....	131
Part 6.9—Other activities during the bid period		133
654A	Bidder not to dispose of securities during the bid period.....	133
654B	Disclosures about substantial shareholdings in listed companies.....	133
654C	Disclosures about substantial shareholdings in unlisted companies.....	133
Part 6.10—Review and intervention		135
Division 1—ASIC’s power to exempt and modify		135
655A	ASIC’s power to exempt and modify	135
655B	Notice of decision and review rights	136
Division 2—The Takeovers Panel		137
Subdivision A—Review of ASIC’s exercise of its exemption or modification powers		137
656A	Review of exercise of exemption or modification powers.....	137
656B	Operation and implementation of a decision that is subject to review	138
Subdivision B—Unacceptable circumstances		139
657A	Declaration of unacceptable circumstances	139
657B	When Panel may make declaration.....	141
657C	Applying for declarations and orders.....	141
657D	Orders that Panel may make following declaration.....	142

657E	Interim orders	143
657EA	Internal Panel reviews	144
657EB	References by Courts	145
657F	Offence to contravene Panel order	145
657G	Orders by the Court where contravention or proposed contravention of Panel order	145
657H	ASIC may publish report about application to Panel or Court	146
Subdivision C—General provisions		147
658A	Power of Panel where a proceeding is frivolous or vexatious	147
658B	Evidentiary value of findings of fact by Panel	147
658C	Panel's power to make rules	147
658D	Inconsistency between Panel rules and ASIC exemption or declaration	148
Division 3—Court powers		149
659A	Panel may refer questions of law to the Court	149
659AA	Object of sections 659B and 659C	149
659B	Court proceedings before end of bid period	149
659C	Court proceedings after end of bid period	151
Chapter 6A—Compulsory acquisitions and buy-outs		152
660A	Chapter extends to some listed bodies that are not companies	152
660B	Chapter extends to listed managed investment schemes	152
Part 6A.1—Compulsory acquisitions and buy-outs following takeover bid		153
Division 1—Compulsory acquisition of bid class securities		153
661A	Compulsory acquisition power following takeover bid	153
661B	Compulsory acquisition notice	155
661C	Terms on which securities to be acquired	156
661D	Holder may obtain names and addresses of other holders	157
661E	Holder may apply to Court to stop acquisition	157
661F	Signpost—completing the acquisition of the securities	158
Division 2—Compulsory buy-out of bid class securities		159
662A	Bidder must offer to buy out remaining holders of bid class securities	159
662B	Bidder to tell remaining holders of their right to be bought out	159
662C	Right of remaining holder of securities in the bid class to be bought out	161
Division 3—Compulsory buy-out of convertible securities		162
663A	Bidder must offer to buy out holders of convertible securities	162
663B	Bidder to tell holders of convertible securities of their right to be bought out	162

663C	Right of holders of convertible securities to be bought out	164
Part 6A.2—General compulsory acquisitions and buy-outs		165
Division 1—Compulsory acquisition of securities by 90% holder		165
664A	Threshold for general compulsory acquisition power.....	165
664AA	Time limit on exercising compulsory acquisition power.....	166
664B	The terms for compulsory acquisition	166
664C	Compulsory acquisition notice	167
664D	Benefits outside compulsory acquisition procedure	169
664E	Holder's right to object to the acquisition.....	170
664F	The Court's power to approve acquisition.....	171
664G	Signpost—completing the acquisition of the securities	171
Division 2—Compulsory buy-out of convertible securities by 100% holder		172
665A	100% holder must offer to buy out holders of convertible securities.....	172
665B	100% holder to tell holders of convertible securities of their right to be bought out	172
665C	Right of holders of convertible securities to be bought out	174
Part 6A.3—Completion of compulsory acquisition of securities		175
666A	Completing the acquisition of securities.....	175
666B	Statutory procedure for completion	176
Part 6A.4—Experts' reports and valuations		177
667A	Expert's report.....	177
667AA	Expert to be nominated.....	177
667B	Expert must not be an associate and must disclose prior dealings and relationships.....	178
667C	Valuation of securities.....	178
Part 6A.5—Records of unclaimed consideration		180
668A	Company's power to deal with unclaimed consideration for compulsory acquisition.....	180
668B	Unclaimed consideration to be transferred to ASIC	181
Part 6A.6—ASIC powers		182
669	ASIC's power to exempt and modify	182
Chapter 6B—Rights and liabilities in relation to Chapter 6 and 6A matters		183
670A	Misstatements in, or omissions from, takeover and compulsory acquisition and buy-out documents.....	183
670B	Right to recover for loss or damage resulting from contravention	184

670C	People liable on takeover or compulsory acquisition statement to inform maker about deficiencies in the statement.....	186
670D	Defences against prosecutions under subsection 670A(3) and actions under section 670B.....	187
670E	Liability for proposing a bid or not carrying through with bid	189
670F	Defences.....	189
Chapter 6C—Information about ownership of listed companies and managed investment schemes		190
671A	Chapter extends to some listed bodies that are not companies	190
Part 6C.1—Substantial holding information		191
671B	Information about substantial holdings must be given to company, responsible entity and relevant market operator.....	191
671C	Civil liability.....	194
Part 6C.2—Tracing beneficial ownership of shares		195
672A	Disclosure notices.....	195
672B	Disclosure by member of relevant interests and instructions.....	195
672C	ASIC may pass information on to person who made request	196
672D	Fee for complying with a direction given by a company or scheme under this Part.....	196
672DA	Register of information about relevant interests in listed company or listed managed investment scheme	197
672E	No notice of rights	200
672F	Civil liability.....	201
Part 6C.3—ASIC powers		202
673	ASIC's power to exempt and modify	202
Chapter 6CA—Continuous disclosure		203
674	Continuous disclosure—listed disclosing entity bound by a disclosure requirement in market listing rules	203
675	Continuous disclosure—other disclosing entities	204
676	Sections 674 and 675—when information is generally available	206
677	Sections 674 and 675—material effect on price or value	207
678	Application of <i>Criminal Code</i> to offences based on subsection 674(2), 674(5) or 675(2).....	207
Chapter 6D—Fundraising		208
Part 6D.1—Application of the fundraising provisions		208
700	Coverage of the fundraising rules.....	208
702	Treatment of offers of options over securities	208
703	Chapter may not be contracted out of.....	209

703A	Operating a clearing and settlement facility is not offering securities etc.	209
Part 6D.2—Disclosure to investors about securities		210
Division 1—Overview		210
704	When disclosure to investors is needed	210
705	Types of disclosure document	210
Division 2—Offers that need disclosure to investors		212
706	Issue offers that need disclosure	212
707	Sale offers that need disclosure	212
708	Offers that do not need disclosure	215
708AA	Rights issues that do not need disclosure.....	221
708A	Sale offers that do not need disclosure	224
Division 3—Types of disclosure documents		229
709	Prospectuses, short-form prospectuses, profile statements and offer information statements	229
Division 4—Disclosure requirements		231
710	Prospectus content—general disclosure test	231
711	Prospectus content—specific disclosures	233
712	Prospectus content—short form prospectuses	235
713	Special prospectus content rules for continuously quoted securities.....	236
714	Contents of profile statement.....	238
715	Contents of offer information statement	239
715A	Presentation etc. of disclosure documents	240
716	Disclosure document date and consents	240
Division 5—Procedure for offering securities		242
717	Overview of procedure for offering securities	242
718	Lodging of disclosure document	244
719	Lodging supplementary or replacement document	244
720	Consents needed for lodgment.....	246
721	Offer must be made in, or accompanied by, the disclosure document	248
722	Application money to be held on trust.....	249
723	Issuing or transferring the securities under a disclosure document	250
724	Choices open to person making the offer if disclosure document condition not met or disclosure document defective	251
725	Expiration of disclosure document	254

Part 6D.3—Prohibitions, liabilities and remedies	255
Division 1—Prohibitions and liabilities	255
726 Offering securities in a body that does not exist.....	255
727 Offering securities without a current disclosure document.....	255
728 Misstatement in, or omission from, disclosure document.....	256
729 Right to recover for loss or damage resulting from contravention	258
730 People liable on disclosure document to inform person making the offer about deficiencies in the disclosure document	259
731 Due diligence defence for prospectuses.....	259
732 Lack of knowledge defence for offer information statements and profile statements	260
733 General defences for all disclosure documents.....	261
734 Restrictions on advertising and publicity.....	262
735 Obligation to keep consents and other documents.....	266
736 Securities hawking prohibited	266
Division 2—Remedies	268
737 Remedies for investors	268
738 Securities may be returned and refund obtained.....	268
Part 6D.4—ASIC’s powers	269
739 ASIC stop orders	269
740 Anti-avoidance determinations.....	271
741 ASIC’s power to exempt and modify	271
Part 6D.5—Miscellaneous	273
742 Exemptions and modifications by regulations	273

Chapter 5C—Managed investment schemes

Part 5C.1—Registration of managed investment schemes

601EA Applying for registration

- (1) To register a managed investment scheme, a person must lodge an application with ASIC.
- (2) The application must state:
 - (a) the name, and the address of the registered office, of the proposed responsible entity; and
 - (b) the name and address of a person who has consented to be the auditor of the compliance plan.
- (3) The applicant must have the consent referred to in paragraph (2)(b) when the application is lodged. After the scheme is registered, the applicant must give the consent to the responsible entity. The responsible entity must keep the consent.
- (4) The following must be lodged with the application:
 - (a) a copy of the scheme's constitution;
 - (b) a copy of the scheme's compliance plan;
 - (c) a statement signed by the directors of the proposed responsible entity that:
 - (i) the scheme's constitution complies with sections 601GA and 601GB; and
 - (ii) the scheme's compliance plan complies with section 601HA.

Note: Section 601HC requires that the copy of the compliance plan be signed by the directors of the responsible entity.

601EB Registration of managed investment scheme

- (1) ASIC must register the scheme within 14 days of lodgment of the application, unless it appears to ASIC that:
 - (c) the application does not comply with section 601EA; or

Section 601EC

- (d) the proposed responsible entity does not meet the requirements of section 601FA; or
 - (e) the scheme's constitution does not meet the requirements of sections 601GA and 601GB; or
 - (f) the scheme's compliance plan does not meet the requirements of section 601HA; or
 - (g) the copy of the compliance plan lodged with the application is not signed as required by section 601HC; or
 - (h) arrangements are not in place that will satisfy the requirements of section 601HG in relation to audit of compliance with the plan.
- (2) If ASIC registers the scheme, ASIC must give it an ARSN.
- (3) ASIC must keep a record of the registration of the scheme.
- (4) For the purpose of determining whether subsection (1) is satisfied in relation to the scheme:
- (a) references in Parts 5C.3, 5C.4 and 5C.5 to a registered scheme are taken to include a reference to the scheme; and
 - (b) references in those Parts to the responsible entity of a registered scheme are taken to include a reference to the proposed responsible entity of the scheme.

601EC All documents etc. lodged with ASIC to bear ARSN or ABN

After a managed investment scheme is registered, all documents relating to the scheme that are lodged with ASIC must set out:

- (a) the scheme's ARSN; or
- (b) if the last 9 digits of the scheme's ARSN are the same, and in the same order, as the last 9 digits of its ABN—the scheme's ABN.

Note: In any case where the scheme's ARSN would be used, the scheme's ABN may be used instead if section 1344 is satisfied.

601ED When a managed investment scheme must be registered

- (1) Subject to subsection (2), a managed investment scheme must be registered under section 601EB if:
- (a) it has more than 20 members; or

Section 601ED

- (b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or
 - (c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.
- (2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.
- (3) ASIC may, in writing, determine that a number of managed investment schemes are closely related and that each of them has to be registered at any time when the total number of members of all of the schemes exceeds 20. ASIC must give written notice of the determination to the operator of each of the schemes.
- (4) For the purpose of this section, when working out how many members a scheme has:
 - (a) joint holders of an interest in the scheme count as a single member; and
 - (b) an interest in the scheme held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if:
 - (i) the beneficiary is presently entitled to a share of the trust estate or of the income of the trust estate; or
 - (ii) the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee.
- (5) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.
- (6) For the purpose of subsection (5), a person is not operating a scheme merely because:
 - (a) they are acting as an agent or employee of another person; or
 - (b) they are taking steps to wind up the scheme or remedy a defect that led to the scheme being deregistered.
- (7) A person who would otherwise contravene subsection (5) because an interest in a scheme is held in trust for 2 or more beneficiaries (see paragraph (4)(b)) does not contravene that subsection if they

Section 601EE

prove that they did not know, and had no reason to suspect, that the interest was held in that way.

601EE Unregistered schemes may be wound up

- (1) If a person operates a managed investment scheme in contravention of subsection 601ED(5), the following may apply to the Court to have the scheme wound up:
 - (a) ASIC;
 - (b) the person operating the scheme;
 - (c) a member of the scheme.
- (2) The Court may make any orders it considers appropriate for the winding up of the scheme.

Part 5C.2—The responsible entity

Division 1—Responsibilities and powers

601FA Responsible entity to be public company and hold Australian financial services licence

The responsible entity of a registered scheme must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme.

601FB Responsible entity to operate scheme

- (1) The responsible entity of a registered scheme is to operate the scheme and perform the functions conferred on it by the scheme's constitution and this Act.
- (2) The responsible entity has power to appoint an agent, or otherwise engage a person, to do anything that it is authorised to do in connection with the scheme. For the purpose of determining whether:
 - (a) there is a liability to the members; or
 - (b) the responsible entity has properly performed its duties for the purposes of subsection 601GA(2);the responsible entity is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement, even if they were acting fraudulently or outside the scope of their authority or engagement.

Note: A scheme's constitution may provide for the responsible entity to be indemnified for liabilities—see subsection 601GA(2).
- (3) An agent appointed, or a person otherwise engaged, by:
 - (a) the agent or person referred to in subsection (2); or
 - (b) a person who is taken under this subsection to be an agent of the responsible entity;to do anything that the responsible entity is authorised to do in connection with the scheme is taken to be an agent appointed by the responsible entity to do that thing for the purposes of subsection (2).

Section 601FC

(4) If:

- (a) an agent holds scheme property on behalf of the responsible entity; and
- (b) the agent is liable to indemnify the responsible entity against any loss or damage that:
 - (i) the responsible entity suffers as a result of a wrongful or negligent act or omission of the agent; and
 - (ii) relates to a failure by the responsible entity to perform its duties in relation to the scheme;

any amount recovered under the indemnity forms part of the scheme property.

601FC Duties of responsible entity

- (1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
 - (a) act honestly; and
 - (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
 - (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
 - (d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and
 - (e) not make use of information acquired through being the responsible entity in order to:
 - (i) gain an improper advantage for itself or another person; or
 - (ii) cause detriment to the members of the scheme; and
 - (f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and
 - (g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and
 - (h) comply with the scheme's compliance plan; and
 - (i) ensure that scheme property is:
 - (i) clearly identified as scheme property; and

Section 601FD

- (ii) held separately from property of the responsible entity and property of any other scheme; and
 - (j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and
 - (k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; and
 - (l) report to ASIC any breach of this Act that:
 - (i) relates to the scheme; and
 - (ii) has had, or is likely to have, a materially adverse effect on the interests of members;as soon as practicable after it becomes aware of the breach; and
 - (m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.
- (2) The responsible entity holds scheme property on trust for scheme members.

Note: Under subsection 601FB(2), the responsible entity may appoint an agent to hold scheme property separately from other property.
- (3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1.
- (5) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: Subsection (5) is a civil penalty provision (see section 1317E).
- (6) A person must not intentionally or recklessly be involved in a responsible entity's contravention of subsection (1).

601FD Duties of officers of responsible entity

- (1) An officer of the responsible entity of a registered scheme must:
 - (a) act honestly; and

Section 601FE

- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
 - (c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and
 - (d) not make use of information acquired through being an officer of the responsible entity in order to:
 - (i) gain an improper advantage for the officer or another person; or
 - (ii) cause detriment to the members of the scheme; and
 - (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
 - (f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:
 - (i) this Act; and
 - (ii) any conditions imposed on the responsible entity's Australian financial services licence; and
 - (iii) the scheme's constitution; and
 - (iv) the scheme's compliance plan.
- (2) A duty of an officer of the responsible entity under subsection (1) overrides any conflicting duty the officer has under Part 2D.1.
- (3) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.
- Note 1: Section 79 defines *involved*.
- Note 2: Subsection (3) is a civil penalty provision (see section 1317E).
- (4) A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

601FE Duties of employees of responsible entity

- (1) An employee of the responsible entity of a registered scheme must not:

Section 601FF

- (a) make use of information acquired through being an employee of the responsible entity in order to:
 - (i) gain an improper advantage for the employee or another person; or
 - (ii) cause detriment to members of the scheme; or
 - (b) make improper use of their position as an employee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme.
- (2) A duty of an employee of the responsible entity under subsection (1) overrides any conflicting duty the employee has under Part 2D.1.
- (3) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.
- Note 1: Section 79 defines *involved*.
- Note 2: Subsection (3) is a civil penalty provision (see section 1317E).
- (4) A person must not intentionally contravene, or be involved in a contravention of, subsection (1).

601FF Surveillance checks by ASIC

- (1) ASIC may, from time to time, check whether the responsible entity of a registered scheme is complying with the scheme's constitution and compliance plan and with this Act.
- Note: For this purpose ASIC may exercise the powers set out in Division 3 of Part 3 of the ASIC Act.
- (2) The responsible entity and its officers must take all reasonable steps to assist ASIC in carrying out a check under subsection (1).
- (3) A person must not intentionally or recklessly fail to comply with subsection (2).

601FG Acquisition of interest in scheme by responsible entity

- (1) The responsible entity of a registered scheme may acquire and hold an interest in the scheme, but it must only do so:
- (a) for not less than the consideration that would be payable if the interest were acquired by another person; and

Section 601FH

- (b) subject to terms and conditions that would not disadvantage other members.

Note: If the responsible entity holds an interest in the scheme, it does so subject to section 253E (certain members cannot vote or be counted).

- (2) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: Subsection (2) is a civil penalty provision (see section 1317E).

- (3) A person must not intentionally be involved in a responsible entity's contravention of subsection (1).

601FH Liquidator etc. of responsible entity entitled to exercise indemnity rights

If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated:

- (a) a provision of the scheme's constitution, or of another instrument, is void against the liquidator, or the administrator of the company or the deed, if it purports to deny the company a right to be indemnified out of the scheme property that the company would have had if it were not being wound up, were not under administration, or had not executed a deed of company arrangement; and
- (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed.

Division 2—Changing the responsible entity

601FJ Changes only take effect when ASIC alters record of registration

- (1) Despite anything in this Division, the company named in ASIC's record of registration as the responsible entity or temporary responsible entity of a registered scheme remains the scheme's responsible entity until the record is altered to name another company as the scheme's responsible entity or temporary responsible entity.
- (2) A purported change of the scheme's responsible entity is ineffective unless it is in accordance with this Division.

601FK Requirements of section 601FA must be met

A company cannot be chosen or appointed as the responsible entity or temporary responsible entity of a registered scheme unless it meets the requirements of section 601FA.

601FL Retirement of responsible entity

- (1) If the responsible entity of a registered scheme wants to retire, it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity. The resolution must be an extraordinary resolution if the scheme is not listed.
- (2) If the members choose a company to be the new responsible entity and that company has consented, in writing, to becoming the scheme's responsible entity:
 - (a) as soon as practicable and in any event within 2 business days after the resolution is passed, the current responsible entity must lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity; and
 - (b) if the current responsible entity does not lodge the notice required by paragraph (a), the company chosen by the members to be the new responsible entity may lodge that notice; and

Section 601FM

- (c) ASIC must comply with the notice when it is lodged.
- (3) If the members do not choose a company to be the new responsible entity, or the company they choose does not consent to becoming the scheme's responsible entity, the current responsible entity may apply to the Court for appointment of a temporary responsible entity under section 601FP.
- (4) A person must not lodge a notice under subsection (2) unless the consent referred to in that subsection has been given before the notice is lodged.

601FM Removal of responsible entity by members

- (1) If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity. The resolutions must be extraordinary resolutions if the scheme is not listed.
- (2) If the members vote to remove the responsible entity and, at the same meeting, choose a company to be the new responsible entity that consents, in writing, to becoming the scheme's responsible entity:
 - (a) as soon as practicable and in any event within 2 business days after the resolution is passed, the current responsible entity must lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity; and
 - (b) if the current responsible entity does not lodge the notice required by paragraph (a), the company chosen by the members to be the new responsible entity may lodge that notice; and
 - (c) ASIC must comply with the notice when it is lodged.
- (3) A person must not lodge a notice under subsection (2) unless the consent referred to in that subsection has been given before the notice is lodged.

Note: If the members vote to remove the responsible entity but do not, at the same meeting, choose a company to be the new responsible entity, or the company they choose does not consent to becoming

Section 601FN

the scheme's responsible entity, the scheme must be wound up
(see section 601NE).

**601FN ASIC or scheme member may apply to Court for
appointment of temporary responsible entity**

ASIC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA.

601FP Appointment of temporary responsible entity by Court

- (1) On application under section 601FL or 601FN, the Court may, by order, appoint a company as the temporary responsible entity of a registered scheme if the Court is satisfied that the appointment is in the interest of the members.
- (2) The Court may make any further orders that it considers necessary.
- (3) If the application was made by the current responsible entity, it must, as soon as practicable after the Court's order appointing the temporary responsible entity, lodge a notice with ASIC informing ASIC of the appointment made by the Court.
- (4) As soon as practicable after the appointment, ASIC must alter the record of the scheme's registration to name the appointed company as the scheme's temporary responsible entity.

**601FQ Temporary responsible entity to take steps for appointment
of new responsible entity**

- (1) The temporary responsible entity of a registered scheme must call a members' meeting for the purpose of the members, by resolution, choosing a company to be the new responsible entity. The resolution must be an extraordinary resolution if the scheme is not listed. The temporary responsible entity must call the meeting as soon as practicable and, in any event, within 3 months of becoming the temporary responsible entity.
- (2) Within that 3 months, the temporary responsible entity may call further members' meetings for the purpose of choosing a company to be the new responsible entity. Before the end of the 3 months, it may apply to the Court for an extension of that period. If the Court

Section 601FQ

grants the extension, the temporary responsible entity may, within the extended period, call further members' meetings for the purpose of choosing a company to be the new responsible entity.

- (3) Provided it still meets the requirements in section 601FA, nothing prevents the company that is the temporary responsible entity from being chosen as the new responsible entity.
- (4) If the members choose a company to be the new responsible entity and that company has consented, in writing, to becoming the scheme's responsible entity, the temporary responsible entity must, as soon as practicable, lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity. ASIC must comply with the notice when it is lodged.
- (5) The temporary responsible entity must apply to the Court for an order directing it to wind up the scheme, and the Court may make the order, if:
 - (a) no meeting is called within the 3 months or extended period for the purpose of choosing a new company to be the responsible entity; or
 - (b) the meeting or meetings called within that period for that purpose have not resulted in the members choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

ASIC or a member of the scheme may apply for the order if the temporary responsible entity does not do so.

- (6) The temporary responsible entity must not lodge a notice under subsection (4) unless the consent referred to in that subsection has been given before the notice is lodged.

Division 3—Consequences of change of responsible entity

601FR Former responsible entity to hand over books and provide reasonable assistance

If the responsible entity of a registered scheme changes, the former responsible entity must:

- (a) as soon as practicable give the new responsible entity any books in the former responsible entity's possession or control that this Act requires to be kept in relation to the scheme; and
- (b) give other reasonable assistance to the new responsible entity to facilitate the change of responsible entity.

601FS Rights, obligations and liabilities of former responsible entity

- (1) If the responsible entity of a registered scheme changes, the rights, obligations and liabilities of the former responsible entity in relation to the scheme become rights, obligations and liabilities of the new responsible entity.
- (2) Despite subsection (1), the following rights and liabilities remain rights and liabilities of the former responsible entity:
 - (a) any right of the former responsible entity to be paid fees for the performance of its functions before it ceased to be the responsible entity; and
 - (b) any right of the former responsible entity to be indemnified for expenses it incurred before it ceased to be the responsible entity; and
 - (c) any right, obligation or liability that the former responsible entity had as a member of the scheme; and
 - (d) any liability for which the former responsible entity could not have been indemnified out of the scheme property if it had remained the scheme's responsible entity.

601FT Effect of change of responsible entity on documents etc. to which former responsible entity is party

- (1) If the responsible entity of a registered scheme changes, a document:

Section 601FT

- (a) to which the former responsible entity is a party, in which a reference is made to the former responsible entity, or under which the former responsible entity has acquired or incurred a right, obligation or liability, or might have acquired or incurred a right, obligation or liability if it had remained the responsible entity; and
 - (b) that is capable of having effect after the change;
has effect as if the new responsible entity (and not the former responsible entity) were a party to it, were referred to in it or had or might have acquired or incurred the right, obligation or liability under it.
- (2) Subsection (1) does not apply to a right, obligation or liability that remains a right, obligation or liability of the former responsible entity because of subsection 601FS(2).

Part 5C.3—The constitution

601GA Contents of the constitution

- (1) The constitution of a registered scheme must make adequate provision for:
 - (a) the consideration that is to be paid to acquire an interest in the scheme; and
 - (b) the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property; and
 - (c) the method by which complaints made by members in relation to the scheme are to be dealt with; and
 - (d) winding up the scheme.
- (2) If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:
 - (a) must be specified in the scheme's constitution; and
 - (b) must be available only in relation to the proper performance of those duties;and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.
- (3) If the responsible entity is to have any powers to borrow or raise money for the purposes of the scheme:
 - (a) those powers must be specified in the scheme's constitution; and
 - (b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power.
- (4) If members are to have a right to withdraw from the scheme, the scheme's constitution must:
 - (a) specify the right; and
 - (b) if the right may be exercised while the scheme is liquid (as defined in section 601KA)—set out adequate procedures for making and dealing with withdrawal requests; and

Section 601GB

- (c) if the right may be exercised while the scheme is not liquid (as defined in section 601KA)—provide for the right to be exercised in accordance with Part 5C.6 and set out any other adequate procedures (consistent with that Part) that are to apply to making and dealing with withdrawal requests.

The right to withdraw, and any provisions in the constitution setting out procedures for making and dealing with withdrawal requests, must be fair to all members.

601GB Constitution must be legally enforceable

The constitution of a registered scheme must be contained in a document that is legally enforceable as between the members and the responsible entity.

601GC Changing the constitution

- (1) The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:
 - (a) by special resolution of the members of the scheme; or
 - (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.
- (2) The responsible entity must lodge with ASIC a copy of the modification or the new constitution. The modification, or repeal and replacement, cannot take effect until the copy has been lodged.
- (3) The responsible entity must lodge with ASIC a consolidated copy of the scheme's constitution if ASIC directs it to do so.
- (4) The responsible entity must send a copy of the scheme's constitution to a member of the scheme within 7 days if the member:
 - (a) asks the responsible entity, in writing, for the copy; and
 - (b) pays any fee (up to the prescribed amount) required by the responsible entity.

Part 5C.4—The compliance plan

601HA Contents of the compliance plan

- (1) The compliance plan of a registered scheme must set out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with this Act and the scheme's constitution, including the arrangements for:
 - (a) ensuring that all scheme property is clearly identified as scheme property and held separately from property of the responsible entity and property of any other scheme (see paragraph 601FC(1)(i)); and
 - (b) if the scheme is required to have a compliance committee (see section 601JA)—ensuring that the compliance committee functions properly, including adequate arrangements relating to:
 - (i) the membership of the committee; and
 - (ii) how often committee meetings are to be held; and
 - (iii) the committee's reports and recommendations to the responsible entity; and
 - (iv) the committee's access to the scheme's accounting records and to the auditor of the scheme's financial statements; and
 - (v) the committee's access to information that is relevant to the responsible entity's compliance with this Act; and
 - (c) ensuring that the scheme property is valued at regular intervals appropriate to the nature of the property; and
 - (d) ensuring that compliance with the plan is audited as required by section 601HG; and
 - (e) ensuring adequate records of the scheme's operations are kept; and
 - (f) any other matter prescribed by the regulations.
- (2) If:
 - (a) a registration application is made as a result of a resolution passed under subparagraph 1457(1)(a)(i); and
 - (b) the resolution included a direction under subsection 1457(1A);

Section 601HB

the compliance plan lodged with the application must provide for scheme property to be held by a person other than the responsible entity, or a person that is not related to the responsible entity, as the responsible entity's agent.

601HB Compliance plan may incorporate provisions from another scheme's plan

- (1) The responsible entity of a registered scheme may lodge with ASIC a compliance plan for the scheme that is expressed to incorporate specified provisions, as in force at a specified time, of a compliance plan of another registered scheme of which it is also the responsible entity.
- (2) The specified provisions, as in force at the specified time, are taken to be included in the plan.

601HC Directors must sign lodged copy of compliance plan

The copy of a scheme's compliance plan that is lodged with ASIC must be signed by all the directors of the responsible entity.

601HD ASIC may require further information about compliance plan

- (1) ASIC may direct the responsible entity of a registered scheme to give it information about the arrangements contained in the compliance plan. The direction is to be given by notice in writing to the responsible entity.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

601HE Changing the compliance plan

Responsible entity's powers

- (1) The responsible entity of a registered scheme may modify the scheme's compliance plan or repeal it and replace it with a new compliance plan.

Section 601HF

ASIC may require modifications

- (2) ASIC may direct the responsible entity of a registered scheme to modify the scheme's compliance plan, as set out in the direction, to ensure that the plan is consistent with section 601HA. The direction is to be given by notice in writing to the responsible entity.

Lodgment of modification or new plan

- (3) The responsible entity must lodge with ASIC a copy of a modification of the scheme's compliance plan or of a new compliance plan within 14 days after the modification is made or the old plan is repealed. The copy must be signed by all the directors of the responsible entity.

601HF ASIC may require consolidation of compliance plan to be lodged

- (1) ASIC may direct the responsible entity of a registered scheme to lodge a consolidated copy of the scheme's compliance plan.
- (2) The consolidation must set out:
 - (a) the plan as modified to the time of lodgment; and
 - (b) if required by ASIC's direction—the full text of provisions taken to be included in the plan by subsection 601HB(2).

601HG Audit of compliance plan

- (1) The responsible entity of a registered scheme must ensure that at all times a registered company auditor, an audit firm or an authorised audit company is engaged to audit compliance with the scheme's compliance plan in accordance with this section. This auditor, firm or company is referred to as the ***auditor of the compliance plan***.
- (2) A person is not eligible to act as the individual auditor, lead auditor or review auditor of the compliance plan if the person is:
 - (a) an associate of the responsible entity; or
 - (b) an agent holding scheme property on behalf of the responsible entity or an associate of an agent of that kind; or
 - (c) the auditor of the responsible entity's financial statements.

Section 601HG

(2A) However:

- (a) the auditor of the compliance plan and the auditor of the responsible entity's financial statements may work for the same firm of auditors or audit company; and
 - (b) the lead auditor or review auditor of the compliance plan (on the one hand) and the lead auditor or review auditor of the responsible entity's financial statements (on the other hand) may work for the same firm of auditors or audit company.
- (3) Within 3 months after the end of a financial year of the scheme, the auditor of the compliance plan must:
- (a) examine the scheme's compliance plan; and
 - (b) carry out:
 - (i) if the scheme has only had one responsible entity during the financial year—an audit of the responsible entity's compliance with the compliance plan during the financial year; or
 - (ii) if the scheme has had more than one responsible entity during the financial year—an audit of each responsible entity's compliance with the compliance plan during that part of the financial year when it was the scheme's responsible entity; and
 - (c) give to the scheme's current responsible entity a report that states whether, in the auditor's opinion:
 - (i) the responsible entity, or each responsible entity, complied with the scheme's compliance plan during the financial year or that part of the financial year when it was the scheme's responsible entity; and
 - (ii) the plan continues to meet the requirements of this Part.

Contravention by individual auditor

- (4) An individual auditor conducting an audit of a compliance plan contravenes this subsection if:
- (a) the auditor is aware of circumstances that:
 - (i) the auditor has reasonable grounds to suspect amount to a contravention of this Act; or
 - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (12)); or

Section 601HG

- (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
- (b) if subparagraph (a)(i) applies:
 - (i) the contravention is a significant one; or
 - (ii) the contravention is not a significant one and the auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
- (c) the auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the auditor becomes aware of those circumstances.

Contravention by audit company

- (4A) An audit company conducting an audit of a compliance plan contravenes this subsection if:
 - (a) the lead auditor for the audit is aware of circumstances that:
 - (i) the lead auditor has reasonable grounds to suspect amount to a contravention of this Act; or
 - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (12)); or
 - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
 - (b) if subparagraph (a)(i) applies:
 - (i) the contravention is a significant one; or
 - (ii) the contravention is not a significant one and the lead auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
 - (c) the lead auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the lead auditor becomes aware of those circumstances.

Section 601HG

Contravention by lead auditor

- (4B) A person contravenes this subsection if:
- (a) the person is the lead auditor for an audit of a compliance plan; and
 - (b) the person is aware of circumstances that:
 - (i) the person has reasonable grounds to suspect amount to a contravention of this Act; or
 - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (12)); or
 - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
 - (c) if subparagraph (b)(i) applies:
 - (i) the contravention is a significant one; or
 - (ii) the contravention is not a significant one and the person believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
 - (d) the person does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the person becomes aware of those circumstances.
- (5) The auditor of the compliance plan:
- (a) has a right of access at all reasonable times to the books of the scheme; and
 - (b) may require an officer of the responsible entity to give the auditor information and explanations for the purposes of the audit.
- (6) An officer of the responsible entity must:
- (a) allow the auditor of the compliance plan to have access to the books of the scheme; and
 - (b) give the auditor information or an explanation required under subsection (5); and
 - (c) otherwise assist the conduct of the audit.

Section 601HG

- (7) The responsible entity must lodge the auditor's report under subsection (3) with ASIC at the same time as the financial statements and reports in respect of the scheme are to be lodged with ASIC (see sections 292 and 321).
- (7A) An offence based on subsection (1), (3), (6) or (7) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (8) The auditor of the compliance plan has qualified privilege in respect of:
 - (a) a statement made in a report under subsection (3); or
 - (b) a notification to ASIC under subsection (4).
- (9) This section does not prevent the responsible entity from arranging for the auditor of the compliance plan to carry out audits in addition to those required by this section.

Significant contraventions

- (10) In determining for the purposes of this section whether a contravention of this Act is a significant one, have regard to:
 - (a) the level of penalty provided for in relation to the contravention; and
 - (b) the effect that the contravention has, or may have, on:
 - (i) the overall financial position of the company, registered scheme or disclosing entity; or
 - (ii) the adequacy of the information available about the overall financial position of the company, registered scheme or disclosing entity; and
 - (c) any other relevant matter.
- (11) Without limiting paragraph (10)(a), a penalty provided for in relation to a contravention of a provision of Part 2M.2 or 2M.3 includes a penalty imposed on a director, because of the operation of section 344, for failing to take reasonable steps to comply with, or to secure compliance with, that provision.

Section 601HH

Person involved in audit

(12) In this section:

person involved in the conduct of an audit means:

- (a) the auditor; or
- (b) the lead auditor for the audit; or
- (c) the review auditor for the audit; or
- (d) a professional member of the audit team for the audit; or
- (e) any other person involved in the conduct of the audit.

601HH Removal and resignation of auditors

Removal of auditor by responsible entity

(1) The responsible entity:

- (a) must remove the auditor of the compliance plan if the auditor becomes ineligible under subsection 601HG(2) to act as auditor of the compliance plan; and
- (b) may, with ASIC's consent, remove the auditor of the compliance plan.

Resignation of auditor

(2) The auditor of the compliance plan may resign by written notice to the responsible entity if:

- (a) the auditor:
 - (i) applies to ASIC in writing for its consent to the resignation; and
 - (ii) gives the responsible entity written notice of the application at or about the same time as applying to ASIC; and
- (b) ASIC consents to the resignation.

(3) As soon as practicable after receiving the application, ASIC must notify the auditor and the responsible entity whether it consents to the resignation.

Section 601HI

- (4) A statement by the auditor in the application or in answer to an inquiry by ASIC relating to the reasons for the application:
- (a) is not admissible in evidence in any civil or criminal proceedings against the auditor (other than proceedings for a contravention of section 1308); and
 - (b) may not be made the ground of a prosecution (other than a prosecution for a contravention of section 1308), action or suit against the auditor.

A certificate by ASIC that the statement was made in the application, or in answer to an inquiry by ASIC, is conclusive evidence that the statement was so made.

- (5) The auditor's resignation takes effect on the later of:
- (a) the day (if any) specified in the notice of resignation; or
 - (b) the day ASIC consents to the resignation; or
 - (c) the day (if any) fixed by ASIC for the purpose.

601HI Action on change of auditor of compliance plan

If the auditor of the compliance plan of a registered scheme changes, the responsible entity must, as soon as practicable after the change and in writing, ask ASIC to alter the record of the scheme's registration to show the name of the new auditor as the auditor of the scheme's compliance plan. ASIC must comply with the request if the change complies with this Act.

Part 5C.5—The compliance committee

601JA When is a compliance committee required?

- (1) The responsible entity of a registered scheme must establish a compliance committee if less than half of the directors of the responsible entity are external directors.
- (2) A director of the responsible entity is an external director if they:
 - (a) are not, and have not been in the previous 2 years, an employee of the responsible entity or a related body corporate; and
 - (b) are not, and have not been in the previous 2 years, a senior manager of a related body corporate; and
 - (c) are not, and have not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
 - (d) are not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
 - (e) do not have a material interest in the responsible entity or a related body corporate; and
 - (f) are not a relative of a person who has a material interest in the responsible entity or a related body corporate.
- (3) The responsible entity must establish the compliance committee within 14 days after it is required to do so by subsection (1) or within any longer period that ASIC has agreed to in writing.
- (3A) A person must not intentionally or recklessly fail to comply with subsection (3).
- (4) In agreeing to a longer period under subsection (3), ASIC may impose conditions to be complied with and the responsible entity must comply with them.
- (4A) An offence based on subsection (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

601JB Membership of compliance committee

- (1) A scheme's compliance committee must have at least 3 members, and a majority of them must be external members.
- (2) A member of the compliance committee is an external member if they:
 - (a) are not, and have not been in the previous 2 years, a non-external director, a senior manager or an employee of the responsible entity or a related body corporate; and
 - (b) are not, and have not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
 - (c) are not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
 - (d) do not have a material interest in the responsible entity or a related body corporate; and
 - (e) are not a relative of a person who has a material interest in the responsible entity or a related body corporate.
- (3) For the purposes of paragraph (2)(a), a person who is a director of a related body corporate, but not of the responsible entity itself, is an external director of the related body corporate if they would have been an external director of the responsible entity under subsection 601JA(2) had they been a director of the responsible entity.
- (4) A person who is, or has been, either:
 - (a) an external director of the responsible entity; or
 - (b) a member of a compliance committee for the scheme or another registered managed investment scheme operated by the responsible entity;is not, merely because of that directorship or membership, taken to be, or to have been, substantially involved in business dealings, or in a professional capacity, with the responsible entity.
- (5) If the membership of the scheme's compliance committee ceases to satisfy subsection (1), the responsible entity must make appointments to the committee to satisfy that subsection within 14

Section 601JC

days or within any longer period that ASIC has agreed to in writing.

- (6) In agreeing to a longer period under subsection (5), ASIC may impose conditions to be complied with and the responsible entity must comply with them.
- (7) An offence based on subsection (5) or (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

601JC Functions of compliance committee

- (1) The functions of a scheme's compliance committee are:
 - (a) to monitor to what extent the responsible entity complies with the scheme's compliance plan and to report on its findings to the responsible entity; and
 - (b) to report to the responsible entity:
 - (i) any breach of this Act involving the scheme; or
 - (ii) any breach of the provisions included in the scheme's constitution in accordance with section 601GA;
of which the committee becomes aware or that it suspects;
and
 - (c) to report to ASIC if the committee is of the view that the responsible entity has not taken, or does not propose to take, appropriate action to deal with a matter reported under paragraph (b); and
 - (d) to assess at regular intervals whether the compliance plan is adequate, to report to the responsible entity on the assessment and to make recommendations to the responsible entity about any changes that it considers should be made to the plan.
- (2) In carrying out its functions, the compliance committee may commission independent legal, accounting or other professional advice or assistance, at the reasonable expense of the responsible entity.

601JD Duties of members

- (1) A member of a scheme's compliance committee must:
 - (a) act honestly; and

Section 601JE

- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the member's position; and
 - (c) not make use of information acquired through being a member of the committee in order to:
 - (i) gain an improper advantage for the member or another person; or
 - (ii) cause detriment to the members of the scheme; and
 - (d) not make improper use of their position as a member of the committee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme.
- (2) A member of the compliance committee is to take all reasonable steps to assist ASIC in carrying out a check under subsection 601FF(1).
- (3) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.
- Note 1: Section 79 defines *involved*.
- Note 2: Subsection (3) is a civil penalty provision (see section 1317E).
- (4) A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

601JE Compliance committee members have qualified privilege in certain cases

A member of a scheme's compliance committee has qualified privilege in respect of a statement concerning the operation of the scheme made by or on behalf of the committee, or a member of the committee, to the responsible entity or to ASIC.

601JF When can responsible entity indemnify compliance committee members?

- (1) A scheme's responsible entity or a related body corporate must not:
- (a) indemnify a person who is or has been a member of the scheme's compliance committee against a liability incurred by the person as a member; or
 - (b) exempt the person from such a liability.

Section 601JG

- (2) A provision of the scheme's constitution or a body corporate's constitution is void in so far as it provides for the responsible entity or a related body corporate to do something that subsection (1) prohibits.
- (3) Subsection (1) does not prevent a person from being indemnified against a liability to another person (other than the responsible entity or a related body corporate) unless the liability arises out of conduct involving a lack of good faith.
- (4) Subsection (1) does not prevent a person from being indemnified against a liability for costs and expenses incurred by them:
 - (a) in defending proceedings, whether civil or criminal, in which judgment is given in favour of them or in which they are acquitted; or
 - (b) in connection with an application, in relation to such proceedings, in which the Court grants relief to them under this Act.
- (5) In this section:
indemnify includes indemnify indirectly through one or more interposed entities.

601JG When can responsible entity pay insurance premiums for compliance committee members?

- (1) A scheme's responsible entity or a related body corporate must not pay, or agree to pay, a premium in respect of a contract insuring a person who is or has been a member of the scheme's compliance committee against a liability:
 - (a) incurred by the person as a member; and
 - (b) arising out of conduct involving a wilful breach of a duty referred to in section 601JD.
- (2) If subsection (1) is contravened, the contract is void in so far as it insures the person against the liability.
- (3) Subsections (1) and (2) do not apply to a liability for costs and expenses incurred by a person in defending proceedings, whether civil or criminal and whatever their outcome.
- (4) In this section:

Section 601JH

pay includes pay indirectly through one or more interposed entities.

601JH Proceedings of compliance committee

- (1) Subject to the requirements of the compliance plan, a scheme's compliance committee may regulate its proceedings as it thinks appropriate.
- (2) The committee must keep:
 - (a) minutes of its meetings; and
 - (b) records of its reports and recommendations.
- (3) A committee meeting may be held using any technology agreed to by all the members.

601JJ Disclosure of interests

- (1) A member of a scheme's compliance committee must disclose to the committee a direct or indirect pecuniary interest that they have in a matter being considered, or about to be considered, by the committee if their interest could conflict with the proper performance of their duties in relation to the consideration of the matter.
- (2) A disclosure under subsection (1) must occur at the first meeting of the committee after the relevant facts have come to the member's knowledge and must be recorded in the minutes of the meeting.

Section 601KA

Part 5C.6—Members' rights to withdraw from a scheme

601KA Members' rights to withdraw

Withdrawal from schemes that are liquid

- (1) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, at any time while the scheme is liquid (see subsection 601GA(4)).

Withdrawal from schemes that are not liquid

- (2) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, in accordance with this Part while the scheme is not liquid (see subsection 601GA(4)).

Restrictions on withdrawal from schemes

- (3) The responsible entity must not allow a member to withdraw from the scheme:
 - (a) if the scheme is liquid—otherwise than in accordance with the scheme's constitution; or
 - (b) if the scheme is not liquid—otherwise than in accordance with the scheme's constitution and sections 601KB to 601KE.

- (3A) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Liquid schemes

- (4) A registered scheme is liquid if liquid assets account for at least 80% of the value of scheme property.

Liquid assets

- (5) The following are liquid assets unless it is proved that the responsible entity cannot reasonably expect to realise them within

Section 601KB

the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid:

- (a) money in an account or on deposit with a bank;
 - (b) bank accepted bills;
 - (c) marketable securities (as defined in section 9);
 - (d) property of a prescribed kind.
- (6) Any other property is a liquid asset if the responsible entity reasonably expects that the property can be realised for its market value within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid.

601KB Non-liquid schemes—offers

- (1) The responsible entity of a registered scheme that is not liquid may offer members an opportunity to withdraw, wholly or partly, from the scheme to the extent that particular assets are available and able to be converted to money in time to satisfy withdrawal requests that members may make in response to the offer.
- (2) The withdrawal offer must be in writing and be made:
 - (a) if the constitution specifies procedures for making the offer—in accordance with those procedures; or
 - (b) otherwise—by giving a copy of the offer to all members of the scheme or to all members of a particular class.
- (3) The withdrawal offer must specify:
 - (a) the period during which the offer will remain open (this period must last for at least 21 days after the offer is made); and
 - (b) the assets that will be used to satisfy withdrawal requests; and
 - (c) the amount of money that is expected to be available when those assets are converted to money; and
 - (d) the method for dealing with withdrawal requests if the money available is insufficient to satisfy all requests.

The method specified under paragraph (d) must comply with section 601KD.
- (4) For joint members, a copy of the withdrawal offer need only be given to the joint member named first in the register of members.

Section 601KC

- (5) As soon as practicable after making the withdrawal offer, the responsible entity must lodge a copy of the offer with ASIC.

601KC Non-liquid schemes—only one withdrawal offer to be open at any time

Only one withdrawal offer may be open at any time in relation to a particular interest in a registered scheme that is not liquid.

601KD Non-liquid schemes—how payments are to be made

The responsible entity of a registered scheme that is not liquid must ensure that withdrawal requests made in response to a withdrawal offer are satisfied within 21 days after the offer closes. No request made under the withdrawal offer may be satisfied while the offer is still open. If an insufficient amount of money is available from the assets specified in the offer to satisfy all requests, the requests are to be satisfied proportionately in accordance with the formula:

$$\text{Amount of money available} \times \frac{\text{Amount member requested to withdraw}}{\text{Total of all amounts members request to withdraw}}$$

601KE Non-liquid schemes—responsible entity may cancel withdrawal offer

- (1) The responsible entity of a registered scheme that is not liquid:
- (a) may cancel a withdrawal offer before it closes if the offer contains a material error; or
 - (b) must cancel a withdrawal offer before it closes if it is in the best interests of members to do so.
- (2) The cancellation must be made:
- (a) if the constitution specifies procedures for cancelling the withdrawal offer—in accordance with those procedures; or
 - (b) otherwise—by notice in writing to the members to whom the withdrawal offer was made.
- (3) The responsible entity must lodge written notice of the cancellation with ASIC.

Part 5C.7—Related party transactions

601LA Chapter 2E applies with modifications

Chapter 2E applies to a registered scheme with the modifications set out in sections 601LB to 601LE and as if:

- (a) references to a public company were instead references to the responsible entity of the scheme; and
- (b) references to a benefit being given to or received by a related party of a public company were instead references to a benefit being given to or received by the responsible entity or a related party; and
- (c) references to a resolution of a public company were instead references to a resolution of the members of the scheme; and
- (d) references to a general meeting were instead references to a members' meeting of the scheme; and
- (e) references to members of a public company were instead references to members of the scheme; and
- (f) references to the company's best interests were instead references to the best interests of the scheme's members.

601LB Replacement section 207

Chapter 2E applies as if section 207 were replaced by the following section:

207 Purpose

The rules in this Chapter, as they apply to a registered scheme, are designed to protect the interests of the scheme's members as a whole, by requiring member approval for giving financial benefits to the responsible entity or its related parties that come out of scheme property or that could endanger those interests.

601LC Replacement section 208

Chapter 2E applies as if section 208 were replaced by the following section:

Section 601LC

208 Need for member approval for financial benefit

- (1) If all the following conditions are satisfied in relation to a financial benefit:
- (a) the benefit is given by:
 - (i) the responsible entity of a registered scheme; or
 - (ii) an entity that the responsible entity controls; or
 - (iii) an agent of, or person engaged by, the responsible entity
 - (b) the benefit either:
 - (i) is given out of the scheme property; or
 - (ii) could endanger the scheme property
 - (c) the benefit is given to:
 - (i) the person or a related party; or
 - (ii) another person referred to in paragraph (a) or a related party of that person;
- then, for the person referred to in paragraph (a) to give the benefit, either:
- (d) the person referred to in paragraph (a) must:
 - (i) obtain the approval of the scheme's members in the way set out in sections 217 to 227; and
 - (ii) give the benefit within 15 months after the approval; or
 - (e) the giving of the benefit must fall within an exception set out in sections 210 to 216.

Note: Section 228 defines *related party*, section 191 defines *entity*, section 191 defines *control* and section 229 affects the meaning of *giving a financial benefit*.

- (2) If:
- (a) the giving of the benefit is required by a contract; and
 - (b) the making of the contract was approved in accordance with subparagraph (1)(d)(i) as a financial benefit given to the entity or related party; and
 - (c) the contract was made:
 - (i) within 15 months after that approval; or
 - (ii) before that approval, if the contract was conditional on the approval being obtained;
- member approval for the giving of the benefit is taken to have been given and the benefit need not be given within the 15 months.

Section 601LD

- (3) Subsection (1) does not prevent the responsible entity from paying itself fees, and exercising rights to an indemnity, as provided for in the scheme's constitution under subsection 601GA(2).

601LD Omission of sections 213, 214 and 224

Chapter 2E applies as if sections 213, 214 and 224 were omitted.

Note: Instead of section 224, the rule in section 253E will apply.

601LE Modification of section 225

Chapter 2E applies as if subsection 225(1) were amended by omitting "subsection 224(1)" and substituting "section 253E".

Section 601MA

Part 5C.8—Effect of contraventions (civil liability and voidable contracts)

601MA Civil liability of responsible entity to members

- (1) A member of a registered scheme who suffers loss or damage because of conduct of the scheme's responsible entity that contravenes a provision of this Chapter may recover the amount of the loss or damage by action against the responsible entity whether or not the responsible entity has been convicted of an offence, or has had a civil penalty order made against it, in respect of the contravention.
- (2) An action under subsection (1) must be begun within 6 years after the cause of action arises.
- (3) This section does not affect any liability that a person has under other provisions of this Act or under other laws.

601MB Voidable contracts where subscription offers and invitations contravene this Act

- (1) If:
 - (a) a managed investment scheme is being operated in contravention of subsection 601ED(5) and a person (the *offeror*) offers an interest in the scheme for subscription, or issues an invitation to subscribe for an interest in the scheme; or
 - (b) a person (the *offeror*) fails to comply with Division 2 of Part 7.9 when offering an interest in a registered scheme for subscription or issuing an invitation to subscribe for an interest in a registered scheme;a contract entered into by a person (other than the offeror) to subscribe for the interest as a result of the person accepting the offer, or of the acceptance of an offer made by the person in response to the invitation, is voidable at the option of that person by notice in writing to the offeror.

Section 601MB

- (2) If the person gives a notice under subsection (1), the obligations of the parties to the contract are suspended:
 - (a) during the period of 21 days after the notice is given; and
 - (b) during the period beginning when an application is made under subsection (4) in relation to the notice and ending when the application, and any appeals arising out of it, have been finally determined or otherwise disposed of.
- (3) Subject to subsection (6), the notice takes effect to void the contract:
 - (a) at the end of 21 days after the notice is given; or
 - (b) if, within that 21 days, the offeror applies under subsection (4)—at the end of the period when the obligations of the parties are suspended under paragraph (2)(b).
- (4) Within 21 days after the notice is given, the offeror may apply to the Court for an order declaring the notice to have had no effect.
- (5) The Court may extend the period within which the offeror may apply under subsection (4), even if the notice has taken effect.
- (6) On application under subsection (4), the Court may declare the notice to have had no effect if it is satisfied that, in all the circumstances, it is just and equitable to make the declaration.

Part 5C.9—Winding up

601NA Winding up required by scheme's constitution

The constitution of a registered scheme may provide that the scheme is to be wound up:

- (a) at a specified time; or
- (b) in specified circumstances or on the happening of a specified event;

but a provision of the constitution that purports to provide that the scheme is to be wound up if a particular company ceases to be its responsible entity is of no effect (including for the purposes of paragraph 601NE(1)(a)).

601NB Winding up at direction of members

If members of a registered scheme want the scheme to be wound up, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme.

601NC Winding up if scheme's purpose accomplished or cannot be accomplished

- (1) If the responsible entity of a registered scheme considers that the purpose of the scheme:
 - (a) has been accomplished; or
 - (b) cannot be accomplished;it may, in accordance with this section, take steps to wind up the scheme.
- (2) The responsible entity must give to the members of the scheme and to ASIC a notice in writing:
 - (a) explaining the proposal to wind up the scheme, including explaining how the scheme's purpose has been accomplished or why that purpose cannot be accomplished; and
 - (b) informing the members of their rights to take action under Division 1 of Part 2G.4 for the calling of a members' meeting

Section 601ND

- to consider the proposed winding up of the scheme and to vote on any extraordinary resolution members propose about the winding up of the scheme; and
- (c) informing the members that the responsible entity is permitted to wind up the scheme unless a meeting is called to consider the proposed winding up of the scheme within 28 days of the responsible entity giving the notice to the members.
- (3) If no meeting is called within that 28 days to consider the proposed winding up, the responsible entity may wind up the scheme.

601ND Winding up ordered by Court

- (1) The Court may, by order, direct the responsible entity of a registered scheme to wind up the scheme if:
- (a) the Court thinks it is just and equitable to make the order; or
 - (b) within 3 months before the application for the order was made, execution or other process was issued on a judgment, decree or order obtained in a court (whether an Australian court or not) in favour of a creditor of, and against, the responsible entity in its capacity as the scheme's responsible entity and the execution or process has been returned unsatisfied.
- (2) An order based on paragraph (1)(a) may be made on the application of:
- (a) the responsible entity; or
 - (b) a director of the responsible entity; or
 - (c) a member of the scheme; or
 - (d) ASIC.
- (3) An order based on paragraph (1)(b) may be made on the application of a creditor.

601NE The winding up of the scheme

- (1) The responsible entity of a registered scheme must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2) if:
- (a) the scheme's constitution provides that the scheme is to be wound up at a specified time, in specified circumstances or

Section 601NF

- on the happening of a specified event and that time is reached, those circumstances occur or that event occurs; or
- (b) the members pass an extraordinary resolution directing the responsible entity to wind up the scheme; or
- (c) the Court makes an order directing the responsible entity to wind up the scheme; or
- (d) the members pass a resolution removing the responsible entity but do not, at the same meeting, pass a resolution choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

Note: For the Court's power to order winding up, see subsection 601FQ(5) and section 601ND.

- (2) The responsible entity of a registered scheme may wind up the scheme in accordance with its constitution and any orders under subsection 601NF(2) if the responsible entity is permitted by subsection 601NC(3) to wind up the scheme.
- (3) Interests must not be issued in a registered scheme at a time after the responsible entity has become obliged to ensure the scheme is wound up, or after the scheme has started to be wound up.

601NF Other orders about winding up

- (1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).
- (2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).
- (3) An order under subsection (1) or (2) may be made on the application of:
 - (a) the responsible entity; or
 - (b) a director of the responsible entity; or
 - (c) a member of the scheme; or
 - (d) ASIC.

Section 601NG

601NG Unclaimed money to be paid to ASIC

If, on completion of the winding up of a registered scheme, the person who has been winding up the scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the scheme property, the person must, as soon as practicable, pay the money or transfer the property to ASIC to be dealt with under Part 9.7.

Part 5C.10—Deregistration

601PA Deregistration—voluntary

Responsible entity may apply for deregistration

- (1) The responsible entity of a registered scheme may lodge an application for deregistration of the scheme with ASIC.
- (2) The responsible entity may only apply if:
 - (a) the scheme:
 - (i) has 20 or less members (calculated in accordance with subsection 601ED(4)) and all the members agree that the scheme should be deregistered; and
 - (ii) is not required to be registered by paragraph 601ED(1)(b) or (c); or
 - (b) because of subsection 601ED(2) (exemption based on Division 2 of Part 7.9 not applying), the scheme is not required to be registered and all the members agree that the scheme should be deregistered; or
 - (c) the scheme is not a managed investment scheme.
- (3) If ASIC is satisfied that the application complies with subsections (1) and (2), it must give notice of the proposed deregistration:
 - (a) on the national database; and
 - (b) in the *Gazette*.

When 2 months have passed since the *Gazette* notice, ASIC may deregister the scheme.
- (4) ASIC must give notice of the deregistration to the applicant.

601PB Deregistration by ASIC

- (1) ASIC may decide to deregister a registered scheme if:
 - (a) the scheme does not have a responsible entity that meets the requirements of section 601FA; or
 - (b) the scheme does not have a constitution that meets the requirements of sections 601GA and 601GB; or

Section 601PB

- (c) the scheme does not have a compliance plan that meets the requirements of section 601HA; or
- (d) the scheme's property is not being:
 - (i) clearly identified as the scheme's property; and
 - (ii) held separately from property of the responsible entity and property of any other scheme;in accordance with the scheme's compliance plan; or
- (e) the following conditions are satisfied:
 - (i) the response to a return of particulars given to the responsible entity of the scheme is at least 6 months late; and
 - (ii) no other documents have been lodged by or on behalf of the scheme in the last 18 months; and
 - (iii) ASIC has no reason to believe that the scheme is being operated; or
- (ea) the scheme's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment; or
- (f) the scheme has been wound up.

Deregistration procedure

- (2) If ASIC decides to deregister a scheme under this section, it must give notice of the proposed deregistration:
 - (a) to the scheme's responsible entity; and
 - (b) to any other person who is winding up the scheme; and
 - (c) on the national database; and
 - (d) in the *Gazette*.

If the notice is given under paragraph (1)(a), (b), (c) or (d), the notice must specify the period at the end of which ASIC proposes to deregister the scheme.

- (3) ASIC may deregister the scheme:
 - (a) if paragraph (1)(a), (b), (c) or (d) applies—at the end of the period set out in the *Gazette* notice; or
 - (b) if paragraph (1)(e) or (f) applies—when 2 months have passed since the *Gazette* notice.

Section 601PC

- (4) ASIC does not have to give a person notice under subsection (2) if ASIC does not have the necessary information about the person's address.
- (5) ASIC must give notice of the deregistration to everyone who was notified of the proposed deregistration under paragraph (2)(a) or (b).

601PC Reinstatement

- (1) ASIC may reinstate the registration of a managed investment scheme if ASIC is satisfied that the scheme should not have been deregistered or if the defect that led to the scheme being deregistered has been remedied.
- (2) The Court may make an order that ASIC reinstate the registration of a managed investment scheme if:
 - (a) an application for reinstatement is made to the Court by:
 - (i) a person aggrieved by the deregistration; or
 - (ii) a person who was winding up the scheme; and
 - (b) the Court is satisfied that it is just that the scheme's registration be reinstated.
- (3) The Court may give any directions it thinks just for putting the scheme and other people in the same position, as far as possible, as if the scheme had not been deregistered.

ASIC to give notice of reinstatement

- (4) ASIC must give notice of a reinstatement in the *Gazette*. If ASIC exercises its power under subsection (1) in response to an application by a person, ASIC must also give notice of the reinstatement to the applicant.

Part 5C.11—Exemptions and modifications

601QA ASIC's power to make exemption and modification orders

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Without limiting this, ASIC may declare that this Chapter applies to a person as if section 601HA included a requirement for scheme property to be held by a person other than the responsible entity as the responsible entity's agent.
- (2) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 11 of Part 11.2 transitionals.

Section 601QB

601QB Modification by regulations

The regulations may modify the operation of this Chapter or any other provisions of this Act relating to securities in relation to:

- (a) a managed investment scheme; or
- (b) all managed investment schemes of a specified class.

Chapter 6—Takeovers

602 Purposes of Chapter

The purposes of this Chapter are to ensure that:

- (a) the acquisition of control over:
 - (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or
 - (ii) the voting shares in a listed body; or
 - (iii) the voting interests in a listed managed investment scheme;takes place in an efficient, competitive and informed market; and
- (b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
 - (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme; and
 - (ii) have a reasonable time to consider the proposal; and
 - (iii) are given enough information to enable them to assess the merits of the proposal; and
- (c) as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and
- (d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or interests or any other kind of securities under Part 6A.1.

Note 1: To achieve the objectives referred to in paragraphs (a), (b) and (c), the prohibition in section 606 and the exceptions to it refer to interests in “voting shares”. To achieve the objective in paragraph (d), the provisions that deal with the takeover procedure refer more broadly to interests in “securities”.

Note 2: Subsection 92(3) defines *securities* for the purposes of this Chapter.

Section 602A

602A Substantial interest concept

- (1) A reference in this Chapter to a *substantial interest* in a company, listed body or listed managed investment scheme is not to be read as being limited to an interest that is constituted by one or more of the following:
 - (a) a relevant interest in securities in the company, body or scheme;
 - (b) a legal or equitable interest in securities in the company, body or scheme;
 - (c) a power or right in relation to:
 - (i) the company, body or scheme; or
 - (ii) securities in the company, body or scheme.
- (2) A person does not have a *substantial interest* in the company, body or scheme for the purposes of this Chapter merely because the person has an interest in, or a relationship with, the company, body or scheme of a kind prescribed by the regulations for the purposes of this subsection.
- (3) The regulations may provide that an interest of a particular kind is an interest that may constitute a substantial interest in a company, listed body or listed managed investment scheme for the purposes of this Chapter.

603 Chapter extends to some listed bodies that are not companies

This Chapter applies to the acquisition of relevant interests in the securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of relevant interests in the securities of companies.

Note: Section 9 defines *company* and *listed*.

604 Chapter extends to listed managed investment schemes

- (1) This Chapter applies to the acquisition of relevant interests in the interests in a registered scheme that is also listed as if:
 - (a) the scheme were a listed company; and
 - (b) interests in the scheme were shares in the company; and
 - (c) voting interests in the scheme were voting shares in the company; and

- (d) a meeting of the members of the scheme were a general meeting of the company; and
- (e) the obligations and powers that are imposed or conferred on the company were imposed or conferred on the responsible entity; and
- (f) the directors of the responsible entity were the directors of the company; and
- (g) the appointment of a responsible entity for the scheme were the election of a director of the company; and
- (h) the scheme's constitution were the company's constitution.

Note 1: Paragraph (g): See subsection 610(2).

Note 2: Section 9 defines *voting interest* in a managed investment scheme.

- (2) The regulations may modify the operation of this Chapter as it applies in relation to the acquisition of interests in listed managed investment schemes.

605 Classes of securities

- (1) Takeover bids are made for securities within a particular class. Similarly, compulsory acquisition and buy-out rights operate on securities within a particular class.
- (2) For the purposes of this Chapter and Chapters 6A and 6C, securities are not taken to be different classes merely because:
 - (a) some of the securities are fully-paid and others are partly-paid; or
 - (b) different amounts are paid up or remain unpaid on the securities.

Part 6.1—Prohibited acquisitions of relevant interests in voting shares

606 Prohibition on certain acquisitions of relevant interests in voting shares

Acquisition of relevant interests in voting shares through transaction entered into by or on behalf of person acquiring relevant interest

- (1) A person must not acquire a relevant interest in issued voting shares in a company if:
- (a) the company is:
 - (i) a listed company; or
 - (ii) an unlisted company with more than 50 members; and
 - (b) the person acquiring the interest does so through a transaction in relation to securities entered into by or on behalf of the person; and
 - (c) because of the transaction, that person's or someone else's voting power in the company increases:
 - (i) from 20% or below to more than 20%; or
 - (ii) from a starting point that is above 20% and below 90%.

Note 1: Section 9 defines *company* as meaning a company registered under this Act.

Note 2: Section 607 deals with the effect of a contravention of this section on transactions. Sections 608 and 609 deal with the meaning of *relevant interest*. Section 610 deals with the calculation of a person's voting power in a company.

Note 3: If the acquisition of relevant interests in an unlisted company with 50 or fewer members leads to the acquisition of a relevant interest in another company that is an unlisted company with more than 50 members, or a listed company, the acquisition is caught by this section because of its effect on that other company.

- (1A) However, the person may acquire the relevant interest under one of the exceptions set out in section 611 without contravening subsection (1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

Acquisition of legal or equitable interest giving rise to relevant interest for someone else

- (2) A person must not acquire a legal or equitable interest in securities of a body corporate if, because of the acquisition:
- (a) another person acquires a relevant interest in issued voting shares in a company that is:
 - (i) a listed company; or
 - (ii) an unlisted company with more than 50 members; and
 - (b) someone's voting power in the company increases:
 - (i) from 20% or below to more than 20%; or
 - (ii) from a starting point that is above 20% and below 90%.
- (2A) However, if the acquisition of the relevant interest is covered by one of the exceptions set out in section 611, the person may acquire the legal or equitable interest without contravening subsection (2).

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A), see subsection 13.3(3) of the *Criminal Code*.

50 member threshold

- (3) In determining whether the company has more than 50 members for the purposes of subsection (1) or (2), count joint holders of a particular parcel of shares as 1 person.

Offers and invitations

- (4) A person must not:
- (a) make an offer, or cause an offer to be made on their behalf, if the person would contravene subsection (1) or (2) if the offer were accepted; or
 - (b) issue an invitation, or cause an invitation to be issued on their behalf, if the person would contravene subsection (1) or (2) if:
 - (i) an offer were made in response to the invitation; and
 - (ii) the offer were accepted.

Absolute liability offences

- (4A) An offence based on subsection (1), (2) or (4) is an offence of absolute liability.

Section 607

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

Defences

- (5) It is a defence to the prosecution of a person for contravening subsection (1), (2) or (4) if the person proves that they contravened the subsection:
- (a) because of inadvertence or mistake; or
 - (b) because the person was not aware of a relevant fact or occurrence.

In determining whether the defence is available, disregard the person's ignorance of, or a mistake on the person's part concerning, a matter of law.

Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (5), see section 13.4 of the *Criminal Code*.

Extended meaning of acquiring relevant interests—conversions and increases in voting rights

- (6) A person is taken for the purposes of subsection (1) or (2) to acquire a relevant interest in voting shares in a company if:
- (a) securities in which the person already had a relevant interest become voting shares in the company; or
 - (b) there is an increase in the number of votes that may be cast on a poll attached to voting shares that the person already had a relevant interest in.

The acquisition occurs when the securities become voting shares or the number of votes increases.

Note: Some examples of cases to which this subsection applies are:

- A person exercises a right to convert a non-voting preference share into an ordinary share that carries votes.
- A person pays up partly-paid shares with limited votes and this leads to an increase in the number of votes attached to the shares.

607 Effect on transactions

A transaction is not invalid merely because it involves a contravention of section 606.

608 Relevant interests in securities

Basic rule—relevant interest is holding, or controlling voting or disposal of, securities

- (1) A person has a relevant interest in securities if they:
- (a) are the holder of the securities; or
 - (b) have power to exercise, or control the exercise of, a right to vote attached to the securities; or
 - (c) have power to dispose of, or control the exercise of a power to dispose of, the securities.

It does not matter how remote the relevant interest is or how it arises. If 2 or more people can jointly exercise one of these powers, each of them is taken to have that power.

Extension to control exercisable through a trust, agreement or practice

- (2) In this section, power or control includes:
- (a) power or control that is indirect; and
 - (b) power or control that is, or can be, exercised as a result of, by means of or by the revocation or breach of:
 - (i) a trust; or
 - (ii) an agreement; or
 - (iii) a practice; or
 - (iv) any combination of them;whether or not they are enforceable; and
 - (c) power or control that is, or can be made, subject to restraint or restriction.

It does not matter whether the power or control is express or implied, formal or informal, exercisable alone or jointly with someone else. It does not matter that the power or control cannot be related to a particular security.

Extension to relevant interests held through bodies corporate

- (3) A person has the relevant interests in any securities that any of the following has:
- (a) a body corporate, or managed investment scheme, in which the person's voting power is above 20%;

Section 608

- (b) a body corporate, or managed investment scheme, that the person controls.

Paragraph (a) does not apply to a relevant interest that the body corporate or scheme itself has in the securities merely because of the operation of that paragraph in relation to another body corporate or managed investment scheme.

- (4) For the purposes of paragraph (3)(b), a person controls a body corporate if the person has the capacity to determine the outcome of decisions about the body corporate's financial and operating policies.
- (5) In determining whether a person has this capacity:
 - (a) the practical influence the person can exert (rather than the rights they can enforce) is the issue to be addressed; and
 - (b) any practice or pattern of behaviour affecting the body corporate's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (6) The person does not control the body corporate merely because the person and an entity that is not an associate jointly have the capacity to determine the outcome of decisions about the body corporate's financial and operating policies.
- (7) A person is not taken to control a body corporate merely because of a capacity they have if they are under a legal obligation to exercise that capacity for the benefit of:
 - (a) if the person is an individual—someone else; or
 - (b) if the person is a body corporate—someone other than its members.

Extension to control in anticipation of performance of agreements etc.

- (8) If at a particular time all the following conditions are satisfied:
 - (a) a person has a relevant interest in issued securities;
 - (b) the person (whether before or after acquiring the relevant interest):
 - (i) has entered or enters into an agreement with another person with respect to the securities; or

Section 609

- (ii) has given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the securities (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition); or
 - (iii) has granted or grants an option to, or has been or is granted an option by, another person with respect to the securities;
 - (c) the other person would have a relevant interest in the securities if the agreement were performed, the right enforced or the option exercised;
- the other person is taken to already have a relevant interest in the securities.

Note: Subsections 609(6) and (7) deal with specific situations in which the agreement will not give rise to a relevant interest.

Body corporate may have relevant interest in its own securities

- (9) This section may result in a body corporate having a relevant interest in its own securities.

609 Situations not giving rise to relevant interests

Money lending and financial accommodation

- (1) A person does not have a relevant interest in securities merely because of a mortgage, charge or other security taken for the purpose of a transaction entered into by the person if:
 - (a) the mortgage, charge or security is taken or acquired in the ordinary course of the person's business of the provision of financial accommodation by any means and on ordinary commercial terms; and
 - (b) the person whose property is subject to the mortgage, charge or security is not an associate of the person.

Note: Sections 11 to 17 define *associate*.

Nominees and other trustees

- (2) A person who would otherwise have a relevant interest in securities as a bare trustee does not have a relevant interest in the securities if a beneficiary under the trust has a relevant interest in the securities

Section 609

because of a presently enforceable and unconditional right of the kind referred to in subsection 608(8).

Note: This subsection will often apply to a person who holds securities as a nominee.

Holding of securities by financial services licensee

- (3) A financial services licensee does not have a relevant interest in securities merely because they hold securities on behalf of someone else in the ordinary course of their financial services business.

Shares covered by buy-backs

- (4) A person does not have a relevant interest in a company's shares if the relevant interest would arise merely because the company has entered into an agreement to buy back the shares.

Proxies

- (5) A person does not have a relevant interest in securities merely because the person has been appointed to vote as a proxy or representative at a meeting of members, or of a class of members, of the company, body or managed investment scheme if:
- (a) the appointment is for one meeting only; and
 - (b) neither the person nor any associate gives valuable consideration for the appointment.

Market traded options and derivatives

- (6) A person does not have a relevant interest in securities merely because of:
- (a) an market traded option over the securities; or
 - (b) a right to acquire the securities given by a derivative.

This subsection stops applying to the relevant interest when the obligation to make or take delivery of the securities arises.

Note: Without this subsection, subsection 608(8) would create a relevant interest from the option or contract.

Conditional agreements

- (7) A person does not have a relevant interest in securities merely because of an agreement if the agreement:

- (a) is conditional on:
 - (i) a resolution under item 7 in the table in section 611 being passed; or
 - (ii) ASIC exempting the acquisition under the agreement from the provisions of this Chapter under section 655A; and
- (b) does not confer any control over, or power to substantially influence, the exercise of a voting right attached to the securities; and
- (c) does not restrict disposal of the securities for more than 3 months from the date when the agreement is entered into.

The person acquires a relevant interest in the securities when the condition referred to in paragraph (a) is satisfied.

Pre-emptive rights

- (8) A member of a company, body or managed investment scheme does not have a relevant interest in securities of the company, body or scheme merely because the company's, body's or scheme's constitution gives members pre-emptive rights on the transfer of the securities if all members have pre-emptive rights on the same terms.

Director of body corporate holding securities

- (9) A person does not have a relevant interest in securities merely because:
 - (a) the person is a director of a body corporate; and
 - (b) the body corporate has a relevant interest in those securities.

Clearing and settlement facilities

- (9A) The operator of a clearing and settlement facility (within the meaning of Chapter 7) does not have a relevant interest in securities merely because of its provision of facilities for the settlement of transactions.

Prescribed exclusions

- (10) A person does not have a relevant interest in securities in the circumstances specified in the regulations. The regulations may

Section 610

provide that interests in securities are not relevant interests subject to specified conditions.

610 Voting power in a body or managed investment scheme

Person's voting power in a body or managed investment scheme

- (1) A person's **voting power** in a designated body is:

$$\frac{\text{Person's and associates' votes}}{\text{Total votes in designated body}} \times 100$$

where:

person's and associates' votes is the total number of votes attached to all the voting shares in the designated body (if any) that the person or an associate has a relevant interest in.

total votes in designated body is the total number of votes attached to all voting shares in the designated body.

Note: Even if a person's relevant interest in voting shares is based on control over disposal of the shares (rather than control over voting rights attached to the shares), their voting power in the designated body is calculated on the basis of the number of votes attached to those shares.

Counting votes

- (2) For the purposes of this section, the number of votes attached to a voting share in a designated body is the maximum number of votes that can be cast in respect of the share on a poll:
- (a) if the election of directors is determined by the casting of votes attached to voting shares—on the election of a director of the designated body; or
 - (b) if the election of directors is not determined by the casting of votes attached to voting shares—on the adoption of a constitution for the designated body or the amendment of the body corporate's constitution.

Note: The Takeovers Panel may decide that the setting or varying of voting rights in a way that affects control of a designated body is unacceptable circumstances under section 657A.

- (3) If:
- (a) a transaction in relation to, or an acquisition of an interest in, securities occurs; and

Section 610

- (b) before the transaction or acquisition, a person did not have a relevant interest in particular voting shares but an associate of the person did have a relevant interest in those shares; and
 - (c) because of the transaction or acquisition, the person acquires a relevant interest in those shares;
- then, for the purposes of applying section 606 to the transaction or acquisition, the person's voting power is taken to have increased because of the transaction or acquisition from what it would have been before the transaction or acquisition if the votes attached to those shares were disregarded to what it was after the transaction or acquisition (taking the votes attached to those shares into account).
- (4) Disregard the operation of section 613 in working out a person's voting power in a designated body.

When a designated body is a managed investment scheme

- (5) For the purposes of the application of this section in relation to a designated body that is a managed investment scheme:
 - (a) a reference to voting shares in the designated body is taken to be a reference to voting interests in the scheme; and
 - (b) a reference to the election of directors of the designated body is taken to be a reference to:
 - (i) if the scheme is a registered scheme—the appointment of a responsible entity for the scheme; or
 - (ii) if the scheme is not a registered scheme—the appointment of a person to the office (by whatever name it is known) in relation to the scheme that corresponds most closely to the office of responsible entity of a registered scheme; and
 - (c) a reference to the designated body's constitution is taken to be a reference to the scheme's constitution.

Meaning of designated body

- (6) In this section:

designated body means:

- (a) a body; or
- (b) a managed investment scheme.

Section 611

Part 6.2—Exceptions to the prohibition

611 Exceptions to the prohibition

The following table sets out:

- (a) acquisitions of relevant interests in a company's voting shares that are exempt from the prohibition in subsection 606(1); and
- (b) acquisitions of relevant interests in a company's voting shares resulting from acquisitions of legal or equitable interests in securities of a body corporate that are exempt from the prohibition in subsection 606(2).

Note: Some of the items in the table cover only activities in relation to the company itself (items 7, 8, 12 and 13) while the other items cover acquisitions in that company that may occur through activities in relation to other companies.

Acquisitions that are exempt		[operative]
Takeover bids		
<i>Acceptance of takeover offer</i>		
1	An acquisition that results from the acceptance of an offer under a takeover bid.	
See also section 612.		
<i>On-market purchase during bid period</i>		
2	An acquisition in relation to bid class securities that results from an on-market transaction if:	
	(a) the acquisition is by or on behalf of the bidder under a takeover bid; and	
	(b) the acquisition occurs during the bid period; and	
	(c) the bid is for all the voting shares in the bid class; and	
	(d) the bid is:	
	(i) unconditional; or	
	(ii) conditional only on the happening of an event referred to in subsection 652C(1) or (2).	
See also sections 612 and 613.		

Section 611

Acquisitions that are exempt	[operative]
<p><i>On-market purchase of convertible securities during bid period</i></p> <p>3 An acquisition of bid class securities that results directly from the exercise of rights attached to convertible securities if:</p> <ul style="list-style-type: none">(a) the acquisition is by or on behalf of the bidder under a takeover bid; and(b) the bidder acquired a relevant interest in the convertible securities through an on-market transaction during the bid period; and(c) the bid is for all the voting shares in the bid class; and(d) the bid is:<ul style="list-style-type: none">(i) unconditional; or(ii) conditional only on the happening of an event referred to in subsection 652C(1) or (2). <p>See sections 612 and 613.</p>	
<p><i>Acceptance of scrip offered as takeover consideration</i></p> <p>4 An acquisition that results from the acceptance of:</p> <ul style="list-style-type: none">(a) an offer under a takeover bid if the voting shares are included in the consideration for offers under the bid; or(b) an offer that results in an acquisition to which item 5 applies. <p>See also section 612.</p>	
<p>Nature of acquirer</p> <p>6 An acquisition that results from the exercise by a person of a power, or appointment as a receiver, or receiver and manager, under a mortgage, charge or other security if:</p> <ul style="list-style-type: none">(a) the person's ordinary business includes the provision of financial accommodation by any means; and(b) the person took or acquired the security in the ordinary course of their business of the provision of financial accommodation by any means and on ordinary commercial terms.	

Section 611

Acquisitions that are exempt	[operative]
Approval by resolution of target	
<p>7 An acquisition approved previously by a resolution passed at a general meeting of the company in which the acquisition is made, if:</p> <p>(a) no votes are cast in favour of the resolution by:</p> <p>(i) the person proposing to make the acquisition and their associates; or</p> <p>(ii) the persons (if any) from whom the acquisition is to be made and their associates; and</p> <p>(b) the members of the company were given all information known to the person proposing to make the acquisition or their associates, or known to the company, that was material to the decision on how to vote on the resolution, including:</p> <p>(i) the identity of the person proposing to make the acquisition and their associates; and</p> <p>(ii) the maximum extent of the increase in that person's voting power in the company that would result from the acquisition; and</p> <p>(iii) the voting power that person would have as a result of the acquisition; and</p> <p>(iv) the maximum extent of the increase in the voting power of each of that person's associates that would result from the acquisition; and</p> <p>(v) the voting power that each of that person's associates would have as a result of the acquisition.</p>	
Target newly formed	
<p>8 An acquisition that results from an issue of securities of the company in which the acquisition is made if the company has not started to carry on any business and has not borrowed any money.</p>	
Manner of acquisition	
<i>3% creep in 6 months</i>	
<p>9 An acquisition by a person if:</p> <p>(a) throughout the 6 months before the acquisition that person, or any other person, has had voting power in the company of at least 19%; and</p> <p>(b) as a result of the acquisition, none of the persons referred to in paragraph (a) would have voting power in the company more than 3 percentage points higher than they had 6 months before the acquisition.</p>	

Section 611

Acquisitions that are exempt	[operative]
<i>Rights issues</i>	
<p>10 An acquisition that results from an issue of securities that satisfies all of the following conditions:</p> <ul style="list-style-type: none">(a) a company offers to issue securities in a particular class;(b) offers are made to every person who holds securities in that class to issue them with the percentage of the securities to be issued that is the same as the percentage of the securities in that class that they hold before the issue;(c) all of those persons have a reasonable opportunity to accept the offers made to them;(d) agreements to issue are not entered into until a specified time for acceptances of offers has closed;(e) the terms of all the offers are the same. <p>This extends to an acquisition by a person as underwriter to the issue or sub-underwriter.</p> <p>See section 615.</p>	
<i>Dividend reinvestment etc.</i>	
<p>11 An acquisition that results from an issue of:</p> <ul style="list-style-type: none">(a) shares in a company to existing holders of shares in the company under a dividend reinvestment plan or bonus share plan; or(b) interests in a managed investment scheme to existing holders of interests in the scheme under a distribution reinvestment plan or switching facility; <p>if the plan or facility is available to all members.</p> <p>Disregard any unavailability to foreign holders in determining whether the plan or facility is available to all members.</p>	
<i>Initial public offering (IPO) fundraising</i>	
<p>12 An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if:</p> <ul style="list-style-type: none">(a) the issue is to a promoter; and(b) the disclosure document is the first issued by the company; and(c) the disclosure document disclosed the effect that the acquisition would have on the promoter's voting power in the company.	

Section 611

Acquisitions that are exempt	[operative]
<i>Underwriting of fundraising</i>	
13 An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if: (a) the issue is to a person as underwriter to the issue or sub-underwriter; and (b) the disclosure document disclosed the effect that the acquisition would have on the person's voting power in the company.	
<i>Acquisition through listed company</i>	
14 An acquisition that results from another acquisition of relevant interests in voting shares in a body corporate included in the official list of: (a) a prescribed financial market; or (b) a foreign body conducting a financial market that is a body approved in writing by ASIC for the purposes of this item.	
<i>Wills etc.</i>	
15 An acquisition through a will or through operation of law.	
<i>Forfeiture of shares</i>	
16 An acquisition that results from an auction of forfeited shares conducted on-market.	
Compromise, arrangement, liquidation or buy-back	
<i>Part 5.1 compromise or arrangement</i>	
17 An acquisition that results from a compromise or arrangement approved by the Court under Part 5.1.	
<i>Section 507 arrangement</i>	
18 An acquisition that results from an arrangement entered into by a liquidator under section 507.	
<i>Buy-back</i>	
19 An acquisition that results from a buy-back authorised by section 257A.	
Regulations	
20 An acquisition made in a manner or in circumstances prescribed by the regulations. The circumstances may include acquisitions of relevant interests in voting shares in a specified body or class of bodies.	

612 Effect of non-compliance with takeover rules for exceptions 1 to 4

The exceptions in items 1 to 4 of the table in section 611 do not apply to a takeover bid if the bid is carried out in contravention of:

- (a) section 618 (full or proportionate bid); or
- (b) section 619 (offers to be the same); or
- (c) subsection 621(3) (minimum price); or
- (d) subsection 624(1) (minimum offer period); or
- (e) sections 625 to 630 (conditional offers); or
- (f) items 2, 3 and 6 in the table in subsection 633(1) (procedural steps for off-market bid); or
- (g) items 3, 4 and 6 in the table in section 635 (procedural steps for market bid).

613 Bidder not to exercise voting rights if failure to send bids for off-market acquisition—exception 2 or 3

If the exception in item 2 or 3 of the table in section 611 applies to an acquisition on-market during a takeover bid, the bidder is not entitled to exercise the voting rights attached to the shares if:

- (a) the bid is an off-market bid; and
- (b) the bidder fails to send offers under the bid within 28 days after giving the bidder's statement to the target.

615 Treatment of foreign holders under equal access issue—exception 10

The exception in item 10 of the table in section 611 applies even though the conditions set out in the item are not satisfied in respect of foreign holders of the company's securities if, under the terms of the offers:

- (a) the company must appoint a nominee for foreign holders of the company's securities who is approved by ASIC; and
- (b) the company must transfer to the nominee:
 - (i) the securities that would otherwise be issued to the foreign holders who accept the offer; or
 - (ii) the right to acquire those securities; and

Section 615

- (c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.

Part 6.3—The different types of takeover bid

616 Off-market bids and market bids

- (1) There are 2 kinds of takeover bid:
- (a) an off-market bid (for quoted or unquoted securities); or
 - (b) a market bid (only available for quoted securities).

Note: Although the prohibition in section 606 is against acquiring relevant interests in voting shares, a takeover bid may be made for any securities (for example, as a preliminary to compulsorily acquiring securities in that class under Part 6A.1).

- (2) The following table shows where to find the provisions dealing with the main features of the offers that may be made under off-market bids and market bids and the procedures to be followed:

Takeover bids		[signpost table]	
	Feature	Off-market bid	Market bid
1	people to whom offers made	617(1)-(2)	617(3)
2	securities covered	618(1)-(2)	618(3)
3	consideration offered for the securities	621(1), (3)-(5) and 651A	621(2), (3)-(5)
4	escalation agreements and collateral benefits not allowed	622 and 623	622 and 623
5	offer period	624(1)-(2) and 650C	624(1)-(2) and 649C
6	conditional offers	625(2)-(3) and 626-630	625(1)
7	procedure to be followed in making bid	632 and 633	634 and 635
8	acceptances	650E and 653A-653B	-

Part 6.4—Formulating the takeover offer

Division 1—General

617 Securities covered by the bid

Off-market bid

- (1) An off-market bid must relate to securities:
 - (a) in a class of securities (the ***bid class***); and
 - (b) that exist or will exist as at the date set by the bidder under subsection 633(2).

Note: Subsection 92(3) defines ***securities*** for the purposes of this Chapter.

- (2) If other securities exist or will exist at that date that:
 - (a) will convert, or may be converted, to securities in the bid class; or
 - (b) confer rights to be issued securities in the bid class;the bid may extend to securities that come to be in the bid class during the offer period due to a conversion or exercise of the rights.

Note: The bidder's statement must say if the bid is extended in this way (see paragraph 636(1)(j)).

Market bid

- (3) A market bid must relate to securities:
 - (a) in a class of quoted securities (the ***bid class***); and
 - (b) that exist or will exist at any time during the offer period.

618 Offers must be for all or a proportion of securities in the bid class

Off-market bid

- (1) An offer for securities under an off-market bid must be an offer to buy:
 - (a) all the securities in the bid class; or
 - (b) a specified proportion of the securities in the bid class.

The proportion specified under paragraph (b) must be the same for all holders of securities in the bid class.

Off-market bid—non-marketable parcels

- (2) If accepting an offer under an off-market bid for quoted securities would leave a person with a parcel of the securities that is less than a marketable parcel (within the meaning of the rules of the relevant financial market), the offer extends to that parcel.

Market bid

- (3) An offer for securities under a market bid must be an offer to buy all the securities in the bid class.

619 General terms of the offer

Off-market bid

- (1) All the offers made under an off-market bid must be the same.

Note: The offers may include alternative forms of consideration (see section 621).

- (2) In applying subsection (1), disregard the following:
 - (a) any differences in the offers attributable to the fact that the number of securities that may be acquired under each offer is limited by the number of securities held by the holder;
 - (b) any differences in the offers attributable to the fact that the offers relate to securities having different accrued dividend or distribution entitlements;
 - (c) any differences in the offers attributable to the fact that the offers relate to securities on which different amounts are paid up or remain unpaid;
 - (d) any differences in the offers attributable to the fact that the bidder may issue or transfer only whole numbers of securities as consideration for the acquisition;
 - (e) any additional cash amount offered to holders instead of the fraction of a security that they would otherwise be offered.

Section 620

Foreign holders

- (3) If the consideration for the bid includes an offer of securities, the securities do not need to be offered to foreign holders of the target's securities if under the terms of the bid:
 - (a) the bidder must appoint a nominee for foreign holders of the target's securities who is approved by ASIC; and
 - (b) the bidder must transfer to the nominee:
 - (i) the securities that would otherwise be transferred to the foreign holders who accept the bid for that consideration; or
 - (ii) the right to acquire those securities; and
 - (c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.

620 Off-market bid (offer formalities)

- (1) Each offer under an off-market bid must:
 - (a) be in writing; and
 - (b) have the same date; and
 - (c) provide that, unless withdrawn, it will remain open until the end of the offer period (see section 624); and
 - (d) state how, and when, the bidder is to satisfy their obligations.
- (2) Each offer must provide that the bidder is to pay or provide the consideration for the offer:
 - (a) if the bidder is given the necessary transfer documents with the acceptance—by the end of whichever of the following periods ends earlier:
 - (i) 1 month after the offer is accepted or, if the offer is subject to a defeating condition, within 1 month after the takeover contract becomes unconditional
 - (ii) 21 days after the end of the offer period; or
 - (b) if the bidder is given the necessary transfer documents after the acceptance and before the end of the bid period—within 1 month after the bidder is given the necessary transfer documents; or
 - (c) if the bidder is given the necessary transfer documents after the acceptance and after the end of the bid period—within 21

days after the bidder is given the necessary transfer documents.

Note: Subsection 630(1) requires an offer that is subject to a defeating condition to specify a date for declaring whether the condition has been fulfilled or not.

- (3) The offer may provide that the bidder may avoid the takeover contract if the bidder is not given the necessary transfer documents within 1 month after the end of the offer period.

Division 2—Consideration for the offer

621 Consideration offered

Off-market bid—general

- (1) A bidder making an off-market bid for securities may offer any form of consideration for the securities, including:
 - (a) a cash sum; or
 - (b) securities (including shares, debentures, interests in a managed investment scheme or options); or
 - (c) a combination of a cash sum and securities.

Note: Sections 650B and 651A deal with variations of the consideration offered under the bid.

Market bid—cash only

- (2) As the offers under a market bid for securities are made through a prescribed financial market, the bidder must offer to acquire the securities for a cash sum only for each security.

Note: Section 649B deals with variations of the consideration offered under the bid.

All bids—minimum consideration if bidder purchased securities in the 4 months before the bid

- (3) The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.
- (4) For the purposes of subsection (3), the consideration offered or provided for a security is:
 - (a) if the consideration offered or provided is a cash sum only—the amount of that cash sum; or
 - (b) if the consideration offered or provided does not include a cash sum—the value of that consideration; or

- (c) if the consideration offered or provided is a cash sum and other consideration—the sum of the amount of the cash sum and the value of the other consideration.

The value of consideration that is not a cash sum is to be ascertained as at the time the relevant offer, purchase or agreement is made.

- (5) If:
 - (a) a person agrees to buy a security in a company; and
 - (b) the agreement provides that the price payable for the security is a price specified in the agreement but may be varied in accordance with the terms of the agreement;any variation in price under the agreement is to be disregarded in working out, for the purposes of subsection (3), the price agreed to be paid for the security under the agreement.

622 Escalation agreements

Benefits linked to bids and proposed bids not allowed

- (1) A person who makes or proposes to make a takeover bid for securities, or their associate, contravenes this section if:
 - (a) a person acquires a relevant interest in securities in the bid class within the 6 months before the bid is made or proposed; and
 - (b) at any time whatever, the bidder, proposed bidder or associate gives or agrees to give a benefit to, or receives or agrees to receive a benefit from:
 - (i) a person who had a relevant interest in any of the paragraph (a) securities immediately before the acquisition; or
 - (ii) an associate of a person who had a relevant interest in any of those securities at that time; and
 - (c) the benefit is attributable to the acquisition or matters that include the acquisition; and
 - (d) the amount or value of the benefit is, or is to be, determined by reference to or to matters that include either of the following:
 - (i) the amount or value of the consideration for the securities under the bid or proposed bid;

Section 623

- (ii) the amount or value of the consideration for which the bidder or proposed bidder acquires, offers or proposes to offer to acquire, securities in the bid class during the offer period (whether or not under the bid) or under Chapter 6A.

Strict liability offences

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Contravening agreements void

- (2) An agreement is void to the extent that it purports to provide for:
- (a) a person to give a benefit to a person; or
 - (b) a person to receive a benefit from a person;
- in contravention of subsection (1).

623 Collateral benefits not allowed

- (1) A bidder, or an associate, must not, during the offer period for a takeover bid, give, offer to give or agree to give a benefit to a person if:
- (a) the benefit is likely to induce the person or an associate to:
 - (i) accept an offer under the bid; or
 - (ii) dispose of securities in the bid class; and
 - (b) the benefit is not offered to all holders of securities in the bid class under the bid.
- (1A) An offence based on subsection (1) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) For the purpose of this section, a person does not receive a benefit that is not offered under a takeover bid merely because the person sells bid class securities on-market and the takeover bid is an off-market bid or a conditional bid.
- (3) This section does not prohibit:
- (a) the variation of a takeover offer as provided by sections 649A to 650D; or
 - (b) an acquisition of securities through an on-market transaction; or

- (c) simultaneous takeover bids for different classes of securities in the target.

Division 3—The offer period

624 Offer period

Offer period set in offer

- (1) The offers under a takeover bid must remain open for the period stated in the offer. The period must:
- (a) start on the date the first offer under the bid is made; and
 - (b) last for at least 1 month, and not more than 12 months.

However, the offer may be withdrawn during that period under section 652B.

Note: Sections 649C (market bids) and 650C (off-market bids) deal with variation of the offer period.

Automatic extension of offer period if bidder reaches 50% or consideration increased in last week

- (2) If, within the last 7 days of the offer period:
- (a) for an off-market bid—the offers under the bid are varied to improve the consideration offered; or
 - (b) in any case—the bidder's voting power in the target increases to more than 50%;

the offer period is extended so that it ends 14 days after the event referred to in paragraph (a) or (b). The bidder must give the target and everyone who has not accepted an offer under the bid written notice that the extension has occurred within 3 days after that event.

Note: The consideration for a market bid cannot be increased in the last 5 trading days of the offer period (see section 649B).

Strict liability offences

- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 4—Conditional offers

625 Conditional offers—general

Market bids

- (1) Offers under a market bid must be unconditional.

Off-market bids may generally be conditional

- (2) Offers under an off-market bid may be subject to conditions that are not prohibited by sections 626 to 629.

- (3) If:

- (a) the consideration offered is or includes securities; and
- (b) the offer or the bidder's statement states or implies that the securities are to be quoted on a financial market (whether in Australia or elsewhere);

the following rules apply:

- (c) the offer is subject to a condition that:
 - (i) an application for admission to quotation will be made within 7 days after the start of the bid period; and
 - (ii) permission for admission to quotation will be granted no later than 7 days after the end of the bid period;
- (d) the offer may not be freed from this condition.

Note: Section 1325A provides that a Court may make a remedial order if the condition is not satisfied.

626 Maximum acceptance conditions in off-market bids

Maximum acceptance conditions not allowed

- (1) Offers under an off-market bid must not be subject to a maximum acceptance condition. A maximum acceptance condition is one that provides that the offers will terminate, or the maximum consideration offered under the bid will be reduced, if one or more of the following occur:
- (a) the number of securities for which the bidder receives acceptances reaches or exceeds a particular number; or

Section 627

- (b) the bidder's voting power in the company reaches or exceeds a particular percentage; or
 - (c) the percentage of securities the bidder has relevant interests in reaches or exceeds a particular percentage of securities in that class.
- (2) For the purposes of subsection (1), it does not matter:
 - (a) how the condition is expressed; or
 - (b) how a particular number or percentage was, or is to be, determined; or
 - (c) whether or not a particular number or percentage is specified in the condition and, if it is so specified, how it is expressed.
- (3) For the purposes of subsection (1), an offer under an off-market bid terminates if:
 - (a) the offer lapses, is withdrawn or otherwise ceases to have effect; or
 - (b) a binding takeover contract will not result from an acceptance of the offer; or
 - (c) an obligation of the bidder will not arise under the takeover contract; or
 - (d) the takeover contract is rescinded; or
 - (e) the bidder is entitled to rescind the takeover contract; or
 - (f) the bidder is relieved of an obligation arising under the takeover contract.

627 Discriminatory conditions not allowed for off-market bids

Offers under an off-market bid must not be subject to a condition that allows the bidder to acquire, or may result in the bidder acquiring, securities from some but not all of the people who accept the offers. It does not matter how the condition is expressed.

628 Conditions requiring payments to officers of target not allowed in off-market bids

An offer to a person under an off-market bid must not be made subject to a condition that requires the person to approve or consent to a payment or other benefit to an officer or employee of the target or a related body corporate:

- (a) as compensation for loss of; or

(b) as consideration in connection with retirement from;
any office or employment in connection with the management of
the target or of a related body corporate. A purported requirement
of this kind is void.

**629 Conditions turning on bidder's or associate's opinion not
allowed in off-market bids**

- (1) Offers under an off-market bid must not be subject to a defeating
condition if the fulfilment of the condition depends on:
- (a) the bidder's, or an associate's, opinion, belief or other state
of mind; or
 - (b) the happening of an event that is within the sole control of, or
is a direct result of action by, any of the following:
 - (i) the bidder (acting alone or together with an associate or
associates);
 - (ii) an associate (acting alone or together with the bidder or
another associate or associates of the bidder).

A purported condition of this kind is void.

Note: Section 9 defines *defeating condition*. Sections 630, 650F and 650G
deal with defeating conditions.

- (2) For the purposes of paragraph (1)(b):
- (a) the target; and
 - (b) a subsidiary of the target;
- are taken not to be associates of the bidder if they would otherwise
be an associate merely because of paragraph 12(2)(a).

630 Defeating conditions

Off-market bid may include defeating conditions

- (1) Offers under an off-market bid may be made subject to a defeating
condition only if the offers specify a date (not more than 14 days
and not less than 7 days before the end of the offer period) for
giving a notice on the status of the condition.
- (2) If the offer period is extended by a period:
- (a) the date for giving the notice is taken to be postponed for the
same period; and

Section 630

- (b) as soon as practicable after the extension, the bidder must give a notice that states:
 - (i) the new date for giving the notice of the status of the condition; and
 - (ii) whether the offers have been freed from the condition and whether, so far as the bidder knows, the condition has been fulfilled on the date the notice under this subsection is given.

Bidder to give notice of status of defeating condition near end of offer period

- (3) On the date determined under subsection (1) or (2), the bidder must give a notice that states:
 - (a) whether the offers are free of the condition; and
 - (b) whether, so far as the bidder knows, the condition was fulfilled on the date the notice is given; and
 - (c) the bidder's voting power in the target.

The bidder must comply with this subsection whether or not the bidder has given a notice under subsection (4) or 650F(1).

Note: The offers may be freed of the condition by a declaration by the bidder under subsection 650F(1).

Bidder to give notice if defeating condition fulfilled

- (4) If the condition is fulfilled (so that the offers become free of the condition) during the bid period but before the date for publishing the notice on the status of the condition, the bidder must publish as soon as practicable a notice that states that the condition has been fulfilled.
- (5) A notice under this section is given by:
 - (a) giving the notice to the target; and
 - (b) for quoted bid class securities—giving the notice to the relevant market operator; and
 - (c) for unquoted bid class securities—lodging the notice with ASIC.

Strict liability offences

- (6) An offence based on subsection (2), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 6.5—The takeover procedure

Division 1—The overall procedure

631 Proposing or announcing a bid

- (1) A person contravenes this subsection if:
- (a) either alone or with other persons, the person publicly proposes to make a takeover bid for securities in a company; and
 - (b) the person does not make offers for the securities under a takeover bid within 2 months after the proposal.

The terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.

Note: The Court has power under section 1325B to order a person to proceed with a bid.

- (1A) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (1)(b) and to the requirement that the terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

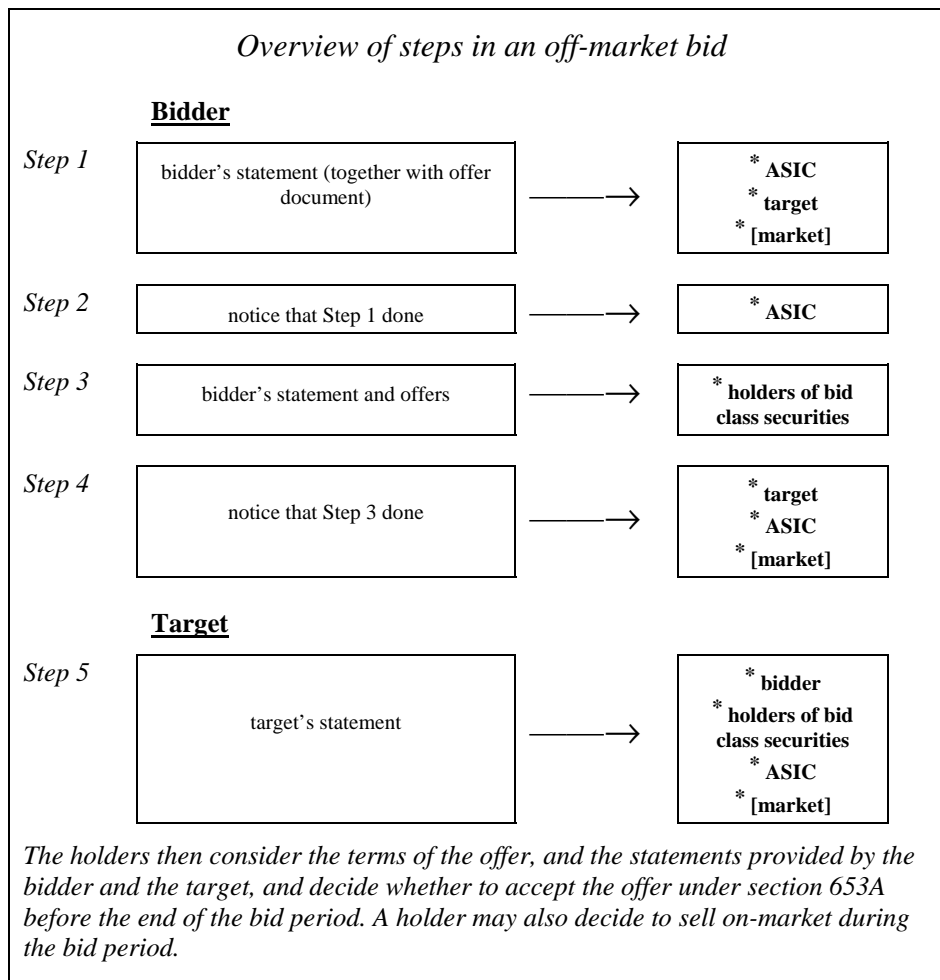
Proposals if takeover bid not intended

- (2) A person must not publicly propose, either alone or with other persons, to make a takeover bid if:
- (a) the person knows the proposed bid will not be made, or is reckless as to whether the proposed bid is made; or
 - (b) the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.
- (3) Section 1314 (continuing offences) and subsection 1324(2) (injunctions) do not apply in relation to a failure to make a takeover bid in accordance with a public proposal under subsection (1).

Note: For liability and defences for contraventions of this section, see sections 670E and 670F.

632 Overview of steps in an off-market bid

The following diagram gives an overview of the steps involved in an off-market bid.



633 Detailed steps in an off-market bid

- (1) The following table provides for the steps that a bidder must take to make an effective off-market bid and the steps that a target must take when an off-market bid is made.

Chapter 6 Takeovers**Part 6.5** The takeover procedure**Division 1** The overall procedure

Section 633

Steps in off-market bid		[operative table]
	Steps	Timing and relevant provisions
1	The bidder must prepare: <ul style="list-style-type: none"> • a bidder's statement; and • if the bidder's statement does not set out all the terms of the offer—an offer document that sets out the other terms of the offer. 	<i>See section 636 for content of statement.</i>
2	The bidder must lodge a copy of the bidder's statement and offer document with ASIC.	
3	The bidder must send a copy of the bidder's statement and offer document to the target.	To be done on the day the bidder's statement is lodged or within 21 days afterwards
4	The bidder must lodge with ASIC a notice stating that the bidder's statement and offer document have been sent to the target.	To be done on the day the bidder's statement is sent to the target
5	The bidder must send a copy of the bidder's statement and offer document to the operator of each prescribed financial market on which the target's securities are quoted.	To be done on the day the bidder's statement is sent to the target <i>See also subsection (5).</i>
6	The bidder must send the bidder's statement and offers to each person (other than the bidder) who holds: <ul style="list-style-type: none"> • securities in the bid class; or • if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities; as at the date set by the bidder under subsection (2). The offers must be made on the terms set out in the bidder's statement and the offer document lodged with ASIC under item 2.	To be done: <ul style="list-style-type: none"> • within a 3 day period; and • within 14-28 days after the bidder's statement is sent to the target The directors of the target may agree that the offers and accompanying documents be sent earlier. <i>See also subsections (5) and (6). Item 2 of the table in section 611 covers offers made by the bidder on-market during the period between the lodgment of the bidder's statement and the making of the offers under the bid. Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>

Section 633

Steps in off-market bid		[operative table]
	Steps	Timing and relevant provisions
7	The bidder must send a notice to the target that the bidder's statement and offers have been sent as required by item 6. The notice must state the date of the offers.	To be done on the day all offers have been sent as required by item 6 <i>See subsection 620(1) on date of offer.</i>
8	The bidder must send a notice that offers have been sent as required by item 6 to the operator of each prescribed financial market on which the target's securities are quoted.	To be done on the day all offers have been sent as required by item 6
9	The bidder must lodge with ASIC a notice that offers have been sent as required by item 6.	To be done on the day all offers have been sent as required by item 6
10	The target must prepare a target's statement.	<i>See section 638 for content of statement.</i>
11	The target must send the target's statement (and any accompanying report) to the bidder.	To be done no later than 15 days after the target receives a notice that all offers have been sent as required by item 6
12	The target must send a copy of the target's statement (and any accompanying report) to each person who holds: <ul style="list-style-type: none"> • securities in the bid class; or • if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities; as at the date set by the bidder under subsection (2).	To be done: <ul style="list-style-type: none"> • no earlier than the day on which the target sends the target's statement to the bidder; and • no later than 15 days after the target receives a notice that all offers have been sent as required by item 6 <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>
13	The target must lodge a copy of the target's statement (and any accompanying report) with ASIC.	To be done on the day the target's statement is sent to the bidder See also subsection (7).

Section 633

Steps in off-market bid		[operative table]
	Steps	Timing and relevant provisions
14	The target must send a copy of the target's statement (and any accompanying report) to the operator of each prescribed financial market on which the target's securities are quoted.	To be done on the day the target's statement is sent to the bidder <i>See also subsection (7)</i>

Date for determining holders of securities

- (2) The people to whom information is to be sent under items 6 and 12 of the table in subsection (1) are the holders of the securities referred to in those items as at the date set by the bidder in:

- (a) the bidder's statement; or
- (b) a separate written notice given to the target on or before the date set by the bidder.

Note: The bidder may set the date when the bidder asks the target for a list of members under section 641.

- (3) The date set by the bidder must be:
- (a) on or after the date on which the bidder gives the bidder's statement, or the separate written notice, to the target; and
 - (b) on or before the date on which the first offers under the bid are made to holders of the securities.
- (4) As soon as practicable after setting the day, the bidder must give notice of it by:
- (a) if the securities in the bid class are quoted—giving the notice to the relevant market operator; or
 - (b) otherwise—lodging the notice with ASIC.

Information to be sent with bidder's statement

- (5) A bidder's statement required to be sent under item 5 or 6 in the table in subsection (1) must be sent together with any other information sent by the bidder to the target with the statement.

Information to be sent with notices that offers have been sent

- (6) If the bidder sends the people to whom the bidder's statement is sent under item 6 of the table in subsection (1) additional

information together with the bidder's statement and the offer, the bidder must also include that information in any notice under item 7, 8 or 9 of the table.

Information to be sent with target's statement

- (7) If the target sends the people to whom the target's statement is sent under item 12 of the table in subsection (1) additional information together with the target's statement, the target must also include that information in any notice under item 13 or 14 of the table.

Strict liability offences

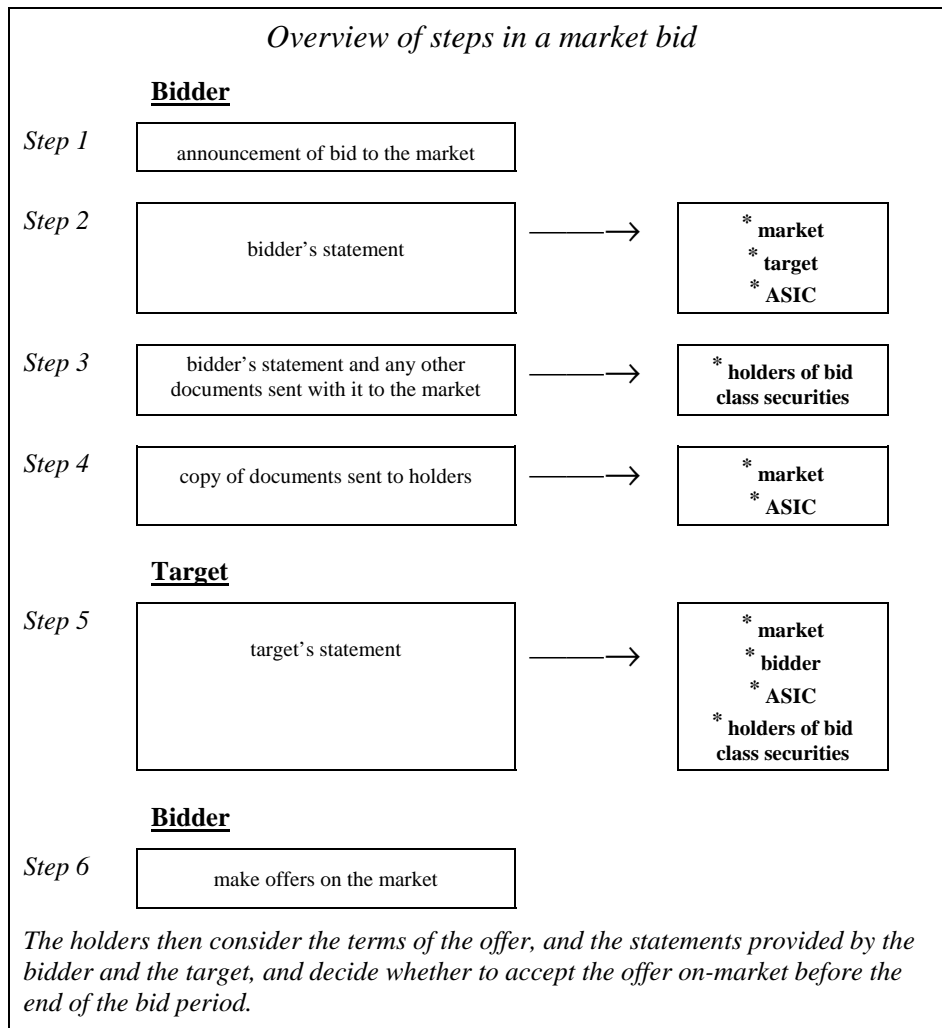
- (8) An offence based on this section is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

634 Overview of steps in a market bid

The following diagram gives an overview of the steps involved in a market bid.

Section 635



635 Detailed steps in a market bid

- (1) The following table provides for the steps that a bidder must take to make an effective market bid and the steps that a target must take when a market bid is made.

Section 635

Steps in market bid		[operative]
	Steps	Timing and relevant provisions
1	The bidder must prepare a bidder's statement.	<i>See section 636 for content of statement</i>
2	The bidder must have the bid announced to the relevant financial market.	
3	The bidder must send a copy of the bidder's statement to the relevant market operator	To be done on the day the announcement is made
4	The bidder must send to the target: <ul style="list-style-type: none"> • a copy of the bidder's statement; and • a copy of any other document that was sent with the bidder's statement to the relevant market operator. 	To be done on the day the announcement is made
5	The bidder must lodge with ASIC: <ul style="list-style-type: none"> • a copy of the bidder's statement; and • a copy of any other document that was sent with the bidder's statement to the relevant market operator. 	To be done on the day the announcement is made
6	The bidder must send to each holder of bid class securities (other than the bidder): <ul style="list-style-type: none"> • a copy of the bidder's statement; and • a copy of any other document that was sent with the bidder's statement to the relevant market operator. 	Within 14 days after the announcement is made. <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>
7	The bidder must lodge with ASIC a copy of every other document sent to holders of bid class securities with the bidder's statement.	To be done no later than the day copies of the bidder's statement have been sent to all holders of bid class securities

Chapter 6 Takeovers**Part 6.5** The takeover procedure**Division 1** The overall procedure

Section 635

Steps in market bid		[operative]
	Steps	Timing and relevant provisions
8	The bidder must give the relevant securities exchange a copy of every other document sent to holders of bid class securities with the bidder's statement.	To be done no later than the day copies of the bidder's statement have been sent to all holders of bid class securities
9	The target must prepare a target's statement.	<i>See section 638 for content of statement</i>
10	The target must send a copy of the target's statement to the relevant market operator.	Within 14 days after the announcement is made
11	The target must send to the bidder: <ul style="list-style-type: none">• a copy of the target's statement; and• a copy of any other document that was sent with the target's statement to the relevant market operator.	To be done on the day the target sends a copy of the target's statement to the relevant market operator
12	The target must lodge with ASIC: <ul style="list-style-type: none">• a copy of the target's statement; and• a copy of any other document that was sent with the target's statement to the relevant market operator.	To be done on the day the target sends a copy of the target's statement to the relevant market operator
13	The target must send each holder of bid class securities: <ul style="list-style-type: none">• a copy of the target's statement; and• a copy of any other document that was sent with the target's statement to the relevant market operator.	Within 14 days after the announcement is made. <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>

Section 635

Steps in market bid		[operative]
	Steps	Timing and relevant provisions
14	The bidder must make offers for the securities under the bid through the relevant financial market.	<p>To be done on the next day after the end of the 14 day period referred to in item 13.</p> <p>If the bidder does not make the offers at that time, the bidder contravenes this section.</p> <p><i>Item 2 of the table in section 611 covers offers made by the bidder on market during the 14 day period between the announcement and the making of the offers under the bid</i></p>

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 2—The bidder's statement

636 Bidder's statement content

- (1) A bidder's statement must include the following:
 - (a) the identity of the bidder;
 - (b) the date of the statement;
 - (c) if the target is a company or body—details of the bidder's intentions regarding:
 - (i) the continuation of the business of the target; and
 - (ii) any major changes to be made to the business of the target, including any redeployment of the fixed assets of the target; and
 - (iii) the future employment of the present employees of the target;
 - (d) if the target is a managed investment scheme—details of the bidder's intentions regarding:
 - (i) the continued operation of the scheme; and
 - (ii) any major changes to be made to the operation of the scheme, including any redeployment of scheme property; and
 - (iii) any plans to remove the current responsible entity and appoint a new responsible entity;
 - (e) for an off-market bid—a statement that the bidder's statement has been lodged with ASIC but that ASIC takes no responsibility for the content of the statement;
 - (f) in relation to the cash consideration (if any) offered under the bid—details of:
 - (i) the cash amounts (if any) held by the bidder for payment of the consideration; and
 - (ii) the identity of any other person who is to provide, directly or indirectly, cash consideration from that person's own funds; and
 - (iii) any arrangements under which cash will be provided by a person referred to in subparagraph (ii);

- (g) if any securities (other than managed investment products) are offered as consideration under the bid and the bidder is:
 - (i) the body that has issued or will issue the securities; or
 - (ii) a person who controls that body;all material that would be required for a prospectus for an offer of those securities by the bidder under section 710 to 713;
- (ga) if any managed investment products are offered as consideration under the bid and the bidder is:
 - (i) the responsible entity of the managed investment scheme; or
 - (ii) a person who controls the responsible entity of the managed investment scheme;all material that would be required by section 1013C to be included in a Product Disclosure Statement given to a person in an issue situation (within the meaning of section 1012B) in relation to those managed investment products;
- (h) if the bidder or an associate provided, or agreed to provide, consideration for a security in the bid class under a purchase or agreement during the 4 months before the date of the bid—the following information about the consideration:
 - (i) to the extent to which the consideration is a cash sum—the amount per security of the cash sum;
 - (ii) to the extent to which the consideration is quoted securities—the market price per security of those securities;
 - (iii) to the extent to which the consideration is neither a cash sum nor a quoted security—the value per security of that consideration;
- (i) if, during the period of 4 months before the date of the bid, the bidder or an associate gave, or offered to give or agreed to give a benefit to another person and the benefit was likely to induce the other person, or an associate, to:
 - (i) accept an offer under the bid; or
 - (ii) dispose of securities in the bid class;and the benefit is not offered to all holders of securities in the bid class under the bid—details of the benefit;

Section 636

- (j) if the bid is to extend to securities that come to be in the bid class during the offer period due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—a statement to that effect;
- (k) for an off-market bid—the following details in relation to each class of securities in the target:
 - (i) the total number of securities in the class;
 - (ii) the number of securities in the class that the bidder had a relevant interest in immediately before the first offer is sent (expressed as a number of securities or as a percentage of the total number of securities in the class);
- (l) for an off-market bid—the bidder's voting power in the company;
- (m) any other information that:
 - (i) is material to the making of the decision by a holder of bid class securities whether to accept an offer under the bid; and
 - (ii) is known to the bidder; and
 - (iii) does not relate to the value of securities offered as consideration under the bid.

The information that the bidder must disclose under subparagraph (k)(i) and paragraph (l) must be only as up-to-date as it is reasonable to expect in the circumstances. The bidder does not have to disclose information under paragraph (m) if it would be unreasonable to require the bidder to do so because the information had previously been disclosed to the holders of bid class securities.

Note: Paragraph (b)—See subsection 637(2) for the date of the statement.

Expert's report on non-cash consideration provided for bid class securities in last 4 months

- (2) If the bidder's statement includes details of the value per share of consideration under subparagraph (1)(h)(iii), the statement must include, or be accompanied by, a report by an expert that states whether, in the expert's opinion, the value stated is fair and reasonable and gives the reasons for forming that opinion.

Note: Subsections 648A(2) and (3) provide for the independence of the expert and disclosure of any association between the bidder and the expert or the target and the expert. A contravention of one of those subsections results in the bidder's statement not complying with this subsection.

Consent of person to whom statement attributed

- (3) The bidder's statement may only include, or be accompanied by, a statement by a person, or a statement said in the bidder's statement to be based on a statement by a person, if:
 - (a) the person has consented to the statement being included in the bidder's statement, or accompanying it, in the form and context in which it is included; and
 - (b) the bidder's statement states that the person has given this consent; and
 - (c) the person has not withdrawn this consent before the bidder's statement is lodged with ASIC.
- (4) The bidder must keep the consent.

Strict liability offences

- (5) An offence based on subsection (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

637 Bidder's statement formalities

Approval

- (1) The copy of the bidder's statement that is lodged with ASIC must be approved by:
 - (a) for a bidder that is a body corporate:
 - (i) if the consideration offered under the bid is a cash sum only—a resolution passed by the directors of the bidder; or
 - (ii) otherwise—a unanimous resolution passed by all the directors of the bidder; or
 - (b) for a bidder who is an individual—the bidder.
- (2) The bidder's statement must be dated. The date is the date on which it is lodged with ASIC.

Section 637

Strict liability offences

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 3—The target's response

638 Target's statement content

General requirement

- (1) A target's statement must include all the information that holders of bid class securities and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid.
- (1A) However, the statement must contain this information:
 - (a) only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the statement; and
 - (b) only if the information is known to any of the directors of the target.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

- (2) In deciding what information should be included under subsection (1), have regard to:
 - (a) the nature of the bid class securities; and
 - (b) if the bid class securities are interests in a managed investment scheme—the nature of the scheme; and
 - (c) the matters that the holders of bid class securities may reasonably be expected to know; and
 - (d) the fact that certain matters may reasonably be expected to be known to their professional advisers; and
 - (e) the time available to the target to prepare the statement.

Director's recommendations

- (3) A target's statement must contain a statement by each director of the target:
 - (a) recommending that offers under the bid be accepted or not accepted, and giving reasons for the recommendation; or
 - (b) giving reasons why a recommendation is not made.

Section 639

- (4) The statement under subsection (3) must be made by:
 - (a) if the target is under administration—the liquidator or administrator; or
 - (b) if the target has executed a deed of company arrangement that has not yet terminated—the deed's administrator.

Consent of person to whom statement attributed

- (5) The target's statement may only include, or be accompanied by, a statement by a person, or a statement said in the target's statement to be based on a statement by a person, if:
 - (a) the person has consented to the statement being included in the target's statement, or accompanying it, in the form and context in which it is included; and
 - (b) the target's statement states that the person has given this consent; and
 - (c) the person has not withdrawn this consent before the target's statement is lodged with ASIC.
- (6) The target must keep the consent.

Strict liability offences

- (7) An offence based on subsection (1), (3), (5) or (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

639 Target's statement formalities

Approval

- (1) The copy of the target's statement that is lodged with ASIC must be approved by:
 - (a) if paragraphs (b) and (c) do not apply—a resolution passed by the directors of the target; or
 - (b) for a target that is under administration—the liquidator or administrator; or
 - (c) for a target that has executed a deed of company arrangement that has not yet terminated—the deed's administrator.

Date

- (2) The target's statement must be dated. The date is the date on which it is lodged with ASIC.

Strict liability offences

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

640 Expert's report to accompany target's statement if bidder connected with target

- (1) If:
- (a) the bidder's voting power in the target is 30% or more; or
 - (b) for a bidder who is, or includes, an individual—the bidder is a director of the target; or
 - (c) for a bidder who is, or includes, a body corporate—a director of the bidder is a director of the target;

a target's statement given in accordance with section 638 must include, or be accompanied by, a report by an expert that states whether, in the expert's opinion, the takeover offers are fair and reasonable and gives the reasons for forming that opinion.

Note: Subsections 648A(2) and (3) provide for the independence of the expert and disclosure of any association between the target and the expert or the bidder and the expert. A contravention of one of those subsections results in the target's statement not complying with this subsection.

- (2) In determining whether the bidder's voting power in the target is 30% or more, calculate the bidder's voting power at the time the bidder's statement is sent to the target.
- (3) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section 641

641 Target must inform bidder about securities holdings

Requirement to inform bidder and information that must be given

- (1) If the bidder has given a bidder's statement to the target and requested the target to give the bidder information in accordance with this section, the target must inform the bidder of:
 - (a) the name and address of each person who, at a time specified by the bidder under subsection (2), held securities:
 - (i) in the bid class; or
 - (ii) convertible into securities in the bid class; and
 - (b) the type, and number of each type, of those securities held by the person at the specified time.

- (1A) However, the target does not need to give information to the bidder about a person or their holding of securities unless the target knows the person's name.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

- (1B) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Time at which target's information must be correct

- (2) The bidder's request must specify a day as at which the information must be correct. The day must be one that occurs after the day on which the bidder makes the request unless the target agrees to it being the day on which the bidder makes the request.

Form in which target must provide information

- (3) The target must give the information to the bidder:
 - (a) in the form that the bidder requests; or
 - (b) if the target is unable to comply with the request—in writing.
- (4) If the target must give the information to the bidder in electronic form, the information must be readable but the information need not be formatted for the bidder's preferred operating system.

Fee for provision of information

- (5) The target may require the bidder to pay an amount, not exceeding the prescribed amount, for the provision of the information to the bidder.

Time by which target must provide information

- (6) The target must give the information to the bidder no later than the latest of the following times:
 - (a) the end of the second day after the day on which the bidder requested the information; or
 - (b) the end of the next day after the day as at which the information must be correct; or
 - (c) the time when the target receives the amount mentioned in subsection (5).

642 Expenses of directors of target companies

- (1) If the target is a company or body, the directors of the target have a right to recover from the target any expenses they reasonably incur in the interest of members of the target and in relation to the takeover bid. The directors have this right regardless of anything contained in the target's constitution (if any).
- (2) If the target is a managed investment scheme, the responsible entity for the scheme has a right to recover from scheme property any expenses it reasonably incurs in the interest of members of the scheme and in relation to the takeover bid. The responsible entity has this right regardless of anything contained in the scheme's constitution.

Division 4—Updating and correcting the bidder's statement and target's statement

643 Supplementary bidder's statement

- (1) If a bidder becomes aware of:
- (a) a misleading or deceptive statement in the bidder's statement;
or
 - (b) an omission from the bidder's statement of information required by section 636; or
 - (c) a new circumstance that:
 - (i) has arisen since the bidder's statement was lodged; and
 - (ii) would have been required by section 636 to be included in the bidder's statement if it had arisen before the bidder's statement was lodged;

that is material from the point of view of a holder of bid class securities, the bidder must prepare a supplementary bidder's statement that remedies this defect.

Note 1: The bidder must then send and lodge the supplementary bidder's statement in accordance with section 647.

Note 2: Section 670A makes it an offence to give a bidder's statement after the bidder has become aware of a misleading or deceptive statement, omission or new circumstance that is material from the point of view of a holder of securities to whom the statement is given (unless the deficiency is corrected).

Note 3: The power to issue a supplementary bidder's statement is not limited to the situations dealt with in this section.

Note 4: This section applies to a bidder's statement that has already been previously supplemented.

- (2) For an offence based on subsection (1), strict liability applies to the conduct, that the bidder must prepare a supplementary bidder's statement that remedies the defect.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

644 Supplementary target's statement

- (1) If a target becomes aware of:
- (a) a misleading or deceptive statement in the target's statement;
or

- (b) an omission from the target's statement of information required by section 638; or
- (c) a new circumstance that:
 - (i) has arisen since the target's statement was lodged; and
 - (ii) would have been required by section 638 to be included in the target's statement if it had arisen before the target's statement was lodged;

that is material from the point of view of a holder of bid class securities, the target must prepare a supplementary target's statement that remedies this defect.

Note 1: The target must then send and lodge the supplementary target's statement in accordance with section 647.

Note 2: Section 670A makes it an offence to give a target's statement after the target has become aware of a misleading or deceptive statement, omission or new circumstance that is material from the point of view of a holder of securities to whom the statement is given (unless the deficiency is corrected).

Note 3: The power to issue a supplementary target's statement is not limited to the situations dealt with in this section.

Note 4: This section applies to a target's statement that has already been previously supplemented.

- (2) For an offence based on subsection (1), strict liability applies to the conduct, that the target must prepare a supplementary target's statement that remedies the defect.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

645 Form of supplementary statement

Identity as a supplementary statement

- (1) At the beginning of a supplementary bidder's or target's statement there must be:
 - (a) a statement that it is a supplementary statement; and
 - (b) an identification of the statement it supplements; and
 - (c) an identification of any previous supplementary statements lodged with ASIC in relation to the bid; and
 - (d) a statement that it is to be read together with the statement it supplements and any previous supplementary statements.

Section 646

Approval of supplementary bidder's statement

- (2) The copy of the supplementary bidder's statement that is lodged with ASIC must be approved by:
- (a) for a bidder that is a body corporate:
 - (i) if the consideration offered under the bid is a cash sum only—a resolution passed by the directors of the bidder; or
 - (ii) otherwise—a unanimous resolution passed by all the directors of the bidder; or
 - (b) for a bidder who is an individual—the bidder.

Approval of supplementary target's statement

- (3) The copy of a supplementary target's statement that is lodged with ASIC must be approved by:
- (a) if paragraphs (b) and (c) do not apply—a resolution passed by the directors of the target; or
 - (b) for a target that is under administration—the liquidator or administrator; or
 - (c) for a target that has executed a deed of company arrangement that has not yet terminated—the deed's administrator.

Date

- (4) A supplementary statement must be dated. The date is the date on which it is lodged with ASIC.

646 Consequences of lodging a supplementary statement

If a supplementary statement is lodged with ASIC, for the purposes of the application of this Chapter and Chapter 6B to events that occur after the lodgment, the bidder's or target's statement is taken to be the original statement together with the supplementary statement.

647 To whom supplementary statement must be sent

- (1) A supplementary bidder's statement must be sent to the target as soon as practicable.

- (2) A supplementary target's statement must be sent to the bidder as soon as practicable.
- (3) Either kind of supplementary statement must as soon as practicable be:
 - (a) lodged with ASIC; and
 - (b) if the bid class securities are quoted and the target is listed—sent to the operator of each prescribed financial market on which the target's securities are quoted; and
 - (c) if the bid is an off-market bid and the bid class securities are not quoted—sent to all holders of bid class securities who have not accepted an offer under the bid.

Note: Sections 648B and 648C provide for the manner in which documents may be sent to holders.

- (4) An offence based on subsection (1), (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 5—General rules on takeover procedure

Subdivision A—Experts' reports

648A Experts' reports

- (1) If the bidder or target obtains 2 or more reports each of which could be used for the purposes of subparagraph 636(1)(h)(iii) or subsection 640(1), the bidder's or target's statement must be accompanied by a copy of each report.
- (1A) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) The expert must be someone other than an associate of the bidder or target.
- (3) The report must set out details of:
 - (a) any relationship between the expert and:
 - (i) the bidder or an associate of the bidder; or
 - (ii) the target or an associate of the target;including any circumstances in which the expert gives them advice, or acts on their behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with them; and
 - (b) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion in relation to the matter being reported on; and
 - (c) any fee, payment or other benefit (whether direct or indirect) that the expert has received or will or may receive in connection with making the report.

Note: If the statement includes, or is accompanied by, the report, it must state that the expert has consented to this being done (see subsections 636(3) and 638(5)).

Subdivision B—Sending documents to holders of securities

648B Address at which bidder may send documents to holders of securities

The bidder may send a document to a holder of securities for the purposes of this Chapter at the address shown for the holder in the information given to the bidder by the target under section 641. This section does not limit the address to which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

648C Manner of sending documents to holders of securities

If a document must be sent to the holder of securities under this Chapter, the document must be sent:

- (a) if the document is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
- (b) if the document is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

Subdivision C—Effect of proportional takeover approval provisions

648D Constitution may contain proportional takeover approval provisions

- (1) Subject to this Subdivision, the constitution of a company may contain provisions to the effect that, if offers are made under a proportional takeover bid for securities of the company:
 - (a) the registration of a transfer giving effect to a takeover contract for the bid is prohibited unless and until a resolution (an *approving resolution*) to approve the bid is passed in accordance with the provisions; and
 - (b) a person (other than the bidder or an associate of the bidder) who, as at the end of the day on which the first offer under the bid was made, held bid class securities is entitled to vote on an approving resolution; and
 - (c) an approving resolution is to be voted on in whichever of the following ways is specified in the provisions:

Section 648E

- (i) at a meeting, convened and conducted by the company, of the persons entitled to vote on the resolution;
- (ii) by means of a postal ballot conducted by the company in accordance with a procedure set out in the provisions; or, if the provisions so provide, in whichever of those ways is determined by the directors of the company; and
- (d) an approving resolution that has been voted on is taken to have been passed if the proportion that the number of votes in favour of the resolution bears to the total number of votes on the resolution is greater than the proportion specified in the provisions, and otherwise is taken to have been rejected.

The proportion specified under paragraph (d) must not exceed 50%.

Note: Section 9 defines *proportional takeover bid*. See paragraph 618(1)(b).

- (2) To be effective, an approving resolution in relation to a proportional takeover bid must be passed before the ***approving resolution deadline***. The deadline is the 14th day before the last day of the bid period.

Note: In certain circumstances, an approving resolution will be taken to have been passed (see subsection 648E(3)).

- (3) Except to the extent to which a company's constitution provides otherwise:
 - (a) the provisions that apply to a general meeting of the company apply, with such modifications as the circumstances require, to a meeting convened under the company's proportional takeover approval provisions; and
 - (b) those provisions apply as if the meeting convened under the proportional takeover provisions were a general meeting of the company.

The provisions referred to in paragraph (a) may be the provisions of a law, provisions of the company's constitution or any other provisions.

648E Resolution to be put if proportional bid made

- (1) If:
 - (a) a company's constitution contains proportional takeover approval provisions; and

Section 648F

- (b) offers are made under a proportional bid for a class of the company's securities;

then:

- (c) the company's directors must ensure that a resolution to approve the bid is voted on in accordance with those provisions before the approving resolution deadline; and
- (d) if the directors fail to ensure that a resolution of that kind is voted on before the deadline, each of the directors contravenes this subsection.

Note: Subsection 648D(2) sets the approving resolution deadline.

- (2) If a resolution to approve the bid is voted on in accordance with the proportional takeover approval provisions before the approving resolution deadline, the company must, on or before the deadline, give:
 - (a) the bidder; and
 - (b) if the company is listed—each relevant financial market;a written notice stating that a resolution to approve the bid has been voted on and whether the resolution was passed or rejected.

- (2A) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) If no resolution to approve the bid has been voted on in accordance with the proportional takeover approval provisions as at the end of the day before the approving resolution deadline, a resolution to approve the bid is taken, for the purposes of those provisions, to have been passed in accordance with those provisions.

648F Effect of rejection of approval resolution

If a resolution to approve the bid is voted on, in accordance with the proportional takeover approval provisions, before the approving resolution deadline and is rejected:

- (a) despite section 652A:
 - (i) all offers under the bid that have not been accepted as at the end of deadline; and
 - (ii) all offers under the bid that have been accepted, and from whose acceptance binding contracts have not resulted, as at the end of the deadline;

Section 648G

- are taken to be withdrawn at the end of the deadline; and
- (b) as soon as practicable after the deadline, the bidder must return to each person who has accepted an offer referred to in subparagraph (a)(ii) any documents that the person sent the bidder with the acceptance of the offer; and
- (c) the bidder:
 - (i) is entitled to rescind; and
 - (ii) must rescind as soon as practicable after the deadline; each binding takeover contract for the bid; and
- (d) a person who has accepted an offer made under the bid is entitled to rescind their takeover contract.

648G Including proportional takeover provisions in constitution

- (1) A company's proportional takeover approval provisions, unless sooner omitted from the constitution of the company, cease to apply at the end of:
 - (a) unless paragraph (b) or (c) applies—3 years;
 - (b) if the constitution provides that the provisions apply for a specified period of less than 3 years and the provisions have not been renewed—the specified period; or
 - (c) if the provisions have been renewed on at least one occasion and the resolution, or the most recent resolution, renewing the provisions states that the provisions are renewed for a specified period of less than 3 years—the specified period.
- (2) The period referred to in subsection (1) starts:
 - (a) if the provisions were contained in the company's constitution when it was incorporated or formed and have not been renewed—at that time; or
 - (b) if the provisions were inserted in the company's constitution and have not been renewed—when the provisions were inserted; or
 - (c) if the provisions have been renewed on at least one occasion—when the provisions were renewed, or last renewed.
- (3) When the provisions cease to apply, the company's constitution is, by force of this subsection, altered by omitting the provisions.

- (4) A company may renew its proportional takeover approval provisions. The provisions are to be renewed in the same manner as that in which the company could alter its constitution to insert proportional takeover approval provisions.
- (5) With every notice that:
 - (a) specifies the intention to propose:
 - (i) a resolution to alter a company's constitution by inserting proportional takeover approval provisions; or
 - (ii) a resolution to renew a company's proportional takeover approval provisions; and
 - (b) is sent to a person who is entitled to vote on the proposed resolution;the company must send a statement that:
 - (c) explains the effect of the proposed provisions, or of the provisions proposed to be renewed; and
 - (d) explains the reasons for proposing the resolution and sets out the factual matters and principles underlying those reasons; and
 - (e) states whether, as at the day on which the statement is prepared, any of the directors of the company is aware of a proposal by a person to acquire, or to increase the extent of, a substantial interest in the company and, if so, explains the extent (if any) to which the proposal has influenced the decision to propose the resolution; and
 - (f) for a proposed resolution to renew proportional takeover approval provisions—reviews both the advantages, and disadvantages, of the provisions proposed to be renewed for:
 - (i) the directors; and
 - (ii) the company's members;during the period during which the provisions have been in effect; and
 - (g) discusses both the potential advantages, and the potential disadvantages, of the proposed provisions, or of the provisions proposed to be renewed, for:
 - (i) the directors; and
 - (ii) the company's members.

Section 648G

- (6) If, on a particular day, a company purports to:
- (a) alter its constitution by inserting proportional takeover approval provisions; or
 - (b) renew its proportional takeover approval provisions;
- then:
- (c) holders who together hold not less than 10% (by number) of the issued securities in a class of securities in the company to which the provisions apply may, within 21 days after that day, apply to the Court to have the purported alteration or renewal set aside to the extent to which it relates to that class; and
 - (d) unless and until an application made under paragraph (c) is finally determined by the making of an order setting aside the purported alteration or renewal to that extent, the company is taken for all purposes (other than the purposes of an application of that kind):
 - (i) to have validly altered its constitution by inserting the provisions referred to in paragraph (a) applying to that class; or
 - (ii) to have validly renewed the provisions referred to in paragraph (b) applying to that class.
- (7) An application under paragraph (6)(c) may be made, on behalf of the holders entitled to make the application, by a holder or holders appointed by them in writing.
- (8) On an application under paragraph (6)(c), the Court may make an order setting aside the purported alteration or renewal to the extent to which it applies to that class if it is satisfied that it is appropriate in all the circumstances to do so. Otherwise the Court must dismiss the application.
- (9) Within 14 days after the day on which the Court makes an order of the kind referred to in subsection (8) in relation to a company, the company must lodge a copy of the order with ASIC.
- (10) An offence based on subsection (5) or (9) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

648H Effect of Subdivision

This Subdivision applies notwithstanding anything contained in:

- (a) the operating rules of a financial market; or
- (b) the constitution of a company; or
- (c) any agreement.

Part 6.6—Variation of offers

Division 1—Market bids

649A General

A bidder may only vary the offers under a market bid in accordance with section 649B or 649C.

Note: ASIC may allow other variations under section 655A.

649B Market bids—raising bid price

The bidder may increase the current market bid price. They may not do so, however, during the last 5 trading days of the relevant financial market in the offer period.

649C Market bids—extending the offer period

- (1) The bidder may extend the offer period. The extension must be announced to the relevant financial market at least 5 trading days of the market before the end of the offer period. However, the announcement may be made up to the end of the offer period if during those 5 trading days:
 - (a) another person lodges with ASIC a bidder's statement for a takeover bid for securities in the bid class; or
 - (b) another person announces a takeover bid for securities in the bid class; or
 - (c) another person makes offers under a takeover bid for securities in the bid class; or
 - (d) the consideration for offers under another takeover bid for securities in the bid class is improved.

The offer period is extended by having the extension announced to the relevant financial market.

Note: Section 624 provides for an automatic extension of the bid period in certain circumstances.

- (2) On the day on which the announcement is made, the bidder must:
 - (a) give the target and the relevant market operator a notice setting out the terms of the announcement; and

Section 649C

- (b) lodge a notice setting out the terms of the announcement with ASIC.
- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 2—Off-market bids (express variation by bidder)

650A General

- (1) A bidder may only vary the offers under an off-market bid in accordance with section 650B, 650C or 650D.

Note: ASIC may allow other variations under section 655A.

- (2) If the bidder varies the offer under an off-market bid in accordance with section 650B, 650C or 650D, the bidder must vary all unaccepted offers under the bid in the same way.

Note: Subsections 650B(2) and (3) deal with the effect of a variation on takeover contracts that have already resulted from acceptances of offers under the bid when the variation is made.

650B Off-market bids—consideration offered

Improving the consideration offered

- (1) The bidder may vary the offers made under the bid to improve the consideration offered:
- (a) by increasing a cash sum offered; or
 - (b) by increasing the number of securities offered; or
 - (c) by increasing the rate of interest payable under debentures offered; or
 - (d) by increasing the amount or value of debentures offered; or
 - (e) by increasing the number of unissued securities that may be acquired under options offered; or
 - (f) by offering a cash sum in addition to securities; or
 - (g) if the securities being acquired include shares to which rights to accrued dividends are attached—by giving the holders the right to:
 - (i) retain the whole or a part of the dividend; or
 - (ii) be paid an amount equal to the amount of the dividend; in addition to the consideration already offered; or
 - (h) offering an additional alternative form of consideration.

Note: If the bidder increases the consideration during the last 7 days of the offer period, subsection 624(2) extends the offer period by a further 14 days.

Section 650B

Effect of increase in consideration on offers already accepted

- (2) Improving the consideration has the effects set out in the following table on the rights of a person who has already accepted an offer when the variation is made.

Effect of improving consideration		[operative]
Improvement		Effect on person who has already accepted bid offer
1	improvement of the only form of consideration being offered	entitled to the improved consideration
2	2 or more forms of consideration offered and all forms improved by the same factor or percentage	entitled to the improvement in the form of consideration accepted
3	2 or more forms of consideration offered and improvement in the consideration is identical for all forms	entitled to the improvement in the form of consideration accepted
4	addition of a new form of consideration	entitled to make a fresh election as to the form of consideration to be taken
5	any other improvement	entitled to make a fresh election as to the form of consideration to be taken

- (2A) The person is entitled to receive the improved consideration immediately, subject to the following paragraphs:
- (a) if the time for payment of the consideration in accordance with subsection 620(2) has not yet occurred, the person is not entitled to receive the improved consideration until that time;
 - (b) if the person has to make an election before being entitled to the improved consideration, the person is not entitled to receive the improved consideration until the later of:
 - (i) the time when the election is made; and
 - (ii) the time applicable under paragraph (a).

Fresh election as to the form of consideration

- (3) If a person who has already accepted an offer has the right to make a fresh election as to the form of consideration to be taken, the bidder must send the person as soon as practicable after the variation a written notice informing them about their right to make the election.

Chapter 6 Takeovers

Part 6.6 Variation of offers

Division 2 Off-market bids (express variation by bidder)

Section 650C

Note 1: Section 651B says how the election is to be exercised.

Note 2: Sections 648B and 648C provide for the manner in which documents may be sent to holders.

Strict liability offences

- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

650C Off-market bids—extension of offer period

- (1) A bidder making an off-market bid may extend the offer period at any time before the end of the offer period.
- (2) If the bid is subject to a defeating condition, the bidder may extend the offer period after the publication of the notice under subsection 630(3) only if one of the following happens after the publication:
- (a) another person lodges with ASIC a bidder's statement for a takeover bid for securities in the bid class;
 - (b) another person announces a takeover bid for securities in the bid class;
 - (c) another person makes offers under a takeover bid for securities in the bid class;
 - (d) the consideration for offers under another takeover bid for securities in the bid class is improved.

Note: Section 624 says how long the total offer period can be.

650D Off-market bids—method of making variation

Variation to be made by notice to the target and holders

- (1) To vary offers under an off-market bid, the bidder must:
- (a) prepare a notice that:
 - (i) sets out the terms of the proposed variation; and
 - (ii) if the bid is subject to a defeating condition and the proposed variation postpones for more than 1 month the time by which the bidder must satisfy their obligations under the bid—informs people about the right to withdraw acceptances under section 650E; and
 - (b) lodge the notice with ASIC; and

Section 650E

- (c) after the notice is lodged, give the notice to:
 - (i) the target; and
 - (ii) everyone to whom offers were made under the bid.

Note: Sections 648B and 648C provide for the manner in which documents may be sent to holders.

- (2) A person must be sent a copy of the notice under subparagraph (1)(c)(ii) even if they have already accepted the offer. However, they need not be sent a copy if:
 - (a) the variation merely extends the offer period; and
 - (b) the bid is not subject to a defeating condition at the time the notice is given to the target.
- (3) A notice under subsection (1) must be signed by:
 - (a) if the bidder is, or includes, an individual—the individual; and
 - (b) if the bidder is, or includes, a body corporate with 2 or more directors—not fewer than 2 of the directors who are authorised to sign the notice by a resolution passed at a directors' meeting; and
 - (c) if the bidder is, or includes, a body corporate that has only one director—that director.
- (4) A copy of a notice given to a person under subparagraph (1)(c)(ii) must include a statement that:
 - (a) a copy of the notice was lodged with ASIC on a specified date; and
 - (b) ASIC takes no responsibility for the contents of the notice.

650E Right to withdraw acceptance

- (1) A person who accepts an offer made under an off-market bid may withdraw their acceptance of the offer if:
 - (a) the bid is subject to a defeating condition; and
 - (b) the bidder varies the offers under the bid in a way that postpones for more than 1 month the time when the bidder has to meet their obligations under the bid; and
 - (c) the person is entitled to be given a notice of the variation under subsection 650D(1).

Section 650E

- (2) To withdraw their acceptance, the person must:
 - (a) give the bidder notice within 1 month beginning on the day after the day on which the copy of the notice of the variation was received; and
 - (b) return any consideration received by the person for accepting the offer.
- (3) A notice under paragraph (2)(a) must:
 - (a) comply with the conditions specified in regulations made for the purposes of this paragraph; or
 - (b) if no such regulations are made—be in writing.
- (4) To return consideration that includes securities, the person must:
 - (a) take any actions that are specified in regulations made for the purposes of this paragraph in relation to the return of those securities; or
 - (b) if no such regulations are made—give the bidder any transfer documents needed to effect the return of the securities.
- (5) If the person withdraws their acceptance, the bidder must:
 - (a) take any actions that are specified in regulations made for the purposes of this paragraph in relation to the withdrawal of acceptance; and
 - (b) return any documents that the person sent the bidder with the acceptance of the offer;within 14 days after:
 - (c) if the person does the things referred to in subsection (2) on the same day—that day; or
 - (d) if the person does those things on different days—the last of those days.
- (6) If under this section a person returns to a company any certificates (together with any necessary transfer documents) in respect of the securities issued by the company, the company must cancel those securities as soon as possible. Any reduction in share capital is authorised by this subsection.
- (7) An offence based on subsection (5) or (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

650F Freeing off-market bids from defeating conditions

- (1) If the offers under an off-market bid are subject to a defeating condition, the bidder may free the offers, and the takeover contracts, from the condition only by giving the target a notice declaring the offers to be free from the condition in accordance with this section:
 - (a) if the condition is that the bidder may withdraw unaccepted offers if an event or circumstance referred to in subsection 652C(1) or (2) occurs in relation to the target—not later than 3 business days after the end of the offer period; or
 - (b) in any other case—not less than 7 days before the end of the offer period.
- (2) The notice must:
 - (a) state that the offers are free from the condition; and
 - (b) specify the bidder's voting power in the company.
- (3) The notice must be:
 - (a) if the securities in the bid class are quoted—given to the relevant market operator; and
 - (b) if those securities are not quoted—lodged with ASIC.
- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

650G Contracts and acceptances void if defeating condition not fulfilled

All takeover contracts, and all acceptances that have not resulted in binding takeover contracts, for an off-market bid are void if:

- (a) offers made under the bid have at any time been subject to a defeating condition; and
- (b) the bidder has not declared the offers to be free from the condition within the period before the date applicable under subsection 630(1) or (2); and
- (c) the condition has not been fulfilled at the end of the offer period.

A transfer of securities based on an acceptance or contract that is void under this section must not be registered.

Division 3—Off-market bids (automatic variations)

651A Off-market bid—effect on bid consideration of purchases made outside bid

Effect of purchases outside bid on offers made under the bid

- (1) The offers made under an off-market bid, and the takeover contracts, are varied under this section if:
- (a) the bidder purchases securities in the bid class outside the bid during the bid period; and
 - (b) the consideration for that purchase consists solely of a cash sum; and
 - (c) either:
 - (i) the consideration, or 1 of the forms of consideration, payable under the bid consists of a cash sum only and the consideration referred to in paragraph (b) is higher than the cash sum payable for the securities under the bid; or
 - (ii) a cash sum only is not the consideration, or 1 of the forms of consideration, payable under the bid.

Note 1: Section 9 defines *takeover contract*.

Note 2: The effect of section 623 is that the purchase outside the bid has to be made through an on-market transaction (see subsection 623(1) and paragraph 623(3)(b)).

Effect on unaccepted cash offers

- (2) If:
- (a) one of the forms of consideration offered to a person under an off-market bid is a cash sum only; and
 - (b) the person has not accepted the offer before the purchase outside the bid occurs;
- the cash sum is taken to be increased to the highest outside purchase price before the offer is accepted.

Effect on cash offers already accepted

- (3) The consideration payable for each security covered by a takeover contract arising from the acceptance of an offer for a cash sum only

Section 651B

is increased to the highest outside purchase price. If the person who accepted the offer has already received the whole or any part of the consideration under the contract, they are entitled to receive the increase in consideration immediately.

Effect on non-cash offers accepted at any time during bid period

- (4) If:
- (a) a person accepts an offer under a bid at any time during the bid period; and
 - (b) the consideration paid or provided, or to be paid or provided, under the takeover contract arising from the acceptance of the offer does not consist of a cash sum only;
- then:
- (c) the person may elect to take as consideration for each security covered by the takeover contract a cash sum equal to the highest outside purchase price instead of the consideration they originally accepted; and
 - (d) the bidder must give the person a written notice of their right to make the election within 14 days after the end of the offer period.

Note: Section 651B says how the election is to be exercised.

- (5) An offence based on subsection (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

651B How to make an election for new forms of consideration

- (1) An election under section 650B or 651A to take a new form of consideration must be made:
 - (a) by written notice to the bidder; and
 - (b) within 1 month after the person receives the notice from the bidder of their right to make the election.
- (2) The person becomes entitled to the new form of consideration if they:
 - (a) make the election; and
 - (b) return to the bidder:
 - (i) any consideration they have already received; and
 - (ii) any necessary transfer documents.

Section 651C

651C Returning securities as part of election

- (1) If under section 651B a person returns to a company any certificates (together with any necessary transfer documents) in respect of the securities issued by a company, the company must cancel those securities as soon as possible.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 6.7—Withdrawal and suspension of offers

652A Withdrawal of unaccepted offers under takeover bid

Unaccepted offers under a takeover bid may only be withdrawn under section 652B or 652C.

652B Withdrawal of takeover offers with ASIC consent

Unaccepted offers under a takeover bid may be withdrawn with the written consent of ASIC. ASIC may consent subject to conditions.

652C Withdrawal of market bids

Bidder entitled to withdraw if certain events happen during the offer period

- (1) The bidder may withdraw unaccepted offers made under a market bid if 1 of the following happens during the bid period, but only if the bidder's voting power in the target is at or below 50% when the event happens:
 - (a) the target converts all or any of its shares into a larger or smaller number of shares (see section 254H);
 - (b) the target or a subsidiary resolves to reduce its share capital in any way;
 - (c) the target or a subsidiary:
 - (i) enters into a buy-back agreement; or
 - (ii) resolves to approve the terms of a buy-back agreement under subsection 257C(1) or 257D(1);
 - (d) the target or a subsidiary issues shares, or grants an option over its shares, or agrees to make such an issue or grant such an option;
 - (e) the target or a subsidiary issues, or agrees to issue, convertible notes;
 - (f) the target or a subsidiary disposes, or agrees to dispose, of the whole, or a substantial part, of its business or property;
 - (g) the target or a subsidiary charges, or agrees to charge, the whole, or a substantial part, of its business or property;

Section 652C

- (h) the target or a subsidiary resolves to be wound up.
- (2) The bidder may also withdraw unaccepted offers made under a market bid if 1 of the following happens during the bid period:
 - (a) a liquidator or provisional liquidator of the target or of a subsidiary is appointed;
 - (b) a court makes an order for the winding up of the target or of a subsidiary;
 - (c) an administrator of the target, or of a subsidiary, is appointed under section 436A, 436B or 436C;
 - (d) the target or a subsidiary executes a deed of company arrangement;
 - (e) a receiver, or a receiver and manager, is appointed in relation to the whole, or a substantial part, of the property of the target or of a subsidiary.

This is so regardless of the bidder's voting power at the time.

- (3) Notice of the withdrawal must be given to each relevant market operator.
- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 6.8—Acceptances

653A Acceptance of offers made under off-market bid

If:

- (a) an offer is made under an off-market bid for quoted securities; and
- (b) regulations made for the purposes of this paragraph set out any requirements for the manner in which the acceptance of the offer, so far as it relates to those securities, must be complied with;

an acceptance of the offer for those securities is effective only if it is made in that way.

653B Acceptances by transferees and nominees of offers made under off-market bid

(1) If an off-market bid is made for securities:

- (a) a person who:
 - (i) is able during the offer period to give good title to a parcel of those securities; and
 - (ii) has not already accepted an offer under the bid for those securities;
may accept as if an offer on terms identical with the other offers made under the bid had been made to that person in relation to those securities; and
- (b) a person who holds 1 or more parcels of those securities as trustee or nominee for, or otherwise on account of, another person may accept as if a separate offer had been made in relation to:
 - (i) each of those parcels; and
 - (ii) any parcel they hold in their own right.

If a person accepts an offer under a proportional takeover bid for securities, no-one else may accept an offer under the bid in respect of those securities.

Note: Section 9 defines *proportional takeover bid*. See paragraph 618(1)(b).

Section 653B

- (2) For the purposes of this section:
 - (a) a person is taken to hold securities if the person is, or is entitled to be registered as, the holder of the securities; and
 - (b) a person is taken to hold the securities on trust for, as nominee for or on account of another person if they:
 - (i) are entitled to be registered as the holder of particular securities; and
 - (ii) hold their interest in the securities on trust for, as nominee for or on account of that other person; and
 - (c) in determining under subsection (1) whether a person has accepted an offer for particular securities under a takeover bid, a person who accepts an offer under a proportional takeover bid is taken to have accepted the offer for all the securities in the bid class that they hold at the time they accept the offer.
- (3) If under paragraph (1)(b) a person may accept as if a separate offer is taken to be made to a person for a parcel of securities within a holding, an acceptance of that offer is ineffective unless:
 - (a) the person gives the bidder a notice stating that the securities consist of a separate parcel; and
 - (b) the acceptance specifies the number of securities in the parcel.
- (4) A notice under subsection (3) must:
 - (a) comply with the conditions specified in regulations made for the purposes of this paragraph that provide for the manner of giving the notice; or
 - (b) if no such regulations are made—be in writing.
- (5) A person contravenes this subsection if:
 - (a) they purport to accept an offer under this section; and
 - (b) the acceptance is not made in accordance with this section.

The acceptance is, however, as valid as it would have been if it had been made in accordance with this section.
- (6) A person may, at the one time, accept for 2 or more parcels under this section as if there had been a single offer for a separate parcel consisting of those parcels.

Part 6.9—Other activities during the bid period

654A Bidder not to dispose of securities during the bid period

- (1) The bidder must not dispose of any securities in the bid class during the bid period.
- (1A) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) Subsection (1) does not apply to a disposal of securities by the bidder if:
 - (a) someone else who is not an associate of the bidder makes an offer, or improves the consideration offered, under a takeover bid for securities in the bid class after the bidder's statement is given to the target; and
 - (b) the bidder disposes of the securities after the offer is made or the consideration is improved.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2), see subsection 13.3(3) of the *Criminal Code*.

654B Disclosures about substantial shareholdings in listed companies

During the bid period, substantial shareholding notices that need to be lodged under section 671B must be lodged by 9.30 am the next business day (rather than the usual 2 business days).

654C Disclosures about substantial shareholdings in unlisted companies

- (1) A bidder making a bid for securities of an unlisted company must give the target a notice stating the bidder's voting power in the target if, at a particular time during the bid period, the bidder's voting power in the target rises from below a percentage in the following list to that percentage or higher:
 - (a) 25%;
 - (b) 50%;
 - (c) 75%;

Section 654C

- (d) 90%.
- (2) The notice must be given as soon as practicable, and in any event within 2 business days, after the rise in voting power occurred.
- (3) The target must:
 - (a) make the notice available at its registered office for inspection without charge by any holder of bid class securities during the bid period; and
 - (b) lodge the notice with ASIC.
- (4) An offence based on subsection (1) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 6.10—Review and intervention

Division 1—ASIC's power to exempt and modify

655A ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- Note: Under section 656A, the Panel has power to review the exercise by ASIC of its powers under this section.
- (2) In deciding whether to give the exemption or declaration, ASIC must consider the purposes of this Chapter set out in section 602.
 - (3) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
 - (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
 - (5) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
 - (6) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or

Section 655B

- (ii) regulations made for the purposes of this Chapter; and
- (c) the old Division 12 of Part 11.2 transitionals.

655B Notice of decision and review rights

- (1) Subject to subsection (2), ASIC must take such steps as are reasonable in the circumstances to give to each person whose interests are affected by a decision under section 655A a notice, in writing or otherwise:
 - (a) of the making of the decision; and
 - (b) of the person's right to have the decision reviewed by the Panel under section 656A.
- (2) Subsection (1) does not require ASIC to give notice to a person affected by the decision or to the persons in a class of persons affected by the decision, if ASIC determines that giving notice to the person or persons is not warranted, having regard to:
 - (a) the cost of giving notice to the person or persons; and
 - (b) the way in which the interests of the person or persons are affected by the decision.
- (3) A failure to comply with this section does not affect the validity of the decision.

Division 2—The Takeovers Panel

Subdivision A—Review of ASIC’s exercise of its exemption or modification powers

656A Review of exercise of exemption or modification powers

- (1) The Panel may review:
 - (a) a decision of ASIC under section 655A; or
 - (b) a decision of ASIC under section 673 in relation to securities of the target of a takeover bid during the bid period.

For these purposes, *decision* has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.
- (2) An application to the Panel for review of the decision may be made by any person whose interests are affected by the decision.
- (3) For the purpose of reviewing the decision, the Panel may exercise all the powers and discretions conferred on ASIC by this Chapter or Chapter 6C. The Panel must make a decision:
 - (a) affirming the decision; or
 - (b) varying the decision; or
 - (c) setting aside the decision and:
 - (i) making a decision in substitution for the decision under review; or
 - (ii) remitting the matter for reconsideration by ASIC in accordance with any directions or recommendations of the Panel.
- (4) The decision must be in writing and published in the *Gazette*.
- (5) If the Panel varies an ASIC decision, or makes a decision in substitution for an ASIC decision:
 - (a) the ASIC decision as varied, or the substituted decision, is taken for all purposes (other than the purposes of applications to the Panel for review in accordance with this section) to be a decision of ASIC under section 655A; and
 - (b) when the Panel’s determination on the review comes into operation, the ASIC decision as varied, or the substituted

Section 656B

decision, has effect, or is taken to have had effect, on and from the day on which the ASIC decision has or had effect.
Paragraph (b) applies unless the Panel otherwise orders.

656B Operation and implementation of a decision that is subject to review

- (1) Subject to this section, applying to the Panel under section 656A for review of an ASIC decision does not:
 - (a) affect the operation of the decision; or
 - (b) prevent the taking of action to implement the decision.
- (2) On application by a party to the proceedings before the Panel, the Panel may:
 - (a) make an order staying, or otherwise affecting the operation or implementation of, the whole or a part of the decision if the Panel considers that:
 - (i) it is desirable to make the order after taking into account the interests of any person who may be affected by the review; and
 - (ii) the order is appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review; or
 - (b) make an order varying or revoking an order made under paragraph (a) (including an order that has previously been varied on one or more occasions under this paragraph).
- (3) Subject to subsection (4), the Panel must not:
 - (a) make an order under paragraph (2)(a) unless ASIC has been given a reasonable opportunity to make a submission to the Panel in relation to the matter; or
 - (b) make an order under paragraph (2)(b) unless:
 - (i) ASIC; and
 - (ii) the person who requested the making of the order under paragraph (2)(a); and
 - (iii) if the order under paragraph (2)(a) has previously been varied by an order or orders under paragraph (2)(b)—the person or persons who applied for the last-mentioned order or orders;

Section 657A

have been given a reasonable opportunity to make submissions to the Panel in relation to the matter.

- (4) Subsection (3) does not prohibit the Panel from making an order without giving to a person referred to in that subsection a reasonable opportunity to make a submission to the Panel in relation to a matter if the Panel is satisfied that, by reason of the urgency of the case or otherwise, it is not practicable to give that person such an opportunity. If an order is so made without giving such an opportunity to ASIC, the order does not come into operation until a notice setting out the terms of the order is served on ASIC.
- (5) An order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)):
 - (a) is subject to the conditions that are specified in the order; and
 - (b) has effect until:
 - (i) if a period for the operation of the order is specified in the order—the end of that period or, if the application for review is decided by the Panel before the end of that period, the decision of the Panel on the application for review comes into operation; or
 - (ii) if a period for the operation of the order is not specified in the order—the decision of the Panel on the application for review comes into operation.

Subdivision B—Unacceptable circumstances

657A Declaration of unacceptable circumstances

- (1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.

Note: Sections 659B and 659C deal with court proceedings during and after a takeover bid.

- (2) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

Section 657A

- (a) are unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of the company or another company; or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or
- (b) are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the company or another company or in relation to securities of the company or another company) having regard to the purposes of this Chapter set out in section 602; or
- (c) are unacceptable because they:
 - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or
 - (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

- (3) In exercising its powers under this section, the Panel:
 - (a) must have regard to:
 - (i) the purposes of this Chapter set out in section 602; and
 - (ii) the other provisions of this Chapter; and
 - (iii) the rules made under section 658C; and
 - (iv) the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the ASIC Act; and
 - (b) may have regard to any other matters it considers relevant.

In having regard to the purpose set out in paragraph 602(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the

Section 657B

acquisition or proposed acquisition not to proceed or contributed to it not proceeding).

- (4) The Panel must give an opportunity to make submissions in relation to the matter to:
 - (a) each person to whom a proposed declaration relates; and
 - (b) each party to the proceedings; and
 - (c) ASIC.
- (5) The declaration must be in writing and published in the *Gazette*.
- (6) As soon as practicable, the Panel must give each person to whom the declaration relates:
 - (a) a copy of the declaration; and
 - (b) a written statement of the Panel's reasons for making the declaration.
- (7) This section does not require the Panel to perform a function, or exercise a power, in a particular way in a particular case.

657B When Panel may make declaration

The Panel can only make a declaration under section 657A within:

- (a) 3 months after the circumstances occur; or
- (b) 1 month after the application under section 657C for the declaration was made;

whichever ends last. The Court may extend the period on application by the Panel.

657C Applying for declarations and orders

- (1) The Panel may make a declaration under section 657A, or an order under section 657D or 657E, only on an application made under this section.
- (2) An application for a declaration under section 657A or an order under section 657D or 657E may be made by:
 - (a) the bidder; or
 - (b) the target; or
 - (c) ASIC; or
 - (d) any other person whose interests are affected by the relevant circumstances.

Section 657D

Note: The Administrative Appeals Tribunal cannot review ASIC's decision whether to apply to the Panel (see paragraph 1317C(gc)).

- (3) An application for a declaration under section 657A can be made only within:
- (a) 2 months after the circumstances have occurred; or
 - (b) a longer period determined by the Panel.

657D Orders that Panel may make following declaration

- (1) The Panel may make an order under subsection (2) if it has declared circumstances to be unacceptable under section 657A. It must not make an order if it is satisfied that the order would unfairly prejudice any person. Before making the order, the Panel must give:
- (a) each person to whom the proposed order would be directed; and
 - (b) each party to the proceedings; and
 - (c) ASIC;
- an opportunity to make submissions to the Panel about the matter
- (2) The Panel may make any order (including a remedial order but not including an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C) that it thinks appropriate to:
- (a) if the Panel is satisfied that the rights or interests of any person, or group of persons, have been or are being affected, or will be or are likely to be affected, by the circumstances—protect those rights or interests, or any other rights or interests, of that person or group of persons; or
 - (b) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred; or
 - (c) specify in greater detail the requirements of an order made under this subsection; or
 - (d) determine who is to bear the costs of the parties to the proceedings before the Panel;
- regardless of whether it has previously made an order under this subsection or section 657E in relation to the declaration. The Panel may also make any ancillary or consequential orders that it thinks appropriate.

Section 657E

Note: Section 9 defines *remedial order*.

- (3) The Panel may vary, revoke or suspend an order made under this section. Before doing so, it must give an opportunity to make submissions in relation to the matter to:
 - (a) each person to whom the order is directed; and
 - (b) each party to the proceedings in which the order was made; and
 - (c) ASIC.
- (4) If the Panel makes an order under this section, the Panel must give a copy of the order, and a written statement of its reasons for making the order, to:
 - (a) each party to the proceedings before the Panel; and
 - (b) each person to whom the order is directed if they are not a party to the proceedings; and
 - (c) for an order relating to specified securities of a company—the company; and
 - (d) ASIC.

The Panel must also publish the order in the *Gazette*. The order takes effect as soon as it is made and not when all the requirements of this subsection are met.
- (5) If the Panel makes an order of the kind referred to in paragraph (j) of the definition of *remedial order*, the exercise of rights attached to shares is to be disregarded as provided in the order.
- (6) If the Panel makes an order of the kind referred to in paragraph (k) of the definition of *remedial order*, then, by force of this subsection, the agreement or offer specified in the order is cancelled, or becomes voidable, as from the making of the order or any later time that is specified in the order.

657E Interim orders

- (1) The Panel, or the President of the Panel, may make an interim order of a kind referred to in subsection 657D(2) in relation to circumstances even if:
 - (a) there is no declaration under section 657A that the circumstances are unacceptable; or
 - (b) no application to the Panel for a declaration of that kind has been made.

Section 657EA

The order must specify the period (not exceeding 2 months) for which it is to have effect.

- (2) The order ceases to have effect:
- (a) at the end of the period specified in the order; or
 - (b) if, before the end of that period, proceedings for a declaration under section 657A in relation to the circumstances (and all related proceedings for an order under section 657D) are determined—when those proceedings are determined.

657EA Internal Panel reviews

- (1) The following may apply under this section for review by the Panel of a decision of the Panel made on an application under section 657C:

- (a) a party to the proceedings in which the decision was made; or
- (b) ASIC.

For these purposes, *decision* has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

- (2) If the decision is not:
- (a) a decision to make a declaration under section 657A; or
 - (b) a decision to make an order under section 657D or 657E;
- the person may apply for review only with the consent of the President of the Panel.

- (3) The regulations may provide for the time limits within which an application may be made for review of a decision.

Note: Regulations made under the ASIC Act deal with the constitution of the Panel for the purposes of conducting a review under this section and the procedures to be followed in conducting the review.

- (4) After conducting a review under this section, the Panel may:
- (a) vary the decision reviewed; or
 - (b) set aside the decision reviewed; or
 - (c) set aside the decision reviewed and substitute a new decision.

In conducting the review, the Panel has the same power to make a declaration under section 657A, or an order under section 657D or 657E, as it has when it is considering an application under section 657C.

Section 657EB

- (5) Despite section 657B, the Panel can only make a declaration under section 657A after conducting a review under this section if the declaration is made within:
- (a) 3 months after the circumstances in relation to which the declaration is made occur; or
 - (b) 1 month after the application for review was made;
- whichever ends last. The Court may extend the period on application by the Panel.

657EB References by Courts

- (1) A Court hearing proceedings in relation to a decision of the Panel made on an application under section 657C may refer the decision to the Panel for review.

Note: Regulations made under the ASIC Act deal with the constitution of the Panel for the purposes of conducting a review under this section and the procedures to be followed in conducting the review.

- (2) After conducting a review under this section, the Panel may:
- (a) vary the decision reviewed; or
 - (b) set aside the decision reviewed; or
 - (c) set aside the decision reviewed and substitute a new decision.
- In conducting the review, the Panel has the same powers to make a declaration under section 657A, or an order under section 657D or 657E, as it has when it is considering an application under section 657C.

657F Offence to contravene Panel order

- (1) A person who contravenes an order made under section 657D or 657E commits an offence.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

657G Orders by the Court where contravention or proposed contravention of Panel order

- (1) If a person contravenes, or proposes to engage in conduct that would contravene, an order made by the Panel under section 657D or 657E, the Court may make any orders it considers appropriate to secure compliance with the Panel's order, including:

Section 657H

- (a) 1 or more remedial orders; and
- (b) an order directing a person to do, or to refrain from doing, a specified act.

Note: Section 9 defines *remedial order*.

- (2) An application for an order under this section may only be made by:
 - (a) ASIC; or
 - (b) the President of the Panel; or
 - (c) a person to whom the Panel's order relates; or
 - (d) a person who was a party to the proceedings in which the Panel's order was made.

657H ASIC may publish report about application to Panel or Court

- (1) ASIC may publish a report, statement or notice in relation to an application it has made for:
 - (a) a declaration of unacceptable circumstances under section 657A; or
 - (b) an order under subsection 657D(2); or
 - (c) an order under section 657E; or
 - (d) review under section 657EA of a decision of the Panel; or
 - (e) an order under section 657G to secure compliance with an order made under subsection 657D(2) or section 657E.
- (2) The report, statement or notice must:
 - (a) state that the application has been made; and
 - (b) name the company; and
 - (c) if ASIC considers that the report, statement or notice should name any other person to whom the declaration would relate or the order would be directed—name that other person.
- (3) The report, statement or notice may be published in any way that ASIC thinks appropriate. It need not be in writing.
- (4) This section does not limit a function or power of ASIC, the Panel or any other person or body.

Subdivision C—General provisions

658A Power of Panel where a proceeding is frivolous or vexatious

- (1) If an application is made to the Panel under this Division, the Panel may, at any stage of the proceeding, if it is satisfied that the application is frivolous or vexatious:
 - (a) dismiss the application; or
 - (b) if the Panel considers it appropriate, on the application of a party to the proceedings, direct that the person who made the application must not, without leave of the Panel, make a subsequent application to the Panel of a kind or kinds specified in the direction.
- (2) A direction given by the Panel under paragraph (1)(b) has effect despite any other provision of this Act or a provision of any other Act.
- (3) The Panel may revoke or vary the direction.

658B Evidentiary value of findings of fact by Panel

- (1) A finding of fact recorded in an order by the Panel, or a written statement of the reasons for an order of the Panel, is proof of the fact in the absence of evidence to the contrary.
- (2) A certificate signed by the President of the Panel that states a finding of fact made in proceedings before the Panel is proof of the fact in the absence of evidence to the contrary.

658C Panel's power to make rules

- (1) The President of the Panel may, after consultation with members of the Panel, make rules, not inconsistent with this Act or the Regulations, to clarify or supplement the operation of the provisions of this Chapter.
- (2) In making rules under this section, the President of the Panel must consider the purposes of this Chapter set out in section 602.
- (3) A rule under this section must be in writing and the President of the Panel must:
 - (a) publish notice of it in the *Gazette*; and

Section 658D

- (b) give the Minister, and ASIC, a copy of the rule as soon as practicable after it is published in the *Gazette*.
- (4) Within 28 days after receiving the copy, the Minister may disallow the whole or a specified part of the rule.
- (5) If a person contravenes a rule made under this section, the Court may give directions for compliance with the rule to:
 - (a) that person; or
 - (b) if that person is a body corporate—the directors of the body corporate.

The Court must give the person against whom the order is sought, and any person aggrieved by the contravention, an opportunity to be heard before giving directions under this subsection.
- (6) The Court may give a direction under subsection (5) only on application by:
 - (a) ASIC; or
 - (b) the President of the Panel; or
 - (c) a person aggrieved by the contravention.

658D Inconsistency between Panel rules and ASIC exemption or declaration

If there is an inconsistency between a rule made under section 658C and an exemption given, or declaration made, by ASIC under section 655A, the rule made under section 658C prevails to the extent of the inconsistency.

Division 3—Court powers

659A Panel may refer questions of law to the Court

The Panel may, of its own motion, refer a question of law arising in a proceeding before the Panel to the Court for decision.

659AA Object of sections 659B and 659C

The object of sections 659B and 659C is to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended.

659B Court proceedings before end of bid period

Delay in commencing court proceedings until after end of bid period

- (1) Only the following may commence court proceedings in relation to a takeover bid, or proposed takeover bid, before the end of the bid period:
- (a) ASIC;
 - (b) a Minister of the Commonwealth;
 - (c) a Minister of a State or Territory in this jurisdiction;
 - (d) the holder of an office established by a law of:
 - (i) the Commonwealth; or
 - (ii) a State or Territory in this jurisdiction;
 - (e) a body corporate incorporated for a public purpose by a law of:
 - (i) the Commonwealth; or
 - (ii) a State or Territory in this jurisdiction;
- to the extent to which it is exercising a power conferred by a law of the Commonwealth or a State or Territory in this jurisdiction.

Note: This restriction starts to apply as soon as there is a takeover bid, or a proposed takeover bid; it does not start to apply only when the bid period commences.

Section 659B

Court power to stay proceedings that have already commenced

- (2) A court may stay:
- (a) court proceedings in relation to a takeover bid or proposed takeover bid; or
 - (b) court proceedings that would have a significant effect on the progress of a takeover bid;
- until the end of the bid period.
- (3) In deciding whether to exercise its powers under subsection (2), the court is to have regard to:
- (a) the purposes of this Chapter; and
 - (b) the availability of review by the Panel under Division 2.
- (4) For the purposes of this section:

court proceedings in relation to a takeover bid or proposed takeover bid:

- (a) means any proceedings before a court in relation to:
 - (i) an action taken or to be taken as part of, or for the purposes of, the bid or the target's response to the bid; or
 - (ii) a document prepared or to be prepared, or a notice given or to be given, under this Chapter; and
- (b) includes:
 - (i) proceedings to enforce an obligation imposed by this Chapter; or
 - (ii) proceedings for the review of a decision, or the exercise of a power or discretion, under this Chapter; or
 - (iii) proceedings for the review of a decision, or the exercise of a power or discretion, under Chapter 6C in relation to securities of the target of a takeover bid during the bid period; and
 - (iv) proceedings under Part 2F.1A for leave to bring, or to intervene in, proceedings referred to in paragraph (a) or subparagraph (b)(i), (ii) or (iii).

This is not limited to proceedings brought under this Chapter or this Act but includes proceedings under other Commonwealth and State or Territory laws (including the general law).

- (5) Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

659C Court proceedings after end of bid period

- (1) If:
- (a) an application is made to the Panel for a declaration under section 657A that particular conduct amounts to, or leads to, circumstances that are unacceptable; and
 - (b) the Panel refuses to make the declaration; and
 - (c) a Court finds after the end of the bid period that the conduct contravenes this Act;
- the Court's powers under this Act in relation to the conduct are limited to the following:
- (d) the Court may:
 - (i) determine whether a person is guilty of an offence against this Act because they engaged in or were involved in the conduct; and
 - (ii) impose a penalty if the person is found guilty;
 - (e) the Court may:
 - (i) determine whether a person who engaged in, or was involved in, the conduct contravened a provision of this Act; and
 - (ii) order the person to pay an amount of money to another person (whether by way of damages, account of profits, pecuniary penalty or otherwise);
 - (f) the Court may make an order under section 1318 or 1322 in relation to the conduct.

This subsection does not confer power or jurisdiction on a court that it does not have apart from this subsection.

- (2) Without limiting subsection (1), the only kind of remedial order that the Court may make is one that requires the person to pay money to another person.

Chapter 6A—Compulsory acquisitions and buy-outs

660A Chapter extends to some listed bodies that are not companies

This Chapter extends to the acquisition of securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of securities of companies.

Note: Section 9 defines *company* and *listed*.

660B Chapter extends to listed managed investment schemes

- (1) This Chapter extends to the acquisition of interests in a registered scheme that is also listed as if:
 - (a) the scheme were a company; and
 - (b) interests in the scheme were shares in the company; and
 - (c) voting interests in the scheme were voting shares in the company.
- (2) If Part 6A.1 applies to a scheme at the end of the bid period for a takeover, that Part continues to apply to the scheme in relation to the takeover bid even if the scheme ceases to be listed.
- (3) If Part 6A.2 applies to a scheme when a compulsory acquisition notice under section 664C is lodged, that Part (including Division 2 of that Part) continues to apply to the scheme in relation to the notice even if the scheme ceases to be listed.
- (4) The regulations may modify the operation of this Chapter as it applies in relation to the acquisition of interests in listed managed investment schemes.

Part 6A.1—Compulsory acquisitions and buy-outs following takeover bid

Division 1—Compulsory acquisition of bid class securities

661A Compulsory acquisition power following takeover bid

Threshold for compulsory acquisition power

- (1) Under this subsection, the bidder under a takeover bid may compulsorily acquire any securities in the bid class if:
 - (a) the bid is:
 - (i) an off-market bid to acquire all the securities in the bid class; or
 - (ii) a market bid; and
 - (b) during, or at the end of, the offer period:
 - (i) the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class; and
 - (ii) the bidder and their associates have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid (whether the acquisitions happened under the bid or otherwise).

This is so even if the bidder subsequently ceases to satisfy subparagraph (b)(i) because of the issue of further securities in the bid class.

Note: Subsection 92(3) defines *securities* for the purposes of this Chapter.

- (2) For the purposes of subsection (1), disregard any relevant interests that the bidder has merely because of the operation of subsection 608(3) (relevant interest by 20% interest in body corporate).

Court may allow compulsory acquisition even if threshold not reached

- (3) Under this subsection, the bidder under a takeover bid may compulsorily acquire securities in the bid class with the approval of the Court.

Section 661A

Securities to be acquired

- (4) If the bidder compulsorily acquires securities in the bid class under subsection (1) or (3), the bidder:
- (a) must acquire all the securities in the bid class:
 - (i) which were issued or granted before the end of the offer period; and
 - (ii) in which the bidder does not have a relevant interest; and
 - (b) may elect to acquire all securities in the bid class:
 - (i) that were issued or granted after the end of the offer period and before the notice under section 661B is issued; and
 - (ii) in which the bidder does not have a relevant interest; but only if the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class when the bidder gives notice under section 661B; and
 - (c) if securities exist when the bidder gives the notice under section 661B that:
 - (i) will convert, or may be converted, to securities in the bid class; or
 - (ii) confer rights to be issued securities in the bid class that may be exercised;within the period of 6 weeks after the notice is given—may elect to acquire securities that come to be in the bid class during that period due to a conversion or exercise of the rights but only if the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class when the bidder gives notice under section 661B; and
 - (d) may elect to acquire any securities in the bid class in which the bidder has a relevant interest (no matter when they were issued or granted).
- (5) This section has effect despite anything in the constitution of the company whose securities are to be acquired.

661B Compulsory acquisition notice

Compulsory acquisition notice

- (1) To compulsorily acquire securities under subsection 661A(1) or (3), the bidder must:
 - (a) prepare a notice in the prescribed form that:
 - (i) informs the holders of the securities that the bidder is entitled to acquire their securities under that subsection; and
 - (ii) informs the holders about the compulsory acquisition procedure under this Part, including:
 - (A) their right under section 661D to obtain the names and addresses of everyone else the bidder has given the notice to; and
 - (B) their right under section 661E to apply to the Court for an order that the securities not be compulsorily acquired; and
 - (b) lodge the notice with ASIC; and
 - (c) give the notice to each other person who is:
 - (i) a holder of securities in the bid class; or
 - (ii) if the bidder elects under paragraph 661A(4)(c) to acquire securities that come to be in the bid class after the notice is given—a holder of the convertible securities referred to in that paragraph; and
 - (d) give a copy to each relevant market operator on the same day as it is lodged with ASIC if the target is listed.

If alternative forms of consideration were offered under the takeover bid, the notice must specify which of those forms of consideration will apply to the acquisition of the holder's securities if the holder does not elect one of the forms under paragraph 661C(2)(a).

Note: Everyone who holds bid class securities on the day on which the notice is lodged with ASIC is entitled notice. Under section 661E, anyone who holds the securities after that day may apply to the Court to stop the acquisition.

Time for dispatching notices to holders

- (2) The bidder must dispatch the notices under paragraph (1)(c):
 - (a) during the offer period, or within 1 month after:

Section 661C

- (i) the end of offer period if the acquisition is under subsection 661A(1); or
- (ii) the court approval if the acquisition is under subsection 661A(3); and
- (b) on the day the bidder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Strict liability offences

- (2A) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Manner of giving notice to holders

- (3) The bidder may give the notice to a holder:
- (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.
- A notice sent by post is taken to be given 3 days after it is posted.
- (4) The notice may be sent:
- (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This section does not limit the manner in which the notice may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

661C Terms on which securities to be acquired

Same terms as takeover bid

- (1) The bidder may acquire the securities only on the terms that applied to the acquisition of securities under the takeover bid immediately before:
- (a) the notice under section 661B is given if it is given before the end of the offer period; or
 - (b) the end of the offer period if it is not.

Alternative forms of consideration under takeover bid

- (2) If alternative forms of consideration were offered under the takeover bid, the form of consideration that applies to the acquisition of the holder's securities is:
 - (a) the form that the holder elects; or
 - (b) the form set out in the compulsory acquisition notice under subsection 661B(1).
- (3) The holder makes an election under subsection (2) by giving the bidder a notice of the election by the later of:
 - (a) 1 month after the compulsory acquisition notice is given under section 661B; or
 - (b) 14 days after the holder is given a statement under section 661D if the holder asks for it.
- (4) The election must:
 - (a) comply with the conditions specified in regulations made for the purposes of this paragraph that provide for the manner of making the election; or
 - (b) if no such regulations are made—be in writing.

661D Holder may obtain names and addresses of other holders

- (1) Within 1 month after a compulsory acquisition notice in relation to securities in the bid class is lodged with ASIC under section 661B, the holder of the securities may ask the bidder in writing for a written statement of the names and addresses of everyone else the bidder has given the notice to. The bidder must give the holder the statement within 7 days after the request.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

661E Holder may apply to Court to stop acquisition

- (1) The holder of securities covered by a compulsory acquisition notice under section 661B may apply to the Court for an order that the securities not be compulsorily acquired under subsection 661A(1). The application must be made before the later of:
 - (a) the end of 1 month after the holder is given notice under section 661B; or

Chapter 6A Compulsory acquisitions and buy-outs

Part 6A.1 Compulsory acquisitions and buy-outs following takeover bid

Division 1 Compulsory acquisition of bid class securities

Section 661F

- (b) the end of 14 days after the holder is given a statement under section 661D if the holder asks for it.
- (2) The Court may order that the securities not be compulsorily acquired under subsection 661A(1) only if the Court is satisfied that the consideration is not fair value for the securities.

Note: See section 667C on valuation.
- (3) If the Court makes an order under this section in relation to an acquisition of securities, the order applies to all holders who have applications to the Court pending for an order under this section in relation to the acquisition.

661F Signpost—completing the acquisition of the securities

See section 666A to find out how to complete the acquisition.

Division 2—Compulsory buy-out of bid class securities

662A Bidder must offer to buy out remaining holders of bid class securities

- (1) If the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class at the end of the offer period, the bidder must offer to buy out the remaining holders of bid class securities in accordance with sections 662B and 662C.
- (1A) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) This section does not apply to securities that are issued:
 - (a) if the takeover bid was not subject to a defeating condition—after the end of the offer period; or
 - (b) if the takeover bid was subject to a defeating condition—after the notice whether the bid is free from a defeating condition or not is given under subsection 630(3).

662B Bidder to tell remaining holders of their right to be bought out

Notice to remaining holders of bid class securities

- (1) The bidder must:
 - (a) prepare a notice in the prescribed form that:
 - (i) states that the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class; and
 - (ii) informs the holder of bid class securities about their right to be bought out under this Part; and
 - (iii) sets out the terms on which the holder may be bought out; and
 - (b) lodge the notice with ASIC; and
 - (c) give the notice to each other person who:
 - (i) is a holder of securities in the bid class on the day on which the notice is lodged with ASIC; and

Section 662B

- (ii) has not been given a compulsory acquisition notice under section 661B when the notice under subsection (2) is given; and
- (d) give the notice to each relevant market operator on the same day as it is lodged with ASIC if the target is listed.

If alternative forms of consideration were offered under the takeover bid, the notice must specify which of those forms will apply to the acquisition of the holder's securities if the holder does not give the bidder an election notice under subsection 662C(1).

Note: The notice is to be given to everyone who holds bid class securities on the day on which the notice is lodged with ASIC. Under section 662C, anyone who acquires the securities after that day may require the bidder to acquire the securities.

Time for dispatching notice to holders

- (2) The bidder must dispatch the notices under paragraph (1)(c):
 - (a) during, or within 1 month after the end of, the offer period; and
 - (b) on the day the bidder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The bidder may give the notice to a holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.

A notice sent by post is taken to be given 3 days after it is posted.
- (4) The notice may be sent:
 - (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

662C Right of remaining holder of securities in the bid class to be bought out

- (1) Within 1 month after notice is given in relation to securities under section 662B, the holder of the securities may give the bidder written notice requiring the bidder to acquire the securities. If alternative forms of consideration were offered under the takeover bid, the holder may elect in the notice which of those forms will apply to the acquisition of the holder's securities.
- (2) The notice by the holder gives rise to a contract between the holder and the bidder for the sale of the securities on:
 - (a) the terms that applied to the acquisition of securities under the bid immediately before the end of the offer period; or
 - (b) if alternative forms of consideration applied at that time—on the terms that the bidder will provide:
 - (i) the alternative specified by the holder in the notice under subsection (1); or
 - (ii) if the holder has not made an election under that subsection—the alternative set out in the bidder's notice under section 662B; or
 - (c) if the holder and the bidder agree on other terms—those terms.

Division 3—Compulsory buy-out of convertible securities

663A Bidder must offer to buy out holders of convertible securities

- (1) If the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class at the end of the offer period, the bidder must offer to buy out the holders of securities that are convertible into bid class securities in accordance with sections 663B and 663C. This section does not apply to securities if a takeover bid has been made for the convertible securities and a notice has been given under section 661B or 662B in relation to the convertible securities.

Note: For when securities are convertible into bid class securities, see the definition of *convertible securities* in section 9.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

663B Bidder to tell holders of convertible securities of their right to be bought out

Notice to holders of convertible securities

- (1) The bidder must:
- (a) prepare a notice in the prescribed form that:
 - (i) states that the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class; and
 - (ii) informs the holder of convertible securities about their right to be bought out under this Part; and
 - (iii) sets out the terms on which the holder may be bought out; and
 - (b) lodge the notice with ASIC; and
 - (c) give each other person who is a holder of convertible securities:
 - (i) the notice; and
 - (ii) a copy of the expert's report, or of all the experts' reports, under section 667A; and

- (d) give a copy of those documents to each relevant market operator on the same day as it is lodged with ASIC if the target is listed.

Note 1: Subparagraph (a)(iii)—Section 667A deals with the contents of an expert's report.

Note 2: The notice is to be given to everyone who holds convertible securities on the day on which the notice is lodged with ASIC. Under section 663C, anyone who acquires the securities after that day may require the bidder to acquire the securities.

Time for dispatching notice to holders

- (2) The bidder must dispatch the notices and reports under paragraph (1)(c):
 - (a) during, or within 1 month after the end of, the offer period; and
 - (b) on the day the bidder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The bidder may give the notice or report to a holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.

A notice or report sent by post is taken to be given 3 days after it is posted.

- (4) The notice may be sent:
 - (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

Section 663C

663C Right of holders of convertible securities to be bought out

- (1) Within 1 month after notice under section 663B is given in relation to convertible securities, the holder of the convertible securities may give the bidder a notice requiring the bidder to acquire the securities.
- (2) The holder's notice gives rise to a contract between the holder and the bidder for the sale of the securities on:
 - (a) the terms agreed to by the bidder and the holder; or
 - (b) the terms determined by the Court on application by the holder.
- (3) If the Court makes a determination under paragraph (2)(b) in relation to the terms of sale for a holder's securities of a particular class, the determination applies to all holders of securities in that class who have applications to the Court pending for a determination under that paragraph in relation to the terms of sale of their securities.

Part 6A.2—General compulsory acquisitions and buy-outs

Division 1—Compulsory acquisition of securities by 90% holder

664A Threshold for general compulsory acquisition power

90% holder—holder of 90% of securities in particular class

- (1) A person is a 90% holder in relation to a class of securities of a company if the person holds, either alone or with a related body corporate, full beneficial interests in at least 90% of the securities (by number) in that class.

90% holder—holder with 90% voting power and 90% of whole company or scheme

- (2) A person is also a 90% holder in relation to a class of securities of a company if:
- (a) the securities in the class are shares or convertible into shares; and
 - (b) the person's voting power in the company is at least 90%; and
 - (c) the person holds, either alone or with a related body corporate, full beneficial interests in at least 90% by value of all the securities of the company that are either shares or convertible into shares.

Note: Subsection 667A(2) provides that the expert's report that accompanies the compulsory acquisition notice must support the paragraph (c) condition.

90% holder may acquire remainder of securities in class

- (3) Under this section, a 90% holder in relation to a class of securities of a company may compulsorily acquire all the securities in that class in which neither the person nor any related bodies corporate has full beneficial interests if either:

Section 664AA

- (a) the holders of securities in that class (if any) who have objected to the acquisition between them hold less than 10% by value of those remaining securities at the end of the objection period set out in the notice under paragraph 664C(1)(b); or
- (b) the Court approves the acquisition under section 664F.

If subsection (2) applies to the 90% holder, the holder may compulsorily acquire securities in a class only if the holder gives compulsory acquisition notices in relation to all classes of shares and securities convertible into shares of which they do not already have full beneficial ownership.

Note: Subsection 92(3) defines *securities* for the purposes of this Chapter.

- (4) This section has effect despite anything in the constitution of the company whose securities are to be acquired.
- (5) This Part does not apply to shares that give the shareholder, as a shareholder, a right to occupy or use real property that the company owns or holds under lease, whether the right is a lease or licence or a contractual right.
- (6) The 90% holder's power to compulsorily acquire securities under a notice given under section 664C ends if the 90% holder contravenes section 664D by offering benefits outside the terms proposed in the compulsory acquisition notice under section 664C.

664AA Time limit on exercising compulsory acquisition power

The 90% holder in relation to a class of securities of a company may compulsorily acquire securities in that class under section 664A only if the holder lodges the compulsory acquisition notice for the acquisition with ASIC under paragraph 664C(2)(a) within whichever of the following periods ends last:

- (a) the period of 12 months that started on 13 March 2000; or
- (b) the period of 6 months after the 90% holder becomes the 90% holder in relation to that class.

664B The terms for compulsory acquisition

- (1) The 90% holder may acquire the securities in the class for a cash sum only and, subject to subsection (2), must pay the same amount for each security in the class acquired.

- (2) The 90% holder may pay different amounts for the securities in the class acquired if the differences are attributable to either or both of the following:
- (a) the fact that there are differences in the accrued dividend or distribution entitlements of the securities;
 - (b) the fact that there are differences in the amounts paid up, or that remain unpaid, on the securities.

664C Compulsory acquisition notice

Compulsory acquisition notice

- (1) To compulsorily acquire securities under section 664A, the 90% holder must prepare a notice in the prescribed form that:
- (a) sets out the cash sum for which the 90% holder proposes to acquire the securities; and
 - (b) specifies a period of at least 1 month during which the holders may return the objection forms; and
 - (c) informs the holders about the compulsory acquisition procedure under this Part, including:
 - (i) their right to obtain the names and addresses of the other holders of securities in that class from the company register; and
 - (ii) their right to object to the acquisition by returning the objection form that accompanies the notice within the period specified in the notice; and
 - (d) gives details of the consideration given for any securities in that class that the 90% holder or an associate has purchased within the last 12 months; and
 - (e) discloses any other information that is:
 - (i) known to the 90% holder or any related bodies corporate; and
 - (ii) material to deciding whether to object to the acquisition; and
 - (iii) not disclosed in an expert's report under section 667A.
- (2) The 90% holder must then:
- (a) lodge the notice with ASIC; and

Section 664C

- (b) give each other person (other than a related body corporate) who is a holder of securities in the class on the day on which the notice is lodged with ASIC:
 - (i) the notice; and
 - (ii) a copy of the expert's report, or of all experts' reports, under section 667A; and
 - (iii) an objection form; and
- (c) give the company copies of those documents; and
- (d) give copies of those documents to the relevant market operator if the company is listed.

Note: Everyone who holds the securities on the day on which the notice is lodged with ASIC is entitled to notice. Under subsection 664E(1), anyone who acquires the securities during the objection period may object to the acquisition.

Time for dispatching notice to holders

- (3) The 90% holder must dispatch the notices under paragraph (2)(b) on the day the 90% holder lodges the notice with ASIC or on the next business day.

Manner of giving notice to holders

- (4) The 90% holder may give the notice to a holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.A notice sent by post is taken to be given 3 days after it is posted.
- (5) The notice may be sent:
 - (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

Notice not to be withdrawn

- (6) The 90% holder may not:
 - (a) withdraw a notice under this section; or
 - (b) if the 90% holder has given a notice under this section in relation to those securities and the objection period for that notice has not ended—give another notice under this section in relation to securities.

664D Benefits outside compulsory acquisition procedure

- (1) If the 90% holder gives a notice under section 664C to compulsorily acquire securities, the 90% holder or an associate must not offer, give or agree to give a benefit to a person during the objection period if:
 - (a) the benefit is likely to induce the person, or an associate of the person, to:
 - (i) dispose of securities in that class; or
 - (ii) not object to the acquisition of those securities under the notice; and
 - (b) the benefit is not provided for in the notice.
- (2) If the 90% holder proposes to give a notice under section 664C to acquire securities within the next 4 months, the 90% holder or an associate must not offer, give or agree to give a benefit to a person if:
 - (a) the benefit is likely to induce the person, or an associate of the person, to:
 - (i) dispose of securities in that class; or
 - (ii) not object to the acquisition of those securities under the notice; and
 - (b) the benefit is not proposed to be provided for in the notice.
- (3) If the 90% holder gives a notice under section 664C to compulsorily acquire securities, the 90% holder or an associate must not give a benefit to a person:
 - (a) within 1 month after the end of the objection period (see subsection 664F(2)); or
 - (b) during any proceedings by the Court to determine an application under subsection 664F(1) by the 90% holder;

Section 664E

if:

- (c) the benefit is likely to induce the person, or an associate of the person, to:
 - (i) not object, or pursue an objection, to the acquisition of those securities under the notice; or
 - (ii) dispose of securities in that class; and
 - (d) the benefit is not offered to all holders of securities in that class under the notice.
- (3A) An offence based on subsection (1), (2) or (3) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (4) This section does not prohibit simultaneous notices under section 664C to compulsorily acquire different classes of securities in the company.

664E Holder's right to object to the acquisition

- (1) A person who holds securities covered by the compulsory acquisition notice may object to the acquisition of the securities by signing an objection form and returning it to the 90% holder. The objection:
 - (a) relates to all securities that are covered by the notice and are held by the person at the end of the objection period; and
 - (b) cannot be withdrawn.
- (2) The 90% holder must lodge with ASIC a copy of any objection form returned under subsection (1) as soon as practicable after it is returned.
- (3) As soon as practicable after the end of the objection period, the 90% holder must:
 - (a) prepare a list that sets out:
 - (i) the names of people who hold securities covered by the compulsory acquisition notice and have objected to the acquisition; and
 - (ii) details of the securities they hold; and
 - (b) lodge the list with ASIC; and
 - (c) give a copy of the list to the company; and

Section 664F

- (d) if the company is listed—give a copy to the relevant market operator.
- (4) If people who hold at least 10% of the securities covered by the compulsory acquisition notice object to the acquisition before the end of the objection period, the 90% holder must give everyone to whom the compulsory acquisition notice was sent under section 664C:
 - (a) a notice that the proposed acquisition will not occur; or
 - (b) a notice that the 90% holder has applied to the Court for approval of the acquisition under section 664F; within 1 month after the end of the objection period.
- (5) An offence based on subsection (2), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

664F The Court's power to approve acquisition

- (1) If people who hold at least 10% of the securities covered by the compulsory acquisition notice object to the acquisition before the end of the objection period, the 90% holder may apply to the Court for approval of the acquisition of the securities covered by the notice.
- (2) The 90% holder must apply within 1 month after the end of the objection period.
- (3) If the 90% holder establishes that the terms set out in the compulsory acquisition notice give a fair value for the securities, the Court must approve the acquisition of the securities on those terms. Otherwise it must confirm that the acquisition will not take place.

Note: See section 667C on valuation.

- (4) The 90% holder must bear the costs that a person incurs on legal proceedings in relation to the application unless the Court is satisfied that the person acted improperly, vexatiously or otherwise unreasonably. The 90% holder must bear their own costs.

664G Signpost—completing the acquisition of the securities

See section 666A for how to complete the acquisition.

Division 2—Compulsory buy-out of convertible securities by 100% holder

665A 100% holder must offer to buy out holders of convertible securities

- (1) A person is a 100% holder of securities in a class if the person, either alone or with a related body corporate, holds full beneficial interests in all the securities in the class.
- (2) A 100% holder in relation to a class of securities (the *main class*) who becomes a 100% holder through compulsory acquisitions under this Part must offer to buy out the holders of securities in another class that are convertible into main class securities in accordance with sections 665B and 665C. This subsection does not apply to securities if a notice is given in relation to the securities under section 661B, 662B or 664C.

Note: For when securities are convertible into main class securities, see the definition of *convertible securities* in section 9.

- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

665B 100% holder to tell holders of convertible securities of their right to be bought out

Notice to holders of convertible securities

- (1) The 100% holder must:
 - (a) prepare a notice in the prescribed form that:
 - (i) states that the person giving the notice has acquired all the securities in the main class; and
 - (ii) sets out the information that was included in the compulsory acquisition notice given in relation to securities in the main class under paragraphs 664C(1)(d) and (e); and
 - (iii) sets out the cash sum for which they are willing to acquire the convertible securities; and
 - (iv) informs the holder of convertible securities about their right to be bought out under this Part; and

- (b) lodge the notice with ASIC; and
- (c) give each other person who is a holder of convertible securities on the day on which the notice is lodged with ASIC:
 - (i) the notice; and
 - (ii) a copy of the expert's report, or all experts' reports, under section 667A; and
- (d) give a copy of the documents to the company that issued the securities; and
- (e) give a copy of the documents to each relevant market operator on the same day as it is lodged with ASIC if the company is listed.

Note 1: Subparagraph (a)(iv)—Section 667A deals with the contents of an expert's report.

Note 2: The notice is to be given to everyone who holds convertible securities on the day on which the notice is lodged with ASIC. Under section 665C, anyone who holds the securities after that day may require the 100% holder to acquire the securities.

Time for dispatching notice to holders

- (2) The 100% holder must dispatch the notices and reports under paragraph (1)(c):
 - (a) within 1 month after they become the 100% holder; and
 - (b) on the day the 100% holder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The 100% holder may give the notice or report to a holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.

A notice or report sent by post is taken to be given 3 days after it is posted.

- (4) The notice may be sent:
 - (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or

Section 665C

- (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

665C Right of holders of convertible securities to be bought out

- (1) Within 1 month after notice under section 665B is given in relation to convertible securities, the holder of the convertible securities may give the 100% holder a notice requiring the 100% holder to acquire the securities.
- (2) The notice by the holder of convertible securities gives rise to a contract between the holder and the 100% holder for the sale of the securities on:
 - (a) terms agreed to by the 100% holder and the holder of the convertible securities; or
 - (b) the terms determined by the Court on application by the holder of the convertible securities.
- (3) If the Court makes a determination under paragraph (2)(b) in relation to the terms of sale for a holder's convertible securities of a particular class, the determination applies to all holders of convertible securities in that class who have applications to the Court pending for a determination under that paragraph in relation to the terms of sale of their convertible securities.

Part 6A.3—Completion of compulsory acquisition of securities

666A Completing the acquisition of securities

Completion to be by private treaty or statutory procedure

- (1) A person entitled to acquire securities under section 661A or 664A must either:
- (a) pay, issue or transfer the consideration to the holder, take a transfer of the securities from the holder and have the company that issued the securities register the transfer; or
 - (b) complete the procedure laid down in section 666B; by the end of the period referred to in subsection (2) or (3).

Strict liability offences

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Time for completing compulsory acquisition following takeover

- (2) For an acquisition under section 661A, the period ends 14 days after the later of:
- (a) the end of 1 month after the compulsory acquisition notice was lodged with ASIC under section 661B; or
 - (b) the end of 14 days after the last statement under section 661D was given if a request is made under that section; or
 - (c) if an application to stop the acquisition is made to the Court under section 661E—the application is finally determined.

Time for completing compulsory acquisition under Part 6A.2

- (3) For an acquisition under section 664A or 664F, the period ends 14 days after the later of:
- (a) the end of the objection period; or

Section 666B

- (b) if an application for approval of the acquisition is made to the Court under section 664F in relation to the securities—the application is finally determined.

666B Statutory procedure for completion

- (1) Under this section, the person acquiring the securities must:
 - (a) give the company that issued the securities a copy of the compulsory acquisition notice under section 661B or 664C together with a transfer of the securities:
 - (i) signed as transferor by someone appointed by the person acquiring the securities; and
 - (ii) signed as transferee by the person acquiring the securities; and
 - (b) pay, issue or transfer the consideration for the transfer to the company that issued the securities.

The person appointed under subparagraph (a)(i) has authority to sign the transfer on behalf of the holder of the securities.

- (2) If the person acquiring the securities complies with subsection (1), the company that issued the securities must:
 - (a) register the person as the holder of the securities; and
 - (b) hold the consideration received under subsection (1) in trust for the person who held the securities immediately before registration; and
 - (c) give written notice to the person referred to in paragraph (b) as soon as practicable that the consideration has been received and is being held by the company pending their instructions as to how it is to be dealt with.
- (3) If the consideration held under subsection (2) consists of, or includes, money, that money must be paid into a bank account opened and maintained for that purpose only.
- (4) An offence based on subsection (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 6A.4—Experts' reports and valuations

667A Expert's report

- (1) An expert's report under section 663B, 664C or 665B must:
 - (a) be prepared by a person nominated by ASIC under section 667AA; and
 - (b) state whether, in the expert's opinion, the terms proposed in the notice give a fair value for the securities concerned; and
 - (c) set out the reasons for forming that opinion.

Note: See section 667C on valuation.

- (2) If the person giving the compulsory acquisition notice is relying on paragraph 664A(2)(c) to give the notice, the expert's report under section 664C must also:
 - (a) state whether, in the expert's opinion, the person (either alone or together with a related body corporate) has full beneficial ownership in at least 90% by value of all the securities of the company that are shares or convertible into shares; and
 - (b) set out the reasons for forming that opinion.
- (3) If the person giving the compulsory acquisition notice obtains 2 or more reports, each of which were obtained for the purposes of that notice, a copy of each report must be given to the holder of the securities.
- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

667AA Expert to be nominated

- (1) A person who proposes to obtain an expert's report for the purposes of section 663B, 664C or 665B must request ASIC in writing to nominate a person to prepare the expert's report.
- (2) Within 14 days after receiving a request under subsection (1), ASIC must nominate:
 - (a) an appropriate person to prepare the report; or

Section 667B

- (b) up to 5 appropriate persons, one of whom the person making the request may choose to prepare the report.
- (3) In determining whether a person is an appropriate person to prepare an expert's report, and without limiting the matters that ASIC may consider, ASIC must consider the nature of the company to be valued.

667B Expert must not be an associate and must disclose prior dealings and relationships

- (1) The expert who provides the report must not be an associate of:
 - (a) the person giving the notice; or
 - (b) the company that issued the securities.
- (2) The report must set out details of:
 - (a) any relationship between the expert and:
 - (i) the person giving the notice or an associate of the person giving the notice; or
 - (ii) the company that issued the securities or an associate of the company;including any circumstances in which the expert gives them advice, or acts on their behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with them; and
 - (b) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion in relation to the matter being reported on; and
 - (c) any fee, payment or other benefit (whether direct or indirect) that the expert has received or will or may receive in connection with the report.

667C Valuation of securities

- (1) To determine what is fair value for securities for the purposes of this Chapter:
 - (a) first, assess the value of the company as a whole; and
 - (b) then allocate that value among the classes of issued securities in the company (taking into account the relative financial risk, and voting and distribution rights, of the classes); and

Section 667C

- (c) then allocate the value of each class pro rata among the securities in that class (without allowing a premium or applying a discount for particular securities in that class).
- (2) Without limiting subsection (1), in determining what is fair value for securities for the purposes of this Chapter, the consideration (if any) paid for securities in that class within the previous 6 months must be taken into account.

Part 6A.5—Records of unclaimed consideration

668A Company's power to deal with unclaimed consideration for compulsory acquisition

Records of unclaimed compulsory acquisition consideration

- (1) If a company is paid consideration in respect of securities that are compulsorily acquired under Part 6A.1 or 6A.3, the company must maintain records of:
 - (a) the consideration paid (including any benefit accruing from the consideration and any property substituted for the whole or any part of that consideration); and
 - (b) the people who are entitled to that consideration; and
 - (c) any transfers of the consideration to the people entitled to it.
- (2) The company must keep the records at:
 - (a) its registered office; or
 - (b) its principal place of business in this jurisdiction; or
 - (c) another place in this jurisdiction approved by ASIC.
- (3) A person may ask the company to let the person inspect all or any of the records kept by the company under this section. The company must let the person inspect the records:
 - (a) if the company requires payment of an amount not exceeding the prescribed amount—within 7 days after the day on which the company receives that amount; or
 - (b) in any other case—within 7 days after the day on which the request is made.
- (4) By the end of February each year, the company must publish in the *Gazette* a copy of the records kept under subsection (1) as at the end of the previous December.
- (5) An offence based on subsection (1), (2), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

668B Unclaimed consideration to be transferred to ASIC

- (1) If the company has not transferred the unclaimed consideration to the person entitled to it within 12 months after the publication of a copy of the records in the *Gazette*, the company must transfer the consideration to ASIC within 1 month after the end of that 12 month period.
- (1A) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) The company is then discharged from liability to any person in respect of the consideration.
- (3) ASIC must deal with the consideration under Part 9.7.
- (4) Except as provided by subsection (2), this Part does not deprive a person of any right or remedy to which the person is entitled against a liquidator or company.

Part 6A.6—ASIC powers

669 ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.

Chapter 6B—Rights and liabilities in relation to Chapter 6 and 6A matters

670A Misstatements in, or omissions from, takeover and compulsory acquisition and buy-out documents

- (1) A person must not give:
- (a) a bidder's statement;
 - (b) a takeover offer document;
 - (c) a notice of variation of a takeover offer;
 - (d) a target's statement;
 - (e) a compulsory acquisition notice under section 661B or 664C;
 - (f) a compulsory buy-out notice under section 662B, 663B or 665B;
 - (g) a report that is included in, or accompanies, a statement or notice referred to in paragraphs (a) to (f);
- if there is:
- (h) for all documents—a misleading or deceptive statement in the document; or
 - (i) for a bidder's statement or target's statement—an omission from the document of material required by section 636 or 638; or
 - (j) for a bidder's statement or a target's statement—a new circumstance that:
 - (i) has arisen since the document was lodged; and
 - (ii) would have been required by section 636 or 638 to be included in the document if it had arisen before the document was lodged; or
 - (k) for an expert's report under subsection 636(2) or section 640, 663B, 664C or 665B—an omission from the report of material required by subsection 648A(3) or 667B(2).

Note 1: See section 670D for defences.

Note 2: Section 995 imposes liabilities in respect of other conduct related to the dealings in securities.

Section 670B

Forecasts and other forward-looking statement

- (2) A person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement. This subsection does not limit the meaning of a reference to a misleading statement or a statement that is misleading in a material particular.

Offence if statement, omission or new matter materially adverse

- (3) A person commits an offence if they contravene subsection (1) and:
- (a) the misleading or deceptive statement; or
 - (b) the omission or new circumstance;
- is materially adverse from the point of view of the holder of securities to whom the document is given.

670B Right to recover for loss or damage resulting from contravention

- (1) A person who suffers loss or damage that results from a contravention of subsection 670A(1) may recover the amount of the loss or damage from a person referred to in the following table if the loss or damage is one that the table makes the person liable for. This is so even if the person did not commit, and was not involved in, the contravention.

People liable on the document		[operative table]
<i>For these documents</i>		
	these people...	...are liable for loss or damages caused by
<i>bidder's statement or takeover offer document</i>		
1	the bidder	any contravention of subsection 670A(1) in relation to the document
2	each director of a bidder that is a body if the consideration offered under the bid is not a cash sum only	any contravention of subsection 670A(1) in relation to the document

Section 670B

People liable on the document		[operative table]
<i>For these documents</i>		
	these people...	...are liable for loss or damages caused by
3	a director of a bidder that is a body unless the director proves that they: (a) were not present when the directors resolved to adopt the statement or offer document; or (b) voted against the resolution; if the consideration offered under the bid is a cash sum only	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
<i>notice of variation of a takeover offer</i>		
4	the bidder	any contravention of subsection 670A(1) in relation to the document
5	a director of a bidder that is a body	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
<i>a target's statement</i>		
6	the target	any contravention of subsection 670A(1) in relation to the document
7	a director of the target unless the director proves that they: (a) were not present when the directors resolved to adopt the statement; or (b) voted against the resolution	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
<i>a compulsory acquisition or compulsory buy-out notice</i>		
8	the person giving the notice	any contravention of subsection 670A(1) in relation to the document
9	a director of a body corporate giving the notice unless the director proves that they: (a) were not present when the directors resolved to give the notice; or (b) voted against the resolution	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.

Section 670C

People liable on the document		[operative table]
<i>For these documents</i>		
these people...		...are liable for loss or damages caused by
10	<i>all documents</i> a person named in the document, with their consent, as having made a statement: (a) that is included in the document; or (b) on which a statement made in the document is based	the inclusion of the statement in the document
11	a person who contravenes, or is involved in a contravention of, subsection 670A(1)	that contravention

(2) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.

(3) This Chapter does not affect any liability that a person has under any other law.

Note: Conduct that contravenes subsection 670A(1) is expressly excluded from the operation of section 995.

670C People liable on takeover or compulsory acquisition statement to inform maker about deficiencies in the statement

- (1) A person referred to in the table in subsection 670B(1) in relation to a document must notify the issuer of the document in writing as soon as practicable if they become aware during the bid period or objection period that:
- (a) a material statement in the document is misleading or deceptive; or
 - (b) there is a material omission from the document of information required by section 636, 638 or 640; or
 - (c) a material new circumstance that:
 - (i) has arisen since the document was lodged; and
 - (ii) would have been required by section 636, 638 or 640 to be included in the document if it had arisen before the document was lodged.

- (2) An expert whose report accompanies, or is included in, a target's statement under section 640 must notify the target in writing as soon as practicable if they become aware during the bid period or objection period that:
 - (a) a material statement in the report is misleading or deceptive; or
 - (b) there has been a significant change affecting information included in the report.
- (3) An expert whose report accompanies, or is included in, a bidder's statement under subsection 636(2) must notify the bidder in writing as soon as practicable if they become aware during the bid period or objection period that:
 - (a) a material statement in the report is misleading or deceptive; or
 - (b) there has been a significant change affecting information included in the report.
- (4) An offence based on subsection (1), (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

670D Defences against prosecutions under subsection 670A(3) and actions under section 670B

Not knowing statement misleading or deceptive

- (1) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention of subsection 670A(1), because of a misleading or deceptive statement in a document if the person proves that they did not know that the statement was misleading or deceptive.

Not knowing there was an omission

- (2) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention of subsection 670A(1), because of an omission from a document in relation to a particular matter if the person proves that they did not know that there was an omission from the document in relation to that matter.

Section 670D

Reasonable reliance on information given by someone else—statements and omissions

- (3) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention against subsection 670A(1), because of a misleading or deceptive statement in, or an omission from, a document if the person proves that they placed reasonable reliance on information given to them by:
 - (a) if the person is a body—someone other than a director, employee or agent of the body; or
 - (b) if the person is an individual—someone other than an employee or agent of the individual.
- (4) For the purposes of subsection (3), a person is not the agent of a body or individual merely because they perform a particular professional or advisory function for the body or individual.

Withdrawal of consent—statements and omissions

- (5) A person who is named in a document as:
 - (a) making a statement included in the document; or
 - (b) making a statement on the basis of which a statement is included in the document;does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention against subsection 670A(1), because of a misleading or deceptive statement in, or an omission from, a document if the person proves that they publicly withdrew their consent to being named in the document in that way.

Unawareness of new matter

- (6) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention of subsection 670A(1), because of a new circumstance that has arisen since the document was lodged if the person proves that they were not aware of the matter.

670E Liability for proposing a bid or not carrying through with bid

- (1) A person who:
 - (a) enters into a transaction relating to securities in reliance on:
 - (i) a public proposal for a takeover bid; or
 - (ii) an announcement of a market bid; and
 - (b) suffers loss or damage that results from a contravention of section 631:

may recover the amount of the loss or damage from:

 - (c) the person who contravened the section; or
 - (d) any person involved in the contravention.
- (2) To determine the amount of compensation payable under subsection (1), deduct the price of the securities at which the transaction was entered into from the price of the securities at which the transaction would have been likely to be entered into if the proposal or announcement had not been made.

670F Defences

A person does not commit an offence under subsection 631(1) or (2), and is not liable under section 670E for a contravention of those subsections if the person proves that they could not reasonably have been expected to comply with those subsections because:

- (a) at the time of the proposal or announcement, circumstances existed that the person did not know of and could not reasonably have been expected to know of; or
- (b) after the proposal or announcement, a change in circumstances occurred that was not caused, directly or indirectly, by the person.

Section 671A

Chapter 6C—Information about ownership of listed companies and managed investment schemes

671A Chapter extends to some listed bodies that are not companies

This Chapter applies to the acquisition of relevant interests in the securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of relevant interests in the securities of companies.

Note: Section 9 defines *company* and *listed*.

Part 6C.1—Substantial holding information

671B Information about substantial holdings must be given to company, responsible entity and relevant market operator

Requirement to give information

- (1) A person must give the information referred to in subsection (3) to a listed company, or the responsible entity for a listed registered managed investment scheme, if:
- (a) the person begins to have, or ceases to have, a substantial holding in the company or scheme; or
 - (b) the person has a substantial holding in the company or scheme and there is a movement of at least 1% in their holding; or
 - (c) the person makes a takeover bid for securities of the company or scheme.

The person must also give the information to each relevant market operator.

Note 1: Section 9 defines *substantial holding* and *associate*.

Note 2: The information must be given even if the situation changes by the time the information is to be given.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) For the purposes of this section, there is a ***movement of at least 1%*** in a person's holding if the percentage worked out using the following formula increases or decreases by 1 or more percentage points from the percentage they last disclosed under this Part in relation to the company or scheme:

$$\frac{\text{Person's and associates' votes}}{\text{Total votes in company or scheme}} \times 100$$

where:

Section 671B

person's and associates' votes is the total number of votes attached to all the voting shares in the company or interests in the scheme (if any) that the person or an associate has a relevant interest in.

total votes in company or scheme is the total number of votes attached to all voting shares in the company or interests in the scheme.

Note: Subsection (7) expands the normal concept of relevant interest to take account of market traded options and conditional agreements.

Information that must be given

- (3) The information to be given is:
- (a) the person's name and address; and
 - (b) details of their relevant interest in:
 - (i) voting shares in the company; or
 - (ii) interests in the scheme; and
 - (c) details of any relevant agreement through which they would have a relevant interest in:
 - (i) voting shares in the company; or
 - (ii) interests in the scheme; and
 - (d) the name of each associate who has a relevant interest in voting shares in the company or interests in the scheme, together with details of:
 - (i) the nature of their association with the associate; and
 - (ii) the relevant interest of the associate; and
 - (iii) any relevant agreement through which the associate has the relevant interest; and
 - (e) if the information is being given because of a movement in their holding—the size and date of that movement; and
 - (f) if the information is being given because a person has ceased to be an associate—the name of the person; and
 - (g) any other particulars that are prescribed.

Note: Subsection (7) expands the normal concept of relevant interest to take account of market traded options and conditional agreements.

Section 671B

Information to be in prescribed form and accompanied by certain documents

- (4) The information must be given in the prescribed form and must be accompanied by:
- (a) a copy of any document setting out the terms of any relevant agreement that:
 - (i) contributed to the situation giving rise to the person needing to provide the information; and
 - (ii) is in writing and readily available to the person; and
 - (b) a statement by the person giving full and accurate details of any contract, scheme or arrangement that:
 - (i) contributed to the situation giving rise to the person needing to provide the information; and
 - (ii) is not both in writing and readily available to the person.
- If the person is required to give a copy of a contract, scheme or arrangement, the copy must be endorsed with a statement that the copy is a true copy.
- (5) The information does not need to be accompanied by the documents referred to in subsection (4) if the transaction that gives rise to the person needing to provide the information takes place on a prescribed financial market.

Deadline for giving information

- (6) The person must give the information:
- (a) within 2 business days after they become aware of the information; or
 - (b) by 9.30 am on the next trading day of the relevant financial market after they become aware of the information if:
 - (i) a takeover bid is made for voting shares in the company or voting interests in the scheme; and
 - (ii) the person becomes aware of the information during the bid period.

Relevant interests—exchange traded options and conditional agreements

- (7) For the purposes of this section, a person has a relevant interest in securities if the person would have a relevant interest in the

Section 671C

securities but for subsection 609(6) (market traded options) or 609(7) (conditional agreements).

671C Civil liability

- (1) A person who contravenes section 671B is liable to compensate a person for any loss or damage the person suffers because of the contravention.
- (2) It is a defence in proceedings brought under this section if the person who contravenes section 671B proves that they contravened that section:
 - (a) because of inadvertence or mistake; or
 - (b) because they were not aware of a relevant fact or occurrence.In determining whether the defence is available, disregard the person's ignorance of, or a mistake on the person's part concerning, a matter of law.
- (3) If 2 or more persons each contravene section 671B because of the same act or omission, their liability under this section for the contravention is joint and individual.

Part 6C.2—Tracing beneficial ownership of shares

672A Disclosure notices

- (1) ASIC, a listed company or the responsible entity for a listed managed investment scheme, may direct:
 - (a) a member of the company or scheme; or
 - (b) a person named in a previous disclosure under section 672B as having a relevant interest in, or having given instructions about, voting shares in the company or interests in the scheme;to make the disclosure required by section 672B.
- (2) ASIC must exercise its powers under this section if requested to do so by a member of the company or scheme unless it considers that it would be unreasonable to do so in all the circumstances.

672B Disclosure by member of relevant interests and instructions

- (1) A person given a direction under section 672A must disclose to the person giving the direction:
 - (a) full details of their own relevant interest in the shares or interests in the scheme and of the circumstances that give rise to that interest; and
 - (b) the name and address of each other person who has a relevant interest in any of the shares or interests together with full details of:
 - (i) the nature and extent of the interest; and
 - (ii) the circumstances that give rise to the other person's interest; and
 - (c) the name and address of each person who has given the person instructions about:
 - (i) the acquisition or disposal of the shares or interests; or
 - (ii) the exercise of any voting or other rights attached to the shares or interests; or
 - (iii) any other matter relating to the shares or interests; together with full details of those instructions (including the date or dates on which they were given).

Section 672C

- (1A) However, a matter referred to in paragraph (1)(b) or (c) need only be disclosed to the extent to which it is known to the person required to make the disclosure.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

- (1B) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The disclosure must be made within 2 business days after:
- (a) the person is given the direction; or
 - (b) if the person applies for an exemption under section 673 from the obligation to make the disclosure and ASIC refuses to grant the exemption—ASIC notifies the person of its decision on the application; or
 - (c) if the direction is given by a company or responsible entity—the company or responsible entity pays any fee payable under the regulations made for the purposes of section 672D.
- (3) The person does not have to comply with a direction given by the company or the responsible entity if the person proves that the giving of the direction is vexatious.

672C ASIC may pass information on to person who made request

If ASIC receives information in response to a direction under section 672A about shares in a company or interests in a listed managed investment scheme, ASIC:

- (a) may pass the information on to the company or the responsible entity for the scheme; and
- (b) if ASIC gave the direction in response to a request under subsection 672A(2)—must pass the information on to the person who made the request unless ASIC considers it would be unreasonable in all the circumstances to do so.

672D Fee for complying with a direction given by a company or scheme under this Part

- (1) The regulations may prescribe fees that companies and responsible entities are to pay to persons for complying with directions given under this Part.

Section 672DA

- (2) A person is liable to repay a fee paid to the person for complying with a direction under section 672A if the person does not comply with the direction on time even if the person does so later. The fee may be recovered as a debt due to the company or responsible entity that paid it to the person.

672DA Register of information about relevant interests in listed company or listed managed investment scheme

- (1) A listed company, or the responsible entity for a listed managed investment scheme, must keep a register of the following information that it receives under this Part on or after 1 January 2005 (whether the information is received pursuant to a direction the company, or responsible entity, itself gives under section 672A or is received from ASIC under section 672C):
- (a) details of the nature and extent of a person's relevant interest in shares in the company or interests in the scheme;
 - (b) details of the circumstances that give rise to a person's relevant interest in shares in the company or interests in the scheme;
 - (c) the name and address of a person who has a relevant interest in shares in the company or interests in the scheme;
 - (d) details of instructions that a person has given about:
 - (i) the acquisition or disposal of shares in the company or interests in the scheme; or
 - (ii) the exercise of any voting or other rights attached to shares in the company or interests in the scheme; or
 - (iii) any other matter relating to shares in the company or interests in the scheme;
 - (e) the name and address of a person who has given instructions of the kind referred to in paragraph (d).

The register must be kept in accordance with this section.

- (2) A register kept under this section by a listed company must be kept at:
- (a) the company's registered office; or
 - (b) the company's principal place of business in this jurisdiction; or

Section 672DA

- (c) a place in this jurisdiction (whether or not an office of the company) where the work involved in maintaining the register is done; or
 - (d) another place in this jurisdiction approved by ASIC.
- (3) A register kept under this section by the responsible entity of a listed managed investment scheme must be kept at:
 - (a) the responsible entity's registered office; or
 - (b) the responsible entity's principal place of business in this jurisdiction; or
 - (c) a place in this jurisdiction (whether or not an office of the responsible entity) where the work involved in maintaining the register is done; or
 - (d) another place in this jurisdiction approved by ASIC.
- (4) The company, or the responsible entity, must lodge with ASIC a notice of the address at which the register is kept within 7 days after the register is:
 - (a) established at a place that:
 - (i) is not the registered office of the company or responsible entity; and
 - (ii) is not at the principal place of business of the company or responsible entity in this jurisdiction; or
 - (b) moved from one place to another.

Notice is not required for moving the register between the registered office and the principal place of business in this jurisdiction.

Note: The obligation to notify ASIC under this subsection is a continuing obligation and the company or responsible entity is guilty of an offence for each day, after the 7 day period, until ASIC is notified (see section 4K of the *Crimes Act 1914*).

- (5) An offence based on subsection (2), (3) or (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (6) The register must either contain:
 - (a) the name of each holder of shares in the company, or interests in the scheme, to whom the information relates; and

Section 672DA

- (b) against the name of each such holder:
 - (i) the name and address of each other person (if any) who, according to information the company, or the responsible entity, has received under this Part on or after 1 January 2005, has a relevant interest in any of the shares or interests (together with details of the relevant interest and of the circumstances because of which the other person has the relevant interest); and
 - (ii) the name and address of each person who, according to information received by the company, or the responsible entity, under this Part on or after 1 January 2005, has given relevant instructions in relation to any of the shares or interests (together with details of those relevant instructions); and
 - (c) in relation to each item of information entered in the register, the date on which the item was entered in the register; or be in such other form as ASIC approves in writing.
- (7) The register must be open for inspection:
- (a) by any member of the company or scheme—without charge; and
 - (b) by any other person:
 - (i) if the company, or the responsible entity, requires the payment of a fee for the inspection—on payment of the fee; or
 - (ii) if the company, or the responsible entity, does not require the payment of a fee for the inspection—without charge.

The amount of the fee required by the company, or the responsible entity, under subparagraph (b)(i) must not exceed the amount prescribed by the regulations for the purposes of this subsection.

- (8) A person may request the company, or the responsible entity, to give to the person a copy of the register (or any part of the register) and, if such a request is made, the company, or the responsible entity, must give the person the copy:
- (a) if the company, or the responsible entity, requires payment of a fee for the copy:

Section 672E

- (i) before the end of 21 days after the day on which the payment of the fee is received by the company or the responsible entity; or
- (ii) within such longer period as ASIC approves in writing; or
- (b) if the company, or the responsible entity, does not require payment of a fee for the copy:
 - (i) before the end of 21 days after the day on which the request is made; or
 - (ii) within such longer period as ASIC approves in writing.

The amount of the fee required by the company, or the responsible entity, under paragraph (a) must not exceed the amount prescribed by the regulations for the purposes of this subsection.

Note: The obligation to give the copy under this subsection is a continuing obligation and the company or responsible entity is guilty of an offence for each day, after the period referred to in paragraph (a) or (b), until the copy is given (see section 4K of the *Crimes Act 1914*).

- (9) The information that subsection (6) requires to be entered in the register must be entered in the register by the company, or the responsible entity, before the end of 2 business days after the day on which the company, or the responsible entity, receives the information.

Note: The obligation to enter the details in the register under this subsection is a continuing obligation and the company or responsible entity is guilty of an offence for each day, after the 2 business day period, until the details are entered in the register (see section 4K of the *Crimes Act 1914*).

672E No notice of rights

A company or responsible entity is not, because of anything done under this Part:

- (a) taken for any purpose to have notice of; or
 - (b) put on inquiry as to;
- a person's right in relation to a share in the company or an interest in the listed managed investment scheme.

Section 672F

672F Civil liability

- (1) A person who contravenes section 672B is liable to compensate a person for any loss or damage the person suffers because of the contravention.
- (2) It is a defence in proceedings brought under this section if the person who contravenes section 672B proves that they contravened that section:
 - (a) because of inadvertence or mistake; or
 - (b) because they were not aware of a relevant fact or occurrence.In determining whether the defence is available, disregard the person's ignorance of, or a mistake on the person's part concerning, a matter of law.
- (3) If 2 or more persons each contravene section 672B because of the same act or omission, their liability under this section for the contravention is joint and individual.

Part 6C.3—ASIC powers

673 ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) In deciding whether to give the exemption or declaration, ASIC must consider the purposes of Chapter 6 set out in section 602.
- (3) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (6) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.

Chapter 6CA—Continuous disclosure

674 Continuous disclosure—listed disclosing entity bound by a disclosure requirement in market listing rules

Obligation to disclose in accordance with listing rules

- (1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.
- (2) If:
- (a) this subsection applies to a listed disclosing entity; and
 - (b) the entity has information that those provisions require the entity to notify to the market operator; and
 - (c) that information:
 - (i) is not generally available; and
 - (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

the entity must notify the market operator of that information in accordance with those provisions.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: An infringement notice may be issued for an alleged contravention of this subsection, see section 1317DAC.

- (2A) A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 2: Section 79 defines *involved*.

Section 675

- (2B) A person does not contravene subsection (2A) if the person proves that they:
- (a) took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection (2); and
 - (b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.
- (3) For the purposes of the application of subsection (2) to a listed disclosing entity that is an undertaking to which interests in a registered scheme relate, the obligation of the entity to notify the market operator of information is an obligation of the responsible entity.
- (4) Nothing in subsection (2) is intended to affect or limit the situations in which action can be taken (otherwise than by way of a prosecution for an offence based on subsection (2)) in respect of a failure to comply with provisions referred to in subsection (1).

Obligation to make provisions of listing rules available

- (5) If the listing rules of a listing market in relation to a listed disclosing entity contain provisions of a kind referred to in subsection (1), the market operator must ensure that those provisions are available, on reasonable terms, to:
- (a) the entity; or
 - (b) if the entity is an undertaking to which interests in a registered scheme relate—the undertaking's responsible entity.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

675 Continuous disclosure—other disclosing entities

- (1) This section applies to:
- (a) a listed disclosing entity if:
 - (i) there is only one listing market in relation to the entity and the listing rules of that market do not contain provisions of a kind referred to in subsection 674(1); or
 - (ii) there is more than one listing market in relation to the entity and none of those markets have listing rules that

Section 675

contain provisions of a kind referred to in subsection 674(1); or

(b) an unlisted disclosing entity.

(2) If the disclosing entity becomes aware of information:

(a) that is not generally available; and

(b) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity; and

(c) either:

(i) if those securities are not managed investment products—the information is not required to be included in a supplementary disclosure document or a replacement disclosure document in relation to the entity; or

(ii) if those securities are managed investment products—the information has not been included in a Product Disclosure Statement, a Supplementary Product Disclosure Statement, or a Replacement Product Disclosure Statement, a copy of which has been lodged with ASIC; and

(d) regulations made for the purposes of this paragraph do not provide that disclosure under this section is not required in the circumstances;

the disclosing entity must, as soon as practicable, lodge a document with ASIC containing the information.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: An infringement notice may be issued for an alleged contravention of this subsection, see section 1317DAC.

Note 4: Subsection (2) has an extended operation in relation to disclosing entities that have made recognised offers of securities under Chapter 8 (see section 1200K).

(2A) A person who is involved in a disclosing entity's contravention of subsection (2) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Section 676

Note 2: Section 79 defines *involved*.

- (2B) A person does not contravene subsection (2A) if the person proves that they:
- (a) took all steps (if any) that were reasonable in the circumstances to ensure that the disclosing entity complied with its obligations under subsection (2); and
 - (b) after doing so, believed on reasonable grounds that the disclosing entity was complying with its obligations under that subsection.
- (3) For the purposes of the application of this section to a disclosing entity that is an undertaking to which interests in a registered scheme relate:
- (a) the entity is aware of information if, and only if, the responsible entity is aware of the information; and
 - (b) the obligation of the entity to lodge a document under subsection (2) is an obligation of the responsible entity.

676 Sections 674 and 675—when information is generally available

- (1) This section has effect for the purposes of sections 674 and 675.
- (2) Information is generally available if:
 - (a) it consists of readily observable matter; or
 - (b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:
 - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and
 - (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.
- (3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
 - (a) information referred to in paragraph (2)(a);
 - (b) information made known as mentioned in subparagraph (2)(b)(i).

Section 677**677 Sections 674 and 675—material effect on price or value**

For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

678 Application of *Criminal Code* to offences based on subsection 674(2), 674(5) or 675(2)

The *Criminal Code* applies to an offence based on subsection 674(2), 674(5) or 675(2).

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: For the meaning of *offence based on* a provision, see the definition in section 9.

Chapter 6D—Fundraising

Part 6D.1—Application of the fundraising provisions

700 Coverage of the fundraising rules

- (1) In this Chapter, *securities* has the same meaning as it has in Chapter 7, but does not include a security referred to in paragraph (e) of the definition of *security* in section 761A.

Offers and invitations both covered

- (2) For the purposes of this Chapter:
- (a) offering securities for issue includes inviting applications for the issue of the securities; and
 - (b) offering securities for sale includes inviting offers to purchase the securities.

Person offering securities

- (3) For the purposes of this Chapter, the person who offers securities is the person who has the capacity, or who agrees, to issue or transfer the securities if the offer is accepted.

Geographical coverage of Chapter

- (4) This Chapter applies to offers of securities that are received in this jurisdiction, regardless of where any resulting issue, sale or transfer occurs.

702 Treatment of offers of options over securities

For the purposes of this Chapter:

- (a) an offer of an option over securities is not taken to be an offer of the underlying securities; and
- (b) the grant of an option without an offer of the option is taken to be an offer of the option; and
- (c) an offer to grant an option is taken to be an offer to issue the security constituted by the option.

Section 703

- Note 1: If a disclosure document is needed for the option and there is no further offer involved in exercising the option, the issue or sale of the underlying securities on the exercise of the option does not need a disclosure document.
- Note 2: Paragraph (b)—the grant of the option will not require a disclosure document if no consideration is payable on the grant or the exercise of the option (see subsections 708(15) and (16)).

703 Chapter may not be contracted out of

A condition of a contract for the sale or issue of securities is void if it provides that a party to the contract is:

- (a) required or bound to waive compliance with any requirement of this Chapter; or
- (b) taken to have notice of any contract, document or matter not specifically referred to in the disclosure document for the offer.

703A Operating a clearing and settlement facility is not offering securities etc.

Nothing that the operator of a clearing and settlement facility (within the meaning of Chapter 7) does in the course of, or in connection with, providing facilities for the settlement of transactions constitutes, for the purposes of this Chapter:

- (a) an offer of securities for subscription or purchase; or
- (b) an invitation to subscribe for or buy securities.

Part 6D.2—Disclosure to investors about securities

Division 1—Overview

704 When disclosure to investors is needed

Sections 706, 707, 708, 708AA and 708A say when an offer of securities needs disclosure to investors under this Part.

Note 1: Section 727 prohibits offering securities without disclosure.

Note 2: If the offer needs disclosure, section 734 applies advertising restrictions. These continue throughout the whole offer process. Different restrictions apply before and after the disclosure document is lodged.

Note 3: The way the offers are made to people must not breach the securities hawking prohibition in section 736.

705 Types of disclosure document

The following table shows what disclosure documents to use if an offer of securities needs disclosure to investors under this Part.

Disclosure document		
	Type	Sections
1	<i>prospectus</i> The standard full-disclosure document.	content [710, 711, 713] procedure [717] liability [728 and 729] defences [731, 733]
2	<i>short form prospectus</i> May be used for any offer. Section 712 allows a prospectus to refer to material lodged with ASIC instead of setting it out. Investors are entitled to a copy of this material if they ask for it.	content [712]

Disclosure document		
	Type	Sections
3	<i>profile statement</i> Section 721 allows a brief profile statement (rather than the prospectus) to be sent out with offers with ASIC approval. The prospectus must still be prepared and lodged with ASIC. Investors are entitled to a copy of the prospectus if they ask for it.	content [714] procedure [717] liability [728 and 729] defences [732, 733]
4	<i>offer information statement</i> Section 709 allows an offer information statement to be used instead of a prospectus for an offer to issue securities if the amount raised from issues of securities is \$10 million or less.	content [715] procedure [717] liability [728 and 729] defences [732, 733]

Division 2—Offers that need disclosure to investors

706 Issue offers that need disclosure

An offer of securities for issue needs disclosure to investors under this Part unless section 708 or 708AA says otherwise.

707 Sale offers that need disclosure

Only some sales need disclosure

- (1) An offer of securities for sale needs disclosure to investors under this Part only if disclosure is required by subsection (2), (3) or (5).

Off-market sale by controller

- (2) An offer of a body's securities for sale needs disclosure to investors under this Part if:
 - (a) the person making the offer controls the body; and
 - (b) either:
 - (i) the securities are not quoted; or
 - (ii) although the securities are quoted, they are not offered for sale in the ordinary course of trading on a relevant financial market;

and section 708 does not say otherwise.

Note: See section 50AA for when a person controls a body.

Sale amounting to indirect issue

- (3) An offer of a body's securities for sale within 12 months after their issue needs disclosure to investors under this Part if:
 - (a) the body issued the securities without disclosure to investors under this Part; and
 - (b) either:
 - (i) the body issued the securities with the purpose of the person to whom they were issued selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; or
 - (ii) the person to whom the securities were issued acquired them with the purpose of selling or transferring the

securities, or granting, issuing or transferring interests
in, or options over, them;

and section 708 or 708A does not say otherwise.

Note 1: Section 706 normally requires disclosure for the issue of securities.
This subsection is intended to prevent avoidance of section 706.
However, to establish a contravention of this subsection, the only
purpose that needs to be shown is that referred to in paragraph (b).

Note 2: The issuer and the seller must both consent to the disclosure document
(see section 720).

The purpose test in subsection (3)

(4) For the purposes of subsection (3):

(a) securities are taken to be:

(i) issued with the purpose referred to in
subparagraph (3)(b)(i); or

(ii) acquired with the purpose referred to in
subparagraph (3)(b)(ii);

if there are reasonable grounds for concluding that the
securities were issued or acquired with that purpose (whether
or not there may have been other purposes for the issue or
acquisition); and

(b) without limiting paragraph (a), securities are taken to be:

(i) issued with the purpose referred to in
subparagraph (3)(b)(i); or

(ii) acquired with the purpose referred to in
subparagraph (3)(b)(ii);

if any of the securities are subsequently sold, or offered for
sale, within 12 months after issue, unless it is proved that the
circumstances of the issue and the subsequent sale or offer
are not such as to give rise to reasonable grounds for
concluding that the securities were issued or acquired with
that purpose.

Sale amounting to indirect off-market sale by controller

(5) An offer of a body's securities for sale within 12 months after their
sale by a person who controlled the body at the time of the sale
needs disclosure to investors under this Part if:

(a) at the time of the sale by the controller either:

(i) the securities were not quoted; or

Section 707

- (ii) although the securities were quoted, they were not offered for sale in the ordinary course of trading on a relevant financial market on which they were quoted; and
- (b) the controller sold the securities without disclosure to investors under this Part; and
- (c) either:
 - (i) the controller sold the securities with the purpose of the person to whom they were sold selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; or
 - (ii) the person to whom the securities were sold acquired them with the purpose of selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them;

and section 708 does not say otherwise.

Note 1: Subsection (2) normally requires disclosure for a sale by a controller. This subsection is intended to prevent avoidance of subsection (2). However, to establish a contravention of this subsection, the only purpose that needs to be shown is that referred to in paragraph (c).

Note 2: See section 50AA for when a person controls a body.

Note 3: The controller and the seller must both consent to the disclosure document (see section 720).

The purpose test in subsection (5)

- (6) For the purposes of subsection (5):
 - (a) securities are taken to be:
 - (i) sold with the purpose referred to in subparagraph (5)(c)(i); or
 - (ii) acquired with the purpose referred to in subparagraph (5)(c)(ii);if there are reasonable grounds for concluding that the securities were sold or acquired with that purpose (whether or not there may have been other purposes for the sale or acquisition); and
 - (b) without limiting paragraph (a), securities are taken to be:
 - (i) sold with the purpose referred to in subparagraph (5)(c)(i); or

- (ii) acquired with the purpose referred to in subparagraph (5)(c)(ii);
if any of the securities are subsequently sold, or offered for sale, within 12 months after their sale by the controller, unless it is proved that the circumstances of the initial sale and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the securities were sold or acquired (in the initial sale) with that purpose.

708 Offers that do not need disclosure

Small scale offerings (20 issues or sales in 12 months)

- (1) Personal offers of a body's securities by a person do not need disclosure to investors under this Part if:
 - (a) none of the offers results in a breach of the 20 investors ceiling (see subsections (3) and (4)); and
 - (b) none of the offers results in a breach of the \$2 million ceiling (see subsections (3) and (4)).

This subsection does not apply to an offer for sale to which subsection 707(3) (sale amounting to indirect issue) or (5) (sale amounting to indirect sale by controller) applies.

Note 1: Subsection 727(4) makes it an offence to issue or transfer securities without disclosure to investors once 20 issues or transfers have occurred or \$2 million has been raised.

Note 2: Under section 740 ASIC may make a determination aggregating the transactions of bodies that ASIC considers to be closely related.

- (2) For the purposes of subsection (1), a personal offer is one that:
 - (a) may only be accepted by the person to whom it is made; and
 - (b) is made to a person who is likely to be interested in the offer, having regard to:
 - (i) previous contact between the person making the offer and that person; or
 - (ii) some professional or other connection between the person making the offer and that person; or
 - (iii) statements or actions by that person that indicate that they are interested in offers of that kind.

Section 708

- (3) An offer by a body to issue securities:
 - (a) results in a breach of the 20 investors ceiling if it results in the number of people to whom securities of the body have been issued exceeding 20 in any 12 month period; and
 - (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the body by issuing securities exceeding \$2 million in any 12 month period.
 - (4) An offer by a person to transfer a body's securities:
 - (a) results in a breach of the 20 investors ceiling if it results in the number of people to whom the person sells securities of the body exceeding 20 in any 12 month period; and
 - (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the person from selling the body's securities exceeding \$2 million in any 12 month period.
 - (5) In counting issues and sales of the body's securities, and the amount raised from issues and sales, for the purposes of subsection (1), disregard issues and sales that result from offers that:
 - (a) do not need a disclosure document because of any other subsection of this section; or
 - (b) are not received in Australia; or
 - (c) are made under a disclosure document.
- Note: Also see provisions on restrictions on advertising (section 734) and securities hawking provisions (Part 6D.3).
- (7) In working out the amount of money raised by the body by issuing securities, include the following:
 - (a) the amount payable for the securities at the time when they are issued;
 - (b) if the securities are shares issued partly-paid—any amount payable at a future time if a call is made;
 - (c) if the security is an option—any amount payable on the exercise of the option;
 - (d) if the securities carry a right to convert the securities into other securities—any amount payable on the exercise of that right.

Sophisticated investors

- (8) An offer of a body's securities does not need disclosure to investors under this Part if:
- (a) the minimum amount payable for the securities on acceptance of the offer by the person to whom the offer is made is at least \$500,000; or
 - (b) the amount payable for the securities on acceptance by the person to whom the offer is made and the amounts previously paid by the person for the body's securities of the same class that are held by the person add up to at least \$500,000; or
 - (c) it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made that the person to whom the offer is made:
 - (i) has net assets of at least the amount specified in regulations made for the purposes of this subparagraph; or
 - (ii) has a gross income for each of the last 2 financial years of at least the amount specified in regulations made for the purposes of this subparagraph a year; or
 - (d) the offer is made to a company or trust controlled by a person who meets the requirements of subparagraph (c)(i) or (ii).

Note 1: Section 9 defines *qualified accountant*.

Note 2: A financial services licensee has obligations under Division 3 of Part 7.7 when providing financial advice. ASIC has a power under section 915C to suspend or cancel a licensee's licence.

- (9) In calculating the amount payable, or paid, for securities for the purposes of paragraph (8)(a) or (b), disregard any amount payable, or paid, to the extent to which it is to be paid, or was paid, out of money lent by the person offering the securities or an associate.
- (9A) In addition to specifying amounts for the purposes of subparagraphs (8)(c)(i) and (ii), the regulations may do either or both of the following:
- (a) deal with how net assets referred to in subparagraph (8)(c)(i) are to be determined and valued, either generally or in specified circumstances;
 - (b) deal with how gross income referred to in subparagraph (8)(c)(ii) is to be calculated, either generally or in specified circumstances.

Section 708

- (9B) In determining the net assets of a person under subparagraph (8)(c)(i), the net assets of a company or trust controlled by the person may be included.

Note: **Control** is defined in section 50AA.

- (9C) In determining the gross income of a person under subparagraph (8)(c)(ii), the gross income of a company or trust controlled by the person may be included.

Note: **Control** is defined in section 50AA.

- (10) An offer of a body's securities does not need disclosure to investors under this Part if:
- (a) the offer is made through a financial services licensee; and
 - (b) the licensee is satisfied on reasonable grounds that the person to whom the offer is made has previous experience in investing in securities that allows them to assess:
 - (i) the merits of the offer; and
 - (ii) the value of the securities; and
 - (iii) the risks involved in accepting the offer; and
 - (iv) their own information needs; and
 - (v) the adequacy of the information given by the person making the offer; and
 - (c) the licensee gives the person before, or at the time when, the offer is made a written statement of the licensee's reasons for being satisfied as to those matters; and
 - (d) the person to whom the offer is made signs a written acknowledgment before, or at the time when, the offer is made that the licensee has not given the person a disclosure document under this Part in relation to the offer.

Professional investors

- (11) An offer of securities does not need disclosure to investors under this Part if it is made to:
- (a) a person covered by the definition of **professional investor** in section 9 (except a person mentioned in paragraph (e) of the definition); or
 - (b) a person who has or controls gross assets of at least \$10 million (including any assets held by an associate or under a trust that the person manages).

Offers of securities to people associated with the body

- (12) An offer of a body's securities does not need disclosure to investors under this Part if it is made to:
- (a) a senior manager of the body or a related body or their spouse, parent, child, brother or sister; or
 - (b) a body corporate controlled by a person referred to in paragraph (a).

Certain offers to present holder of securities

- (13) An offer of securities for issue does not need disclosure to investors under this Part if it is:
- (a) an offer of fully-paid shares in a body to 1 or more existing holders of shares in the body under a dividend reinvestment plan or bonus share plan; or
 - (b) an offer of interests in a managed investment scheme to 1 or more existing holders of interests in the scheme if:
 - (i) the offer is made under a distribution reinvestment plan or switching facility; or
 - (ii) the scheme is of a kind commonly known as a cash common fund or cash management trust.
- (14) An offer of a disclosing entity's debentures for issue does not need disclosure to investors under this Part if the offer is made to 1 or more existing debenture holders.

Issues or sales for no consideration

- (15) An offer of securities (other than options) does not need disclosure to investors under this Part if no consideration is to be provided for the issue or transfer of the securities.
- (16) An offer of options does not need disclosure to investors under this Part if:
- (a) no consideration is to be provided for the issue or transfer of the options; and
 - (b) no consideration is to be provided for the underlying securities on the exercise of the option.

Section 708

Compromise or arrangement under Part 5.1

- (17) An offer of securities does not need disclosure to investors under this Part if it is made under a compromise or arrangement under Part 5.1 approved at a meeting held as a result of an order under subsection 411(1) or (1A).

Deed of company arrangement

- (17A) An offer of securities does not need disclosure to investors under this Part if:
- (a) it is made to any or all of the company's creditors under a deed of company arrangement; and
 - (b) it does not require the provision of consideration other than the release of the company from a debt or debts; and
 - (c) in a case where the offer is specified in the deed otherwise than as a result of a resolution passed at a meeting convened under section 445F—the subsection 439A(3) notice given in relation to the administration of the company was accompanied by a statement:
 - (i) that set out all relevant information about the offer that was within the knowledge of the administrator of the company; and
 - (ii) that stated that the statement is not a prospectus and may contain less information than a prospectus; and
 - (d) in a case where the offer is specified in the deed as a result of a resolution passed at a meeting convened under section 445F—the subsection 445F(2) notice given in relation to the resolution was accompanied by a statement:
 - (i) that set out all relevant information about the offer that was within the knowledge of the administrator of the deed; and
 - (ii) that stated that the statement is not a prospectus and may contain less information than a prospectus.

Takeovers

- (18) An offer of securities does not need disclosure to investors under this Part if it is:
- (a) made as consideration for an offer to acquire securities under a takeover bid under Chapter 6; and

Section 708AA

- (b) accompanied by a bidder's statement.

Note: Although this offer does not need a disclosure document, similar disclosures must be made about the securities in the bidder's statement under section 636.

Debentures of certain bodies

- (19) An offer of a body's debentures for issue or sale does not need disclosure to investors under this Part if the body is:
- (a) an Australian ADI; or
 - (b) registered under the *Life Insurance Act 1995*.

Offers by exempt bodies

- (20) An offer of a body's securities in a State or Territory in this jurisdiction does not need disclosure to investors under this Part if the body is an exempt body of that State or Territory.

Note: Section 66A defines *exempt body*.

- (21) An offer of a body's securities for issue does not need disclosure to investors under this Part if the body is an exempt public authority of a State or Territory.

Note: Debentures, stock or bonds issued by a government are not securities for the purposes of this Chapter (see subsection 92(3)).

708AA Rights issues that do not need disclosure

- (1) This section applies to an offer of a body's securities (the *relevant securities*) for issue if:
- (a) but for subsection (2), disclosure to investors under this Part would be required by section 706; and
 - (b) a determination under subsection (3) is not in force in relation to the body at the time when the relevant securities are offered.

Conditions required for rights issue

- (2) The offer does not need disclosure to investors under this Part if:
- (a) the relevant securities are being offered under a rights issue; and
 - (b) the class of the relevant securities are quoted securities at the time at which the offer is made; and

Section 708AA

- (c) trading in that class of securities on a prescribed financial market on which they are quoted was not suspended for more than a total of 5 days during the shorter of the following periods:
 - (i) the period during which the class of securities is quoted;
 - (ii) the period of 12 months before the day on which the offer is made; and
- (d) no exemption under section 111AS or 111AT covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (c); and
- (e) no order under section 340 or 341 covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (c); and
- (f) the body gives the relevant market operator for the body a notice that complies with subsection (7) within the 24 hour period before the offer is made.

Determination by ASIC

- (3) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the body contravened any of the following provisions:
 - (a) subsection 283AA(1), 283AB(1) or 283AC(1);
 - (b) the provisions of Chapter 2M as they apply to the body;
 - (c) section 674 or 675;
 - (d) section 724 or 728;
 - (e) subsection (10) of this section;
 - (f) section 1308 as that section applies to a notice under subsection (2) of this section.
- (4) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (5) The determination made under subsection (3) is not a legislative instrument.
- (6) A failure to publish a copy of the determination does not affect the validity of the determination.

Requirements for notice

- (7) A notice complies with this subsection if the notice:
- (a) states that the body will offer the relevant securities for issue without disclosure to investors under this Part; and
 - (b) states that the notice is being given under paragraph (2)(f); and
 - (c) states that, as at the date of the notice, the body has complied with:
 - (i) the provisions of Chapter 2M as they apply to the body; and
 - (ii) section 674; and
 - (d) sets out any information that is excluded information as at the date of the notice (see subsections (8) and (9)); and
 - (e) states:
 - (i) the potential effect the issue of the relevant securities will have on the control of the body; and
 - (ii) the consequences of that effect.
- Note 1: A person is taken not to contravene section 727 if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 727(5).
- Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The body has an obligation to correct a defective notice: see subsection (10) of this section.
- (8) For the purposes of subsection (7), excluded information is information:
- (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
 - (b) that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:
 - (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; or
 - (ii) the rights and liabilities attaching to the relevant securities.

Section 708A

- (9) The notice given under subsection (2) must contain any excluded information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in a disclosure document.

Obligation to correct defective notice

- (10) The body contravenes this subsection if:
- (a) the notice given under subsection (2) is defective; and
 - (b) the body becomes aware of the defect in the notice within 12 months after the relevant securities are issued; and
 - (c) the body does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.
- (11) For the purposes of subsection (10), the notice under subsection (2) is **defective** if the notice:
- (a) does not comply with paragraph (2)(f); or
 - (b) is false or misleading in a material particular; or
 - (c) has omitted from it a matter or thing, the omission of which renders the notice misleading in a material respect.

708A Sale offers that do not need disclosure

Sale offers to which this section applies

- (1) This section applies to an offer (the **sale offer**) of a body's securities (the **relevant securities**) for sale by a person if:
- (a) but for subsection (5), (11) or (12), disclosure to investors under this Part would be required by subsection 707(3) for the sale offer; and
 - (b) the securities were not issued by the body with the purpose referred to in subparagraph 707(3)(b)(i); and
 - (c) a determination under subsection (2) was not in force in relation to the body at the time when the relevant securities were issued.
- (1A) This section also applies to an offer (the **sale offer**) of a body's securities (the **relevant securities**) for sale by a person if:

Section 708A

- (a) but for subsection (5), disclosure to investors under this Part would be required by subsection 707(5) for the sale offer; and
- (b) the securities were not sold by the controller with the purpose referred to in subparagraph 707(5)(c)(i); and
- (c) a determination under subsection (2) was not in force in relation to the body at the time when the relevant securities were issued.

Determination by ASIC

- (2) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the body contravened any of the following provisions:
 - (a) subsection 283AA(1), 283AB(1) or 283AC(1);
 - (b) the provisions of Chapter 2M as they apply to the body;
 - (c) section 674 or 675;
 - (d) section 724 or 728;
 - (e) subsection (9) of this section; or
 - (f) section 1308 as that section applies to a notice under subsection (5) of this section.
- (3) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (4) A failure to publish a copy of the determination does not affect the validity of the determination.

Sale offer of quoted securities—case 1

- (5) The sale offer does not need disclosure to investors under this Part if:
 - (a) the relevant securities are in a class of securities that were quoted securities at all times in the 3 months before the day on which the relevant securities were issued; and
 - (b) trading in that class of securities on a prescribed financial market on which they were quoted was not suspended for more than a total of 5 days during the shorter of the period during which the class of securities were quoted, and the period of 12 months before the day on which the relevant securities were issued; and

Section 708A

- (c) no exemption under section 111AS or 111AT covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (b); and
 - (d) no order under section 340 or 341 covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (b); and
 - (e) either:
 - (i) if this section applies because of subsection (1)—the body gives the relevant market operator for the body a notice that complies with subsection (6) before the sale offer is made; or
 - (ii) if this section applies because of subsection (1A)—both the body, and the controller, give the relevant market operator for the body a notice that complies with subsection (6) before the sale offer is made.
- (6) A notice complies with this subsection if the notice:
- (a) is given within 5 business days after the day on which the relevant securities were issued by the body; and
 - (b) states that the body issued the relevant securities without disclosure to investors under this Part; and
 - (c) states that the notice is being given under paragraph (5)(e); and
 - (d) states that, as at the date of the notice, the body has complied with:
 - (i) the provisions of Chapter 2M as they apply to the body; and
 - (ii) section 674; and
 - (e) sets out any information that is excluded information as at the date of the notice (see subsections (7) and (8)).
- Note 1: A person is taken not to contravene section 727 if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 727(5).
- Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The body has an obligation to correct a defective notice: see subsection (9) of this section.
- (7) For the purposes of subsection (6), excluded information is information:
-

Section 708A

- (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
 - (b) that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:
 - (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; or
 - (ii) the rights and liabilities attaching to the relevant securities.
- (8) The notice given under subsection (5) must contain any excluded information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in a disclosure document.

Obligation to correct defective notice

- (9) The body contravenes this subsection if:
- (a) the notice given under subsection (5) is defective; and
 - (b) the body becomes aware of the defect in the notice within 12 months after the relevant securities are issued; and
 - (c) the body does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.
- (10) For the purposes of subsection (9), the notice under subsection (5) is **defective** if the notice:
- (a) does not comply with paragraph (6)(e); or
 - (b) is false or misleading in a material particular; or
 - (c) has omitted from it a matter or thing the omission of which renders the notice misleading in a material respect.

Sale offer of quoted securities—case 2

- (11) The sale offer does not need disclosure to investors under this Part if:
- (a) the relevant securities are in a class of securities that are quoted securities of the body; and

Section 708A

- (b) either:
 - (i) a prospectus is lodged with ASIC on or after the day on which the relevant securities were issued but before the day on which the sale offer is made; or
 - (ii) a prospectus is lodged with ASIC before the day on which the relevant securities are issued and offers of securities that have been made under the prospectus are still open for acceptance on the day on which the relevant securities were issued; and
- (c) the prospectus is for an offer of securities issued by the body that are in the same class of securities as the relevant securities.

Sale offer of quoted securities—case 3

- (12) This subsection is satisfied if:
 - (a) the body offered to issue securities under a prospectus; and
 - (b) the body issued the relevant securities to:
 - (i) a person (the ***underwriter***) named in that prospectus as an underwriter of the issue; or
 - (ii) a person nominated by the underwriter; and
 - (c) the relevant securities were issued to the underwriter, or the person nominated by the underwriter, at or about the time that persons who applied for securities under the prospectus were issued with those securities; and
 - (d) the relevant securities are in a class of securities that were quoted securities of the body.

Division 3—Types of disclosure documents

709 Prospectuses, short-form prospectuses, profile statements and offer information statements

Prospectus or short-form prospectus

- (1) If an offer of securities needs disclosure to investors under this Part, a prospectus must be prepared for the offer unless subsection (4) allows an offer information statement to be used instead. Under section 712, the prospectus may simply refer to material already lodged with ASIC instead of including it.

Note: See sections 710 to 713 for the contents of a prospectus.

Profile statement

- (2) A profile statement for an offer may be prepared in addition to the prospectus if ASIC has approved the making of offers of that kind with a profile statement instead of a disclosure document.

Note 1: See section 714 for the contents of a profile statement.

Note 2: Subsection 729(2) provides that there is still liability to investors on the prospectus when a profile statement is used.

- (3) ASIC may approve the use of profile statements for offers of securities of a particular kind. The approval may specify information to be included in the profile statement (including information about a matter referred to in paragraphs 714(1)(a) to (d)).

Offer information statement

- (4) A body offering to issue securities may use an offer information statement for the offer instead of a prospectus if the amount of money to be raised by the body by issuing the securities, when added to all amounts previously raised by:
- (a) the body; or
 - (b) a related body corporate; or
 - (c) an entity controlled by:
 - (i) a person who controls the body; or
 - (ii) an associate of that person;

Section 709

by issuing securities under an offer information statement is \$10 million or less.

Note 1: See section 715 for the contents of an offer information statement. The statement must include financial statements that are less than 6 months old.

Note 2: Under section 740, ASIC may make a determination aggregating the transactions of bodies that ASIC considers to be closely related.

- (5) In working out the amount of money to be raised by a body or entity by issuing securities, include the following:
- (a) the amount payable for the securities at the time when they are issued;
 - (b) if the securities are issued partly-paid—any amount payable at a future time if a call is made;
 - (c) if the securities are options—any amount payable on the exercise of the options;
 - (d) if the securities carry a right to convert the securities into other securities—any amount payable on the exercise of that right.

However, do not include an amount payable for securities, or payable on the exercise of options, if the securities or options are issued under an eligible employee share scheme.

Division 4—Disclosure requirements

710 Prospectus content—general disclosure test

- (1) A prospectus for a body's securities must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters set out in the table below. The prospectus must contain this information:
- (a) only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus; and
 - (b) only if a person whose knowledge is relevant (see subsection (3)):
 - (i) actually knows the information; or
 - (ii) in the circumstances ought reasonably to have obtained the information by making enquiries.

Disclosures		[operative]	
	Offer		Matters
1	offer to issue (or transfer) shares, debentures or interests in a managed investment scheme	<ul style="list-style-type: none">••	the rights and liabilities attaching to the securities offered the assets and liabilities, financial position and performance, profits and losses and prospects of the body that is to issue (or issued) the shares, debentures or interests

Section 710

Disclosures		[operative]	
Offer		Matters	
2	offer to grant (or transfer) a legal or equitable interest in securities or grant (or transfer) an option over securities	<ul style="list-style-type: none"> • the rights and liabilities attaching to: <ul style="list-style-type: none"> - the interest or option - the underlying securities • for an option—the capacity of the person making the offer to issue or deliver the underlying securities • if the person making the offer is: <ul style="list-style-type: none"> - the body that issued or is to issue the underlying securities; or - a person who controls that body; the assets and liabilities, financial position and performance, profits and losses and prospects of that body • if subsection 707(3) or (5) applies to the offer—the assets and liabilities, financial position and performance, profits and losses and prospects of the body whose securities are offered 	

Note: Section 713 makes special provision for prospectuses for continuously quoted securities.

- (2) In deciding what information should be included under subsection (1), have regard to:
- (a) the nature of the securities and of the body; and
 - (b) if the securities are investments in a managed investment scheme—the nature of the scheme; and
 - (c) the matters that likely investors may reasonably be expected to know; and
 - (d) the fact that certain matters may reasonably be expected to be known to their professional advisers.
- (3) For the purposes of this section, a person's knowledge is relevant only if they are one of the following:
- (a) the person offering the securities;
 - (b) if the person offering the securities is a body—a director of the body;
 - (c) a proposed director of the body whose securities will be issued under the offer;

- (d) a person named in the prospectus as an underwriter of the issue or sale;
- (e) a person named in the prospectus as a person named in the prospectus as a financial services licensee involved in the issue or sale;
- (f) a person named in the prospectus with their consent as having made a statement:
 - (i) that is included in the prospectus; or
 - (ii) on which a statement made in the prospectus is based;
- (g) a person named in the prospectus with their consent as having performed a particular professional or advisory function.

Note: Section 729 says who is liable for misstatements in, and omissions from, a disclosure document.

711 Prospectus content—specific disclosures

Terms and conditions of offer

- (1) The prospectus must set out the terms and conditions of the offer.

Disclosure of interests and fees of certain people involved in the offer

- (2) The prospectus must set out the nature and extent of the interests (if any) that each person referred to in subsection (4) holds, or held at any time during the last 2 years, in:
 - (a) the formation or promotion of the body; or
 - (b) property acquired or proposed to be acquired by the body in connection with:
 - (i) its formation or promotion; or
 - (ii) the offer of the securities; or
 - (c) the offer of the securities.
- (3) The prospectus must set out the amount that anyone has paid or agreed to pay, or the nature and value of any benefit anyone has given or agreed to give:
 - (a) to a director, or proposed director, to induce them to become, or to qualify as, a director of the body; and

Section 711

- (b) for services provided by a person referred to in subsection (4) in connection with:
 - (i) the formation or promotion of the body; or
 - (ii) the offer of the securities; and
- (c) if the prospectus is for interests in a managed investment scheme—to the responsible entity:
 - (i) to procure acquisitions of interests in the scheme; or
 - (ii) for services provided under the constitution of the scheme.

To comply with this subsection it is not sufficient merely to state in the prospectus that a person has been paid or will be paid normal, usual or standard fees.

- (4) Disclosures need to be made under subsections (2) and (3) in relation to:
 - (a) any directors and proposed directors of the body;
 - (b) a person named in the prospectus as performing a function in a professional, advisory or other capacity in connection with the preparation or distribution of the prospectus;
 - (d) a promoter of the body;
 - (e) an underwriter (but not a sub-underwriter) to the issue or sale or a financial services licensee named in the prospectus as a financial services licensee involved in the issue or sale.

Quotation of securities

- (5) If the prospectus for an offer of securities states or implies that the securities will be able to be traded on a financial market (whether in Australia or elsewhere), the prospectus must state that:
 - (a) the securities have been admitted to quotation on that financial market; or
 - (b) an application for admission of the securities to quotation on that financial market has been made to the operator of that market; or
 - (c) an application for admission of the securities to quotation on that financial market will be made to the operator of that market within 7 days after the date of the prospectus.

Note 1: Paragraph 724(1)(b) gives times within which the person should seek and obtain admission to quotation.

Note 2: Subsection 716(1) requires the prospectus to be dated.

Expiry date

- (6) The prospectus must state that no securities will be issued on the basis of the prospectus after the expiry date specified in the prospectus. The expiry date must not be later than 13 months after the date of the prospectus. The expiry date of a replacement prospectus must be the same as that of the original prospectus it replaces.

Note 1: Subsection 716(1) requires the prospectus to be dated.

Note 2: Section 719 deals with replacement prospectuses.

Lodgment with ASIC

- (7) The prospectus must state that:
- (a) a copy of the prospectus has been lodged with ASIC; and
 - (b) ASIC takes no responsibility for the content of the prospectus.

Prescribed information

- (8) The prospectus must set out the information required by the regulations.

712 Prospectus content—short form prospectuses

Prospectus may simply refer to material lodged with ASIC

- (1) Instead of setting out information that is contained in a document that has been lodged with ASIC, a prospectus may simply refer to the document. The reference must:
- (a) identify the document or the part of the document that contains the information; and
 - (b) inform people of their right to obtain a copy of the document (or part) under subsection (5).
- (2) The reference must also include:
- (a) if the information is primarily of interest to professional analysts or advisers or investors with similar specialist information needs:
 - (i) a description of the contents of the document (or part);
 - and

Section 713

- (ii) a statement to the effect that the information in the document (or part) is primarily of interest to those people; or
 - (b) in any other case—sufficient information about the contents of the document to allow a person to whom the offer is made to decide whether to obtain a copy of the document (or part).
- (3) The document (or part) referred to under subsection (1) is taken to be included in the prospectus.
- (4) A person who wishes to take advantage of subsection (1) may lodge a document with ASIC even if this Act does not require the document to be lodged.
- (5) If the prospectus is taken to include a document, or part of a document, under subsection (1), the person making the offer must give a copy of the document (or part) free of charge to anyone who asks for it during the application period of the prospectus.

713 Special prospectus content rules for continuously quoted securities

Alternative general disclosure test

- (1) A prospectus for an offer of:
 - (a) continuously quoted securities of a body; or
 - (b) options to acquire continuously quoted securities of a body;satisfies section 710 if it complies with subsections (2), (3) and (4) of this section.
- (2) The prospectus must contain all the information investors and their professional advisers would reasonably require to make an informed assessment of:
 - (a) the effect of the offer on the body; and
 - (c) the rights and liabilities attaching to the securities offered; and
 - (d) if the securities are options—the rights and liabilities attaching to:
 - (i) the options themselves; and
 - (ii) the underlying securities.

The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus.

- (3) The prospectus must state that:
 - (a) as a disclosing entity, the body is subject to regular reporting and disclosure obligations; and
 - (b) copies of documents lodged with ASIC in relation to the body may be obtained from, or inspected at, an ASIC office.
- (4) The prospectus must either:
 - (a) inform people of their right to obtain a copy of any of the following documents:
 - (i) the annual financial report most recently lodged with ASIC by the body;
 - (ii) any half-year financial report lodged with ASIC by the body after the lodgment of that annual financial report and before the lodgment of the copy of the prospectus with ASIC;
 - (iii) any continuous disclosure notices given by the body after the lodgment of that annual financial report and before the lodgment of the copy of the prospectus with ASIC; or
 - (b) include, or be accompanied by, a copy of the document.

If the prospectus informs people of their right to obtain a copy of the document, the person making the offer must give a copy of the document free of charge to anyone who asks for it during the application period for the prospectus.

Information excluded from continuous disclosure notice

- (5) Information about the offer must also be set out in the prospectus if the information:
 - (a) has been excluded from a continuous disclosure notice in accordance with the listing rules of the prescribed financial market whose operator was given the notice; and
 - (b) is information that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:

Section 714

- (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; and
- (ii) the rights and liabilities attaching to the securities being offered.

The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus.

ASIC power to exclude entity from this section

- (6) ASIC may determine in writing that a body may not rely on this section if it is satisfied that, in the previous 12 months, any of the following provisions were contravened in relation to the body:
 - (a) the provisions of Chapter 2M;
 - (aa) subsection 674(2) or 675(2);
 - (ab) subsection 708AA(10) or 708A(9);
 - (b) section 724;
 - (c) section 728;
 - (d) section 1308 as it applies to a notice under subsection 708AA(2) or 708A(5);

ASIC must publish a copy of the determination in the *Gazette*. While the determination is in force, section 710 and not this section applies to securities of the body.

714 Contents of profile statement

- (1) A profile statement must:
 - (a) identify the body and the nature of the securities; and
 - (b) state the nature of the risks involved in investing in the securities; and
 - (c) give details of all amounts payable in respect of the securities (including any amounts by way of fee, commission or charge); and
 - (d) state that the person given the profile statement is entitled to a copy of the prospectus free of charge; and
 - (e) state that:
 - (i) a copy of the statement has been lodged with ASIC; and
 - (ii) ASIC takes no responsibility for the content of the statement; and

- (f) give any other information required by the regulations or by ASIC approval under subsection 709(3).
- (2) The profile statement must state that no securities will be issued on the basis of the statement after the expiry date specified in the statement. The expiry date must not be later than 13 months after the date of the prospectus. The expiry date of a replacement statement must be the same as that of the original statement it replaces.

Note 1: Subsection 716(1) requires the profile statement to be dated.

Note 2: Section 719 deals with supplementary and replacement profile statements.

715 Contents of offer information statement

- (1) An offer information statement for the issue of a body's securities must:
 - (a) identify the body and the nature of the securities; and
 - (b) describe the body's business; and
 - (c) describe what the funds raised by the offers are to be used for; and
 - (d) state the nature of the risks involved in investing in the securities; and
 - (e) give details of all amounts payable in respect of the securities (including any amounts by way of fee, commission or charge); and
 - (f) state that:
 - (i) a copy of the statement has been lodged with ASIC; and
 - (ii) ASIC takes no responsibility for the content of the statement; and
 - (g) state that the statement is not a prospectus and that it has a lower level of disclosure requirements than a prospectus; and
 - (h) state that investors should obtain professional investment advice before accepting the offer; and
 - (i) include a copy of a financial report for the body; and
 - (j) include any other information that the regulations require to be included in the statement.

Section 715A

- (2) The financial report included under paragraph (1)(i) must:
- (a) be a report for a 12 month period and have a balance date that occurs within the last 6 months before the securities are first offered under the statement; and
 - (b) be prepared in accordance with the accounting standards; and
 - (c) be audited.
- (3) The statement must state that no securities will be issued on the basis of the statement after the expiry date specified in the statement. The expiry date must not be later than 13 months after the date of the statement. The expiry date of a replacement statement must be the same as that of the original statement it replaces.

Note 1: Subsection 716(1) requires the statement to be dated.

Note 2: Section 719 deals with replacement statements.

715A Presentation etc. of disclosure documents

- (1) The information in a disclosure document must be worded and presented in a clear, concise and effective manner.

Note: If this subsection is contravened, ASIC may make a stop order under section 739.

- (2) A contravention of subsection (1) is not an offence.

716 Disclosure document date and consents

Date of disclosure document

- (1) A disclosure document must be dated. The date is the date on which it is lodged with ASIC.

Consent of person to whom statement attributed

- (2) A disclosure document may only include a statement by a person, or a statement said in the document to be based on a statement by a person, if:
- (a) the person has consented to the statement being included in the document in the form and context in which it is included; and
 - (b) the document states that the person has given this consent; and

- (c) the person has not withdrawn this consent before the document is lodged with ASIC.

Division 5—Procedure for offering securities**717 Overview of procedure for offering securities**

The following table summarises what a person who wants to offer securities must do to make an offer of securities that needs disclosure to investors under this Part and gives signposts to relevant sections:

Offering securities (disclosure documents and procedure)			
	Action required	Sections	Comments and related sections
1	Prepare disclosure document, making sure that it: <ul style="list-style-type: none">• sets out all the information required• does not contain any misleading or deceptive statements• is dated and that the directors consent to the disclosure document.	710 711 712 713 714 715 716	Section 728 prohibits offering securities under a disclosure document that is materially deficient. Section 729 deals with the liability for breaches of this prohibition. Sections 731, 732 and 733 set out defences.
2	Lodge the disclosure document with ASIC	718	Subsection 727(3) prohibits processing applications for non-quoted securities for 7 days after the disclosure document is lodged.

Offering securities (disclosure documents and procedure)

	Action required	Sections	Comments and related sections
3	Offer the securities, making sure that the offer and any application form is either included in or accompanies: <ul style="list-style-type: none"> • the disclosure document; or • a profile statement if ASIC has approved the use of a profile statement for offers of that kind. 	721	<p>Sections 727 and 728 make it an offence to:</p> <ul style="list-style-type: none"> • offer securities without a disclosure document • offer securities if the disclosure document is materially deficient. <p>Subsection 729(3) deals with liability on the prospectus if a profile statement is used.</p> <p>The securities hawking provisions (section 736) restrict the way in which the securities can be offered.</p>
4	If it is found that the disclosure document lodged was deficient or a significant new matter arises, either: <ul style="list-style-type: none"> • lodge a supplementary or replacement document under section 719; or • return money to applicants under section 724. 	719 724	<p>Section 728 prohibits making offers after becoming aware of a material deficiency in the disclosure document or a significant new matter.</p> <p>Section 730 requires people liable on the disclosure document to inform the person making the offer about material deficiencies and new matters.</p>
5	Hold application money received on trust until the securities are issued or transferred or the money returned.	722	Investors may have a right to have their money returned if certain events occur (see sections 724, 737 and 738).

Section 718

Offering securities (disclosure documents and procedure)

	Action required	Sections	Comments and related sections
6	<p>Issue or transfer the securities, making sure that:</p> <ul style="list-style-type: none"> the investor used an application form distributed with the disclosure document; and the disclosure document is current and not materially deficient; and any minimum subscription condition has been satisfied. 	723	<p>Section 721 says which disclosure document must be distributed with the application form.</p> <p>Section 729 identifies the people who may be liable if:</p> <ul style="list-style-type: none"> securities are issued in response to an improper application form; or the disclosure document is not current or is materially deficient. <p>Sections 731, 732 and 733 provide defences for the contraventions.</p> <p>Section 737 provides remedies for an investor.</p>

718 Lodging of disclosure document

A disclosure document to be used for an offer of securities must be lodged with ASIC.

Note 1: Subsection 727(3) makes it an offence to process applications for non-quoted securities under an offer that needs a disclosure document until 7 days after the disclosure document is lodged.

Note 2: See section 720 for the consents that need to be obtained before lodgment.

Note 3: Section 351 says what signatures are necessary for documents that are to be lodged with ASIC.

719 Lodging supplementary or replacement document

Need for a supplementary or replacement document

- (1) If the person making the offer becomes aware of:
- a misleading or deceptive statement in the disclosure document; or
 - an omission from the disclosure document of information required by section 710, 711, 712, 713, 714 or 715; or

- (c) a new circumstance that:
 - (i) has arisen since the disclosure document was lodged;
and
 - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged;

that is materially adverse from the point of view of an investor, the person may lodge a supplementary or replacement document with ASIC.

- Note 1: Section 728 makes it an offence to continue making offers after the person has become aware of a misleading or deceptive statement, omission or new circumstance that is materially adverse from the point of view of an investor unless the deficiency is corrected.
- Note 2: Because of section 712, a prospectus may be taken to include information in another document. This should be taken into account when considering whether the prospectus is deficient.
- Note 3: The power to issue a supplementary or replacement document is not limited to the situations dealt with in this section.
- Note 4: This section applies to a document that has already been previously supplemented or replaced.
- Note 5: See section 720 for the consents that need to be obtained before lodgment.

- (1A) If the person making the offer becomes aware that information in the disclosure document is not worded and presented in a clear, concise and effective manner, the person may lodge a supplementary or replacement document with ASIC.

Form of supplementary document

- (2) At the beginning of a supplementary document, there must be:
- (a) a statement that it is a supplementary document; and
 - (b) an identification of the disclosure document it supplements;
and
 - (c) an identification of any previous supplementary documents lodged with ASIC in relation to the offer; and
 - (d) a statement that it is to be read together with the disclosure document it supplements and any previous supplementary documents.

The supplementary document must be dated. The date is the date on which it is lodged with ASIC.

Section 720

Form of replacement document

- (3) At the beginning of a replacement document, there must be:
- (a) a statement that it is a replacement document; and
 - (b) an identification of the disclosure document it replaces.

The replacement document must be dated. The date is the date on which it is lodged with ASIC.

Consequences of lodging a supplementary document

- (4) If a supplementary document is lodged with ASIC, the disclosure document is taken to be the disclosure document together with the supplementary document for the purposes of the application of this Chapter to events that occur after the lodgment.

Note: This subsection means, for example, that offers made after lodgment of the supplementary document must be accompanied by copies of both the original disclosure document and the supplementary document.

Consequences of lodging a replacement document

- (5) If a replacement document is lodged with ASIC, the disclosure document is taken to be the replacement document for the purposes of the application of this Chapter to events that occur after the lodgment.

Note: This subsection means, for example, that offers made after lodgment of the replacement document must be accompanied by copies of the replacement document and not the original disclosure document.

720 Consents needed for lodgment

The lodgment of a disclosure document, or a supplementary or replacement document, for the offer of a body's securities requires the consent of:

Consents required for lodgment		[operative]
Type of offer		People whose consent is required
<i>Issue offers</i>		
1	offer of securities for issue	every director of the body every person named in the document as a proposed director of the body if securities interests in a managed investment scheme made available by a body—every director of that body if securities interests in a managed investment scheme made available by an individual—that individual
<i>sale offers (sale by controller)</i>		
2	offer of securities for sale that needs a disclosure document because of subsection 707(2)	if seller an individual—that individual if seller a body—every director of the body
<i>sale offers (sale amounting to indirect issue)</i>		
3	offer of securities for sale that needs a disclosure document because of subsection 707(3)	every director of the body whose securities are offered for sale if seller an individual—that individual if seller a body—every director of the body

Section 721

Consents required for lodgment		[operative]
Type of offer	People whose consent is required	
	<i>sale offers (sale amounting to indirect sale by controller)</i>	
4	offer of securities for sale that needs a disclosure document because of subsection 707(5)	<p>if seller an individual—that individual</p> <p>if seller a body—every director of the body</p> <p>if individual controls the body whose securities are offered for sale—that individual</p> <p>if body controls the body whose securities are offered for sale—every director of the controlling body</p>

721 Offer must be made in, or accompanied by, the disclosure document

Offers using prospectus alone

- (1) Offers of securities for which a prospectus is being used must be made in, or accompanied by, the prospectus.

Note 1: Subsection 727(1) makes it an offence to make an offer of securities unless the offer is made in or accompanied by the disclosure document and subsection 723(1) makes it an offence to issue securities unless they are applied for on a form that was issued in or together with the disclosure document.

Note 2: Section 736 makes it an offence to make unsolicited offers in a way that amounts to securities hawking.

Note 3: Section 728 makes it an offence for a person to offer securities if the disclosure document is deficient in a way that is material from the point of view of an investor.

- (1A) Subsection (1) does not apply to the extent that subsection (2) allows a profile statement to be used instead of a prospectus.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

Offers using prospectus and profile statement

- (2) An offer of securities may be made in, or accompanied by, a profile statement if:
 - (a) under subsection 709(3), ASIC has approved the making of offers of that kind with a profile statement instead of a prospectus; and
 - (b) the profile statement complies with the requirements specified in ASIC approval.
- (3) If the offer that is made to a person is made in or accompanied by a profile statement, the person making the offer must give the person a copy of the prospectus free of charge if the person asks for it.

Offers using offer information statement

- (4) Offers for which an offer information statement is being used must be made in, or accompanied by, the offer information statement.

Note 1: Subsection 727(1) makes it an offence to make an offer of securities unless the offer is made in or accompanied by the disclosure document and subsection 723(1) makes it an offence to issue securities unless they are applied for on a form that was issued in or together with the disclosure document.

Note 2: Section 736 makes it an offence to make unsolicited offers in a way that amounts to securities hawking.

Note 3: Section 728 makes it an offence for a person to offer securities if the disclosure document is deficient in a way that is material from the point of view of an investor.

Offence

- (5) A person commits an offence if the person intentionally or recklessly contravenes subsection (1) or (4).

722 Application money to be held on trust

- (1) If a person offers securities for issue or sale under a disclosure document, the person must hold:
 - (a) all application money received from people applying for securities under the disclosure document; and
 - (b) all other money paid by them on account of the securities before they are issued or transferred;in trust under this section for the applicants until:

Section 723

- (c) the securities are issued or transferred; or
 - (d) the money is returned to the applicants.
- (2) If the application money needs to be returned to an applicant, the person must return the money as soon as practicable.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

723 Issuing or transferring the securities under a disclosure document

Applications must be made on form included in, or accompanied by, disclosure document

- (1) If an offer of securities needs a disclosure document, the securities may only be issued or transferred in response to an application form. The securities may only be issued or transferred if the person issuing or transferring them has reasonable grounds to believe that:
 - (a) the form was included in, or accompanied by:
 - (i) the disclosure document; or
 - (ii) if subsection 721(2) allows a profile statement to be used—the prospectus or the profile statement;when the form was distributed by the person issuing or transferring the securities; or
 - (b) the form was copied, or directly derived, by the person making the application from a form referred to in paragraph (a).

Minimum subscription condition must be fulfilled before issue or transfer

- (2) If a disclosure document for an offer of securities states that the securities will not be issued or transferred unless:
 - (a) applications for a minimum number of the securities are received; or
 - (b) a minimum amount is raised;the person making the offer must not issue or transfer any of the securities until that condition is satisfied. For the purpose of working out whether the condition has been satisfied, a person who

has agreed to take securities as underwriter is taken to have applied for those securities.

Note 1: Under section 722, the application money must be held in trust until the issue or transfer of the securities.

Note 2: This subsection prevents the issue or transfer of the securities not only to those who apply for them in response to the disclosure document but also to those who do not need to apply for them (for example, because they are to take the securities under an underwriting agreement).

Issue or transfer void if quotation condition not fulfilled

- (3) If a disclosure document for an offer of securities states or implies that the securities are to be quoted on a financial market (whether in Australia or elsewhere) and:
- (a) an application for the admission of the securities to quotation is not made within 7 days after the date of the disclosure document; or
 - (b) the securities are not admitted to quotation within 3 months after the date of the disclosure document;
- then:
- (c) an issue or transfer of securities in response to an application made under the disclosure document is void; and
 - (d) the person offering the securities must return the money received by the person from the applicants as soon as practicable.

Strict liability offences

- (4) An offence based on subsection (1), (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

724 Choices open to person making the offer if disclosure document condition not met or disclosure document defective

- (1) If a person offers securities under a disclosure document and:
- (a) the disclosure document states that the securities will not be issued or transferred unless:
 - (i) applications for a minimum number of the securities are received; or
 - (ii) a minimum amount raised;

Section 724

and that condition is not satisfied within 4 months after the date of the disclosure document; or

- (b) the disclosure document states or implies that the securities are to be quoted on a financial market (whether in Australia or elsewhere) and:
 - (i) an application for the admission to quotation is not made within 7 days after the date of the disclosure document; or
 - (ii) the securities are not admitted to quotation within 3 months after the date of the disclosure document; or
- (c) the person becomes aware that:
 - (i) the disclosure document contains a misleading or deceptive statement; or
 - (ii) there is an omission from the disclosure document of information required by section 710, 711, 712, 713, 714 or 715;that is materially adverse from the point of view of an investor; or
- (d) the person becomes aware of a new circumstance that:
 - (i) has arisen since the disclosure document was lodged; and
 - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged; and
 - (iii) is materially adverse from the point of view of an investor;

the person must deal under subsection (2) with any applications for the securities made under the disclosure document that have not resulted in an issue or transfer of the securities. For the purpose of working out whether a condition referred to in paragraph (a) has been satisfied, a person who has agreed to take securities as underwriter is taken to have applied for those securities.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The person must either:
- (a) repay the money received by the person from the applicants; or

- (b) give the applicants:
 - (i) the documents required by subsection (3); and
 - (ii) 1 month to withdraw their application and be repaid; or
- (c) issue or transfer the securities to the applicants and give them:
 - (i) the documents required by subsection (3); and
 - (ii) 1 month to withdraw their application and be repaid.

Note: Section 719 deals with lodging supplementary and replacement documents. Section 728 makes it an offence for a person to offer securities if the disclosure document is deficient in a way that is material from the point of view of an investor.

- (3) The documents to be given are set out in the following table:

Documents to be given		[operative]
	Circumstances	Documents
1	the sole disclosure document is a prospectus	a supplementary or replacement prospectus that corrects the deficiency or changes the terms of the offer
2	the disclosure documents are a prospectus and a profile statement and subsection (1) applies to the prospectus	a statement that sets out the changes needed to the prospectus to correct the deficiency or change the terms of offer; and a statement that the person is entitled to a copy of the prospectus free of charge
3	the disclosure documents are a prospectus and a profile statement and subsection (1) applies to the profile statement <i>Note that item 2 and this item may both apply to the offer.</i>	a supplementary or replacement profile statement that corrects the deficiency or changes the terms of the offer

Section 725

Documents to be given		[operative]
Circumstances		Documents
4	the disclosure document is an offer information statement	a supplementary or replacement offer information statement that corrects the deficiency or changes the terms of the offer

725 Expiration of disclosure document

- (1) If a person offers securities under a disclosure document and the disclosure document passes its expiry date, the person must deal with applications for the securities under the document in accordance with subsections (2) and (3).

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) If an application is received on or before the expiry date, the person may issue or transfer securities to the applicant.

Note: Subsection 723(1) (when read with subsections 719(4) and (5)) requires the person issuing or transferring the securities to have reasonable grounds to believe that the application form was included in, or accompanied by, a disclosure document that was current at the time.

- (3) If an application is received after the expiry date, the person must either:
- (a) return any money received by the person from the applicant; or
 - (b) give the applicant:
 - (i) a new disclosure document; and
 - (ii) 1 month to withdraw their application and be repaid; or
 - (c) issue or transfer the securities to the applicant and give them:
 - (i) a new disclosure document; and
 - (ii) 1 month to withdraw their application and be repaid.

Part 6D.3—Prohibitions, liabilities and remedies

Division 1—Prohibitions and liabilities

726 Offering securities in a body that does not exist

A person must not offer securities of a body that has not been formed or does not exist if the offer would need disclosure to investors under Part 6D.2 if the body did exist. This is so even if it is proposed to form or incorporate the body.

727 Offering securities without a current disclosure document

Offer of securities needs lodged disclosure document

- (1) A person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 unless a disclosure document for the offer has been lodged with ASIC.

Offer form to be included in or accompanied by disclosure document

- (2) A person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 unless:
 - (a) if a prospectus is used for the offer—the offer or form is:
 - (i) included in the prospectus; or
 - (ii) accompanied by a copy of the prospectus; or
 - (b) if both a prospectus and a profile statement are used for the offer—the offer or form is:
 - (i) included in the prospectus or profile statement; or
 - (ii) accompanied by a copy of the prospectus or profile statement; or
 - (c) if an offer information statement is used for the offer—the offer or form is:
 - (i) included in the statement; or
 - (ii) accompanied by a copy of the statement.

Section 728

Note: Sections 706, 707, 708, 708AA and 708A say when the offer needs disclosure to investors under Part 6D.2.

Non-quoted securities—waiting period after lodgment before processing applications for securities

- (3) A person must not accept an application for, or issue or transfer, non-quoted securities offered under a disclosure document until the period of 7 days after lodgment of the disclosure document has ended. ASIC may extend the period by notice in writing to the person offering the securities. The period as extended must end no more than 14 days after lodgment.

Issue or transfer not to breach section 708 ceiling

- (4) If a person relies on subsection 708(1) to make offers of securities without disclosure to investors under Part 6D.2, the person must not issue or transfer securities without disclosure to investors under that Part if the issue or transfer would result in a breach of the 20 investors ceiling or the \$2 million ceiling (see subsections 708(3), (4), (5), (6) and (7)).

Circumstances in which a person is taken not to contravene this section

- (5) If:
- (a) a person relies on subsection 708AA(2) or 708A(5) to make offers of securities for issue or sale without disclosure to investors under Part 6D.2; and
 - (b) the notice given under that subsection purported to comply with subsection 708AA(7) or 708A(6) but did not actually comply with subsection 708AA(7) or 708A(6);
- the person is taken not to contravene this section.

728 Misstatement in, or omission from, disclosure document

Misleading or deceptive statements, omissions and new matters

- (1) A person must not offer securities under a disclosure document if there is:
- (a) a misleading or deceptive statement in:
 - (i) the disclosure document; or

- (ii) any application form that accompanies the disclosure document; or
 - (iii) any document that contains the offer if the offer is not in the disclosure document or the application form; or
- (b) an omission from the disclosure document of material required by section 710, 711, 712, 713, 714 or 715; or
- (c) a new circumstance that:
 - (i) has arisen since the disclosure document was lodged; and
 - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged.

Note 1: The person may make further offers after making up the deficiency in the current disclosure document by lodging a supplementary or replacement document.

Note 2: See sections 731, 732 and 733 for defences.

Note 3: Section 995 imposes liabilities in respect of other conduct related to the offering of the securities.

Forecasts and other forward-looking statements

- (2) A person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement. This subsection does not limit the meaning of a reference to a misleading statement or a statement that is misleading in a material particular.

Offence if statement, omission or new matter materially adverse

- (3) A person commits an offence if they contravene subsection (1) and:
 - (a) the misleading or deceptive statement; or
 - (b) the omission or new circumstance;is materially adverse from the point of view of an investor.

Section 729

729 Right to recover for loss or damage resulting from contravention*Right to compensation*

- (1) A person who suffers loss or damage because an offer of securities under a disclosure document contravenes subsection 728(1) may recover the amount of the loss or damage from a person referred to in the following table if the loss or damage is one that the table makes the person liable for. This is so even if the person did not commit, and was not involved in, the contravention.

People liable on disclosure document		[operative]
These people...		are liable for loss or damage caused by...
1	the person making the offer	any contravention of subsection 728(1) in relation to the disclosure document
2	each director of the body making the offer if the offer is made by a body	any contravention of subsection 728(1) in relation to the disclosure document
3	a person named in the disclosure document with their consent as a proposed director of the body whose securities are being offered	any contravention of subsection 728(1) in relation to the disclosure document
4	an underwriter (but not a sub-underwriter) to the issue or sale named in the disclosure document with their consent	any contravention of subsection 728(1) in relation to the disclosure document
5	a person named in the disclosure document with their consent as having made a statement: (a) that is included in the disclosure document; or (b) on which a statement made in the disclosure document is based	the inclusion of the statement in the disclosure document
6	a person who contravenes, or is involved in the contravention of, subsection 728(1)	that contravention

Note: Item 2—*director* includes a shadow director (see section 9).

- (2) A person who acquires securities as a result of an offer that was accompanied by a profile statement is taken to have acquired the securities in reliance on both the profile statement and the prospectus for the offer.
- (3) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.
- (4) This Part does not affect any liability that a person has under any other law.

Note: Conduct that contravenes subsection 728(1) is expressly excluded from the operation of section 995.

730 People liable on disclosure document to inform person making the offer about deficiencies in the disclosure document

- (1) A person referred to in the table in section 729 must notify the person making the offer in writing as soon as practicable if they become aware during the application period that:
 - (a) a material statement in the disclosure document is misleading or deceptive; or
 - (b) there is a material omission from the disclosure document of material required by section 710, 711, 712, 713, 714 or 715; or
 - (c) a material new circumstance that:
 - (i) has arisen since the disclosure document was lodged; and
 - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

731 Due diligence defence for prospectuses

Reasonable inquiries and reasonable belief—statements

- (1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of

Section 732

subsection 728(1), because of a misleading or deceptive statement in a prospectus if the person proves that they:

- (a) made all inquiries (if any) that were reasonable in the circumstances; and
- (b) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive.

Reasonable inquiries and reasonable belief—omissions

- (2) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of an omission from a prospectus in relation to a particular matter if the person proves that they:
 - (a) made all inquiries (if any) that were reasonable in the circumstances; and
 - (b) after doing so, believed on reasonable grounds that there was no omission from the prospectus in relation to that matter.

732 Lack of knowledge defence for offer information statements and profile statements

Not knowing statement misleading or deceptive

- (1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of a misleading or deceptive statement in an offer information statement or profile statement if the person proves that they did not know that the statement was misleading or deceptive.

Not knowing there was an omission

- (2) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of an omission from an offer information statement or profile statement in relation to a particular matter if the person proves that they did not know that there was an omission from the statement in relation to that matter.

733 General defences for all disclosure documents

*Reasonable reliance on information given by someone else—
statements and omissions*

- (1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention against subsection 728(1), because of a misleading or deceptive statement in, or an omission from, a disclosure document if the person proves that they placed reasonable reliance on information given to them by:
 - (a) if the person is a body—someone other than a director, employee or agent of the body; or
 - (b) if the person is an individual—someone other than an employee or agent of the individual.
- (2) For the purposes of subsection (1), a person is not the agent of a body or individual merely because they perform a particular professional or advisory function for the body or individual.

Withdrawal of consent—statements and omissions

- (3) A person who is named in a disclosure document as:
 - (a) being a proposed director or underwriter; or
 - (b) making a statement included in the document; or
 - (c) making a statement on the basis of which a statement is included in the document;does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention against subsection 728(1), because of a misleading or deceptive statement in, or an omission from, a disclosure document if the person proves that they publicly withdrew their consent to being named in the document in that way.

Unawareness of new matter

- (4) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of a new circumstance that has arisen since the disclosure document was lodged if the person proves that they were not aware of the matter.

Section 734

734 Restrictions on advertising and publicity

No advertising or publicity for offers covered by the exception for 20 issues in 12 months

- (1) A person must not:
- (a) advertise; or
 - (b) publish a statement that directly or indirectly refers to; an offer, or intended offer, of securities that would need a disclosure document but for subsection 708(1) (exception for 20 issues in 12 months).

Advertising or publicity for offers that need a disclosure document

- (2) If an offer, or intended offer, of securities needs a disclosure document, a person must not:
- (a) advertise the offer or intended offer; or
 - (b) publish a statement that:
 - (i) directly or indirectly refers to the offer or intended offer; or
 - (ii) is reasonably likely to induce people to apply for the securities.
- (2A) Subsection (2) does not apply if the advertisement or publication is authorised by subsection (4), (5), (6) or (7).

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A), see subsection 13.3(3) of the *Criminal Code*.

Strict liability offences

- (2B) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Image advertising

- (3) In deciding whether a statement:
- (a) indirectly refers to an offer, or intended offer, of securities; or
 - (b) is reasonably likely to induce people to apply for securities;
- have regard to whether the statement:

- (c) forms part of the normal advertising of a body's products or services and is genuinely directed at maintaining its existing customers, or attracting new customers, for those products or services; and
- (d) communicates information that materially deals with the affairs of the body; and
- (e) is likely to encourage investment decisions being made on the basis of the statement rather than on the basis of information contained in a disclosure document.

Dissemination of disclosure document

- (4) A person may disseminate a disclosure document that has been lodged with ASIC without contravening subsection (2). This does not apply if an order under section 739 is in force in relation to the offer.

Note: Subsection (4) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(1)).

Advertising and publicity before the disclosure document is lodged

- (5) Before the disclosure document is lodged, an advertisement or publication does not contravene subsection (2) if it:
 - (a) if the offer is of securities in a class already quoted—includes a statement that:
 - (i) if the securities are likely to be offered by way of issue—identifies the issuer of the securities; and
 - (ii) if the securities are likely to be offered pursuant to sale offers to which section 707 will apply—identifies the issuer of the securities and the seller of the securities; and
 - (iii) in any case—a disclosure document for the offer will be made available when the securities are offered; and
 - (iv) indicates when and where the disclosure document is expected to be made available; and
 - (v) a person should consider the disclosure document in deciding whether to acquire the securities; and
 - (vi) anyone who wants to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document; and
 - (b) in any other case—contains the following but nothing more:

Section 734

- (i) a statement that identifies the offeror and the securities;
- (ii) a statement that a disclosure document for the offer will be made available when the securities are offered;
- (iii) a statement that anyone who wants to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document;
- (iv) a statement of how to arrange to receive a copy of the disclosure document.

To satisfy paragraph (b), the advertisement or publication must include all of the statements referred to in subparagraphs (i), (ii) and (iii). It may include the statement referred to in subparagraph (iv).

Note: Subsection (5) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(2)).

Advertising and publicity after the disclosure document is lodged

- (6) After the disclosure document is lodged, an advertisement or publication does not contravene subsection (2) if it includes a statement that:
- (a) identifies:
 - (i) if the securities are offered by way of issue—the issuer of the securities; or
 - (ii) if the securities are offered pursuant to sale offers to which section 707 applies or will apply—the issuer of the securities and the seller of the securities; and
 - (b) indicates that the disclosure document for the offer is available and where it can be obtained; and
 - (c) the offers of the securities will be made in, or accompanied by, a copy of the disclosure document; and
 - (d) a person should consider the disclosure document in deciding whether to acquire the securities; and
 - (e) anyone who wants to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document.

Note: Subsection (6) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(3)).

General exceptions

- (7) An advertisement or publication does not contravene subsection (2) if it:
- (a) relates to an offer of securities of a listed body and consists of a notice or report by the body, or one of its officers, about its affairs to the relevant market operator; or
 - (b) consists solely of a notice or report of a general meeting of the body; or
 - (c) consists solely of a report about the body that is published by the body and:
 - (i) does not contain information that materially affects affairs of the body other than information previously made available in a disclosure document that has been lodged, an annual report or a report referred to in paragraph (a) or (b); and
 - (ii) does not refer (whether directly or indirectly) to the offer; or
 - (d) is a news report or is genuine comment, in a newspaper or periodical or on radio or television relating to:
 - (i) a disclosure document that has been lodged or information contained in such a disclosure document; or
 - (ii) a notice or report covered by paragraph (a), (b) or (c); or
 - (e) is a report about the securities of a body or proposed body published by someone who is not:
 - (i) the body; or
 - (ii) acting at the instigation of, or by arrangement with, the body; or
 - (iii) a director of the body; or
 - (iv) a person who has an interest in the success of the issue or sale of the securities.

Paragraphs (d) and (e) do not apply if anyone gives consideration or another benefit for publishing the report.

Liability of publishers

- (8) A person does not contravene subsection (1) or (2) by publishing an advertisement or statement if they publish it in the ordinary course of a business of:
- (a) publishing a newspaper or magazine; or

Section 735

(b) broadcasting by radio or television;
and the person did not know and had no reason to suspect that its publication would amount to a contravention of a provision of this Chapter.

Note: Depending on the circumstances of the publication, the person may, however, commit an offence by being involved in someone else's contravention of subsection (1) or (2).

Pathfinder documents

- (9) A person does not contravene subsection (1) or (2) by sending a draft disclosure document for securities to a person if an offer of the securities to the person would not require a disclosure document because of subsection 708(8) or (10) (sophisticated investors) or 708(11) (professional investors).

735 Obligation to keep consents and other documents

- (1) A person who offers securities under a disclosure document must keep a consent required in respect of the document by subsection 716(2) or section 720.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

736 Securities hawking prohibited

- (1) A person must not offer securities for issue or sale in the course of, or because of, an unsolicited:
- (a) meeting with another person; or
 - (b) telephone call to another person.
- (1A) Subsection (1) does not apply if the offer is exempted under subsection (2).
- Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.
- (1B) An offence based on subsection (1) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) Subsection (1) does not prohibit an offer of securities if:
- (a) the offer does not need a disclosure document because of subsection 708(8) or (10) (sophisticated investors); or

- (b) the offer does not need a disclosure document because of subsection 708(11) (professional investors); or
- (c) the offer is an offer of listed securities made by telephone by a licensed securities dealer; or
- (d) the offer is made to a client by a licensed securities dealer through whom the client has bought or sold securities in the last 12 months; or
- (e) the offer is made under an eligible employee share scheme.

Division 2—Remedies

737 Remedies for investors

Right to withdraw and have money returned

- (1) If securities are issued to a person in contravention of section 724 (situation calling for a supplementary or replacement document), the person has the right to return the securities and to have their application money repaid. This is so even if the company that issued the securities is being wound up.
- (2) A right referred to in subsection (1) is exercisable by written notice given to the company within 1 month after the date of the issue.
- (3) If the body or the seller does not repay the money as required by subsection (1), the directors of the body or seller are personally liable to repay the money.

738 Securities may be returned and refund obtained

If securities are issued or transferred to a person as a result of an offer that contravenes section 736, the person may return the securities within 1 month after the issue or transfer. If they do so, they are entitled to be repaid the amount they paid for the securities.

Part 6D.4—ASIC's powers

739 ASIC stop orders

Power to make orders

- (1) This section applies if ASIC is satisfied that:
 - (a) information in a disclosure document lodged with ASIC is not worded and presented in a clear, concise and effective manner (see section 715A); or
 - (b) an offer of securities under a disclosure document lodged with ASIC would contravene section 728; or
 - (c) an advertisement or publication of a kind referred to in subsection 734(5) or (6) that relates to securities is defective (see subsection (6) of this section).
- (1A) ASIC may order that:
 - (a) if paragraph (1)(a) or (b) applies—no offers, issues, sales or transfers of the securities be made while the order is in force; or
 - (b) if paragraph (1)(c) applies—specified conduct in respect of the securities to which the advertisement or publication relates must not be engaged in.
- (1B) An order under paragraph (1A)(b) may include a statement that specified conduct engaged in contrary to the order will be regarded as not complying with the requirements of a specified provision of this Chapter.
- (2) Before making an order under subsection (1A), ASIC must:
 - (a) hold a hearing; and
 - (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.
- (3) If ASIC considers that any delay in making an order under subsection (1A) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order may be made

Section 739

without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.

- (4) At any time during the hearing, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order lasts until:
 - (a) ASIC makes an order under subsection (1A) after the conclusion of the hearing; or
 - (b) the interim order is revoked;whichever happens first.
- (5) An order under subsection (1A), (3) or (4) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer securities under the disclosure document.

Defective advertisements or statements

- (6) For the purposes of this section, an advertisement or publication of a kind referred to in subsection 734(5) or (6) is **defective** if:
 - (a) there is a misleading or deceptive statement in the advertisement or publication; or
 - (b) there is an omission from the advertisement or publication of material required by the relevant subsection to be included in the advertisement or publication; or
 - (c) if the advertisement or publication relates to an offer of securities in a class that is not already quoted, and is published before a disclosure document in relation to the offer is lodged—the advertisement or publication includes material that is not referred to in paragraph 734(5)(b).

Forecasts and other forward-looking statements

- (7) For the purposes of the definition of **defective** in subsection (6), a person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement.
- (8) Subsection (7) does not limit the circumstances in which a statement may be misleading.

740 Anti-avoidance determinations

- (1) ASIC may determine in writing that a number of different bodies are closely related and that their transactions should be aggregated for the purposes of this Chapter. If ASIC does so:
 - (a) an issue, sale or transfer of securities in any other bodies is taken to also be an issue, sale or transfer of the securities of each of the other bodies by those bodies; and
 - (b) any money received from an issue, sale or transfer of securities in any of the bodies is taken to also be received by each of the other bodies from an issue, sale or transfer of its own securities.

ASIC must give written notice of the determination to each of the bodies.

- (2) ASIC may determine in writing that the transactions of a body and of a person who controls the body should be aggregated for the purposes of this Chapter. If ASIC does so:
 - (a) an issue of securities in the body is taken to also be the transfer of the securities by the controller; and
 - (b) any money received from an issue of securities in the body is taken to also be received by the controller from a transfer of the securities; and
 - (c) a sale or transfer of securities in the body by the controller is taken to also be the issue of the securities by the body; and
 - (d) any money received from a sale or transfer of securities in the body by the controller is taken to also be received by the body from an issue of the securities.

ASIC must give written notice of the determination to the body and the controller.

741 ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may do all or any of the following:
 - (a) apply to all or specified provisions of this Chapter;

Section 741

- (b) apply to all persons, specified persons, or a specified class of persons;
 - (c) relate to all securities, specified securities or a specified class of securities;
 - (d) relate to any other matter generally or as specified.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.

Part 6D.5—Miscellaneous

742 Exemptions and modifications by regulations

- (1) The regulations may:
 - (a) exempt a person or class of persons from all or specified provisions of this Chapter; or
 - (b) exempt a security or class of securities from all or specified provisions of this Chapter; or
 - (c) provide that this Chapter applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (2) Without limiting subsection (1), regulations made for the purposes of this section may:
 - (a) declare that provisions of this Chapter are modified so that they apply (with or without further modifications) in relation to persons, securities, financial products or situations to which they would not otherwise apply; or
 - (b) declare that provisions of this Chapter are modified so that they apply (whether with or without further modifications) in a way that changes the person by whom or to whom a document or information is required to be given by a provision of this Chapter.
- (3) For the purpose of this section, the *provisions of this Chapter* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Chapter; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Chapter.

Corporations Act 2001

Act No. 50 of 2001 as amended

This compilation was prepared on 12 January 2009
taking into account amendments up to Act No. 146 of 2008

Volume 4 includes: Table of Contents
Chapters 7 and 8 (ss. 760A – 1200U)

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Contents

Chapter 7—Financial services and markets	1
Part 7.1—Preliminary	1
Division 1—Object of Chapter and outline of Chapter	1
760A Object of Chapter	1
760B Outline of Chapter	1
Division 2—Definitions	3
761A Definitions	3
761B Meaning of <i>arrangement</i> —2 or more arrangements that together form a derivative or other financial product	13
761C Meaning of <i>carry on</i> a financial services business	13
761CA Meaning of <i>class</i> and <i>kind</i> of financial products and financial services	13
761D Meaning of <i>derivative</i>	13
761E Meaning of <i>issued</i> , <i>issuer</i> , <i>acquire</i> and <i>provide</i> in relation to financial products	15
761F Meaning of <i>person</i> —generally includes a partnership	18
761FA Meaning of <i>person</i> —generally includes multiple trustees	18
761G Meaning of retail client and wholesale client	20
761GA Meaning of <i>retail client</i> —sophisticated investors	25
761H References to this Chapter include references to regulations or other instruments made for the purposes of this Chapter	26
Division 3—What is a financial product?	27
Subdivision A—Preliminary	27
762A Overview of approach to defining what a financial product is	27
762B What if a financial product is part of a broader facility?	27
762C Meaning of <i>facility</i>	28
Subdivision B—The general definition	28
763A General definition of <i>financial product</i>	28
763B When a person makes a financial investment	29
763C When a person manages financial risk	30
763D When a person makes non-cash payments	30
763E What if a financial product is only incidental?	31
Subdivision C—Specific inclusions	32
764A Specific things that are financial products (subject to Subdivision D)	32
Subdivision D—Specific exclusions	34
765A Specific things that are not financial products	34

Division 4—When does a person provide a financial service?	38
766A When does a person provide a <i>financial service</i> ?	38
766B Meaning of financial product advice	38
766C Meaning of <i>dealing</i>	41
766D Meaning of <i>makes a market</i> for a financial product	42
766E Meaning of provide a custodial or depository service	43
Division 5—What is a financial market?	45
767A What is a <i>financial market</i> ?	45
Division 6—What is a clearing and settlement facility?	46
768A What is a clearing and settlement facility?	46
Division 7—General provisions relating to civil and criminal liability	48
769A Part 2.5 of <i>Criminal Code</i> does not apply	48
769B People are generally responsible for the conduct of their agents, employees etc.	48
769C Representations about future matters taken to be misleading if made without reasonable grounds	51
Part 7.2—Licensing of financial markets	52
Division 1—Preliminary	52
790A Definition	52
Division 2—Requirement to be licensed	53
791A Need for a licence	53
791B Other prohibitions on holding out	53
791C Exemptions	53
791D When a market is taken to be operated in this jurisdiction	54
Division 3—Regulation of market licensees	55
Subdivision A—Licensee’s obligations	55
792A General obligations	55
792B Obligation to notify ASIC of certain matters	56
792C Giving ASIC information about a listed disclosing entity	58
792D Obligation to assist ASIC	58
792E Obligation to give ASIC access to market facilities	58
792F Annual report	59
792G Obligations to notify people about clearing and settlement arrangements in certain circumstances	59
792H Change of country by foreign licensee	60
792I Making information about compensation arrangements publicly available	61

Subdivision B—The market’s operating rules and procedures	61
793A Content of the operating rules and procedures.....	61
793B Legal effect of operating rules.....	62
793C Enforcement of operating rules	62
793D Changing the operating rules.....	63
793E Disallowance of changes to operating rules.....	64
Subdivision C—Powers of the Minister and ASIC	64
794A Minister’s power to give directions	64
794B Minister’s power to require special report.....	65
794C ASIC to assess licensee’s compliance	65
794D ASIC’s power to give directions.....	66
794E Additional directions to clearing and settlement facilities	68
Division 4—The Australian market licence	69
Subdivision A—How to get a licence	69
795A How to apply for a licence.....	69
795B When a licence may be granted	69
795C Publication of notice of licence grant	71
795D More than one licence in the same document.....	71
795E More than one market covered by the same licence	72
Subdivision B—The conditions on the licence	72
796A The conditions on the licence	72
Subdivision C—When a licence can be varied, suspended or cancelled	73
797A Varying licences	73
797B Immediate suspension or cancellation	74
797C Suspension or cancellation following hearing and report	74
797D Effect of suspension	75
797E Variation or revocation of suspension	75
797F Publication of notice of licence suspension or cancellation.....	75
797G Suspension and cancellation only in accordance with this Subdivision.....	76
Division 5—Other matters	77
798A Matters to be taken into account by the Minister.....	77
798B ASIC may give advice to Minister	78
798C Market licensee or related body corporate etc. listing on market.....	78
798D Exemptions and modifications for self-listing licensees or related bodies corporate etc.	80
798DA Market licensee, related body corporate etc. or competitor participating in market.....	81
798E Other potential conflict situations.....	82

Part 7.3—Licensing of clearing and settlement facilities	84
Division 1—Requirement to be licensed	84
820A Need for a licence	84
820B Other prohibitions on holding out.....	84
820C Exemptions.....	85
820D When a clearing and settlement facility is taken to be operated in this jurisdiction	85
Division 2—Regulation of CS facility licensees	86
Subdivision A—Licensee’s obligations	86
821A General obligations.....	86
821B Obligation to notify ASIC of certain matters.....	87
821BA Obligation to notify Reserve Bank of certain matters.....	88
821C Obligation to assist	89
821D Obligation to give ASIC access to the facility	89
821E Annual report.....	90
821F Change of country by foreign licensee	90
Subdivision B—The facility’s operating rules and procedures	91
822A Content of the operating rules and procedures.....	91
822B Legal effect of operating rules	92
822C Enforcement of operating rules	92
822D Changing the operating rules	93
822E Disallowance of changes to operating rules.....	93
Subdivision C—Powers of the Minister, ASIC and the Reserve Bank in relation to licensees	94
823A Minister’s power to give directions	94
823B Minister’s power to require special report	94
823C ASIC to assess licensee’s compliance	95
823CA Reserve Bank to assess licensee’s compliance	96
823D Directions power—protecting dealings in financial products and ensuring fair and effective provision of services by CS facilities	96
823E Directions power—reduction of systemic risk.....	98
Division 3—The Australian CS facility licence	100
Subdivision A—How to get a licence	100
824A How to apply for a licence.....	100
824B When a licence may be granted	100
824C Publication of notice of licence grant	102
824D More than one licence in the same document	102
824E More than one CS facility covered by the same licence	102
Subdivision B—The conditions on the licence	103
825A The conditions on the licence	103

Subdivision C—When a licence can be varied, suspended or cancelled	104
826A Varying licences	104
826B Immediate suspension or cancellation	105
826C Suspension or cancellation following hearing and report	105
826D Effect of suspension	106
826E Variation or revocation of suspension	106
826F Publication of notice of licence suspension or cancellation.....	106
826G Suspension and cancellation only in accordance with this Subdivision.....	106
Division 4—Other matters	107
827A Matters to be taken into account by the Minister.....	107
827B ASIC may give advice to Minister	108
827C Reserve Bank may give advice to Minister	108
827D Reserve Bank may determine financial stability standards.....	108
Part 7.4—Limits on involvement with licensees	111
Division 1—Limit on control of certain licensees	111
Subdivision A—15% voting power limit	111
850A Scope of Division	111
850B Meaning of unacceptable control situation	111
850C Acquisitions of shares.....	112
850D Remedial orders.....	112
850E Injunctions.....	113
Subdivision B—Approval to exceed 15% voting power limit	113
851A Application for approval to exceed 15% voting power limit	113
851B Approval of application	114
851C Duration of approval.....	114
851D Conditions of approval	115
851E Varying percentage approved	116
851F Revoking an approval.....	117
851G Further information about applications.....	118
851H Time limit for Minister's decision.....	118
851I Preservation of voting power in relation to bodies specified in regulations made for section 850A	119
Subdivision C—Other matters	120
852A Acquisition of property.....	120
852B Anti-avoidance	120
Division 2—Individuals who are not fit and proper are disqualified	122
853A Who is disqualified.....	122
853B When an individual is <i>involved in</i> an operator.....	122

853C	Declaration by ASIC	122
853D	Procedure for declaration.....	123
853E	Revoking a declaration	124
853F	Obligations on disqualified individuals	124
853G	Notification by ASIC.....	124
Division 3—Miscellaneous		125
854A	Record-keeping and giving of information.....	125
854B	Exemptions and modifications by regulations	126
Part 7.5—Compensation regimes for financial markets		127
Division 1—Preliminary		127
880A	Part does not apply to markets licensed under special provisions about overseas markets	127
880B	Definitions.....	127
Division 2—When there must be a compensation regime		129
881A	Licensed markets through which participants provide services for retail clients must generally have a compensation regime	129
881B	Additional requirements for the licence application	129
881C	What happens if an application contains information in accordance with paragraph 881B(2)(c).....	130
881D	What happens if an application contains a statement in accordance with paragraph 881B(2)(d)	130
Division 3—Approved compensation arrangements		131
Subdivision A—Approval of compensation arrangements		131
882A	How to get compensation arrangements approved with grant of licence	131
882B	How to get compensation arrangements approved after licence is granted	131
882C	Revocation of approval.....	132
882D	Minister’s power to give directions	132
Subdivision B—Effect of compensation rules forming part of Division 3 arrangements		133
883A	Legal effect of compensation rules.....	133
883B	Enforcement of compensation rules	133
883C	Other sources of funds for compensation	134
883D	Payment of levies	134
Subdivision C—Changing Division 3 arrangements		135
884A	Division 3 arrangements must generally only be changed in accordance with this Subdivision	135
884B	Changing Division 3 arrangements—matters required to be dealt with in the compensation rules.....	136

884C	Changing Division 3 arrangements—matters not required to be dealt with in the compensation rules.....	137
Subdivision D—Are compensation arrangements adequate?		138
885A	Purpose of this Subdivision	138
885B	Requirements to be complied with for arrangements to be adequate.....	138
885C	The losses to be covered.....	139
885D	Certain losses that are not Division 3 losses	140
885E	The amount of compensation.....	141
885F	Method of payment of compensation	142
885G	Making and determination of claims	142
885H	The source of funds—general.....	143
885I	Administration and monitoring.....	143
885J	The losses to be covered—other matters to be taken into account	144
Subdivision E—Other provisions about Division 3 arrangements		144
886A	Only one claim in respect of the same loss.....	144
886B	Regulations relating to fidelity funds.....	144
Division 4—NGF Compensation regime		145
Subdivision A—Application of Division		145
887A	Markets to which this Division applies.....	145
Subdivision B—Claims for and payment of compensation		145
888A	The situations in which compensation may be claimed.....	145
888B	Kinds of compensation available.....	145
888C	Amount of compensation payable	145
888D	Payment of compensation.....	146
888E	Making and determination of claims	146
888F	The SEGC has power to determine claims	147
888G	Allowing a claim does not constitute an admission of any other liability	147
888H	Claimant may apply to Court if claim disallowed	147
888I	Non-NGF property of the SEGC not available to meet claims	148
888J	The SEGC may enter into contracts of insurance or indemnity.....	148
888K	NGF may be used to acquire financial products to be transferred as compensation	149
Subdivision C—The NGF		149
889A	Continuation of the National Guarantee Fund	149
889B	Compensation to be provided out of the NGF	149
889C	The SEGC to keep the NGF	149
889D	What the NGF consists of.....	150
889E	Power to borrow etc. for purposes of the NGF	150
889F	Money borrowed and paid to the SEGC	151

889G	Money borrowed and not paid to the SEGC	151
889H	Payments out of the NGF	151
889I	Minimum amount of the NGF	152
889J	Levy by the SEGC.....	153
889K	Levy by market operator.....	154
Subdivision D—The SEGC		156
890A	Minister to nominate the SEGC.....	156
890B	The SEGC's functions and powers	157
890C	Delegation	157
890D	Operating rules of the SEGC	158
890E	Legal effect of the SEGC's operating rules	158
890F	Enforcement of the SEGC's operating rules.....	158
890G	Changing the SEGC's operating rules	159
890H	Disallowance of changes to the SEGC's operating rules.....	159
Subdivision E—Other provisions relating to compensation under this Division		159
891A	Payment out of the NGF to prescribed body with arrangements covering clearing and settlement facility support.....	159
891B	Markets operated by bodies corporate that become members of the SEGC—regulations may deal with transitional provisions and other matters.....	160
891C	Regulations may make different provision in respect of different markets etc.	161
Division 5—Provisions common to both kinds of compensation arrangements		162
892A	Definitions	162
892B	How regulated funds are to be kept	162
892C	Money in regulated funds may be invested	163
892D	Powers of relevant authority to require production or delivery of documents or statements	164
892E	Power to require assistance for purpose of dealing with a claim.....	165
892F	Relevant authority's right of subrogation if compensation is paid.....	166
892G	Excess money in compensation funds	166
892H	Accounting and reporting for regulated funds	166
892I	Division 3 arrangements—reporting in situations where compensation does not come out of a regulated fund.....	168
892J	Regulations may provide for qualified privilege in respect of certain matters	168
892K	Risk assessment report	168

Division 6—Miscellaneous	170
893A Exemptions and modifications by regulations	170
Part 7.6—Licensing of providers of financial services	171
Division 1—Preliminary	171
910A Definitions	171
Division 2—Requirement to be licensed or authorised	172
911A Need for an Australian financial services licence	172
911B Providing financial services on behalf of a person who carries on a financial services business.....	177
911C Prohibition on holding out	178
911D When a financial services business is taken to be carried on in this jurisdiction	179
Division 3—Obligations of financial services licensees	180
912A General obligations.....	180
912B Compensation arrangements if financial services provided to persons as retail clients	181
912C Direction to provide a statement.....	182
912CA Regulations may require information to be provided	183
912D Obligation to notify ASIC of certain matters.....	183
912E Surveillance checks by ASIC	185
912F Obligation to cite licence number in documents.....	185
Division 4—Australian financial services licences	186
Subdivision A—How to get a licence	186
913A Applying for a licence	186
913B When a licence may be granted	186
913C Licence numbers.....	188
Subdivision B—The conditions on the licence	188
914A The conditions on the licence	188
Subdivision C—When a licence can be varied, suspended or cancelled	190
915A Varying licences	190
915B Immediate suspension or cancellation	190
915C Suspension or cancellation after offering a hearing.....	192
915D Effect of suspension	193
915E Revocation of suspension	193
915F Date of effect and publication of cancellation or suspension.....	193
915G Statement of reasons.....	194
915H ASIC may allow licence to continue in effect	194
915I Special procedures for APRA-regulated bodies	194
915J Variation, suspension and cancellation only under this Subdivision.....	195

Division 5—Authorised representatives	196
916A How representatives are authorised	196
916B Sub-authorisations	196
916C Authorised representative of 2 or more licensees	197
916D Licensees cannot authorise other licensees	198
916E Licensees acting under a binder	198
916F Obligation to notify ASIC etc. about authorised representatives	199
916G ASIC may give licensee information about representatives	200
Division 6—Liability of financial services licensees for representatives	203
917A Application of Division	203
917B Responsibility if representative of only one licensee	204
917C Representatives of multiple licensees	204
917D Exception if lack of authority is disclosed to client	205
917E Responsibility extends to loss or damage suffered by client	205
917F Effect of Division	206
Division 8—Banning or disqualification of persons from providing financial services	207
Subdivision A—Banning orders	207
920A ASIC’s power to make a banning order	207
920B What is a <i>banning order</i> ?	207
920C Effect of banning orders	208
920D Variation or cancellation of banning orders	208
920E Date of effect and publication of banning order, variation or cancellation	209
920F Statement of reasons	209
Subdivision B—Disqualification by the Court	210
921A Disqualification by the Court	210
Division 9—Registers relating to financial services	211
922A Registers relating to financial services	211
922B Inspection of Registers	211
Division 10—Restrictions on use of terminology	212
923A Restriction on use of certain words or expressions	212
923B Restriction on use of certain words or expressions unless authorised in licence conditions	214
Division 11—Agreements with unlicensed persons relating to the provision of financial services	217
Subdivision A—Agreements affected	217
924A Agreements with certain unlicensed persons	217

Subdivision B—Effect on agreements	217
925A Client may give notice of rescission	217
925B Effect of notice under section 925A	218
925C Client may apply to Court for partial rescission	218
925D Court may make consequential orders	219
925E Agreement unenforceable against client	219
925F Non-licensee not entitled to recover commission	220
925G Onus of establishing non-application of section 925E or 925F	220
925H Client may recover commission paid to non-licensee	220
925I Remedies under this Division additional to other remedies	221
Division 12—Miscellaneous	222
926A Exemptions and modifications by ASIC	222
926B Exemptions and modifications by regulations	223
Part 7.7—Financial services disclosure	224
Division 1—Preliminary	224
940A How Part applies if a financial services licensee is acting as authorised representative	224
940B What if there is no reasonable opportunity to give a document, information or statement required by this Part?	224
940C How documents, information and statements are to be given	225
940D General approach to offence provisions	227
Division 2—Person provided with financial service as retail client to be given a Financial Services Guide	228
Subdivision A—Requirement for a Financial Services Guide to be given	228
941A Obligation on financial services licensee to give a Financial Services Guide if financial service provided to person as a retail client	228
941B Obligation on authorised representative to give a Financial Services Guide if financial service provided to person as a retail client	228
941C Situations in which a Financial Services Guide is not required	229
941D Timing of giving Financial Services Guide	230
941E Information must be up to date	231
941F Obligation to give updated Financial Services Guide	231
Subdivision B—Content and authorisation of Financial Services Guide	232
942A Title of Financial Services Guide	232
942B Financial Services Guide given by financial services licensee—main requirements	232

942C	Financial Services Guide given by authorised representative—main requirements	235
942D	Financial Services Guide may consist of 2 or more separate documents given at same time	238
942DA	Combining a Financial Services Guide and a Product Disclosure Statement in a single document	240
942E	Altering a Financial Services Guide after its preparation and before giving it to a person	240
Subdivision C—Supplementary Financial Services Guides		241
943A	What a Supplementary Financial Services Guide is	241
943B	Title of Supplementary Financial Services Guide	241
943C	Form of Supplementary Financial Services Guide	241
943D	Effect of giving a person a Supplementary Financial Services Guide	242
943E	Situation in which only a Supplementary Financial Services Guide need be given	242
943F	Altering a Supplementary Financial Services Guide after its preparation and before giving it to a person	242
Division 3—Additional requirements for personal advice provided to a retail client		244
Subdivision A—When this Division applies		244
944A	Situation in which Division applies	244
Subdivision B—Requirements relating to basis of advice		244
945A	Requirement to have a reasonable basis for the advice.....	244
945B	Obligation to warn client if advice based on incomplete or inaccurate information.....	245
Subdivision C—Requirement for a Statement of Advice to be given		246
946A	Obligation to give client a Statement of Advice	246
946AA	Small investments—Statement of Advice not required	246
946B	Other situations in which a Statement of Advice is not required.....	248
946C	Timing of giving Statement of Advice	252
Subdivision D—Content of Statement of Advice		253
947A	Title of Statement of Advice.....	253
947B	Statement of Advice given by financial services licensee—main requirements	253
947C	Statement of Advice given by authorised representative—main requirements	255
947D	Additional requirements when advice recommends replacement of one product with another.....	257
947E	Statement of Advice not to be combined with Financial Services Guide or Product Disclosure Statement	258

Subdivision E—Other matters	258
948A Qualified privilege if providing entity complies with this Division	258
Division 4—Other disclosure requirements	260
949A General advice provided to retail client—obligation to warn client that advice does not take account of client’s objectives, financial situation or needs	260
949B Regulations may impose disclosure requirements in certain situations.....	261
Division 6—Miscellaneous	263
951A Part cannot be contracted out of	263
951B Exemptions and modifications by ASIC.....	263
951C Exemptions and modifications by regulations	264
Division 7—Enforcement	265
Subdivision A—Offences	265
952A Overview	265
952B Definitions	265
952C Offence of failing to give a disclosure document or statement	267
952D Offence of giving a disclosure document or statement knowing it to be defective	268
952E Offence of giving a defective disclosure document or statement (whether or not known to be defective).....	269
952F Offences of financial services licensee knowingly providing defective disclosure material to an authorised representative	271
952G Offences of financial services licensee providing disclosure material to an authorised representative (whether or not known to be defective)	272
952H Offence of financial services licensee failing to ensure authorised representative gives disclosure documents or statements as required.....	275
952I Offences if a Financial Services Guide (or Supplementary FSG) does not comply with certain requirements.....	275
952J Offence if a Statement of Advice does not comply with certain requirements	277
952K Offence if authorised representative gives out unauthorised Financial Services Guide (or Supplementary FSG).....	277
952L Offences if financial services licensee or authorised representative becomes aware that a Financial Services Guide (or Supplementary FSG) is defective	278
952M Offence of unauthorised alteration of Financial Services Guide or Supplementary Financial Services Guide	279
Subdivision B—Civil liability	279
953A Definitions.....	279
953B Civil action for loss or damage.....	281

953C	Additional powers of court to make orders.....	283
Part 7.8—Other provisions relating to conduct etc. connected with financial products and financial services, other than financial product disclosure		
		285
Division 1—Preliminary		
980A	Matters covered by this Part	285
980B	General approach to offence provisions	285
Division 2—Dealing with clients' money		
		286
Subdivision A—Money other than loans		
		286
981A	Money to which Subdivision applies.....	286
981B	Obligation to pay money into an account	287
981C	Regulations may deal with various matters relating to accounts maintained for the purposes of section 981B	288
981D	Money related to derivatives may be used for general margining etc. purposes.....	288
981E	Protection of money from attachment etc.	289
981F	Regulations may deal with how money to be dealt with if licensee ceases to be licensed etc.....	289
981G	Account provider not liable merely because of licensee's contravention	290
981H	Money to which Subdivision applies taken to be held in trust.....	290
Subdivision B—Loan money		
		290
982A	Money to which this Subdivision applies	290
982B	Obligation to pay money into an account	291
982C	Licensee to give client statement setting out terms of loan etc.	291
982D	Permitted use of loan	292
Subdivision C—Powers of Court		
		292
983A	Court may freeze certain accounts.....	292
983B	Interim order freezing accounts	293
983C	Duty of person to whom order directed to make full disclosure.....	293
983D	Further orders and directions	294
983E	Power of Court to make order relating to payment of money	294
Division 3—Dealing with other property of clients		
		296
984A	Property to which Division applies.....	296
984B	How property to which this Division applies is to be dealt with.....	296
Division 4—Special provisions relating to insurance		
		298
985A	Definitions etc.	298

985B	Status of amounts paid to financial services licensees in respect of contracts of insurance.....	298
985C	Regulations may impose other requirements etc. if financial services licensee is not the insurer.....	299
985D	Financial services licensees etc. not to deal in general insurance products from unauthorised insurers etc.....	300
Division 5—Obligations to report		301
986A	Reporting in relation to money to which Subdivision A or B of Division 2 applies or property to which Division 3 applies.....	301
986B	Reporting in relation to dealings in derivatives	301
Division 6—Financial records, statements and audit		302
Subdivision A—Preliminary		302
987A	Application of Division	302
Subdivision B—Financial records of financial services licensees		302
988A	Obligation to keep financial records.....	302
988B	Records to be kept so that profit and loss statements and balance sheet can be prepared and audited	303
988C	Language of records	303
988D	Location of records.....	303
988E	Particular categories of information to be shown in records.....	303
988F	Regulations may impose additional requirements	304
988G	Records taken to be made with licensee's authority	304
Subdivision C—Financial statements of financial services licensees		305
989A	Meaning of <i>financial year</i>	305
989B	Financial services licensee to prepare and lodge annual profit and loss statement and balance sheet	305
989C	Requirements as to contents and applicable accounting principles	305
989CA	Audit to be conducted in accordance with auditing standards	306
989D	Time of lodgment	306
Subdivision D—Appointment etc. of auditors		307
990A	Sections 990B to 990H not to apply to public companies	307
990B	Appointment of auditor by licensee.....	307
990C	When a person or firm is ineligible to act as auditor	309
990D	Ineligible person or firm must not consent to act or disqualify themselves etc.....	309
990E	Duration of appointment of auditors.....	309
990F	Removal of auditors	310
990G	Resignation of auditors—requirements for resignation	310
990H	Resignation of auditors—when resignation takes effect.....	311
990I	Auditor's right of access to records, information etc.....	311
990J	Auditor's fees and expenses	312
990K	Auditor to report on certain matters.....	312

990L	Qualified privilege for auditor etc.	313
Division 7—Other rules about conduct		315
991A	Financial services licensee not to engage in unconscionable conduct	315
991B	Financial services licensee to give priority to clients' orders	315
991C	Regulations may deal with various matters relating to instructions to deal through licensed markets	316
991D	Regulations may require records to be kept in relation to instructions to deal on licensed markets and foreign markets	316
991E	Obligations of financial services licensee in relation to dealings with non-licensees	317
991F	Dealings involving employees of financial services licensees	318
Division 8—Miscellaneous		320
992A	Prohibition on hawking of certain financial products	320
992AA	Prohibition of hawking of managed investment products	322
992B	Exemptions and modifications by ASIC	323
992C	Exemptions and modifications by regulations	324
Division 9—Enforcement		325
993A	Overview	325
993B	Offence of failing to pay client money into an account as required	325
993C	Offence of failing to comply with requirements relating to client money account	326
993D	Offence of failing to pay loan money into an account as required	326
Part 7.9—Financial product disclosure and other provisions relating to issue, sale and purchase of financial products		327
Division 1—Preliminary		327
1010A	Part generally does not apply to securities	327
1010B	Part does not apply to financial products not issued in the course of a business	327
1010BA	Part does not apply to contribution plans	327
1010C	Special provisions about meaning of <i>sale</i> and <i>offer</i>	328
1010D	General approach to offence provisions	328
Division 2—Product Disclosure Statements		329
Subdivision A—Preliminary		329
1011A	Jurisdictional scope of Division	329
1011B	Definitions	329
1011C	Treatment of offers of options over financial products	330

**Subdivision B—Requirement for a Product Disclosure Statement
to be given**

	to be given	330
1012A	Obligation to give Product Disclosure Statement—personal advice recommending particular financial product.....	330
1012B	Obligation to give Product Disclosure Statement—situations related to issue of financial products	331
1012C	Obligation to give Product Disclosure Statement—offers related to sale of financial products	333
1012D	Situations in which Product Disclosure Statement is not required.....	337
1012DA	Rights issues for which Product Disclosure Statement is not required	342
1012DA	Product Disclosure Statement not required for sale amounting to indirect issue.....	345
1012E	Small scale offerings of managed investment and other prescribed financial products (20 issues or sales in 12 months).....	350
1012F	Product Disclosure Statement for certain superannuation products may be provided later.....	352
1012G	Product Disclosure Statement may sometimes be provided later.....	353
1012H	Obligation to take reasonable steps to ensure that Product Disclosure Statement is given to person electing to be covered by group financial product	355
1012I	Obligation to give employer a Product Disclosure Statement in relation to certain superannuation products and RSA products	355
1012IA	Treatment of arrangements under which a person can instruct another person to acquire a financial product	357
1012J	Information must be up to date	361
1012K	Anti-avoidance determinations	361

**Subdivision C—Preparation and content of Product Disclosure
Statements**

Statements		362
1013A	Who must prepare Product Disclosure Statement.....	362
1013B	Title of Product Disclosure Statement	363
1013C	Product Disclosure Statement content requirements.....	363
1013D	Product Disclosure Statement content—main requirements.....	365
1013DA	Information about ethical considerations etc.	367
1013E	General obligation to include other information that might influence a decision to acquire	367
1013F	General limitations on extent to which information is required to be included	367
1013FA	Information not required to be included in PDS for continuously quoted securities.....	368
1013G	Product Disclosure Statement must be dated.....	369

1013H	Requirements if Product Disclosure Statement states or implies that financial product will be able to be traded	370
1013I	Extra requirements if Product Disclosure Statement relates to managed investment products that are ED securities.....	370
1013J	Requirements if Statement has been lodged with ASIC	371
1013K	Requirements relating to consents to certain statements.....	371
1013L	Product Disclosure Statement may consist of 2 or more separate documents given at same time	372
1013M	Combining a Product Disclosure Statement and a Financial Services Guide in a single document	373
Subdivision D—Supplementary Product Disclosure Statements		373
1014A	What a Supplementary Product Disclosure Statement is	373
1014B	Title of Supplementary Product Disclosure Statement	374
1014C	Form of Supplementary Product Disclosure Statement	374
1014D	Effect of giving person a Supplementary Product Disclosure Statement	374
1014E	Situation in which only a Supplementary Product Disclosure Statement need be given	374
1014F	Application of other provisions in relation to Supplementary Product Disclosure Statements	375
Subdivision DA—Replacement Product Disclosure Statements		375
1014G	Application of this Subdivision—stapled securities	375
1014H	What a Replacement Product Disclosure Statement is	375
1014J	Consequences of lodging a Replacement Product Disclosure Statement	376
1014K	Form, content and preparation of Replacement Product Disclosure Statements	376
1014L	Giving, lodgment and notice of Replacement Product Disclosure Statements	377
Subdivision E—Other requirements relating to Product Disclosure Statements and Supplementary Product Disclosure Statements		377
1015A	Subdivision applies to Product Disclosure Statements and Supplementary Product Disclosure Statements	377
1015B	Some Statements must be lodged with ASIC	377
1015C	How a Statement is to be given	378
1015D	Notice, retention and access requirements for Statement that does not need to be lodged	379
1015E	Altering a Statement after its preparation and before giving it to a person	380
Subdivision F—Other rights and obligations related to Product Disclosure Statements		381
1016A	Provisions relating to use of application forms.....	381
1016B	If Statement lodged with ASIC, financial product is not to be issued or sold before specified period.....	385

1016C	Minimum subscription condition must be fulfilled before issue or sale	385
1016D	Condition about ability to trade on a market must be fulfilled before issue or sale	386
1016E	Choices open to person making the offer if disclosure condition not met or Product Disclosure Statement defective	387
1016F	Remedies for person acquiring financial product under defective Product Disclosure Document.....	392
Division 3—Other disclosure obligations of the issuer of a financial product		394
1017A	Obligation to give additional information on request	394
1017B	Ongoing disclosure of material changes and significant events.....	396
1017C	Information for existing holders of superannuation products and RSA products.....	398
1017D	Periodic statements for retail clients for financial products that have an investment component.....	402
1017DA	Trustees of superannuation entities—regulations may specify additional obligations to provide information.....	405
1017E	Dealing with money received for financial product before the product is issued	406
1017F	Confirming transactions	408
1017G	Certain product issuers and regulated persons must meet appropriate dispute resolution requirements	414
Division 4—Advertising for financial products		416
1018A	Advertising or other promotional material for financial product must refer to Product Disclosure Statement.....	416
1018B	Prohibition on advertising personal offers covered by section 1012E	419
Division 5—Cooling-off periods		420
1019A	Situations in which this Division applies	420
1019B	Cooling-off period for return of financial product.....	420
Division 5A—Unsolicited offers to purchase financial products off-market		423
1019C	Definitions.....	423
1019D	Offers to which this Division applies	423
1019E	How offers are to be made.....	424
1019F	Prohibition on inviting offers to sell.....	425
1019G	Duration and withdrawal of offers.....	425
1019H	Terms of offer cannot be varied.....	425
1019I	Contents of offer document	426
1019J	Obligation to update market value.....	426
1019K	Rights if requirements of Division not complied with.....	428

Division 6—Miscellaneous	431
1020A Offers etc. relating to certain managed investment schemes not to be made in certain circumstances	431
1020B Prohibition of certain short sales of securities, managed investment products and certain other financial products	431
1020D Part cannot be contracted out of	433
1020E Stop orders by ASIC.....	433
1020F Exemptions and modifications by ASIC.....	435
1020G Exemptions and modifications by regulations	437
Division 7—Enforcement	438
Subdivision A—Offences	438
1021A Overview	438
1021B Definitions.....	438
1021C Offence of failing to give etc. a disclosure document or statement.....	440
1021D Offence of preparer of defective disclosure document or statement giving the document or statement knowing it to be defective	442
1021E Offence of preparer of defective disclosure document or statement giving the document or statement (whether or not known to be defective)	443
1021F Offence of regulated person (other than preparer) giving disclosure document or statement knowing it to be defective.....	444
1021FA Paragraph 1012G(3)(a) obligation—offences relating to communication of information	444
1021FB Paragraph 1012G(3)(a) obligation—offences relating to information provided by product issuer for communication by another person	445
1021G Offence of financial services licensee failing to ensure authorised representative gives etc. disclosure documents or statements as required.....	448
1021H Offences if a Product Disclosure Statement (or Supplementary PDS) does not comply with certain requirements	448
1021I Offence of giving disclosure document or statement that has not been prepared by the appropriate person	449
1021J Offences if preparer etc. of disclosure document or statement becomes aware that it is defective	450
1021K Offence of unauthorised alteration of Product Disclosure Statement (or Supplementary PDS).....	451
1021L Offences of giving, or failing to withdraw, consent to inclusion of defective statement	452
1021M Offences relating to keeping and providing copies of Product Disclosure Statements (or Supplementary PDSs).....	453
1021N Offence of failing to provide additional information requested under section 1017A.....	454

1021O	Offences of issuer or seller of financial product failing to pay money into an account as required	454
1021P	Offences relating to offers to which Division 5A applies	455
Subdivision B—Civil liability		457
1022A	Definitions	457
1022B	Civil action for loss or damage	459
1022C	Additional powers of court to make orders	464
Part 7.10—Market misconduct and other prohibited conduct relating to financial products and financial services		465
Division 1—Preliminary		465
1040A	Content of Part	465
Division 2—The prohibited conduct (other than insider trading prohibitions)		466
1041A	Market manipulation	466
1041B	False trading and market rigging—creating a false or misleading appearance of active trading etc.	466
1041C	False trading and market rigging—artificially maintaining etc. trading price	468
1041D	Dissemination of information about illegal transactions	468
1041E	False or misleading statements	469
1041F	Inducing persons to deal	470
1041G	Dishonest conduct	471
1041H	Misleading or deceptive conduct (civil liability only)	471
1041I	Civil action for loss or damage for contravention of sections 1041E to 1041H	473
1041J	Sections of this Division have effect independently of each other	474
1041K	Division applies to certain conduct to the exclusion of State Fair Trading Acts provisions	475
Division 2A—Proportionate liability for misleading and deceptive conduct		476
1041L	Application of Division	476
1041M	Certain concurrent wrongdoers not to have benefit of apportionment	476
1041N	Proportionate liability for apportionable claims	477
1041O	Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware	478
1041P	Contribution not recoverable from defendant	478
1041Q	Subsequent actions	479
1041R	Joining non-party concurrent wrongdoer in the action	479
1041S	Application of Division	479

Division 3—The insider trading prohibitions	480
Subdivision A—Preliminary	480
1042A Definitions.....	480
1042B Application of Division	481
1042C When information is <i>generally available</i>	481
1042D When a reasonable person would take information to have a <i>material effect</i> on price or value of Division 3 financial products	482
1042E Division 3 financial products taken to be <i>able to be traded</i> despite suspensions or section 794D directions	482
1042F Inciting, inducing or encouraging an act or omission constitutes <i>procuring</i> the omission	482
1042G Information in possession of officer of body corporate	483
1042H Information in possession of partner or employee of partnership	483
Subdivision B—The prohibited conduct	484
1043A Prohibited conduct by person in possession of inside information	484
1043B Exception for withdrawal from registered scheme	485
1043C Exception for underwriters	486
1043D Exception for acquisition pursuant to legal requirement	486
1043E Exception for information communicated pursuant to a legal requirement.....	486
1043F Chinese wall arrangements by bodies corporate.....	487
1043G Chinese wall arrangements by partnerships etc.	487
1043H Exception for knowledge of person's own intentions or activities	488
1043I Exception for bodies corporate.....	488
1043J Exception for officers or agents of body corporate.....	489
1043K Transactions by holder of financial services licence or a representative of the holder of such a licence	489
1043L A specific situation in which a compensation order under section 1317HA may be made	490
1043M Defences to prosecution for an offence	494
1043N Relief from civil liability	495
1043O Powers of Court.....	496
Division 4—Defences, relief and limits on liability	497
1044A General defence or relief for publishers.....	497
1044B Limit on liability for misleading or deceptive conduct.....	497
Division 5—Miscellaneous	499
1045A Exemptions and modifications by regulations	499

Part 7.11—Title and transfer	500
Division 1—Title to certain securities	500
1070A Nature of shares and certain other interests in a company or registered scheme	500
1070B Numbering of shares.....	501
1070C Matters to be specified in share certificate	502
1070D Loss or destruction of title documents for certain securities.....	502
Division 2—Transfer of certain securities	505
Subdivision A—General provisions	505
1071A Application of the Subdivision to certain securities	505
1071B Instrument of transfer	505
1071C Occupation need not appear in transfer document, register etc.	507
1071D Registration of transfer at request of transferor	508
1071E Notice of refusal to register transfer	509
1071F Remedy for refusal to register transfer or transmission	509
1071G Certification of transfers.....	510
1071H Duties of company with respect to issue of certificates	511
Subdivision B—Special provisions for shares	513
1072A Transmission of shares on death (<i>replaceable rule—see section 135</i>)	513
1072B Transmission of shares on bankruptcy (<i>replaceable rule—see section 135</i>)	514
1072C Rights of trustee of estate of bankrupt shareholder.....	514
1072D Transmission of shares on mental incapacity (<i>replaceable rule—see section 135</i>)	516
1072E Trustee etc. may be registered as owner of shares	517
1072F Registration of transfers (<i>replaceable rule—see section 135</i>)	519
1072G Additional general discretion for directors of proprietary companies to refuse to register transfers (<i>replaceable rule—see section 135</i>)	519
1072H Notices relating to non-beneficial and beneficial ownership of shares.....	520
Division 3—Transfer of certain securities effected otherwise than through a prescribed CS facility	524
1073A Application of the Division to certain securities.....	524
1073B Definitions.....	524
1073C Application of Division to certain bodies as if they were companies.....	525
1073D Regulations may govern transfer of certain securities	525
1073E ASIC may extend regulations to securities not otherwise covered	527

1073F	Operation of this Division and regulations made for its purposes.....	528
Division 4—Transfer of financial products effected through prescribed CS facility		
1074A	Financial products to which this Division applies	530
1074B	Definitions.....	530
1074C	Operating rules of prescribed CS facility may deal with transfer of title	530
1074D	Valid and effective transfer if operating rules complied with.....	531
1074E	Regulations may govern transfer of financial products in accordance with operating rules of prescribed CS facility.....	531
1074F	Issuer protected from civil liability for person's contravention of prescribed CS facility's certificate cancellation rules.....	534
1074G	Operation of this Division and regulations made for its purposes.....	534
Division 5—Exemptions and modifications		
1075A	ASIC's power to exempt and modify	536
Part 7.12—Miscellaneous		
Division 1—Qualified privilege		
1100A	Qualified privilege for information given to ASIC.....	538
1100B	Qualified privilege for the conduct of market licensees and CS facility licensees	538
1100C	Qualified privilege for information given to market licensees and CS facility licensees etc.	540
1100D	Extension of protections given by this Division	540
Division 2—Other matters		
1101A	Approved codes of conduct	541
1101B	Power of Court to make certain orders	542
1101C	Preservation and disposal of records etc.	546
1101D	Destruction of records by ASIC	547
1101E	Concealing etc. of books	547
1101F	Falsification of records	548
1101G	Precautions against falsification of records	549
1101GA	How Part 9.3 applies to books required to be kept by this Chapter etc.....	549
1101H	Contravention of Chapter does not generally affect validity of transactions etc.	550
1101I	Gaming and wagering laws do not affect validity of contracts relating to financial products	550
1101J	Delegation	550

Chapter 8—Mutual recognition of securities offers	552
Part 8.1—Preliminary	552
1200A Definitions	552
Part 8.2—Foreign offers that are recognised in this jurisdiction	554
Division 1—Recognised offers	554
1200B When an offer is a recognised offer	554
1200C Conditions that must be met to be a recognised offer	554
1200D Required documents and information	555
1200E Warning statement	557
Division 2—Effect of a recognised offer	558
1200F Effect of a recognised offer	558
Division 3—Ongoing conditions for recognised offers	560
1200G Offering conditions	560
1200H Address for service condition	563
1200J Dispute resolution condition	564
Division 4—Modification of provisions of this Act	566
1200K Additional operation of section 675 (continuous disclosure)	566
1200L Pre-offer advertising	566
1200M Modification by the regulations	567
Division 5—ASIC’s powers in relation to recognised offers	568
1200N Stop orders	568
1200P Ban on making subsequent recognised offers	572
1200Q Offence of breaching an ongoing condition	573
Division 6—Miscellaneous	574
1200R Service of documents	574
Part 8.3—Offers made under foreign recognition schemes	575
1200S Notice to ASIC	575
1200T Extension of this Act to recognised jurisdictions	575
1200U ASIC stop order for advertising in a recognised jurisdiction	576

Chapter 7—Financial services and markets

Part 7.1—Preliminary

Division 1—Object of Chapter and outline of Chapter

760A Object of Chapter

The main object of this Chapter is to promote:

- (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products; and
- (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

760B Outline of Chapter

An outline of this Chapter is set out in the table below.

Part-by-Part outline of Chapter 7		
	Part...	Covers...
1	7.1	definitions of key concepts and of commonly occurring expressions
2	7.2	licensing of financial markets other matters relating to financial markets
3	7.3	licensing of clearing and settlement facilities other matters relating to clearing and settlement facilities
4	7.4	limitation on ownership of certain licensees individuals who are disqualified from being involved in certain licensees
5	7.5	compensation regimes for financial markets

Chapter 7 Financial services and markets

Part 7.1 Preliminary

Division 1 Object of Chapter and outline of Chapter

Section 760B

Part-by-Part outline of Chapter 7

	Part...	Covers...
6	7.6	licensing of providers of financial services other related matters (e.g. restrictions on use of terminology; agreements with unlicensed persons relating to provision of financial services)
7	7.7	disclosure requirements for financial services licensees and their authorised representatives disclosure requirements for certain people who are not required to be licensed
8	7.8	other conduct requirements for financial services licensees (e.g. dealing with client money and property; financial records, statements and audit) special provisions relating to insurance
9	7.9	financial product disclosure requirements other requirements relating to issue, sale and purchase of financial products
10	7.10	market misconduct and other prohibited conduct relating to financial products and services
11	7.11	title to, and transfer of, certain securities and other financial products
12	7.12	qualified privilege in certain situations other miscellaneous matters

Division 2—Definitions

761A Definitions

In this Chapter:

able to be traded, in relation to a market, includes (but is not limited to) admitted to quotation on the market.

acquire, in relation to a financial product, has a meaning affected by section 761E.

arrangement means, subject to section 761B, a contract, agreement, understanding, scheme or other arrangement (as existing from time to time):

- (a) whether formal or informal, or partly formal and partly informal; and
- (b) whether written or oral, or partly written and partly oral; and
- (c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights.

Australian CS facility licence means a licence under section 824B that authorises a person to operate a clearing and settlement facility.

Australian financial services licence means a licence under section 913B that authorises a person who carries on a financial services business to provide financial services.

Australian market licence means a licence under section 795B that authorises a person to operate a financial market.

authorised representative of a financial services licensee means a person authorised in accordance with section 916A or 916B to provide a financial service or financial services on behalf of the licensee.

basic deposit product means a deposit product that is a facility in relation to which the following conditions are satisfied:

- (a) the terms applicable to the facility (the ***governing terms***) do not permit the amount from time to time standing to the

Section 761A

credit of the facility to be reduced otherwise than in consequence of one or more of the following:

- (i) a withdrawal, transfer or debit on the instruction of, or by authority of, the depositor, not being on account of entry fees, exit fees or charges for the management of the funds (but this does not exclude charges for the maintenance of the facility itself);
 - (ii) a payment of charges or duties on deposits into, or withdrawals from, the facility that are payable under a law of the Commonwealth or of a State or Territory;
 - (iii) a payment that a law of the Commonwealth, or of a State or Territory, requires to be made out of the facility;
 - (iv) a payment that an order of a court requires to be made out of the facility;
 - (v) the exercise of a right to combine accounts;
 - (vi) the correction of an error;
 - (vii) any other circumstances specified in regulations made for the purposes of this subparagraph; and
- (b) any return to be generated for the depositor on the amount from time to time standing to the credit of the facility is an amount that is set out in, or that is calculated by reference to a rate or rates that are set out in, the governing terms; and
- (c) either:
- (i) there is no minimum period before which funds cannot be withdrawn or transferred from the facility without a reduction in the return generated for the depositor; or
 - (ii) if there is such a period, it expires on or before the end of the period of 5 years starting on the day on which funds were first deposited in the facility; and
- (d) unless subparagraph (c)(ii) applies and the period referred to in that subparagraph expires on or before the end of the period of 2 years starting on the day on which funds were first deposited in the facility—funds are able to be withdrawn or transferred from the facility on the instruction of, or by authority of, the depositor:
- (i) without any prior notice to the ADI that makes the facility available; or
 - (ii) if the ADI that makes the facility available is included in a class of ADIs specified in regulations made for the

Section 761A

purposes of this subparagraph—subject to a prior notice requirement that does not exceed the period specified in those regulations in relation to that class of ADIs;

whether or not the withdrawal or transfer will attract a reduction in the return generated for the depositor as mentioned in subparagraph (c)(i); and

(da) the facility is not an FHSA product; and

(e) any other conditions specified in regulations made for the purposes of this paragraph.

binder means an authorisation given to a person by a financial services licensee who is an insurer to do either or both of the following:

(a) enter into contracts that are risk insurance products on behalf of the insurer as insurer; or

(b) deal with and settle, on behalf of the insurer, claims relating to risk insurance products against the insurer as insurer;

but does not include an authorisation of a kind referred to in paragraph (a) that is limited to effecting contracts of insurance by way of interim cover unless there is also in existence an authority given by the insurer to the person to enter into, on behalf of the insurer and otherwise than by way of interim cover, contracts of insurance.

carried on in this jurisdiction, in relation to a financial services business, has a meaning affected by section 911D.

certificate cancellation provisions, in relation to a prescribed CS facility, means the provisions of the facility's operating rules that deal with:

(a) the cancellation of documents of title to financial products transferred through the facility; and

(b) matters incidental to the cancellation of those documents.

class, in relation to financial products or financial services, has a meaning affected by regulations made for the purposes of section 761CA.

clearing and settlement facility has the meaning given by Division 6.

Section 761A

CS facility licensee means a person who holds an Australian CS facility licence.

custodial or depository service that a person provides has the meaning given by section 766E.

dealing in a financial product has the meaning given by section 766C (and **deal** has a corresponding meaning).

deposit product means a financial product described in paragraph 764A(1)(i).

derivative has the meaning given by section 761D.

dispose, in relation to a financial product, includes terminate or close out the legal relationship that constitutes the financial product.

disqualified individual means an individual who is disqualified within the meaning given by section 853A.

employer-sponsor has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

FHSA product means an FHSA (within the meaning of the *First Home Saver Accounts Act 2008*).

financial market has the meaning given by Division 5.

financial product has the meaning given by Division 3.

Note: References in this Chapter to financial products have effect subject to particular express exclusions for particular purposes—see e.g. sections 1010A and 1074A.

financial product advice has the meaning given by section 766B.

financial product advice law means:

- (a) a provision of Chapter 7 that covers conduct relating to the provision of financial product advice (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial product advice; or
- (b) a provision of Chapter 9 as it applies in relation to a provision referred to in paragraph (a); or
- (c) a provision of Division 2 of Part 2 of the ASIC Act that covers conduct relating to the provision of financial product

Section 761A

advice (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial product advice; or

- (d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial product advice (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial product advice.

financial service has the meaning given by Division 4.

financial services business means a business of providing financial services.

Note: The meaning of ***carry on*** a financial services business is affected by section 761C.

Financial Services Guide means a Financial Services Guide required by section 941A or 941B to be given in accordance with Division 2 of Part 7.7.

financial services law means:

- (a) a provision of this Chapter or of Chapter 5C, 6, 6A, 6B, 6C or 6D; or
- (b) a provision of Chapter 9 as it applies in relation to a provision referred to in paragraph (a); or
- (c) a provision of Division 2 of Part 2 of the ASIC Act; or
- (d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services.

financial services licensee means a person who holds an Australian financial services licence.

foreign exchange contract means a contract:

- (a) to buy or sell currency (whether Australian or not); or
- (b) to exchange one currency (whether Australian or not) for another (whether Australian or not).

funeral benefit means a benefit that consists of the provision of funeral, burial or cremation services, with or without the supply of goods connected with such services.

Section 761A

further market-related advice means advice to which subsection 946B(1) applies.

general advice has the meaning given by subsection 766B(4).

general insurance product means a financial product described in paragraph 764A(1)(d).

holder, in relation to a financial product, means the person to whom the financial product was issued, or if it has (since issue) been disposed of to another person who has not themselves disposed of it, that other person (and ***hold*** has a corresponding meaning).

insurance product means a financial product described in paragraph 764A(1)(d), (e) or (f).

investment life insurance product means a financial product described in paragraph 764A(1)(f).

involved in a market licensee or CS facility licensee, or in an applicant for such a licence, has the meaning given by section 853B.

issue, in relation to a financial product, has a meaning affected by section 761E.

issuer, in relation to a financial product, has a meaning affected by section 761E.

kind, in relation to financial products or financial services, has a meaning affected by regulations made for the purposes of section 761CA.

licensed CS facility means a clearing and settlement facility the operation of which is authorised by an Australian CS facility licence.

licensed market means a financial market the operation of which is authorised by an Australian market licence.

life risk insurance product means a financial product described in paragraph 764A(1)(e).

listing rules of a financial market, or proposed financial market, means any rules (however described) that are made by the operator

Section 761A

of the market, or contained in the operator's constitution, and that deal with:

- (a) admitting entities to, or removing entities from, the market's official list, whether for the purpose of enabling financial products of those entities to be traded on the market or for other purposes; or
- (b) the activities or conduct of entities that are included on that list.

lodge with ASIC, when used in a provision of this Chapter in relation to which regulations made for the purposes of this definition state that the lodgment is to be in a prescribed form, means lodge with ASIC in a prescribed form.

Note: See section 350 for the meaning of ***lodge in a prescribed form***.

makes a market for a financial product has the meaning given by section 766D.

managed investment product means a financial product described in paragraph 764A(1)(b).

market licensee means a person who holds an Australian market licence.

operated in this jurisdiction:

- (a) in relation to a financial market, has a meaning affected by section 791D; and
- (b) in relation to a clearing and settlement facility, has a meaning affected by section 820D.

operating rules:

- (a) of a clearing and settlement facility, or proposed clearing and settlement facility, means any rules (however described) made by the operator of the facility, or contained in the operator's constitution, that deal with:
 - (i) the activities or conduct of the facility; or
 - (ii) the activities or conduct of persons in relation to the facility;but does not include any such rules that deal with matters in respect of which licensed CS facilities must have written procedures under regulations made for the purposes of subsection 822A(2); or

Section 761A

- (b) of a financial market, or proposed financial market, means any rules (however described), including the market's listing rules (if any), that are made by the operator of the market, or contained in the operator's constitution, and that deal with:
 - (i) the activities or conduct of the market; or
 - (ii) the activities or conduct of persons in relation to the market;but does not include:
 - (iii) any such rules that deal with matters in respect of which licensed markets must have written procedures under regulations made for the purposes of subsection 793A(2); or
 - (iv) compensation rules within the meaning of Part 7.5.

participant:

- (a) in relation to a clearing and settlement facility, means a person who is allowed to directly participate in the facility under the facility's operating rules and, when used in any of the following provisions, also includes a recognised affiliate in relation to the facility:
 - (i) paragraph 821B(2)(b);
 - (ii) section 822B;
 - (iii) subsection 915F(2);
 - (iv) any other provisions prescribed by regulations made for the purposes of this subparagraph; and
- (b) in relation to a financial market, means a person who is allowed to directly participate in the market under the market's operating rules and, when used in any of the following provisions, also includes a recognised affiliate in relation to the market:
 - (i) paragraph 792B(2)(b);
 - (ii) section 793B;
 - (iii) section 883A;
 - (iv) subsection 915F(2);
 - (v) paragraphs 923B(3)(a) and (b);
 - (vi) any other provisions prescribed by regulations made for the purposes of this subparagraph.

Section 761A

person has a meaning affected by section 761F (which deals with partnerships) and section 761FA (which deals with multiple trustees).

personal advice has the meaning given by subsection 766B(3).

prescribed CS facility means a licensed CS facility that is prescribed by regulations made for the purposes of this definition.

Product Disclosure Statement means a Product Disclosure Statement:

- (a) required by section 1012A, 1012B, 1012C or 1012I to be given in accordance with Division 2 of Part 7.9; or
- (b) that section 1012H requires an issuer of a financial product to take reasonable steps to ensure is given to a new group member in accordance with Division 2 of Part 7.9.

Note: For the effect of the lodgment of a Replacement Product Disclosure Statement, see section 1014J.

provide, in relation to a financial product, has a meaning affected by section 761E.

recognised affiliate, in relation to a clearing and settlement facility or a financial market, means a person who is:

- (a) recognised by the operating rules of the facility or market as a suitably qualified affiliate of the facility or market; and
- (b) involved in the carrying on of a financial services business (including as an employee, director or in some other capacity).

relevant personal circumstances, in relation to advice provided or to be provided to a person in relation to a matter, are such of the person's objectives, financial situation and needs as would reasonably be considered to be relevant to the advice.

Replacement Product Disclosure Statement has the meaning given by section 1014H.

retail client has the meaning given by sections 761G and 761GA.

risk insurance product means a financial product described in paragraph 764A(1)(d) or (e).

Section 761A

RSA product means a financial product described in paragraph 764A(1)(h).

security means:

- (a) a share in a body; or
- (b) a debenture of a body; or
- (c) a legal or equitable right or interest in a security covered by paragraph (a) or (b); or
- (d) an option to acquire, by way of issue, a security covered by paragraph (a), (b) or (c); or
- (e) a right (whether existing or future and whether contingent or not) to acquire, by way of issue, the following under a rights issue:
 - (i) a security covered by paragraph (a), (b), (c) or (d);
 - (ii) an interest or right covered by paragraph 764A(1)(b) or (ba);

but does not include an excluded security. In Part 7.11, it also includes a managed investment product.

self-managed superannuation fund has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

Statement of Advice means a Statement of Advice required by section 946A to be given in accordance with Subdivisions C and D of Division 3 of Part 7.7.

superannuation entity has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

superannuation product means a financial product described in paragraph 764A(1)(g).

Supplementary Financial Services Guide has the meaning given by section 943A.

Supplementary Product Disclosure Statement has the meaning given by section 1014A.

title document, for a financial product, means a certificate or other document evidencing ownership of the financial product.

wholesale client has the meaning given by section 761G.

Section 761B

761B Meaning of *arrangement*—2 or more arrangements that together form a derivative or other financial product

If:

- (a) an arrangement, when considered by itself, does not constitute a derivative, or some other kind of financial product; and
 - (b) that arrangement, and one or more other arrangements, if they had instead been a single arrangement, would have constituted a derivative or other financial product; and
 - (c) it is reasonable to assume that the parties to the arrangements regard them as constituting a single scheme;
- the arrangements are, for the purposes of this Part, to be treated as if they together constituted a single arrangement.

761C Meaning of *carry on* a financial services business

In working out whether someone carries on a financial services business, Division 3 of Part 1.2 needs to be taken into account. However, paragraph 21(3)(e) does not apply for the purposes of this Chapter.

761CA Meaning of *class* and *kind* of financial products and financial services

The regulations may include provisions identifying, or providing for the identification of, what constitutes a *class* or *kind* of financial products or financial services for the purposes of a provision or provisions of this Chapter.

761D Meaning of *derivative*

- (1) For the purposes of this Chapter, subject to subsections (2), (3) and (4), a *derivative* is an arrangement in relation to which the following conditions are satisfied:
 - (a) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time consideration of a particular kind or kinds to someone; and
 - (b) that future time is not less than the number of days, prescribed by regulations made for the purposes of this

Section 761D

paragraph, after the day on which the arrangement is entered into; and

- (c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following:
 - (i) an asset;
 - (ii) a rate (including an interest rate or exchange rate);
 - (iii) an index;
 - (iv) a commodity.
- (2) Without limiting subsection (1), anything declared by the regulations to be a derivative for the purposes of this section is a derivative for the purposes of this Chapter. A thing so declared is a derivative despite anything in subsections (3) and (4).
- (3) Subject to subsection (2), the following are not derivatives for the purposes of this Chapter even if they are covered by the definition in subsection (1):
 - (a) an arrangement in relation to which subparagraphs (i), (ii) and (iii) are satisfied:
 - (i) a party has, or may have, an obligation to buy, and another party has, or may have, an obligation to sell, tangible property (other than Australian or foreign currency) at a price and on a date in the future; and
 - (ii) the arrangement does not permit the seller's obligations to be wholly settled by cash, or by set-off between the parties, rather than by delivery of the property; and
 - (iii) neither usual market practice, nor the rules of a licensed market or a licensed CS facility, permits the seller's obligations to be closed out by the matching up of the arrangement with another arrangement of the same kind under which the seller has offsetting obligations to buy; but only to the extent that the arrangement deals with that purchase and sale;
 - (b) a contract for the future provision of services;
 - (c) anything that is covered by a paragraph of subsection 764A(1), other than paragraph (c) of that subsection;

Section 761E

- (d) anything declared by the regulations not to be a derivative for the purposes of this Chapter.
- (4) Subject to subsection (2), an arrangement under which one party has an obligation to buy, and the other has an obligation to sell, property is not a derivative for the purposes of this Chapter merely because the arrangement provides for the consideration to be varied by reference to a general inflation index such as the Consumer Price Index.

761E Meaning of *issued*, *issuer*, *acquire* and *provide* in relation to financial products

General

- (1) This section defines when a financial product is ***issued*** to a person. It also defines who the ***issuer*** of a financial product is. If a financial product is issued to a person:
- (a) the person ***acquires*** the product from the issuer; and
 - (b) the issuer ***provides*** the product to the person.

Note: Some financial products can also be acquired from, or provided by, someone other than the issuer (e.g. on secondary trading in financial products).

Issuing a financial product

- (2) Subject to this section, a financial product is ***issued*** to a person when it is first issued, granted or otherwise made available to a person.
- (3) Subject to this section, a financial product specified in the table is issued to a person when the event specified for that product occurs:

When particular financial products are issued		
Item	Financial product	Event
1	superannuation product	the person becomes a member of the fund concerned
2	RSA product	the account concerned is opened in the person's name

Section 761E

When particular financial products are issued		
Item	Financial product	Event
2A	FHSA product	the person becomes the holder (within the meaning of the <i>First Home Saver Accounts Act 2008</i>) of the FHSA product
3	derivative	the person enters into the legal relationship that constitutes the financial product

- (3A) For the avoidance of doubt, none of the following are taken to give rise to the issue of a financial product to a person (the **client**):
- (a) the client making a further contribution to a superannuation fund of which the client is already a member;
 - (aa) an employer of the client making a further contribution, for the benefit of the client, to a superannuation fund of which the client is already a member;
 - (b) the client making a further deposit into an RSA maintained in the client's name;
 - (ba) the client making a further contribution (within the meaning of the *First Home Saver Accounts Act 2008*) into an FHSA product maintained in the client's name;
 - (c) the client making a further payment under a life insurance investment product;
 - (d) the client making a further deposit into a deposit product;
 - (e) the client engaging in conduct specified in regulations made for the purposes of this paragraph in relation to a financial product already held by the client.

Issuer of a financial product

- (4) Subject to this section, the **issuer**, in relation to a financial product issued to a person (the **client**), is the person responsible for the obligations owed, under the terms of the facility that is the product:
- (a) to, or to a person nominated by, the client; or
 - (b) if the product has been transferred from the client to another person and is now held by that person or another person to whom it has subsequently been transferred—to, or to a person nominated by, that person or that other person.

Section 761E

Note: For example, the issuer of a direct debit facility is the financial institution with which the account to be debited is held, rather than the persons to whom payments can be made using the facility.

- (5) Subject to subsection (7), each person who is a party to a financial product that:

- (a) is a derivative; and
- (b) is not entered into, or acquired, on a financial market;

is taken to be an issuer of the product.

Note 1: Under paragraph (1)(a), each person who is a party to the derivative will also acquire the financial product at the time of its issue as specified in subsection (3).

Note 2: Although each party to the derivative is an issuer, whether any particular party has disclosure or other obligations under this Chapter will depend on the circumstances (e.g. whether the issue occurs in the course of a business of issuing financial products and whether any of the other parties is a retail client).

- (6) Subject to subsection (7), the issuer of a financial product that:

- (a) is a derivative; and
- (b) is entered into, or acquired, on a financial market;

is taken to be:

- (c) if the product is entered into, or acquired, on the market through an arrangement made by a financial services licensee acting on behalf of another person—the financial services licensee; or
- (d) if the product is entered into, or acquired, on the market through an arrangement made by an authorised representative of a financial services licensee acting on behalf of another person (not being the licensee)—the financial services licensee; or
- (e) if neither paragraph (c) nor (d) applies—the market operator.

- (7) The regulations may make provision determining all or any of the following for the purposes of this Chapter:

- (a) the meaning of **issue** (and/or related parts of speech, including **issuer**) in relation to a class of financial products;
- (b) the meaning of **acquire** (and/or related parts of speech) in relation to a class of financial products;
- (c) the meaning of **provide** (and/or related parts of speech) in relation to a class of financial products.

Section 761F

Regulations made for the purposes of this subsection have effect despite anything else in this section.

761F Meaning of *person*—generally includes a partnership

- (1) This Chapter applies to a partnership as if the partnership were a person, but it applies with the following changes:
 - (a) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;
 - (b) any contravention of a provision of this Chapter, or a provision of this Act that relates to a requirement in a provision of this Chapter, that would otherwise be a contravention by the partnership is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each partner who:
 - (i) aided, abetted, counselled or procured the relevant act or omission; or
 - (ii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner).
- (2) For the purposes of this Chapter, a change in the composition of a partnership does not affect the continuity of the partnership.
- (3) Subsections (1) and (2) have effect subject to:
 - (a) an express or implied contrary intention in a provision or provisions of this Chapter; and
 - (b) the regulations, which may exclude or modify the effect of those subsections in relation to specified provisions.

761FA Meaning of *person*—generally includes multiple trustees

- (1) This section applies in relation to a trust while the trust continues to have:
 - (a) 2 or more trustees; or
 - (b) a single trustee who was a trustee of the trust at a time when it had 2 or more trustees.
- (2) Subject to subsections (3) and (4), during a period while this section applies to a trust, this Chapter applies to the trust as if the trustee or trustees of the trust from time to time during the period

Section 761FA

constituted a single legal entity (the *notional entity*) that remained the same for the duration of that period.

Note: So, for example, while this section applies to a trust, a licence granted under this Chapter to the trustees of the trust will continue in force, despite a change in the persons who are the trustees.

- (3) During any period or part of a period while this section applies to a trust and the trust has 2 or more trustees, this Chapter applies to the trustees as mentioned in subsection (2), but it applies with the following changes:
- (a) obligations that would be imposed on the notional entity are imposed instead on each trustee, but may be discharged by any of the trustees;
 - (b) any contravention of a provision of this Chapter, or a provision of this Act that relates to a requirement in a provision of this Chapter, that would otherwise be a contravention by the notional entity is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each trustee who:
 - (i) aided, abetted, counselled or procured the relevant act or omission; or
 - (ii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the trustee).
- (4) During any period or part of a period while this section applies to a trust and the trust has only one trustee, this Chapter applies to the trustee as mentioned in subsection (2), but it applies with the following changes:
- (a) obligations that would be imposed on the notional entity are imposed instead on that single trustee;
 - (b) any contravention of a provision of this Chapter, or a provision of this Act that relates to a requirement in a provision of this Chapter, that would otherwise be a contravention by the notional entity is taken (whether for the purposes of criminal or civil liability) to have been a contravention by that single trustee.
- (5) Subsections (2), (3) and (4) have effect subject to:
- (a) an express or implied contrary intention in a provision or provisions of this Chapter; and
-

Section 761G

- (b) the regulations, which may exclude or modify the effect of those subsections in relation to specified provisions.

761G Meaning of retail client and wholesale client

Providing a financial product or financial service to a person as a retail client

- (1) For the purposes of this Chapter, a financial product or a financial service is provided to a person as a **retail client** unless subsection (5), (6) or (7), or section 761GA, provides otherwise.

Note: The references in this section to providing a financial product to a person are not to be taken to imply that the provision of a financial product is not also the provision of a financial service (see the meaning of **dealing** in section 766C).

Acquiring a financial product or financial service as a retail client

- (2) For the purposes of this Chapter, a person to whom a financial product or financial service is provided as a retail client is taken to acquire the product or service as a retail client.

Disposing of a financial product as a retail client

- (3) If a financial product is provided to a person as a retail client, any subsequent disposal of all or part of that product by the person is, for the purposes of this Chapter, a disposal by the person as a retail client.

Wholesale clients

- (4) For the purposes of this Chapter, a financial product or a financial service is provided to, or acquired by, a person as a **wholesale client** if it is not provided to, or acquired by, the person as a retail client.

General insurance products

- (5) For the purposes of this Chapter, if a financial product is, or a financial service provided to a person relates to, a general insurance product, the product or service is provided to the person as a retail client if:
- (a) either:
- (i) the person is an individual; or

Section 761G

- (ii) the insurance product is or would be for use in connection with a small business (see subsection (12)); and
- (b) the general insurance product is:
 - (i) a motor vehicle insurance product (as defined in the regulations); or
 - (ii) a home building insurance product (as defined in the regulations); or
 - (iii) a home contents insurance product (as defined in the regulations); or
 - (iv) a sickness and accident insurance product (as defined in the regulations); or
 - (v) a consumer credit insurance product (as defined in the regulations); or
 - (vi) a travel insurance product (as defined in the regulations); or
 - (vii) a personal and domestic property insurance product (as defined in the regulations); or
 - (viii) a kind of general insurance product prescribed by regulations made for the purposes of this subparagraph.

In any other cases, the provision to a person of a financial product that is, or a financial service that relates to, a general insurance product does not constitute the provision of a financial product or financial service to the person as a retail client.

Superannuation products and RSA products

- (6) For the purposes of this Chapter:
 - (a) if a financial product provided to a person is a superannuation product or an RSA product, the product is provided to the person as a retail client; and
 - (aa) however, if a trustee of a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) provides a financial product that is an interest in the trust to a person covered by subparagraph (c)(i), the product is not provided to the person as a retail client; and
 - (b) if a financial service (other than the provision of a financial product) provided to a person who is not covered by subparagraph (c)(i) or (ii) relates to a superannuation product

Section 761G

or an RSA product, the service is provided to the person as a retail client; and

- (c) if a financial service (other than the provision of a financial product) provided to a person who is:
 - (i) the trustee of a superannuation fund, an approved deposit fund, a pooled superannuation trust or a public sector superannuation scheme (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) that has net assets of at least \$10 million; or
 - (ii) an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*);

relates to a superannuation product or an RSA product, that does not constitute the provision of a financial service to the person as a retail client.

Other kinds of financial product

- (7) For the purposes of this Chapter, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the product or service is provided to the person as a retail client unless one or more of the following paragraphs apply:
 - (a) the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of this paragraph as being applicable in the circumstances (but see also subsection (10)); or
 - (b) the financial product, or the financial service, is provided for use in connection with a business that is not a small business (see subsection (12));
 - (c) the financial product, or the financial service, is not provided for use in connection with a business, and the person who acquires the product or service gives the provider of the product or service, before the provision of the product or service, a copy of a certificate given within the preceding 6 months by a qualified accountant (as defined in section 9) that states that the person:
 - (i) has net assets of at least the amount specified in regulations made for the purposes of this subparagraph; or

Section 761G

- (ii) has a gross income for each of the last 2 financial years of at least the amount specified in regulations made for the purposes of this subparagraph a year;
- (d) the person is a professional investor.

Offence proceedings—defendant bears evidential burden in relation to matters referred to in paragraphs (7)(a) to (d)

- (8) In a prosecution for an offence based on a provision of this Chapter, a defendant bears an evidential burden in relation to the matters in paragraphs (7)(a) to (d) as if those matters were exceptions for the purposes of subsection 13.3(3) of the *Criminal Code*.

Other proceedings relating to subsection (7) products—presumption in non-criminal proceedings of retail client unless contrary established

- (9) If:
 - (a) it is alleged in a proceeding under this Chapter (not being a prosecution for an offence), or in any other proceeding (not being a prosecution for an offence) in respect of a matter arising under this Chapter, that a particular financial product or financial service was provided to a person as a retail client; and
 - (b) the product or the service is one to which subsection (7) applies;

it is presumed that the product or service was provided to the person as a retail client unless the contrary is established.

Note 1: There is no such presumption in relation to the provision of a product or service that is or relates to a general insurance product, a superannuation product or an RSA product. Whether or not such a product, or a service relating to such a product, was provided to a person as a retail client is to be resolved as provided in subsection (5) or (6), as the case requires.

Note 2: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in paragraphs (7)(a) to (d) (see subsection (8)).

Section 761G

Regulations and paragraph (7)(a)

- (10) In addition to specifying an amount or amounts for the purposes of paragraph (7)(a), the regulations may do either or both of the following:
- (a) deal with how a price or value referred to in that paragraph is to be calculated, either generally or in relation to a specified class of financial products;
 - (b) modify the way in which that paragraph applies in particular circumstances.

Regulations and paragraph (7)(c)

- (10A) In addition to specifying amounts for the purposes of subparagraphs (7)(c)(i) and (ii), the regulations may do either or both of the following:
- (a) deal with how net assets referred to in subparagraph (7)(c)(i) are to be determined and valued, either generally or in specified circumstances;
 - (b) deal with how gross income referred to in subparagraph (7)(c)(ii) is to be calculated, either generally or in specified circumstances.

What happens if a package of general insurance products and other kinds of financial products is provided?

- (11) If:
- (a) either:
 - (i) in a single transaction, 2 or more financial products are provided to a person; or
 - (ii) a single financial service provided to a person relates to 2 or more financial products; and
 - (b) one or more, but not all, of the financial products are general insurance products;
- subsection (5) applies to the transaction or service so far as it relates to the general insurance products, and subsection (6) or (7), as the case requires, applies to the transaction or service so far as it relates to other financial products.

Section 761GA

Definition

(12) In this section:

small business means a business employing less than:

- (a) if the business is or includes the manufacture of goods—100 people; or
- (b) otherwise—20 people.

761GA Meaning of *retail client*—sophisticated investors

For the purposes of this Chapter, a financial product, or a financial service in relation to a financial product, is not provided by one person to another person as a ***retail client*** if:

- (a) the first person (the ***licensee***) is a financial services licensee; and
- (b) the financial product is not a general insurance product, a superannuation product or an RSA product; and
- (c) the financial product or service is not provided for use in connection with a business; and
- (d) the licensee is satisfied on reasonable grounds that the other person (the ***client***) has previous experience in using financial services and investing in financial products that allows the client to assess:
 - (i) the merits of the product or service; and
 - (ii) the value of the product or service; and
 - (iii) the risks associated with holding the product; and
 - (iv) the client's own information needs; and
 - (v) the adequacy of the information given by the licensee and the product issuer; and
- (e) the licensee gives the client before, or at the time when, the product or advice is provided a written statement of the licensee's reasons for being satisfied as to those matters; and
- (f) the client signs a written acknowledgment before, or at the time when, the product or service is provided that:
 - (i) the licensee has not given the client a Product Disclosure Statement; and
 - (ii) the licensee has not given the client any other document that would be required to be given to the client under

Section 761H

this Chapter if the product or service were provided to the client as a retail client; and

- (iii) the licensee does not have any other obligation to the client under this Chapter that the licensee would have if the product or service were provided to the client as a retail client.

761H References to this Chapter include references to regulations or other instruments made for the purposes of this Chapter

- (1) A reference in a provision of this Chapter to this Chapter, or to a particular provision or group of provisions of this Chapter, includes (unless a contrary intention appears) a reference to regulations, or other instruments, made for the purposes of this Chapter, or for the purposes of that provision or any of those provisions, as the case requires.
- (2) Subsection (1) has effect as if provisions in Part 10.2 (transitional provisions) that relate to matters dealt with in this Chapter were part of this Chapter.

Division 3—What is a financial product?**Subdivision A—Preliminary****762A Overview of approach to defining what a financial product is***General definition*

- (1) Subdivision B sets out a general definition of ***financial product***. Subject to subsections (2) and (3), a facility is a financial product if it falls within that definition.

Specific inclusions

- (2) Subdivision C identifies, or provides for the identification of, kinds of facilities that, subject to subsection (3), are financial products (whether or not they are within the general definition).

Overriding exclusions

- (3) Subdivision D identifies, or provides for the identification of, kinds of facilities that are not financial products. These facilities are not financial products:
- (a) even if they are within the general definition; and
 - (b) even if they are within a class of facilities identified as mentioned in subsection (2).

762B What if a financial product is part of a broader facility?

If a financial product is a component of a facility that also has other components, this Chapter, in applying to the financial product, only applies in relation to the facility to the extent it consists of the component that is the financial product.

Note: So, e.g., Part 7.9 does not require disclosures to be made in relation to those other components.

Section 762C

762C Meaning of *facility*

In this Division:

facility includes:

- (a) intangible property; or
- (b) an arrangement or a term of an arrangement (including a term that is implied by law or that is required by law to be included); or
- (c) a combination of intangible property and an arrangement or term of an arrangement.

Note: 2 or more arrangements may be taken to constitute a single arrangement—see section 761B.

Subdivision B—The general definition

763A General definition of *financial product*

- (1) For the purposes of this Chapter, a ***financial product*** is a facility through which, or through the acquisition of which, a person does one or more of the following:
 - (a) makes a financial investment (see section 763B);
 - (b) manages financial risk (see section 763C);
 - (c) makes non-cash payments (see section 763D).This has effect subject to section 763E.
- (2) For the purposes of this Chapter, a particular facility that is of a kind through which people commonly make financial investments, manage financial risks or make non-cash payments is a ***financial product*** even if that facility is acquired by a particular person for some other purpose.
- (3) A facility does not cease to be a financial product merely because:
 - (a) the facility has been acquired by a person other than the person to whom it was originally issued; and
 - (b) that person, in acquiring the product, was not making a financial investment or managing a financial risk.

763B When a person makes a financial investment

For the purposes of this Chapter, a person (the *investor*) *makes a financial investment* if:

- (a) the investor gives money or money's worth (the *contribution*) to another person and any of the following apply:
 - (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
 - (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
 - (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
- (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

Note 1: Examples of actions that constitute making a financial investment under this subsection are:

- (a) a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the person, as a shareholder, does not have control over the day-to-day affairs of the company); or
- (b) a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and the person, as a member of the scheme, does not have day-to-day control over the operation of the scheme).

Note 2: Examples of actions that do not constitute making a financial investment under this subsection are:

- (a) a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person); or
- (b) a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

Section 763C

763C When a person manages financial risk

For the purposes of this Chapter, a person *manages financial risk* if they:

- (a) manage the financial consequences to them of particular circumstances happening; or
- (b) avoid or limit the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates).

Note 1: Examples of actions that constitute managing a financial risk are:

- (a) taking out insurance; or
- (b) hedging a liability by acquiring a futures contract or entering into a currency swap.

Note 2: An example of an action that does not constitute managing a financial risk is employing a security firm (while that is a way of managing the risk that thefts will happen, it is not a way of managing the financial consequences if thefts do occur).

763D When a person makes non-cash payments

- (1) For the purposes of this Chapter, a person *makes non-cash payments* if they make payments, or cause payments to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins.

Note: Examples of actions that constitute making non-cash payments are:

- (a) making payments by means of a facility for direct debit of a deposit account; or
- (b) making payments by means of a facility for the use of cheques; or
- (c) making payments by means of a purchased payment facility within the meaning of the *Payment Systems (Regulation) Act 1998*, such as a smart card; or
- (d) making payments by means of traveller's cheques (whether denominated in Australian or foreign currency).

- (2) For the purposes of this Chapter, the following are not *making non-cash payments*, even if they might otherwise be covered by subsection (1):
 - (a) making payments by means of a facility in relation to which one of the following applies:

Section 763E

- (i) there is only one person to whom payments can be made by means of the facility;
- (ii) the facility is, or is of a kind, specified in the regulations as being a facility that is not to be covered by this section because of restrictions relating to the number of people to whom payments can be made by means of the facility, or relating to the number of persons who can use the facility to make payments;
- (b) making payments by means of:
 - (i) a letter of credit from a financial institution; or
 - (ii) a cheque drawn by a financial institution on itself; or
 - (iii) a guarantee given by a financial institution.

763E What if a financial product is only incidental?

- (1) If:
 - (a) something (the *incidental product*) that, but for this section, would be a financial product because of this Subdivision is:
 - (i) an incidental component of a facility that also has other components; or
 - (ii) a facility that is incidental to one or more other facilities; and
 - (b) it is reasonable to assume that the main purpose of:
 - (i) if subparagraph (a)(i) applies—the facility referred to in that subparagraph, when considered as a whole; or
 - (ii) if subparagraph (a)(ii) applies—the incidental product, and the other facilities referred to in that subparagraph, when considered as a whole;is not a financial product purpose;the incidental product is not a financial product because of this Subdivision (however, it may still be a financial product because of Subdivision C).
- (2) In this section:
financial product purpose means a purpose of:
 - (a) making a financial investment; or
 - (b) managing financial risk; or
 - (c) making non-cash payments.

Section 764A

Subdivision C—Specific inclusions

764A Specific things that are financial products (subject to Subdivision D)

- (1) Subject to Subdivision D, the following are *financial products* for the purposes of this Chapter:
 - (a) a security;
 - (b) any of the following in relation to a registered scheme:
 - (i) an interest in the scheme;
 - (ii) a legal or equitable right or interest in an interest covered by subparagraph (i);
 - (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);
 - (ba) any of the following in relation to a managed investment scheme that is not a registered scheme, other than a scheme (whether or not operated in this jurisdiction) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) are satisfied:
 - (i) an interest in the scheme;
 - (ii) a legal or equitable right or interest in an interest covered by subparagraph (i);
 - (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);
 - (c) a derivative;
 - (d) a contract of insurance that is not a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, but not including such a contract of insurance:
 - (i) to the extent that it provides for a benefit to be provided by an association of employees that is an organisation within the meaning of the *Workplace Relations Act 1996* for a member of the organisation or a dependant of a member; or
 - (ii) to the extent that it provides for benefits, pensions or payments described in paragraph 11(3)(c) of the *Life Insurance Act 1995*; or
 - (iii) to the extent that it provides for the provision of a funeral benefit; or
 - (iv) issued by an employer to an employee of the employer;

Section 764A

- (e) a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is a contract of insurance, but not including such a policy:
 - (i) to the extent that it provides for a benefit to be provided by an association of employees that is an organisation within the meaning of the *Workplace Relations Act 1996* for a member of the organisation or a dependant of a member; or
 - (ii) to the extent that it provides for benefits, pensions or payments described in paragraph 11(3)(c) of the *Life Insurance Act 1995*; or
 - (iii) to the extent that it provides for the provision of a funeral benefit; or
 - (iv) issued by an employer to an employee of the employer;
 - (f) a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is not a contract of insurance, but not including such a policy:
 - (i) to the extent that it provides for a benefit to be provided by an association of employees that is an organisation within the meaning of the *Workplace Relations Act 1996* for a member of the organisation or a dependant of a member; or
 - (ii) to the extent that it provides for benefits, pensions or payments described in paragraph 11(3)(c) of the *Life Insurance Act 1995*; or
 - (iii) to the extent that it provides for the provision of a funeral benefit; or
 - (iv) issued by an employer to an employee of the employer;
 - (g) a superannuation interest within the meaning of the *Superannuation Industry (Supervision) Act 1993*;
 - (h) an RSA (retirement savings account) within the meaning of the *Retirement Savings Accounts Act 1997*;
 - (ha) an FHSA (short for first home saver account) within the meaning of the *First Home Saver Accounts Act 2008*;
 - (i) any deposit-taking facility made available by an ADI (within the meaning of the *Banking Act 1959*) in the course of its banking business (within the meaning of that Act), other than an RSA (RSAs are covered by paragraph (h));
 - (j) a debenture, stock or bond issued or proposed to be issued by a government;
-

Section 765A

- (k) a foreign exchange contract that is not:
 - (i) a derivative (derivatives are covered by paragraph (c));
or
 - (ii) a contract to exchange one currency (whether Australian or not) for another that is to be settled immediately;
- (m) anything declared by the regulations to be a financial product for the purposes of this section.

Note: Even though something is expressly excluded from one of these paragraphs, it may still be a financial product (subject to Subdivision D) either because:

- (a) it is covered by another of these paragraphs; or
- (b) it is covered by the general definition in Subdivision B.

- (1A) If a single contract of insurance provides 2 or more kinds of cover, paragraph (1)(d) applies separately in relation to that contract, in relation to each of those kinds of cover, as if the contract only provided that kind of cover.

Note: Because of this subsection (including as it is affected by subsection (1B)), a single contract of insurance may constitute 2 or more separate general insurance products.

- (1B) If a contract of insurance provides a kind of cover in relation to 2 or more kinds of asset, subsection (1A) applies to the contract, in relation to each of those kinds of asset, as if the cover provided by the contract in relation to that kind of asset constituted a separate kind of cover.
- (2) For the purpose of paragraphs (1)(d), (e) and (f) and subsections (1A) and (1B), ***contract of insurance*** includes:
- (a) a contract that would ordinarily be regarded as a contract of insurance even if some of its provisions are not by way of insurance; and
 - (b) a contract that includes provisions of insurance in so far as those provisions are concerned, even if the contract would not ordinarily be regarded as a contract of insurance.

Subdivision D—Specific exclusions

765A Specific things that are not financial products

- (1) Despite anything in Subdivision B or Subdivision C, the following are not ***financial products*** for the purposes of this Chapter:
-

Section 765A

- (a) an excluded security;
- (b) an undertaking by a body corporate to pay money to a related body corporate;
- (c) health insurance provided as part of a health insurance business (as defined in Division 121 of the *Private Health Insurance Act 2007*);
- (ca) insurance provided as part of a health-related business (as defined by section 131-15 of that Act) that is conducted through a health benefits fund (as defined by section 131-10 of that Act);
- (d) insurance provided by the Commonwealth;
- (e) State insurance or Northern Territory insurance, including insurance entered into by:
 - (i) a State or the Northern Territory; and
 - (ii) some other insurer;as joint insurers;
- (f) insurance entered into by the Export Finance and Insurance Corporation, other than a short-term insurance contract within the meaning of the *Export Finance and Insurance Corporation Act 1991*;
- (g) reinsurance;
- (h) any of the following:
 - (i) a credit facility within the meaning of the regulations;
 - (ii) a facility for making non-cash payments (see section 763D), if payments made using the facility will all be debited to a credit facility covered by subparagraph (i);
- (i) a facility:
 - (i) that is an approved RTGS system within the meaning of the *Payment Systems and Netting Act 1998*; or
 - (ii) for the transmission and reconciliation of non-cash payments (see section 763D), and the establishment of final positions, for settlement through an approved RTGS system within the meaning of the *Payment Systems and Netting Act 1998*;
- (j) a facility that is a designated payment system for the purposes of the *Payment Systems (Regulation) Act 1998*;

Section 765A

- (k) a facility for the exchange and settlement of non-cash payments (see section 763D) between providers of non-cash payment facilities;
- (l) a facility that is:
 - (i) a financial market; or
 - (ii) a clearing and settlement facility; or
 - (iii) a payment system operated as part of a clearing and settlement facility;
- (m) a contract to exchange one currency (whether Australian or not) for another that is to be settled immediately;
- (n) so much of an arrangement as is not a derivative because of paragraph 761D(3)(a);
- (p) an arrangement that is not a derivative because of subsection 761D(4);
- (q) an interest in a superannuation fund of a kind prescribed by regulations made for the purposes of this paragraph;
- (r) any of the following:
 - (i) an interest in something that is not a managed investment scheme because of paragraph (c), (e), (f), (k), (l) or (m) of the definition of *managed investment scheme* in section 9;
 - (ii) a legal or equitable right or interest in an interest covered by subparagraph (i);
 - (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);
- (s) any of the following in relation to a managed investment scheme (whether or not operated in this jurisdiction) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) are satisfied and that is not a registered scheme:
 - (i) an interest in the scheme;
 - (ii) a legal or equitable right or interest in an interest covered by subparagraph (i);
 - (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);
- (t) a deposit-taking facility that is, or is used for, State banking;
- (u) a benefit provided by an association of employees that is an organisation within the meaning of the *Workplace Relations Act 1996* for a member of the organisation or a dependant of a member;

Section 765A

- (v) either of the following:
 - (i) a contract of insurance; or
 - (ii) a life policy or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is not a contract of insurance;
issued by an employer to an employee of the employer;
 - (w) a funeral benefit;
 - (x) physical equipment or physical infrastructure by which something else that is a financial product is provided;
 - (y) a facility, interest or other thing declared by regulations made for the purposes of this subsection not to be a financial product;
 - (z) a facility, interest or other thing declared by ASIC under subsection (2) not to be a financial product.
- (2) ASIC may declare that a specified facility, interest or other thing is not a financial product for the purposes of this Chapter. The declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

Division 4—When does a person provide a financial service?

766A When does a person provide a *financial service*?

- (1) For the purposes of this Chapter, subject to paragraph (2)(b), a person provides a *financial service* if they:
 - (a) provide financial product advice (see section 766B); or
 - (b) deal in a financial product (see section 766C); or
 - (c) make a market for a financial product (see section 766D); or
 - (d) operate a registered scheme; or
 - (e) provide a custodial or depository service (see section 766E); or
 - (f) engage in conduct of a kind prescribed by regulations made for the purposes of this paragraph.
- (2) The regulations may set out:
 - (a) the circumstances in which persons facilitating the provision of a financial service (for example, by publishing information) are taken also to provide that service; or
 - (b) the circumstances in which persons are taken to provide, or are taken not to provide, a financial service.
- (3) To avoid doubt, a person's conduct is not the provision of a *financial service* if it is done in the course of work of a kind ordinarily done by clerks or cashiers.
- (4) For the purposes of this section, a person is not *operating a registered scheme* merely because:
 - (a) they are acting as an agent or employee of another person; or
 - (b) they are taking steps to wind up the scheme.

766B Meaning of financial product advice

- (1) For the purposes of this Chapter, *financial product advice* means a recommendation or a statement of opinion, or a report of either of those things, that:
 - (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class

Section 766B

of financial products, or an interest in a particular financial product or class of financial products; or

(b) could reasonably be regarded as being intended to have such an influence.

(1A) However, subject to subsection (1B), the provision or giving of an exempt document or statement does not constitute the provision of financial product advice.

(1B) Subsection (1A) does not apply for the purpose of determining whether a recommendation or statement of opinion made by an outside expert, or a report of such a recommendation or statement of opinion, that is included in an exempt document or statement is financial product advice provided by the outside expert.

(2) There are 2 types of financial product advice: personal advice and general advice.

(3) For the purposes of this Chapter, **personal advice** is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

- (a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or with regulations, or AML/CTF Rules, under that Act); or
- (b) a reasonable person might expect the provider to have considered one or more of those matters.

(4) For the purposes of this Chapter, **general advice** is financial product advice that is not personal advice.

(5) The following advice is not financial product advice:

- (a) advice given by a lawyer in his or her professional capacity, about matters of law, legal interpretation or the application of the law to any facts;
- (b) except as may be prescribed by the regulations—any other advice given by a lawyer in the ordinary course of activities as a lawyer, that is reasonably regarded as a necessary part of those activities;
- (c) except as may be prescribed by the regulations—advice given by a tax agent registered under Part VIIA of the *Income Tax Assessment Act 1936*, that is given in the

Section 766B

ordinary course of activities as such an agent and that is reasonably regarded as a necessary part of those activities.

(6) If:

- (a) in response to a request made by a person (the *inquirer*) to another person (the *provider*), the provider tells the inquirer the cost, or an estimate of the likely cost, of a financial product (for example, an insurance product); and
- (b) that cost or estimate is worked out, or said by the provider to be worked out, by reference to a valuation of an item (for example, a house or car to which an insurance policy would relate), being a valuation that the provider suggests or recommends to the inquirer;

the acts of telling the inquirer the cost, or estimated cost, and suggesting or recommending the valuation, do not, of themselves, constitute the making of a recommendation (or the provision of any other kind of financial product advice) relating to the financial product.

(7) If:

- (a) in response to a request made by a person (the *inquirer*) to another person (the *provider*), the provider tells the inquirer information about:
 - (i) the cost of a financial product; or
 - (ii) the rate of return on a financial product; or
 - (iii) any other matter identified in regulations made for the purposes of this subparagraph; and
- (b) the request could also have been complied with (but was not also so complied with) by telling the inquirer equivalent information about one or more other financial products;

the act of telling the inquirer the information does not, of itself, constitute the making of a recommendation (or the provision of any other kind of financial product advice) in relation to the financial product referred to in paragraph (a).

- (8) Subsections (5), (6) and (7) are not intended to affect, in any way, the determination of whether situations not covered by those subsections do, or do not, constitute the provision of financial product advice.

(9) In this section:

exempt document or statement means:

- (a) a document prepared, or a statement given, in accordance with requirements of this Chapter, other than:
 - (i) a Statement of Advice; or
 - (ii) a document or statement of a kind prescribed by regulations made for the purposes of this subparagraph;or
- (b) any other document or statement of a kind prescribed by regulations made for the purposes of this paragraph.

outside expert, in relation to an exempt document or statement, means an expert who is not:

- (a) the person by whom, or on whose behalf, the exempt document or statement was prepared; or
- (b) an employee or director of that person.

766C Meaning of *dealing*

- (1) For the purposes of this Chapter, the following conduct (whether engaged in as principal or agent) constitutes ***dealing*** in a financial product:
 - (a) applying for or acquiring a financial product;
 - (b) issuing a financial product;
 - (c) in relation to securities or managed investment interests—underwriting the securities or interests;
 - (d) varying a financial product;
 - (e) disposing of a financial product.
- (2) Arranging for a person to engage in conduct referred to in subsection (1) is also ***dealing*** in a financial product, unless the actions concerned amount to providing financial product advice.
- (3) A person is taken not to ***deal*** in a financial product if the person deals in the product on their own behalf (whether directly or through an agent or other representative), unless:
 - (a) the person is an issuer of financial products; and
 - (b) the dealing is in relation to one or more of those products.

Section 766D

- (3A) For the purposes of subsection (3), a person (the **agent**) who deals in a product as an agent or representative of another person (the **principal**) is not taken to deal in the product on the agent's own behalf, even if that dealing, when considered as a dealing by the principal, is a dealing by the principal on the principal's own behalf.
- (4) Also, a transaction entered into by a person who is, or who encompasses or constitutes in whole or in part, any of the following entities:
- (a) a government or local government authority;
 - (b) a public authority or instrumentality or agency of the Crown;
 - (c) a body corporate or an unincorporated body;
- is taken not to be **dealing** in a financial product by that person if the transaction relates only to:
- (d) securities of that entity; or
 - (e) if the entity is a government—debentures, stocks or bonds issued or proposed to be issued by that government.
- (5) Paragraph (4)(c) does not apply if the entity:
- (a) carries on a business of investment in securities, interests in land or other investments; and
 - (b) in the course of carrying on that business, invests funds subscribed, whether directly or indirectly, after an offer or invitation to the public (within the meaning of section 82) made on terms that the funds subscribed would be invested.
- (6) A transaction entered into by a sub-underwriter of an issue of securities that relates only to the sub-underwriting is taken not to be **dealing** in a financial product.
- (7) The regulations may prescribe conduct that is taken to be, or not to be, **dealing** in a financial product. Regulations made for the purposes of this subsection have effect despite anything else in this section.

766D Meaning of *makes a market* for a financial product

- (1) For the purposes of this Chapter, a person **makes a market** for a financial product if:

Section 766E

- (a) either through a facility, at a place or otherwise, the person regularly states the prices at which they propose to acquire or dispose of financial products on their own behalf; and
 - (b) other persons have a reasonable expectation that they will be able to regularly effect transactions at the stated prices; and
 - (c) the actions of the person do not, or would not if they happened through a facility or at a place, constitute operating a financial market because of the effect of paragraph 767A(2)(a).
- (2) Paragraph (1)(a) does not apply to a person stating prices at which they propose to acquire or dispose of financial products if:
- (a) the person is the issuer of the products; and
 - (b) the products are superannuation products, managed investment products or financial products referred to in paragraph 764A(1)(ba) (which relates to unregistered managed investment schemes).

766E Meaning of provide a custodial or depository service

- (1) For the purposes of this Chapter, a person (the **provider**) provides a **custodial or depository service** to another person (the **client**) if, under an arrangement between the provider and the client, or between the provider and another person with whom the client has an arrangement, (whether or not there are also other parties to any such arrangement), a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or another person nominated by the client.
- (2) The following provisions apply in relation to a custodial or depository service:
- (a) subject to paragraph (b), for the purposes of this Chapter, the time at which a custodial or depository service is provided is the time when the financial product or beneficial interest concerned is first held by the provider as mentioned in subsection (1);
 - (b) for the purposes of Part 7.6, and of any other provisions of this Act prescribed by regulations made for the purposes of this paragraph, the continued holding of the financial product or beneficial interest concerned by the provider as mentioned in subsection (1) also constitutes the provision of a custodial or depository service.

Section 766E

Note: Because of paragraph (a) (subject to regulations made for the purposes of paragraph (b)), the requirements of Part 7.7 relating to financial services disclosure need only be complied with before the product or interest is first held by the provider. However, because of paragraph (b), the provider will be subject to the licensing and related requirements of Part 7.6 for so long as they continue to hold the product or interest.

- (3) However, the following conduct does not constitute providing a ***custodial or depository service***:
- (a) the operation of a clearing and settlement facility;
 - (b) the operation of a registered scheme, or the holding of the assets of a registered scheme;
 - (c) the operation of a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) by the trustees of that fund or trust;
 - (ca) the operation of a statutory fund by a life company (within the meaning of the *Life Insurance Act 1995*);
 - (cb) the operation of an FHSA trust (within the meaning of the *First Home Saver Accounts Act 2008*) by an FHSA provider (within the meaning of that Act);
 - (d) the provision of services to a related body corporate;
 - (e) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Division 5—What is a financial market?**767A What is a *financial market*?**

- (1) For the purposes of this Chapter, a *financial market* is a facility through which:
 - (a) offers to acquire or dispose of financial products are regularly made or accepted; or
 - (b) offers or invitations are regularly made to acquire or dispose of financial products that are intended to result or may reasonably be expected to result, directly or indirectly, in:
 - (i) the making of offers to acquire or dispose of financial products; or
 - (ii) the acceptance of such offers.
- (2) However, the following conduct does not constitute operating a *financial market* for the purposes of this Chapter:
 - (a) a person making or accepting offers or invitations to acquire or dispose of financial products on the person's own behalf, or on behalf of one party to the transaction only, unless the regulations specify circumstances in which such conduct does constitute operating a financial market and the person's conduct occurs in circumstances so specified;
 - (b) conducting treasury operations between related bodies corporate;
 - (c) a person, being the holder of a licence under an Australian law relating to the licensing of auctioneers, conducting an auction of forfeited shares;
 - (d) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Division 6—What is a clearing and settlement facility?

768A What is a clearing and settlement facility?

- (1) For the purposes of this Chapter, a ***clearing and settlement facility*** is a facility that provides a regular mechanism for the parties to transactions relating to financial products to meet obligations to each other that:
- (a) arise from entering into the transactions; and
 - (b) are of a kind prescribed by regulations made for the purposes of this paragraph.

Example 1: A facility that provides a regular mechanism for stockbrokers to pay for the shares they buy and to be paid for the shares they sell, and for records of those transactions to be processed to facilitate registration of the new ownership of the shares, would be a ***clearing and settlement facility*** (assuming that the relevant obligations are of a kind prescribed by regulations made for the purposes of this section).

Example 2: A facility that provides a regular mechanism for registering trade in derivatives on a futures market and that enables the calculation of payments that market participants owe by way of margins would also be a ***clearing and settlement facility*** (assuming that the relevant obligations are of a kind prescribed by regulations made for the purposes of this section).

- (2) However, the following conduct does not constitute operating a ***clearing and settlement facility*** for the purposes of this Chapter:
- (a) an ADI (within the meaning of the *Banking Act 1959*) acting in the ordinary course of its banking business;
 - (b) a person acting on their own behalf, or on behalf of one party to a transaction only;
 - (c) a person who provides financial services to another person dealing with the other person's accounts in the ordinary course of the first person's business activities;
 - (d) the actions of a participant in a clearing and settlement facility who has taken on the delivery or payment obligations, in relation to a particular financial product, of another person who is a party to a transaction relating to a financial product;
 - (e) conducting treasury operations between related bodies corporate;

Section 768A

- (h) operating a facility for the exchange and settlement of non-cash payments (see section 763D) between providers of non-cash payment facilities;
- (i) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Division 7—General provisions relating to civil and criminal liability

769A Part 2.5 of *Criminal Code* does not apply

Despite section 1308A, Part 2.5 of the *Criminal Code* does not apply to any offences based on the provisions of this Chapter.

Note: For the purposes of offences based on provisions of this Chapter, corporate criminal responsibility is dealt with by section 769B, rather than by Part 2.5 of the *Criminal Code*.

769B People are generally responsible for the conduct of their agents, employees etc.

- (1) Subject to subsections (7) and (8), conduct engaged in on behalf of a body corporate:
 - (a) by a director, employee or agent of the body, within the scope of the person's actual or apparent authority; or
 - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;is taken, for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also by the body corporate.
- (2) Conduct engaged in by a person (for example, the giving of money or property) in relation to:
 - (a) a director, employee or agent of a body corporate, acting within the scope of their actual or apparent authority; or
 - (b) any other person acting at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of a body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

Section 769B

is taken, for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also in relation to the body corporate.

- (3) If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body, being a director, employee or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind. For this purpose, a person acting as mentioned in paragraph (1)(b) is taken to be an agent of the body corporate concerned.
- (4) Subject to subsections (7) and (8), conduct engaged in on behalf of a person other than a body corporate:
- (a) by an employee or agent of the person, acting within the scope of the actual or apparent authority of the employee or agent; or
 - (b) by any other person acting at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;

is taken, for the purposes of a provision of this Chapter, or of a proceeding under this Chapter, to have been engaged in also by the first-mentioned person.

- (5) Conduct engaged in by a person (for example, the giving of money or property) in relation to:
- (a) an employee or agent of a person (the *principal*) other than a body corporate, acting within the scope of their actual or apparent authority; or
 - (b) any other person acting at the direction or with the consent or agreement (whether express or implied) of an employee or agent of a person (the *principal*) other than a body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;

is taken, for the purposes of a provision of this Chapter, or of a proceeding under this Chapter, to have been engaged in also in relation to the principal.

Section 769B

- (6) If, in a proceeding under this Chapter in respect of conduct engaged in by a person other than a body corporate, it is necessary to establish the state of mind of the person, it is sufficient to show that an employee or agent of the person, being an employee or agent by whom the conduct was engaged in within the scope of the employee's or agent's actual or apparent authority, had that state of mind. For this purpose, a person acting as mentioned in paragraph (4)(b) is taken to be an agent of the person first referred to in subsection (4).
- (7) Nothing in this section, or in any other law (including the common law), has the effect that, for the purposes of a provision of Part 7.7, or a proceeding under this Chapter that relates to a provision of Part 7.7, a financial service provided by person in their capacity as an authorised representative of a financial services licensee is taken, or taken also, to have been provided by that financial services licensee.
- (8) Nothing in this section, or in any other law (including the common law), has the effect that, for the purposes of a provision of Division 2 of Part 7.9, or a proceeding under this Chapter that relates to a provision of Division 2 of Part 7.9, conduct engaged in by a person in their capacity as a regulated person (within the meaning of section 1011B) is taken, or taken also, to have been engaged in by another such regulated person.
- (8A) Nothing in this section, other than subsections (7) and (8), excludes or limits the operation of subsection 601FB(2) in relation to the provisions of this Chapter or to proceedings under this Chapter.
- (9) The regulations may provide that this section, or a particular provision of this section, has effect for specified purposes subject to modifications specified in the regulations. The regulations have effect accordingly.
- (10) In this section:
 - (a) a reference to a proceeding ***under*** this Chapter includes a reference to:
 - (i) a prosecution for an offence based on a provision of this Chapter; and
 - (ii) a proceeding under a provision of Part 9.4B that relates to a provision of this Chapter; and

- (iii) any other proceeding under any other provision of Chapter 9 that relates to a provision of this Chapter; and
- (b) a reference to **conduct** is a reference to an act, an omission to perform an act, or a state of affairs; and
- (c) a reference to the **state of mind** of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.

Note: For the meaning of **offence based on** a provision, see the definition in section 9.

769C Representations about future matters taken to be misleading if made without reasonable grounds

- (1) For the purposes of this Chapter, or of a proceeding under this Chapter, if:
 - (a) a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act); and
 - (b) the person does not have reasonable grounds for making the representation;the representation is taken to be misleading.
- (2) Subsection (1) does not limit the circumstances in which a representation may be misleading.
- (3) In this section:
proceeding under this Chapter has the same meaning as it has in section 769B.

Part 7.2—Licensing of financial markets

Division 1—Preliminary

790A Definition

In this Part:

clearing and settlement arrangements, for transactions effected through a financial market, means arrangements for the clearing and settlement of those transactions. The arrangements may be part of the market's operating rules or be separate from those operating rules.

Division 2—Requirement to be licensed

791A Need for a licence

- (1) A person must only operate, or hold out that the person operates, a financial market in this jurisdiction if:
- (a) the person has an Australian market licence that authorises the person to operate the market in this jurisdiction; or
 - (b) the market is exempt from the operation of this Part.

Note 1: A market licensee may also provide financial services incidental to the operation of the market: see paragraph 911A(2)(d).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (1)(b).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

791B Other prohibitions on holding out

A person must not hold out:

- (a) that the person has an Australian market licence; or
 - (b) that the operation of a financial market by the person in this jurisdiction is authorised by an Australian market licence; or
 - (c) that a financial market is exempt from the operation of this Part; or
 - (d) that the person is a participant in a licensed market;
- if that is not the case.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

791C Exemptions

- (1) The Minister may, by publishing a notice in the *Gazette*, exempt from the operation of this Part a particular financial market or type of financial market.

Section 791D

- (2) The Minister may, at any time, by publishing a notice in the *Gazette*:
 - (a) impose conditions, or additional conditions, on an exemption; or
 - (b) vary or revoke the conditions on an exemption; or
 - (c) revoke an exemption.
- (3) However, the Minister may only take action under subsection (2) after:
 - (a) giving notice, and an opportunity to make submissions on the proposed action, to the operator of each financial market known by the Minister to be covered by the exemption; and
 - (b) if the exemption covers a type of financial market—causing a notice to be published in a newspaper or newspapers circulating generally in each State and internal Territory allowing a reasonable time within which the operator of each financial market covered by the exemption may make submissions on the proposed action.

This subsection does not apply to the Minister imposing conditions when an exemption is made.

791D When a market is taken to be operated in this jurisdiction

- (1) For the purposes of this Chapter, a financial market is taken to be operated *in this jurisdiction* if it is operated by a body corporate that is registered under Chapter 2A.
- (2) Subsection (1) does not limit the circumstances in which a financial market is operated *in this jurisdiction* for the purposes of this Chapter.

Division 3—Regulation of market licensees

Subdivision A—Licensee’s obligations

792A General obligations

A market licensee must:

- (a) to the extent that it is reasonably practicable to do so, do all things necessary to ensure that the market is a fair, orderly and transparent market; and
- (b) comply with the conditions on the licence; and
- (c) have adequate arrangements (whether they involve a self-regulatory structure or the appointment of an independent person or related entity) for supervising the market, including arrangements for:
 - (i) handling conflicts between the commercial interests of the licensee and the need for the licensee to ensure that the market operates in the way mentioned in paragraph (a); and
 - (ii) monitoring the conduct of participants on or in relation to the market; and
 - (iii) enforcing compliance with the market’s operating rules; and
- (d) have sufficient resources (including financial, technological and human resources) to operate the market properly and for the required supervisory arrangements to be provided; and
- (e) if section 881A requires there to be compensation arrangements in relation to the market that are approved in accordance with Division 3 of Part 7.5—ensure that there are such approved compensation arrangements in relation to the market; and
- (f) if the licensee is a foreign body corporate—be registered under Division 2 of Part 5B.2; and
- (g) if the licence was granted under subsection 795B(2) (overseas markets)—both:
 - (i) remain authorised to operate a financial market in the foreign country in which the licensee’s principal place of business is located; and

Section 792B

- (ii) get the Minister's approval under section 792H before that principal place of business becomes located in any other foreign country; and
- (h) if the licensee, or a holding company of the licensee, is a widely held market body (within the meaning of Division 1 of Part 7.4)—take all reasonable steps to ensure that an unacceptable control situation (within the meaning of that Division) does not exist in relation to the body; and
- (i) take all reasonable steps to ensure that no disqualified individual becomes, or remains, involved in the licensee (see Division 2 of Part 7.4).

792B Obligation to notify ASIC of certain matters

- (1) A market licensee must give written notice to ASIC, as soon as practicable, if it becomes aware that it may no longer be able to meet, or has breached, an obligation under section 792A. If ASIC considers it appropriate to do so, ASIC may give the Minister advice about the matter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A market licensee must give written notice to ASIC, as soon as practicable, as required by the following paragraphs:
 - (a) if the licensee provides a new class of financial service incidental to the operation of the market, the licensee must give notice that includes details of the new class;
 - (b) if the licensee takes any kind of disciplinary action against a participant in the market, the licensee must give notice that includes:
 - (i) the participant's name; and
 - (ii) the reason for and nature of the action taken;
 - (c) if the licensee has reason to suspect that a person has committed, is committing, or is about to commit a significant contravention of the market's operating rules or this Act, the licensee must give notice that includes:
 - (i) the person's name; and
 - (ii) details of the contravention or impending contravention; and
 - (iii) the licensee's reasons for that belief.

Section 792B

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) If a market licensee becomes aware of:
- (a) a matter that the licensee considers has adversely affected, is adversely affecting, or may adversely affect the ability of a participant in the market, who is a financial services licensee, to meet the participant's obligations as a financial services licensee; or
 - (b) a matter, concerning a participant in the market who is a financial services licensee, that is of a kind prescribed by regulations made for the purposes of this paragraph;
- the market licensee must give a written report to ASIC on the matter and send a copy of it to the participant.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) A market licensee whose licence was granted under subsection 795B(2) (overseas markets) must, as soon as practicable, give written notice to ASIC if:
- (a) the licensee ceases to be authorised to operate a financial market in the foreign country in which the licensee's principal place of business is located; or
 - (b) there is a significant change to the regulatory regime applying in relation to the market in the foreign country in which the licensee's principal place of business is located.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (5) As soon as practicable after:
- (a) a person becomes or ceases to be a director, secretary or senior manager of a market licensee or of a holding company of a market licensee (including when a person changes from one of those positions to another); or
 - (b) a market licensee becomes aware that a person has come to have, or has ceased to have, more than 15% of the voting power in the licensee or in a holding company of the licensee;
- the licensee must give written notice of this to ASIC. The notice must include such other information about the matter as is prescribed by regulations made for the purposes of this subsection.

Section 792C

Note 1: To the extent that the licensee is required to give the notice and information under any other provision of this Act, the licensee may comply with this subsection by doing so. It need not provide the same information twice.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

792C Giving ASIC information about a listed disclosing entity

- (1) If a market licensee makes information about a listed disclosing entity available to participants in the market (whether or not the licensee also makes the information available to anyone else), the licensee must give ASIC the same information as soon as practicable.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) However, the licensee is not required to give ASIC any information of a kind that is excluded by the regulations.
- (3) ASIC may require the information to be given in a particular form.

792D Obligation to assist ASIC

- (1) A market licensee must give such assistance to ASIC, or a person authorised by ASIC, as ASIC or the authorised person reasonably requests in relation to the performance of ASIC's functions.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Such assistance may include showing ASIC the licensee's books or giving ASIC other information.

792E Obligation to give ASIC access to market facilities

A market licensee must give a person authorised by ASIC such reasonable access to the market's facilities as the person requests for any of the purposes of this Chapter.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

792F Annual report

- (1) A market licensee must, within 3 months after the end of its financial year, give ASIC an annual report on the extent to which the licensee complied with its obligations as a market licensee under this Chapter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The licensee must ensure that the annual report is accompanied by any information and statements prescribed by regulations made for the purposes of this subsection.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) The licensee must also ensure that the annual report is accompanied by any audit report that the Minister requires under subsection (4).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The Minister may, by giving written notice to a market licensee, require the licensee to obtain an audit report on the annual report and on any information or statements accompanying it. The Minister must nominate to prepare the audit report:

- (a) ASIC; or
- (b) a specified person or body that is suitably qualified.

- (5) ASIC must give the annual report and accompanying material to the Minister.

792G Obligations to notify people about clearing and settlement arrangements in certain circumstances

- (1) If, in relation to a category of transactions, being all transactions or a class of transactions effected through a licensed market, the market licensee:

- (a) does not have any clearing and settlement arrangements for transactions in that category; or
- (b) has clearing and settlement arrangements for transactions in that category, but they are not arrangements with the operator of a clearing and settlement facility for the clearing and settlement of such transactions through the facility;

Section 792H

the market licensee must, before a person becomes a participant in the market, give the person written advice:

- (c) if paragraph (a) applies—that the licensee does not have any clearing and settlement arrangements for transactions in that category, and that it is the responsibility of the parties to such transactions to make their own arrangements for the clearing and settlement of such transactions; or
- (d) if paragraph (b) applies—setting out particulars of the clearing and settlement arrangements for transactions in that category.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Within a reasonable time before a market licensee ceases, in relation to a category of transactions, being all transactions or a class of transactions effected through a licensed market, to have clearing and settlement arrangements (the ***terminating arrangements***) with the operator of a particular clearing and settlement facility for the clearing and settlement of such transactions through the facility, the market licensee must give the participants in the market written advice:

- (a) if the terminating arrangements are not being replaced by any other clearing and settlement arrangements—that the licensee will no longer have clearing and settlement arrangements for that category of transactions, and that it will be the responsibility of the parties to such transactions to make their own arrangements for the clearing and settlement of such transactions; or
- (b) if the terminating arrangements are being replaced by new clearing and settlement arrangements—setting out particulars of the new arrangements.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

792H Change of country by foreign licensee

- (1) In the case of a licence granted under subsection 795B(2), the Minister may approve the location of the licensee's principal place of business in a new country only if:
 - (a) the new country is not Australia; and

Section 792I

- (b) the operation of the market in that country will be subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of investor protection and market integrity they achieve, to the requirements and supervision to which financial markets are subject under this Act in relation to those matters.
- (2) If, in relation to a licence granted under subsection 795B(2), the licensee's principal place of business changes to become a place in Australia:
 - (a) the licence ceases to be in force from the time of the change; and
 - (b) if the licensee wishes the market to continue to be licensed, the licensee may apply for the grant of a new licence under subsection 795B(1); and
 - (c) the application must be assessed in accordance with Subdivision A of Division 4, subject to such modifications (if any) of that Subdivision as are set out in regulations made for the purposes of this paragraph.
- (3) An application referred to in paragraph (2)(b) may be made in advance of the change of location of the principal place of business, and a decision on the application may be made before that time. However, any licence granted pursuant to the application does not come into force until the change occurs.

792I Making information about compensation arrangements publicly available

A market licensee must take reasonable steps to ensure that information about the compensation arrangements that are in place under Part 7.5 is available to the public free of charge.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Subdivision B—The market's operating rules and procedures

793A Content of the operating rules and procedures

- (1) The operating rules of a licensed market must deal with the matters prescribed by regulations made for the purposes of this subsection.

Section 793B

- (2) The regulations may also prescribe matters in respect of which a licensed market must have written procedures.
- (3) However, subsections (1) and (2) do not apply if the licensee is also authorised to operate the market in the foreign country in which its principal place of business is located and the licence was granted under subsection 795B(2) (overseas markets).
- (4) In a subsection (3) case, ASIC may determine, by giving written notice to the licensee, matters in respect of which the licensed market must have written procedures.

793B Legal effect of operating rules

The operating rules (other than listing rules) of a licensed market have effect as a contract under seal:

- (a) between the licensee and each participant in the market; and
- (b) between a participant and each other participant;

under which each of those persons agrees to observe the operating rules to the extent that they apply to the person and to engage in conduct that the person is required by the operating rules to engage in.

793C Enforcement of operating rules

- (1) If a person who is under an obligation to comply with or enforce any of a licensed market's operating rules fails to meet that obligation, an application to the Court may be made by:
 - (a) ASIC; or
 - (b) the licensee; or
 - (c) the operator of a clearing and settlement facility with which the licensee has clearing and settlement arrangements; or
 - (d) a person aggrieved by the failure.
- (2) After giving an opportunity to be heard to the applicant and the person against whom the order is sought, the Court may make an order giving directions to:
 - (a) the person against whom the order is sought; or
 - (b) if that person is a body corporate—the directors of the body corporate;about compliance with, or enforcement of, the operating rules.

Section 793D

- (3) For the purposes of this section, a body corporate that is, with its acquiescence, included in the official list of a licensed market, or an associate of such a body corporate, is taken to be under an obligation to comply with the operating rules of that market to the extent to which those rules purport to apply to the body corporate or associate.
- (4) For the purposes of this section, if a disclosing entity that is an undertaking to which interests in a registered scheme relate is, with the responsible entity's acquiescence, included in the official list of a licensed market, the responsible entity, or an associate of the responsible entity, is taken to be under an obligation to comply with the operating rules of that market to the extent to which those rules purport to apply to the responsible entity or associate.
- (5) For the purposes of this section, if a body corporate fails to comply with or enforce provisions of the operating rules of a licensed market, a person who holds financial products of the body corporate that are able to be traded on the market is taken to be a person aggrieved by the failure.
- (6) There may be other circumstances in which a person may be aggrieved by a failure for the purposes of this section.

793D Changing the operating rules

Licensed markets other than subsection 795B(2) markets

- (1) As soon as practicable after a change is made to the operating rules of a licensed market, other than a market licensed under subsection 795B(2) (overseas markets), the licensee must lodge with ASIC written notice of the change. The notice must:
 - (a) set out the text of the change; and
 - (b) specify the date on which the change was made; and
 - (c) contain an explanation of the purpose of the change.
- (2) If no notice is lodged as required by subsection (1) with ASIC within 21 days after the change is made, the change ceases to have effect at the end of that period.

Section 793E

Subsection 795B(2) markets

- (3) As soon as practicable after a change is made to the operating rules of a market the operation of which is licensed under subsection 795B(2) (overseas markets), the licensee must lodge with ASIC written notice of the change. The notice must:
- (a) set out the text of the change; and
 - (b) specify the date on which the change was made; and
 - (c) contain an explanation of the purpose of the change.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

793E Disallowance of changes to operating rules

- (1) This section does not apply in respect of an Australian market licence granted under subsection 795B(2) (overseas markets).
- (2) As soon as practicable after receiving a notice under section 793D from a market licensee, ASIC must send a copy of the notice to the Minister.
- (3) Within 28 days after ASIC receives the notice from the licensee, the Minister may disallow all or a specified part of the change to the operating rules.
- (4) In deciding whether to do so, the Minister must have regard to the consistency of the change with the licensee's obligations under this Part (including in particular the obligation mentioned in paragraph 792A(a)).

Note: The Minister must also have regard to the matters in section 798A.

- (5) As soon as practicable after all or a part of a change is disallowed, ASIC must give notice of the disallowance to the licensee. The change ceases to have effect, to the extent of the disallowance, when the licensee receives the notice.

Subdivision C—Powers of the Minister and ASIC

794A Minister's power to give directions

- (1) If the Minister considers that a market licensee is not complying with its obligations as a market licensee under this Chapter, the Minister may give the licensee a written direction to do specified

Section 794B

things that the Minister believes will promote compliance by the licensee with those obligations.

- (2) The licensee must comply with the direction.
- (3) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.
- (4) The Minister may vary or revoke a direction at any time by giving written notice to the licensee.

794B Minister's power to require special report

- (1) The Minister may give a market licensee a written notice requiring the licensee to give ASIC a special report on specified matters. ASIC must give the report to the Minister.
- (2) The notice may also require the licensee to give ASIC an audit report on the special report. The Minister must nominate to prepare the audit report:
 - (a) ASIC; or
 - (b) a specified person or body that is suitably qualified.
- (3) The licensee must give the special report, and audit report (if any), to ASIC within the time required by the notice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

794C ASIC to assess licensee's compliance

- (1) ASIC may do an assessment of how well a market licensee is complying with any or all of its obligations as a market licensee under this Chapter. In doing the assessment, ASIC may take account of any information and reports that it thinks appropriate, including information and reports from an overseas regulatory authority.
- (2) In respect of the obligation in paragraph 792A(c), ASIC must do such an assessment at least once a year for each market licensee.
- (3) As soon as practicable after doing an assessment under this section, ASIC must give a written report on the assessment to the licensee and to the Minister.

Section 794D

- (4) If an assessment, or part of an assessment, relates to any other person's affairs to a material extent, ASIC may, at the person's request or of its own motion, give the person a copy of the written report on the assessment or the relevant part of the report.
- (5) If an assessment, or part of an assessment, relates to a serious contravention of a law of the Commonwealth or of a State or Territory, ASIC may give a copy of the written report on the assessment, or the relevant part of the report, to:
 - (a) the Australian Federal Police; or
 - (b) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*); or
 - (c) the Director of Public Prosecutions; or
 - (d) an agency prescribed by regulations made for the purposes of this paragraph.
- (6) Either the Minister or ASIC may cause the written report on an assessment, or part of the report on an assessment, to be printed and published.

794D ASIC's power to give directions

- (1) If ASIC is of the opinion that it is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products by:
 - (a) giving a direction to a market licensee to suspend dealings in the financial product or class of financial products; or
 - (b) giving some other direction in relation to those dealings;ASIC may give written advice to the licensee of that opinion and the reasons for it.

Example: Under paragraph (b), ASIC could give a direction to limit the kinds of dealings that are allowed in the financial product or class of financial products or to require a participant in the market to act in a specified manner in relation to dealings in the financial product or class of financial products.

- (2) If, after receiving ASIC's advice and reasons, the licensee does not take:
 - (a) in the case of a proposed direction to suspend dealings in the financial products—action to prevent such dealings; or

Section 794D

- (b) in any other case—such other action as in ASIC’s view is adequate to address the situation raised in the advice; and ASIC still considers that it is appropriate to give the direction to the licensee, ASIC may give the licensee the written direction with a statement setting out its reasons for making the direction.
- (3) The direction has effect for the period specified in it (which may be up to 21 days). During that period, the licensee must comply with the direction and must not allow any dealings to take place contrary to it.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (4) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.
- (5) As soon as practicable after making or varying (see subsection (7)) a direction, ASIC must:
- (a) give a copy of the direction or variation to the operator of each clearing and settlement facility with which the market licensee has clearing and settlement arrangements for transactions effected through the market; and
 - (b) give a written report to the Minister setting out ASIC’s reasons for making the direction or variation; and
 - (c) give a copy of the report to the licensee.
- (6) If, at any time after the licensee receives ASIC’s advice under subsection (1), the licensee requests in writing that ASIC refer the matter to the Minister, ASIC must do so immediately. In that event, the Minister may, if he or she considers it appropriate, require ASIC not to make, or to revoke, the direction. ASIC must immediately comply with such a requirement.
- (7) ASIC may vary a direction by giving written notice to the licensee if ASIC is of the opinion that the variation is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products.
- (8) ASIC may revoke a direction by giving written notice to the licensee. ASIC must also give written notice of the revocation to the operator of each clearing and settlement facility with which the

Section 794E

market licensee has clearing and settlement arrangements for transactions effected through the market.

794E Additional directions to clearing and settlement facilities

- (1) If ASIC gives a direction under section 794D, it may also give a written direction to the operator of each clearing and settlement facility with which the market licensee has clearing and settlement arrangements for transactions effected through the market:
 - (a) prohibiting the operator from acting in a manner inconsistent with the section 794D direction; and
 - (b) requiring the operator to do all that the operator is reasonably capable of doing to give effect to the section 794D direction.

- (2) The operator must comply with the direction given to it under this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) If the operator fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the operator comply with the direction.

Division 4—The Australian market licence

Subdivision A—How to get a licence

795A How to apply for a licence

- (1) A body corporate may apply for an Australian market licence by lodging with ASIC an application that:
 - (a) includes the information required by regulations made for the purposes of this paragraph; and
 - (b) is accompanied by the documents (if any) required by regulations made for the purposes of this paragraph; and
 - (c) complies with the requirements of section 881B (relating to compensation arrangements).

Note: For fees in respect of lodging applications, see Part 9.10.

- (2) ASIC must, within a reasonable time, give the application to the Minister with advice about the application.

795B When a licence may be granted

General

- (1) The Minister may grant an applicant an Australian market licence if the Minister is satisfied that:
 - (a) the application was made in accordance with section 795A; and
 - (b) the applicant will comply with the obligations that will apply if the licence is granted; and
 - (c) the applicant has adequate operating rules, and procedures, (see Subdivision B of Division 3) to ensure, as far as is reasonably practicable, that the market will operate as mentioned in paragraph 792A(a); and
 - (d) the applicant has adequate arrangements (whether they involve a self-regulatory structure or the appointment of an independent person or related entity) for supervising the market, including arrangements for:
 - (i) handling conflicts between the commercial interests of the licensee and the need for the licensee to ensure that

Section 795B

the market operates in the way mentioned in paragraph 792A(a); and

- (ii) monitoring the conduct of participants on or in relation to the market; and
- (iii) enforcing compliance with the market's operating rules; and
- (e) the applicant has adequate clearing and settlement arrangements for transactions effected through the market, if the Minister considers that the applicant should have such arrangements; and
- (f) neither subsection 881D(2) nor 882A(2) (relating to compensation arrangements) requires the Minister to reject the application; and
- (g) no unacceptable control situation (see Division 1 of Part 7.4) is likely to result if the licence is granted; and
- (h) no disqualified individual appears to be involved in the applicant (see Division 2 of Part 7.4).

This subsection has effect subject to subsections (3) and (4).

Note: The Minister must also have regard to the matters in section 798A in deciding whether to grant a licence.

Alternative criteria for granting licence for overseas market

- (2) If an applicant is authorised to operate a financial market in the foreign country in which its principal place of business is located, the Minister may grant the applicant an Australian market licence authorising the applicant to operate the same market in this jurisdiction. The Minister must be satisfied that:
 - (a) the application was made in accordance with section 795A; and
 - (b) the applicant will comply with the obligations that will apply if the licence is granted; and
 - (c) the operation of the market in that country is subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of investor protection and market integrity they achieve, to the requirements and supervision to which financial markets are subject under this Act in relation to those matters; and
 - (d) the applicant undertakes to cooperate with ASIC by sharing information and in other appropriate ways; and

Section 795C

- (e) no unacceptable control situation (see Division 1 of Part 7.4) is likely to result if the licence is granted; and
- (f) no disqualified individual appears to be involved in the applicant (see Division 2 of Part 7.4); and
- (g) any other requirements that are prescribed by regulations made for the purposes of this paragraph are satisfied.

This subsection has effect subject to subsections (3) and (4).

Note: The Minister must also have regard to the matters in section 798A in deciding whether to grant a licence.

Foreign bodies

- (3) If the applicant is a foreign body corporate, the Minister:
 - (a) must not grant the applicant a licence unless the applicant is registered under Division 2 of Part 5B.2; and
 - (b) may otherwise grant a licence under either subsection (1) or (2) (if the relevant criteria are satisfied).

Disqualified individuals

- (4) The Minister must not grant the applicant a licence unless:
 - (a) ASIC has notified the Minister that, as far as ASIC is aware, no disqualified individual is involved in the applicant (see Division 2 of Part 7.4); or
 - (b) 42 days have passed since the application was made and ASIC has not given a notice under subsection 853D(2) to the applicant within that 42 days.

795C Publication of notice of licence grant

If the Minister grants an Australian market licence, the Minister must publish a notice in the *Gazette* stating:

- (a) the name of the licensee; and
- (b) when the licence was granted; and
- (c) the conditions on the licence.

795D More than one licence in the same document

If the Minister grants a person 2 or more of the following:

- (a) an Australian market licence;
- (b) an Australian CS facility licence;

Section 795E

they may be included in the same document.

795E More than one market covered by the same licence

- (1) The same Australian market licence may authorise the licensee to operate 2 or more financial markets.
- (2) In that case, a reference in this Chapter to the market to which an Australian market licence relates is taken instead to be a reference to each of those financial markets severally.
- (3) Before varying the conditions on an Australian market licence so as to add another market that the licensee is authorised to operate, the Minister must be satisfied of the matters listed in subsection 795B(1) or (2) (as appropriate) in relation to the market.
- (4) An Australian market licence that authorises the licensee to operate 2 or more financial markets may be suspended or cancelled under Subdivision C in respect of one or some of those markets only, as if the licensee held a separate licence for each of the markets.

Subdivision B—The conditions on the licence

796A The conditions on the licence

- (1) The Minister may, at any time:
 - (a) impose conditions, or additional conditions, on an Australian market licence; or
 - (b) vary or revoke conditions imposed on such a licence;by giving written notice to the licensee. The Minister must also publish a notice in the *Gazette* with details of the action and when it took effect.

Note: As well as the requirements in this section, the Minister must also have regard to the matters in section 798A.

- (2) The Minister may do so:
 - (a) on his or her own initiative, subject to subsection (3); or
 - (b) if the licensee lodges with ASIC an application for the Minister to do so, which is accompanied by the prescribed documents, if any.

Note: For fees in respect of lodging applications, see Part 9.10.

Section 797A

- (3) The Minister may only impose conditions or additional conditions, or vary the conditions, on the licence on his or her own initiative if:
- (a) he or she considers it appropriate to do so having regard to:
 - (i) the licensee's obligations as a market licensee under this Chapter; and
 - (ii) any change in market operations or the conditions in which the market is operating; and
 - (b) the Minister gives the licensee written notice of the proposed action and an opportunity to make a submission before it takes effect.

This subsection does not apply to the Minister imposing conditions when a licence is granted.

- (4) The Minister must ensure that each Australian market licence is subject to conditions that specify:
- (a) the particular market that the licensee is authorised to operate; and
 - (b) the class or classes of financial products that can be dealt with on the market; and
 - (c) if the Minister considers that the licensee should have clearing and settlement arrangements for transactions effected through the market—the type of clearing and settlement arrangements that are adequate.

Note: If compensation arrangements in relation to the market are approved under Division 3 of Part 7.5, there must also be conditions as required by subsection 882A(4) or paragraph 882B(4)(b).

- (6) ASIC must give the Minister any application and documents lodged under subsection (2).

Subdivision C—When a licence can be varied, suspended or cancelled

797A Varying licences

- (1) The Minister may vary an Australian market licence to take account of a change in the licensee's name if the licensee lodges with ASIC an application for the variation, accompanied by the prescribed documents, if any.

Note 1: The conditions on the licence can be varied under section 796A.

Note 2: For fees in respect of lodging applications, see Part 9.10.

Section 797B

- (2) The Minister must give written notice of the variation to the licensee.
- (3) ASIC must give the Minister any application and documents lodged under subsection (1).

797B Immediate suspension or cancellation

The Minister may, by giving written notice to a market licensee, suspend the licence for a specified period, or cancel it, if:

- (a) the licensee ceases to carry on the business of operating the market; or
- (b) the licensee becomes an externally-administered body corporate; or
- (c) the licensee asks the Minister to do so; or
- (d) in the case of a licence granted under subsection 795B(2) (overseas markets):
 - (i) the licensee ceases to be authorised to operate a financial market in the foreign country in which the licensee's principal place of business is located; or
 - (ii) there is a change to the regulatory regime applying in relation to the market to which the licence relates in the country in which the licensee's principal place of business is located, and, because of that change, the Minister is no longer satisfied as mentioned in paragraph 795B(2)(c).

797C Suspension or cancellation following hearing and report

- (1) If the Minister considers that a market licensee has breached, or is in breach of, one or more of its obligations as a market licensee under this Chapter, the Minister may give the licensee a written notice that requires the licensee to show cause, at a hearing before a specified person, why the licence should not be suspended or cancelled.
- (2) The notice must specify:
 - (a) the grounds on which it is proposed to suspend or cancel the licence; and
 - (b) a reasonable time and place at which the hearing is to be held.

Section 797D

However, if the licensee consents, the person conducting the hearing may fix a different time or place.

- (3) The person conducting the hearing must:
 - (a) give the licensee an opportunity to be heard at the hearing; and
 - (b) give the Minister:
 - (i) a report about the hearing; and
 - (ii) a recommendation about the grounds in the notice on which it is proposed to suspend or cancel the licence.
- (4) After considering the report and recommendation, the Minister may:
 - (a) decide to take no further action in relation to the matter and give written advice of that decision to the licensee; or
 - (b) suspend the licence for a specified period, or cancel the licence, by giving written notice to the licensee.

Note: The Minister must also have regard to the matters in section 798A.

797D Effect of suspension

- (1) A person whose Australian market licence is suspended is taken not to hold that licence while it is suspended.
- (2) However, the Minister may specify in the written notice to the licensee that subsection (1) does not apply for specified purposes.

797E Variation or revocation of suspension

The Minister may at any time vary or revoke a suspension of an Australian market licence by giving written notice to the licensee.

797F Publication of notice of licence suspension or cancellation

- (1) If the Minister:
 - (a) suspends, or varies or revokes a suspension of, an Australian market licence; or
 - (b) cancels an Australian market licence;the Minister must publish a notice in the *Gazette* to that effect.
- (2) The notice must state when the action took effect.

Section 797G

797G Suspension and cancellation only in accordance with this Subdivision

An Australian market licence cannot be varied, suspended or cancelled otherwise than in accordance with this Subdivision.

Note: The conditions on the licence can be varied under section 796A.

Division 5—Other matters

798A Matters to be taken into account by the Minister

- (1) The Minister must have regard to certain matters in deciding whether to:
 - (a) grant an applicant an Australian market licence under section 795B; or
 - (b) impose, vary or revoke conditions on such a licence under section 796A; or
 - (c) suspend or cancel such a licence under section 797C; or
 - (d) disallow a change to the operating rules of a licensed market under section 793E.
- (2) These are the matters the Minister must have regard to:
 - (a) the structure, or proposed structure, of the market;
 - (b) the nature of the activities conducted, or proposed to be conducted, on the market;
 - (c) the size, or proposed size, of the market;
 - (d) the nature of the financial products dealt with, or proposed to be dealt with, on the market;
 - (e) the participants, or proposed participants, in the market and:
 - (i) whether those participants, in effecting transactions through the market, are, or will be, providing financial services to other persons; and
 - (ii) whether those participants acquire or dispose, or will acquire or dispose, of financial products through the market as retail clients or as wholesale clients; and
 - (iii) whether those participants are also, or will also be, participants in any other financial markets;
 - (f) the technology used, or proposed to be used, in the operation of the market;
 - (g) whether it would be in the public interest to take the action referred to in subsection (1);
 - (h) any relevant advice received from ASIC.

The Minister may also have regard to any other matter that the Minister considers relevant.

Section 798B

- (3) If the Minister is deciding whether to take the action referred to in paragraph (1)(a), (b) or (c) in respect of an Australian market licence granted under subsection 795B(2) (overseas markets), the Minister must also have regard to:
- (a) the criteria that the licensee or applicant satisfied to obtain an authorisation to operate the same market in the foreign country in which their principal place of business is located; and
 - (b) the obligations they must continue to satisfy to keep the authorisation; and
 - (c) the level of supervision to which the operation of the market in that country is subject; and
 - (d) whether adequate arrangements exist for cooperation between ASIC and the authority that is responsible for that supervision.

798B ASIC may give advice to Minister

ASIC may give advice to the Minister in relation to:

- (a) any matter in respect of which the Minister has a discretion under this Part; or
- (b) any other matter concerning financial markets.

Note: In some cases, the Minister must have regard to ASIC's advice: see paragraph 798A(2)(h).

798C Market licensee or related body corporate etc. listing on market

- (1) Any of the following kinds of entity or scheme (the *listed entity*) may be included in a market's official list:
- (a) the market licensee for the market;
 - (b) a related body corporate of the market licensee;
 - (c) a managed investment scheme whose responsible entity is a related body corporate of the market licensee;
 - (d) a trust whose trustee is a related body corporate of the market licensee.

Note: There are certain matters that must be included in the market's listing rules before such an entity or scheme is included in the official list (see subsection (4)).

Section 798C

- (2) In such a case, the financial products of the listed entity may be traded on the market, if either or both the listed entity and the market licensee have entered into such arrangements as ASIC requires:
- (a) for dealing with possible conflicts of interest that might arise from the listed entity's financial products being able to be traded on the market; and
 - (b) for the purposes of ensuring the integrity of trading in the listed entity's financial products.

Note: For fees in respect of ASIC performing functions under such arrangements, see Part 9.10.

- (3) The listed entity, and the market licensee (if applicable), with whom ASIC has entered into arrangements for the purposes of subsection (2) must comply with the arrangements.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) Before, and at all times while, the listed entity is included in the market's official list, the market's listing rules must provide for ASIC, instead of the market licensee, to make decisions and to take action (or to require the market licensee to take action on ASIC's behalf) in relation to these matters, and matters related to these matters:

- (a) the admission of the listed entity to the market's official list; and
- (b) the removal of the listed entity from that list; and
- (c) allowing, stopping or suspending the trading on the market of the listed entity's financial products.

Note: For fees in respect of ASIC performing this function, see Part 9.10.

- (5) ASIC has the powers and functions that are provided for it in any listing rules or arrangements made for the purposes of this section.

- (6) The products of an entity or scheme referred to in subsection (1) must not be traded on the market licensee's market otherwise than as allowed by this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (7) This section does not apply if the licence of the market licensee was granted under subsection 795B(2) (overseas markets). Instead,

Section 798D

the law of the country in which the market licensee's principal place of business is located applies for all purposes connected with the inclusion of the listed entity in the market's official list.

798D Exemptions and modifications for self-listing licensees or related bodies corporate etc.

- (1) ASIC may:
 - (a) exempt an entity or scheme referred to in subsection 798C(1) whose financial products are able to be traded on the market from a modifiable provision (see subsection (7)); or
 - (b) declare that a modifiable provision applies to an entity or scheme referred to in subsection 798C(1) whose financial products are able to be traded on the market as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (3) An exemption may apply unconditionally or subject to specified conditions.
- (4) If an exemption is granted subject to specified conditions, the entity or scheme must comply with those conditions.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (5) If an exemption is granted subject to specified conditions, the Court may, on ASIC's application, order the entity or scheme to comply with one or more of those conditions in a specified way.
- (6) If conduct (including an omission) of a person would not have constituted an offence if:
 - (a) a particular condition had not been imposed on an exemption under paragraph (1)(a); or
 - (b) a particular declaration under paragraph (1)(b) had not been made;

that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (2)), ASIC gave written notice setting out the text of the condition or the declaration to the person. In a prosecution for an offence to which this subsection applies, the

Section 798DA

prosecution must prove that this additional notification requirement was complied with before the conduct occurred.

(7) In this section:

modifiable provision means:

- (a) section 205G and any of the provisions of Chapter 6, 6A, 6B, 6C, 6CA or 7; or
- (b) regulations made for the purposes of that section or any of those provisions.

798DA Market licensee, related body corporate etc. or competitor participating in market

- (1) This section applies if any of the following is a participant (the ***participant***) in a market:
 - (a) the market licensee;
 - (b) a related body corporate of the market licensee;
 - (c) a partnership if a partner in the partnership is a related entity of the market licensee;
 - (d) an entity if:
 - (i) the entity conducts, or participates in, a business that is in competition with a business conducted by the market licensee, or by a related body corporate of the market licensee; and
 - (ii) the entity requests that ASIC make decisions and take action in relation to the matters referred to in subsection (2).
- (2) Before, and at all times while, the participant is participating in the market, the market's operating rules must provide for ASIC, instead of the market licensee, to make decisions and to take action (or to require the market licensee to take action on ASIC's behalf) in relation to these matters, and matters related to these matters:
 - (a) the admission of the participant to the market; and
 - (b) the expulsion and suspension of the participant from the market; and
 - (c) the disciplining of the participant; and
 - (d) the participant's compliance with the operating rules or this Act, including:

Section 798E

- (i) the method of determining whether the participant has complied with those rules or this Act; and
- (ii) any action (including the imposition of a fine or penalty) to be taken in respect of contraventions of those rules or this Act.

Note: For fees in respect of ASIC performing this function, see Part 9.10.

- (3) ASIC has the powers and functions that are provided for it in any operating rules made for the purposes of this section.
- (4) A participant referred to in subsection (1) must not participate in the market licensee's market otherwise than as allowed by this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (5) This section does not apply if the licence of the market licensee was granted under subsection 795B(2) (overseas markets). Instead, the law of the country in which the market licensee's principal place of business is located applies for all purposes connected with the participation of the participant in the market.
- (6) To avoid doubt, subsection (1) does not authorise a market licensee to participate in its own market.

798E Other potential conflict situations

- (1) The regulations may make provision in relation to the rules and procedures that are to apply in the case of conflicts, or potential conflicts, between the commercial interests of the licensee and the need for the licensee to ensure that the market operates in the way mentioned in paragraph 792A(a).
- (2) In particular, such regulations may deal with the following:
 - (a) identifying when such a conflict, or potential conflict, is taken to arise;
 - (b) empowering ASIC, instead of the licensee, to make decisions and to take action under the market's operating rules in relation to such a conflict or potential conflict;
 - (c) empowering ASIC to require the licensee to take action under the market's operating rules (whether or not on ASIC's behalf) in relation to such a conflict or potential conflict.

Section 798E

Note: For fees in respect of ASIC performing this function, see Part 9.10.

(3) Subsection (2) does not limit the generality of subsection (1).

Part 7.3—Licensing of clearing and settlement facilities

Division 1—Requirement to be licensed

820A Need for a licence

- (1) A person must only operate, or hold out that the person operates, a clearing and settlement facility in this jurisdiction if:
 - (a) the person has an Australian CS facility licence that authorises the person to operate the facility in this jurisdiction; or
 - (b) the facility is exempt from the operation of this Part.

Note 1: A CS facility licensee may also provide financial services incidental to the operation of the facility: see paragraph 911A(2)(d).

Note 2: Failure to comply with this subsection is an offence: see subsection 1311(1).

- (2) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (1)(b).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

820B Other prohibitions on holding out

A person must not hold out:

- (a) that the person has an Australian CS facility licence; or
- (b) that the operation of a clearing and settlement facility by the person in this jurisdiction is authorised by an Australian CS facility licence; or
- (c) that a clearing and settlement facility is exempt from the operation of this Part;

if that is not the case.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

820C Exemptions

- (1) The Minister may, by publishing a notice in the *Gazette*, exempt from the operation of this Part a particular clearing and settlement facility or type of clearing and settlement facility.
- (2) The Minister may, at any time, by publishing a notice in the *Gazette*:
 - (a) impose conditions, or additional conditions, on an exemption; or
 - (b) vary or revoke the conditions on an exemption; or
 - (c) revoke an exemption.
- (3) However, the Minister may only take action under subsection (2) after:
 - (a) giving notice, and an opportunity to make submissions on the proposed action, to the operator of each clearing and settlement facility known by the Minister to be covered by the exemption; and
 - (b) if the exemption covers a type of clearing and settlement facility—causing a notice to be published in a newspaper or newspapers circulating generally in each State and internal Territory allowing a reasonable time within which the operator of each facility covered by the exemption may make submissions on the proposed action.

This subsection does not apply to the Minister imposing conditions when an exemption is made.

820D When a clearing and settlement facility is taken to be operated in this jurisdiction

- (1) For the purposes of this Chapter, a clearing and settlement facility is taken to be operated *in this jurisdiction* if it is operated by a body corporate that is registered under Chapter 2A.
- (2) Subsection (1) does not limit the circumstances in which a clearing and settlement facility is operated *in this jurisdiction* for the purposes of this Chapter.

Section 821A

Division 2—Regulation of CS facility licensees

Subdivision A—Licensee’s obligations

821A General obligations

A CS facility licensee must:

- (aa) to the extent that it is reasonably practicable to do so:
 - (i) comply with standards determined under section 827D;
and
 - (ii) do all other things necessary to reduce systemic risk;
and
- (a) to the extent that it is reasonably practicable to do so, do all things necessary to ensure that the facility’s services are provided in a fair and effective way; and
- (b) comply with the conditions on the licence; and
- (c) have adequate arrangements (whether they involve a self-regulatory structure or the appointment of an independent person or related entity) for supervising the facility, including arrangements for:
 - (i) handling conflicts between the commercial interests of the licensee and the need for the licensee to ensure that the facility’s services are provided in a fair and effective way; and
 - (ii) enforcing compliance with the facility’s operating rules;
and
- (d) have sufficient resources (including financial, technological and human resources) to operate the facility properly and for the required supervisory arrangements to be provided; and
- (e) if the licensee is a foreign body corporate—be registered under Division 2 of Part 5B.2; and
- (f) if the licence was granted under subsection 824B(2) (overseas clearing and settlement facilities)—both:
 - (i) remain authorised to operate a clearing and settlement facility in the foreign country in which the licensee’s principal place of business is located; and

- (ii) get the Minister's approval under section 821F before that principal place of business becomes located in any other foreign country; and
- (g) if the licensee, or a holding company of the licensee, is a widely held market body (within the meaning of Division 1 of Part 7.4)—take all reasonable steps to ensure that an unacceptable control situation (within the meaning of that Division) does not exist in relation to the body; and
- (h) take all reasonable steps to ensure that no disqualified individual becomes, or remains, involved in the licensee (see Division 2 of Part 7.4).

821B Obligation to notify ASIC of certain matters

- (1) A CS facility licensee must give written notice to ASIC, as soon as practicable, if it becomes aware that it may no longer be able to meet, or has breached, an obligation under section 821A. If ASIC considers it appropriate to do so, ASIC may give the Minister advice about the matter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A CS facility licensee must give written notice to ASIC, as soon as practicable, as required by the following paragraphs:
 - (a) if the licensee provides a new class of financial service incidental to the operation of the facility, the licensee must give notice that includes details of the new class;
 - (b) if the licensee takes any kind of disciplinary action against a participant in the facility, the licensee must give notice that includes:
 - (i) the participant's name; and
 - (ii) the reason for and nature of the action taken;
 - (c) if the licensee has reason to suspect that a person has committed, is committing, or is about to commit a significant contravention of the facility's operating rules or this Act, the licensee must give notice that includes:
 - (i) the person's name; and
 - (ii) details of the contravention or impending contravention; and
 - (iii) the licensee's reasons for that belief.

Section 821BA

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) A CS facility licensee whose licence was granted under subsection 824B(2) (overseas clearing and settlement facilities) must, as soon as practicable, give written notice to ASIC if:
- (a) the licensee ceases to be authorised to operate a clearing and settlement facility in the foreign country in which the licensee's principal place of business is located; or
 - (b) there is a significant change to the regulatory regime applying in relation to the facility in the foreign country in which the licensee's principal place of business is located.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) As soon as practicable after:
- (a) a person becomes or ceases to be a director, secretary or senior manager of a CS facility licensee or of a holding company of a CS facility licensee (including when a person changes from one of those positions to another); or
 - (b) a CS facility licensee becomes aware that a person has come to have, or has ceased to have, more than 15% of the voting power in the licensee or in a holding company of the licensee;

the licensee must give written notice of this to ASIC. The notice must include such other information about the matter as is prescribed by regulations made for the purposes of this subsection.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: To the extent that the licensee is required to give the notice and information under any other provision of this Act, the licensee may comply with this subsection by doing so. It need not provide the same information twice.

821BA Obligation to notify Reserve Bank of certain matters

- (1) A CS facility licensee must give written notice to the Reserve Bank of Australia (the ***Reserve Bank***), as soon as practicable, if:
- (a) the licensee becomes aware that it has failed to comply with standards determined under section 827D, or is likely to fail to comply with such standards; or

Section 821C

- (b) the licensee becomes aware that it may no longer be able to meet, or has breached, its obligation under subparagraph 821A(aa)(ii).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) If the Reserve Bank considers it appropriate to do so, the Reserve Bank may give the Minister advice about the matter.

821C Obligation to assist

ASIC

- (1) A CS facility licensee must give such assistance to ASIC, or a person authorised by ASIC, as ASIC or the authorised person reasonably requests in relation to the performance of ASIC's functions.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Such assistance may include showing ASIC the licensee's books or giving ASIC other information.

Reserve Bank

- (3) A CS facility licensee must give such assistance to the Reserve Bank of Australia (the **Reserve Bank**), or a person authorised by the Reserve Bank, as the Reserve Bank or the authorised person reasonably requests in relation to the performance of the Reserve Bank's functions under this Part.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) Such assistance may include showing the Reserve Bank the licensee's books or giving the Reserve Bank other information.

821D Obligation to give ASIC access to the facility

A CS facility licensee must give a person authorised by ASIC such reasonable access to the facility as the person requests for any of the purposes of this Chapter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 821E

821E Annual report

- (1) A CS facility licensee must, within 3 months after the end of its financial year, give ASIC an annual report on the extent to which the licensee complied with its obligations as a CS facility licensee under this Chapter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The licensee must ensure that the annual report is accompanied by any information and statements prescribed by regulations made for the purposes of this subsection.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) The licensee must also ensure that the annual report is accompanied by any audit report that the Minister requires under subsection (4).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The Minister may, by giving written notice to a CS facility licensee, require the licensee to obtain an audit report on the annual report and on any information or statements accompanying it. The Minister must nominate to prepare the audit report:
- (a) ASIC; or
 - (b) a specified person or body that is suitably qualified.

- (5) ASIC must give the annual report and accompanying material to the Minister.

821F Change of country by foreign licensee

- (1) In the case of a licence granted under subsection 824B(2), the Minister may approve the location of the licensee's principal place of business in a new country only if:
- (a) the new country is not Australia; and
 - (b) the operation of the facility in that country will be subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of protection from systemic risk and the level of effectiveness and fairness of services they achieve, to the requirements and supervision to which

Section 822A

clearing and settlement facilities are subject under this Act in relation to those matters.

- (2) If, in relation to a licence granted under subsection 824B(2), the licensee's principal place of business changes to become a place in Australia:
 - (a) the licence ceases to be in force from the time of the change; and
 - (b) if the licensee wishes the facility to continue to be licensed, the licensee may apply for the grant of a new licence under subsection 824B(1); and
 - (c) the application must be assessed in accordance with Subdivision A of Division 3, subject to such modifications (if any) of that Subdivision as are set out in regulations made for the purposes of this paragraph.
- (3) An application referred to in paragraph (2)(b) may be made in advance of the change of location of the principal place of business, and a decision on the application may be made before that time. However, any licence granted pursuant to the application does not come into force until the change occurs.

Subdivision B—The facility's operating rules and procedures

822A Content of the operating rules and procedures

- (1) The operating rules of a licensed CS facility must deal with the matters prescribed by regulations made for the purposes of this subsection.
- (2) The regulations may also prescribe matters in respect of which a licensed CS facility must have written procedures.
- (3) However, subsections (1) and (2) do not apply if the licensee is also authorised to operate the facility in the foreign country in which its principal place of business is located and the licence was granted under subsection 824B(2) (overseas clearing and settlement facilities).
- (4) In a subsection (3) case, ASIC may determine, by giving written notice to the licensee, matters in respect of which the licensed CS facility must have written procedures.

Section 822B

822B Legal effect of operating rules

The operating rules of a licensed CS facility have effect as a contract under seal:

- (a) between the licensee and each issuer of financial products in respect of which the facility provides its services; and
- (b) between the licensee and each participant in the facility; and
- (c) between each issuer of financial products in respect of which the facility provides its services and each participant in the facility; and
- (d) between a participant in the facility and each other participant in the facility;

under which each of those persons agrees to observe the operating rules to the extent that they apply to the person and to engage in conduct that the person is required by the operating rules to engage in.

822C Enforcement of operating rules

- (1) If a person who is under an obligation to comply with or enforce any of a licensed CS facility's operating rules fails to meet that obligation, an application to the Court may be made by:
 - (a) ASIC; or
 - (b) the licensee; or
 - (c) the operator of a financial market with which the facility has arrangements to provide services for transactions effected through the market; or
 - (d) a person aggrieved by the failure.
- (2) After giving an opportunity to be heard to the applicant and the person against whom the order is sought, the Court may make an order giving directions to:
 - (a) the person against whom the order is sought; or
 - (b) if that person is a body corporate—the directors of the body corporate;about compliance with, or enforcement of, the operating rules.

822D Changing the operating rules

Licensed CS facilities other than subsection 824B(2) facilities

- (1) As soon as practicable after a change is made to the operating rules of a licensed CS facility, other than a facility licensed under subsection 824B(2) (overseas clearing and settlement facilities), the licensee must lodge with ASIC written notice of the change. The notice must:
 - (a) set out the text of the change; and
 - (b) specify the date on which the change was made; and
 - (c) contain an explanation of the purpose of the change.
- (2) If no notice is lodged with ASIC, as required by subsection (1), within 21 days after the change is made, the change ceases to have effect at the end of that period.

Subsection 824B(2) facilities

- (3) As soon as practicable after a change is made to the operating rules of a clearing and settlement facility the operation of which is licensed under subsection 824B(2) (overseas clearing and settlement facilities), the licensee must lodge with ASIC written notice of the change. The notice must:
 - (a) set out the text of the change; and
 - (b) specify the date on which the change was made; and
 - (c) contain an explanation of the purpose of the change.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

822E Disallowance of changes to operating rules

- (1) This section does not apply in respect of an Australian CS facility licence granted under subsection 824B(2) (overseas clearing and settlement facilities).
- (2) As soon as practicable after receiving a notice under section 822D from a CS facility licensee, ASIC must send a copy of the notice to the Minister.
- (3) Within 28 days after ASIC receives the notice from the licensee, the Minister may disallow all or a specified part of the change to the operating rules.

Section 823A

- (4) In deciding whether to do so, the Minister must have regard to the consistency of the change with the licensee's obligations under this Part (including in particular the obligations mentioned in paragraphs 821A(aa) and (a)).

Note: The Minister must also have regard to the matters in section 827A.

- (5) As soon as practicable after all or a part of a change is disallowed, ASIC must give notice of the disallowance to the licensee. The change ceases to have effect, to the extent of the disallowance, when the licensee receives the notice.

Subdivision C—Powers of the Minister, ASIC and the Reserve Bank in relation to licensees

823A Minister's power to give directions

- (1) If the Minister considers that a CS facility licensee is not complying with its obligations as a CS facility licensee under this Chapter, the Minister may give the licensee a written direction to do specified things that the Minister believes will promote compliance by the licensee with those obligations.
- (2) The licensee must comply with the direction.
- (3) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.
- (4) The Minister may vary or revoke a direction at any time by giving written notice to the licensee.

823B Minister's power to require special report

- (1) The Minister may give a CS facility licensee a written notice requiring the licensee to give ASIC a special report on specified matters. ASIC must give the report to the Minister.
- (2) The notice may also require the licensee to give ASIC an audit report on the special report. The Minister must nominate to prepare the report:
 - (a) ASIC; or
 - (b) a specified person or body that is suitably qualified.

- (3) The licensee must give the special report, and audit report (if any), to ASIC within the time required by the notice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

823C ASIC to assess licensee's compliance

- (1) ASIC may do an assessment of how well a CS facility licensee is complying with its obligations as a CS facility licensee under this Chapter (other than its obligation under paragraph 821A(aa)). In doing the assessment, ASIC may take account of any information and reports that it thinks appropriate, including information and reports from an overseas regulatory authority.
- (2) In respect of the obligation in paragraph 821A(c), ASIC must do such an assessment at least once a year for each CS facility licensee.
- (3) As soon as practicable after doing an assessment under this section, ASIC must give a written report on the assessment to the Minister and a copy of the written report to the Reserve Bank of Australia.
- (4) If an assessment, or part of an assessment, relates to any other person's affairs to a material extent, ASIC may, at the person's request or of its own motion, give the person a copy of the written report on the assessment or the relevant part of the report.
- (5) If an assessment, or part of an assessment, relates to a serious contravention of a law of the Commonwealth or of a State or Territory, ASIC may give a copy of the written report on the assessment, or the relevant part of the report, to:
- (a) the Australian Federal Police; or
 - (b) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*); or
 - (c) the Director of Public Prosecutions; or
 - (d) an agency prescribed by regulations made for the purposes of this paragraph.
- (6) Either the Minister or ASIC may cause the written report on an assessment, or part of the report on an assessment, to be printed and published.

Section 823CA

823CA Reserve Bank to assess licensee's compliance

- (1) At least once each year, the Reserve Bank of Australia (the *Reserve Bank*) must do an assessment of how well each CS facility licensee is complying with its obligation under paragraph 821A(aa). In doing the assessment, the Reserve Bank may take account of any information and reports that it thinks appropriate, including information and reports from an overseas regulatory authority.
- (2) As soon as practicable after doing an assessment under this section, the Reserve Bank must give a written report on the assessment to the Minister and a copy of the written report to ASIC.
- (3) If an assessment, or part of an assessment, relates to any other person's affairs to a material extent, the Reserve Bank may, at the person's request or of its own motion, give the person a copy of the written report on the assessment or the relevant part of the report.
- (4) If an assessment, or part of an assessment, relates to a serious contravention of a law of the Commonwealth or of a State or Territory, the Reserve Bank may give a copy of the written report on the assessment, or the relevant part of the report, to:
 - (a) the Australian Federal Police; or
 - (b) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*); or
 - (c) the Director of Public Prosecutions; or
 - (d) an agency prescribed by regulations made for the purposes of this paragraph.
- (5) Either the Minister or the Reserve Bank may cause the written report on an assessment, or part of the report on an assessment, to be printed and published.

823D Directions power—protecting dealings in financial products and ensuring fair and effective provision of services by CS facilities

- (1) If ASIC:

- (a) considers that it is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products; or
- (b) considers that a CS facility licensee has not done all things reasonably practicable to ensure the facility's services are provided in a fair and effective way;

ASIC may give the licensee written advice that it intends to give the licensee a specified direction under this section. The advice must include the reasons for ASIC's intention to give the direction.

- (2) As soon as practicable after giving the advice to the licensee, ASIC must give notice of the advice to the operator of each financial market with which the facility has arrangements to provide services for transactions effected through the market.
- (3) For the purpose of remedying the matter mentioned in subsection (1), ASIC may give the following directions to the licensee under this section:
 - (a) a direction not to provide the licensee's services in relation to any transactions, of which the licensee receives notice after the direction takes effect, that relate to a specified financial product or class of financial products;
 - (b) any other direction concerning dealings with transactions that relate to a specified financial product or class of financial products.
- (4) If, after receiving ASIC's advice and reasons:
 - (a) the licensee does not take steps that in ASIC's view are adequate to address the situation; and
 - (b) ASIC still considers that it is appropriate to give the direction to the licensee;

ASIC may give the licensee the direction, in writing, with a statement setting out the reasons for giving the direction.

- (5) The direction has effect until the earlier of the following times:
 - (a) the time ASIC revokes the direction in accordance with subsection (10);
 - (b) the end of the period (which may be up to 21 days) specified in the direction as the period during which the direction is effective ends.

While the direction has effect, the licensee must comply with the direction and must not provide any services contrary to it.

Section 823E

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.
- (7) As soon as practicable after making or varying (see subsection (9)) a direction, ASIC must:
 - (a) give a copy of the direction or variation to:
 - (i) if the direction relates to a specified financial product—the issuer of that product; and
 - (ii) each of the operators mentioned in subsection (2); and
 - (b) give a written report to the Minister setting out ASIC's reasons for making the direction or variation; and
 - (c) give a copy of the report to the licensee.
- (8) If, at any time after the licensee receives ASIC's advice under subsection (1), the licensee requests in writing that ASIC refer the matter to the Minister, ASIC must do so immediately. In that event, the Minister may, if he or she considers it appropriate, require ASIC not to make, or to revoke, the direction. ASIC must immediately comply with such a requirement.
- (9) ASIC may vary a direction by giving written notice to the licensee.
- (10) ASIC may revoke a direction by giving written notice to the licensee. ASIC must also give written notice of the revocation to each of the operators mentioned in subsection (2).

823E Directions power—reduction of systemic risk

- (1) If ASIC considers that a CS facility licensee has not done all things reasonably practicable to reduce systemic risk in the provision of the facility's services, ASIC may give the licensee a direction, in writing, to take:
 - (a) specified measures to comply with the whole or a part of a standard determined under section 827D; or
 - (b) any other action that ASIC considers will reduce systemic risk in the provision of the facility's services.

Section 823E

- (2) The direction may deal with the time by which, or period during which, it is to be complied with. The time or period must be reasonable.
- (3) The licensee must comply with the direction.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3A) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.
- (4) ASIC may vary the direction by giving written notice to the licensee.
- (5) The direction has effect until ASIC revokes it by giving written notice to the licensee.
- (6) ASIC may revoke the direction if, at the time of revocation, it considers that the direction is no longer necessary or appropriate.
- (7) Before giving, varying or revoking the direction, ASIC must consult the Reserve Bank of Australia. However, a failure to consult the Reserve Bank of Australia does not invalidate the direction, variation or revocation.
- (8) The Reserve Bank of Australia may at any time request ASIC to make a direction under this section. However, ASIC is not required to comply with the request.

Division 3—The Australian CS facility licence

Subdivision A—How to get a licence

824A How to apply for a licence

- (1) A body corporate may apply for an Australian CS facility licence by lodging with ASIC an application that:
 - (a) includes the information required by regulations made for the purposes of this paragraph; and
 - (b) is accompanied by the documents (if any) required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

- (2) ASIC must, within a reasonable time, give the application to the Minister with advice about the application.

824B When a licence may be granted

General

- (1) The Minister may grant an applicant an Australian CS facility licence if the Minister is satisfied that:
 - (a) the application was made in accordance with section 824A; and
 - (b) the applicant will comply with the obligations that will apply if the licence is granted; and
 - (c) the applicant has adequate operating rules, and procedures, (see Subdivision B of Division 2) for the facility to ensure, as far as is reasonably practicable, that systemic risk is reduced and the facility is operated in a fair and effective way; and
 - (d) the applicant has adequate arrangements (whether they involve a self-regulatory structure or the appointment of an independent person or related entity) for supervising the facility, including arrangements for:
 - (i) handling conflicts between the commercial interests of the licensee and the need for the licensee to reduce systemic risk and ensure that the facility's services are provided in a fair and effective way; and

Section 824B

- (ii) enforcing compliance with the facility's operating rules;
and
- (e) no unacceptable control situation (see Division 1 of Part 7.4)
is likely to result if the licence is granted; and
- (f) no disqualified individual appears to be involved in the
applicant (see Division 2 of Part 7.4).

This subsection has effect subject to subsections (3) and (4).

Note: The Minister must also have regard to the matters in section 827A in
deciding whether to grant a licence.

*Alternative criteria for granting licence to overseas clearing and
settlement facility*

- (2) If an applicant is authorised to operate a clearing and settlement
facility in the foreign country in which its principal place of
business is located, the Minister may grant the applicant an
Australian CS facility licence authorising the applicant to operate
the same facility in this jurisdiction. The Minister must be satisfied
that:
- (a) the application was made in accordance with section 824A;
and
 - (b) the applicant will comply with the obligations that will apply
if the licence is granted; and
 - (c) the operation of the facility in that country is subject to
requirements and supervision that are sufficiently equivalent,
in relation to the degree of protection from systemic risk and
the level of effectiveness and fairness of services they
achieve, to the requirements and supervision to which
clearing and settlement facilities are subject under this Act in
relation to those matters; and
 - (d) the applicant undertakes to cooperate with ASIC and the
Reserve Bank of Australia by sharing information and in
other ways; and
 - (e) no unacceptable control situation (see Division 1 of Part 7.4)
is likely to result if the licence is granted; and
 - (f) no disqualified individual appears to be involved in the
applicant (see Division 2 of Part 7.4); and
 - (g) any other requirements that are prescribed by regulations
made for the purposes of this subsection are satisfied.

This subsection has effect subject to subsections (3) and (4).

Section 824C

Note: The Minister must also have regard to the matters in section 827A in deciding whether to grant a licence.

Foreign bodies

- (3) If the applicant is a foreign body corporate, the Minister:
- (a) must not grant the applicant a licence unless the applicant is registered under Division 2 of Part 5B.2; and
 - (b) may otherwise grant a licence under either subsection (1) or (2) (subject to the relevant criteria being satisfied).

Disqualified individuals

- (4) The Minister must not grant the applicant a licence unless:
- (a) ASIC has notified the Minister that, as far as ASIC is aware, no disqualified individual is involved in the applicant (see Division 2 of Part 7.4); or
 - (b) 42 days have passed since the application was made and ASIC has not given a notice under subsection 853D(2) to the applicant within that 42 days.

824C Publication of notice of licence grant

If the Minister grants an Australian CS facility licence, the Minister must publish a notice in the *Gazette* stating:

- (a) the name of the licensee; and
- (b) the date on which the licence was granted; and
- (c) the conditions on the licence.

824D More than one licence in the same document

If the Minister grants a person 2 or more of the following:

- (a) an Australian CS facility licence;
 - (b) an Australian market licence;
- they may be included in the same document.

824E More than one CS facility covered by the same licence

- (1) The same Australian CS facility licence may authorise the licensee to operate 2 or more clearing and settlement facilities.

Section 825A

- (2) In that case, a reference in this Chapter to the clearing and settlement facility to which an Australian CS facility licence relates is taken instead to be a reference to each of those facilities severally.
- (3) Before varying the conditions on an Australian CS facility licence so as to add another facility that the licensee is authorised to operate, the Minister must be satisfied of the matters listed in subsection 824B(1) or (2) (as appropriate) in relation to the facility.
- (4) An Australian CS facility licence that authorises the licensee to operate 2 or more clearing and settlement facilities may be suspended or cancelled under Subdivision C in respect of one or some of those facilities only, as if the licensee held a separate licence for each of the facilities.

Subdivision B—The conditions on the licence

825A The conditions on the licence

- (1) The Minister may, at any time:
 - (a) impose conditions, or additional conditions, on an Australian CS facility licence; or
 - (b) vary or revoke conditions imposed on such a licence;by giving written notice to the licensee. The Minister must also publish a notice in the *Gazette* with details of the action and when it took effect.

Note: As well as the requirements in this section, the Minister must also have regard to the matters in section 827A.

- (2) The Minister may do so:
 - (a) on the Minister's own initiative, subject to subsection (3); or
 - (b) if the licensee lodges with ASIC an application for the Minister to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

- (3) The Minister may only impose conditions or additional conditions, or vary the conditions, on the licence on his or her own initiative if:
 - (a) he or she considers it appropriate to do so having regard to:

Section 826A

- (i) the licensee's obligations as a CS facility licensee under this Chapter; and
- (ii) any change in the facility's operations or the conditions in which the facility is operating; and
- (b) the Minister gives the licensee written notice of the proposed action and an opportunity to make a submission before it takes effect.

This subsection does not apply to the Minister imposing conditions when a licence is granted.

- (4) The Minister must ensure that each Australian CS facility licence is subject to conditions that specify:
 - (a) the particular facility that the licensee is authorised to operate; and
 - (b) the class or classes of financial products in respect of which the facility can provide services.
- (5) ASIC must give the Minister any application and documents lodged under subsection (2).

Subdivision C—When a licence can be varied, suspended or cancelled

826A Varying licences

- (1) The Minister may vary an Australian CS facility licence to take account of a change in the licensee's name if the licensee lodges with ASIC an application for the variation, accompanied by the documents, if any, required by regulations made for the purposes of this subsection.

Note 1: The conditions on the licence can be varied under section 825A.

Note 2: For fees in respect of lodging applications, see Part 9.10.

- (2) The Minister must give written notice of the variation to the licensee.
- (3) ASIC must give the Minister any application and documents lodged under subsection (1).

826B Immediate suspension or cancellation

The Minister may, by giving written notice to a CS facility licensee, suspend the licence for a specified period, or cancel it, if:

- (a) the licensee ceases to carry on the business of operating the facility; or
- (b) the licensee becomes an externally-administered body corporate; or
- (c) the licensee asks the Minister to do so; or
- (d) in the case of a licence granted under subsection 824B(2) (overseas clearing and settlement facilities):
 - (i) the licensee ceases to be authorised to operate a clearing and settlement facility in the foreign country in which the licensee's principal place of business is located; or
 - (ii) there is a change to the regulatory regime applying in relation to the facility to which the licence relates in the country in which the licensee's principal place of business is located, and, because of that change, the Minister is no longer satisfied as mentioned in paragraph 824B(2)(c).

826C Suspension or cancellation following hearing and report

- (1) If the Minister considers that a CS facility licensee has breached one or more of its obligations as a CS facility licensee under this Chapter, the Minister may give the licensee a written notice that requires the licensee to show cause, at a hearing before a specified person, why the licence should not be suspended or cancelled.
- (2) The notice must specify:
 - (a) the grounds on which it is proposed to suspend or cancel the licence; and
 - (b) a reasonable time and place at which the hearing is to be held.

However, if the licensee consents, the person conducting the hearing may fix a different time or place.

- (3) The person conducting the hearing must:
 - (a) give the licensee an opportunity to be heard at the hearing; and
 - (b) give the Minister:

Section 826D

- (i) a report about the hearing; and
 - (ii) a recommendation about the grounds in the notice on which it is proposed to suspend or cancel the licence.
- (4) After considering the report and recommendation, the Minister may:
 - (a) decide to take no further action in relation to the matter and give written advice of that decision to the licensee; or
 - (b) suspend the licence for a specified period, or cancel the licence, by giving written notice to the licensee.

Note: The Minister must have regard to the matters in section 827A.

826D Effect of suspension

- (1) A person whose Australian CS facility licence is suspended is taken not to hold that licence while it is suspended.
- (2) However, the Minister may specify in the written notice to the licensee that subsection (1) does not apply for specified purposes.

826E Variation or revocation of suspension

The Minister may at any time vary or revoke a suspension of an Australian CS facility licence by giving written notice to the licensee.

826F Publication of notice of licence suspension or cancellation

- (1) If the Minister:
 - (a) suspends, or varies or revokes a suspension of, an Australian CS facility licence; or
 - (b) cancels an Australian CS facility licence;the Minister must publish a notice in the *Gazette* to that effect.
- (2) The notice must state when the action took effect.

826G Suspension and cancellation only in accordance with this Subdivision

An Australian CS facility licence cannot be varied, suspended or cancelled otherwise than in accordance with this Subdivision.

Note: The conditions on the licence can be varied under section 825A.

Division 4—Other matters

827A Matters to be taken into account by the Minister

- (1) The Minister must have regard to certain matters in deciding whether to:
 - (a) grant an applicant an Australian CS facility licence under section 824B; or
 - (b) impose, vary or revoke conditions on such a licence under section 825A; or
 - (c) suspend or cancel such a licence under section 826C; or
 - (d) disallow a change to the operating rules of a licensed CS facility under section 822E.
- (2) These are the matters the Minister must have regard to:
 - (a) the structure, or proposed structure, of the facility;
 - (b) the nature of the services provided, or proposed to be provided, by the facility;
 - (c) the size, or proposed size, of the facility;
 - (d) the nature of the financial products in respect of which the facility provides services or proposes to provide services;
 - (e) the participants, or proposed participants, in the facility and whether those participants:
 - (i) in using the facility's services, are, or will be, providing financial services to other persons; or
 - (ii) use, or will use, the facility's services in respect of financial products they acquire or dispose of as retail clients or as wholesale clients; or
 - (iii) are, or will be, participants in a financial market, or other clearing and settlement facilities, as well;
 - (f) the technology used, or proposed to be used, in the operation of the facility;
 - (g) whether it would be in the public interest to take the action referred to in subsection (1);
 - (h) any relevant advice received from ASIC or the Reserve Bank of Australia.

The Minister may also have regard to any other matter that the Minister considers relevant.

Section 827B

- (3) If the Minister is deciding whether to take the action mentioned in paragraph (1)(a), (b) or (c) in respect of an Australian CS facility licence granted under subsection 824B(2) (overseas clearing and settlement facilities), the Minister must also have regard to:
- (a) the criteria that the licensee or applicant satisfied to obtain an authorisation to operate the same facility in the foreign country in which their principal place of business is located; and
 - (b) the obligations they must continue to satisfy to keep the authorisation; and
 - (c) the level of supervision to which the facility is subject in that country; and
 - (d) whether adequate arrangements exist for cooperation between ASIC, the Reserve Bank of Australia and the authority, or authorities, that are responsible for that supervision.

827B ASIC may give advice to Minister

ASIC may give advice to the Minister in relation to:

- (a) any matter in respect of which the Minister has a discretion under this Part; or
- (b) any other matter concerning clearing and settlement facilities.

Note: In some cases, the Minister must have regard to ASIC's advice: see paragraph 827A(2)(h).

827C Reserve Bank may give advice to Minister

The Reserve Bank of Australia may give advice to the Minister in relation to any matter concerning clearing and settlement facilities.

Note: In some cases, the Minister must have regard to the Reserve Bank's advice: see paragraph 827A(2)(h).

827D Reserve Bank may determine financial stability standards

- (1) The Reserve Bank of Australia (the *Reserve Bank*) may, in writing, determine standards for the purposes of ensuring that CS facility licensees conduct their affairs in a way that causes or promotes overall stability in the Australian financial system.
- (2) The standards are to be complied with by:

Section 827D

- (a) all CS facility licensees; or
 - (b) a specified class of CS facility licensees, in the case of a standard that is expressed to apply only in relation to that class.
- (3) Before the Reserve Bank determines a standard, it must consult with:
 - (a) the CS facility licensees that will be required to comply with the standard; and
 - (b) ASIC.
- (4) A standard may impose different requirements to be complied with in different situations or in respect of different activities.
- (5) A standard:
 - (a) comes into force:
 - (i) unless subparagraph (ii) applies—on the day on which the determination of the standard is made; or
 - (ii) if that determination specifies a later day as the day on which the standard comes into force—on the day so specified; and
 - (b) continues in force until it is revoked.
- (6) The Reserve Bank may vary a standard in writing. Before it does so, it must consult with:
 - (a) the CS facility licensees that will be required to comply with the standard if it is varied as proposed; and
 - (b) ASIC.
- (7) If the Reserve Bank determines or varies a standard, it must, as soon as practicable:
 - (a) cause a notice advising of the determination of the standard, or of the variation of the standard, and summarising the purpose and effect of the standard or variation, to be published in the *Gazette*; and
 - (b) make the text of the notice available on the Internet; and
 - (c) give a copy of the standard, or of the variation, to the following:
 - (i) each CS facility licensee to which the standard applies;
 - (ii) the Minister;
 - (iii) ASIC.

Section 827D

- (8) The Reserve Bank may revoke a standard in writing. Before it does so, it must consult with ASIC.
- (9) If the Reserve Bank revokes a standard, it must, as soon as practicable:
 - (a) cause a notice advising of the revocation of the standard to be published in the *Gazette*; and
 - (b) make the text of the notice available on the Internet; and
 - (c) give notice of the revocation of the standard to the following:
 - (i) each CS facility licensee to which the standard applied;
 - (ii) the Minister;
 - (iii) ASIC.
- (10) The Reserve Bank must take reasonable steps to ensure that copies of the current text of the standards are available for inspection and purchase.

Part 7.4—Limits on involvement with licensees

Division 1—Limit on control of certain licensees

Subdivision A—15% voting power limit

850A Scope of Division

- (1) This Division applies in relation to a body corporate that:
 - (a) has an Australian market licence or an Australian CS facility licence; or
 - (b) is the holding company of a body corporate that has an Australian market licence or an Australian CS facility licence;and that is specified in regulations made for the purposes of this section.
- (2) In this Division, such a body is called a *widely held market body*.

850B Meaning of unacceptable control situation

- (1) For the purposes of this Division, an *unacceptable control situation* exists in relation to a widely held market body and in relation to a particular person if the person's voting power in the body is more than:
 - (a) 15%; or
 - (b) in relation to a body other than the Australian Stock Exchange Limited—if an approval of a higher percentage is in force under Subdivision B in relation to the body and in relation to the person, that higher percentage; or
 - (c) in relation to the Australian Stock Exchange Limited—if the regulations prescribe a higher percentage in relation to the Australian Stock Exchange Limited in relation to the person, that higher percentage.
- (2) Regulations made for the purposes of paragraph (1)(c) may not take effect earlier than the day after the last day on which the regulations may be disallowed under Part 5 of the *Legislative Instruments Act 2003*.

Section 850C

850C Acquisitions of shares

If:

- (a) a person, or 2 or more persons under an arrangement, acquire shares in a body corporate; and
- (b) the acquisition has the result, in relation to a widely held market body, that:
 - (i) an unacceptable control situation comes into existence in relation to the body and in relation to a person; or
 - (ii) if an unacceptable control situation already exists in relation to the body and in relation to a person—there is an increase in the voting power of the person in the body;

the person or persons mentioned in paragraph (a) contravene this section.

Note: A contravention of this section is an offence (see subsection 1311(1)).

850D Remedial orders

- (1) If an unacceptable control situation exists in relation to a widely held market body, the Court may make such orders as the Court considers appropriate for the purpose of ensuring that the unacceptable control situation ceases to exist.
- (2) However, the Court may only make orders under this section on application by:
 - (a) the Minister; or
 - (b) ASIC; or
 - (c) the body; or
 - (d) a person who has any voting power in the body.
- (3) The Court's orders may include:
 - (a) an order directing the disposal of shares; or
 - (b) an order restraining the exercise of any rights attached to shares; or
 - (c) an order prohibiting or deferring the payment of any sums due to a person in respect of shares held by the person; or
 - (d) an order that any exercise of rights attached to shares be disregarded; or

Section 850E

- (e) an order directing any person to do or refrain from doing a specified act, for the purpose of securing compliance with any other order made under this section; or
 - (f) an order containing such ancillary or consequential provisions as the Court thinks just.
- (4) Subsection (3) does not, by implication, limit subsection (1).
- (5) Before making an order under this section, the Court may direct that notice of the application be given to such persons as the Court thinks fit or be published in such manner as the Court thinks fit, or both.
- (6) The Court may, by order:
- (a) rescind, vary or discharge an order made by the Court under this section; or
 - (b) suspend the operation of such an order.

850E Injunctions

- (1) If any conduct (including a refusal or failure to act) amounts or would amount to a contravention of this Division in relation to a particular widely held market body, the body is taken, for the purposes of section 1324, to be a person whose interests are affected by the conduct.
- (2) Subsection (1) does not, by implication, limit the class of persons whose interests are affected by the conduct.
- (3) The Minister has the same powers as ASIC to apply for an injunction under section 1324 in relation to a contravention of this Division.
- (4) The powers in sections 850D and 1324 do not, by implication, limit each other.

Subdivision B—Approval to exceed 15% voting power limit

851A Application for approval to exceed 15% voting power limit

- (1) A person may apply for approval to have voting power of more than 15% in a particular widely held market body (other than the

Section 851B

Australian Stock Exchange Limited) by lodging with ASIC an application that:

- (a) specifies the percentage of voting power (if any) the person currently has in the widely held market body; and
- (b) specifies the percentage of voting power the person is seeking approval to have in the body; and
- (c) sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

- (2) ASIC must give the application to the Minister as soon as possible.

851B Approval of application

- (1) If the Minister is satisfied that it is in the national interest to approve the applicant having voting power in the widely held market body of more than 15%, the Minister may grant the application.
- (2) If the Minister grants the application, the Minister must:
 - (a) give written notice of the approval to the applicant; and
 - (b) specify the percentage of the voting power the Minister approves the applicant having in the widely held market body (which may or may not be the percentage the applicant applied for); and
 - (c) either:
 - (i) specify the period during which the approval remains in force; or
 - (ii) specify that the approval remains in force indefinitely.
- (3) If the Minister refuses the application, the Minister must give written notice of the refusal to the applicant.
- (4) As soon as practicable, the Minister must arrange for a copy of a notice of approval under this section to be:
 - (a) published in the *Gazette*; and
 - (b) given to the body concerned.

851C Duration of approval

- (1) An approval under section 851B remains in force:

Section 851D

- (a) if the notice of approval specifies a period during which the approval remains in force—until the end of that period, or if the Minister extends that period, until the end of that extended period; or
- (b) otherwise—indefinitely.

Extension of approval

- (2) A person who holds an approval under section 851B that is in force for a specified period may apply to extend that period by lodging with ASIC an application that sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

- (3) ASIC must give the application to the Minister as soon as possible.
- (4) If the Minister is satisfied that it is in the national interest to grant the extension, the Minister may grant the application.
- (5) If the Minister grants the application, the Minister must:
 - (a) give written notice of the extension to the applicant; and
 - (b) specify the extended period during which the approval remains in force (which may or may not be the period the applicant applied for).
- (6) If the Minister refuses the application, the Minister must give written notice of the refusal to the applicant.
- (7) As soon as practicable, the Minister must arrange for a copy of a notice of extension under this section to be:
 - (a) published in the *Gazette*; and
 - (b) given to the widely held market body concerned.

851D Conditions of approval

- (1) An approval under section 851B is subject to such conditions (if any) as are specified in the notice of approval.
- (2) The Minister may, by written notice given to a person who holds an approval under section 851B:
 - (a) impose one or more conditions or further conditions to which the approval is subject; or
 - (b) revoke or vary any condition:

Section 851E

- (i) imposed under paragraph (a); or
 - (ii) specified in the notice of approval.
- (3) The Minister's power under subsection (2) may be exercised:
 - (a) on the Minister's own initiative; or
 - (b) on application by the person who holds the approval.
- (4) An application made by a person under paragraph (3)(b) must be lodged with ASIC and must set out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.
- (5) ASIC must give the application to the Minister as soon as possible.
- (6) If the Minister refuses an application under paragraph (3)(b), the Minister must give written notice of the refusal to the applicant.
- (7) As soon as practicable, the Minister must arrange for a copy of a notice under subsection (2) to be:
 - (a) published in the *Gazette*; and
 - (b) given to the widely held market body concerned.
- (8) A person who holds an approval under section 851B must give written notice to ASIC if they become aware that they have breached a condition to which the approval is subject.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

851E Varying percentage approved

Application by holder of approval

- (1) A person who holds an approval under section 851B may apply to vary the percentage specified in the approval by lodging with ASIC an application that:
 - (a) specifies the percentage of the voting power the person currently has in the widely held market body concerned; and
 - (b) specifies the percentage of the voting power the person is seeking approval to have in the body; and
 - (c) sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

Section 851F

- (2) ASIC must give the application to the Minister as soon as possible.
- (3) If the Minister is satisfied that it is in the national interest to vary the percentage, the Minister may grant the application.
- (4) If the Minister grants the application, the Minister must:
 - (a) give written notice of the variation to the applicant; and
 - (b) specify the variation granted (which may or may not be the variation the applicant applied for).
- (5) If the Minister refuses an application, the Minister must give written notice of the refusal to the applicant.

Minister's own initiative

- (6) The Minister may, by written notice given to a person who holds an approval under section 851B, vary the percentage specified in the approval if the Minister is satisfied that it is in the national interest to do so.

Percentage varied upwards

- (7) If the Minister varies a percentage upwards, the variation takes effect on the day the notice of variation is given.

Percentage varied downwards

- (8) If the Minister varies a percentage downwards, the variation takes effect on the day specified in the notice of variation. The specified day must be a day at least 90 days after the day on which the notice is given.

Notification of variation

- (9) As soon as practicable, the Minister must arrange for a copy of a notice of variation under this section to be:
 - (a) published in the *Gazette*; and
 - (b) given to the widely held market body concerned.

851F Revoking an approval

- (1) The Minister may, by written notice given to a person who holds an approval under section 851B in relation to a widely held market body, revoke the approval if the Minister is satisfied that:

Section 851G

- (a) it is in the national interest to do so; or
 - (b) an unacceptable control situation exists in relation to the widely held market body and in relation to the person; or
 - (c) there has been a contravention of a condition to which the approval is subject.
- (2) The revocation takes effect on the day specified in the notice of revocation. The specified day must be a day at least 90 days after the day on which the notice is given.
- (3) If a person who holds an approval under section 851B requests the Minister to revoke the approval, the Minister must, by written notice given to the person, revoke the approval. The revocation takes effect on the day specified in the notice of revocation.
- (4) As soon as practicable, the Minister must arrange for a copy of a notice of revocation under this section to be:
 - (a) published in the *Gazette*; and
 - (b) given to the widely held market body concerned.

851G Further information about applications

- (1) This section applies to an application under this Subdivision.
- (2) The Minister may, by written notice given to the applicant, require the applicant to give the Minister, within a specified period, further information about the application.
- (3) The Minister may refuse to consider the application until the applicant gives the Minister the information.

851H Time limit for Minister's decision

- (1) The Minister must make a decision on an application under this Subdivision within 30 days after receiving the application.
- (2) However, before the end of the 30 days, the Minister may decide to extend the period for considering the application until the end of 60 days after the application was received.

Section 851I

- (3) If the Minister has not made a decision within the 30 days (or the 60 days, if subsection (2) applies), the Minister is taken to have granted whatever was applied for. As soon as practicable after that happens, the Minister must arrange for a notice to that effect to be:
 - (a) published in the *Gazette*; and
 - (b) given to the widely held market body concerned.
- (4) The time for making the decision stops running if the Minister gives a notice under section 851G in relation to the application, and does not start again until the notice is complied with.
- (5) The time limit in this section does not apply to an application under section 851A or 851E if an unacceptable control situation exists in relation to the applicant and in relation to the relevant widely held market body at any time before the Minister makes a decision.

851I Preservation of voting power in relation to bodies specified in regulations made for section 850A

- (1) A person holding a particular percentage of voting power in a body at its specification time (see subsection (3)) is taken at that time to be granted an approval under section 851B to hold that percentage of voting power in the body if:
 - (a) in a case where the body's specification time occurs at the same time as the commencement of this section—the person holding the percentage of voting power in the body immediately before the specification time did not, to any extent, constitute a contravention of previous law (see subsection (3)); and
 - (b) whether the body's specification time occurs at the same time as, or after, the commencement of this section—on the body's specification time, the person holding that percentage of voting power in the body would (apart from this section) constitute an unacceptable control situation.

Note: Conditions can be imposed on the approval under section 851D and then varied or revoked in accordance with that section.

- (2) The Minister is taken to have complied with the Minister's obligations under section 851B in relation to the granting of the approval to the person.

Section 852A

- (3) In this section:

contravention of previous law means a contravention of a provision of Part 7.1A of this Act as in force immediately before the commencement of this section.

specification time, in relation to a body, means the time a body first becomes specified in regulations made for the purposes of section 850A.

Subdivision C—Other matters

852A Acquisition of property

- (1) The Court must not make an order under section 850D if:
- (a) the order would result in the acquisition of property from a person otherwise than on just terms; and
 - (b) the order would be invalid because of paragraph 51(xxxi) of the Constitution.
- (2) Section 1350 does not apply in relation to the making of an order under section 850D.
- (3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

852B Anti-avoidance

- (1) If:
- (a) one or more persons enter into, begin to carry out or carry out a scheme; and
 - (b) it would be concluded that the person, or any of the persons, who entered into, began to carry out or carried out the scheme or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision of Subdivision A in relation to any person or persons (whether or not mentioned in paragraph (a)); and

Section 852B

- (c) as a result of the scheme or a part of the scheme, a person (the ***controller***) increases the controller's voting power in a widely held market body;
the Minister may give the controller a written direction to cease having that voting power within a specified time.
- (2) A person who is subject to a written direction under subsection (1) must comply with the direction.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3) In this section:
- increase*** voting power includes increasing it from a starting point of nil.

Section 853A

Division 2—Individuals who are not fit and proper are disqualified

853A Who is disqualified

For the purposes of this Division, an individual is *disqualified* if:

- (a) a declaration by ASIC that the individual is disqualified is in effect under section 853C; or
- (b) the individual is disqualified from managing a corporation under section 206B; or
- (c) the individual is on the Register that ASIC must keep under section 1274AA.

853B When an individual is *involved in* an operator

For the purposes of this Division, an individual is *involved in* a market licensee or a CS facility licensee, or an applicant for such a licence, if:

- (a) the individual is a director, secretary or senior manager of the licensee or applicant, or in a holding company of the licensee or applicant; or
- (b) the individual has more than 15% of the total voting power in the licensee or applicant, or in a holding company of the licensee or applicant.

853C Declaration by ASIC

- (1) ASIC may declare in writing that an individual who is involved in a licensed financial market operator or licensed CS facility operator, or in an applicant for a licence of either of those kinds, is *disqualified* for the purposes of this Division.
- (2) ASIC may make such a declaration only if ASIC is satisfied that, because the individual is unfit to be involved in the licensee or applicant, there is a risk that the licensee or applicant will breach its obligations under this Chapter if the declaration is not made.
- (3) In deciding whether an individual is unfit as mentioned in subsection (2), ASIC must take into account such matters as the

individual's fame, character and integrity, rather than his or her competence, experience, knowledge or other such attributes.

- (4) A declaration may be expressed to remain in effect for a specified period or until a specified event occurs. Otherwise, it remains in effect indefinitely (unless it is revoked under section 853E).

853D Procedure for declaration

- (1) ASIC must not make a declaration under section 853C unless it has followed the procedure in this section.
- (2) Within 42 days after:
- (a) a body corporate applies for an Australian market licence or an Australian CS facility licence; or
 - (b) ASIC receives other information that may be relevant to deciding whether to make a declaration under section 853C about an individual who is involved in an applicant for an Australian market licence or an Australian CS facility licence, or in an existing licensee;

ASIC may give the applicant or licensee written notice that ASIC proposes to make a declaration under section 853C about the individual in question.

- (3) ASIC must give a copy of the notice to the individual and to the Minister.
- (4) The notice must:
- (a) state the grounds on which ASIC proposes to make the declaration; and
 - (b) require the applicant or licensee, and the individual, to show, at a hearing before a specified person, why the declaration should not be made; and
 - (c) specify a reasonable time and place at which the hearing is to be held.

However, if the applicant or licensee, and the individual, consent, the person conducting the hearing may fix a different time or place.

- (5) The person conducting the hearing must:
- (a) give the applicant or licensee, and the individual, an opportunity to be heard at the hearing; and
 - (b) give ASIC:

Section 853E

- (i) a report about the hearing; and
 - (ii) a recommendation about the grounds in the notice on which it is proposed to make the declaration.
- (6) As soon as practicable after the hearing, ASIC must:
 - (a) decide whether to make the declaration; and
 - (b) give each of the following persons a copy of the declaration, or a written notice of its decision not to make the declaration:
 - (i) the applicant or licensee;
 - (ii) the individual;
 - (iii) the Minister.

853E Revoking a declaration

- (1) ASIC may, in writing, revoke a declaration under section 853C if it is no longer satisfied as mentioned in subsection 853C(2) in relation to the individual in question.
- (2) ASIC must give a copy of the revocation to the relevant applicant or licensee, the individual and the Minister.

853F Obligations on disqualified individuals

- (1) A disqualified individual must not become involved in a market licensee or a CS licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (2) A disqualified individual who is involved in a market licensee or CS licensee must take all reasonable steps to ensure that he or she ceases to be involved in the licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

853G Notification by ASIC

If ASIC becomes aware that an individual who is involved in a market licensee or a CS facility licensee is disqualified because of paragraph 853A(b) or (c), ASIC must notify the individual, the licensee and the Minister as soon as practicable.

Division 3—Miscellaneous

854A Record-keeping and giving of information

- (1) The regulations may make provision for and in relation to requiring a person:
 - (a) to keep and retain records that are relevant to whether a person has voting power in a widely held market body and, if so, how much; and
 - (b) to keep and retain records that are relevant to determining whether any disqualified individual is involved in a market licensee or a CS facility licensee; and
 - (c) to give the Minister or ASIC information that is relevant to the matters mentioned in paragraphs (a) and (b); and
 - (d) to give a widely held market body information that is relevant to the matter mentioned in paragraph (a).
- (2) The regulations may provide that information given in accordance with a requirement covered by paragraph (1)(c) or (d) must be verified by statutory declaration.
- (3) However, an individual is not required to give information in accordance with a requirement covered by paragraph (1)(c) or (d) if the information might tend to incriminate the individual or expose the individual to a penalty.
- (4) A person contravenes this section if:
 - (a) the person makes or keeps a record in compliance, or purported compliance, with a requirement covered by subsection (1); and
 - (b) the person does so knowing that the record:
 - (i) is false or misleading; or
 - (ii) omits any matter or thing without which the record is misleading.

Note: A contravention of this subsection is an offence (see subsection 1311(1)).
- (5) Regulations made for the purposes of this section may make provision for or in relation to a matter by conferring a power on the Minister.

Section 854B

854B Exemptions and modifications by regulations

- (1) The regulations may:
 - (a) exempt a person or class of persons from all or specified provisions of this Part; or
 - (b) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (3) For the purpose of this section, the *provisions of this Part* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Part 7.5—Compensation regimes for financial markets

Division 1—Preliminary

880A Part does not apply to markets licensed under special provisions about overseas markets

Nothing in this Part applies in relation to:

- (a) a financial market the operation of which is licensed under subsection 795B(2); or
- (b) an application for the grant of a licence under that subsection.

880B Definitions

- (1) In this Part:

adequate has a meaning affected by subsection (2).

borrowing includes obtaining credit.

compensation arrangements are arrangements that consist of:

- (a) a set of rules about compensation; and
- (b) a source of funds from which compensation is payable; and
- (c) associated administrative and monitoring arrangements.

compensation rules means rules referred to in paragraph (a) of the definition of *compensation arrangements*.

Division 3 arrangements means compensation arrangements approved under Division 3.

Division 3 loss means a loss described in section 885C, other than a loss that section 885D provides is to be taken not to be a Division 3 loss.

Division 4 arrangements means the arrangements constituted by Division 4.

Section 880B

fidelity fund, in relation to a financial market, means a fund consisting principally of contributions made by:

- (a) participants and past participants in the market; or
- (b) participants and past participants in:
 - (i) the market; and
 - (ii) one or more other financial markets;

the purpose, or the main purpose, of which is to provide a source of funds for the payment of compensation to clients of participants.

Any investments made using money in the fund are taken to form part of the fund.

NGF means the National Guarantee Fund that continues in existence under section 889A.

operating rules, in relation to the SEGC, means the rules referred to in section 890D.

Part 7.5 arrangements means Division 3 arrangements or Division 4 arrangements.

pay compensation includes provide compensation in a form other than money.

SEGC means the body corporate in relation to which a nomination as the Securities Exchanges Guarantee Corporation is in force under section 890A.

- (2) For the purposes of this Part, the question whether proposed compensation arrangements, compensation arrangements as proposed to be changed, or compensation arrangements that have been approved, are ***adequate*** is to be determined in accordance with Subdivision D of Division 3.

Division 2—When there must be a compensation regime

881A Licensed markets through which participants provide services for retail clients must generally have a compensation regime

- (1) If:
 - (a) any of the participants in a licensed market, in effecting transactions through the market, provide financial services for persons as retail clients; and
 - (b) in connection with the provision of those financial services, those persons will or may give money or other property, or authority over property, to those participants; and
 - (c) the market is not a financial market to which Division 4 applies;there must be compensation arrangements in relation to the market that are approved in accordance with Division 3.
- (2) The compensation regime applicable in relation to financial markets to which Division 4 applies is as constituted by that Division.

881B Additional requirements for the licence application

- (1) A person who is applying for an Australian market licence must state in their application:
 - (a) whether any of the participants in the market, in effecting transactions through the market, will provide financial services for persons as retail clients; and
 - (b) if any participants will so provide financial services to persons as retail clients—whether, in connection with the provision of those financial services, those persons will or may give money or other property, or authority over property, to those participants.
- (2) If:
 - (a) participants in the market will provide financial services to persons as retail clients as mentioned in paragraph (1)(a); and

Section 881C

- (b) in connection with the provision of those financial services, those persons will or may give money or property, or authority over property, to those participants;

the application must:

- (c) contain the information, in relation to the proposed compensation arrangements, required by regulations made for the purposes of this paragraph and be accompanied by a copy of the proposed compensation rules; or
- (d) state that the market is or will be covered by Division 4, and set out evidence, in accordance with the requirements (if any) of the regulations, in support of that statement.

881C What happens if an application contains information in accordance with paragraph 881B(2)(c)

If a licence application contains information in relation to proposed compensation arrangements as required by paragraph 881B(2)(c), the Minister must deal with the application in accordance with section 882A.

881D What happens if an application contains a statement in accordance with paragraph 881B(2)(d)

- (1) If a licence application contains a statement in accordance with paragraph 881B(2)(d), the Minister must consider whether he or she is satisfied that the market will be covered by Division 4.
- (2) If the Minister is not so satisfied, the application for the licence must be rejected.
- (3) If the Minister is so satisfied, the Minister may (subject to the other provisions about granting licences) grant the licence.

Note: The other provisions about granting licences are in Subdivision A of Division 4 of Part 7.2.

Division 3—Approved compensation arrangements

Subdivision A—Approval of compensation arrangements

882A How to get compensation arrangements approved with grant of licence

- (1) If an application for an Australian market licence contains information in relation to proposed compensation arrangements in accordance with paragraph 881B(2)(c), the Minister must treat the application as also being an application for approval of the compensation arrangements and, for that purpose, must consider whether the proposed arrangements are adequate.
- (2) If the Minister does not consider that the proposed compensation arrangements are adequate, the application for the licence must be rejected.
- (3) If the Minister considers that the proposed compensation arrangements are adequate, the Minister may (subject to the other provisions about granting licences) grant the licence. On the granting of the licence, the Minister is taken to have approved the compensation arrangements.

Note: The other provisions about granting licences are in Subdivision A of Division 4 of Part 7.2.

- (4) In the conditions of the licence, the Minister must:
 - (a) deal with the minimum amount of cover required in relation to the compensation arrangements in such manner as the Minister thinks appropriate; and
 - (b) identify the source of funds available to cover claims, on the basis of which the Minister approves the arrangements (see section 885H).

882B How to get compensation arrangements approved after licence is granted

- (1) If the operator of a licensed market wants to have compensation arrangements for the market approved after the licence has been granted, the operator must apply for approval in accordance with this section.

Section 882C

- (2) The application must:
- (a) contain the information, in relation to the proposed compensation arrangements, required by regulations made for the purposes of this paragraph and be accompanied by a copy of the proposed compensation rules; and
 - (b) be made to the Minister by lodging the application with ASIC.

Note: For fees in respect of lodging applications, see Part 9.10.

- (3) If the Minister does not consider that the proposed compensation arrangements are adequate, the application for approval must be rejected.
- (4) If the Minister considers that the proposed compensation arrangements are adequate, the Minister must:
- (a) approve the compensation arrangements in writing; and
 - (b) vary the conditions of the operator's licence so as to:
 - (i) deal with the minimum amount of cover required in relation to the compensation arrangements in such manner as the Minister thinks appropriate; and
 - (ii) identify the source of funds available to cover claims, on the basis of which the Minister approves the arrangements (see section 885H).
- (5) In varying licence conditions as mentioned in paragraph (4)(b), the Minister must proceed under section 796A as though the licensee had applied for the variation to be made.

882C Revocation of approval

The Minister may at any time revoke an approval of compensation arrangements if the Minister considers that the arrangements are not adequate.

882D Minister's power to give directions

- (1) If the Minister considers that a market licensee's approved compensation arrangements are no longer adequate, the Minister may give the licensee a written direction to do specified things that the Minister believes will ensure that the arrangements become adequate once more.

- (2) The licensee must comply with the direction.
- (3) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.
- (4) The Minister may vary or revoke a direction at any time by giving written notice to the licensee.

Subdivision B—Effect of compensation rules forming part of Division 3 arrangements

883A Legal effect of compensation rules

Compensation rules forming part of Division 3 arrangements for a financial market have effect as a contract under seal between the operator of the market and each participant in the market under which each of those persons agrees to observe the rules to the extent that they apply to the person and engage in conduct that the person is required by the rules to engage in.

883B Enforcement of compensation rules

- (1) If a person who is under an obligation to comply with or enforce any of the compensation rules forming part of Division 3 arrangements for a financial market fails to meet that obligation, an application to the Court may be made by:
 - (a) ASIC; or
 - (b) the operator of the market; or
 - (c) the operator of a clearing and settlement facility, if:
 - (i) there are clearing and settlement arrangements (as defined in section 790A) for some or all transactions effected through the market; and
 - (ii) those arrangements are with the operator of the facility; or
 - (d) a person aggrieved by the failure.
- (2) After giving an opportunity to be heard to the applicant and the person against whom the order is sought, the Court may make an order giving directions to:
 - (a) the person against whom the order is sought; or

Section 883C

- (b) if that person is a body corporate—the directors of the body corporate;
about compliance with, or enforcement of, the compensation rules.
- (3) For the purposes of this section, if the operator of the market fails to comply with or enforce provisions of the compensation rules, a person who is, under the rules, entitled to make a claim for compensation is (whether or not they have actually made a claim) taken to be a person aggrieved by the failure.
- (4) There may be other circumstances in which a person may be aggrieved by a failure for the purposes of this section.

883C Other sources of funds for compensation

Nothing in this Division makes the operator of a financial market liable to pay compensation from any source of funds other than the source identified in the licence conditions under paragraph 882A(4)(b) or subparagraph 882B(4)(b)(ii).

883D Payment of levies

- (1) This section applies if, under the compensation rules forming part of Division 3 arrangements for a particular financial market, a levy is payable by all or some of the participants in the market in order to ensure that adequate funds are available for the purposes of the arrangements.
- (2) The levy is payable to the operator of the market, as agent for the Commonwealth, by each of the participants affected.

Note: For the imposition and amount of the levy, see the *Corporations (Compensation Arrangements Levies) Act 2001*.
- (3) An amount of levy payable under subsection (2) must be paid within the time and in the manner specified by the operator either generally or in relation to a particular case.
- (4) Whenever an amount of levy (the **levy amount**) is paid under this section, or under section 6 of the *Corporations (Compensation Arrangements Levies) Act 2001*, to the operator of a market as agent for the Commonwealth:
 - (a) the operator must pay an amount equal to the levy amount to the Commonwealth; and

Section 884A

- (b) the Consolidated Revenue Fund is appropriated by that amount for the purpose of payment to the operator; and
 - (c) the Commonwealth must pay the amount so appropriated to the operator; and
 - (d) the operator must deal with the amount it receives under paragraph (c) in accordance with the compensation rules.
- (5) A payment of an amount to the operator of a market as required by paragraph (4)(c) in respect of a particular levy amount is subject to a condition that, if the Commonwealth becomes liable to refund the whole or a part of the levy amount, the operator must pay the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund.
- (6) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to the operator of a market as agent for the Commonwealth. However, the operation of that Act in relation to the following payments is not affected:
 - (a) the payment of an amount to the Commonwealth as required by paragraph (4)(a); or
 - (b) the payment of an amount by the Commonwealth as required by paragraph (4)(c).The operator must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth.
- (7) An amount payable by an operator as required by paragraph (4)(a) may be set off against an amount payable to the operator as required by paragraph (4)(c).

Subdivision C—Changing Division 3 arrangements

884A Division 3 arrangements must generally only be changed in accordance with this Subdivision

- (1) The operator of a financial market in relation to which there are Division 3 arrangements must not change those arrangements except in accordance with this Subdivision.

Section 884B

- (2) However, a change may be made to Division 3 arrangements otherwise than in accordance with this Subdivision if:
 - (a) the change is not to a matter required by section 885B to be dealt with in the compensation rules; and
 - (b) the change is merely a minor administrative change.

884B Changing Division 3 arrangements—matters required to be dealt with in the compensation rules

- (1) If the proposed change is to a matter required by section 885B to be dealt with in the compensation rules, the change may only be made by changing the rules.
- (2) As soon as practicable after the change is made, the operator must lodge with ASIC written notice of the change.
- (3) The notice must:
 - (a) set out the text of the change; and
 - (b) specify the date on which the change was made; and
 - (c) contain an explanation of the purpose of the change.
- (4) If no notice is lodged with ASIC within 21 days after the change is made, the change ceases to have effect.
- (5) As soon as practicable after receiving a notice under subsection (2), ASIC must send a copy of the notice to the Minister.
- (6) Within 28 days after receiving the copy of the notice, the Minister may disallow all or a specified part of the change to the compensation rules.
- (7) The Minister must not disallow all or part of the change unless the Minister considers that, because of the change, or that part of the change, the compensation arrangements are not adequate.
- (8) As soon as practicable after all or part of a change is disallowed, ASIC must give notice of the disallowance to the operator of the market concerned. The change ceases to have effect, to the extent of the disallowance, when the operator receives the notice.

884C Changing Division 3 arrangements—matters not required to be dealt with in the compensation rules

- (1) If:
- (a) the proposed change is to a matter that is not required by section 885B to be dealt with in the compensation rules (including a matter that is dealt with in the compensation rules even though it is not required to be dealt with in those rules); and
 - (b) the change is not merely a minor administrative change; the operator must not make the change unless:
 - (c) the operator has applied for approval of the change; and
 - (d) the change has been approved by the Minister.
- (2) The application for approval must:
- (a) include the information, required by regulations made for the purposes of this paragraph, in relation to the proposed change; and
 - (b) be made to the Minister by lodging the application with ASIC.
- Note: For fees in respect of lodging applications, see Part 9.10.
- (3) If the Minister does not consider that the compensation arrangements as proposed to be changed are adequate, the application for approval must be rejected.
- (4) If the Minister considers that the compensation arrangements as proposed to be changed are adequate, the Minister must approve the change.
- (5) If:
- (a) the proposed change is to a matter that is dealt with in the compensation rules even though it is not required to be dealt with in those rules; and
 - (b) the change is approved;
- the operator may make any change to the compensation rules that is necessary to give effect to the change that has been approved or that is incidental to giving effect to that change.
- (6) If a change to the compensation rules is made as permitted by subsection (5), the operator must, as soon as practicable after the change is made, give ASIC written notice of the change.

Section 885A

- (7) A notice required by subsection (6) must:
- (a) set out the text of the change; and
 - (b) specify the date on which it was made; and
 - (c) contain an explanation of why it is a change that is permitted to be made by subsection (5).

Subdivision D—Are compensation arrangements adequate?

885A Purpose of this Subdivision

- (1) This Subdivision applies for the purpose of determining, for the purposes of a provision of this Division:
- (a) whether:
 - (i) proposed compensation arrangements are adequate; or
 - (ii) compensation arrangements as proposed to be changed are adequate; or
 - (b) whether compensation arrangements that have been approved are adequate.
- (2) A reference in this Subdivision to the *arrangements* is a reference to the proposed arrangements, the arrangements as proposed to be changed, or the arrangements that have been approved, as the case requires.
- (3) A reference in this Subdivision to the *compensation rules* is a reference to the compensation rules, or the proposed compensation rules, forming part of the arrangements under consideration.

885B Requirements to be complied with for arrangements to be adequate

- (1) The arrangements are *adequate* if, and only if, the Minister is satisfied that:
- (a) the compensation rules provide adequate coverage for Division 3 losses (see sections 885C and 885D); and
 - (b) the compensation rules provide for adequate compensation to be paid in respect of Division 3 losses (see section 885E); and
 - (c) the compensation rules deal adequately with how compensation in respect of Division 3 losses is to be paid (see section 885F); and

Section 885C

- (d) the compensation rules deal adequately with the making and determination of claims in respect of Division 3 losses, and with the notification of the outcome of such claims (see section 885G); and
 - (e) the arrangements provide for an adequate source of funds for paying compensation in respect of Division 3 losses and in respect of any other losses covered by the arrangements (see section 885H); and
 - (f) the arrangements include adequate arrangements for administration and monitoring (see section 885I); and
 - (g) under the arrangements, potential claimants have reasonable and timely access to the compensation regime; and
 - (h) if the licensee ceases (for whatever reason) to be required to have Division 3 arrangements, the rights of people to seek compensation under the arrangements, being rights that accrued while the licensee was required to have such arrangements, will be adequately protected.
- (2) In considering the matters mentioned in subsection (1), the Minister must also have regard to the matters mentioned in section 885J.
- (3) The matters that may be dealt with in compensation rules are not limited to matters mentioned in this section.

885C The losses to be covered

- (1) Subject to section 885D, the compensation rules must cover losses (**Division 3 losses**) of a kind described in the following paragraphs:
- (a) a person (the *client*) gave money or other property, or authority over property, to a person (the *participant*):
 - (i) who was a participant in the market at that time; or
 - (ii) who the client reasonably believed to be a participant in the market at that time and who was a participant in the market at some earlier time; and
 - (b) the money or other property, or the authority, was given to the participant in connection with effecting a transaction, or proposed transaction, covered by provisions of the operating rules of the market relating to transactions effected through the market; and

Section 885D

- (c) the effecting of the transaction through the market constitutes or would constitute the provision of a financial service to the client as a retail client; and
 - (d) the client suffers a loss because of:
 - (i) if the client gave the participant money or other property—the defalcation or fraudulent misuse of the money or other property by the participant; or
 - (ii) if the client gave the participant authority over property—the fraudulent misuse of that authority by the participant.
- (2) The compensation rules must provide that a claim relating to an alleged loss caused by defalcation or fraudulent misuse may be allowed even if:
 - (a) the person against whom the defalcation or misuse is alleged has not been convicted or prosecuted; and
 - (b) the evidence on which the claim is allowed would not be sufficient to establish the guilt of that person on a criminal trial in respect of the defalcation or fraudulent misuse.
- (3) The compensation rules may exclude losses of a kind described above that occur in specified situations. However, the compensation arrangements will not be adequate unless the Minister is satisfied that those exclusions are appropriate.

885D Certain losses that are not Division 3 losses

- (1) If, in relation to a loss suffered by a person:
 - (a) the requirements of subsection 885C(1) are satisfied in relation to a participant and 2 or more financial markets; and
 - (b) the person did not (expressly or impliedly) instruct the participant to use a particular one of those markets; and
 - (c) it is not reasonably apparent from the usual business practice of the participant which of those markets the participant would use when acting for the person;the loss is taken not to be a **Division 3 loss**.
- (2) If, in relation to a loss suffered by a person:
 - (a) the requirements of subsection 885C(1) are satisfied in relation to a participant and a financial market; and

- (b) the loss is also connected (see section 888A) with a financial market to which Division 4 applies; and
 - (c) the person did not (expressly or impliedly) instruct the participant to use a particular one of those markets; and
 - (d) it is not reasonably apparent from the usual business practice of the participant which of those markets the participant would use when acting for the person;
- the loss is taken not to be a **Division 3 loss**.
- (3) If, in relation to a loss suffered by a person:
- (a) the transaction referred to in paragraph 885C(1)(b) could have been effected otherwise than through a financial market; and
 - (b) the person did not (expressly or impliedly) instruct the participant concerned to effect the transaction through a financial market; and
 - (c) it is not reasonably apparent from the usual business practice of the participant that the transaction would be effected through a financial market;
- the loss is taken not to be a **Division 3 loss**.

885E The amount of compensation

- (1) Subject to this section, the compensation rules must provide that the amount of compensation to be paid in respect of a Division 3 loss is to be not less than the sum of:
 - (a) the actual pecuniary loss suffered by the claimant, calculated by reference to the market value of any relevant assets or liabilities as at the date on which the loss was suffered; and
 - (b) the claimant's reasonable costs of, and disbursements incidental to, the making and proof of the claim.
- (2) The compensation rules may provide for the amount of compensation payable in respect of a Division 3 loss to be reduced by reference to a right of set-off available to the claimant.
- (3) The compensation rules may impose an upper limit on the amount of compensation to which a person is entitled in respect of a claim in particular circumstances, or an upper limit on the total amount of compensation to which persons are entitled in respect of claims referable to a particular event or circumstance.

Section 885F

- (4) That upper limit may be specified in the compensation rules or determined by a method specified in the rules.
- (5) The compensation rules must also provide for the payment to the claimant of interest at the rate applicable under the regulations on the amount of the actual pecuniary loss, or so much of that loss as from time to time has not been compensated by an instalment or instalments of compensation, in respect of the period starting on the day when the loss was suffered and ending on the day when the compensation, or the last instalment of compensation, is paid.
- (6) The compensation rules may provide for what is to happen if there are insufficient funds to meet claims in respect of Division 3 losses and in respect of any other losses covered by the arrangements. For example, they may provide for the prioritisation of claims, or the apportionment of available funds between claims.
- (7) In other provisions of this Division a reference to ***compensation in respect of a Division 3 loss*** includes (unless the contrary intention appears) a reference to interest referred to in subsection (5).

885F Method of payment of compensation

- (1) The compensation rules must deal with how compensation in respect of Division 3 losses is to be paid.
- (2) Without limiting subsection (1), the compensation rules may provide for compensation to be paid in a lump sum or by instalments.

885G Making and determination of claims

- (1) The compensation rules must provide for how claims in respect of Division 3 losses are to be made and determined, and for how claimants are notified of the outcome of their claims.
- (2) Without limiting subsection (1), the compensation rules may:
 - (a) require a person making a claim to pay money, or transfer other property, in support of a claim; and
 - (b) provide for claims to be disallowed unless persons exercise rights of set-off; and
 - (c) set time limits for the making of claims; and

- (d) provide for claims to be partially allowed (including, for example, in a case where the operator considers that the claimant's conduct contributed to the loss).

885H The source of funds—general

There must be an adequate source of funds available to cover claims made under the compensation arrangements in respect of Division 3 losses and in respect of any other losses covered by the arrangements.

Note 1: For example, the source of funds may consist of:

- (a) a fidelity fund; or
- (b) insurance arrangements; or
- (c) an irrevocable letter of credit.

Note 2: The source of funds does not have to consist of a single thing. It may consist of a combination of different things.

885I Administration and monitoring

- (1) The arrangements must include arrangements for:
 - (a) the administration of the compensation arrangements; and
 - (b) monitoring compliance with the compensation arrangements and reporting breaches of the arrangements to the board of the operator of the market; and
 - (c) monitoring the adequacy of the arrangements and reporting to the board of the operator of the market on the need for, or desirability of, changes to the compensation arrangements.
- (2) Without limiting subsection (1), the arrangements may give responsibilities to:
 - (a) the operator of the market, or a related company, or a director or employee of the operator or a related company; or
 - (b) a committee; or
 - (c) another person acting under an arrangement with the operator.
- (3) The people who may be members of a committee referred to in paragraph (2)(b) include, but are not limited to:
 - (a) participants in the market, or representatives of such participants; and

Section 885J

- (b) members of the board of the operator of the market.

885J The losses to be covered—other matters to be taken into account

- (1) In considering whether the arrangements are adequate, the Minister must also have regard to:
 - (a) the services provided by the market and by the participants in the market; and
 - (b) any risk assessment report in relation to the market given to the Minister under section 892K.
- (2) The Minister may take into account such other matters as the Minister thinks appropriate.

Subdivision E—Other provisions about Division 3 arrangements

886A Only one claim in respect of the same loss

If:

- (a) a claim by a person for compensation in respect of a particular Division 3 loss suffered by the person has been allowed under Division 3 arrangements; and
 - (b) the person makes or has made another claim under those Division 3 arrangements, or under other Division 3 arrangements, in respect of the same loss;
- that other claim must not be allowed.

886B Regulations relating to fidelity funds

The regulations may include provisions relating to how a fidelity fund, or part of a fidelity fund, is to be dealt with if:

- (a) the operator of a financial market becomes insolvent, within the meaning of the regulations; or
- (b) a financial market merges with another financial market; or
- (c) a financial market ceases to operate (otherwise than because of a merger), or ceases to be required by subsection 881A(1) to have approved compensation arrangements.

Division 4—NGF Compensation regime

Subdivision A—Application of Division

887A Markets to which this Division applies

This Division applies to a financial market that is operated by:

- (a) a body corporate that is a member of the SEGC; or
- (b) a body corporate that is a subsidiary of such a member;

other than any such market that the regulations state is not covered by this Division.

Subdivision B—Claims for and payment of compensation

888A The situations in which compensation may be claimed

- (1) The situations in which compensation may be claimed in respect of a loss that is connected with a financial market to which this Division applies are as specified in the regulations.
- (2) Without limiting subsection (1), a loss is connected with a financial market if it is caused by a participant, or past participant, in the market.

888B Kinds of compensation available

The regulations may provide that compensation under this Division is to take the form of a payment of money or some other form (for example, a transfer of financial products).

888C Amount of compensation payable

- (1) The amount of compensation (including the value of any non-monetary compensation) to which a person is entitled in respect of a claim that is allowed is to be as determined in accordance with the regulations.

Section 888D

- (2) Without limiting subsection (1), the regulations may do all or any of the following:
 - (a) provide for the amount of compensation to be determined by agreement with the claimant, or by arbitration if agreement cannot be reached; and
 - (b) provide for the payment of interest on the amount of the claimant's loss; and
 - (c) provide for the amount of compensation to be reduced by reference to a right of set-off available to the claimant or by reference to the extent to which the claimant was responsible for causing the loss; and
 - (d) impose an upper limit on the amount of compensation to which a person is entitled in respect of a claim in particular circumstances, or an upper limit on the total amount of compensation to which persons are entitled in respect of claims referable to a particular event or circumstance.
- (3) An upper limit referred to in paragraph (2)(d) may be specified in the regulations or determined by a method specified in the regulations.
- (4) The regulations may also provide for a claimant to be paid an amount in respect of the claimant's reasonable costs of, and disbursements incidental to, the making and proof of the claim (whether or not the claim is allowed in whole or in part).
- (5) The regulations may also provide for a claimant to be paid an amount in respect of the claimant's reasonable costs of, and disbursements incidental to, attempting to recover the loss (whether or not the claim is allowed in whole or in part).

888D Payment of compensation

- (1) The regulations may provide for the compensation to be paid in a lump sum or by instalments.
- (2) The regulations may make other provisions in relation to how compensation is to be paid.

888E Making and determination of claims

- (1) Claims are to be made and determined in accordance with:
 - (a) the regulations; and
-

Section 888F

- (b) any relevant provisions of the SEGC's operating rules.
- (2) Without limiting subsection (1), the regulations, or the SEGC's operating rules, may do all or any of the following:
 - (a) require a person making a claim to pay money, or transfer other property, to the SEGC in support of a claim;
 - (b) provide for claims to be disallowed unless persons exercise rights of set-off;
 - (c) set time limits for the making of claims;
 - (d) provide for claims to be partially allowed (including, for example, in a case where the SEGC considers that the claimant's conduct contributed to the loss).
- (3) The regulations, or the SEGC's operating rules, may impose other requirements to be complied with by the SEGC in relation to claims (including, for example, requirements to notify claimants whether their claims have been allowed).
- (4) If a provision of the SEGC's operating rules is wholly or partly inconsistent with regulations made for the purposes of this section, the provision of the SEGC's operating rules is, to the extent of the inconsistency, of no effect.

888F The SEGC has power to determine claims

The SEGC has power to determine claims in accordance with this Division.

888G Allowing a claim does not constitute an admission of any other liability

If the SEGC allows a claim, neither the allowance of the claim, nor any other act done by SEGC as a result of allowing the claim, constitutes an admission (by anyone) of any liability, other than the liability to provide compensation in respect of the claim in accordance with this Division.

888H Claimant may apply to Court if claim disallowed

- (1) If the SEGC has disallowed a claim, the claimant may bring proceedings in the Court to establish the claim. The proceedings

Section 888I

must be brought within 3 months of notice of the disallowance of the claim.

- (2) If the SEGC has neither allowed nor disallowed a claim within a reasonable period after it was made, the claimant may bring proceedings in the Court to establish the claim.
- (3) If, in proceedings under subsection (1) or (2), the Court is satisfied that the claim should be allowed, the Court:
 - (a) must, by order, make a declaration accordingly and direct the SEGC to allow the claim and deal with it in accordance with this Division; and
 - (b) may, at any time after the order is made, on application made (whether before or after the order is made) by the claimant or the SEGC, give such directions relating to the claim as the Court thinks just and reasonable.
- (4) In proceedings to establish a claim, all questions of costs are in the discretion of the Court.

888I Non-NGF property of the SEGC not available to meet claims

Money or other property of the SEGC that is not part of the NGF is not available to be applied in respect of a claim that has been allowed by the SEGC, whether or not under an order of the Court.

888J The SEGC may enter into contracts of insurance or indemnity

- (1) The SEGC may enter into a contract with a person (the *insurer*) carrying on a fidelity insurance business under which the SEGC will be insured or indemnified against liability in respect of claims to the extent and in the manner provided by the contract.
- (2) The contract may relate to all claims or only to certain claims as specified in the contract. The contract may, for example, exclude claims relating to the conduct of a particular financial services licensee.
- (3) The following persons each have qualified privilege in respect of the publication of a statement that the contract does not apply with respect to claims relating to the conduct of a particular financial services licensee:
 - (a) the SEGC and the members of its board;

Section 888K

- (b) any body corporate that is a member of the SEGC;
 - (c) any subsidiary of such a member;
 - (d) any employee of a body covered by paragraph (a), (b) or (c).
- (4) A person who has made a claim does not have a right of action against the insurer in respect of the contract or a right or claim in respect of money paid by the insurer in accordance with the contract.

888K NGF may be used to acquire financial products to be transferred as compensation

The SEGC may pay money out of the NGF to acquire financial products for the purpose of providing compensation (in accordance with the regulations) that takes the form of a transfer of financial products.

Subdivision C—The NGF

889A Continuation of the National Guarantee Fund

The National Guarantee Fund that continued to exist under section 928B of this Act before the repeal of that section by the *Financial Services Reform Act 2001* continues in existence as the National Guarantee Fund for the purposes of this Part.

889B Compensation to be provided out of the NGF

Compensation payable under this Division is to be paid out of the NGF.

889C The SEGC to keep the NGF

- (1) The SEGC must keep and administer the NGF.
- (2) The assets of the NGF are the property of SEGC, but must be kept separate from all other property and must be held on trust by the SEGC for the purposes of this Division.

Section 889D

889D What the NGF consists of

The NGF consists of:

- (a) money and other property constituting the NGF before the commencement of this Chapter; and
- (b) money paid into the NGF in accordance with section 889J or 889K; and
- (c) money paid to the SEGC in accordance with regulations referred to in section 888E in support of a claim; and
- (d) money paid to the SEGC under a contract of insurance or indemnity referred to in section 888J; and
- (e) money paid into the NGF under subsection 889F(2); and
- (f) the interest and profits from time to time accruing from the investment of the NGF; and
- (g) money recovered by or on behalf of the SEGC in the exercise of a right of action that the SEGC has by virtue of a provision of this Part; and
- (h) money and other property paid or transferred to the SEGC for inclusion in the NGF in accordance with regulations referred to in section 891B; and
- (i) all other money and other property lawfully paid into, or forming part of, the NGF.

889E Power to borrow etc. for purposes of the NGF

- (1) If the SEGC considers that, in the interests of the sound financial management of the NGF, money should be borrowed for the purpose of meeting a payment due out of the NGF, the SEGC may borrow money for that purpose on such terms and conditions as the SEGC thinks appropriate.
- (2) The SEGC may give security, including over the assets of the NGF, in respect of the SEGC's obligations in relation to a borrowing under subsection (1).
- (3) If:
 - (a) money borrowed under subsection (1) is a loan from a body corporate that is a member of the SEGC; and
 - (b) the body corporate borrowed money for the purpose of making the loan to the SEGC;

Section 889F

the SEGC may give security, including over the assets of the NGF, in relation to the body corporate's obligations in respect of the borrowing referred to in paragraph (b).

889F Money borrowed and paid to the SEGC

- (1) This section applies if money borrowed by the SEGC under subsection 889E(1) is paid to the SEGC.
- (2) The SEGC must pay the money into the NGF.
- (3) If:
 - (a) the money was borrowed for the purpose of meeting a payment due out of the NGF; and
 - (b) the borrowed money has been paid into the NGF; and
 - (c) the payment due out of the NGF has not yet been made;then, for the purposes of section 889J, the amount in the NGF is taken to be reduced by the amount of the borrowed money.

889G Money borrowed and not paid to the SEGC

- (1) This section applies if money borrowed by the SEGC under subsection 889E(1) is not paid to the SEGC but is payable to other persons at the direction of the SEGC.
- (2) The SEGC must not direct that any of the money be paid to a person unless the payment is of a kind that can, under section 889H, be made out of the NGF.

889H Payments out of the NGF

Subject to regulations made for the purposes of this section, the following are to be paid out of the NGF, in such order as the SEGC considers appropriate:

- (a) amounts, including costs, disbursements and interest, that any provision of this Part requires to be paid in connection with claims;
- (b) all legal and other expenses incurred:
 - (i) in investigating or defending claims; or
 - (ii) in relation to the NGF; or

Section 889I

- (iii) in the exercise by the SEGC of the rights and powers vested in it by any provision of this Part in relation to the NGF;
- (c) money payable out of the NGF under regulations referred to in subsection 892G(2);
- (d) amounts to be paid to acquire financial products as mentioned in section 888K;
- (e) premiums payable in respect of contracts of insurance or indemnity entered into by the SEGC under section 888J;
- (f) payments of principal, interest and other amounts payable by the SEGC in respect of money borrowed, and security given, under section 889E;
- (g) the expenses incurred in the administration of the NGF, including the salaries and wages of persons employed by the SEGC in relation to the NGF;
- (h) amounts to be paid to a body corporate in accordance with a direction of the Minister under section 891A;
- (i) any other money payable out of the NGF in accordance with a provision of this Part.

889I Minimum amount of the NGF

- (1) The *minimum amount* in relation to the NGF is:
 - (a) unless paragraph (b) applies—\$80,000,000; or
 - (b) if a determination is in force under subsection (2)—the amount specified in the determination.
- (2) The SEGC may, in writing, determine an amount (whether greater than, or less than, \$80,000,000) to be the minimum amount in relation to the NGF. The determination does not come into force until it has been approved by the Minister.
- (3) The SEGC must publish in the *Gazette* notice of a determination that has come into force under subsection (2). The notice must specify the date when the determination came into force.
- (4) If the amount in the NGF falls below the minimum amount, the SEGC must consider what action needs to be taken.

889J Levy by the SEGC

- (1) If the amount in the NGF is less than the minimum amount applicable under section 889I, the SEGC may determine in writing that:
- (a) the operators of all, or a class, of the financial markets to which this Division applies; or
 - (b) all, or a class, of the participants in any of these markets; must pay a levy to the SEGC.

- (2) The levy is payable to the SEGC, as agent for the Commonwealth, in accordance with this section.

Note: For the imposition and amount of the levy, see the *Corporations (National Guarantee Fund Levies) Act 2001*. There is a limit on the amount of levy that is payable to the SEGC in a financial year under that Act.

- (3) A levy payable under this section must be paid within the period and in the manner determined in writing by the SEGC.
- (4) Whenever an amount of levy (the **levy amount**) is paid under this section, or under subsection 6(2) of the *Corporations (National Guarantee Fund Levies) Act 2001*, to the SEGC as agent for the Commonwealth:
- (a) the SEGC must pay an amount equal to the levy amount to the Commonwealth; and
 - (b) the Consolidated Revenue Fund is appropriated by that amount for the purpose of payment to the SEGC; and
 - (c) the Commonwealth must pay the amount so appropriated to the SEGC; and
 - (d) the SEGC must pay the amount it receives under paragraph (c) into the NGF.
- (5) Whenever an amount of levy (the **levy amount**) is paid under subsection 6(1) of the *Corporations (National Guarantee Fund Levies) Act 2001*, to the operator of a financial market as agent for the Commonwealth:
- (a) the operator must pay an amount equal to the levy amount to the SEGC; and
 - (b) the SEGC must pay an amount equal to the amount so paid to it to the Commonwealth; and

Section 889K

- (c) the Consolidated Revenue Fund is appropriated by that amount for the purpose of payment to the SEGC; and
 - (d) the Commonwealth must pay the amount so appropriated to the SEGC; and
 - (e) the SEGC must pay the amount it receives under paragraph (d) into the NGF.
- (6) A payment of an amount to the SEGC as required by paragraph (4)(c) or (5)(d) in respect of a particular levy amount is subject to a condition that, if the Commonwealth becomes liable to refund the whole or a part of the levy amount, the SEGC must pay the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund. The SEGC may pay, out of the NGF, any amount so required to be paid to the Commonwealth.
- (7) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to the SEGC, or the operator of a financial products market, as agent for the Commonwealth. However, the operation of that Act in relation to the following payments is not affected:
 - (a) the payment of an amount to the Commonwealth as required by paragraph (4)(a) or (5)(b); or
 - (b) the payment of an amount by the Commonwealth as required by paragraph (4)(c) or (5)(d).The SEGC must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth, and the operator of a financial market must, in accordance with the regulations, notify the Commonwealth of payments it receives as agent for the Commonwealth as mentioned in paragraph (5)(a).
- (8) An amount payable by the SEGC as required by paragraph (4)(a) may be set off against an amount payable to the SEGC as required by paragraph (4)(c), and an amount payable by the SEGC as required by paragraph (5)(b) may be set off against an amount payable to the SEGC as required by paragraph (5)(d).

889K Levy by market operator

- (1) An operator of a financial market who must pay an amount of levy (the *primary levy amount*) under section 889J may determine in writing that participants in the market must pay a levy (the

contributory levy). The determination must be such that the total of the amounts of contributory levy payable by the participants does not exceed the primary levy amount. The contributory levy is payable to the operator as agent for the Commonwealth.

Note: For the imposition and amount of the levy, see the *Corporations (National Guarantee Fund Levies) Act 2001*.

- (2) If a determination is made under subsection (1), the contributory levy is payable by each participant in the market who, when the determination is made, is in a class of participants in the market determined in writing by the operator for the purposes of the levy.
- (3) The amount of contributory levy payable by a participant under a determination under subsection (1) must be paid within the period, and in the manner, specified in writing by the operator either generally or in relation to particular participants or classes of participants.
- (4) Whenever an amount of levy (the **levy amount**) is paid under this section, or under subsection 6(3) of the *Corporations (National Guarantee Fund Levies) Act 2001*, to the operator of a financial market as agent for the Commonwealth:
 - (a) the operator must pay an amount equal to the levy amount to the Commonwealth; and
 - (b) the Consolidated Revenue Fund is appropriated by that amount for the purpose of payment to the SEGC; and
 - (c) the Commonwealth must pay the amount so appropriated to the SEGC; and
 - (d) the SEGC must pay the amount it receives under paragraph (c) into the NGF; and
 - (e) the operator's liability to pay the primary levy amount is reduced by the amount paid into the NGF under paragraph (d).
- (5) A payment of an amount to the SEGC as required by paragraph (4)(c) in respect of a particular contributory levy amount is subject to a condition that, if the Commonwealth becomes liable to refund the whole or a part of the contributory levy amount, the SEGC must pay the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund. The SEGC may pay, out of the NGF, any amount so required to be paid to the Commonwealth.

Section 890A

- (6) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to the operator of a financial market as agent for the Commonwealth. However, the operation of that Act in relation to the following payments is not affected:
- (a) the payment of an amount to the Commonwealth as required by paragraph (4)(a); or
 - (b) the payment of an amount by the Commonwealth as required by paragraph (4)(c).

The operator must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth.

Subdivision D—The SEGC

890A Minister to nominate the SEGC

- (1) Subject to subsection (3), the Minister may nominate in writing as the *Securities Exchanges Guarantee Corporation* a body corporate (whenever incorporated) that is, for the purposes of the national corporate laws, a company limited by guarantee.
- (2) ASIC must cause a copy of a nomination by the Minister under subsection (1) to be published in the *Gazette*.
- (3) The Minister may only nominate a body corporate under subsection (1) if he or she is satisfied that:
 - (a) the Australian Stock Exchange Limited is a member of the body corporate; and
 - (b) each of the other members of the body corporate is a market licensee; and
 - (c) the body corporate's constitution provides that only market licensees may become or remain members of the body corporate; and
 - (d) the body corporate will, if nominated under subsection (1), be able to perform and exercise the SEGC's functions and powers under this Division adequately and with due regard to the interests of the public; and
 - (e) the body corporate has obtained, or will within a reasonable period after being nominated under subsection (1) obtain, indemnity insurance in respect of its liabilities for:

Section 890B

- (i) negligence in; and
- (ii) defalcation, or fraudulent misuse of property, by an officer, employee or agent of the body corporate in connection with;
the performance or exercise of the SEGC's functions or powers under this Division, or has made or will make other satisfactory provisions for meeting those liabilities; and
- (f) the body corporate's business rules make satisfactory provision:
 - (i) for ensuring the safety of property received by the body corporate; and
 - (ii) generally for the protection of the interests of the public.

890B The SEGC's functions and powers

- (1) In addition to the legal capacity and powers it has because of section 124, the SEGC has such functions and powers as are conferred, or expressed to be conferred, on it by or under this Part.
- (2) Section 125 does not apply in relation to a function or power conferred, or expressed to be conferred, as mentioned in subsection (1) of this section.
- (3) The SEGC is to perform the functions, and may exercise the powers, that are conferred on it by or under this Part.
- (4) The SEGC is to administer the arrangements constituted by this Division.

890C Delegation

- (1) Subject to this section, all decisions of the SEGC in relation to the performance of its functions, and the exercise of its powers, under this Part must be made by the board of the SEGC.
- (2) The board of the SEGC must not delegate any of the following powers of the SEGC:
 - (a) the power to borrow under section 889E;
 - (b) the power to determine the order of payments under section 889H;
 - (c) the power to determine a minimum amount under section 889I;

Section 890D

- (d) the power to make operating rules under section 890D;
 - (e) the power (or duty) to make a payment under section 891A.
- (3) Otherwise, the board of the SEGC may delegate any of their powers under this Part in accordance with section 198D.

890D Operating rules of the SEGC

The SEGC may make rules (*operating rules*) relating to the performance or exercise of its powers or duties under this Part, or relating to matters permitted by this Part to be dealt with in its operating rules.

890E Legal effect of the SEGC's operating rules

The SEGC's operating rules have effect as a contract under seal between the SEGC and each member of the SEGC under which each of those persons agrees to observe the operating rules to the extent that they apply to the person and engage in conduct that the person is required by the operating rules to engage in.

890F Enforcement of the SEGC's operating rules

- (1) If a person who is under an obligation to comply with or enforce any of the SEGC's operating rules fails to meet that obligation, an application to the Court may be made by:
 - (a) ASIC; or
 - (b) the SEGC; or
 - (c) a member of the SEGC; or
 - (d) a person aggrieved by the failure.
- (2) After giving an opportunity to be heard to the applicant and the person against whom the order is sought, the Court may make an order giving directions to:
 - (a) the person against whom the order is sought; or
 - (b) if that person is a body corporate—the directors of the body corporate;about compliance with, or enforcement of, the operating rules.

890G Changing the SEGC's operating rules

- (1) As soon as practicable after a change is made to the SEGC's operating rules, the SEGC must lodge with ASIC written notice of the change.
- (2) The notice must:
 - (a) set out the text of the change; and
 - (b) specify the date on which the change was made; and
 - (c) contain an explanation of the purpose of the change.
- (3) If no notice is lodged with ASIC within 21 days after the change is made, the change ceases to have effect.

890H Disallowance of changes to the SEGC's operating rules

- (1) As soon as practicable after receiving a notice under section 890G, ASIC must send a copy of the notice to the Minister.
- (2) Within 28 days after ASIC received the notice under section 890G, the Minister may disallow all or a specified part of the change to the SEGC's operating rules.
- (3) As soon as practicable after all or part of a change is disallowed, ASIC must give notice of the disallowance to the SEGC. The change ceases to have effect, to the extent of the disallowance, when the SEGC receives the notice.

Subdivision E—Other provisions relating to compensation under this Division

891A Payment out of the NGF to prescribed body with arrangements covering clearing and settlement facility support

- (1) If the Minister is satisfied that a body corporate specified in regulations made for the purposes of this section has made adequate arrangements covering all or part of the clearing and settlement system support that this Division provides for, the Minister may, in writing, direct the SEGC to pay a specified amount to that body corporate out of the NGF.

Section 891B

- (2) The Minister may, in writing, impose conditions to be complied with by the SEGC or the body corporate, or both, in relation to the payment.
- (3) The SEGC and the body corporate must comply with the direction and with any applicable conditions to which the direction is subject.
- (4) Before giving a direction under subsection (1), the Minister must be satisfied that, after the payment is made, the NGF will still have an adequate amount of assets to meet claims.

891B Markets operated by bodies corporate that become members of the SEGC—regulations may deal with transitional provisions and other matters

- (1) In this section:

joining market means a financial market that:

- (a) is operated by a body corporate that becomes a member of the SEGC after the commencement of this Division, or by a subsidiary of such a body corporate; and
 - (b) is a financial market to which this Division applies.
- (2) The regulations may make provisions of a transitional or saving nature dealing with the transition, in relation to a joining market, from the compensation regime previously applicable in relation to the market to the arrangements constituted by this Division.
- (3) Without limiting subsection (2), the regulations may require money or other property (including money or other property in a fidelity fund) to be paid or transferred to the SEGC for inclusion in the NGF.
- (4) The regulations may also provide for the allocation of part of the NGF as being for use for the purposes of claims arising in connection with the joining market.
- (5) The regulations may make modifications of provisions of this Division and Division 5 that are necessary or convenient to take account of allocations of a kind referred to in subsection (4).

891C Regulations may make different provision in respect of different markets etc.

Regulations made for the purposes of a provision of this Division may make different provision in respect of different financial markets to which this Division applies and in respect of different circumstances.

Division 5—Provisions common to both kinds of compensation arrangements

892A Definitions

In this Division:

regulated fund means:

- (a) a fidelity fund that is the source, or a source, of funds under Division 3 arrangements; or
- (b) the NGF; or
- (c) an account kept as required by subsection 892B(3).

relevant authority, in relation to Part 7.5 arrangements, means:

- (a) if the arrangements are Division 3 arrangements of a financial market—the operator of the market; or
- (b) if the arrangements are Division 4 arrangements—the SEGC.

892B How regulated funds are to be kept

- (1) Money in:

- (a) a fidelity fund that is the source, or a source, of funds under Division 3 arrangements; or
- (b) the NGF;

must, until applied in paying claims or otherwise spent for the purposes of this Part, or invested in accordance with section 892C, be kept by the relevant authority in an account or accounts:

- (c) with an Australian ADI; or
- (d) of a kind prescribed by regulations made for the purposes of this paragraph;

separate from any account or accounts in which other money is kept.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The regulations may impose additional requirements to be complied with in relation to the keeping of a regulated fund that covers 2 or more financial markets.

Section 892C

(3) If:

- (a) a source of funds under Division 3 arrangements for a financial market is something other than a fidelity fund; and
- (b) the operator of the market, or a person involved in the administration of the arrangements, receives money from that source of funds;

the money received must, until applied in paying claims or otherwise spent for the purposes of this Part, or invested in accordance with section 892C, be kept by the relevant authority in an account or accounts:

- (c) with an Australian ADI; or
- (d) of a kind prescribed by regulations made for the purposes of this paragraph;

separate from any account or accounts in which other money is kept.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

892C Money in regulated funds may be invested

- (1) Money in a regulated fund that is not immediately required for the purposes of meeting claims may be invested in any way in which trustees are for the time being authorised by law in force in a State or Territory in this jurisdiction to invest trust funds.
- (2) The relevant authority may, with the approval of ASIC, appoint a person to invest on behalf of the relevant authority money to which subsection (1) applies.
- (3) ASIC must not grant approval to the appointment of a person under subsection (2) unless it is satisfied that:
 - (a) the person has appropriate qualifications and expertise to perform the duties of the appointment; and
 - (b) the relevant authority has adequate indemnity insurance in respect of its liabilities for any negligence, or any defalcation or fraudulent misuse of property, by the person in the performance of those duties, or has made other satisfactory provisions for meeting those liabilities.
- (4) A person appointed under subsection (2) must perform the duties of the appointment in accordance with the directions of the relevant

Section 892D

authority and subject to such conditions (if any) as the relevant authority imposes.

892D Powers of relevant authority to require production or delivery of documents or statements

- (1) The relevant authority in relation to Part 7.5 arrangements may require a person:
 - (a) to deliver to the relevant authority documents or copies of documents, including documents of, or evidencing, title to financial products; or
 - (b) to make out and deliver to the relevant authority a statement of evidence;that the relevant authority considers will assist it in determining a claim for compensation that has been made, or that the relevant authority considers are necessary for the purpose of exercising the subrogated rights and remedies it has in relation to a claim (see section 892F).
- (2) The requirement must be made by notice in writing given to the person. The notice must:
 - (a) so far as it requires documents or copies referred to in paragraph (1)(a)—identify or describe the documents or copies that are required; and
 - (b) so far as it requires a statement referred to in paragraph (1)(b)—describe the matters in relation to which the person's evidence is required, and set out any requirements to be complied with in relation to how the statement is made out.
- (3) The person must comply with the requirement.
- (4) If the person fails, without reasonable excuse, to comply with the requirement, the relevant authority may apply to the Court for, and the Court may make, an order that the person comply with the direction.
- (5) If the person fails, without reasonable excuse, to comply with the requirement, the relevant authority may disallow a claim made by the person.

Note: This subsection would not apply if the person subject to the requirement were someone other than a claimant.

Section 892E

- (6) The relevant authority may, in writing, delegate the power given by this section to a person involved in the administration of the Part 7.5 arrangements.
- (7) The relevant authority must return any documents (other than copies of documents) provided to it under this section as soon as practicable after the claim referred to in subsection (1) has been determined, and any proceedings relating to the determination of the claim (including any arising from the subrogation of the relevant authority for the claimant) have been completed.
- (8) Subsection (7) does not apply if:
 - (a) another law prohibits or prevents the return of the documents; or
 - (b) the documents are no longer in the custody of the relevant authority; or
 - (c) the person tells the relevant authority that the person does not want the documents back.

892E Power to require assistance for purpose of dealing with a claim

- (1) If Division 3 arrangements give responsibilities (as mentioned in paragraph 885I(2)(c)) to a person acting under an arrangement with the operator of the market concerned, the person may give the operator a written request to give such assistance as the person requires for the purpose of fulfilling the person's responsibilities under the arrangement.
- (2) The SEGC may give a member of the SEGC, or a subsidiary of a member of the SEGC, a written request to give such assistance as the SEGC requires for the purpose of:
 - (a) dealing with a claim; or
 - (b) the assessment of risks to the NGF.
- (3) A requirement for assistance under subsection (1) or (2) must be reasonable.
- (4) A person who is required under this section to give assistance must give the assistance.
- (5) If the person fails to give the assistance, the person who required the assistance may apply to the Court for, and the Court may make, an order that the other person give the assistance.

Section 892F

892F Relevant authority's right of subrogation if compensation is paid

- (1) If compensation in respect of a claim is paid under Part 7.5 arrangements, the relevant authority in relation to the arrangements is subrogated, to the extent of that payment, to all the claimant's rights and remedies in relation to the loss to which the claim relates.
- (2) The relevant authority may also recover from the participant or participants who caused the loss the costs it incurred in determining the claim.

892G Excess money in compensation funds

- (1) The regulations may determine, or provide a method for determining, when there is excess money in a regulated fund.
- (2) The regulations may make provision in relation to how excess money in a regulated fund may be, or is to be, dealt with. The regulations may make different provision in relation to different funds.

892H Accounting and reporting for regulated funds

- (1) The relevant authority in relation to Part 7.5 arrangements must, in relation to each regulated fund established in connection with the arrangements, keep written financial records that:
 - (a) correctly record and explain the fund's transactions and financial position and performance; and
 - (b) would enable true and fair financial statements to be prepared and audited;and must retain the financial records for 7 years after the transactions covered by the records are completed.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (2) Within 2 months after the end of each financial year of the relevant authority, the authority must cause financial statements and notes to those financial statements (within the meaning of section 295) for the regulated fund to be made out as at the end of that financial year.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) A registered company auditor, or authorised audit company, must be appointed to audit the accounts of the regulated fund in accordance with whichever of the following paragraphs applies:
- (a) if there is only one relevant authority for the fund, that relevant authority must appoint a registered company auditor, or authorised audit company, to audit the fund's accounts;
 - (b) if there is more than one relevant authority for the fund:
 - (i) each of those relevant authorities must ensure that a registered company auditor, or authorised audit company, is appointed in accordance with subparagraph (ii) to audit the fund's accounts; and
 - (ii) the appointment is to be made by one or more of the relevant authorities, with the consent of such of the relevant authorities (if any) as do not make the appointment; and
 - (iii) a relevant authority must not purport to appoint a person to audit the fund's accounts unless each other relevant authority (if any) who has not also made the appointment has consented to the appointment.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) If there is more than one relevant authority for a fund and they cannot agree on which auditor to appoint, ASIC may, on the written application of any of the authorities, appoint an auditor who consents to being so appointed.
- (5) The auditor must:
- (a) audit the accounts of the regulated fund and the financial statements; and
 - (b) do the things required by sections 307 and 308 in relation to those documents, as if the audit were being done under Chapter 2M.
- (6) The relevant authority for the regulated fund must, within 14 days after receiving the auditor's report, lodge with ASIC a copy of the report and a copy of the financial statements. If there is more than one relevant authority for the regulated fund, the copy must be

Section 892I

given to ASIC by at least one of those authorities, or else they all contravene this subsection.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7) If the regulated fund is the NGF, the relevant authority (being the SEGC) must:

- (a) give a copy of the audited financial statements to each member of the SEGC; and
- (b) cause a copy of the audited financial statements to be laid before the annual general meeting of each member of the SEGC next following the making of that report.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

892I Division 3 arrangements—reporting in situations where compensation does not come out of a regulated fund

The regulations may impose reporting requirements to be complied with by the relevant authority in relation to Division 3 arrangements in relation to situations in which compensation under the arrangements is provided otherwise than out of a regulated fund.

892J Regulations may provide for qualified privilege in respect of certain matters

The regulations may provide for specified persons to have qualified privilege in respect of specified things done:

- (a) under compensation rules forming part of Division 3 arrangements; or
- (b) under regulations made for the purposes of a provision or provisions of Subdivision B of Division 4.

892K Risk assessment report

- (1) For the purposes of monitoring compliance with, and the operation of, this Part, the Minister may, by giving the operator of a financial market written notice, require the operator:

Section 892K

- (a) to cause a risk assessment report to be prepared in relation to the market in accordance with the requirements specified in the notice; and
 - (b) to give that report to the Minister by the time specified in the notice.
- (2) The operator must comply with the notice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Division 6—Miscellaneous

893A Exemptions and modifications by regulations

- (1) The regulations may:
 - (a) exempt a person or class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial market or class of financial markets from all or specified provisions of this Part; or
 - (c) provide that this Part applies in relation to a person or a financial market, or a class of persons or financial markets, as if specified provisions were omitted, modified or varied as specified in the regulations.
- (2) For the purpose of this section, the *provisions of this Part* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 7.2 that refer to provisions of this Part; and
 - (c) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Part 7.6—Licensing of providers of financial services

Division 1—Preliminary

910A Definitions

In this Part, unless the contrary intention appears:

representative of a person means:

- (a) if the person is a financial services licensee:
 - (i) an authorised representative of the licensee; or
 - (ii) an employee or director of the licensee; or
 - (iii) an employee or director of a related body corporate of the licensee; or
 - (iv) any other person acting on behalf of the licensee; or
- (b) in any other case:
 - (i) an employee or director of the person; or
 - (ii) an employee or director of a related body corporate of the person; or
 - (iii) any other person acting on behalf of the person.

Division 2—Requirement to be licensed or authorised

911A Need for an Australian financial services licence

- (1) Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

Note 1: Also, a person must not provide a financial service contrary to a banning order or disqualification order under Division 8.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) However, a person is exempt from the requirement to hold an Australian financial services licence for a financial service they provide in any of the following circumstances:
- (a) the person provides the service as representative of a second person who carries on a financial services business and who:
 - (i) holds an Australian financial services licence that covers the provision of the service; or
 - (ii) is exempt under this subsection from the requirement to hold an Australian financial services licence that covers the provision of the service;

Note: However, representatives must still comply with section 911B even if they are exempted from this section by this paragraph.

- (b) the service is the issue, variation or disposal of a financial product by the person (the **product provider**) pursuant to an arrangement (an **intermediary authorisation**) between the product provider and a financial services licensee under which:
 - (i) the financial services licensee, or their authorised representatives, may make offers to people to arrange for the issue, variation or disposal of financial products by the product provider; and
 - (ii) the product provider is to issue, vary or dispose of financial products in accordance with such offers, if they are accepted;provided that the offer pursuant to which the issue, variation or disposal is made was covered by the financial services licensee's Australian financial services licence;

Section 911A

- (ba) the service is the entry into of an intermediary authorisation referred to in paragraph (b);
- (c) all of the following apply:
 - (i) the service is the variation or disposal of a financial product by the person;
 - (ii) the same person issued the original product;
 - (iii) the person provides the service at the direct request of the person to whom it is provided (rather than through an intermediary);
- (d) the service is, or is provided incidentally to, the operation of a licensed market, or a licensed CS facility, operated by the person;
- (ea) the service is the provision of general advice and all of the following apply:
 - (i) the advice is provided in a newspaper or periodical of which the person is the proprietor or publisher;
 - (ii) the newspaper or periodical is generally available to the public otherwise than only on subscription;
 - (iii) the sole or principal purpose of the newspaper or periodical is not the provision of financial product advice;
- (eb) the service is the provision of general advice and all of the following apply:
 - (i) the advice is provided in the course of, or by means of, transmissions that the person makes by means of an information service (see subsection (6)), or that are made by means of an information service that the person owns, operates or makes available;
 - (ii) the transmissions are generally available to the public;
 - (iii) the sole or principal purpose of the transmissions is not the provision of financial product advice;
- (ec) the service is the provision of general advice and all of the following apply:
 - (i) the advice is provided in sound recordings, video recordings, or data recordings;
 - (ii) the person makes the recordings available to the public by supplying copies of them to the public and/or by causing the recordings (if they are sound recordings) to be heard by the public, causing the recordings (if they

Section 911A

- are video recordings) to be seen and heard by the public, or the contents of the recordings (if they are data recordings) to be displayed or reproduced for the public;
- (iii) the sole or principal purpose of the recordings is not the provision of financial product advice;
- (ed) both of the following apply:
 - (i) the service is the provision of general advice by the person in connection with an offer of financial products under an eligible employee share scheme;
 - (ii) the person is the corporation whose financial products are being issued or sold under the scheme, or an entity that that corporation controls;
- (ee) all of the following apply:
 - (i) the service is dealing in a financial product by the person in connection with an offer of the financial product under an eligible employee share scheme;
 - (ii) the scheme requires that any purchase or disposal of the financial product under the scheme occurs through a person who holds an Australian financial services licence to deal in financial products, or a person outside this jurisdiction who is licensed or otherwise authorised to deal in financial products in that jurisdiction;
 - (iii) the person is the corporation whose financial products are being issued or sold under the scheme, or an entity that that corporation controls;
- (ef) both of the following apply:
 - (i) the service is, or is provided incidentally to, a custodial or depository service that is provided by the person in connection with an eligible employee share scheme;
 - (ii) the person is the corporation whose financial products are being issued or sold under the scheme, or an entity that that corporation controls;
- (eg) both of the following apply:
 - (i) the service is dealing in an interest in a contribution plan operated by the person in relation to an eligible employee share scheme;
 - (ii) the person is the corporation whose financial products are being issued or sold under the scheme, or an entity that that corporation controls;

Section 911A

- (f) the person provides the service while performing functions, or exercising powers, in any of the following capacities or circumstances:
 - (i) as an official receiver or trustee within the meaning of the *Bankruptcy Act 1966*;
 - (ii) as a receiver, receiver and manager, or liquidator (whether appointed by a court or otherwise);
 - (iii) as a person appointed by a court to carry on a financial services business;
 - (iv) as the Public Trustee acting under a law, prescribed by regulations made for the purposes of this paragraph, of a State or Territory;
 - (v) as an administrator of a body corporate;
 - (vi) as an administrator of a deed of company arrangement executed by a body corporate;
 - (vii) as a trustee or person administering a compromise or arrangement between a body corporate and another person or persons;
 - (viii) as a personal representative of a deceased person other than a deceased financial services licensee;
 - (ix) subject to subsection (3), as a personal representative of a deceased financial services licensee;
 - (x) in the administration of a bankrupt estate or in the winding up of a body corporate or partnership;
- (g) all of the following apply:
 - (i) the person is a body regulated by APRA;
 - (ii) the service is one in relation to which APRA has regulatory or supervisory responsibilities;
 - (iii) the service is provided only to wholesale clients;
- (h) all of the following apply:
 - (i) the person is regulated by an overseas regulatory authority;
 - (ii) the provision of the service by the person is covered by an exemption specified by ASIC in writing under this subparagraph and published in the *Gazette*; and
 - (iii) the service is provided only to wholesale clients;
- (i) the person provides the service only to related bodies corporate of the person;

Section 911A

- (j) the person provides the service in the person's capacity as trustee of a self-managed superannuation fund;
- (k) the provision of the service is covered by an exemption prescribed in regulations made for the purposes of this paragraph;
- (l) the provision of the service is covered by an exemption specified by ASIC in writing and published in the *Gazette*.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

- (3) Subparagraph (2)(f)(ix) only applies until whichever of these happens first:
 - (a) the end of 6 months after the death of the licensee;
 - (b) the removal or discharge of the personal representative;
 - (c) the final distribution of the licensee's estate.
- (4) A person is not exempt under any paragraph of subsection (2) for a financial service they provide if the service is the operation of a registered scheme.
- (5) The exemption under paragraph (2)(ea), (eb) or (ec), or an exemption under subparagraph (2)(h)(ii) or under paragraph (2)(k) or (l), may apply unconditionally or subject to conditions:
 - (a) in the case of the exemption under paragraph (2)(ea), (eb) or (ec), or an exemption under paragraph (2)(k)—specified in regulations made for the purposes of this paragraph; or
 - (b) in the case of an exemption under subparagraph (2)(h)(ii) or under paragraph (2)(l)—specified by ASIC in writing published in the *Gazette*.
- (6) In this section:
information service means:
 - (a) a broadcasting service; or
 - (b) an interactive or broadcast videotext or teletext service or a similar service; or
 - (c) an online database service or a similar service; or
 - (d) any other service identified in regulations made for the purposes of this paragraph.

911B Providing financial services on behalf of a person who carries on a financial services business

- (1) A person (the *provider*) must only provide a financial service in this jurisdiction on behalf of another person (the *principal*) who carries on a financial services business if one or more of the following paragraphs apply:
- (a) these conditions are satisfied:
 - (i) the principal holds an Australian financial services licence covering the provision of the service; and
 - (ii) the provider is an employee or director of the principal or of a related body corporate of the principal; and
 - (iii) the provider is not an employee or director, or authorised representative, of any other person who carries on a financial services business and who is not a related body corporate of the principal; and
 - (iv) the provider is not an employee or director, or authorised representative, of a related body corporate of a person of the kind mentioned in subparagraph (iii);
 - (b) these conditions are satisfied:
 - (i) the principal holds an Australian financial services licence covering the provision of the service; and
 - (ii) the provider is an authorised representative of the principal; and
 - (iii) the authorisation covers the provision of the service by the provider; and
 - (iv) in the case of a provider who is an employee or director of any other person (the *second principal*) who carries on a financial services business, or of a related body corporate of such a second principal—if the provider provides any financial services in this jurisdiction on behalf of the second principal, the provider does so as an authorised representative of the second principal;
 - (c) these conditions are satisfied:
 - (i) the principal holds an Australian financial services licence covering the provision of the service; and
 - (ii) the provider is an employee of an authorised representative of the principal; and
 - (iii) the authorisation covers the provision of the service by the authorised representative; and

Section 911C

(iv) the service is the provision of a basic deposit product or of a facility for making non-cash payments (see section 763D) that is related to a basic deposit product, or is the provision of a financial product of a kind prescribed by regulations made for the purposes of this subparagraph;

(d) the provider holds their own Australian financial services licence covering the provision of the service;

Note: However, in general a financial services licensee cannot be the authorised representative of another financial services licensee: see sections 916D and 916E.

(e) if the principal (rather than the provider) provided the service, the principal would not need an Australian financial services licence because the provision of the service would be exempt under subsection 911A(2).

Note 1: Also, a person must not provide a financial service on behalf of another person contrary to a banning order or disqualification order under Division 8.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Paragraphs (1)(a), (b) and (c) do not apply if the provider is a financial services licensee, unless the principal is an insurer and the provider is acting under a binder given by the principal.

(3) If, as mentioned in paragraph (1)(d), the provider holds their own Australian financial services licence covering the provision of the service, then, for the purposes of the other provisions of this Chapter, the service is taken to be provided by the provider (and not by the principal) unless regulations made for the purposes of this subsection provide otherwise.

911C Prohibition on holding out

A person must not hold out:

- (a) that the person has an Australian financial services licence; or
- (b) that a financial service provided by the person or by someone else is exempt from the requirement to hold an Australian financial services licence; or
- (c) that, in providing a financial service, the person acts on behalf of another person; or

Section 911D

- (d) that conduct, or proposed conduct, of the person is within authority (within the meaning of Division 6) in relation to a particular financial services licensee;
if that is not the case.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

911D When a financial services business is taken to be carried on in this jurisdiction

- (1) For the purposes of this Chapter, a financial services business is taken to be carried on *in this jurisdiction* by a person if, in the course of the person carrying on the business, the person engages in conduct that is:
- (a) intended to induce people in this jurisdiction to use the financial services the person provides; or
 - (b) is likely to have that effect;
- whether or not the conduct is intended, or likely, to have that effect in other places as well.
- (2) This section does not limit the circumstances in which a financial services business is carried on *in this jurisdiction* for the purposes of this Chapter.

Division 3—Obligations of financial services licensees

912A General obligations

- (1) A financial services licensee must:
- (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
 - (aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and
 - (b) comply with the conditions on the licence; and
 - (c) comply with the financial services laws; and
 - (ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and
 - (d) unless the licensee is a body regulated by APRA—have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and
 - (e) maintain the competence to provide those financial services; and
 - (f) ensure that its representatives are adequately trained, and are competent, to provide those financial services; and
 - (g) if those financial services are provided to persons as retail clients—have a dispute resolution system complying with subsection (2); and
 - (h) unless the licensee is a body regulated by APRA—have adequate risk management systems; and
 - (j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

Section 912B

- (2) To comply with this subsection, a dispute resolution system must consist of:
 - (a) an internal dispute resolution procedure that:
 - (i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and
 - (ii) covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and
 - (b) membership of one or more external dispute resolution schemes that:
 - (i) is, or are, approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and
 - (ii) covers, or together cover, complaints (other than complaints that may be dealt with by the Superannuation Complaints Tribunal established by section 6 of the *Superannuation (Resolution of Complaints) Act 1993*) against the licensee made by retail clients in connection with the provision of all financial services covered by the licence.
- (3) Regulations made for the purposes of subparagraph (2)(a)(i) or (2)(b)(i) may also deal with the variation or revocation of:
 - (a) standards or requirements made by ASIC; or
 - (b) approvals given by ASIC.

912B Compensation arrangements if financial services provided to persons as retail clients

- (1) If a financial services licensee provides a financial service to persons as retail clients, the licensee must have arrangements for compensating those persons for loss or damage suffered because of breaches of the relevant obligations under this Chapter by the licensee or its representatives. The arrangements must meet the requirements of subsection (2).
- (2) The arrangements must:
 - (a) if the regulations specify requirements that are applicable to all arrangements, or to arrangements of that kind—satisfy those requirements; or

Section 912C

- (b) be approved in writing by ASIC.
- (3) Before approving arrangements under paragraph (2)(b), ASIC must have regard to:
 - (a) the financial services covered by the licence; and
 - (b) whether the arrangements will continue to cover persons after the licensee ceases carrying on the business of providing financial services, and the length of time for which that cover will continue; and
 - (c) any other matters that are prescribed by regulations made for the purposes of this paragraph.
- (4) Regulations made for the purposes of paragraph (3)(c) may, in particular, prescribe additional details in relation to the matters to which ASIC must have regard under paragraphs (3)(a) and (b).

912C Direction to provide a statement

- (1) ASIC may, by giving written notice to a financial services licensee, direct the licensee to give to ASIC a written statement containing the specified information about:
 - (a) the financial services provided by the licensee or its representatives; or
 - (b) the financial services business carried on by the licensee.
- (1A) Notices under subsection (1):
 - (a) may be sent out at any time; and
 - (b) may be sent to one or more particular licensees, or to each licensee in one or more classes of licensee, or to all licensees; and
 - (c) may all require the same information, or may contain differences as to the information they require; and
 - (d) may require a statement containing information to be provided on a periodic basis, or each time a particular event or circumstance occurs, without ASIC having to give a further written notice.
- (2) ASIC may also, by giving written notice to the licensee, direct the licensee to obtain an audit report, prepared by a suitably qualified person specified in the notice, on a statement, or each statement in a class of statements, under subsection (1) before the statement is given to ASIC.

Section 912CA

- (3) The licensee must comply with a direction given under this section:
- (a) within the time specified in the direction if that is a reasonable time; or
 - (b) in any other case—within a reasonable time.

ASIC may extend the time within which the licensee must comply with the direction by giving written notice to the licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

912CA Regulations may require information to be provided

The regulations may require a financial services licensee, or each financial services licensee in a class of financial services licensees, to provide ASIC with specified information about:

- (a) the financial services provided by the licensee or its representatives; or
- (b) the financial services business carried on by the licensee.

912D Obligation to notify ASIC of certain matters

- (1) A financial services licensee must comply with subsection (1B) if:
- (a) the licensee breaches, or is likely to breach:
 - (i) any of the obligations under section 912A or 912B, other than the obligation under paragraph 912A(1)(c); or
 - (ii) the obligation under paragraph 912A(1)(c), so far as it relates to provisions of this Act or the ASIC Act referred to in paragraphs (a), (b) and (c) of the definition of *financial services law* in section 761A; or
 - (iii) the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth legislation that is covered by paragraph (d) of that definition and that is specified in regulations made for the purposes of this subparagraph; and
 - (b) the breach, or likely breach, is significant, having regard to the following:
 - (i) the number or frequency of similar previous breaches;
 - (ii) the impact of the breach or likely breach on the licensee's ability to provide the financial services covered by the licence;

Section 912D

- (iii) the extent to which the breach or likely breach indicates that the licensee's arrangements to ensure compliance with those obligations is inadequate;
- (iv) the actual or potential financial loss to clients of the licensee, or the licensee itself, arising from the breach or likely breach;
- (v) any other matters prescribed by regulations made for the purposes of this paragraph.

(1A) For the purposes of subsection (1), a financial services licensee is ***likely to breach*** an obligation referred to in that subsection if, and only if, the person is no longer able to comply with the obligation.

(1B) The financial services licensee must, as soon as practicable and in any case within 10 business days after becoming aware of the breach or likely breach mentioned in subsection (1), lodge a written report on the matter with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(1C) A report that a licensee is required to lodge under subsection (1B) is taken to have been lodged with ASIC if:

- (a) the licensee is a body regulated by APRA; and
- (b) the report is received by APRA in accordance with the terms of an agreement between APRA and ASIC under which APRA is to act as ASIC's agent in relation to such reports.

(1D) Subsection (1B) does not apply to a financial services licensee that is a body regulated by APRA in relation to a breach if:

- (a) the auditor or actuary of the licensee gives APRA a written report about the breach; and
- (b) the report is given before, or within 10 business days after, the licensee becomes aware of the breach.

(2) A financial services licensee must give written notice to ASIC, as soon as practicable, if the licensee becomes a participant in a licensed market or a licensed CS facility, or ceases to be such a participant. The notice must say when this happened and identify the market or facility.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

912E Surveillance checks by ASIC

- (1) A financial services licensee and its representatives must give such assistance to ASIC, or a person authorised by ASIC, as ASIC or the authorised person reasonably requests in relation to whether the licensee and its representatives are complying with the financial services laws, and in relation to the performance of ASIC's other functions.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Such assistance may include showing ASIC the licensee's books or giving ASIC other information.

912F Obligation to cite licence number in documents

- (1) Whenever a financial services licensee identifies itself in a document of a kind specified in regulations made for the purposes of this subsection, the document must include the licensee's licence number (see section 913C).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 4—Australian financial services licences

Subdivision A—How to get a licence

913A Applying for a licence

A person may apply for an Australian financial services licence by lodging an application with ASIC that:

- (a) includes the information required by regulations made for the purposes of this paragraph; and
- (b) is accompanied by the documents (if any) required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

913B When a licence may be granted

- (1) ASIC must grant an applicant an Australian financial services licence if (and must not grant such a licence unless):
 - (a) the application was made in accordance with section 913A; and
 - (b) ASIC has no reason to believe that the applicant will not comply with the obligations that will apply under section 912A if the licence is granted; and
 - (c) the requirement in whichever of subsection (2) or (3) of this section applies is satisfied; and
 - (ca) the applicant has provided ASIC with any additional information requested by ASIC in relation to matters that, under this section, can be taken into account in deciding whether to grant the licence; and
 - (d) the applicant meets any other requirements prescribed by regulations made for the purposes of this paragraph.

Note: ASIC must not grant an Australian financial services licence to a person contrary to a banning order or disqualification order (see Division 8).

- (2) If the applicant is a natural person, ASIC must be satisfied that there is no reason to believe that the applicant is not of good fame or character.

- (3) If the applicant is not a single natural person, ASIC must be satisfied:
- (a) that:
 - (i) if the applicant is a body corporate—there is no reason to believe that any of the applicant's responsible officers are not of good fame or character; or
 - (ii) if the applicant is a partnership or the trustees of a trust—there is no reason to believe that any of the partners or trustees who would perform duties in connection with the holding of the licence are not of good fame or character; or
 - (b) if ASIC is not satisfied of the matter in paragraph (a)—that the applicant's ability to provide the financial services covered by the licence would nevertheless not be significantly impaired.
- (4) In considering whether there is reason to believe that a person is not of good fame or character, ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to:
- (a) any conviction of the person, within 10 years before the application was made, for serious fraud; and
 - (b) whether the person has held an Australian financial services licence that was suspended or cancelled; and
 - (c) whether a banning order or disqualification order under Division 8 has previously been made against the person; and
 - (d) any other matter ASIC considers relevant.
- Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.
- (5) However, ASIC may only refuse to grant a licence after giving the applicant an opportunity:
- (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC in relation to the matter.

Section 913C

913C Licence numbers

ASIC must give each Australian financial services licence a unique licence number when it is granted, and must notify the licensee of that number.

Subdivision B—The conditions on the licence

914A The conditions on the licence

- (1) Subject to this section, ASIC may, at any time, by giving written notice to a financial services licensee:
- (a) impose conditions, or additional conditions, on the licence; and
 - (b) vary or revoke conditions imposed on the licence.

Note: Subsection 923B(3) restricts the circumstances in which ASIC can impose a condition authorising a person to assume or use a restricted word or expression under that section.

- (2) ASIC may do so:
- (a) on its own initiative; or
 - (b) if the licensee lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

- (3) ASIC may only impose conditions or additional conditions, or vary the conditions, on the licence after giving the licensee an opportunity:
- (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC in relation to the matter.

This subsection does not apply to ASIC imposing conditions when a licence is granted.

- (4) If the licensee, or a related body corporate, is a body (the **APRA body**) regulated by APRA, other than an ADI (within the meaning of the *Banking Act 1959*), then the following provisions apply:
- (a) ASIC cannot:
 - (i) impose, vary or revoke a condition on the licence that, in ASIC's opinion, has or would have the result of

Section 914A

- preventing the APRA body from being able to carry on all or any of its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities); or
- (ii) vary a condition so that it would, in ASIC's opinion, become a condition that would have a result as described in subparagraph (i);
- unless ASIC has first consulted APRA about the proposed action;
- (b) if ASIC imposes, varies or revokes a condition on the licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.
- (5) If the licensee, or a related body corporate, is an ADI (within the meaning of the *Banking Act 1959*), then the following provisions apply:
- (a) subject to paragraphs (b) and (c), the powers that ASIC would otherwise have under this section:
- (i) to impose, vary or revoke a condition on the licence that, in ASIC's opinion, has or would have the result of preventing the ADI from being able to carry on all or any of its banking business (within the meaning of the *Banking Act 1959*); or
- (ii) to vary a condition so that it would, in ASIC's opinion, become a condition that would have a result as described in subparagraph (i);
- are instead powers of the Minister;
- (b) the following provisions apply in relation to a power to which paragraph (a) applies:
- (i) the procedures for the exercise of the power are the same as would apply if ASIC could exercise the power, except that the Minister must not exercise the power unless he or she has first considered advice from ASIC on the proposed action, being advice given after ASIC has consulted APRA about the proposed action;
- (ii) ASIC (rather than the Minister) must still conduct any hearing required under paragraph (3)(a) and receive any submissions under paragraph (3)(b);
- (c) if ASIC imposes, varies or revokes a condition on the licence and paragraph (a) does not apply to that action, ASIC must,
-

Section 915A

within one week, inform APRA of the action that has been taken.

- (5A) A failure to comply with a requirement of subsection (4) or (5) to consult or inform APRA about, or to consider advice from ASIC about, an imposition, variation or revocation of a condition does not invalidate the action taken.
- (6) ASIC must ensure that the licence is subject to a condition that specifies the particular financial services or class of financial services that the licensee is authorised to provide.
- (7) The financial services or class of financial services may be specified by reference to particular financial products, or classes of financial products.
- (8) The licence is subject to such other conditions as are prescribed by regulations made for the purposes of this subsection. However, ASIC cannot vary or revoke those conditions.

Subdivision C—When a licence can be varied, suspended or cancelled

915A Varying licences

- (1) ASIC may vary an Australian financial services licence to take account of a change in the licensee's name if the licensee lodges with ASIC an application for the variation, accompanied by the documents, if any, required by regulations made for the purposes of this subsection.

Note 1: The conditions on the licence can be varied under section 914A.

Note 2: For fees in respect of lodging applications, see Part 9.10.

- (2) ASIC must give written notice of the variation to the licensee.

915B Immediate suspension or cancellation

Licence held by a natural person

- (1) ASIC may suspend or cancel an Australian financial services licence held by a natural person, by giving written notice to the person, if the person:
 - (a) ceases to carry on the financial services business; or

Section 915B

- (b) becomes an insolvent under administration; or
- (c) is convicted of serious fraud; or
- (d) becomes incapable of managing their affairs because of mental or physical incapacity; or
- (e) lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

Licence held by a partnership

- (2) ASIC may suspend or cancel an Australian financial services licence held by a partnership, by giving written notice to the partnership, if:
 - (a) the partnership ceases to carry on the financial services business; or
 - (b) a creditor's petition or a debtor's petition is presented under Division 2 or 3 of Part IV of the *Bankruptcy Act 1966* against the partnership; or
 - (c) one or more of the partners is convicted of serious fraud; or
 - (d) the partnership lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

Licence held by a body corporate

- (3) ASIC may suspend or cancel an Australian financial services licence held by a body corporate, by giving written notice to the body, if the body:
 - (a) ceases to carry on the financial services business; or
 - (b) becomes an externally-administered body corporate; or
 - (c) is a responsible entity of a registered scheme whose members have suffered, or are likely to suffer, loss or damage because the body has breached this Act; or
 - (d) lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

Section 915C

- (4) ASIC may suspend or cancel an Australian financial services licence held by the trustees of a trust, by giving written notice to the trustees, if:
- (a) the trustees of the trust cease to carry on the financial services business; or
 - (b) a trustee who is a natural person:
 - (i) becomes an insolvent under administration; or
 - (ii) is convicted of serious fraud; or
 - (iii) becomes incapable of managing their affairs because of physical or mental incapacity; or
 - (c) a trustee that is a body corporate becomes an externally-administered body corporate; or
 - (d) the trustees lodge with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note 1: For fees in respect of lodging applications, see Part 9.10.

Note 2: If there is only one trustee, subsection (1) will apply (if the trustee is a natural person), and subsection (3) will apply (if the trustee is a body corporate).

915C Suspension or cancellation after offering a hearing

- (1) ASIC may suspend or cancel an Australian financial services licence (subject to complying with subsection (4)) in any of the following cases:
- (a) the licensee has not complied with their obligations under section 912A;
 - (aa) ASIC has reason to believe that the licensee will not comply with their obligations under section 912A;
 - (b) ASIC is no longer satisfied of the matter in whichever of subsection 913B(2) or (3) applied at the time the licence was granted (about whether the licensee, or the licensee's representatives, are of good fame or character);
 - (c) a banning order or disqualification order under Division 8 is made against the licensee;
 - (d) a banning order or disqualification order under Division 8 is made against a representative of the licensee and ASIC considers that the representative's involvement in the provision of the licensee's financial services will

Section 915D

significantly impair the licensee's ability to meet its obligations under this Chapter.

- (2) ASIC may also cancel an Australian financial services licence (subject to complying with subsection (4)) if:
 - (a) the application for the licence was false in a material particular or materially misleading; or
 - (b) there was an omission of a material matter from the application.
- (3) An Australian financial services licence is suspended or cancelled by ASIC giving written notice to the licensee.
- (4) However, ASIC may only suspend or cancel an Australian financial services licence under this section after giving the licensee an opportunity:
 - (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC on the matter.

915D Effect of suspension

- (1) A suspended Australian financial services licence has no effect while it remains suspended.
- (2) Subsection (1) has effect subject to section 915H.

915E Revocation of suspension

ASIC may at any time revoke the suspension of an Australian financial services licence by giving written notice to the licensee.

915F Date of effect and publication of cancellation or suspension

- (1) A variation, suspension, revocation of a suspension, or cancellation, of an Australian financial services licence takes effect when the written notice of that action is given to the licensee.
- (2) As soon as practicable after the notice is given to the licensee, ASIC must:
 - (a) publish a notice of the action in the *Gazette*; and

Section 915G

- (b) if the licensee is a participant in a licensed market or a licensed CS facility—give written notice of the action to the operator of the market or facility.

A notice under this subsection must state when the action took effect.

915G Statement of reasons

A notice of suspension or cancellation given to a licensee under this Subdivision must be accompanied by a statement of reasons for the action taken.

915H ASIC may allow licence to continue in effect

In the written notice of suspension or cancellation that ASIC gives to the licensee, ASIC may specify that the licence continues in effect as though the suspension or cancellation had not happened for the purposes of specified provisions of this Act in relation to specified matters, a specified period, or both.

915I Special procedures for APRA-regulated bodies

- (1) If a financial services licensee, or a related body corporate, is a body (the **APRA body**) regulated by APRA, other than an ADI (within the meaning of the *Banking Act 1959*), the following provisions apply:
 - (a) ASIC cannot suspend or cancel the licensee's licence if doing so would, in ASIC's opinion, have the result of preventing the APRA body from being able to carry on all or any of its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities), unless ASIC has first consulted APRA about the proposed action;
 - (b) if ASIC suspends or cancels the licensee's licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.
- (2) If:
 - (a) a financial services licensee is an ADI (within the meaning of the *Banking Act 1959*); or
 - (b) a related body corporate of a financial services licensee is an ADI (within the meaning of the *Banking Act 1959*), and

Section 915J

cancellation or suspension of the licensee's licence would, in ASIC's opinion, have the result of preventing the ADI from being able to carry on all or any of its banking business (within the meaning of the *Banking Act 1959*);

the following provisions have effect:

- (c) subject to paragraph (d), the powers that ASIC would otherwise have under this Subdivision to cancel or suspend the licensee's licence, or to subsequently revoke a suspension to which this subsection applied, are instead powers of the Minister;
 - (d) the procedures for the exercise of a power to which paragraph (c) applies are the same as would apply if ASIC could exercise the power, except that the Minister must not exercise the power unless he or she has first considered advice from ASIC on the proposed action, being advice given after ASIC has consulted APRA about the proposed action;
 - (e) ASIC (rather than the Minister) must still conduct any hearing required under paragraph 915C(4)(a) and receive any submissions under paragraph 915C(4)(b).
- (3) A failure to comply with a requirement of subsection (1) or (2) to consult or inform APRA about, or to consider advice from ASIC about, a cancellation or suspension, or a revocation of a suspension, of a licence does not invalidate the action taken.

915J Variation, suspension and cancellation only under this Subdivision

An Australian financial services licence cannot be varied, suspended or cancelled otherwise than under this Subdivision.

Note: The conditions on the licence can be varied under section 914A.

Division 5—Authorised representatives

916A How representatives are authorised

- (1) A financial services licensee may give a person (the ***authorised representative***) a written notice authorising the person, for the purposes of this Chapter, to provide a specified financial service or financial services on behalf of the licensee.
- (2) The financial services specified may be some or all of the financial services covered by the licensee's licence.
- (3) An authorisation under subsection (1) is void to the extent that it purports to authorise a person to provide a financial service:
 - (a) that is not covered by the licensee's licence; or
 - (b) contrary to a banning order or disqualification order under Division 8.
- (3A) A person must not give a purported authorisation if that purported authorisation is void to any extent under subsection (3).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (4) An authorisation may be revoked at any time by the licensee giving written notice to the authorised representative.

916B Sub-authorisations

- (1) Subject to subsection (3), an authorised representative of a financial services licensee cannot, in that capacity, make a person their authorised representative or an authorised representative of the licensee.
- (2) A purported authorisation contrary to this section is void.
- (2A) A person must not give a purported authorisation if that purported authorisation is contrary to this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3) A body corporate that is an authorised representative of a financial services licensee may, in that capacity, give an individual a written

Section 916C

notice authorising that individual, for the purposes of this Chapter, to provide a specified financial service or financial services on behalf of the licensee, but only if the licensee consents in writing given to the body corporate.

- (4) The financial services specified may be some or all of the financial services covered by the licensee's licence.
- (5) The licensee may give consent under subsection (3) in respect of either a specified individual or a specified class of individuals (the membership of which might change from time to time).
- (5A) If a licensee gives consent under subsection (3) to a body corporate, the licensee must keep a copy of the consent for 5 years after the day on which it ceases to have effect.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (6) An individual who is authorised as mentioned in subsection (3) is an ***authorised representative*** of the relevant licensee.
- (7) An authorisation of an individual as mentioned in subsection (3) may be revoked at any time by:
 - (a) the licensee; or
 - (b) the body corporate that gave the individual the authorisation; giving written notice to the individual.
- (8) If a person revokes the authorisation of an individual under subsection (7), that person must inform, in writing, the other person who could have revoked the authorisation.
- (9) To avoid doubt, an authorisation given as mentioned in subsection (3) is taken, for the purposes of sections 916C to 916F, to be given by the body corporate, not the licensee.

916C Authorised representative of 2 or more licensees

- (1) One person can be the authorised representative of 2 or more financial services licensees, but only if:
 - (a) each of those licensees has consented to the person also being the authorised representative of each of the other licensees;
 - or

Section 916D

- (b) each of those licensees is a related body corporate of each of the other licensees.
- (2) A purported authorisation given in breach of this requirement is void.
- (3) A person must not give a purported authorisation if that purported authorisation is in breach of this requirement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

916D Licensees cannot authorise other licensees

- (1) A financial services licensee cannot be the authorised representative of another financial services licensee.

Note 1: Instead, the first licensee could use their own licence to provide financial services on behalf of the second licensee (assuming that the first licensee's licence covered the provision of those services). See paragraph 911B(1)(d).

Note 2: There is an exception to this rule in section 916E.

- (2) A purported authorisation given in breach of this requirement is void.
- (2A) A person must not give a purported authorisation if that purported authorisation is given in breach of this requirement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2B) The requirement in subsection (1) does not prohibit a financial services licensee from being an authorised representative in circumstances covered by section 916E.

Note: In a prosecution for an offence based on subsection (2A), a defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

- (3) As well, an authorisation that starts to breach this requirement, because the person authorised is subsequently granted an Australian financial services licence, is void.

916E Licensees acting under a binder

- (1) Despite section 916D, a financial services licensee (the *authorised licensee*) may be the authorised representative of another financial

Section 916F

services licensee who is an insurer, if the authorised licensee acts under a binder given by the insurer.

- (2) For all purposes connected with contracts that are risk insurance products, or with claims against the insurer, in respect of which the authorised licensee acts under the binder:
- (a) the authorised licensee is taken to act on behalf of the insurer and not the insured; and
 - (b) if the insured in fact relied in good faith on the conduct of the authorised licensee, the authorised licensee is taken to act on behalf of the insurer regardless of the fact that the authorised licensee did not act within the scope of the binder.

916F Obligation to notify ASIC etc. about authorised representatives

- (1) A person must lodge with ASIC a written notice (in accordance with subsection (2)), within 15 business days, if the person authorises a representative to provide a financial service as mentioned in section 916A or 916B.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (1AA) Subsection (1) does not apply to an authorisation of a representative if:
- (a) the authorisation is by a body corporate and is given as mentioned in section 916B; and
 - (b) the relevant consent under subsection 916B(5) was given in respect of a specified class of individuals of which the representative is a member; and
 - (c) the representative is an employee of the body corporate; and
 - (d) the only financial services that the representative is authorised to provide are either or both of the following:
 - (i) general advice that relates to financial products covered by regulations made for the purposes of this paragraph;
 - (ii) dealing in financial products covered by regulations made for the purposes of this paragraph.

Note 1: Regulations made for the purposes of paragraph (d) may be expressed to cover all financial products, or only one or more specified kinds of financial products.

Section 916G

Note 2: A defendant bears an evidential burden in relation to the matters in subsection (1AA). See subsection 13.3(3) of the *Criminal Code*.

- (1A) A person who authorises an individual to provide a financial service on behalf of a financial services licensee as mentioned in section 916B must give the licensee written notice (in accordance with subsection (2)), within 15 business days of the individual being authorised to provide the financial service, if the licensee's consent to the authorisation was given in respect of a specified class of individuals.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The notice must include the following details:
- (a) the name and business address of the representative;
 - (b) details of the authorisation, including the date on which it was made and what the representative is authorised to do on behalf of the relevant licensee;
 - (c) details of each other financial services licensee on behalf of whom the representative is an authorised representative.
- (3) A person must notify ASIC, by lodging a written notice, within 10 business days if:
- (a) the person authorised a representative under section 916A or 916B and there is a change in any details relating to the representative that are required to be included under subsection (2); or
 - (b) the person revokes an authorisation to which subsection (1) applied.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of circumstance of the offence, that the details mentioned in subsection (3) changed.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

916G ASIC may give licensee information about representatives

- (1) If ASIC considers it appropriate to do so, it may give information to a financial services licensee about a person who ASIC believes is, or will be, a representative of the licensee. However, ASIC may

only do so if it believes, on reasonable grounds, that the information is true.

- (2) A financial services licensee to whom the information is given may only make use of, make a record of, or give to another person, the information for a purpose connected with:
- (a) the licensee making a decision about what action (if any) to take in relation to the representative, as a consequence of receiving the information; or
 - (b) the licensee taking action pursuant to such a decision.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) A person to whom information has been given for a purpose or purposes under subsection (2) or this subsection, may only make use of, make a record of, or give to another person, that information for that purpose or any of those purposes.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) A person has qualified privilege in respect of an act done by the person under subsection (2) or (3).
- (5) A person to whom information is given in accordance with this section must not give any of the information to a court, or produce in a court a document that sets out some or all of the information, except:
- (a) for a purpose connected with:
 - (i) a financial services licensee making a decision about what action (if any) to take in relation to the representative, as a consequence of receiving some or all of the information; or
 - (ii) a financial services licensee taking action pursuant to that decision; or
 - (iii) proving in a proceeding in that court that particular action taken by a financial services licensee in relation to the representative was taken pursuant to that decision; or
 - (b) in a proceeding in that court, in so far as the proceeding relates to an alleged breach of this section; or
 - (c) in a proceeding in respect of an ancillary offence relating to an offence based on this section; or

Section 916G

- (d) in a proceeding about giving to a court false information some, at least, of which was the information given under this section.
- (6) A reference in this section to a financial services licensee taking action in relation to a representative is a reference to the licensee:
 - (a) taking action by way of making, terminating or varying the terms and conditions of an agreement; or
 - (b) otherwise taking action in relation to an agreement;to the extent that the agreement relates to the representative acting on behalf of the licensee.
- (7) Subsection (5) also has the effect it would have if:
 - (a) a reference in it to a court were a reference to a court of an external Territory or of a country outside Australia and the external Territories; and
 - (b) paragraphs (5)(b) and (c) were omitted.

Division 6—Liability of financial services licensees for representatives

917A Application of Division

- (1) This Division applies to any conduct of a representative of a financial services licensee:
 - (a) that relates to the provision of a financial service; and
 - (b) on which a third person (the *client*) could reasonably be expected to rely; and
 - (c) on which the client in fact relied in good faith.
- (2) In this Division, a reference to a representative's conduct being *within authority* in relation to a particular financial services licensee is, subject to subsection (3), a reference to:
 - (a) if the representative is an employee of the licensee or of a related body corporate of the licensee—conduct being within the scope of the employee's employment; or
 - (b) if the representative is a director of the licensee or of a related body corporate of the licensee—conduct being within the scope of the director's duties as director; or
 - (c) in any other case—conduct being within the scope of the authority given by the licensee.
- (3) If:
 - (a) a person is the representative of more than one financial services licensee in respect of a particular class of financial service; and
 - (b) the person engages in conduct relating to that class of service; and
 - (ba) the conduct relates to a particular kind of financial product prescribed by regulations made for the purposes of paragraph 917C(3)(ba); and
 - (c) any one or more of the licensees issues or transfers a financial product of that kind as a result of the conduct;then, for the purposes of this Division:
 - (d) the person is taken, in respect of the conduct, to have acted *within authority* in relation to the licensee or to each licensee

Section 917B

who issued or transferred a financial product of that kind as a result of the conduct; and

- (e) the person is, in respect of the conduct, taken not to have acted ***within authority*** in relation to any licensee who did not issue or transfer a financial product of that kind as a result of the conduct.

917B Responsibility if representative of only one licensee

If the representative is the representative of only one financial services licensee, the licensee is responsible, as between the licensee and the client, for the conduct of the representative, whether or not the representative's conduct is within authority.

917C Representatives of multiple licensees

- (1) This section applies if the representative is the representative of more than one financial services licensee.

Financial service covered by only one authority

- (2) If:
 - (a) the representative is the representative of one of the licensees only in respect of a particular class of financial service; and
 - (b) the conduct relates to that class of service;that licensee is responsible for the conduct, as between that licensee and the client, whether or not the conduct is within authority.

Financial service covered by multiple authorities: conduct within authority for one or more of them

- (3) If:
 - (a) the representative is the representative of more than one of the licensees in respect of a particular class of financial service; and
 - (b) the conduct relates to that class of service; and
 - (ba) the conduct relates to a particular kind of financial product prescribed by regulations made for the purposes of this paragraph; and
 - (c) the conduct is within authority in relation to:

- (i) only one of those licensees (the *authorising licensee*);
or
- (ii) two or more of those licensees (the *authorising licensees*);

then:

- (d) if subparagraph (c)(i) applies—the authorising licensee is responsible for the conduct, as between that licensee and the client; or
- (e) if subparagraph (c)(ii) applies—the authorising licensees are jointly and severally responsible for the conduct, as between themselves and the client.

All other cases

- (4) In any other case, all of the licensees are jointly and severally responsible for the conduct, as between themselves and the client, whether or not the representative’s conduct is within authority in relation to any of them.

917D Exception if lack of authority is disclosed to client

A financial services licensee is not responsible under section 917B or 917C for the conduct of their representative if:

- (a) the conduct is not within authority in relation to the licensee (or in relation to any of the licensees, if there were more than one); and
- (b) the representative disclosed that fact to the client before the client relied on the conduct; and
- (c) the clarity and the prominence of the disclosure was such as a person would reasonably require for the purpose of deciding whether to acquire the relevant financial service.

Note: A person must not hold out that conduct, or proposed conduct, of the person is within authority in relation to a particular financial services licensee, unless that is the case. See section 911C.

917E Responsibility extends to loss or damage suffered by client

The responsibility of a financial services licensee under this Division extends so as to make the licensee liable to the client in respect of any loss or damage suffered by the client as a result of the representative’s conduct.

Section 917F

917F Effect of Division

- (1) If a financial services licensee is responsible for the conduct of their representative under this Division, the client has the same remedies against the licensee that the client has against the representative.
- (2) The licensee and the representative (along with any other licensees who are also responsible) are all jointly and severally liable to the client in respect of those remedies.
- (3) However, nothing in this Division imposes:
 - (a) any criminal responsibility; or
 - (b) any civil liability under a provision of this Act apart from this Division;on a financial services licensee that would not otherwise be imposed on the licensee.
- (4) This Division does not relieve a representative of a financial services licensee of any liability they have to the client or the licensee.
- (5) An agreement is void in so far as it purports to alter or restrict the operation of section 917B, 917C, 917D or 917E.
- (6) However, subsection (5) does not apply to the extent that the agreement:
 - (a) provides for a representative of a financial services licensee to indemnify the licensee for a liability of the licensee in respect of the representative; or
 - (b) provides for a financial services licensee, for whom a representative acts, to indemnify another financial services licensee for a liability in respect of the representative.
- (7) A financial services licensee must not make, or offer to make, an agreement that is, or would be, void under subsection (5).

Division 8—Banning or disqualification of persons from providing financial services

Subdivision A—Banning orders

920A ASIC's power to make a banning order

- (1) ASIC may make a banning order against a person, by giving written notice to the person, if:
 - (a) ASIC suspends or cancels an Australian financial services licence held by the person; or
 - (b) the person has not complied with their obligations under section 912A; or
 - (ba) ASIC has reason to believe that the person will not comply with their obligations under section 912A; or
 - (bb) the person becomes an insolvent under administration; or
 - (c) the person is convicted of fraud; or
 - (e) the person has not complied with a financial services law; or
 - (f) ASIC has reason to believe that the person will not comply with a financial services law.
- (2) However, ASIC may only make a banning order against a person after giving the person an opportunity:
 - (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC on the matter.
- (3) Subsection (2) does not apply in so far as ASIC's grounds for making the banning order are or include the following:
 - (a) that the suspension or cancellation of the relevant licence took place under section 915B;
 - (b) that the person has been convicted of serious fraud.

920B What is a *banning order*?

- (1) A ***banning order*** is a written order that prohibits a person from providing any financial services or specified financial services in specified circumstances or capacities.

Section 920C

- (2) The order may prohibit the person against whom it is made from providing a financial service:
 - (a) permanently; or
 - (b) for a specified period, unless ASIC has reason to believe that the person is not of good fame or character.
- (3) A banning order may include a provision allowing the person against whom it was made, subject to any specified conditions:
 - (a) to do specified acts; or
 - (b) to do specified acts in specified circumstances;that the order would otherwise prohibit them from doing.

920C Effect of banning orders

- (1) A person against whom a banning order is made cannot be granted an Australian financial services licence contrary to the banning order.
- (2) A person contravenes this subsection if:
 - (a) the person engages in conduct; and
 - (b) the conduct breaches a banning order that has been made against the person.

Note: A contravention of this subsection is an offence (see subsection 1311(1)).

920D Variation or cancellation of banning orders

- (1) ASIC may vary or cancel a banning order, by giving written notice to the person against whom the order was made, if ASIC is satisfied that it is appropriate to do so because of a change in any of the circumstances based on which ASIC made the order.
- (2) ASIC may do so:
 - (a) on its own initiative; or
 - (b) if the person against whom the order was made lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

- (3) If ASIC proposes not to vary or cancel a banning order in accordance with an application lodged by a person under paragraph (2)(b), ASIC must give the person an opportunity:
 - (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC on the matter.

920E Date of effect and publication of banning order, variation or cancellation

- (1) A banning order, or variation or cancellation of a banning order, takes effect when it is given to the person against whom the order is or was made.
- (2) ASIC must publish a notice in the *Gazette* as soon as practicable after making, varying or cancelling a banning order. The notice must state when the action took effect and:
 - (a) in the case of the making of a banning order—set out a copy of the banning order; or
 - (b) in the case of the variation of a banning order—set out a copy of the banning order as varied.
- (3) However, if the banning order contains a provision of the kind referred to in subsection 920B(3) and ASIC considers that the *Gazette* notice would be unreasonably long if that provision were included, the notice may instead set out a summary of the provision's effect.
- (4) If ASIC makes a banning order against a person who is a participant in a licensed market or a licensed CS facility, or varies a banning order against such a person, ASIC must give the operator of the market or facility written notice of the making of the order or the variation.

920F Statement of reasons

- (1) A banning order given to a person must be accompanied by a statement of reasons for the order.
- (2) If ASIC varies a banning order made against a person, ASIC must, on request by the person, give the person a statement of reasons for the variation.

Section 921A

Subdivision B—Disqualification by the Court

921A Disqualification by the Court

- (1) ASIC may apply to the Court for an order or orders under this section in relation to a person if ASIC:
 - (a) cancels an Australian financial services licence held by the person; or
 - (b) makes a banning order against the person that is to operate permanently.
- (2) The Court may make:
 - (a) an order disqualifying the person, permanently or for a specified period, from providing any financial services, or specified financial services, in specified circumstances or capacities; or
 - (b) any other order the Court considers appropriate.
- (3) The Court may revoke or vary an order made under subsection (2).
- (4) A person against whom such an order is made cannot be granted an Australian financial services licence contrary to the order.
- (5) If the Court makes or varies an order under this section in relation to a person who is a participant in a licensed market or a licensed CS facility, ASIC must give the operator of the market or facility written notice of the making of the order or the variation.

Division 9—Registers relating to financial services

922A Registers relating to financial services

- (1) ASIC must establish and maintain one or more registers relating to financial services.
- (2) The regulations may prescribe the way in which the register or registers must be established or maintained, including the details that ASIC must enter in the register or registers in respect of the following persons or bodies:
 - (a) financial services licensees;
 - (b) authorised representatives of financial services licensees;
 - (c) persons against whom a banning order or disqualification order under Division 8 is made;
 - (e) any other persons or bodies that are prescribed by regulations made for the purposes of this paragraph.

922B Inspection of Registers

- (1) A person may inspect the register or registers relating to financial services established under this Division and may make copies of, or take extracts from, the register or registers.
- (2) The regulations may prescribe the fees that a person must pay ASIC to do the things mentioned in subsection (1).
- (3) Any disclosure necessary for the purposes of this section is authorised by this section.

Division 10—Restrictions on use of terminology

923A Restriction on use of certain words or expressions

- (1) A person contravenes this subsection if:
- (a) either:
 - (i) the person carries on a financial services business or provides a financial service (whether or not on behalf of another person); or
 - (ii) another person (the *provider*) provides a financial service on behalf of the first person; and
 - (b) the first person assumes or uses, in this jurisdiction, a restricted word or expression in relation to that business or service.

Note 1: For the meanings of *restricted word or expression* and *assume or use*, see subsection (5).

Note 2: A contravention of this subsection is an offence (see subsection 1311(1)).

- (2) However, it is not a contravention of subsection (1) for a person to assume or use a restricted word or expression if:
- (a) the person does not receive any of the following:
 - (i) commissions (apart from commissions that are rebated in full to the person's clients);
 - (ii) forms of remuneration calculated on the basis of the volume of business placed by the person with an issuer of a financial product;
 - (iii) other gifts or benefits from an issuer of a financial product which may reasonably be expected to influence the person; and
 - (b) none of the following persons receives any of the things covered by paragraph (a):
 - (i) the person's employer (if any);
 - (ii) if the person provides the financial service on behalf of another person (as mentioned in subparagraph (1)(a)(i))—that other person;
 - (iii) any other person identified (whether by reference to a class of person or otherwise) in regulations made for the purposes of this subparagraph; and

- (c) if subparagraph (1)(a)(ii) applies in relation to a financial service—the provider mentioned in that subparagraph does not receive any of the things mentioned in paragraph (a) of this subsection in respect of the provision of that service; and
- (d) in carrying on a financial services business, or providing financial services, the person operates free from direct or indirect restrictions relating to the financial products in respect of which they provide financial services; and
- (e) in carrying on that business, or providing those services, the person operates without any conflicts of interest that might:
 - (i) arise from their associations or relationships with issuers of financial products; and
 - (ii) reasonably be expected to influence the person in carrying on the business or providing the services.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

- (3) The reference in paragraph (2)(d) to direct or indirect restrictions does not include a reference to restrictions imposed on a person by:
 - (a) the conditions on an Australian financial services licence; or
 - (b) this Chapter or regulations made for the purposes of this Chapter.
- (4) If a person assumes or uses a word or expression in circumstances that give rise to the person committing an offence based on subsection (1) of this section, the person is guilty of such an offence in respect of:
 - (a) the first day on which the offence is committed; and
 - (b) each subsequent day (if any) on which the circumstances that gave rise to the person committing the offence continue (including the day of conviction for any such offence or any later day).
- (5) In this section:
 - (a) a reference to a restricted word or expression is a reference to:
 - (i) the word *independent*, *impartial* or *unbiased*; or
 - (ii) any other word or expression specified in the regulations as a restricted word or expression for the purposes of this section; or

Section 923B

- (iii) any other word or expression (whether or not in English) that is of like import to a word or expression covered by any of the previous subparagraphs; and
- (b) a reference to a word or expression being assumed or used includes a reference to the word or expression being assumed or used:
 - (i) as part of another word or expression; or
 - (ii) in combination with other words, letters or other symbols.

923B Restriction on use of certain words or expressions unless authorised in licence conditions

- (1) A person contravenes this subsection if:
 - (a) the person carries on a financial services business or provides a financial service (whether or not on behalf of another person); and
 - (b) the person assumes or uses, in this jurisdiction, a restricted word or expression in relation to that business or service; and
 - (c) the person is not authorised, by the conditions on an Australian financial services licence held by the person, or by a person in relation to whom they are a representative, to assume or use that word or expression (see subsection (3)).

Note 1: For the meanings of *restricted word or expression* and *assume or use*, see subsection (4).

Note 2: A contravention of this subsection is an offence (see subsection 1311(1)).

- (2) If a person assumes or uses a word or expression in circumstances that give rise to the person committing an offence based on subsection (1), the person is guilty of such an offence in respect of:
 - (a) the first day on which the offence is committed; and
 - (b) each subsequent day (if any) on which the circumstances that gave rise to the person committing the offence continue (including the day of conviction for any such offence or any later day).
- (3) ASIC can only impose a condition on an Australian financial services licence authorising a person to assume or use a restricted word or expression in these circumstances:

- (a) in the case of a word or expression covered by subparagraph (4)(a)(i)—if the person:
 - (i) can, under the licence, provide a financial service relating to securities (whether or not the person can provide other financial services under the licence as well); and
 - (ii) is a participant in a licensed market whose licence covers dealings in securities;
 - (b) in the case of a word or expression covered by subparagraph (4)(a)(ii)—if the person:
 - (i) can, under the licence, provide a financial service relating to derivatives (whether or not the person can provide other financial services under the licence as well); and
 - (ii) is a participant in a licensed market whose licence covers dealings in derivatives;
 - (c) in the case of a word or expression covered by subparagraph (4)(a)(iii)—if the person:
 - (i) can, under the licence, provide a financial service relating to contracts of insurance (whether or not the person can provide other financial services under the licence as well); and
 - (ii) in providing that service, acts on behalf of intending insureds;
 - (d) in the case of a word or expression covered by subparagraph (4)(a)(iv)—if the person:
 - (i) can, under the licence, provide a financial service relating to contracts of general insurance (whether or not the person can provide other financial services under the licence as well); and
 - (ii) in providing that service, acts on behalf of intending insureds;
 - (e) in the case of a word or expression covered by subparagraph (4)(a)(v)—if the person:
 - (i) can, under the licence, provide a financial service relating to contracts of life insurance (whether or not the person can provide other financial services under the licence as well); and
 - (ii) in providing that service, acts on behalf of intending insureds;
-

Section 923B

- (f) in the case of a word or expression covered by subparagraph (4)(a)(vi)—in the circumstances (if any) that are prescribed by regulations made for the purposes of this paragraph, or after ASIC has considered the matters (if any) that are so prescribed.
- (4) In this section:
 - (a) a reference to a restricted word or expression is a reference to:
 - (i) the expression ***stockbroker*** or ***sharebroker***, or any other word or expression (whether or not in English) that is of like import to that expression; or
 - (ii) the expression ***futures broker***, or any other word or expression (whether or not in English) that is of like import to that expression; or
 - (iii) the expression ***insurance broker*** or ***insurance broking***, or any other word or expression (whether or not in English) that is of like import to that expression; or
 - (iv) the expression ***general insurance broker***, or any other word or expression (whether or not in English) that is of like import to that expression; or
 - (v) the expression ***life insurance broker***, or any other word or expression (whether or not in English) that is of like import to that expression; or
 - (vi) any other expression or word specified in the regulations as a restricted word or expression for the purposes of this section, or any other word or expression (whether or not in English) that is of like import to such a word or expression; and
 - (b) a reference to a word or expression being assumed or used includes a reference to the word or expression being assumed or used:
 - (i) as part of another word or expression; or
 - (ii) in combination with other words, letters or other symbols; and
 - (c) ***contract of insurance*** and ***insured*** have the same meanings as in Division 4 of Part 7.8.

Division 11—Agreements with unlicensed persons relating to the provision of financial services

Subdivision A—Agreements affected

924A Agreements with certain unlicensed persons

- (1) Subdivision B applies to an agreement entered into by a person (in this section and Subdivision B called the ***non-licensee***) and another person (in this section and Subdivision B called the ***client***) (not being a financial services licensee) that constitutes, or relates to, the provision of a financial service by the non-licensee if:
 - (a) the agreement is entered into in the course of a financial services business carried on by the non-licensee; and
 - (b) the non-licensee does not hold an Australian financial services licence covering the provision of the financial service, and is not exempt from the requirement to hold such a licence.

Note: It does not matter whether the financial service is provided to the client as a wholesale client or as a retail client.

- (2) Subdivision B applies to the agreement whether or not anyone else is a party to the agreement.

Subdivision B—Effect on agreements

925A Client may give notice of rescission

- (1) Subject to this section, the client may, whether before or after completion of the agreement, give to the non-licensee a written notice stating that the client wishes to rescind the agreement.
- (2) The client may only give a notice under this section within a reasonable period after becoming aware of the facts entitling the client to give the notice.
- (3) The client is not entitled to give a notice under this section if the client engages in conduct by engaging in which the client would, if the entitlement so to give a notice were a right to rescind the

Section 925B

agreement for misrepresentation by the non-licensee, be taken to have affirmed the agreement.

- (4) The client is not entitled to give a notice under this section if, within a reasonable period before the agreement was entered into, the non-licensee informed the client (whether or not in writing) that the non-licensee did not hold an Australian financial services licence.
- (5) If, at a time when an Australian financial services licence held by the non-licensee was suspended, the non-licensee informed the client that the licence was suspended, the non-licensee is to be taken for the purposes of subsection (4) to have informed the client at that time that the non-licensee did not hold the licence.
- (6) None of subsections (2), (3) and (4) limits the generality of either of the others.
- (7) Subject to this section, the client may give a notice under this section whether or not:
 - (a) the notice will result under section 925B in rescission of the agreement; or
 - (b) the Court will, if the notice so results, be empowered to make a particular order, or any order at all, under section 925D.

925B Effect of notice under section 925A

A notice given under section 925A rescinds the agreement unless rescission of the agreement would prejudice a right, or an estate in property, acquired by a person (other than the non-licensee) in good faith, for valuable consideration and without notice of the facts entitling the client to give the notice.

925C Client may apply to Court for partial rescission

- (1) If the client gives a notice under section 925A but the notice does not rescind the agreement because rescission of it would prejudice a right or estate of the kind referred to in section 925B, the client may, within a reasonable period after giving the notice, apply to the Court for an order under subsection (4) of this section.
- (2) The Court may extend the period for making an application under subsection (1).

Section 925D

- (3) If an application is made under subsection (1), the Court may make such orders expressed to have effect until the determination of the application as it would have power to make if the notice had rescinded the agreement under section 925B and the application were for orders under section 925D.
- (4) On an application under subsection (1), the Court may make an order:
 - (a) varying the agreement in such a way as to put the client in the same position, as nearly as can be done without prejudicing such a right or estate acquired before the order is made, as if the agreement had not been entered into; and
 - (b) declaring the agreement to have had effect as so varied at and after the time when it was originally made.
- (5) If the Court makes an order under subsection (4), the agreement is to be taken for the purposes of section 925D to have been rescinded under section 925B.
- (6) An order under subsection (4) does not affect the application of section 925F or 925H in relation to the agreement as originally made or as varied by the order.

925D Court may make consequential orders

- (1) Subject to subsection (2), on rescission of the agreement under section 925B, the Court, on the application of the client or the non-licensee, may make such order or orders as it would have power to make if the client had duly rescinded the agreement because of misrepresentation by the non-licensee.
- (2) The Court is not empowered to make a particular order under subsection (1) if the order would prejudice a right, or an estate in property, acquired by a person (other than the non-licensee) in good faith, for valuable consideration and without notice of the facts entitling the client to give the notice.

925E Agreement unenforceable against client

- (1) This section:
 - (a) applies while both of the following are the case:
 - (i) the client is entitled to give a notice under section 925A;

Section 925F

- (ii) a notice so given will result under section 925B in rescission of the agreement; and
 - (b) applies after the agreement is rescinded under section 925B; but does not otherwise apply.
- (2) The non-licensee is not entitled, as against the client:
 - (a) to enforce the agreement, whether directly or indirectly; or
 - (b) to rely on the agreement, whether directly or indirectly and whether by way of defence or otherwise.

925F Non-licensee not entitled to recover commission

- (1) Without limiting the generality of section 925E, this section:
 - (a) applies while the client is entitled to give a notice under section 925A; and
 - (b) applies after the client so gives a notice, even if the notice does not result under section 925B in rescission of the agreement; but does not otherwise apply.
- (2) The non-licensee is not entitled to recover by any means (including, for example, set-off or a claim on a *quantum meruit*) any brokerage, commission or other fee for which the client would, but for this section, have been liable to the non-licensee under or in connection with the agreement.

925G Onus of establishing non-application of section 925E or 925F

For the purposes of determining, in a proceeding in a court, whether or not the non-licensee is, or was at a particular time, entitled as mentioned in subsection 925E(2) or 925F(2), it is to be presumed, unless the contrary is proved, that section 925E or 925F, as the case may be, applies, or applied at that time, as the case may be.

925H Client may recover commission paid to non-licensee

- (1) Without limiting the generality of section 925D, if the client gives a notice under section 925A, the client may, even if the notice does not result under section 925B in rescission of the agreement, recover from the non-licensee as a debt the amount of any

Section 925I

brokerage, commission or other fee that the client has paid to the non-licensee under or in connection with the agreement.

- (2) ASIC may, if it considers that it is in the public interest to do so, bring an action under subsection (1) in the name of, and for the benefit of, the client.

925I Remedies under this Division additional to other remedies

The client's rights and remedies under this Division are additional to, and do not prejudice, any other right or remedy of the client.

Division 12—Miscellaneous

926A Exemptions and modifications by ASIC

- (1) The *provisions to which this section applies* are all provisions of this Part other than Divisions 4 and 8.
- (2) ASIC may:
 - (a) exempt a person or class of persons from all or specified provisions to which this section applies; or
 - (b) exempt a financial product or class of financial products from all or specified provisions to which this section applies; or
 - (c) declare that provisions to which this section applies apply in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) An exemption or declaration is a legislative instrument if the exemption or declaration is expressed to apply in relation to a class of persons or a class of financial products (whether or not it is also expressed to apply in relation to one or more persons or products identified otherwise than by reference to membership of a class).
- (4A) If subsection (4) does not apply to an exemption or declaration, the exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (2)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the requirements of the *Legislative Instruments Act 2003* (if the declaration is of a kind referred to in subsection (4)), or with the gazettal requirement of subsection (4A), as the case may be):

Section 926B

- (a) the text of the declaration was made available by ASIC on the Internet; or
- (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

- (6) For the purpose of this section, the *provisions to which this section applies* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in those provisions; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to those provisions.

Note: Because of section 761H, a reference to the provisions to which this section applies, or to provisions of Part 10.2, also includes a reference to regulations or other instruments made for the purposes of those provisions.

926B Exemptions and modifications by regulations

- (1) The regulations may:
 - (a) exempt a person or class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or
 - (c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (2) For the purpose of this section, the *provisions of this Part* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Part 7.7—Financial services disclosure

Division 1—Preliminary

940A How Part applies if a financial services licensee is acting as authorised representative

If a financial services licensee is, in providing a financial service, acting as the authorised representative of another financial services licensee (see section 916E), this Part applies to the first-mentioned licensee, in relation to the service, in the capacity of authorised representative (rather than the capacity of licensee).

940B What if there is no reasonable opportunity to give a document, information or statement required by this Part?

(1) If:

- (a) apart from this section, a person (the *providing entity*) would be required by a provision of this Part to give another person (the *client*) a particular document (for example, a Financial Services Guide or a Statement of Advice), or particular information or a particular statement; and
- (b) the providing entity has not had a reasonable opportunity to give (in accordance with section 940C) the client the document, information or statement by the time they are required by this Part to give it to the client;

the fact that the providing entity has not given the document, information or statement to the client as required by the provision is not a contravention of the provision.

Note: In a prosecution for an offence, a defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3) of the *Criminal Code*).

- (2) For the purposes of subsection (1), the providing entity is not taken not to have had a reasonable opportunity to provide the document, information or statement if:
 - (a) section 940C (or regulations made for the purposes of that section) permit the document, information or statement to be sent to an address (including an electronic address) or fax number nominated by the client; and

Section 940C

- (b) the client has not given the providing entity an address (including an electronic address) or fax number to which the document, information or statement can be sent; but
- (c) the providing entity has had a reasonable opportunity to make, but has not made, reasonable enquiries of the client to obtain such an address or fax number.

940C How documents, information and statements are to be given

- (1) For the purposes of this Part (unless a contrary intention appears), a Financial Services Guide, a Supplementary Financial Services Guide or a Statement of Advice is given by a person (the *providing entity*) to another person (the *client*) if (and only if):
 - (a) it is:
 - (i) given to the client, or to the client's agent, personally; or
 - (ii) sent to the client, or the client's agent, at an address (including an electronic address) or fax number nominated by the client or the client's agent; or
 - (iii) otherwise made available to the client, or the client's agent, as agreed between the client, or the client's agent, and the providing entity; and
 - (b) it is in printed or electronic form.
- (2) For the purposes of this Part (unless a contrary intention appears), information that subsection 941C(7) or 946B(6) requires to be given by a person (the *providing entity*) to another person (the *client*) is given by the providing entity to the client if (and only if):
 - (a) it is given to the client, or the client's agent, orally; or
 - (b) it is in printed or electronic form and is:
 - (i) given to the client, or the client's agent, personally; or
 - (ii) sent to the client, or the client's agent, at an address (including an electronic address) or fax number nominated by the client or the client's agent; or
 - (iii) otherwise made available to the client, or the client's agent, as agreed between the client or the client's agent and the providing entity; or
 - (c) it is given by some other method permitted by regulations made for the purposes of this paragraph.
- (3) For the purposes of this Part (unless a contrary intention appears), information that subsection 941C(5), paragraph 946AA(5)(b) or

Section 940C

subsection 946B(3) or (8) requires to be given by a person (the *providing entity*) to another person (the *client*) is given by the providing entity to the client if (and only if) it is given to the client, or the client's agent, in accordance with the applicable requirements of regulations made for the purposes of this subsection.

- (4) For the purposes of this Part (unless a contrary intention appears), a statement that subsection 941D(2) or 946C(2) requires to be given by a person (the *providing entity*) to another person (the *client*) is given by the providing entity to the client if (and only if) it is given orally to the client or the client's agent.
- (5) For the purposes of this section, a document, information or statement to which this section applies is sent to a person at an address if, and only if:
 - (a) the document, information or statement is sent to the address; and
 - (b) either:
 - (i) the envelope or other container in which it is sent; or
 - (ii) the message that accompanies it;is addressed to the person.
- (6) A document, information or statement to which this section applies may be given or sent to a person's agent only if the agent is not acting as the person's agent in one of the following capacities:
 - (a) a financial services licensee;
 - (b) an authorised representative of a financial services licensee;
 - (d) a person who is not required to hold an Australian financial services licence because the person is covered by:
 - (i) paragraph 911A(2)(j); or
 - (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or
 - (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l);
 - (e) a person who is required to hold an Australian financial services licence but who does not hold such a licence;
 - (f) an employee, director or other representative of a person referred to in paragraph (a), (b), (c), (d) or (e).

Section 940D

- (7) The regulations may specify requirements as to:
- (a) the manner in which a document, information or statement may be given to a person; and
 - (b) the presentation, structure and format for a document, information or statement that is to be given in electronic form.

The giving of the document, information or statement is not effective unless those requirements are satisfied.

940D General approach to offence provisions

Subdivision A of Division 7 contains provisions creating offences by reference to various rules contained in Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

Section 941A

Division 2—Person provided with financial service as retail client to be given a Financial Services Guide

Subdivision A—Requirement for a Financial Services Guide to be given

941A Obligation on financial services licensee to give a Financial Services Guide if financial service provided to person as a retail client

- (1) A financial services licensee (the *providing entity*) must give a person a Financial Services Guide in accordance with this Division if the providing entity provides a financial service to the person (the *client*) as a retail client.
- (2) This section has effect subject to section 941C.

941B Obligation on authorised representative to give a Financial Services Guide if financial service provided to person as a retail client

- (1) An authorised representative (the *providing entity*) of a financial services licensee (the *authorising licensee*), or of 2 or more financial services licensees (the *authorising licensees*), must give a person a Financial Services Guide in accordance with this Division if the providing entity, as a representative of the authorising licensee, or one or more of the authorising licensees, provides a financial service to the person (the *client*) as a retail client.

Note: If the providing entity is the authorised representative of 2 or more financial services licensees, each of those licensees is, for the purposes of this Division, an authorising licensee in relation to the financial service provided to the client, even though the providing entity may not have been acting as representative of each of those licensees in providing the service to the client.

- (2) A Financial Services Guide must not be given to the person by the providing entity unless the authorising licensee, or each of the authorising licensees, has authorised its distribution by the providing entity.
- (3) This section has effect subject to section 941C.

941C Situations in which a Financial Services Guide is not required

Client has already received the information

- (1) The providing entity does not have to give the client a Financial Services Guide (the **new FSG**) if the client has already received a Financial Services Guide that contains all of the information that the new FSG is required to contain.

Providing entity is product issuer dealing in own products

- (2) The providing entity does not have to give the client a Financial Services Guide if:
 - (a) the providing entity is an issuer of financial products; and
 - (b) the financial service is a dealing (see section 766C) in financial products, other than derivatives able to be traded on a licensed market, issued by the providing entity, and does not also relate to financial products issued by someone else.

Note: The issuer will however have to comply with the Product Disclosure Statement requirements (see Division 2 of Part 7.9).

Providing entity is merely operating a registered scheme

- (3) The providing entity does not have to give the client a Financial Services Guide if:
 - (a) the providing entity is the responsible entity of a registered scheme; and
 - (b) the financial service consists only of the operation of that scheme by the providing entity.

Financial product advice given to the public

- (4) The providing entity does not have to give the client a Financial Services Guide if the financial service is general advice provided to the public, or a section of the public, in the manner prescribed by regulations made for the purposes of this subsection.
- (5) However, if subsection (4) applies and the client is not given a Financial Services Guide before the advice is provided, the client must instead, before the advice is provided, be given the information that would be required to be in the Financial Services Guide by paragraphs 942B(2)(a), (e) and (f), or paragraphs 942C(2)(a), (c), (f) and (g), as the case requires.

Section 941D

Certain basic deposit and other products

- (6) The providing entity does not have to give the client a Financial Services Guide if the financial service is a dealing (see section 766C) in, is the provision of financial product advice (see section 766B) about, or in any other way relates to, any of the following:
 - (a) a basic deposit product;
 - (b) a facility for making non-cash payments (see section 763D) that is related to a basic deposit product;
 - (c) a financial product of a kind prescribed by regulations made for the purposes of this paragraph.
- (7) However, if subsection (6) applies and the client is not given a Financial Services Guide before the service is provided, the client must instead, before the service is provided, be given the information that would be required to be in the Financial Services Guide by paragraphs 942B(2)(a) and (h), or paragraphs 942C(2)(a) and (i), as the case requires.

Regulations may specify other exemptions

- (8) A Financial Services Guide does not have to be given to the client in circumstances specified in regulations made for the purposes of this subsection.

941D Timing of giving Financial Services Guide

General rule

- (1) Subject to this section, the Financial Services Guide must be given to the client as soon as practicable after it becomes apparent to the providing entity that the financial service will be, or is likely to be, provided to the client, and must in any event be given to the client before the financial service is provided.

Time critical cases

- (2) If:
 - (a) the client expressly instructs that they require the financial service to be provided immediately, or by a specified time; and

Section 941E

- (b) it is not reasonably practicable to give the Financial Services Guide to the client before the service is provided as so instructed;
the providing entity must instead give the client a statement that complies with subsection (3) before the service is provided.
- (3) The statement must contain:
 - (a) the information that would be required to be in the Financial Services Guide by paragraphs 942B(2)(e), (f) and (i), or paragraphs 942C(2)(f), (g) and (j), as the case requires; and
 - (b) such other information as would be required to be in the Financial Services Guide as is particularly relevant to the financial service to be provided.
- (4) The client must then be given the Financial Services Guide within 5 days after being given the statement, or sooner if practicable.

941E Information must be up to date

The information in the Financial Services Guide must be up to date as at the time when it is given to the client.

Note: A Supplementary Financial Services Guide containing updated information may be given with a Financial Services Guide that has become out of date. The updated information is taken to be included in the Financial Services Guide (see section 943D.)

941F Obligation to give updated Financial Services Guide

If:

- (a) the Financial Services Guide is given to the client before the financial service is provided; and
- (b) the following conditions are satisfied:
 - (i) there is a change in circumstances before the service is provided, and the Financial Services Guide does not contain the information it would be required to contain if it were given to a person immediately after that change;
 - (ii) the fact that the Financial Services Guide does not contain the up to date information is materially adverse from the point of view of a reasonable person deciding, as a retail client, whether to proceed to be provided with the financial service;

Section 942A

the providing entity must, before the service is provided, give the client:

- (c) another Financial Services Guide that contains the up to date information before the service is provided; or
- (d) a Supplementary Financial Services Guide (see Subdivision C) that updates the information in the Financial Services Guide.

Subdivision B—Content and authorisation of Financial Services Guide

942A Title of Financial Services Guide

- (1) The title “Financial Services Guide” must be used on the cover of, or at or near the front of, a Financial Services Guide.
- (2) In any other part of a Financial Services Guide, “Financial Services Guide” may be abbreviated to “FSG”.

942B Financial Services Guide given by financial services licensee—main requirements

- (1) This section applies if the providing entity is a financial services licensee.
- (2) Subject to subsection (3) and to the regulations (see subsection (4)), the Financial Services Guide must include the following statements and information:
 - (a) a statement setting out the name and contact details of the providing entity; and
 - (b) a statement setting out any special instructions about how the client may provide instructions to the providing entity; and
 - (c) information about the kinds of financial services (the *authorised services*) that the providing entity is authorised by its licence to provide, and the kinds of financial products to which those services relate; and
 - (d) information about who the providing entity acts for when providing the authorised services; and
 - (e) information about the remuneration (including commission) or other benefits that any of the following is to receive in

Section 942B

respect of, or that is attributable to, the provision of any of the authorised services:

- (i) the providing entity;
 - (ii) a related body corporate of the providing entity;
 - (iii) a director or employee of the providing entity or a related body corporate;
 - (iv) an associate of any of the above;
 - (v) any other person in relation to whom the regulations require the information to be provided;
- (f) information about any associations or relationships between the providing entity, or any related body corporate, and the issuers of any financial products, being associations or relationships that might reasonably be expected to be capable of influencing the providing entity in providing any of the authorised services; and
- (g) if the providing entity provides further market-related advice (see subsection 946B(1)) or advice to which subsection 946B(7) applies—a statement in relation to which the following requirements are satisfied:
- (i) the statement must indicate that the client may request a record of that advice, if they have not already been provided with a record of that advice;
 - (ii) the statement must set out particulars of how the client may request such a record;
 - (iii) any limitations in those particulars on the time within which the client may request such a record must be consistent with any applicable requirements in regulations made for the purposes of this subparagraph or, if there are no such applicable requirements, must be such as to allow the client a reasonable opportunity to request a record of the advice; and
- (h) information about the dispute resolution system that covers complaints by persons to whom the providing entity provides financial services, and about how that system may be accessed; and
- (i) if the providing entity acts under a binder in providing any of the authorised services—a statement that:
- (i) identifies the services provided under the binder; and
 - (ii) states that they are provided under a binder; and

Section 942B

- (iii) explains the significance of the services being provided under a binder; and
- (j) if the providing entity is a participant in a licensed market or a licensed CS facility—a statement that the providing entity is a participant in that market or facility; and
- (k) any other statements or information required by the regulations.

Note: A Supplementary Financial Services Guide containing additional information may be given with a Financial Services Guide that does not contain all the required information. The additional information is taken to be included in the Financial Services Guide (see section 943D.)

- (3) Subject to subsection (4), the level of information about a matter that is required is such as a person would reasonably require for the purpose of making a decision whether to acquire financial services from the providing entity as a retail client.
- (4) The regulations may provide all or any of the following:
 - (a) that a provision of subsection (2) does not apply in a particular situation;
 - (b) that particular information is not required by a provision of subsection (2), either in a particular situation or generally;
 - (c) a more detailed statement of the information that is required by a provision of subsection (2), either in a particular situation or generally;
 - (d) that certain supplementary information must be given or made available to the client in some other way.
- (5) The Financial Services Guide must be dated. The date must be the date on which the Financial Services Guide was prepared or its preparation was completed.
- (6) The Financial Services Guide may also contain other information.
- (6A) The information included in the Financial Services Guide must be worded and presented in a clear, concise and effective manner.
- (7) The regulations may require the providing entity, in circumstances specified in the regulations, to provide the client, on request, with more detailed information about remuneration (including commission) or other benefits of a kind referred to in paragraph (2)(e).

- (8) If:
- (a) the Financial Services Guide includes a statement to the effect that a client may request a record of further market-related advice or advice to which subsection 946B(7) applies; and
 - (b) the client is provided with advice to which that statement applies; and
 - (c) the client has not already been provided with a record of that advice;
- the providing entity must comply with a request made in accordance with that statement for a record of that advice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

942C Financial Services Guide given by authorised representative— main requirements

- (1) This section applies if the providing entity is an authorised representative.
- (2) Subject to subsection (3) and to the regulations (see subsection (4)), the Financial Services Guide must include the following statements and information:
 - (a) a statement setting out the name and contact details of the providing entity; and
 - (b) a statement setting out any special instructions about how the client may provide instructions to the providing entity; and
 - (c) a statement:
 - (i) setting out the name and contact details of the authorising licensee, or of each of the authorising licensees; and
 - (ii) stating that the providing entity is the authorised representative of that licensee or those licensees; and
 - (d) information, in relation to the authorising licensee or each of the authorising licensees, about the kinds of financial services (the *authorised services*) that the providing entity provides as representative of the authorising licensee, and the kinds of financial products to which those services relate; and

Section 942C

- (e) information about who the authorising licensee, or each of the authorising licensees, acts for when financial services are provided on their behalf by the providing entity; and
- (f) information about the remuneration (including commission) or other benefits that any of the following is to receive in respect of, or that is attributable to, the provision of any of the authorised services:
 - (i) the providing entity;
 - (ii) an employer of the providing entity;
 - (iii) the authorising licensee, or any of the authorising licensees;
 - (iv) an employee or director of the authorising licensee, or of any of the authorising licensees;
 - (v) an associate of any of the above;
 - (vi) any other person in relation to whom the regulations require the information to be provided; and
- (g) information about any associations or relationships between:
 - (i) the providing entity, or any employer of the providing entity, and the issuers of any financial products; or
 - (ii) the authorising licensee, or any of the authorising licensees, or any related body corporate of the authorising licensee or any of the authorising licensees, and the issuers of any financial products;being associations or relationships that might reasonably be expected to be capable of influencing the providing entity in providing any of the authorised services; and
- (h) if the providing entity, when acting as representative of the authorising licensee or any of the authorising licensees, provides further market-related advice (see subsection 946B(1)) or advice to which subsection 946B(7) applies—a statement in relation to which the following requirements are satisfied:
 - (i) the statement must indicate that the client may request a record of that advice, if they have not already been provided with a record of that advice;
 - (ii) the statement must set out particulars of how the client may request such a record;
 - (iii) any limitations in those particulars on the time within which the client may request such a record must be

Section 942C

consistent with any applicable requirements in regulations made for the purposes of this subparagraph or, if there are no such applicable requirements, must be such as to allow the client a reasonable opportunity to request a record of the advice; and

- (i) information about the dispute resolution system that covers complaints by persons to whom the providing entity provides financial services when acting as representative of the authorising licensee or any of the authorising licensees, and about how that system may be accessed; and
- (j) if the providing entity acts under a binder in providing any of the authorised services—a statement that:
 - (i) identifies the services provided under the binder; and
 - (ii) states that they are provided under a binder; and
 - (iii) explains the significance of the services being provided under a binder; and
- (k) if the providing entity, or the authorising licensee or any of the authorising licensees, is a participant in a licensed market or a licensed CS facility—a statement that the providing entity or authorising licensee is a participant in that market or facility; and
- (l) a statement to the effect that the distribution of the Financial Services Guide by the providing entity has been authorised by the authorising licensee, or by each of the authorising licensees; and
- (m) any other statements or information required by the regulations.

Note: A Supplementary Financial Services Guide containing additional information may be given with a Financial Services Guide that does not contain all the required information. The additional information is taken to be included in the Financial Services Guide (see section 943D.)

- (3) Subject to subsection (4), the level of detail of information about a matter that is required is such as a person would reasonably require for the purpose of making a decision whether to acquire financial services from the providing entity as a retail client.
- (4) The regulations may provide all or any of the following:
 - (a) that a provision of subsection (2) does not apply in a particular situation;

Section 942D

- (b) that particular information is not required by a provision of subsection (2), either in a particular situation or generally;
 - (c) a more detailed statement of the information that is required by a provision of subsection (2), either in a particular situation or generally;
 - (d) that certain supplementary information must be given or made available to the client in some other way.
- (5) The Financial Services Guide must be dated. The date must be the date on which the Financial Services Guide was prepared or its preparation was completed.
- (6) The Financial Services Guide may also contain other information.
- (6A) The information included in the Financial Services Guide must be worded and presented in a clear, concise and effective manner.
- (7) The regulations may require the providing entity, in circumstances specified in the regulations, to provide the client, on request, with more detailed information about remuneration (including commission) or other benefits of a kind referred to in paragraph (2)(f).
- (8) If:
 - (a) the Financial Services Guide includes a statement to the effect that a client may request a record of further market-related advice or advice to which subsection 946B(7) applies; and
 - (b) the client is provided with advice to which that statement applies; and
 - (c) the client has not already been provided with a record of that advice;the providing entity must comply with a request made in accordance with that statement for a record of that advice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

942D Financial Services Guide may consist of 2 or more separate documents given at same time

- (1) Subject to this section, a Financial Services Guide may be made up of 2 or more separate documents that are given at the same time.

Section 942D

- (2) Each of the documents must have on the cover of the document, or at or near the front of the document, a statement:
- (a) to the effect that the document is part of a Financial Services Guide; and
 - (b) that (subject to subsection (3)) identifies the other documents that make up the Financial Services Guide.

- (3) If there are or may be different versions of a document referred to in paragraph (2)(b), the statement required by subsection (2) does not have to identify any particular one of those versions and may instead identify the document generically.

Note: For example, if a Financial Services Guide is made up of a core document that is not updated very frequently, and a separate document providing information about remuneration that is updated more frequently:

- (a) the statement in the core document need only refer to the fact that it, and a separate document about remuneration, make up the Financial Services Guide; and
 - (b) the statement in the document about remuneration need only refer to the fact that it, and a separate document about all other required matters, make up the Financial Services Guide.
- (4) The requirement of section 942A (title of Financial Services Guide) is taken to be satisfied if the title “Financial Services Guide” is used on the cover of, or at or near the front of, at least one of the documents that make up the Financial Services Guide.
- (5) The requirement of subsection 942B(5) or 942C(5) (dating of Financial Services Guide) must be separately complied with in relation to each of the documents. If, for any purpose, a single date needs to be determined as the date of the Financial Services Guide as a whole, that date is the most recent of the dates of those documents.
- (6) Section 942E applies to an alteration to one of the documents as though the reference in that section to the date specified in the Financial Services Guide were a reference to the date specified in the document.
- (7) The regulations may impose additional requirements to be complied with if a Financial Services Guide is made up of 2 or more documents.

Section 942DA

942DA Combining a Financial Services Guide and a Product Disclosure Statement in a single document

- (1) A Financial Services Guide and a Product Disclosure Statement may be combined in a single document (a ***combined FSG and PDS***) in circumstances specified in regulations made for the purposes of this section.
- (2) Those regulations may also provide that this Chapter applies in relation to a combined FSG and PDS as if specified provisions were omitted, modified or varied as specified in the regulations.
- (3) A Financial Services Guide and a Product Disclosure Statement must not be combined in a single document except as permitted under subsection (1).

942E Altering a Financial Services Guide after its preparation and before giving it to a person

A financial services licensee, or an authorised representative of a financial services licensee, must not, in purported compliance with a provision of this Part, give a person a Financial Services Guide (the ***FSG***) that has been altered (otherwise than pursuant to paragraph (b)) after the date specified in the FSG as required by subsection 942B(5) or 942C(5) unless:

- (a) the alteration was made by, or with the authority of:
 - (i) if section 942B applies to the FSG—the financial services licensee to which the FSG relates; or
 - (ii) if section 942C applies to the FSG—the financial services licensee, or each of the financial services licensees, who authorised the distribution of the FSG; and
- (b) if the alteration is a material alteration—the date of the FSG has been changed to the date on which the alteration was made.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Subdivision C—Supplementary Financial Services Guides

943A What a Supplementary Financial Services Guide is

- (1) A *Supplementary Financial Services Guide* is a document by which a person who has prepared a Financial Services Guide (the *FSG*) can:
 - (a) correct a misleading or deceptive statement in the FSG; or
 - (b) correct an omission from the FSG of information it is required to contain; or
 - (c) update the information contained in the FSG.
- (2) A Supplementary Financial Services Guide must not be given to a person by an authorised representative of a financial services licensee unless the licensee has authorised its distribution by the authorised representative.

943B Title of Supplementary Financial Services Guide

- (1) The title “Supplementary Financial Services Guide” must be used on the cover of, or at or near the front of, a Supplementary Financial Services Guide.
- (2) In any other part of a Supplementary Financial Services Guide, “Supplementary Financial Services Guide” may be abbreviated to “SFSG”.

943C Form of Supplementary Financial Services Guide

- (1) At the beginning of a Supplementary Financial Services Guide there must be:
 - (a) a statement that it is a Supplementary Financial Services Guide; and
 - (b) an identification of the Financial Services Guide that it supplements; and
 - (c) a statement that it is to be read together with that Financial Services Guide and any other specified Supplementary Financial Services Guides.
- (2) The Supplementary Financial Services Guide must be dated. The date must be the date on which the Supplementary Financial Services Guide was prepared or its preparation was completed.

Section 943D

- (3) If the Supplementary Financial Services Guide will or may be distributed by an authorised representative of a financial services licensee, it must contain a statement to the effect that its distribution by the authorised representative has been authorised by the licensee.

943D Effect of giving a person a Supplementary Financial Services Guide

If:

- (a) a person is given a Financial Services Guide (the *FSG*); and
- (b) at the same time, or later, they are given a Supplementary Financial Services Guide (the *SFSG*) that supplements the FSG;

the FSG is taken, from when the SFSG is given to the person, to include the information and statements contained in the SFSG.

943E Situation in which only a Supplementary Financial Services Guide need be given

If:

- (a) apart from this section, a person (the *providing entity*) would be required to give another person (the *client*) a Financial Services Guide (the *new FSG*); and
- (b) the client has, because of some previous conduct, already been given a Financial Services Guide (the *earlier FSG*) containing some, but not all, of the information that the new FSG is required to contain;

the provider may, instead of giving the client the new FSG, give the client a Supplementary Financial Services Guide that contains the additional information.

943F Altering a Supplementary Financial Services Guide after its preparation and before giving it to a person

A financial services licensee, or an authorised representative of a financial services licensee, must not, in purported compliance with a provision of this Part, give a person a Supplementary Financial Services Guide (the *SFSG*) that has been altered (otherwise than pursuant to paragraph (b)) after the date specified in the SFSG as required by subsection 943C(2) unless:

Section 943F

- (a) the alteration was made by, or with the authority of:
 - (i) if section 942B applies to the Financial Services Guide that the SFSG supplements—the financial services licensee to which the Guide relates; or
 - (ii) if section 942C applies to the Financial Services Guide that the SFSG supplements—the financial services licensee, or each of the financial services licensees, who authorised the distribution of the SFSG; and
- (b) if the alteration is a material alteration—the date of the SFSG has been changed to the date on which the alteration was made.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Division 3—Additional requirements for personal advice provided to a retail client

Subdivision A—When this Division applies

944A Situation in which Division applies

This Division applies in relation to the provision of personal advice (the *advice*) in the following circumstances:

- (a) the advice is provided:
 - (i) by a financial services licensee (the *providing entity*); or
 - (ii) by a person (the *providing entity*) in their capacity as authorised representative of a financial services licensee (the *authorising licensee*), or of 2 or more financial services licensees (the *authorising licensees*); and
- (b) the advice is provided to a person (the *client*) as a retail client.

Subdivision B—Requirements relating to basis of advice

945A Requirement to have a reasonable basis for the advice

- (1) The providing entity must only provide the advice to the client if:
 - (a) the providing entity:
 - (i) determines the relevant personal circumstances in relation to giving the advice; and
 - (ii) makes reasonable inquiries in relation to those personal circumstances; and
 - (b) having regard to information obtained from the client in relation to those personal circumstances, the providing entity has given such consideration to, and conducted such investigation of, the subject matter of the advice as is reasonable in all of the circumstances; and
 - (c) the advice is appropriate to the client, having regard to that consideration and investigation.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 945B

- (2) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1), it is a defence if:
- (a) the licensee had provided the authorised representative with information or instructions about the requirements to be complied with in relation to the giving of personal advice; and
 - (b) the representative's failure to comply with subsection (1) occurred because the representative was acting in reliance on that information or those instructions; and
 - (c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

- (3) A financial services licensee must take reasonable steps to ensure that an authorised representative of the licensee complies with subsection (1).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

945B Obligation to warn client if advice based on incomplete or inaccurate information

- (1) If:
- (a) the advice is based on information relating to the client's relevant personal circumstances that is incomplete or inaccurate; and
 - (b) the providing entity knows that the information is incomplete or inaccurate, or is reckless as to whether it is incomplete or inaccurate;
- the providing entity must, in accordance with subsections (2) and (3), warn the client that:
- (c) the advice is, or may be, based on incomplete or inaccurate information relating to the client's relevant personal circumstances; and
 - (d) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's relevant personal circumstances.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 946A

- (2) The warning must be given to the client at the same time as the advice is provided and, subject to subsection (3), by the same means as the advice is provided.
- (3) If the Statement of Advice (see Subdivision C) is the means by which the advice is provided, or is given to the client at the same time as the advice is provided, the warning may be given by including it in the Statement of Advice.

Note: The Statement of Advice must at least contain a record of the warning—see paragraphs 947B(2)(f) and 947C(2)(g).

Subdivision C—Requirement for a Statement of Advice to be given

946A Obligation to give client a Statement of Advice

- (1) The providing entity must give the client a Statement of Advice in accordance with this Subdivision and Subdivision D.
- (2) The Statement of Advice may be:
 - (a) the means by which the advice is provided; or
 - (b) a separate record of the advice.
- (3) This section has effect subject to sections 946AA and 946B.

946AA Small investments—Statement of Advice not required

Small investments generally

- (1) The providing entity does not have to give the client a Statement of Advice for particular advice (the *small investment advice*) if:
 - (a) both of the following apply:
 - (i) an amount (the *threshold amount*) has been prescribed by regulations made for the purposes of this paragraph;
 - (ii) the total value of all financial investments in relation to which the advice is provided, as worked out under subsection (2), does not exceed the threshold amount; and
 - (b) the advice does not relate to any of the following:
 - (i) a derivative;
 - (ii) a general insurance product;

Section 946AA

- (iii) a life risk insurance product (except to the extent that advice about a superannuation product relates to a life risk insurance product); and
 - (c) the advice does not relate to any superannuation product or RSA product, unless the client already has an interest in the product.
- (1A) The providing entity does not have to give the client a Statement of Advice as mentioned in subsection (1) if:
- (a) the advice relates to an FHSA product; and
 - (b) both subparagraphs (1)(a)(i) and (ii) apply.

Total value of investments

- (2) For the purposes of paragraph (1)(a), the total value of investments in relation to which the small investment advice is provided is:
- (a) if the advice solely relates to the acquisition of all (or part) of one or more financial products, or of an increased interest in one or more financial products—the sum of the values (the ***total acquisition value***) of each acquisition; or
 - (b) if the advice solely relates to the disposal of all (or part) of one or more financial products, or of a part of an interest in one or more financial products—the sum of the values (the ***total disposal value***) of each disposal; or
 - (c) if the advice relates to both an acquisition, and a disposal, mentioned in paragraphs (a) and (b):
 - (i) the total acquisition value; or
 - (ii) if the total disposal value exceeds the total acquisition value—the total disposal value.

Method for working out threshold amount

- (3) Regulations made for the purposes of paragraph (1)(a) may prescribe how the threshold amount is to be worked out in relation to particular kinds of financial products.

Record of advice

- (4) The providing entity must keep a record of the small investment advice and, in doing so, must comply with any applicable requirements of regulations made for the purposes of this subsection.

Section 946B

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (5) The providing entity must, at the applicable time, give the client:
- (a) a copy of the record of the small investment advice; and
 - (b) the information that would, if a Statement of Advice were to be given, be required to be in the Statement by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) For the purposes of subsection (5), the *applicable time* for something to be given relating to the small investment advice is the time:
- (a) when, or as soon as practicable after, the advice is provided; and
 - (b) in any event—before the providing entity provides the client with any further financial service arising out of, or connected with, the advice.

946B Other situations in which a Statement of Advice is not required

Further market-related advice

- (1) The providing entity does not have to give the client a Statement of Advice for particular advice (the *further market-related advice*) if:
- (a) the providing entity is a participant in a licensed market, or is an authorised representative of a participant in a licensed market; and
 - (b) the providing entity has previously given the client a Statement of Advice that set out the client's relevant personal circumstances in relation to the advice (the *previous advice*) set out in that Statement; and
 - (c) the further market-related advice recommends that the client:
 - (i) acquire or dispose of, or not acquire or dispose of; or
 - (ii) accept or refuse an offer or invitation which, if accepted, would result in the client acquiring or disposing of, or offering to acquire or dispose of;

Section 946B

securities, managed investment products or derivatives that are able to be traded on a licensed market; and

- (d) the following conditions are satisfied:
 - (ia) the providing entity has, either immediately before the further market-related advice is given, or within the preceding 12 months, checked with the client whether the client's objectives, financial situation and needs have changed since the last time the providing entity checked with the client about those matters; and
 - (i) the client's relevant personal circumstances in relation to the further market-related advice (determined having regard to the client's objectives, financial situation and needs as currently known to the providing entity) are not significantly different from the client's relevant personal circumstances in relation to the previous advice; and
 - (ii) so far as the basis on which advice is given relates to other matters—the basis on which the further market-related advice is given is not significantly different from the basis on which the previous advice was given; and
- (e) the providing entity has a reasonable belief that:
 - (i) the client requires the further market-related advice to be provided promptly; or
 - (ii) it is in the client's interests that the further market-related advice be provided promptly; and
- (f) either:
 - (i) the further market-related advice does not contain any other kind of financial product advice; or
 - (ii) the only other kind of financial product advice contained in the further market-related advice is cash management facility advice; and
- (g) the further market-related advice is given:
 - (i) by telephone; or
 - (ii) by fax; or
 - (iii) by e-mail; or
 - (iv) by another kind of electronic communication specified in regulations made for the purposes of this subparagraph.

Section 946B

Note: Paragraphs 947B(2)(b) and 947C(2)(b) require a Statement of Advice to include information about the basis on which the advice is or was given, which may include the client's relevant personal circumstances, in which case paragraph (b) of this subsection would be satisfied.

(2) For the purposes of subsection (1):

able to be traded on a licensed market means:

- (a) in relation to securities or managed investment products—
either:
 - (i) the securities or products are admitted to quotation on a licensed market and their admission to quotation is not suspended; or
 - (ii) the securities or products are not admitted to quotation on a licensed market, but are further securities or products of a kind that are already admitted to quotation on the market and whose admission to quotation is not suspended; and
- (b) in relation to derivatives:
 - (i) the standard terms of the arrangement that constitutes the derivative are set out in the operating rules of a licensed market; and
 - (ii) under the operating rules of that market, the derivatives are able to be dealt with on the market.

cash management facility means:

- (a) an interest in a registered scheme of a kind commonly known as a cash common fund or a cash management trust; or
- (b) a basic deposit product; or
- (c) a bank accepted bill.

cash management facility advice means advice about the use (but not the establishment) of a cash management facility in connection with an acquisition or disposal of securities, managed investment products or derivatives to which the further market-related advice relates.

(3) However, in the same communication as is used to provide the further market-related advice to the client, the client must be given the information that would, if a Statement of Advice were to be given, be required to be in the Statement by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires.

Section 946B

- (3A) The providing entity must keep a record of the further market-related advice and, in doing so, must comply with any applicable requirements of regulations made for the purposes of this subsection.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: For the client's right to a record of the advice, see subsections 942B(8) and 942C(8).

Certain basic deposit and other products

- (5) The providing entity does not have to give the client a Statement of Advice if the advice relates to any or all of the following:
- (a) a basic deposit product;
 - (b) a facility for making non-cash payments (see section 763D) that is related to a basic deposit product;
 - (c) a financial product of a kind prescribed by regulations made for the purposes of this paragraph.
- (6) However, if subsection (5) applies and the client is not given a Statement of Advice, the client must instead, when, or as soon as practicable after, the advice is provided, be given the information that would be required to be in the Statement of Advice by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires.

Where advice does not recommend the purchase or sale of products

- (7) The providing entity does not have to give the client a Statement of Advice for particular advice if:
- (a) the advice does not recommend or state an opinion in respect of:
 - (i) the acquisition or disposal of any specific financial product, or the products of a specific issuer; nor
 - (ii) a modification to an investment strategy or a contribution level in relation to a financial product held by the client; and
 - (b) the following persons do not directly receive any remuneration (other than remuneration that is currently being received for an earlier acquisition of a product) or other benefit for, or in relation to, the advice:

Section 946C

- (i) the providing entity;
 - (ii) an employer of the providing entity;
 - (iii) the authorising licensee, or any of the authorising licensees;
 - (iv) an employee or director of the authorising licensee, or of any of the authorising licensees;
 - (v) an associate of any of the above;
 - (vi) any other person prescribed by regulations made for the purposes of this paragraph.
- (8) However, in the same communication as is used to provide to the client the advice referred to in subsection (7), the client must be given the information that would, if a Statement of Advice were to be given, be required to be in the Statement by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires.
- (9) The providing entity must keep a record of the advice and, in doing so, must comply with any applicable requirements of regulations made for the purposes of this subsection.
- Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- Note 2: For the client's right to a record of the advice, see subsections 942B(8) and 942C(8).

946C Timing of giving Statement of Advice

General rule

- (1) Subject to this section, if the Statement of Advice is not the means by which the advice is provided, the Statement of Advice must be given to the client when, or as soon as practicable after, the advice is provided and, in any event, before the providing entity provides the client with any further financial service that arises out of or is connected with that advice.

Statement of certain information if Statement of Advice not given when advice provided

- (2) If the Statement of Advice is not given to the client when the advice is provided, the providing entity must, when the advice is provided, give the client a statement that contains the information that would be required to be in a Statement of Advice by

Section 947A

paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires, and by section 947D, if applicable.

Time critical cases

(3) If:

- (a) the client expressly instructs that they require a further financial service that arises out of, or is connected with, the advice to be provided immediately, or by a specified time; and
- (b) it is not reasonably practicable to give the Statement of Advice to the client before that further service is provided as so instructed;

the providing entity must give the client the Statement of Advice:

- (c) unless paragraph (d) applies—within 5 days after providing that further service, or sooner if practicable; or
- (d) if that further service is the provision to the person of a financial product and section 1019B (cooling-off period) will apply to the acquisition of the product by the person—before the start of the period applicable under subsection 1019B(3), or sooner if practicable.

Subdivision D—Content of Statement of Advice

947A Title of Statement of Advice

- (1) The title “Statement of Advice” must be used on the cover of, or at or near the front of, a Statement of Advice.
- (2) In any other part of a Statement of Advice, “Statement of Advice” may be abbreviated to “SoA”.

947B Statement of Advice given by financial services licensee—main requirements

- (1) This section applies if the providing entity is a financial services licensee.
- (2) Subject to subsection (3) and to the regulations (see subsection (4)), the Statement of Advice must include the following statements and information:
 - (a) a statement setting out the advice; and

Section 947B

- (b) information about the basis on which the advice is or was given; and
 - (c) a statement setting out the name and contact details of the providing entity; and
 - (d) information about any remuneration (including commission) or other benefits that any of the following is to receive that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice:
 - (i) the providing entity;
 - (ii) a related body corporate of the providing entity;
 - (iii) a director or employee of the providing entity or a related body corporate;
 - (iv) an associate of any of the above;
 - (v) any other person in relation to whom the regulations require the information to be provided; and
 - (e) information about:
 - (i) any other interests, whether pecuniary or not and whether direct or indirect, of the providing entity or of any associate of the providing entity; and
 - (ii) any associations or relationships between the providing entity or any associate of the providing entity and the issuers of any financial products;
that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice;
and
 - (f) if section 945B requires a warning to be given to the client in relation to the advice—a statement setting out, or recording, the warning required by that section; and
 - (g) any other statements or information required by the regulations; and
 - (h) unless in accordance with the regulations, for information to be disclosed in accordance with paragraph (d) and subparagraph (e)(i), any amounts are to be stated in dollars.
- (3) Subject to subsection (4), the level of detail about a matter that is required is such as a person would reasonably require for the purpose of deciding whether to act on the advice as a retail client.
- (4) The regulations may provide all or any of the following:

Section 947C

- (a) that a provision of subsection (2) does not apply in a particular situation;
 - (b) that particular information is not required by a provision of subsection (2), either in a particular situation or generally;
 - (c) a more detailed statement of the information that is required by a provision of subsection (2), either in a particular situation or generally.
- (5) The Statement of Advice:
 - (a) must also include any information required by section 947D, if applicable; and
 - (b) may also include other information.
- (6) The statements and information included in the Statement of Advice must be worded and presented in a clear, concise and effective manner.

947C Statement of Advice given by authorised representative—main requirements

- (1) This section applies if the providing entity is an authorised representative.
- (2) Subject to subsection (3) and to the regulations (see subsection (4)), the Statement of Advice must include the following statements and information:
 - (a) a statement setting out the advice; and
 - (b) information about the basis on which the advice is or was given; and
 - (c) a statement setting out the name and contact details of the providing entity; and
 - (d) a statement
 - (i) setting out the name and contact details of the authorising licensee, or of each of the authorising licensees; and
 - (ii) stating that the providing entity is the authorised representative of that licensee or those licensees; and
 - (e) information about the remuneration (including commission) or other benefits that any of the following is to receive that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice:

Section 947C

- (i) the providing entity;
 - (ii) an employer of the providing entity;
 - (iii) the authorising licensee, or any of the authorising licensees;
 - (iv) an employee or director of the authorising licensee, or of any of the authorising licensees;
 - (v) an associate of any of the above;
 - (vi) any other person in relation to whom the regulations require the information to be provided; and
 - (f) information about:
 - (i) any other interests, whether pecuniary or not and whether direct or indirect, of the providing entity, any employer of the providing entity, the authorising licensee or any of the authorising licensees, or of any associate of any of those persons; and
 - (ii) any associations or relationships between the providing entity, any employer of the providing entity, the authorising licensee or any of the authorising licensees, or any associate of any of those persons, and the issuers of any financial products;that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice; and
 - (g) if section 945B requires a warning to be given to the client in relation to the advice—a statement setting out, or recording, the warning required by that section; and
 - (h) any other statements or information required by the regulations; and
 - (i) unless in accordance with the regulations, for information to be disclosed in accordance with paragraph (e) and subparagraph (f)(i), any amounts are to be stated in dollars.
- (3) Subject to subsection (4), the level of detail about a matter that is required is such as a person would reasonably require for the purpose of deciding whether to act on the advice as a retail client.
- (4) The regulations may provide all or any of the following:
- (a) that a provision of subsection (2) does not apply in a particular situation;

Section 947D

- (b) that particular information is not required by a provision of subsection (2), either in a particular situation or generally;
 - (c) a more detailed statement of the information that is required by a provision of subsection (2), either in a particular situation or generally.
- (5) The Statement of Advice:
 - (a) must also include any information required by section 947D, if applicable; and
 - (b) may also include other information.
- (6) The statements and information included in the Statement of Advice must be worded and presented in a clear, concise and effective manner.

947D Additional requirements when advice recommends replacement of one product with another

- (1) This section applies (subject to subsection (4)) if the advice is or includes a recommendation that the client dispose of, or reduce the client's interest in, all or part of a particular financial product and instead acquire all or part of, or increase the client's interest in, another financial product.
- (2) The following additional information must be included in the Statement of Advice:
 - (a) information about the following, to the extent that the information is known to, or could reasonably be found out by, the providing entity:
 - (i) any charges the client will or may incur in respect of the disposal or reduction;
 - (ii) any charges the client will or may incur in respect of the acquisition or increase;
 - (iii) any pecuniary or other benefits that the client will or may lose (temporarily or otherwise) as a result of taking the recommended action;
 - (b) information about any other significant consequences for the client of taking the recommended action that the providing entity knows, or ought reasonably to know, are likely;
 - (c) any other information required by regulations made for the purposes of this paragraph;

Section 947E

- (d) unless in accordance with the regulations, for information to be disclosed in accordance with paragraph (a), any amounts are to be stated in dollars.
- (3) If:
 - (a) the providing entity knows that, or is reckless as to whether:
 - (i) the client will or may incur charges as mentioned in subparagraph (2)(a)(i) or (ii); or
 - (ii) the client will or may lose benefits as mentioned in subparagraph (2)(a)(iii); or
 - (iii) there will or may be consequences for the client as mentioned in paragraph (2)(b); but
 - (b) the providing entity does not know, and cannot reasonably find out, what those charges, losses or consequences are or will be;the Statement of Advice must include a statement to the effect that there will or may be such charges, losses or consequences but the providing entity does not know what they are.
- (4) The regulations may provide either or both of the following:
 - (a) that this section does not apply in relation to a financial product or a class of financial products;
 - (b) that this section does not require the provision of information of a particular kind, whether generally or in relation to a particular situation, financial product or class of financial products.

947E Statement of Advice not to be combined with Financial Services Guide or Product Disclosure Statement

A Statement of Advice must not be combined in a single document with a Financial Services Guide or a Product Disclosure Statement.

Subdivision E—Other matters

948A Qualified privilege if providing entity complies with this Division

The providing entity has qualified privilege in respect of a statement made to the client, whether orally or in writing, in the course of, or in connection with, providing the advice if the

Section 948A

providing entity has complied with all material requirements of this Division in relation to the advice.

Division 4—Other disclosure requirements

949A General advice provided to retail client—obligation to warn client that advice does not take account of client’s objectives, financial situation or needs

- (1) This section applies in relation to the provision of general advice if:
 - (a) the advice is provided:
 - (i) by a financial services licensee (the *providing entity*); or
 - (ii) by an authorised representative (the *providing entity*) of a financial services licensee, or of 2 or more financial services licensees; and
 - (b) the advice is provided to a person (the *client*) as a retail client; and
 - (c) the advice is not provided in circumstances specified in regulations made for the purposes of this paragraph.
- (2) The providing entity must, in accordance with subsection (3), warn the client that:
 - (a) the advice has been prepared without taking account of the client’s objectives, financial situation or needs; and
 - (b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client’s objectives, financial situation and needs; and
 - (c) if the advice relates to the acquisition, or possible acquisition, of a particular financial product—the client should obtain a Product Disclosure Statement (see Division 2 of Part 7.9) relating to the product and consider the Statement before making any decision about whether to acquire the product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3) The warning must be given to the client at the same time as the advice is provided and by the same means as the advice is provided.

Section 949B

- (4) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1), it is a defence if:
- (a) the licensee had provided the authorised representative with information or instructions about the requirements to be complied with in relation to the giving of personal advice; and
 - (b) the representative's failure to comply with subsection (1) occurred because the representative was acting in reliance on that information or those instructions; and
 - (c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

- (5) A financial services licensee must take reasonable steps to ensure that an authorised representative of the licensee complies with subsection (2).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

949B Regulations may impose disclosure requirements in certain situations

- (1) The regulations may impose disclosure requirements, or additional disclosure requirements, to be complied with in any of the following situations:
- (a) a financial service related to a risk insurance product or an investment life insurance product is provided to a person as a retail client by a financial services licensee, or an authorised representative of a financial services licensee, acting under a binder;
 - (b) a financial services licensee, or an authorised representative of a financial services licensee, arranges for a person's instructions to be carried out through a financial market or a clearing and settlement facility (whether inside or outside Australia) that is not a licensed market or a licensed CS facility;

Section 949B

- (d) a financial service is provided by a person who does not need an Australian financial services licence because the person is covered by an exemption under paragraph 911A(2)(k) or (l);
 - (e) a financial service is provided to a person as a wholesale client.
- (2) A person to whom regulations made for the purposes of subsection (1) apply must comply with any applicable requirements in those regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (2), it is a defence if:
 - (a) the licensee had provided the authorised representative with information or instructions about the requirements to be complied with in relation to the matter dealt with in the requirement in the regulations; and
 - (b) the representative's failure to comply with the requirement in the regulations occurred because the representative was acting in reliance on that information or those instructions; and
 - (c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3). See subsection 13.3(3) of the *Criminal Code*.
- (4) A financial services licensee must take reasonable steps to ensure that an authorised representative of the licensee complies with subsection (2).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Division 6—Miscellaneous

951A Part cannot be contracted out of

A condition of a contract for the acquisition of a financial product, or for the provision of a financial service, is void if it provides that a party to the contract is:

- (a) required or bound to waive compliance with any requirement of this Part; or
- (b) taken to have notice of any contract, document or matter not specifically referred to in a Financial Services Guide, Statement of Advice or other document given to the party.

951B Exemptions and modifications by ASIC

- (1) ASIC may:
 - (a) exempt a person or a class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial product or class of financial products from all or specified provisions of this Part; or
 - (c) declare that this Part applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of this Part were omitted, modified or varied as specified in the declaration.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (4)):

Section 951C

- (a) the text of the declaration was made available by ASIC on the Internet; or
- (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

- (6) For the purpose of this section, the *provisions of this Part* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

951C Exemptions and modifications by regulations

- (1) The regulations may:
 - (a) exempt a person or class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or
 - (c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (2) For the purpose of this section, the *provisions of this Part* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Division 7—Enforcement

Subdivision A—Offences

952A Overview

This Subdivision contains provisions creating offences by references to various rules contained in preceding Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

952B Definitions

- (1) In this Subdivision:

defective, in relation to a disclosure document or statement, means:

- (a) if the disclosure document or statement is a Financial Services Guide, a Supplementary Financial Services Guide, or is information or a statement required by subsection 941C(5), 941C(7) or 941D(2):
 - (i) there is a misleading or deceptive statement in the disclosure document or statement; or
 - (ii) if it is a Financial Services Guide—there is an omission from the Financial Services Guide of material required by section 942B or 942C; or
 - (iii) if it is a Supplementary Financial Services Guide that is given for the purposes of paragraph 941F(d)—there is an omission from the Supplementary Financial Services Guide of material required by that paragraph; or
 - (iv) if it is information or a statement required by subsection 941C(5), 941C(7) or 941D(2)—there is an omission from the document or statement of material required by that subsection;

being a statement, or an omission, that is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to be provided with the financial service concerned; or

Section 952B

- (b) if the disclosure document or statement is a Statement of Advice, or is information, a statement or a copy of a record required by subsection 946AA(5), 946B(3), (6) or (8) or 946C(2):
 - (i) there is a misleading or deceptive statement in the disclosure document or statement; or
 - (ii) if it is a Statement of Advice—there is an omission from the Statement of advice of material required by section 947B, 947C or 947D; or
 - (iii) if it is information, a statement or a copy of a record required by subsection 946AA(5), 946B(3), (6) or (8) or 946C(2)—there is an omission from the information, statement or copy of material required by that subsection or section;being a statement, or an omission, that is or would be materially adverse from the point of view of a reasonable person considering whether to act in reliance on the advice concerned.

Note: In determining whether a Financial Services Guide is defective, the effect of section 943D must be taken into account (section 943D takes information and statements in a Supplementary Financial Services Guide to be included in the Financial Services Guide it supplements).

disclosure document or statement means:

- (a) a Financial Services Guide; or
 - (b) a Supplementary Financial Services Guide; or
 - (c) a Statement of Advice; or
 - (d) information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2).
- (1A) For the avoidance of doubt, if section 941E (information must be up to date) is not complied with in relation to a Financial Services Guide, then, for the purposes of the definition of ***defective*** in subsection (1):
- (a) if the circumstance constituting the non-compliance is that particular information included in the Financial Services Guide is not as up to date as section 941E requires it to be—the information so included constitutes a misleading statement in the Financial Services Guide; and

Section 952C

- (b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Financial Services Guide—the failure to include the information constitutes an omission from the Statement of material required by section 942B or 942C.

Note 1: The effect of section 943D (information in a Supplementary Financial Services Guide is taken to be contained in the Financial Services Guide it supplements) must be taken into account in determining whether section 941E is complied with in relation to a Financial Services Guide.

Note 2: Whether the inclusion of out of date information, or the failure to include information, results in the Financial Services Guide being *defective* as defined in subsection (1) depends on whether the materiality test set out in that definition is satisfied.

- (2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement of a kind referred to in a paragraph of the definition of *disclosure document or statement* in subsection (1) includes a reference to something purporting to be a document or statement of that kind.

952C Offence of failing to give a disclosure document or statement

Strict liability offence

- (1) A person (the *providing entity*) commits an offence if:
- (a) the providing entity is required by a provision of this Part to give another person a disclosure document or statement (the *required disclosure document or statement*); and
 - (b) the providing entity does not give (within the meaning of section 940C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section 952D

Ordinary offence

- (3) A person (the *providing entity*) commits an offence if:
- (a) the providing entity is required by a provision of this Part to give another person a disclosure document or statement (the *required disclosure document or statement*); and
 - (b) the providing entity does not give (within the meaning of section 940C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

Defence for authorised representative

- (4) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1) or (3), it is a defence if:
- (a) the licensee had provided the representative with information or instructions about the giving of disclosure documents or statements; and
 - (b) the representative's failure to give the required disclosure document or statement occurred because the representative was acting in reliance on that information or those instructions; and
 - (c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

952D Offence of giving a disclosure document or statement knowing it to be defective

- (1) A person (the *providing entity*), being a financial services licensee, commits an offence if:
- (a) the providing entity:
 - (i) gives (see subsection (3)) another person a disclosure document or statement in circumstances in which the document or statement is required by a provision of this Part to be given to the other person; or

Section 952E

- (ii) is a financial services licensee and gives (see subsection (3)), or makes available to, another person a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, reckless as to whether the other person will or may rely on the information in it; and
- (b) the providing entity knows that the disclosure document or statement is defective.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

- (2) An authorised representative of a financial services licensee commits an offence if:

- (a) the representative:
 - (i) gives (see subsection (3)) a person a disclosure document or statement in circumstances in which the document or statement is required by a provision of this Part to be given to the person; or
 - (ii) gives (see subsection (3)), or makes available to, a person a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, reckless as to whether the person will or may rely on the information in it; and
- (b) the representative knows that the disclosure document or statement is defective.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

- (3) In this section, **give** means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

952E Offence of giving a defective disclosure document or statement (whether or not known to be defective)

- (1) A person (the **providing entity**), being a financial services licensee, commits an offence if:
- (a) the providing entity:
 - (i) gives (see subsection (7)) another person a disclosure document or statement in circumstances in which the

Section 952E

document or statement is required by a provision of this Part to be given to the other person; or

- (ii) is a financial services licensee and gives (see subsection (7)), or makes available to, another person a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, reckless as to whether the other person will or may rely on the information in it; and

- (b) the disclosure document or statement is defective.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

- (2) For the purposes of an offence based on subsection (1), strict liability applies to the physical element of the offence specified in paragraph (1)(b).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) An authorised representative of a financial services licensee commits an offence if:

- (a) the representative gives (see subsection (7)) a person a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2), in circumstances in which the document or statement is required by a provision of this Part to be given to the person; and
- (b) the disclosure document or statement is defective.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of the offence specified in paragraph (3)(b).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (5) In any proceedings against a person for an offence based on subsection (1) or (3), it is a defence if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

Section 952F

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

- (6) In any proceedings against a person for an offence based on subsection (3), it is a defence if the disclosure document or statement:
- (a) was provided to the person by a financial services licensee for whom they were, at that time, an authorised representative; or
 - (b) was defective because of information, or an omission from information, provided to them by a financial services licensee for whom they were, at that time, an authorised representative.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6). See subsection 13.3(3) of the *Criminal Code*.

- (7) In this section, **give** means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

952F Offences of financial services licensee knowingly providing defective disclosure material to an authorised representative

- (1) For the purposes of this section, a financial services licensee ***provides disclosure material*** to an authorised representative of the licensee if:
- (a) the licensee authorises the distribution by the representative of a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide; or
 - (b) the licensee provides the representative with a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2); or
 - (c) the licensee provides the representative with information:
 - (i) for the purpose of it being included by the representative in a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2); or

Section 952G

- (ii) knowing that it is likely that it will be so included in such a document.
- (2) A financial services licensee commits an offence if:
 - (a) the licensee provides disclosure material (being a disclosure document or statement) to an authorised representative of the licensee as mentioned in paragraph (1)(a) or (b); and
 - (b) the licensee knows that the disclosure document or statement is defective.
- (3) A financial services licensee commits an offence if:
 - (a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in paragraph (1)(c); and
 - (b) the licensee knows that, if the information is included by the representative as mentioned in that paragraph, the disclosure document or statement concerned will be defective.
- (4) A financial services licensee commits an offence if:
 - (a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in paragraph (1)(c); and
 - (b) the information relates to a matter or matters, but the licensee knows that it is only some of the information relating to the matter or matters that the disclosure document or statement concerned is required to contain; and
 - (c) the licensee is reckless as to whether the representative will or may prepare the disclosure document or statement on the basis that the information is all the information relating to the matter or matters that the disclosure document or statement is required to contain.

952G Offences of financial services licensee providing disclosure material to an authorised representative (whether or not known to be defective)

- (1) For the purposes of this section, a financial services licensee *provides disclosure material* to an authorised representative of the licensee if:
 - (a) the licensee authorises the distribution by the representative of a disclosure document or statement, being a Financial

Section 952G

Services Guide or a Supplementary Financial Services Guide; or

- (b) the licensee provides the representative with a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2); or
 - (c) the licensee provides the representative with information:
 - (i) for the purpose of it being included by the representative in a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2); or
 - (ii) knowing that it is likely that it will be so included in such a document.
- (2) A financial services licensee commits an offence if:
- (a) the licensee provides disclosure material (being a disclosure document or statement) to an authorised representative of the licensee as mentioned in paragraph (1)(a) or (b); and
 - (b) the disclosure document or statement is defective in a respect that does not relate to material required to be in the document or statement only because the representative is also the authorised representative of another financial services licensee.
- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical element of the offence specified in paragraph (2)(b).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (4) A financial services licensee commits an offence if:
- (a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in paragraph (1)(c); and
 - (b) the authorised representative includes the information in the disclosure document or statement concerned; and
 - (c) the disclosure document or statement is defective because it includes that information (whether or not it is also defective for other reasons).

Section 952G

- (5) For the purposes of an offence based on subsection (4), strict liability applies to the physical element of the offence specified in paragraph (4)(c).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (6) A financial services licensee commits an offence if:
- (a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in paragraph (1)(c); and
 - (b) the information relates to a matter or matters, but it is only some of the information relating to the matter or matters that the disclosure document or statement concerned is required to contain; and
 - (c) the representative prepares the disclosure document or statement on the basis that the information is all the information relating to the matter or matters that the disclosure document or statement is required to contain; and
 - (d) the disclosure document or statement is defective because it includes only that information about the matter or matters (whether or not it is also defective for other reasons).

- (7) For the purposes of an offence based on subsection (6), strict liability applies to the physical elements of the offence specified in paragraphs (6)(b) and (d).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (8) In any proceedings against a person for an offence based on subsection (2), it is a defence if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (8). See subsection 13.3(3) of the *Criminal Code*.

- (9) In any proceedings against a person for an offence based on subsection (4), it is a defence if the person took reasonable steps to ensure that the information they provided would not be such as to make the disclosure document or statement defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (9). See subsection 13.3(3) of the *Criminal Code*.

Section 952H

- (10) In any proceedings against a person for an offence based on subsection (6), it is a defence if the person took reasonable steps to ensure that the information they provided about the matter or matters would be all the information about the matter or matters that the disclosure document or statement would be required to contain.

Note: A defendant bears an evidential burden in relation to the matters in subsection (10). See subsection 13.3(3) of the *Criminal Code*.

952H Offence of financial services licensee failing to ensure authorised representative gives disclosure documents or statements as required

A financial services licensee commits an offence if the licensee does not take reasonable steps to ensure that an authorised representative of the licensee:

- (a) complies with their obligations under this Part to give disclosure documents or statements as and when required; and
- (b) without limiting paragraph (a), does not, in purported compliance with obligations under this Part, give disclosure documents or statements that are defective.

952I Offences if a Financial Services Guide (or Supplementary FSG) does not comply with certain requirements

- (1) A financial services licensee commits an offence if:
- (a) the licensee:
 - (i) gives (see subsection (6)) a person a Financial Services Guide in circumstances in which it is required by a provision of this Part to be given to the person; or
 - (ii) gives (see subsection (6)), or makes available to, a person a Financial Services Guide, reckless as to whether the person will or may rely on the information in it; and
 - (b) the Financial Services Guide does not comply with section 942A, subsection 942B(5) or 942DA(3) or paragraph 942E(b).

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

Section 952I

- (2) A financial services licensee commits an offence if:
- (a) the financial services licensee authorises the distribution of a Financial Services Guide by an authorised representative of the licensee; and
 - (b) the Financial Services Guide does not comply with section 942A, subsection 942B(5) or 942DA(3) or paragraph 942E(b).

- (3) A financial services licensee commits an offence if:
- (a) the licensee:
 - (i) gives (see subsection (6)) a person a Supplementary Financial Services Guide in circumstances in which it is required by a provision of this Part to be given to the person; or
 - (ii) gives (see subsection (6)), or makes available to, a person a Supplementary Financial Services Guide, reckless as to whether the person will or may rely on the information in it; and
 - (b) the Supplementary Financial Services Guide does not comply with section 943B or 943C.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

- (4) A financial services licensee commits an offence if:
- (a) the financial services licensee authorises the distribution of a Supplementary Financial Services Guide by an authorised representative of the licensee; and
 - (b) the Supplementary Financial Services Guide does not comply with section 943B or 943C.

- (5) For the purposes of an offence based on subsection (1), (2), (3) or (4), strict liability applies to paragraph (b) of that subsection.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (6) In this section, **give** means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

952J Offence if a Statement of Advice does not comply with certain requirements

- (1) A financial services licensee, or an authorised representative of a financial services licensee, commits an offence if:
- (a) the licensee or representative gives (see subsection (3)) a person a Statement of Advice in circumstances in which it is required by a provision of this Part to be given to the person; and
 - (b) the Statement of Advice does not comply with section 947A or 947E.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

- (2) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (b) of that subsection.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) In this section, *give* means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

952K Offence if authorised representative gives out unauthorised Financial Services Guide (or Supplementary FSG)

An authorised representative of a financial services licensee commits an offence if:

- (a) the representative:
 - (i) gives a person a Financial Services Guide, or a Supplementary Financial Services Guide, in circumstances in which it is required by a provision of this Part to be given to the person; or
 - (ii) gives, or makes available to, a person a Financial Services Guide, or a Supplementary Financial Services Guide, reckless as to whether the person will or may rely on the information in it; and
- (b) the licensee has not authorised the distribution by the representative of the Financial Services Guide or the Supplementary Financial Services Guide.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

Section 952L

952L Offences if financial services licensee or authorised representative becomes aware that a Financial Services Guide (or Supplementary FSG) is defective

- (1) A financial services licensee commits an offence if:
 - (a) the licensee has authorised an authorised representative of the licensee to distribute a Financial Services Guide or a Supplementary Financial Services Guide; and
 - (b) the licensee becomes aware that the Financial Services Guide, or the Supplementary Financial Services Guide, is defective; and
 - (c) the licensee does not, as soon as practicable, give the representative a direction that satisfies one or more of the following subparagraphs:
 - (i) a direction not to distribute the Financial Services Guide or the Supplementary Financial Services Guide;
 - (ii) a direction not to distribute the Financial Services Guide unless it is accompanied by a Supplementary Financial Services Guide that corrects the deficiency;
 - (iii) a direction not to distribute the Financial Services Guide or the Supplementary Financial Services Guide without first altering it in a way that is specified in the direction, being a way that corrects the deficiency and that complies with section 942E or 943F.
- (2) An authorised representative commits an offence if:
 - (a) the representative is given a direction under subsection (1); and
 - (b) the representative does not comply with the direction.
- (3) An authorised representative of a financial services licensee commits an offence if:
 - (a) the licensee has authorised the representative to distribute a Financial Services Guide or a Supplementary Financial Services Guide; and
 - (b) the representative becomes aware that the Financial Services Guide, or the Supplementary Financial Services Guide, is defective; and
 - (c) the representative does not, as soon as practicable, notify the licensee of the particulars of the deficiency.

Section 952M

- (4) In this section, a reference to *distributing* a Financial Services Guide or a Supplementary Financial Services Guide includes (but is not limited to) giving or reading the document or statement to another person in purported compliance with a requirement of this Part.

952M Offence of unauthorised alteration of Financial Services Guide or Supplementary Financial Services Guide

A person commits an offence if:

- (a) the person engages in conduct that results in an alteration of a Financial Services Guide or a Supplementary Financial Services Guide that:
 - (i) has been prepared by or on behalf of a particular financial services licensee; or
 - (ii) the distribution of which by the person has been authorised by a particular financial services licensee; and
- (b) the alteration results in the Financial Services Guide or Supplementary Financial Services Guide becoming defective, or more defective than it previously was; and
- (c) the alteration is not made with the authority of the licensee; and
- (d) the person, in purported compliance with a provision of this Part, gives the altered Financial Services Guide or Supplementary Financial Services Guide to another person.

Subdivision B—Civil liability**953A Definitions**

- (1) In this Subdivision:

defective, in relation to a disclosure document or statement, means:

- (a) if the disclosure document or statement is a Financial Services Guide, a Supplementary Financial Services Guide, or is information or a statement required by subsection 941C(5), 941C(7) or 941D(2):
 - (i) there is a misleading or deceptive statement in the disclosure document or statement; or

Section 953A

- (ii) if it is a Financial Services Guide—there is an omission from the Financial Services Guide of material required by section 942B or 942C; or
 - (iii) if it is a Supplementary Financial Services Guide that is given for the purposes of paragraph 941F(d)—there is an omission from the Supplementary Financial Services Guide of material required by that paragraph; or
 - (iv) if it is information or a statement required by subsection 941C(5), 941C(7) or 941D(2)—there is an omission from the document or statement of material required by that subsection; or
- (b) if the disclosure document or statement is a Statement of Advice, or is information, a statement or a copy of a record required by subsection 946AA(5), 946B(3), (6) or (8) or 946C(2):
- (i) there is a misleading or deceptive statement in the disclosure document or statement; or
 - (ii) if it is a Statement of Advice—there is an omission from the Statement of Advice of material required by section 947B, 947C or 947D; or
 - (iii) if it is information, a statement or a copy of a record required by subsection 946AA(5), 946B(3), (6) or (8) or 946C(2)—there is an omission from the information, statement or copy of material required by that subsection or section.

Note: In determining whether a Financial Services Guide is defective, the effect of section 943D must be taken into account (section 943D takes information and statements in a Supplementary Financial Services Guide to be included in the Financial Services Guide it supplements).

disclosure document or statement means:

- (a) a Financial Services Guide; or
- (b) a Supplementary Financial Services Guide; or
- (c) a Statement of Advice; or
- (d) information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2).

- (1A) For the avoidance of doubt, if section 941E (information must be up to date) is not complied with in relation to a Financial Services

Section 953B

Guide, then, for the purposes of the definition of *defective* in subsection (1):

- (a) if the circumstance constituting the non-compliance is that particular information included in the Financial Services Guide is not as up to date as section 941E requires it to be—the information so included constitutes a misleading statement in the Financial Services Guide; and
- (b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Financial Services Guide—the failure to include the information constitutes an omission from the Statement of material required by section 942B or 942C.

Note: The effect of section 943D (information in a Supplementary Financial Services Guide is taken to be contained in the Financial Services Guide it supplements) must be taken into account in determining whether section 941E is complied with in relation to a Financial Services Guide.

- (2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement of a kind referred to in a paragraph of the definition of *disclosure document or statement* in subsection (1) includes a reference to something purporting to be a document or statement of that kind.

953B Civil action for loss or damage

- (1) This section applies in the following situations:
 - (a) a person:
 - (i) is required by a provision of this Part to give another person (the *client*) a disclosure document or statement (the *required disclosure document or statement*); and
 - (ii) does not give (within the meaning of section 940C) the client anything purporting to be the required disclosure document or statement by the time they are required to do so; or
 - (b) a person:
 - (i) gives another person (the *client*) a disclosure document or statement that is defective in circumstances in which a disclosure document or statement is required by a provision of this Part to be given to the client; or

Section 953B

- (ii) is a financial services licensee and gives, or makes available to, another person (the *client*) a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, that is defective, reckless as to whether the client will or may rely on the information in it; or

- (c) a person contravenes section 945A, 945B, 949A or 949B.

In paragraph (b), *give* means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

- (2) In a situation to which this section applies, if a person suffers loss or damage:
 - (a) if paragraph (1)(a) applies—because the client was not given the disclosure document or statement that they should have been given; or
 - (b) if paragraph (1)(b) applies—because the disclosure document or statement the client was given was defective; or
 - (c) if paragraph (1)(c) applies—because of the contravention referred to in that paragraph;

the person may, subject to subsection (6), recover the amount of the loss or damage by action against the, or a, liable person (see subsections (3) and (4)), whether or not that person (or anyone else) has been convicted of an offence in respect of the matter referred to in paragraph (a), (b) or (c).

- (3) For the purposes of subsection (2), the, or a, *liable person* is:
 - (a) if the person first-referred to in paragraph (1)(a), (b) or (c) is a financial services licensee—subject to subsection (4), that person; or
 - (b) if the person first-referred to in paragraph (1)(a), (b) or (c) is an authorised representative of only one financial services licensee—that financial services licensee; or
 - (c) if the person first-referred to in paragraph (1)(a), (b) or (c) is an authorised representative of more than one financial services licensee:
 - (i) if, under the rules in section 917C, one of those licensees is responsible for the person's conduct—that licensee; or
 - (ii) if, under the rules in section 917C, 2 or more of those licensees are jointly and severally responsible for the person's conduct—each of those licensees.

Section 953C

- (3A) For the purposes of paragraph (3)(c):
- (a) section 917C is taken to apply, despite section 917F; and
 - (b) section 917D is taken not to apply.
- (4) If:
- (a) paragraph (1)(b) applies; and
 - (b) an alteration was made to the disclosure document or statement before it was given to the client; and
 - (c) the alteration made the disclosure document or statement defective, or more defective than it would otherwise have been; and
 - (d) the alteration was not made by, or with the authority of, the person who would, but for this subsection, be the liable person because of paragraph (3)(a);
- then, so far as a person has suffered loss or damage because the disclosure document or statement was defective because of the alteration, the liable person is the person who made the alteration, rather than the person referred to in paragraph (d).
- (5) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.
- (6) A person is not liable under subsection (2) in a situation described in paragraph (1)(b) if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.
- (7) This section does not affect any liability that a person has under any other law.

953C Additional powers of court to make orders

- (1) The court dealing with an action under subsection 953B(2) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:
- (a) make an order declaring void a contract entered into by the client referred to in that subsection for or relating to a financial product or a financial service; and
 - (b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.

Section 953C

- (2) Without limiting paragraph (1)(b), an order under that paragraph may include an order for the return of money paid by a person, and/or an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

Part 7.8—Other provisions relating to conduct etc. connected with financial products and financial services, other than financial product disclosure

Division 1—Preliminary

980A Matters covered by this Part

This Part contains:

- (a) provisions (see Divisions 2 to 7) relating to conduct etc. of financial services licensees; and
- (b) miscellaneous provisions (see Division 8) relating to other conduct connected with financial products and financial services.

It does not deal with financial product disclosure (which is dealt with in Part 7.9).

980B General approach to offence provisions

Division 9 contains provisions creating offences by reference to various rules contained in Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

Section 981A

Division 2—Dealing with clients' money

Subdivision A—Money other than loans

981A Money to which Subdivision applies

- (1) This Subdivision applies (subject to subsections (2), (3) and (4)) to money paid to a financial services licensee (the *licensee*) in the following circumstances:
 - (a) the money is paid in connection with:
 - (i) a financial service that has been provided, or that will or may be provided, to a person (the *client*); or
 - (ii) a financial product held by a person (the *client*); and
 - (b) the money is paid:
 - (i) by the client; or
 - (ii) by a person acting on behalf of the client; or
 - (iii) to the licensee in the licensee's capacity as a person acting on behalf of the client.
- (2) This Subdivision does not apply to money paid as mentioned in subsection (1) to the extent that:
 - (a) the money is paid by way of remuneration payable to the licensee, or the licensee is entitled to deduct such remuneration from the money; or
 - (b) the money is paid:
 - (i) to reimburse the licensee for payments made to acquire, or acquire an increased interest in, a financial product; or
 - (ii) to discharge a liability incurred by the licensee in respect of the acquisition of a financial product or an increased interest in a financial product, or to indemnify the licensee in respect of such a liability; or
 - (c) the money is paid to acquire, or acquire an increased interest in, a financial product from the licensee, whether by way of issue or sale by the licensee; or
 - (d) Subdivision B (loan money) applies to the money.

Note: Money excluded by paragraph (c) is covered by section 1017E.

Section 981B

- (3) If a person pays money to a financial services licensee in order for it to be deposited to the credit of a deposit product held by the person or another person with the licensee, that payment does not constitute money to which this Subdivision applies.
- (4) The regulations may:
 - (a) exempt money paid in specified circumstances from some or all of the provisions of this Subdivision; or
 - (b) declare that this Subdivision applies in relation to money paid in specified circumstances as if specified provisions of this Subdivision were omitted, modified or varied as set out in the regulations.
- (5) An exemption in regulations made for the purposes of paragraph (4)(a) may be made subject to conditions specified in, or imposed in accordance with, the regulations. The regulations may provide for consequences of a contravention of a condition.

981B Obligation to pay money into an account

- (1) The licensee must ensure that money to which this Subdivision applies is paid into an account that satisfies these requirements:
 - (a) the account is:
 - (i) with an Australian ADI; or
 - (ii) of a kind prescribed by regulations made for the purposes of this paragraph;and is designated as an account for the purposes of this section of this Act; and
 - (b) the only money paid into the account is:
 - (i) money to which this Subdivision applies (which may be money paid by, on behalf of, or for the benefit of, several different clients); or
 - (ii) interest on the amount from time to time standing to the credit of the account; or
 - (iii) interest, or other similar payments, on an investment made in accordance with regulations referred to in section 981C, or the proceeds of the realisation of such an investment; or
 - (iv) other money permitted to be paid into the account by the regulations; and

Section 981C

- (c) if regulations made for the purposes of this paragraph impose additional requirements—the requirements so imposed by the regulations; and
- (d) if the licence conditions of the licensee's licence impose additional requirements—the requirements so imposed by the licence conditions.

The money must be paid into such an account on the day it is received by the licensee, or on the next business day.

- (2) The licensee may, for the purposes of this section, maintain a single account or 2 or more accounts.

981C Regulations may deal with various matters relating to accounts maintained for the purposes of section 981B

The regulations may deal with all or any of the following in relation to accounts, or a class of accounts, maintained for the purposes of section 981B:

- (a) the circumstances in which payments may be made out of an account (including the circumstances in which money may be withdrawn and invested, and the kinds of investment that may be made);
- (b) the minimum balance to be maintained in an account;
- (c) how interest on an account is to be dealt with;
- (d) how interest or other earnings on an investment of money withdrawn from an account, or the proceeds of the realisation of such an investment, are to be dealt with.

981D Money related to derivatives may be used for general margining etc. purposes

Despite anything in regulations made for the purposes of section 981C, if:

- (a) the financial service referred to in subparagraph 981A(1)(a)(i) is or relates to a dealing in a derivative; or
- (b) the financial product referred to in subparagraph 981A(1)(a)(ii) is a derivative;

the money concerned may also be used for the purpose of meeting obligations incurred by the licensee in connection with margining, guaranteeing, securing, transferring, adjusting or settling dealings

Section 981E

in derivatives by the licensee (including dealings on behalf of people other than the client).

981E Protection of money from attachment etc.

- (1) This section applies to:
 - (a) money to which this Subdivision applies that has been paid to the licensee, both while it is in an account maintained for the purposes of section 981B and before and after it is paid into such an account; and
 - (b) other money in such an account as permitted by paragraph 981B(1)(b); and
 - (c) investments made in accordance with regulations made for the purposes of section 981C.
- (2) Money and investments to which this section applies are not capable:
 - (a) of being attached or otherwise taken in execution; or
 - (b) of being made subject to a set-off, charge or charging order, or to any process of a similar nature;except at the suit of a person who is otherwise entitled to the money or investment.

981F Regulations may deal with how money to be dealt with if licensee ceases to be licensed etc.

The regulations may include provisions dealing with how money in an account maintained for the purposes of section 981B, or an investment of such money, is to be dealt with if:

- (a) the licensee ceases to be a financial services licensee; or
- (b) the licensee becomes insolvent, within the meaning of the regulations; or
- (c) the licensee merges with another financial services licensee; or
- (d) the licensee ceases to carry on some or all of the activities authorised by their licence.

Section 981G

981G Account provider not liable merely because of licensee's contravention

Nothing in this Subdivision, or in regulations made for the purposes of this Subdivision, makes the body (not being the licensee) that the account is with under paragraph 981B(1)(a) subject to any liability merely because of a failure by the licensee to comply with any of the provisions of this Subdivision or those regulations.

981H Money to which Subdivision applies taken to be held in trust

- (1) Subject to subsection (3), money to which this Subdivision applies that is paid to the licensee:
 - (a) by the client; or
 - (b) by a person acting on behalf of the client; or
 - (c) in the licensee's capacity as a person acting on behalf of the client;is taken to be held in trust by the licensee for the benefit of the client.
- (3) The regulations may:
 - (a) provide that subsection (1) does not apply in relation to money in specified circumstances; and
 - (b) provide for matters relating to the taking of money to be held in trust (including, for example, terms on which the money is taken to be held in trust and circumstances in which it is no longer taken to be held in trust).

Subdivision B—Loan money

982A Money to which this Subdivision applies

- (1) Subject to subsection (2), this Subdivision applies to money paid to a financial services licensee (the *licensee*) by way of a loan from a person (the *client*) in connection with activities authorised by the licensee's licence.
- (2) If a person pays money to a financial services licensee:

Section 982B

- (a) in order for it to be deposited to the credit of a deposit product held by the person or another person with the licensee; or
 - (b) on condition that it is to be repaid to the person by the licensee, as a debt, pursuant to the terms of a debenture or other financial product issued by the licensee;
- that payment does not constitute money to which this Subdivision applies.

982B Obligation to pay money into an account

- (1) The licensee must ensure that money to which this Subdivision applies is paid into an account that satisfies these requirements:
 - (a) the account is:
 - (i) with an Australian ADI; or
 - (ii) of a kind prescribed by regulations made for the purposes of this paragraph;and is designated as an account for the purposes of this section of this Act; and
 - (b) the only money paid into the account is:
 - (i) money to which this Subdivision applies (which may be money lent by several different persons); or
 - (ii) interest on the amount from time to time standing to the credit of the account.

The money must be paid into such an account on the day it is received by the licensee, or on the next business day.

- (2) The licensee may, for the purposes of this section, maintain a single account or 2 or more accounts.

982C Licensee to give client statement setting out terms of loan etc.

Obligation to give client a statement

- (1) The licensee must, in accordance with the regulations, give the client a statement setting out:
 - (a) the terms and conditions on which the loan is made and accepted; and
 - (b) the purpose for which, and the manner in which, the licensee is to use the money.

Chapter 7 Financial services and markets

Part 7.8 Other provisions relating to conduct etc. connected with financial products and financial services, other than financial product disclosure

Division 2 Dealing with clients' money

Section 982D

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Obligation to keep money in account until receive acknowledgment of receipt of statement

- (2) The licensee must not take money out of the account before the client has given the licensee a written acknowledgment that the client has received the statement required by subsection (1).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

982D Permitted use of loan

The licensee must only use the money:

- (a) for the purpose, and in the manner, set out in the statement given under section 982C; or
- (b) for another purpose, or in another manner, agreed on in writing by the licensee and the client after the licensee gave the client the statement.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Subdivision C—Powers of Court

983A Court may freeze certain accounts

- (1) The Court may, by order, restrain dealings in respect of specified accounts with financial institutions that a person holds or maintains (whether in Australia or elsewhere), subject to such terms and conditions as the Court imposes, if subsection (2) or (3) applies in relation to the person.
- (2) This subsection applies to a person if, on application by ASIC, the Court is satisfied that the person holds, or has at any time held, an Australian financial services licence and that:
 - (a) there are reasonable grounds for believing that there is a deficiency in an account maintained by the person for the purposes of section 981B or 982B, whether the account is maintained in this jurisdiction or elsewhere; or
 - (b) there has been undue delay, or unreasonable refusal, on the person's part in paying, applying or accounting for money as

Section 983B

provided for by this Division, by a condition of the licence, or by the operating rules of a licensed market or a licensed CS facility in which the person is or has been a participant; or

- (c) without limiting the generality of paragraph (a) or (b), the person has contravened section 981B or 982B.
- (3) This subsection applies to a person if, on application by ASIC, the Court is satisfied that the person holds, or has at any time held, an Australian financial services licence and that:
 - (a) the licence has been revoked or suspended; or
 - (b) the person is incapable, through mental or physical incapacity, of managing his or her affairs; or
 - (c) the person no longer carries on a financial services business; or
 - (d) the person has died.

983B Interim order freezing accounts

- (1) Before considering an application under section 983A, the Court may, if it considers it desirable to do so, grant an interim order that is an order of the kind applied for and is expressed to apply until the application is determined.
- (2) The Court must not require ASIC or any other person, as a condition of granting an order under subsection (1), to give an undertaking as to damages.

983C Duty of person to whom order directed to make full disclosure

If an order made under section 983A is directed to a financial institution, the institution must:

- (a) disclose to ASIC every account kept at the institution in the name of the person to whom the order relates, and any account that the institution reasonably suspects is held or kept at the institution for the benefit of that person; and
- (b) permit ASIC to make a copy of, or to take an extract from, any account of the person to whom the order relates or any of the institution's books relating to that person.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Section 983D

983D Further orders and directions

- (1) If an order is made under section 983A or 983B, the Court may, on application by ASIC or a person whom the order affects, make a further order that does one or more of the following:
 - (a) deals with such ancillary matters as the Court thinks necessary or desirable;
 - (b) directs that specified amounts in an account affected by the first-mentioned order be paid to ASIC or a person nominated by ASIC;
 - (c) varies or discharges the first-mentioned order or an order under this section.
- (2) An order under this section may be made subject to such terms and conditions as the Court imposes.

983E Power of Court to make order relating to payment of money

- (1) An order made under section 983D may include directions to a person to whom money is ordered to be paid directing that the person:
 - (a) must pay the money into a separate account; or
 - (b) is authorised to prepare a scheme for distributing the money to persons who claim, within 6 months after the person receives the money, to be entitled to the money and satisfy the person that they are so entitled; or
 - (c) if the money received is insufficient to pay all proved claims, may, despite any rule of law or equity to the contrary, apportion the money among the claimants in proportion to their proved claims and show in the scheme how the money is so apportioned.
- (2) If a person prepares a scheme for a distribution of money under subsection (1), the person must apply to the Court for approval of the scheme and for directions in respect of it.
- (3) The Court may, in relation to money held in a separate account under subsection (1), give such directions as the Court thinks fit as to:
 - (a) the persons to whom that money is to be paid, and in what amounts the whole or any portion of that money is to be paid; and

Section 983E

- (b) the payment of the balance of the money (if any) remaining
in the account.

Section 984A

Division 3—Dealing with other property of clients

984A Property to which Division applies

- (1) Subject to subsection (2), this Division applies to property other than money (for example, share certificates) given to a financial services licensee (the *licensee*) in the following circumstances:
 - (a) the property is given in connection with:
 - (i) a financial service that has been provided, or that will or may be provided, to a person (the *client*); or
 - (ii) a financial product held by a person (the *client*); and
 - (b) the property is given:
 - (i) by the client; or
 - (ii) by a person acting on behalf of the client; or
 - (iii) for the benefit of the client; and
 - (c) the licensee is accountable for the property.
- (2) The regulations may:
 - (a) exempt property given in specified circumstances from some or all of the provisions of this Division; or
 - (b) declare that this Division applies in relation to property given in specified circumstances as if specified provisions of this Division were omitted, modified or varied as set out in the regulations.

The circumstances that may be specified include (but are not limited to) that the property was given in connection with a specified class of financial product or financial service.
- (3) An exemption in regulations made for the purposes of paragraph (2)(a) may be made subject to conditions specified in, or imposed in accordance with, the regulations. The regulations may provide for consequences of a contravention of a condition.

984B How property to which this Division applies is to be dealt with

- (1) Subject to subsection (2), the licensee must ensure that property to which this Division applies is only dealt with in accordance with:
 - (a) the requirements (if any) specified in regulations made for the purposes of this paragraph; and

Section 984B

- (b) subject to those requirements:
 - (i) the terms and conditions on which the property was given to the licensee; and
 - (ii) any subsequent instructions given by the client.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) If:
 - (a) the financial service referred to in subparagraph 984A(1)(a)(i) is or relates to a dealing in a derivative; or
 - (b) the financial product referred to in subparagraph 984A(1)(a)(ii) is a derivative;the property concerned may also be used for the purpose of meeting obligations incurred by the licensee in connection with margining, guaranteeing, securing, transferring, adjusting or settling dealings in derivatives by the licensee (including dealings on behalf of people other than the client).

Section 985A

Division 4—Special provisions relating to insurance

985A Definitions etc.

- (1) In this Division:

contract of insurance includes a contract of life insurance.

Note: *Contract of life insurance* has a meaning affected by subsection (2).

insured, in relation to a contract of life insurance, means a person (other than the insurer) who is entitled to a benefit under the contract, whether that person is the life insured or some other person.

Note: *Intending insured* has a corresponding meaning.

- (2) For the purposes of this Division, if:

- (a) a life policy (within the meaning of the *Life Insurance Act 1995*) would not ordinarily be regarded as a contract of life insurance; and
 - (b) liability under the policy is borne by a company registered under that Act; and
 - (c) the policy was entered into after the commencement of section 9D of the *Insurance (Agents and Brokers) Act 1984* as in force before the commencement of this Chapter;
- the policy is taken to be a contract of life insurance.

985B Status of amounts paid to financial services licensees in respect of contracts of insurance

- (1) If:

- (a) a contract of insurance is arranged or effected by a financial services licensee; and
 - (b) the licensee is not the insurer;
- payment to the licensee of money payable (whether in respect of a premium or otherwise) by the insured under or in relation to the contract is a discharge, as between the insured and the insurer, of the liability of the insured to the insurer in respect of that money.

- (2) Payment to a financial services licensee by or on behalf of an intending insured of money (whether in respect of a premium or

Section 985C

otherwise) in respect of a contract of insurance to be arranged or effected by the licensee with an insurer (not being the licensee) is a discharge, as between the insured and the insurer, of any liability of the insured under or in respect of the contract, to the extent of the amount of the payment.

- (3) Payment by an insurer to a financial services licensee of money payable to an insured, whether in respect of a claim, return of premiums or otherwise, under or in relation to a contract of insurance, does not discharge any liability of the insurer to the insured in respect of that money.
- (4) An agreement, so far as it purports to alter or restrict the operation of subsection (1), (2) or (3), is void.
- (5) Subsection (4) does not make void an agreement between a financial services licensee and an insured in so far as the agreement allows the licensee to set off against money payable to the insured money payable by the insured to the licensee in respect of premiums.

985C Regulations may impose other requirements etc. if financial services licensee is not the insurer

- (1) The regulations may impose requirements to be complied with by a financial services licensee in relation to, or make other provision dealing with, a situation specified in subsection (2) that arises in relation to a contract or proposed contract of insurance under which the licensee is not the insurer.
- (2) The situations are as follows:
 - (a) the licensee receives an amount as a premium or instalment of premium;
 - (b) the licensee does not receive an amount as a premium or instalment of premium by a particular time;
 - (c) the licensee is not aware of the amount of a premium or instalment of premium that is to be paid;
 - (d) the licensee receives money from the insured or intending insured but the risk or part of the risk has not been accepted by a particular time;
 - (e) the licensee receives money from the insurer for payment to or on behalf of the insured.

Section 985D

985D Financial services licensees etc. not to deal in general insurance products from unauthorised insurers etc.

- (1) A financial services licensee, or an authorised representative of a financial services licensee, must not deal in a general insurance product if the insurer for the product, or (if there is more than one insurer for the product) each insurer for the product, is not at least one of the following:
- (a) a general insurer within the meaning of the *Insurance Act 1973*;
 - (b) a Lloyd's underwriter within the meaning of that Act;
 - (c) a person in respect of whom a determination is in force, under subsection 7(1) of that Act, that subsection 9(1) or 10(1) or (2) of that Act does not apply (the effect of which is the effect referred to in paragraph 9(1)(c), 10(1)(c) or 10(2)(c) of that Act (as the case requires)).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Subsection (1) does not apply in relation to a general insurance product if, because of section 3A of the *Insurance Act 1973*, undertaking liability under the contract of insurance concerned is not, or would not be, insurance business for the purposes of that Act.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

- (3) Paragraph (1)(b) ceases to apply after section 93 of the *Insurance Act 1973* has ceased to have effect.

- (4) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 5—Obligations to report

986A Reporting in relation to money to which Subdivision A or B of Division 2 applies or property to which Division 3 applies

The regulations may impose reporting requirements to be complied with by a financial services licensee in relation to money to which Subdivision A or B of Division 2 applies or property to which Division 3 applies.

986B Reporting in relation to dealings in derivatives

The regulations may impose reporting requirements to be complied with by a financial services licensee in relation to dealings in derivatives on behalf of other people.

Section 987A

Division 6—Financial records, statements and audit

Subdivision A—Preliminary

987A Application of Division

- (1) This Division applies in relation to a financial services licensee and a financial services business carried on by the licensee, whether that business is carried on in this jurisdiction or elsewhere.
- (2) This Division does not affect, and is to be taken never to have affected, the operation of Chapter 2M in relation to a company that is a financial services licensee or in relation to a financial services business that is carried on by such a company.

Subdivision B—Financial records of financial services licensees

988A Obligation to keep financial records

- (1) A financial services licensee must (subject to subsection (2)):
 - (a) keep financial records that correctly record and explain the transactions and financial position of the financial services business carried on by the licensee; and
 - (b) keep those records in accordance with the requirements of this Subdivision; and
 - (c) comply with the requirements of this Subdivision in relation to conversion of records into the English language (see subsection 988C(2)).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The licensee does not contravene a requirement of this Subdivision merely because some or all of the records are kept as a part of, or in conjunction with, the records relating to any other business that is carried on by the licensee.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

988B Records to be kept so that profit and loss statements and balance sheet can be prepared and audited

The records must be kept in a way that:

- (a) enables true and fair profit and loss statements, and balance sheets, of the financial services business of the licensee to be prepared from time to time; and
- (b) allows those statements and balance sheets to be conveniently and properly audited.

988C Language of records

- (1) The records must be kept in writing in the English language, or in a manner that enables them to be readily accessible and readily converted into writing in the English language.
- (2) If any of the records are not kept in writing in the English language, the licensee must, if required to convert the records concerned into writing in the English language by a person who is entitled to examine the records concerned, comply with the requirement within a reasonable time.

988D Location of records

If any of the records are kept outside this jurisdiction, the licensee must:

- (a) cause to be sent to and kept at a place in this jurisdiction such particulars with respect to the business dealt with in those records as will enable true and fair profit and loss statements and balance sheets to be prepared; and
- (b) if required by ASIC to produce those records at a place in this jurisdiction, comply with the requirement not later than 28 days after the requirement is made.

988E Particular categories of information to be shown in records

The records must be kept in sufficient detail to show particulars of:

- (a) all money received or paid by the licensee, including money paid to, or disbursed from, an account maintained for the purposes of section 981B or 982B; and

Chapter 7 Financial services and markets

Part 7.8 Other provisions relating to conduct etc. connected with financial products and financial services, other than financial product disclosure

Division 6 Financial records, statements and audit

Section 988F

- (b) all acquisitions and disposals of financial products made by the licensee, the charges and credits arising from them, and the names of the person acquiring or disposing of each of those products; and
- (c) all income received by the licensee from commissions, interest, and other sources, and all expenses, commissions, and interest paid by the licensee; and
- (d) all the assets and liabilities (including contingent liabilities) of the licensee; and
- (e) all securities or managed investment products that are the property of the licensee, showing by whom the securities or products, or the documents of title to the securities or products, are held and, if they are held by some other person, whether or not they are held as security against loans or advances; and
- (f) all securities or managed investment products that are not the property of the licensee and for which the licensee or a nominee controlled by the licensee is accountable, showing:
 - (i) by whom, and for whom, the securities or products, or the documents of title to the securities or products, are held; and
 - (ii) the extent to which they are either held for safe custody or deposited with a third party as security for loans or advances made to the licensee; and
- (g) such other matters (if any) as are specified in regulations made for the purposes of this paragraph.

988F Regulations may impose additional requirements

The regulations may impose additional requirements to be complied with in relation to the records including, for example, requirements for things to be contained in the records, and requirements relating to the level of detail to be shown in the records.

988G Records taken to be made with licensee's authority

An entry in the records is, unless the contrary is proved, to be taken to have been made by, or with the authority of, the licensee.

Subdivision C—Financial statements of financial services licensees

989A Meaning of *financial year*

In this Subdivision:

financial year, in relation to a financial services licensee, means:

- (a) if the licensee is not a body corporate—a year ending on 30 June; and
- (b) if the licensee is a body corporate—a financial year of the body corporate.

989B Financial services licensee to prepare and lodge annual profit and loss statement and balance sheet

- (1) A financial services licensee must, in respect of each financial year, prepare a true and fair profit and loss statement and balance sheet in accordance with this Subdivision.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The licensee must lodge the statement and balance sheet with ASIC in accordance with this Subdivision.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) The licensee must, with the statement and balance sheet, lodge an auditor's report with ASIC containing the information and matters required by the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

989C Requirements as to contents and applicable accounting principles

The profit and loss statement and the balance sheet must:

- (a) contain the information that is required by the regulations; and
- (b) be prepared in accordance with any requirements in the regulations as to the accounting principles to be used.

Section 989CA

989CA Audit to be conducted in accordance with auditing standards

- (1) If an individual auditor, or an audit company, conducts an audit of a profit and loss statement and balance sheet for the purposes of this Subdivision, the individual auditor or audit company must:
 - (a) conduct the audit in accordance with the auditing standards; and
 - (b) include in the audit report on the profit and loss statement, and balance sheet, any statements or disclosures required by the auditing standards.
- (2) If an audit firm, or an audit company, conducts an audit of a profit and loss statement and balance sheet for the purposes of this Subdivision, the lead auditor for the audit or review must ensure that:
 - (a) the audit is conducted in accordance with the auditing standards; and
 - (b) the audit report on the profit and loss statement, and balance sheet, includes any statements or disclosures required by the auditing standards.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability* see section 6.1 of the *Criminal Code*.

989D Time of lodgment

- (1) Unless an extension is granted under subsection (3), the profit and loss statement and the balance sheet must be lodged before:
 - (a) if the licensee is not a body corporate—the day that is 2 months after the end of that financial year; or
 - (b) if the licensee is a body corporate—the day that is 3 months after the end of that financial year.
 - (2) If an extension is granted under subsection (3), the profit and loss statement and the balance sheet must be lodged before the end of the extended period.
 - (3) ASIC may, on application made:
 - (a) by a financial services licensee and the licensee's auditor; and
 - (b) before the end of the period that would otherwise apply;
-

Section 990A

approve an extension of the period for lodging the profit and loss statement and balance sheet. The extension may be of the period originally applicable or the period applicable under a previous extension.

- (4) An approval under subsection (3) may be given subject to such conditions (if any) as ASIC imposes.
- (5) If an approval under subsection (3) is given subject to conditions, the licensee must comply with those conditions.

Subdivision D—Appointment etc. of auditors

990A Sections 990B to 990H not to apply to public companies

Sections 990B to 990H do not apply to a financial services licensee that is a public company.

990B Appointment of auditor by licensee

- (1) A financial services licensee must, within 1 month after beginning to hold the licence, appoint as auditor or auditors to audit the licensee's financial statements:
 - (a) a person or persons; or
 - (b) a firm or firms; or
 - (c) a person or persons and a firm or firms.

Subsections (4) and (5) must be complied with in relation to the appointment.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Within 14 days after a vacancy occurs in the office of an auditor of the licensee, if there is no surviving or continuing auditor of the licensee, the licensee must appoint:
 - (a) a person or persons; or
 - (b) a firm or firms; or
 - (c) a person or persons and a firm or firms;

to fill the vacancy. Subsections (4) and (5) must be complied with in relation to the appointment.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 990B

- (3) While a vacancy in the office of an auditor of the licensee continues, the surviving or continuing auditor or auditors (if any) may act.
- (4) The licensee must not appoint as auditor a person who, or firm that, is ineligible by virtue of regulations made for the purposes of section 990C to act as auditor of the licensee.
- (5) The licensee must not appoint a person or firm as auditor of the licensee unless that person or firm has, before the appointment, consented by written notice given to the licensee to act as auditor and has not withdrawn the consent by written notice given to the licensee.
- (6) The licensee must, within 14 days after an appointment of a person or firm as auditor, lodge a written notice with ASIC stating that the licensee has made the appointment and specifying the name of the person or firm.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (7) The regulations may include provisions (including provisions imposing obligations) dealing with matters related to the appointment of a firm as auditor, including, for example:
 - (a) taking certain members of the firm to have been appointed as auditors; and
 - (b) the effect of a dissolution and reconstitution of the firm; and
 - (c) requiring a member of the firm who retires or withdraws to continue to act as auditor in certain circumstances; and
 - (d) how a report, notice or other document is to be made or given.
- (8) Regulations made for the purposes of subsection (7) may also include provisions modifying the effect of provisions of this Subdivision in relation to matters dealt with in those regulations.
- (9) In this section:

person means:

 - (a) an individual auditor; or
 - (b) an authorised audit company.

990C When a person or firm is ineligible to act as auditor

A person or firm is ineligible to act as auditor of the licensee if regulations made for the purposes of this section provide that the person or firm is ineligible so to act.

990D Ineligible person or firm must not consent to act or disqualify themselves etc.

- (1) A person or firm, while ineligible to act as auditor of the licensee, must not:
- (a) consent to be appointed as auditor of the licensee; or
 - (b) act as auditor of the licensee; or
 - (c) prepare a report that an auditor of the licensee is to prepare under this Part.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A person must not:
- (a) if the person has been appointed auditor of the licensee—disqualify himself or herself, while the appointment continues, from acting as auditor of the licensee; or
 - (b) if the person is a member of a firm that has been appointed auditor of the licensee—disqualify the firm, while the appointment continues, from acting as auditor of the licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

990E Duration of appointment of auditors

An auditor of the licensee holds office until:

- (a) death; or
- (b) removal in accordance with section 990F; or
- (c) resignation in accordance with sections 990G and 990H; or
- (d) becoming prohibited by subsection 990D(1) from acting as auditor of the licensee;

whichever occurs first.

Section 990F

990F Removal of auditors

The licensee:

- (a) must remove an auditor of the licensee from office if the auditor becomes ineligible to act as auditor of the licensee; and
- (b) may, with ASIC's consent, remove an auditor of the licensee from office.

Note: Failure to comply with paragraph (a) is an offence (see subsection 1311(1)).

990G Resignation of auditors—requirements for resignation

- (1) An auditor of the licensee may, by written notice given to the licensee, resign as auditor of the licensee if:
 - (a) the auditor has, by written notice given to ASIC, applied for consent to the resignation and, at or about the same time as the auditor gave notice to ASIC, gave written notice of the application to the licensee; and
 - (b) ASIC has consented and the auditor has received notice of ASIC's consent.
- (2) ASIC must, as soon as practicable after receiving an application from an auditor under subsection (1), notify the auditor and the licensee whether it consents to the resignation.
- (3) A statement by an auditor in an application under subsection (1), or in answer to an inquiry by ASIC relating to the reasons for the application:
 - (a) is not admissible in evidence in any civil or criminal proceedings in a court against the auditor other than proceedings for a contravention of section 1308; and
 - (b) may not be made the ground of a prosecution (other than a prosecution for a contravention of section 1308), action or suit against the auditor.
- (4) A certificate by ASIC that a statement was made in an application under subsection (1), or in answer to an inquiry by ASIC relating to the reasons for such an application, is conclusive evidence that the statement was so made.

990H Resignation of auditors—when resignation takes effect

The resignation of an auditor of the licensee takes effect on:

- (a) if the notice of resignation specifies a date as the date the resignation is to take effect—the date so specified; or
 - (b) the date on which ASIC gives its consent to the resignation; or
 - (c) if ASIC has fixed a date as the date the resignation is to take effect—the date so fixed;
- whichever last occurs.

990I Auditor's right of access to records, information etc.

- (1) An auditor of the licensee has a right of access at all reasonable times to the financial records or other records (including any register) of the licensee.
- (2) An auditor of the licensee is entitled to require:
 - (a) from the licensee; or
 - (b) if the licensee is a body corporate—from any director, secretary or senior manager of the licensee;such assistance and explanations as the auditor desires for the purposes of audit.
- (3) The licensee, or a director, secretary or senior manager of the licensee if it is a body corporate, must not:
 - (a) refuse or fail to allow an auditor of the licensee access, in accordance with subsection (1), to financial records or other records of the licensee; or
 - (b) refuse or fail to give assistance, or an explanation, to an auditor of the licensee as and when required under subsection (2); or
 - (c) otherwise hinder, obstruct or delay an auditor of the licensee in the performance or exercise of the auditor's duties or powers.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 990J

990J Auditor's fees and expenses

- (1) The reasonable fees and expenses of an auditor of the licensee are payable by the licensee.
- (2) The auditor may recover those fees by action against the licensee.

990K Auditor to report on certain matters

- (1) If an auditor, in the performance of duties as auditor of the licensee, becomes aware of a matter referred to in subsection (2), the auditor must, within 7 days after becoming aware of the matter, lodge a written report on the matter with ASIC and send a copy of the report to the licensee, and to each licensed market (if any) and each licensed CS facility (if any) in which the licensee is a participant.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

- (2) A report must be given in relation to any matter that, in the opinion of the auditor:
 - (a) has adversely affected, is adversely affecting or may adversely affect the ability of the licensee to meet the licensee's obligations as a licensee; or
 - (b) constitutes or may constitute a contravention of:
 - (i) a provision of Subdivision A or B of Division 2 (or a provision of regulations made for the purposes of such a provision); or
 - (ii) a provision of Division 3 (or a provision of regulations made for the purposes of such a provision); or
 - (iii) a provision of Subdivision B or C of this Division (or a provision of regulations made for the purposes of such a provision); or
 - (iv) a condition of the licensee's licence; or
 - (c) constitutes an attempt to unduly influence, coerce, manipulate or mislead the auditor in the conduct of the audit.

990L Qualified privilege for auditor etc.

Qualified privilege for auditor

- (1) An auditor of the licensee has qualified privilege in respect of:
- (a) a statement that the auditor makes, orally or in writing, in the course of the auditor's duties as auditor; or
 - (b) the lodging of a report under subsection 990K(1); or
 - (c) the sending of a report to:
 - (i) the licensee; or
 - (ii) a licensed market or a licensed CS facility; under subsection 990K(1); or
 - (d) a disclosure made by the auditor in response to a notice given to the auditor under subsection 225A(5) of the ASIC Act.

Note: If the auditor is an audit company, the company has qualified privilege under this subsection in respect of statements made, and reports lodged or sent, by individuals on behalf of the company if those statements and notices can be properly attributed to the company.

Qualified privilege for registered company auditor acting on behalf of audit company

- (2) If the auditor of the licensee is an audit company, a registered company auditor acting on behalf of the company has qualified privilege in respect of:
- (a) a statement that the registered company auditor makes (orally or in writing) in the course of the performance, on behalf of the company, of the company's duties as auditor; or
 - (b) the lodging by the registered company auditor, on behalf of the company, of a report under subsection 990K(1); or
 - (c) the sending by the registered company auditor, on behalf of the company, of a report to:
 - (i) the licensee; or
 - (ii) a licensed market or a licensed CS facility; under subsection 990K(1); or
 - (d) a disclosure made by the registered company auditor in response to a notice given to the audit company under subsection 225A(5) of the ASIC Act.

Chapter 7 Financial services and markets

Part 7.8 Other provisions relating to conduct etc. connected with financial products and financial services, other than financial product disclosure

Division 6 Financial records, statements and audit

Section 990L

Qualified privilege for subsequent publication

- (3) A person has qualified privilege in respect of the publishing of a document:
 - (a) prepared by an auditor of the licensee in the course of the auditor's duties as auditor; or
 - (b) required by or under this Chapter to be lodged with ASIC (whether or not the document has been so lodged).
- (4) A person has qualified privilege in respect of the publishing of a statement:
 - (a) made by an auditor of the licensee as mentioned in subsection (1); or
 - (b) a statement made by a registered company auditor as mentioned in subsection (2).

Division 7—Other rules about conduct

991A Financial services licensee not to engage in unconscionable conduct

- (1) A financial services licensee must not, in or in relation to the provision of a financial service, engage in conduct that is, in all the circumstances, unconscionable.
- (2) If a person suffers loss or damage because a financial services licensee contravenes subsection (1), the person may recover the amount of the loss or damage by action against the licensee.
- (3) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.
- (4) This section does not affect any liability that a person has under any other law.

991B Financial services licensee to give priority to clients' orders

- (1) This section applies if:
 - (a) a person (the *client*) has instructed a financial services licensee to buy or sell financial products of a particular class that are able to be traded on a licensed market; and
 - (b) the licensee has not complied with the instruction; and
 - (c) the client is not an associate of the licensee; and
 - (d) regulations made for the purposes of this paragraph do not exclude those financial products from this section.
- (2) The financial services licensee must not, except as permitted by subsection (3):
 - (a) enter into a transaction of purchase or sale of financial products of that class either on their own behalf or on behalf of an associate of the licensee; or
 - (b) instruct another person to enter into a transaction of purchase or sale of financial products of that class on behalf of the licensee or an associate of the licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 991C

- (3) Subsection (2) does not apply in relation to the entering into of a transaction, or the giving of an instruction, by the licensee if:
- (a) the client's instructions required the purchase or sale to be effected only on specified conditions relating to price and the licensee has been unable to comply with the instructions because of those conditions; or
 - (b) the transaction, or the giving of the instruction, is permitted by regulations made for the purposes of this paragraph.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

991C Regulations may deal with various matters relating to instructions to deal through licensed markets

The regulations may do all or any of the following in relation to instructions received by financial services licensees to deal in financial products through licensed markets:

- (a) impose requirements relating to the order in which instructions are to be transmitted to a licensed market or to another financial services licensee who is a participant in a licensed market;
- (b) impose requirements relating to the order in which dealings that have been effected on a licensed market are to be allocated to instructions;
- (c) prohibit the disclosure of instructions in specified circumstances.

991D Regulations may require records to be kept in relation to instructions to deal on licensed markets and foreign markets

The regulations may impose requirements for the keeping of records relating to all or any of the following:

- (a) instructions received by financial services licensees to deal in financial products through licensed markets or through other financial markets (whether inside or outside Australia);
- (b) the execution of such instructions;
- (c) the transmission of such instructions.

991E Obligations of financial services licensee in relation to dealings with non-licensees

Obligation to disclose if acting on own behalf

- (1) Subject to the regulations, a financial services licensee must not, either personally or through an authorised representative, enter into a financial product transaction on their own behalf:
- (a) that relates to a financial product that is able to be traded on a licensed market; and
 - (b) that is with a person (the **non-licensee**) who is not a financial services licensee or an authorised representative;
- if:
- (c) the licensee has not (in accordance with any applicable regulations made for the purposes of paragraph (2)(a)) disclosed to the non-licensee the fact that the licensee will be acting on their own behalf in the proposed dealing; or
 - (d) the non-licensee has not (in accordance with any applicable regulations made for the purposes of paragraph (2)(b)) consented to the licensee so acting in the proposed dealing.

If the licensee is acting through an authorised representative, the disclosure referred to in paragraph (c) may instead be given by the representative.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The regulations may deal with either or both of the following:
- (a) how a disclosure referred to in paragraph (1)(c) is to be made;
 - (b) how a consent referred to in paragraph (1)(d) is to be given.

Obligation not to charge fee

- (3) If a financial services licensee, either personally or through an authorised representative, enters into a transaction of sale or purchase of financial products on their own behalf:
- (a) that relates to a financial product that is able to be traded on a licensed market; and
 - (b) that is with a person (the **non-licensee**) who is not a financial services licensee or an authorised representative;

Section 991F

the licensee must only charge the non-licensee a brokerage, commission or other fee in respect of the transaction if the charge is permitted by the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Person may rescind contract if section contravened

- (4) If subsection (1) or (3) is contravened in relation to a transaction (whether or not anyone is convicted of an offence in respect of the contravention), the non-licensee may, subject to subsection (5), rescind the contract effecting the transaction, unless the contract was for the purchase of financial products by the non-licensee and the non-licensee has disposed of those products.
- (5) The right under subsection (4) to rescind the contract:
 - (a) can only be exercised during the period of 14 days starting on:
 - (i) unless subparagraph (ii) applies—the day on which the contract was entered into; or
 - (ii) if regulations made for the purposes of this subparagraph specify a later day—that later day; and
 - (b) is to be exercised by notice in writing to the licensee.
- (6) Nothing in subsections (4) and (5) affects any other right that a person has.

Regulations may require records to be kept in relation to transactions entered into by licensee on own behalf

- (7) The regulations may impose requirements for the keeping of records relating to financial products transactions entered into by a financial services licensee on their own behalf.

991F Dealings involving employees of financial services licensees

- (1) Subject to the regulations, a financial services licensee and an employee of the licensee must not, on their own behalves, jointly acquire a financial product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 991F

- (2) Subject to the regulations, a financial services licensee must not give credit to an employee of the licensee, or to a person who they know is an associate of an employee of the licensee, if:
- (a) the credit is given for the purpose of enabling the person to whom the credit is given to acquire a financial product; or
 - (b) the licensee knows or has reason to believe that the credit will be used for the purpose of acquiring a financial product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) Subject to the regulations, a person:
- (a) who is an employee of a financial services licensee that is a participant in a licensed market; and
 - (b) who is so employed in connection with a business of dealing in financial products;
- must only, on their own behalf, acquire or agree to acquire a financial product of a kind that is able to be traded on that market if the licensee acts as the agent of the person in respect of the acquisition.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) In this section, a reference to an employee of a financial services licensee includes, for a licensee that is a body corporate, a reference to an officer of the body.

Section 992A

Division 8—Miscellaneous

992A Prohibition on hawking of certain financial products

- (1) A person must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting with another person.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Subsection (1) does not apply to offering of securities, hawking of which is prohibited by section 736, or to offering of managed investment products, hawking of which is prohibited by section 992AA.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

- (3) A person must not make an offer to issue or sell a financial product in the course of, or because of:

- (aa) an unsolicited telephone call to another person; or
- (ab) an unsolicited contact with another person in another way that is prescribed by the regulations for the purposes of this paragraph;

unless the other person has been:

- (a) contacted only during the hours prescribed by the regulations and only if the person is not listed on the “No Contact/No Call” register in relation to the person making the contact; and
- (b) given an opportunity to:
 - (i) register on a “No Contact/No Call” register maintained by the person making the contact at no cost to that person; and
 - (ii) select the time and frequency of any future contacts; and
- (c) given a Product Disclosure Statement before becoming bound to acquire a financial product; and
- (d) clearly informed of the importance of using the information in the Product Disclosure Statement when making a decision to acquire a financial product; and

Section 992A

- (e) given the option of having the information in the Product Disclosure Statement read out to that person.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3A) Neither subsection (1) nor (3) applies to an offer of financial products if the offer is not to a retail client.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

- (3B) Neither subsection (1) nor (3) applies to an offer of financial products that is made under an eligible employee share scheme.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

- (4) In addition to other penalties for breaches of this section, a failure to comply with this section gives the other person a right of return and refund exercisable within 1 month after the expiry date of the relevant cooling-off period for the financial product, or one month and fourteen days in the event that no cooling-off period applies to the financial product, subject to the following provisions:

- (a) on the exercise of the right to return the product:
 - (i) if the product is constituted by a legal relationship between the client and the issuer of the product—that relationship is, by force of this subsection, terminated with effect from that time without penalty to the client; and
 - (ii) any contract for the acquisition of the product by the client is, by force of this subsection, terminated with effect from that time without penalty to the client;
- (b) the regulations may provide for consequences and obligations (in addition to those provided for in paragraph (a)) to apply if the right to return a financial product is exercised;
- (c) the regulations may do any or all of the following:
 - (i) provide that a specified subclass of financial products that would otherwise be covered by this subsection is excluded from this subsection;
 - (ii) provide additional requirements to be satisfied before this subsection applies in relation to a class or subclass of financial products;

Section 992AA

- (iii) provide that this subsection does not apply in relation to the provision of a financial product in specified circumstances.
- (5) For the purposes of this section:
 - (a) a reference to offering a financial product for issue (or offering to issue a financial product) includes a reference to inviting an application for the issue of the financial product; and
 - (b) a reference to offering a financial product for sale (or offering to sell a financial product) includes a reference to inviting an offer to purchase the financial product.

992AA Prohibition of hawking of managed investment products

- (1) A person must not offer interests in managed investment schemes for issue or sale in the course of, or because of:
 - (a) an unsolicited meeting with another person; or
 - (b) an unsolicited telephone call to another person;unless the offer is exempted under subsection (2).
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (2) Subsection (1) does not apply to an offer of interests in managed investment schemes if:
 - (a) the offer is not to a retail client;
 - (b) the offer is an offer of interests in a listed managed investment scheme made by telephone by a financial services licensee; or
 - (c) the offer is made to a client by a financial services licensee through whom the client has acquired or disposed of an interest in a managed investment scheme in the previous 12 months; or
 - (d) the offer is made under an eligible employee share scheme.
 - (3) For the purposes of this section:
 - (a) a reference to offering interests in a managed investment scheme for issue includes a reference to inviting an application for the issue of interests in the scheme; and

Section 992B

- (b) a reference to offering interests in a managed investment scheme for sale includes a reference to inviting an offer to purchase interests in the scheme.

992B Exemptions and modifications by ASIC

- (1) ASIC may:
 - (a) exempt a person or class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial product or class of financial products from all or specified provisions of this Part; or
 - (c) declare that this Part applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of this Part were omitted, modified or varied as specified in the declaration.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (4)):
 - (a) the text of the declaration was made available by ASIC on the Internet; or
 - (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

- (6) For the purpose of this section, the *provisions of this Part* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

Chapter 7 Financial services and markets

Part 7.8 Other provisions relating to conduct etc. connected with financial products and financial services, other than financial product disclosure

Division 8 Miscellaneous

Section 992C

- (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

992C Exemptions and modifications by regulations

- (1) The regulations may:
 - (a) exempt a person or class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or
 - (c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (2) For the purpose of this section, the *provisions of this Part* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Division 9—Enforcement

993A Overview

This Division contains provisions creating offences by reference to various rules contained in preceding Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

993B Offence of failing to pay client money into an account as required

Strict liability offence

- (1) A financial services licensee commits an offence if:
 - (a) the licensee is required by subsection 981B(1) to pay particular money into an account in accordance with that subsection; and
 - (b) the licensee does not pay the money into an account in accordance with that subsection.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Ordinary offence

- (3) A financial services licensee commits an offence if:
 - (a) the licensee is required by subsection 981B(1) to pay particular money into an account in accordance with that subsection; and
 - (b) the licensee does not pay the money into an account in accordance with that subsection.

Section 993C

993C Offence of failing to comply with requirements relating to client money account

Strict liability offence

- (1) A financial services licensee commits an offence if the licensee contravenes a requirement in regulations made for the purposes of section 981C.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Ordinary offence

- (3) A financial services licensee commits an offence if:
 - (a) a requirement in regulations made for the purposes of section 981C applies to the licensee; and
 - (b) the licensee contravenes the requirement.

993D Offence of failing to pay loan money into an account as required

Strict liability offence

- (1) A financial services licensee commits an offence if:
 - (a) the licensee is required by subsection 982B(1) to pay particular money into an account in accordance with that subsection; and
 - (b) the licensee does not pay the money into an account in accordance with that subsection.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Ordinary offence

- (3) A financial services licensee commits an offence if:
 - (a) the licensee is required by subsection 982B(1) to pay particular money into an account in accordance with that subsection; and
 - (b) the licensee does not pay the money into an account in accordance with that subsection.

Part 7.9—Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

Division 1—Preliminary

1010A Part generally does not apply to securities

- (1) Apart from section 1017F and Divisions 5A and 6 (and provisions of Division 7 that apply in relation to that section or provisions of those Divisions), nothing in this Part applies in relation to securities.

Note: Chapters 6CA and 6D provide for disclosure in relation to securities.

- (2) Apart from section 1017F and Divisions 5A and 6, nothing in this Part applies in relation to debentures, stocks or bonds issued or proposed to be issued by a government.

Note: These financial products are not *securities* within the meaning of section 761A.

1010B Part does not apply to financial products not issued in the course of a business

- (1) Apart from Division 5A, nothing in this Part applies in relation to a financial product that is not or was not issued, or that will not be issued, in the course of a business of issuing financial products.
- (2) For this purpose, the issue of:
 - (a) any managed investment product; or
 - (b) any superannuation product;is taken to occur in the course of a business of issuing financial products.

1010BA Part does not apply to contribution plans

Apart from section 1017F and Divisions 5A and 6 (and provisions of Division 7 that apply in relation to that section or provisions of

Section 1010C

those Divisions), nothing in this Part applies in relation to contribution plans.

1010C Special provisions about meaning of *sale* and *offer*

- (1) For the purposes of this Part, a reference to a *sale* or *purchase* of a financial product is a reference to a sale of the product by, or a purchase of the product from, a person who has (whether by issue or otherwise) acquired the product. The issue of a financial product is not a sale of the financial product.
- (2) For the purposes of this Part:
 - (a) a reference to offering to issue a financial product includes a reference to inviting an application for the issue of the financial product; and
 - (b) a reference to offering to sell a financial product includes a reference to inviting an offer to purchase the financial product.

1010D General approach to offence provisions

Division 7 contains provisions creating offences by reference to various rules contained in Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

Division 2—Product Disclosure Statements

Subdivision A—Preliminary

1011A Jurisdictional scope of Division

- (1) Subject to subsection (2), sections 1012A, 1012B and 1012C only apply in relation to offers and recommendations referred to in those sections that are received in this jurisdiction.
- (2) Section 1012B also applies in relation to issues referred to in subparagraph 1012B(3)(a)(iii) that are made in this jurisdiction.
- (3) The regulations may make provision dealing with the jurisdictional scope of some or all of the other provisions of this Division. The other provisions of this Division have effect subject to any such regulations.

1011B Definitions

In this Division:

issue Statement has the meaning given by subsection 1013A(1).

offer has a meaning affected by sections 1010C and 1011C.

regulated person, in relation to a financial product, means:

- (a) an issuer of the financial product; or
- (b) a seller of the financial product if the sale takes place in circumstances described in subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement); or
- (c) any financial services licensee; or
- (d) any authorised representative of a financial services licensee; or
- (f) any person who is not required to hold an Australian financial services licence because the person is covered by:
 - (i) paragraph 911A(2)(j); or
 - (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or

Section 1011C

- (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l); or
- (g) any person who is required to hold an Australian financial services licence but who does not hold such a licence.

responsible person for a Product Disclosure Statement has the meaning given by subsection 1013A(3).

sale has a meaning affected by section 1010C.

sale Statement has the meaning given by subsection 1013A(2).

1011C Treatment of offers of options over financial products

For the purposes of this Division:

- (a) an offer of an option over a financial product is not to be taken to be an offer of the underlying financial product; and
- (b) the grant of an option without an offer of the option is taken to be an offer of the option; and
- (c) an offer to grant an option is taken to be an offer to issue the financial product constituted by the option.

Subdivision B—Requirement for a Product Disclosure Statement to be given

1012A Obligation to give Product Disclosure Statement—personal advice recommending particular financial product

Section sets out recommendation situation in which Product Disclosure Statement required

- (1) This section sets out the situations in which giving financial product advice that consists of, or includes, a recommendation to acquire a financial product gives rise to an obligation on a regulated person to give another person a Product Disclosure Statement for the product.

Section 1012B

- (2) For the purposes of this Division:
- (a) each of the situations is a ***recommendation situation***; and
 - (b) the ***relevant conduct*** for that situation is the making of the recommendation; and
 - (c) the ***client*** for that situation is the person to whom the advice is provided.

Personal advice recommending a particular financial product

- (3) A regulated person must give a person a Product Disclosure Statement for a financial product if:
- (a) the regulated person provides financial product advice to the person that consists of, or includes, a recommendation that the person acquire the financial product; and
 - (b) the person would acquire the financial product by way of:
 - (i) the issue of the product to the person (rather than the transfer of the product to the person); or
 - (ii) the transfer of the product to the person in circumstances described in subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement); and
 - (c) the financial product advice is provided to the client as a retail client; and
 - (d) the financial product advice is personal advice to the client.
- The Product Disclosure Statement must be given at or before the time when the regulated person provides the advice and must be given in accordance with this Division.

This section has effect subject to other provisions

- (4) This section has effect subject to sections 1012D, 1012DA, 1012E, 1012F, 1012G and 1014E.

1012B Obligation to give Product Disclosure Statement—situations related to issue of financial products

Section sets out issue situations in which Product Disclosure Statement required

- (1) This section sets out situations in which:
- (a) an offer relating to the issue of a financial product; or

Section 1012B

(b) the issue of a financial product;
gives rise to an obligation on a regulated person to give another person a Product Disclosure Statement for the product.

(2) For the purposes of this Division:

- (a) each of the situations is an *issue situation*; and
- (b) the *relevant conduct* for that situation is the conduct by the regulated person that gives rise to the obligation to give the Product Disclosure Statement; and
- (c) the *client* for that situation is the person to whom the financial product is to be or is issued.

The main issue situations

(3) A regulated person must give a person a Product Disclosure Statement for a financial product if:

- (a) the regulated person:
 - (i) offers to issue the financial product to the person; or
 - (ii) offers to arrange for the issue of the financial product to the person; or
 - (iii) issues the financial product to the person in circumstances in which there are reasonable grounds to believe that the person has not been given a Product Disclosure Statement for the product; and
- (b) the financial product is, or is to be, issued to the person as a retail client.

The Product Disclosure Statement must be given at or before the time when the regulated person makes the offer, or issues the financial product, to the person and must be given in accordance with this Division.

Note: If a Product Disclosure Statement is given when the offer is made, it will not need to be given again when the product is issued to the person (see subsection 1012D(1)) unless the Product Disclosure Statement that was given is no longer up to date.

Receiving offer to acquire financial product

(4) A regulated person must give a person a Product Disclosure Statement for a financial product if:

- (a) the person makes an offer to the regulated person to acquire the financial product; and

Section 1012C

- (b) the person would acquire the financial product by way of the issue of the product to the person (rather than the transfer of the product to the person); and
- (c) the financial product is to be issued to the person as a retail client.

The Product Disclosure Statement must be given to the person before the person becomes bound by a legal obligation to acquire the financial product pursuant to the offer and must be given in accordance with this Division.

This section has effect subject to other provisions

- (5) This section has effect subject to sections 1012D, 1012DAA, 1012E, 1012F, 1012G and 1014E.

1012C Obligation to give Product Disclosure Statement—offers related to sale of financial products

Section sets out sale situations in which Product Disclosure Statement required

- (1) This section sets out situations in which an offer relating to the sale of a financial product gives rise to an obligation on a regulated person to give another person a Product Disclosure Statement for the product.
- (2) For the purposes of this Division:
 - (a) each of the situations is a **sale situation**; and
 - (b) the **relevant conduct** for that situation is the offer; and
 - (c) the **client** for that situation is the person to whom the product is to be sold.

Sale offers that require a Product Disclosure Statement

- (3) A regulated person must give a person a Product Disclosure Statement for a financial product if:
 - (a) the regulated person offers to sell the financial product to the person; and
 - (b) a sale of the product to the person pursuant to the offer would take place in circumstances covered by subsection (5), (6) or (8); and

Section 1012C

- (c) the financial product is to be sold to the person as a retail client.

The Product Disclosure Statement must be given at or before the time when the regulated person makes the offer and must be given in accordance with this Division.

- (4) A regulated person must give a person a Product Disclosure Statement for a financial product if:
 - (a) the person makes an offer to the regulated person to acquire the financial product; and
 - (b) the person would acquire the financial product by way of the transfer of the product to the person; and
 - (c) a sale of the product to the person pursuant to the offer would take place in the circumstances described in subsection (5), (6) or (8); and
 - (d) the financial product is to be sold to the person as a retail client.

The Product Disclosure Statement must be given to the person before the person becomes bound by a legal obligation to acquire the financial product pursuant to the offer and must be given in accordance with this Division.

Off-market sale by controller

- (5) This subsection covers the circumstances in which:
 - (a) the seller controls the issuer of the financial product; and
 - (b) either:
 - (i) the product is not able to be traded on any licensed market; or
 - (ii) although the product is able to be traded on a licensed market, the offer is not made in the ordinary course of trading on a licensed market.

Note: See section 50AA for when a person controls a body.

Sale amounting to indirect issue

- (6) This subsection covers the circumstances in which:
 - (a) the offer is made within 12 months after the issue of the financial product; and

Section 1012C

- (b) the product was issued without a Product Disclosure Statement for the product being prepared; and
- (c) either:
 - (i) the issuer issued the product with the purpose of the person to whom it was issued selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product; or
 - (ii) the person to whom the product was issued acquired it with the purpose of selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product.

The purpose test in subsection (6)

- (7) For the purposes of subsection (6):
 - (a) a financial product is taken to be:
 - (i) issued with the purpose referred to in subparagraph (6)(c)(i); or
 - (ii) acquired with the purpose referred to in subparagraph (6)(c)(ii);if there are reasonable grounds for concluding that the product was issued or acquired with that purpose (whether or not there were or may have been other purposes for the issue or acquisition); and
 - (b) without limiting paragraph (a), a financial product is taken to be:
 - (i) issued with the purpose referred to in subparagraph (6)(c)(i); or
 - (ii) acquired with the purpose referred to in subparagraph (6)(c)(ii);if the financial product, or any financial product of the same kind that was issued at the same time, is subsequently sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the issue and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the product was issued or acquired with that purpose.

Section 1012C

Sale amounting to indirect off-market sale by controller

- (8) This subsection covers the circumstances in which:
- (a) the offer is made within 12 months after the sale of the financial product by a person (the **controller**) who controlled the issuer of the product at the time of the sale; and
 - (b) either:
 - (i) at the time of the sale by the controller, the product was not able to be traded on any licensed market; or
 - (ii) although the product was able to be traded on a licensed market at that time, the sale by the controller did not occur in the ordinary course of trading on a licensed market; and
 - (c) a Product Disclosure Statement was not prepared by, or on behalf of, the controller before the sale of the product by the controller; and
 - (d) either:
 - (i) the controller sold the product with the purpose of the person to whom it was sold selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product; or
 - (ii) the person to whom the controller sold the product acquired it with the purpose of selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product.

Note: See section 50AA for when a person controls a body.

The purpose test in subsection (8)

- (9) For the purposes of subsection (8):
- (a) a financial product is taken to be:
 - (i) sold with the purpose referred to in subparagraph (8)(d)(i); or
 - (ii) acquired with the purpose referred to in subparagraph (8)(d)(ii);
- if there are reasonable grounds for concluding that the product was sold or acquired with that purpose (whether or not there were or may have been other purposes for the sale or acquisition); and

Section 1012D

(b) without limiting paragraph (a), a financial product is taken to be:

- (i) sold with the purpose referred to in subparagraph (8)(d)(i); or
- (ii) acquired with the purpose referred to in subparagraph (8)(d)(ii);

if the financial product, or any financial product of the same kind that was sold by the controller at the same time, is subsequently sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the initial sale and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the product was sold or acquired (in the initial sale) with that purpose.

This section has effect subject to other provisions

- (10) This section has effect subject to sections 1012D, 1012DA, 1012E and 1014E.

1012D Situations in which Product Disclosure Statement is not required

Recommendation, issue or sale situation—client has already received an up to date Product Disclosure Statement

- (1) In a recommendation situation, issue situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
- (a) the client has already received a Product Disclosure Statement that contains all of the information that the first-mentioned Product Disclosure Statement would be required to contain; or
 - (b) the regulated person believes on reasonable grounds that paragraph (a) applies.

Recommendation, issue or sale situation—client has or has access to up to date information

- (2) In a recommendation situation, issue situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if:

Section 1012D

- (a) the client already holds a financial product of the same kind; and
- (b) the regulated person believes on reasonable grounds that the client has received, or has, and knows that they have, access to, all of the information that the first-mentioned Product Disclosure Statement would be required to contain through:
 - (i) a Product Disclosure Statement; and
 - (ii) information provided to the client under section 1017B, 1017C or 1017D or through continuous disclosure under Chapter 6CA.

Note: Paragraph (a)—see subsection (10).

Recommendation or issue situation—interests in self-managed superannuation funds

- (2A) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if:
 - (a) the financial product is an interest in a self-managed superannuation fund; and
 - (b) the regulated person believes on reasonable grounds that the client has received, or has, and knows that they have, access to, all of the information that the Product Disclosure Statement would be required to contain.

Recommendation, issue or sale situation—no information required to be in Product Disclosure Statement

- (2B) In a recommendation situation, issue situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if, because of section 1013F, no information would be required to be included in the Statement.

Recommendation or issue situation—certain offers to present holders

- (3) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if:

Section 1012D

- (a) the client already holds a financial product of the same kind;
and
- (b) either:
 - (i) in a recommendation situation—the advice that constitutes the relevant conduct relates to an offer made under a distribution reinvestment plan or switching facility; or
 - (ii) in an issue situation—the offer or issue that constitutes the relevant conduct is made under a distribution reinvestment plan or switching facility.

Note: Paragraph (a)—see subsection (10).

Recommendation, issue or sale situation—no consideration to be provided

- (5) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) no consideration is to be provided for the issue or sale of the financial product; and
 - (b) the financial product is not an option and is:
 - (i) a managed investment product; or
 - (ii) a financial product of a kind prescribed by regulations made for the purposes of this subparagraph.
- (6) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) the financial product is an option; and
 - (b) no consideration is to be provided for the issue or sale of the financial product; and
 - (c) no consideration is to be provided for the underlying financial product on the exercise of the option.

Issue or sale situation—takeovers

- (7) In an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) the financial product is:
 - (i) a managed investment product; or

Section 1012D

- (ii) an option to acquire, by way of transfer, a share in a body, a debenture of a body or a legal or equitable right or interest in a share in a body or a debenture of a body; and
- (b) the offer that constitutes the relevant conduct is made as consideration for an offer made under a takeover bid under Chapter 6; and
- (c) the offer is accompanied by a bidder's statement.

Note: Although a Product Disclosure Statement is not needed, disclosures must be made in the bidder's document under section 636.

Recommendation, issue or sale situation—responsible entity an exempt body

- (8) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) the financial product is a financial product described in paragraph 764A(1)(ba) (which relates to certain managed investment schemes that are not registered schemes); and
 - (b) the holder of the office (by whatever name it is known), in relation to the managed investment scheme, that corresponds most closely to the office of responsible entity of a registered scheme is an exempt body; and
 - (c) in the case of a recommendation situation or an issue situation—either:
 - (i) the recommendation that constitutes the relevant conduct relates to an offer made by the office holder referred to in paragraph (b); or
 - (ii) the offer that constitutes the relevant conduct is made by or to the office holder referred to in paragraph (b).

Note 1: Section 66A defines *exempt body*.

Note 2: In the case of a sale situation, there is no additional requirement equivalent to paragraph (c).

Recommendation or issue situation—interim contracts of insurance

- (9) In a recommendation situation or an issue situation, the regulated person does not have to give the client a Product Disclosure Statement if the financial product is an interim contract of

Section 1012D

insurance (as defined in subsection 11(2) of the *Insurance Contracts Act 1984*).

Note: This does not detract from the obligation to give a Product Disclosure Statement relating to any contract of insurance that replaces or supersedes the interim contract.

Recommendation, issue or sale situation—client is associated with registered scheme

- (9A) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
- (a) the financial product is a managed investment product; and
 - (b) the client is associated (within the meaning of subsection (9B)) with the scheme's responsible entity.
- (9B) For the purposes of subsection (9A), the client is associated with the scheme's responsible entity if the client is:
- (a) a senior manager of the responsible entity or of a related body corporate; or
 - (b) a spouse, parent, child, brother or sister of a person who is a senior manager of the responsible entity or a related body corporate; or
 - (c) a body corporate controlled by a person referred to in paragraph (a) or (b).

Interpretation

- (10) For the purposes of this section:
- (a) a financial product (other than a managed investment product or a superannuation product) is of the same kind as another financial product only if they are both issued:
 - (i) by the same issuer; and
 - (ii) on the same terms and conditions (other than price); and
 - (b) a managed investment product, or a superannuation product, is of the same kind as another product only if the other product is an interest in the same scheme or fund; and
 - (c) a reference to information that a Product Disclosure Statement would be required to contain includes a reference to information that would be required to be in any statement

Section 1012DAA

that the Product Disclosure Statement would be required to contain.

1012DAA Rights issues for which Product Disclosure Statement is not required

- (1) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) but for subsection (2), the regulated person would be required by section 1012B to give a Product Disclosure Statement for the transfer or issue of a financial product (the *relevant product*); and
 - (b) a determination under subsection (3) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.

Conditions required for rights issue

- (2) The regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) the relevant product is being offered under a rights issue; and
 - (b) the class of the relevant product are quoted securities at the time at which the offer is made; and
 - (c) trading in that class of the relevant product on a prescribed financial market on which they are quoted was not suspended for more than a total of 5 days during the shorter of the following periods:
 - (i) the period during which the class of the relevant product is quoted;
 - (ii) the period of 12 months before the day on which the offer is made; and
 - (d) no exemption under section 111AS or 111AT covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (c); and
 - (e) no order under section 340 or 341 covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (c); and

Section 1012DAA

- (f) the issuer of the relevant product gives the relevant market operator for the issuer a written notice that complies with subsection (7) within the 24 hour period before the relevant conduct occurs.

Determination by ASIC

- (3) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the issuer of the relevant product contravened any of the following provisions:
 - (a) the provisions of Chapter 2M as they apply to the registered scheme in which the relevant product is an interest;
 - (b) section 674 or 675 as it applies to the registered scheme in which the relevant product is an interest;
 - (c) section 1016E, 1021D, 1021E or 1021J;
 - (d) subsection (10) of this section;
 - (e) section 1308 as it applies to a notice under subsection (2) of this section.
- (4) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (5) The determination made under subsection (3) is not a legislative instrument.
- (6) A failure to publish a copy of the determination does not affect the validity of the determination.

Requirements for notice

- (7) A notice complies with this subsection if the notice:
 - (a) states that the relevant product was issued without a Product Disclosure Statement for the relevant product being prepared; and
 - (b) states that the notice is being given under paragraph (2)(f); and
 - (c) states that, as a disclosing entity, the issuer of the relevant product is subject to regular reporting and disclosure obligations; and

Section 1012DAA

- (d) states that, as at the date of the notice, the issuer of the relevant product has complied with:
 - (i) the provisions of Chapter 2M as they apply to the registered scheme in which the relevant product is an interest; and
 - (ii) section 674 as it applies to that registered scheme; and
- (e) sets out any information that is excluded information as at the date of the notice (see subsections (8) and (9)); and
- (f) states:
 - (i) the potential effect the issue of the relevant product will have on the control of the body; and
 - (ii) the consequences of that effect.

Note 1: A person is taken not to contravene section 1021C if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 1021C(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The issuer has an obligation to correct a defective notice: see subsection (10) of this section.

- (8) For the purposes of subsection (7), excluded information is information:
 - (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
 - (b) that a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the relevant product.
- (9) The notice given under subsection (2) must contain any excluded information only to the extent to which it is reasonable for a person considering, as a retail client, whether to acquire the relevant product to expect to find the information in a Product Disclosure Statement.

Obligation to correct defective notice

- (10) The issuer of the relevant product contravenes this subsection if:
 - (a) the notice given under subsection (2) is defective; and
 - (b) the issuer becomes aware of the defect in the notice within 12 months after the relevant product is issued; and

Section 1012DA

- (c) the issuer does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.
- (11) For the purposes of subsection (10), the notice under subsection (2) is **defective** if the notice:
 - (a) does not comply with paragraph (2)(f); or
 - (b) is false or misleading in a material particular; or
 - (c) has omitted from it a matter or thing, the omission of which renders the notice misleading in a material respect.

1012DA Product Disclosure Statement not required for sale amounting to indirect issue

Product Disclosure Statement not required

- (1) In a recommendation situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) but for subsection (5), (11) or (12), the regulated person would be required by section 1012A or 1012C to give a Product Disclosure Statement for the relevant product; and
 - (b) the transfer or sale of the financial product (the **relevant product**) to the client would take place in circumstances covered by subsection 1012C(6); and
 - (c) the relevant product was not issued by the issuer with the purpose referred to in subparagraph 1012C(6)(c)(i); and
 - (d) a determination under subsection (2) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.
- (1A) In a recommendation situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) but for subsection (5), the regulated person would be required by section 1012C to give a Product Disclosure Statement for the transfer or sale of the financial product (the **relevant product**); and

Section 1012DA

- (b) the transfer or sale of the relevant product to the client would take place in circumstances covered by subsection 1012C(8); and
- (c) the relevant product was not sold by the controller with the purpose referred to in subparagraph 1012C(8)(d)(i); and
- (d) a determination under subsection (2) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.

Determination by ASIC

- (2) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the issuer of the relevant product contravened any of the following provisions:
 - (a) the provisions of Chapter 2M as they apply to the issuer (or, if the relevant financial product is an interest in a registered scheme, as those provisions apply to the scheme);
 - (b) section 674 or 675 as it applies to the issuer (or, if the relevant financial product is an interest in a registered scheme, as that section applies to the scheme);
 - (c) section 1016E, 1021D, 1021E or 1021J;
 - (d) subsection (9) of this section;
 - (e) section 1308 as it applies to a notice under subsection (5) of this section.
- (3) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (4) A failure to publish a copy of the determination does not affect the validity of the determination.

Transfer or sale of quoted securities—case 1

- (5) The regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) the relevant product is in a class of financial products that were quoted securities at all times in the 3 months before the day on which the relevant product was issued; and
 - (b) trading in that class of financial products on a prescribed financial market on which they were quoted was not

Section 1012DA

suspended for more than a total of 5 days during the shorter of the period during which the class of financial product was quoted, and the period of 12 months before the day on which the relevant product was issued; and

- (c) no exemption under section 111AS or 111AT covered the issue of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (b); and
 - (d) no order under section 340 or 341 covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (b); and
 - (e) either:
 - (i) if the regulated person is not required under subsection (1) to give a Product Disclosure Statement—the issuer of the relevant product gives the relevant market operator for the issuer a written notice that complies with subsection (6) before the relevant conduct occurs; or
 - (ii) if the regulated person is not required under subsection (1A) to give a Product Disclosure Statement—both the issuer of the relevant product, and the controller, give the relevant market operator for the issuer a written notice that complies with subsection (6) before the relevant conduct occurs.
- (6) A notice complies with this subsection if the notice:
- (a) is given within 5 business days after the day on which the relevant product was issued; and
 - (b) states that the relevant product was issued without a Product Disclosure Statement for the relevant product being prepared; and
 - (c) states that the notice is being given under paragraph (5)(e); and
 - (d) states that, as a disclosing entity, the issuer of the relevant product is subject to regular reporting and disclosure obligations; and
 - (e) states that, as at the date of the notice, the issuer of the relevant product has complied with:

Section 1012DA

- (i) the provisions of Chapter 2M as they apply to the issuer (or, if the relevant financial product is an interest in a registered scheme, as those provisions apply to the scheme); and
- (ii) section 674 as it applies to the issuer (or, if the relevant financial product is an interest in a registered scheme, as that section applies to the scheme); and
- (f) sets out any information that is excluded information as at the date of the notice (see subsections (7) and (8)).

Note 1: A person is taken not to contravene section 1021C if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 1021C(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The issuer has an obligation to correct a defective notice: see subsection (9) of this section.

- (7) For the purposes of subsection (6), excluded information is information:
 - (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
 - (b) that a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the relevant product.
- (8) The notice given under subsection (5) must contain any excluded information only to the extent to which it is reasonable for a person considering, as a retail client, whether to acquire the relevant product to expect to find the information in a Product Disclosure Statement.

Obligation to correct defective notice

- (9) The issuer of the relevant product contravenes this subsection if:
 - (a) the notice given under subsection (5) is defective; and
 - (b) the issuer becomes aware of the defect in the notice within 12 months after the relevant product is issued; and
 - (c) the issuer does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.

Section 1012DA

- (10) For the purposes of subsection (9), the notice under subsection (5) is **defective** if the notice:
- (a) does not comply with paragraph (6)(f); or
 - (b) is false or misleading in a material particular; or
 - (c) has omitted from it a matter or thing the omission of which renders the notice misleading in a material respect.

Transfer or sale of quoted securities—case 2

- (11) The regulated person does not have to give the client a Product Disclosure Statement if:
- (a) the relevant product is in a class of financial products that are quoted securities of the issuer; and
 - (b) either:
 - (i) a Product Disclosure Statement required to be given by section 1012B is lodged with ASIC on or after the day on which the relevant product is issued but before the day on which the relevant conduct occurs; or
 - (ii) a Product Disclosure Statement required to be given by section 1012B is lodged with ASIC before the day on which the relevant product is issued and, on the day on which the relevant product is issued, the Product Disclosure Statement is still being used by the issuer of the relevant product for offers of financial products in the same class of financial products as the relevant product; and
 - (c) the Product Disclosure Statement is for a financial product of the issuer of the relevant product that is in the same class of financial products as the relevant product.

Transfer or sale of quoted securities—case 3

- (12) The regulated person does not have to give the client a Product Disclosure Statement if:
- (a) a Product Disclosure Statement for a financial product was given under section 1012B; and
 - (b) the relevant product was issued to:
 - (i) a person (the **underwriter**) named in that Product Disclosure Statement as an underwriter of the issue of the financial product; or

Section 1012E

- (ii) a person nominated by the underwriter; and
- (c) the relevant product was issued to the underwriter, or the person nominated by the underwriter, at or about the time that persons who applied for the financial product under that Product Disclosure Statement were issued with that product; and
- (d) the relevant product is in a class of financial products that were quoted securities of the issuer.

1012E Small scale offerings of managed investment and other prescribed financial products (20 issues or sales in 12 months)

- (1) This section applies only to financial products that are:
 - (a) managed investment products; or
 - (b) financial products of a kind prescribed by regulations made for the purposes of this paragraph.
- (2) Personal offers of financial products do not need a Product Disclosure Statement under this Part if:
 - (a) all of the financial products are issued by the same person (the *issuer*); and
 - (b) none of the offers results in a breach of the 20 purchasers ceiling (see subsections (6) and (7)); and
 - (c) none of the offers results in a breach of the \$2 million ceiling (see subsections (6) and (7)).
- (3) Subsection (2) does not apply to an offer to which subsection 1012C(6) (sale amounting to indirect issue) or (8) (sale amounting to indirect sale by controller) applies.

Note: Under section 1012K, ASIC may make a determination aggregating the transactions of bodies that ASIC considers to be closely related.
- (4) If subsection (2) applies to an offer of a financial product, a recommendation to a person to acquire a financial product in response to a personal offer of that kind does not need a Product Disclosure Statement under this Part.
- (5) For the purposes of subsections (2) and (4), a *personal offer* is one that:
 - (a) may only be accepted by the person to whom it is made; and

Section 1012E

- (b) is made to a person who is likely to be interested in the offer, having regard to:
 - (i) previous contact between the person making the offer and that person; or
 - (ii) some professional or other connection between the person making the offer and that person; or
 - (iii) statements or actions by that person that indicate that they are interested in offers of that kind.
 - (6) An offer to issue, or arrange for the issue of, a financial product:
 - (a) results in a breach of the 20 purchasers ceiling if it results in the number of people to whom the issuer has issued financial products exceeding 20 in any 12 month period; and
 - (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the issuer from issuing financial products exceeding \$2 million in any 12 month period.
 - (7) An offer by a person to sell a financial product:
 - (a) results in a breach of the 20 purchasers ceiling if it results in the number of people to whom the person sells financial products issued by the issuer of that financial product exceeding 20 in any 12 month period; and
 - (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the person from selling financial products issued by the issuer of that financial product exceeding \$2 million in any 12 month period.
 - (8) In counting issues and sales of the financial products issued by the issuer, and the amount raised from issues and sales, for the purposes of subsection (2), disregard issues and sales that result from offers that:
 - (a) do not need a Product Disclosure Statement (otherwise than because of this section); or
 - (b) are made under a Product Disclosure Statement.
- Note: Also see provisions on restrictions on advertising (section 1018A) and the anti-hawking provisions in section 992A.
- (9) In counting issues and sales of the financial products issued by the issuer, and the amount raised from issues and sales, for the purposes of subsection (2), disregard any issues and sales made by a body if:

Section 1012F

- (a) the body was a managed investment scheme (but not a registered scheme) at the time that the offer of interests in the scheme that resulted in the issues or sales was made; and
 - (b) the body became a registered scheme within 12 months after that offer was made; and
 - (c) the offer would not have required a Product Disclosure Statement (otherwise than because of this section) if the managed investment scheme had been a registered scheme at the time that the offer was made.
- (10) In working out the amount of money raised by the issuer from issuing financial products, include the following:
 - (a) the amount payable for the financial products at the time when they are issued;
 - (b) if the financial product is an option—any amount payable on the exercise of the option;
 - (c) if the financial products carry a right to convert the financial product into other financial products—any amount payable on the exercise of that right.
- (11) If a person relies on subsection (2) to make offers of financial products without a Product Disclosure Statement under this Part, the person must not issue, arrange for the issue of, or transfer, financial products without a Product Disclosure Statement under this Part if the issue or transfer would result in a breach of the 20 purchasers ceiling or the \$2 million ceiling (see subsections (6), (7), (8), (9) and (10)).
- (12) For the purposes of this section, an *offer of a financial product* is an offer to:
 - (a) issue the financial product; or
 - (b) arrange for the issue of the financial product; or
 - (c) sell the financial product.

1012F Product Disclosure Statement for certain superannuation products may be provided later

In a recommendation situation or an issue situation in which the financial product is a superannuation product of a kind specified in regulations made for the purposes of this section, the regulated person:

Section 1012G

- (a) need not give the client the Product Disclosure Statement at or before the time when it would otherwise be required to be given; and
- (b) must give the client the Product Disclosure Statement as soon as is reasonably practicable and in any event within 3 months after the product is issued to the client; and
- (c) need not give the client the Product Disclosure Statement at all if the client ceases to be a member of the superannuation fund concerned before the regulated person is required to give the Product Disclosure Statement under paragraph (b).

1012G Product Disclosure Statement may sometimes be provided later

- (1) The regulated person may deal with a financial product under this section only if:
 - (a) the financial product is one for which an application form is not required under section 1016A and section 1019B (cooling off period) will apply if the client enters into a legal obligation to acquire the product pursuant to the recommendation or offer that constitutes the relevant conduct; or
 - (b) the financial product is:
 - (i) a basic deposit product; or
 - (ii) a facility for making non-cash payments (see section 763D) that is related to a basic deposit product; or
 - (iii) a financial product of a kind prescribed by regulations made for the purposes of this subparagraph.
- (2) In a recommendation situation or an issue situation, the regulated person need not give the client a Product Disclosure Statement for the financial product at or before the time when it would otherwise be required to be given if:
 - (a) the client expressly instructs the regulated person that they require:
 - (i) in a recommendation situation—the advice constituting the recommendation; or
 - (ii) in an issue situation—the financial product;

Section 1012G

to be provided or issued immediately, or by a specified time; and

- (b) it is not reasonably practicable, while complying with the client's instructions, to give the client the Product Disclosure Statement at or before the time when it would otherwise be required to be given.

The regulated person must comply with subsection (3) instead.

- (3) The regulated person must:

- (a) at or before the time referred to in paragraph (2)(b), orally communicate the following information to the client:
 - (i) the name and contact details of the issuer of the financial product; and
 - (ii) information about the essential features of the financial product; and
 - (iii) the information that would be required to be in a Product Disclosure Statement for the financial product by paragraphs 1013D(1)(c), (d), (g) and (i); and
- (b) give the client the Product Disclosure Statement as soon as practicable after that time, and in any event not later than:
 - (i) the time when the confirmation requirement (if applicable) is complied with; or
 - (ii) the end of the fifth day after the day on which the financial product was issued or sold to the client.

- (3A) The information referred to in paragraph (3)(a) must be communicated in a clear, concise and effective manner.

- (4) For the purposes of paragraph (3)(b), the confirmation requirement is complied with when:
 - (a) the client receives confirmation, as mentioned in paragraph 1017F(5)(a), of the transaction by which they acquired the financial product; or
 - (b) confirmation of that transaction is available to the client by a facility as mentioned in paragraph 1017F(5)(b).

1012H Obligation to take reasonable steps to ensure that Product Disclosure Statement is given to person electing to be covered by group financial product

- (1) This section covers the situation in which a financial product:
- (a) is issued to a person; and
 - (b) covers, or is designed to cover, a group of people; and
 - (c) may cover a particular person (the *new group member*) if the person elects to be covered by the financial product.

- (2) The issuer must take reasonable steps to ensure that the new group member is given a Product Disclosure Statement for the financial product in accordance with this Division before the new group member makes an election to be covered by the financial product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) For the purposes of this section, a person is covered by a financial product if benefits are, or may be, provided under the financial product directly to:
- (a) the person; or
 - (b) a relative of the person; or
 - (c) a person nominated by the person.

1012I Obligation to give employer a Product Disclosure Statement in relation to certain superannuation products and RSA products

- (1) At or before the time when a person (the *applicant*) becomes a standard employer-sponsor of a superannuation entity, the person (the *issuer*) who is to provide the superannuation products to the applicant's employees must give the applicant a Product Disclosure Statement in accordance with this Division for each of those superannuation products.
- (2) If:
- (a) a person (the *applicant*) applies for the issue of an RSA product to the employee; and
 - (b) the applicant has not previously applied to the RSA provider for the issue to any employee of an RSA product of the same kind;

Section 1012I

the person (the **issuer**) who is to issue the RSA product to the employee must, at or before the time when the RSA product is issued to the employee, give the applicant a Product Disclosure Statement in accordance with this Division for the RSA product.

(2A) If:

- (a) a trustee (the **applicant**), under Part 24 of the *Superannuation Industry (Supervision) Act 1993*, applies on behalf of a person for the issue of an interest in a relevant superannuation entity; and
 - (b) the applicant has not previously applied under that Part for the issue of an interest in that entity on behalf of any person;
- the person (the **issuer**) who is to issue the interest to the person must, at or before the time when the interest is issued to the person, give the applicant a Product Disclosure Statement in accordance with this Division for the interest.

(2B) If:

- (a) a trustee (the **applicant**), under Part 9 of the *Retirement Savings Accounts Act 1997*, applies on behalf of a person for the issue of an interest in a relevant superannuation entity; and
 - (b) the applicant has not previously applied under that Part for the issue of an interest in that entity on behalf of any person;
- the person (the **issuer**) who is to issue the interest to the person must, at or before the time when the interest is issued to the person, give the applicant a Product Disclosure Statement in accordance with this Division for the interest.

(3) The issuer does not have to give the applicant a Product Disclosure Statement under subsection (1), (2), (2A) or (2B) for a financial product if:

- (a) the applicant has already received a Product Disclosure Statement for that financial product that contains all of the information that the first-mentioned Product Disclosure Statement would be required to contain; or
- (b) the issuer believes on reasonable grounds that paragraph (a) applies.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Section 1012IA

- (4) The issuer need not give the applicant a Product Disclosure Statement under subsection (1), (2), (2A) or (2B) in the circumstances specified in the regulations.
- (5) In this section:
 - (a) terms used in subsection (1) that are defined for the purposes of the *Superannuation Industry (Supervision) Act 1993* have the same meanings as in that Act; and
 - (b) terms used in subsection (2) that are defined for the purposes of the *Retirement Savings Accounts Act 1997* have the same meanings as in that Act; and
 - (c) **relevant superannuation entity** has the same meaning as in section 1016A of this Act.

1012IA Treatment of arrangements under which a person can instruct another person to acquire a financial product

Definitions

- (1) In this section:

acquirer, in relation to a custodial arrangement, has the meaning given by the definition of **custodial arrangement**.

client, in relation to a custodial arrangement, has the meaning given by the definition of **custodial arrangement**.

custodial arrangement means an arrangement between a person (the **provider**) and another person (the **client**) (whether or not there are also other parties to the arrangement) under which:

- (a) the client is, or is entitled, to give an instruction that a particular financial product, or a financial product of a particular kind, is to be acquired; and
- (b) if the client gives such an instruction, a person (the **acquirer**), being the provider or a person with whom the provider has or will have an arrangement, must (subject to any discretion they have to refuse) acquire the financial product, or a financial product of that kind; and
- (c) if the acquirer acquires the financial product, or a financial product of that kind, pursuant to an instruction given by the client, either:

Section 1012IA

- (i) the product is to be held on trust for the client or another person nominated by the client; or
- (ii) the client, or another person nominated by the client, is to have rights or benefits in relation to the product or a beneficial interest in the product, or in relation to, or calculated by reference to, dividends or other benefits derived from the product.

instruction includes a direction or request.

provider, in relation to a custodial arrangement, has the meaning given by the definition of **custodial arrangement**.

regulated acquisition means an acquisition of a financial product pursuant to an instruction by the client under a custodial arrangement, being an acquisition:

- (a) by way of issue by the issuer (the **regulated person**); or
- (b) pursuant to a sale by a person (the **regulated person**) in circumstances described in subsection 1012C(5), (6) or (8).

regulated person, in relation to a regulated acquisition of a financial product, has the meaning given by paragraph (a) or (b) (as the case requires) of the definition of **regulated acquisition**.

Obligation on provider to give client a PDS

- (2) Before a regulated acquisition of a financial product occurs pursuant to an instruction given by the client under a custodial arrangement, the provider must give the client a Product Disclosure Statement for the product if a Product Disclosure Statement for the product would, if there were an equivalent direct acquisition by the client, be required by subsection 1012B(3) or 1012C(3) (see subsection (3) of this section) to be given to the client by the regulated person before that acquisition occurred. For this purpose, an **equivalent direct acquisition** is an acquisition that would occur if:
 - (a) the product were instead being offered for issue or sale direct to the client by the regulated person for the same price (or for the appropriate proportion of that price, if the transaction for the regulated acquisition also covers other products); and

Section 1012IA

- (b) the circumstances of that issue or sale to the client were otherwise the same as those in which the regulated acquisition will occur.

Determining whether a PDS would have to be given for an equivalent direct acquisition

- (3) The following provisions apply for the purpose of determining whether the regulated person would be required by subsection 1012B(3) or 1012C(3) to give the client a Product Disclosure Statement for the financial product:
 - (a) the effect of the provisions referred to in subsection 1012B(5) or 1012C(10), as the case requires, as they have effect subject to the following paragraphs, must be taken into account;
 - (b) subsections 1012D(1), (2) and (2A) apply as if references in those subsections to the regulated person's belief in relation to a matter were instead references to the provider's belief in relation to that matter;
 - (c) subsections 1012D(2) and (3) apply as if references to the client already holding a financial product of the same kind also included a reference to a person already holding a financial product of the same kind as a result of an instruction given by the client under a custodial arrangement;
 - (d) sections 1012E and 1012F are to be disregarded;
 - (e) section 1012G has effect in accordance with subsection (4).

Modification of section 1012G

- (4) The following provisions apply in relation to section 1012G:
 - (a) in determining for the purposes of subsection (2) whether the regulated person would be required by subsection 1012B(3) or 1012C(3) to give the client a Product Disclosure Statement for the financial product, subsection 1012G(2) applies as if the reference to the client instructing the regulated person (in an issue situation) that they require the financial product to be provided or issued immediately, or by a specified time, were instead a reference to the client instructing the provider that they require the financial product to be acquired immediately, or by a specified time;

Section 1012IA

- (b) if, because of subsection 1012G(2) as it applies because of paragraph (a) of this subsection, the provider does not have to give the client a Product Disclosure Statement for a financial product before a regulated acquisition of the financial product occurs pursuant to an instruction given by the client under a custodial arrangement:
 - (i) subsection 1012G(2) applies in relation to the provider, the client and the regulated acquisition as if the obligation it imposes to comply with subsection 1012G(3) were imposed on the provider; and
 - (ii) subsection 1012G(3) applies in relation to the provider, the client and the regulated acquisition as if the reference to the regulated person were instead a reference to the provider, as if subparagraph 1012G(3)(b)(i) were omitted and as if the reference in subparagraph 1012G(3)(b)(ii) to the day on which the financial product was issued or sold to the client were instead a reference to the day on which the regulated acquisition occurs.

Modification of section 1013A

- (5) Section 1013A applies in relation to a regulated acquisition as if:
 - (a) paragraph 1013A(1)(b) also covered a Product Disclosure Statement that is required to be given by subsection (2) of this section in relation to an acquisition covered by paragraph (a) of the definition of **regulated acquisition** in subsection (1) of this section; and
 - (b) paragraph 1013A(2)(b) also covered a Product Disclosure Statement that is required to be given by subsection (2) of this section in relation to an acquisition covered by paragraph (b) of the definition of **regulated acquisition** in subsection (1) of this section.

Provider is not an agent for the purposes of section 1015C

- (6) For the purposes of the application of section 1015C in relation to a regulated acquisition, the provider in relation to the relevant custodial arrangement is taken not to be an agent of the client.

Section 1012J

Provider is covered by sections 1015E, 1021F and 1021I

- (7) Sections 1015E, 1021F and 1021I apply in relation to a regulated acquisition as if the references to a regulated person were instead references to the provider in relation to the relevant custodial arrangement.

Regulations may provide for other modifications

- (8) The regulations may provide for other modifications of provisions of this Part that are to have effect in relation to regulated acquisitions.

1012J Information must be up to date

The information in a Product Disclosure Statement must be up to date as at the time when it is given.

Note: A Supplementary Product Disclosure Statement containing updated information may be given with a Product Disclosure Statement that has become out of date. The updated information is taken to be included in the Product Disclosure Statement (see section 1014D).

1012K Anti-avoidance determinations

- (1) ASIC may determine in writing that a number of different bodies are closely related and that their transactions should be aggregated for the purposes of this Subdivision. If ASIC does so:
- (a) an issue, sale or transfer of financial products of any other bodies is taken to also be an issue, sale or transfer of the financial products of each of the other bodies by those bodies; and
 - (b) any money received from an issue, sale or transfer of financial products of any of the bodies is taken to also be received by each of the other bodies from an issue, sale or transfer of its own financial products.

ASIC must give written notice of the determination to each of the bodies.

- (2) ASIC may determine in writing that the transactions of a body and of a person who controls the body should be aggregated for the purposes of this Subdivision. If ASIC does so:

Section 1013A

- (a) an issue of financial products of the body is taken to also be the transfer of the financial products by the controller; and
- (b) any money received from an issue of financial products of the body is taken to also be received by the controller from a transfer of the financial products; and
- (c) a sale or transfer of financial products of the body by the controller is taken to also be the issue of the financial products by the body; and
- (d) any money received from a sale or transfer of financial products of the body by the controller is taken to also be received by the body from an issue of the financial products.

ASIC must give written notice of the determination to the body and the controller.

Subdivision C—Preparation and content of Product Disclosure Statements

1013A Who must prepare Product Disclosure Statement

- (1) A Product Disclosure Statement that:
 - (a) is required to be given by section 1012A (otherwise than in a situation in which the recommendation concerned relates to an offer described in subsection 1012C(3) or (4)); or
 - (b) is required to be given by section 1012B; or
 - (c) section 1012H requires an issuer to take reasonable steps to ensure is given to a new group member; or
 - (d) is required to be given by section 1012I;

must be a document that has been prepared by the issuer of the financial product. A Product Disclosure Statement of this kind is in this Division referred to as an *issue Statement*.

- (2) A Product Disclosure Statement that:
 - (a) is required to be given by section 1012A in a situation in which the recommendation concerned relates to an offer described in subsection 1012C(3) or (4)); or
 - (b) is required to be given by section 1012C;

must be a document that has been prepared by the person making the offer to sell the financial product. A Product Disclosure Statement of this kind is in this Division referred to as a *sale Statement*.

Section 1013B

- (3) The person who, or on whose behalf, a Product Disclosure Statement for a financial product is required to be prepared is, in this Division, referred to as the *responsible person* for the financial product.
- (4) For the purposes of this Part, a Product Disclosure Statement prepared on behalf of a person is taken to be prepared by the person.

1013B Title of Product Disclosure Statement

- (1) The title “Product Disclosure Statement” must be used on the cover of, or at or near the front of, a Product Disclosure Statement.
- (2) In any other part of a Product Disclosure Statement, “Product Disclosure Statement” may be abbreviated to “PDS”.

1013C Product Disclosure Statement content requirements

- (1) A Product Disclosure Statement:
 - (a) must include the following statements and information required by this Subdivision:
 - (i) the statements and information required by section 1013D; and
 - (ii) the information required by section 1013E; and
 - (iii) the information required by the other provisions of this Subdivision; and
 - (b) may also:
 - (i) include other information; or
 - (ii) refer to other information that is set out in another document.

Note: A Supplementary Product Disclosure Statement containing additional information may be given with a Product Disclosure Statement that does not contain all the required information. The additional information is taken to be included in the Product Disclosure Statement (see section 1014D).

- (2) The information required by sections 1013D and 1013E need only be included in the Product Disclosure Statement to the extent to which it is actually known to:
 - (a) the responsible person; and

Section 1013C

- (b) in the case of a sale Statement—the issuer of the financial product; and
 - (c) any person named in the Statement as an underwriter of the issue or sale of the financial product; and
 - (d) any person:
 - (i) named in the Statement as a financial services licensee providing services in relation to the issue or sale of the financial product; and
 - (ii) who participated in any way in the preparation of the Statement; and
 - (e) any person who has given a consent referred to in section 1013K in relation to a statement included in the Statement; and
 - (f) any person named in the Statement with their consent as having performed a particular professional or advisory function; and
 - (g) if any of the above persons is a body corporate—any director of that body corporate.
- (3) The information included in the Product Disclosure Statement must be worded and presented in a clear, concise and effective manner.
- (4) The responsible person may include in the Product Disclosure Statement a statement about the association between the financial product and another person.
- (5) The responsible person must not include a statement about the association between the financial product and a person if:
 - (a) the statement creates the impression that the financial product is issued or sold by that other person; and
 - (b) the person has not issued or sold the product.
- (6) The responsible person must not include a statement about the association between the financial product and a person if:
 - (a) the statement creates the impression that the financial product is guaranteed or underwritten by that other person; and
 - (b) the person has not guaranteed or underwritten the product.
- (7) If the Product Disclosure Statement states that a person provides, or is to provide, services in relation to the financial product, the Product Disclosure Statement must clearly distinguish between the

Section 1013D

respective roles of that person and the issuer or seller of the financial product.

1013D Product Disclosure Statement content—main requirements

- (1) Subject to this section, subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must include the following statements, and such of the following information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product:
 - (a) a statement setting out the name and contact details of:
 - (i) the issuer of the financial product; and
 - (ii) if the Statement is a sale Statement—the seller; and
 - (b) information about any significant benefits to which a holder of the product will or may become entitled, the circumstances in which and times at which those benefits will or may be provided, and the way in which those benefits will or may be provided; and
 - (c) information about any significant risks associated with holding the product; and
 - (d) information about:
 - (i) the cost of the product; and
 - (ii) any amounts that will or may be payable by a holder of the product in respect of the product after its acquisition, and the times at which those amounts will or may be payable; and
 - (iii) if the amounts paid in respect of the financial product and the amounts paid in respect of other financial products are paid into a common fund—any amounts that will or may be deducted from the fund by way of fees, expenses or charges; and
 - (e) if the product will or may generate a return to a holder of the product—information about any commission, or other similar payments, that will or may impact on the amount of such a return; and
 - (f) information about any other significant characteristics or features of the product or of the rights, terms, conditions and obligations attaching to the product; and

Section 1013D

- (g) information about the dispute resolution system that covers complaints by holders of the product and about how that system may be accessed; and
 - (h) general information about any significant taxation implications of financial products of that kind; and
 - (i) information about any cooling-off regime that applies in respect of acquisitions of the product (whether the regime is provided for by a law or otherwise); and
 - (j) if the product issuer (in the case of an issue Statement) or the seller (in the case of a sale Statement) makes other information relating to the product available to holders or prospective holders of the product, or to people more generally—a statement of how that information may be accessed; and
 - (k) any other statements or information required by the regulations; and
 - (l) if the product has an investment component—the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment; and
 - (m) unless in accordance with the regulations, for information to be disclosed in accordance with paragraphs (b), (d) and (e), any amounts are to be stated in dollars.
- (2) For the purposes of paragraph (1)(d), an amount will or may be payable in respect of a financial product by the holder of the financial product if:
- (a) the holder will or may have to pay an amount in respect of the product; or
 - (b) an amount will or may be deducted from:
 - (i) a payment to be made by the holder; or
 - (ii) a payment to be made to the holder; or
 - (iii) an amount held on the holder's behalf under the financial product; or
 - (c) an account representing the holder's interest in the financial product will or may be debited with an amount.

It includes an amount that the holder will or may have to pay, or that will or may be deducted or debited, as a fee, expense or charge in relation to a particular transaction in relation to the financial product.

Section 1013DA

- (2A) For the purposes of paragraph (1)(l), products which have an investment component include superannuation products, managed investment products and investment life insurance products.
- (3) Subsection (1) requires information to be included in the Product Disclosure Statement only to the extent to which the requirement is applicable to the financial product. The Product Disclosure Statement does not need to indicate that a particular requirement is not applicable to the financial product.
- (4) The regulations may:
 - (a) provide that a provision of subsection (1) does not apply in a particular situation; or
 - (b) provide that particular information is not required by a provision of subsection (1), either in a particular situation or generally; or
 - (c) provide a more detailed statement of the information that is required by a provision of subsection (1), either in a particular situation or generally.

1013DA Information about ethical considerations etc.

ASIC may develop guidelines that must be complied with where a Product Disclosure Statement makes any claim that labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.

1013E General obligation to include other information that might influence a decision to acquire

Subject to subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must also contain any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product.

1013F General limitations on extent to which information is required to be included

- (1) Despite anything in section 1013D or 1013E, information, or a statement containing information, is not required to be included in

Section 1013FA

a Product Disclosure Statement if it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find the information in the Statement.

- (2) In considering whether it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find particular information in the Statement, the matters that may be taken into account include, but are not limited to:
- (a) the nature of the product (including its risk profile); and
 - (b) the extent to which the product is well understood by the kinds of person who commonly acquire products of that kind as retail clients; and
 - (c) the kinds of things such persons may reasonably be expected to know; and
 - (d) if the product is an ED security that is not a continuously quoted security—the effect of the following provisions:
 - (i) Chapter 2M as it applies to disclosing entities;
 - (ii) sections 674 and 675; and
 - (e) the way in which the product is promoted, sold or distributed; and
 - (f) any other matters specified in the regulations.

1013FA Information not required to be included in PDS for continuously quoted securities

- (1) This section applies to a Product Disclosure Statement that relates to a continuously quoted security.
- (2) Despite anything in section 1013D, 1013E or 1013F, information is not required to be included in the Product Disclosure Statement if:
- (a) the information is included in any of the following documents:
 - (i) the annual financial report most recently lodged with ASIC by the issuer of the product;
 - (ii) any half-year financial report lodged with ASIC by the issuer of the product after the lodgment of that annual financial report and before the date of the Product Disclosure Statement;
 - (iii) any continuous disclosure notices given by the issuer of the product after the lodgment of that annual financial

Section 1013G

report and before the date of the Product Disclosure Statement; and

- (b) the Product Disclosure Statement:
 - (i) states that as a disclosing entity, the issuer of the product is subject to regular reporting and disclosure obligations; and
 - (ii) informs people of their right to obtain a copy of any of the documents referred to in paragraph (a).

If the Product Disclosure Statement informs people of their right to obtain a copy of the document, the issuer of the product must give a copy of the document free of charge to anyone who asks for it.

- (3) ASIC may determine that this section does not apply to Product Disclosure Statements for continuously quoted securities if ASIC is satisfied that in the previous 12 months:
 - (a) the issuer of the continuously quoted securities contravened:
 - (i) the provisions of Chapter 2M; or
 - (ii) subsection 674(2) or 675(2); or
 - (iii) subsection 1012DAA(10) or 1012DA(9); or
 - (iv) section 1308 as it applies to a notice under subsection 1012DAA(2) or 1012DA(5); or
 - (b) the responsible person for the Product Disclosure Statement contravened section 1016E, 1021D, 1021E or 1021J.
- (4) The determination must be made in writing and ASIC must publish a copy of the determination in the *Gazette*.

1013G Product Disclosure Statement must be dated

A Product Disclosure Statement must be dated. The date must be:

- (a) if a copy of the Product Disclosure Statement has been lodged with ASIC (see section 1015B)—the date on which it was so lodged; or
- (b) in any other case—the date on which the Product Disclosure Statement was prepared or its preparation was completed.

Section 1013H

1013H Requirements if Product Disclosure Statement states or implies that financial product will be able to be traded

If a Product Disclosure Statement states or implies that the financial product will be able to be traded on a financial market (whether in Australia or elsewhere), the Statement must state that:

- (a) the product is able to be traded on that market; or
- (b) an application has been made to the operator of that market for the taking of such action as is necessary to enable the product to be traded on that market; or
- (c) an application of a kind referred to in paragraph (b) will be made to the operator of that market within 7 days after the date of the Statement.

1013I Extra requirements if Product Disclosure Statement relates to managed investment products that are ED securities

- (1) This section applies to a Product Disclosure Statement that relates to managed investment products that are ED securities.
- (2) The Product Disclosure Statement must include a statement that:
 - (a) as a disclosing entity, the scheme is subject to regular reporting and disclosure obligations; and
 - (b) copies of documents lodged with ASIC in relation to the scheme may be obtained from, or inspected at, an ASIC office.
- (3) The Product Disclosure Statement must either:
 - (a) inform people of their right to obtain a copy of the following documents:
 - (i) the annual financial report most recently lodged with ASIC by the scheme;
 - (ii) any half-year financial report lodged with ASIC by the scheme after the lodgment of that annual financial report and before the date of the Product Disclosure Statement;
 - (iii) any continuous disclosure notices given by the scheme after the lodgment of that annual report and before the date of the Product Disclosure Statement; or
 - (b) include, or be accompanied by, a copy of the relevant document or documents.

Section 1013J

- (4) If:
- (a) the Product Disclosure Statement informs people of their right to obtain a copy of a document referred to in subsection (3); and
 - (b) a person asks the issuer (in the case of an issue Statement) or the seller (in the case of a sale Statement) for a copy of the document;
- the issuer or seller must give (see subsection (5)) the person a copy of the document free of charge as soon as practicable, and in any event within 5 days, after receiving the person's request.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (5) In subsection (4), **give** means give in a way that would satisfy the requirements of section 1015C if the copy of the document were a Statement to which that section applied.

1013J Requirements if Statement has been lodged with ASIC

A Product Disclosure Statement, a copy of which has been lodged with ASIC (see section 1015B), must include a statement that:

- (a) a copy of the document has been lodged with ASIC; and
- (b) ASIC takes no responsibility for the content of the document.

1013K Requirements relating to consents to certain statements

- (1) A Product Disclosure Statement must only include a statement made by a person, or a statement said in the Product Disclosure Statement to be based on a statement made by a person, if:
- (a) the person has consented to the statement being included in the Product Disclosure Statement in the form and context in which it is included; and
 - (b) the Product Disclosure Statement states that the person has given this consent; and
 - (c) the person has not withdrawn this consent before the date of the Product Disclosure Statement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 1013L

- (2) The person who prepared the Product Disclosure Statement must not, without reasonable excuse, fail to keep the consent, or a copy of it, for the period, and in the manner, required by the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1013L Product Disclosure Statement may consist of 2 or more separate documents given at same time

- (1) Subject to this section, a Product Disclosure Statement may be made up of 2 or more separate documents that are given at the same time.
- (2) Each of the documents must have on the cover of the document, or at or near the front of the document, a statement:
- (a) to the effect that the document is part of a Product Disclosure Statement; and
 - (b) that (subject to subsection (3)) identifies the other documents that make up the Product Disclosure Statement.
- (3) If there are or may be different versions of a document referred to in paragraph (2)(b), the statement required by subsection (2) does not have to identify any particular one of those versions and may instead identify the document generically.

Note: For example, if a Product Disclosure Statement is made up of a core document that is not updated very frequently, and a separate document providing information about remuneration that is updated more frequently:

- (a) the statement in the core document need only refer to the fact that it, and a separate document about remuneration, make up the Product Disclosure Statement; and
 - (b) the statement in the document about remuneration need only refer to the fact that it, and a separate document about all other required matters, make up the Product Disclosure Statement.
- (4) The requirement of section 1013B (title of Product Disclosure Statement) is taken to be satisfied if the title “Product Disclosure Statement” is used on the cover of, or at or near the front of, at least one of the documents that make up the Product Disclosure Statement.
- (5) The requirement of section 1013G (dating of Product Disclosure Statement) must be separately complied with in relation to each of

Section 1013M

the documents. If, for any purpose, a single date needs to be determined as the date of the Product Disclosure Statement as a whole, that date is the most recent of the dates of those documents.

- (6) Section 1015E applies to an alteration to one of the documents as though the reference in that section to the date specified in the Product Disclosure Statement were a reference to the date specified in the document.
- (7) The regulations may impose additional requirements to be complied with if a Product Disclosure Statement is made up of 2 or more documents.

1013M Combining a Product Disclosure Statement and a Financial Services Guide in a single document

For provisions about combining a Product Disclosure Statement and a Financial Services Guide in a single document, see section 942DA and regulations made for the purposes of that section.

Subdivision D—Supplementary Product Disclosure Statements

1014A What a Supplementary Product Disclosure Statement is

A *Supplementary Product Disclosure Statement* is a document by which a person who has prepared a Product Disclosure Statement (the *PDS*) can:

- (a) correct a misleading or deceptive statement in the PDS; or
- (b) correct an omission from the PDS of information it is required to contain; or
- (c) update, or add to, the information contained in the PDS; or
- (d) change a statement of a kind referred to in paragraph 1016E(1)(a) or (b).

Note: In certain circumstances a Replacement Product Disclosure Statement may be prepared instead of a Supplementary Product Disclosure Statement (see Subdivision DA).

Section 1014B

1014B Title of Supplementary Product Disclosure Statement

- (1) The title “Supplementary Product Disclosure Statement” must be used on the cover of, or at or near the front of, a Supplementary Product Disclosure Statement.
- (2) In any other part of a Supplementary Product Disclosure Statement, “Supplementary Product Disclosure Statement” may be abbreviated to “SPDS”.

1014C Form of Supplementary Product Disclosure Statement

At the beginning of a Supplementary Product Disclosure Statement there must be:

- (a) a statement that it is a Supplementary Product Disclosure Statement; and
- (b) an identification of the Product Disclosure Statement that it supplements; and
- (c) a statement that it is to be read together with that Product Disclosure Statement and any other specified Supplementary Disclosure Statements.

1014D Effect of giving person a Supplementary Product Disclosure Statement

If:

- (a) a person is given a Product Disclosure Statement (the *PDS*); and
- (b) at the same time, or later, they are given a Supplementary Product Disclosure Statement (the *SPDS*) that supplements the PDS;

the PDS is taken, from when the SPDS is given to the person, to include the information and statements contained in the SPDS.

1014E Situation in which only a Supplementary Product Disclosure Statement need be given

If:

- (a) apart from this section, a person would be required to give another person (the *client*) a Product Disclosure Statement (the *new PDS*) relating to a financial product; and

Section 1014F

- (b) the client has, because of some previous conduct, already received a Product Disclosure Statement (the *earlier PDS*) relating to the financial product; and
 - (c) the earlier PDS contains some, but not all, of the information that the new PDS is required to contain;
- the person may, instead of giving the client the new PDS, give the client a Supplementary Product Disclosure Statement that contains the additional information.

1014F Application of other provisions in relation to Supplementary Product Disclosure Statements

Sections 1013A, 1013G, 1013H, 1013J and 1013K, and subsections 1013C(3) to (7), apply in relation to a Supplementary Product Disclosure Statement in the same way as they apply to a Product Disclosure Statement.

Subdivision DA—Replacement Product Disclosure Statements

1014G Application of this Subdivision—stapled securities

This Subdivision applies if:

- (a) a Product Disclosure Statement has been lodged in relation to an offer for the issue or sale of an interest in a managed investment scheme; and
- (b) the interest can only be transferred together with one or more securities; and
- (c) a disclosure document has been lodged in relation to an offer for the issue or sale of the security (or securities).

1014H What a Replacement Product Disclosure Statement is

A *Replacement Product Disclosure Statement* is a document that replaces the Product Disclosure Statement (the *earlier PDS*) mentioned in paragraph 1014G(a) in order to:

- (a) correct a misleading or deceptive statement in the earlier PDS; or
- (b) correct an omission from the earlier PDS of information it is required to contain; or

Section 1014J

- (c) update, or add to, the information contained in the earlier PDS; or
- (d) change a statement of a kind referred to in paragraph 1016E(1)(a) or (b).

1014J Consequences of lodging a Replacement Product Disclosure Statement

If a Replacement Product Disclosure Statement is prepared in accordance with section 1014K and lodged with ASIC as provided by Subdivision E (in its application under section 1014L), a reference to a Product Disclosure Statement is taken to be a reference to the Replacement Product Disclosure Statement for the purposes of the application of this Act to events that occur after the lodgment.

Note: This section means, for example, that offers made after lodgment of the Replacement Product Disclosure Statement must be accompanied by copies of the Replacement Product Disclosure Statement and not the earlier PDS.

1014K Form, content and preparation of Replacement Product Disclosure Statements

- (1) At the beginning of a Replacement Product Disclosure Statement, there must be:
 - (a) a statement that it is a Replacement Product Disclosure Statement; and
 - (b) an identification of the Product Disclosure Statement it replaces.
- (2) The title “Replacement Product Disclosure Statement” must be used on the cover of, or at or near the front of, a Replacement Product Disclosure Statement.
- (3) In any other part of a Replacement Product Disclosure Statement, “Replacement Product Disclosure Statement” may be abbreviated to “RPDS”.
- (4) Otherwise, section 1012J and Subdivision C (apart from section 1013B) apply in relation to a Replacement Product Disclosure Statement in the same way as they apply to a Product Disclosure Statement.

Section 1014L

Note: Section 1012J provides that the information in a Product Disclosure Statement must be up to date at the time it is given. Subdivision C deals with the preparation and content of Product Disclosure Statements.

1014L Giving, lodgment and notice of Replacement Product Disclosure Statements

Subdivision E applies in relation to a Replacement Product Disclosure Statement in the same way as it applies to a Product Disclosure Statement that is required to be lodged with ASIC under section 1015B.

Subdivision E—Other requirements relating to Product Disclosure Statements and Supplementary Product Disclosure Statements

1015A Subdivision applies to Product Disclosure Statements and Supplementary Product Disclosure Statements

This Subdivision applies to Product Disclosure Statements and to Supplementary Product Disclosure Statements. Both kinds of document are referred to in this Subdivision as a *Statement*.

1015B Some Statements must be lodged with ASIC

- (1) A copy of a Statement must have been lodged with ASIC (in accordance with the requirements of subsection (2) for consents) before the Statement is given to a person for the purposes of a provision of this Part if:
 - (a) the following subparagraphs apply:
 - (i) the financial product is a managed investment product; and
 - (ii) the Statement states or implies that the product will be able to be traded on a financial market; and
 - (iii) the Statement meets the requirements set out in section 1013H; or
 - (b) the financial product is a managed investment product that can be traded on a financial market; or
 - (c) the financial product is a financial product of a kind specified in regulations made for the purposes of this paragraph.

Section 1015C

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The lodgment of a Statement with ASIC requires the consent of:
 - (a) whether it is an issue Statement or a sale Statement:
 - (i) if the responsible person is a body corporate—every director of the responsible person; or
 - (ii) otherwise—the responsible person; and
 - (b) if it is a sale Statement:
 - (i) if the issuer of the financial product concerned is a body corporate—every director of the issuer; or
 - (ii) otherwise—the issuer of the financial product concerned.

1015C How a Statement is to be given

- (1) A Statement:
 - (a) must be:
 - (i) given to a person, or the person's agent, personally; or
 - (ii) sent to the person, or the person's agent, at an address (including an electronic address) or fax number nominated by the person or the agent; and
 - (b) may be printed or be in electronic form.
- (2) For the purposes of this section, the Statement is sent to a person at an address if, and only if:
 - (a) the Statement is sent to the address; and
 - (b) either:
 - (i) the envelope or other container in which the Statement is sent; or
 - (ii) the message that accompanies the Statement; is addressed to the person.
- (3) The Statement may be given or sent to the person's agent only if the agent is not acting as the person's agent in one of the following capacities:
 - (a) a financial services licensee;
 - (b) an authorised representative of a financial services licensee;
 - (d) a person who is not required to hold an Australian financial services licence because the person is covered by:

Section 1015D

- (i) paragraph 911A(2)(j); or
 - (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or
 - (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l);
 - (e) a person who is required to hold an Australian financial services licence but who does not hold such a licence;
 - (f) an employee, director or other representative of a person referred to in paragraph (a), (b), (d) or (e).
- (4) The regulations may provide for alternative ways of giving a Statement to a person.
- (5) The regulations may specify requirements as to:
- (a) the manner in which a Statement may be given to a person; and
 - (b) the presentation, structure and format for a Statement that is to be given in electronic form.

The giving of the Statement is not effective unless those requirements are satisfied.

1015D Notice, retention and access requirements for Statement that does not need to be lodged

- (1) This section applies to a Statement if section 1015B does not require a copy of the Statement to be lodged with ASIC.
- (2) The responsible person for the Statement (other than the trustee of a self-managed superannuation fund) must lodge a notice with ASIC, in electronic form, advising of the occurrence of any of the following events as soon as practicable, and in any event within 5 business days, after the occurrence of the event:
- (a) except in the case of a Supplementary Product Disclosure Statement—a copy of the Statement is first given to someone in a recommendation, issue or sale situation;
 - (b) a change is made to fees and charges set out in the Statement;
 - (c) the financial product to which the Statement relates ceases to be available to be recommended or offered to new clients in a recommendation, issue or sale situation.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 1015E

Note 2: The fees and charges set out in a Product Disclosure Statement may be changed by a Supplementary Product Disclosure Statement (see section 1014A).

- (3) The responsible person for the Statement must keep a copy of the Statement for the period of 7 years after the date of the Statement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) During that period the responsible person:
- (a) must make a copy of the Statement available to ASIC if asked to do so by ASIC; and
 - (b) must comply with any reasonable request from any other person for a copy of the Statement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1015E Altering a Statement after its preparation and before giving it to a person

- (1) A regulated person must not, in purported compliance with a provision of this Part, give a person a Statement that has been altered (otherwise than pursuant to paragraph (b)) after the date of the Statement if either or both of the following paragraphs applies:
- (a) the alteration was not made by, or with the authority of, the issuer or seller, as the case requires, of the financial products;
 - (b) the alteration is a material alteration and the date of the Statement has not been changed to:
 - (i) if a copy of the altered Statement has been lodged with ASIC (see subsection (2))—the date on which it was so lodged; or
 - (ii) in any other case—the date on which the alteration was made.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) If the alteration is a material alteration to a Statement that has been lodged with ASIC under section 1015B, that section applies to the altered Statement as if it were a new Statement.

Subdivision F—Other rights and obligations related to Product Disclosure Statements

1016A Provisions relating to use of application forms

(1) In this section:

defective, in relation to a Product Disclosure Statement as at a particular time, means that the Product Disclosure Statement, if it had been given to a person at that time, would have been ***defective*** as defined in Subdivision A of Division 7.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

eligible application, in relation to a restricted issue or restricted sale of a relevant financial product, means an application that satisfies the following requirements:

- (a) the application is made using an application form; and
- (b) the application form used to apply for the product:
 - (i) was included in, or accompanied, a Product Disclosure Statement (relating to the product) that was given to the applicant and that was not defective as at the time when the application was made; or
 - (ii) was copied, or directly derived, by the applicant from a form referred to in subparagraph (i); and
- (c) all other applicable requirements (if any) in regulations made for the purposes of this paragraph are satisfied in relation to the application.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

relevant financial product means:

- (a) a managed investment product; or
- (b) a superannuation product; or
- (c) an investment life insurance product; or
- (d) an RSA product; or
- (da) an FHSA product; or
- (e) a financial product of a kind specified in regulations made for the purposes of this paragraph.

Section 1016A

relevant superannuation entity means a superannuation entity of a kind specified in regulations made for the purposes of this definition.

restricted issue means an issue of a relevant financial product to a person as a retail client, other than an issue covered by either of the following paragraphs:

- (a) an issue in a situation, or pursuant to an offer made in a situation, to which a subsection, other than subsection (1), of section 1012D applies; or
- (b) an issue in a situation, or pursuant to an offer made in a situation, to which section 1012E or 1012F applies.

restricted sale means a sale of a relevant financial product pursuant to an offer that:

- (a) is of a kind described in subsection 1012C(3) or (4); and
- (b) is not made in a situation to which a subsection, other than subsection (1), of section 1012D applies.

RSA provider has the same meaning as in the *Retirement Savings Accounts Act 1997*.

standard employer-sponsor has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

standard employer-sponsored fund has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

standard employer-sponsored member has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

- (2) A person (the **issuer** or **seller**) must only make a restricted issue or a restricted sale of a relevant financial product to a person (the **recipient**) if:
 - (a) the issue or sale is made pursuant to an eligible application made to the issuer or seller by the recipient; or
 - (b) it is a restricted issue in relation to which the following conditions are satisfied:
 - (i) the financial product is an interest in a relevant superannuation entity;

Section 1016A

- (ii) the interest is issued pursuant to an application made to the issuer by a standard employer-sponsor of the entity on the recipient's behalf;
 - (iii) if the application is the first application for the issue of a superannuation interest made to the issuer by the standard employer-sponsor on behalf of any person—the application is an eligible application; or
- (c) it is a restricted issue in relation to which the following conditions are satisfied:
 - (i) the financial product is an interest in a relevant superannuation entity;
 - (ii) the interest is issued pursuant to an application made to the issuer by another trustee under Part 24 of the *Superannuation Industry (Supervision) Act 1993* on the recipient's behalf;
 - (iii) if the application is the first application under Part 24 of that Act made to the issuer by the other trustee on behalf of any person—the application is an eligible application; or
- (d) it is a restricted issue in relation to which the following conditions are satisfied:
 - (i) the financial product is an interest in a relevant superannuation entity;
 - (ii) the interest is issued pursuant to an application made to the issuer by an RSA provider under Part 9 of the *Retirement Savings Accounts Act 1997* on the recipient's behalf;
 - (iii) if the application is the first application under Part 9 of that Act made to the issuer by the RSA provider on behalf of any person—the application is an eligible application; or
- (e) it is a restricted issue in relation to which the following conditions are satisfied:
 - (i) the financial product is an RSA product;
 - (ii) the interest is issued pursuant to an application made to the issuer by an employer (within the meaning of the *Retirement Savings Accounts Act 1997*) of the recipient;
 - (iii) if the application is the first application for the issue of an RSA product of that kind made to the issuer by the

Section 1016A

employer on behalf of any person—the application is an eligible application;

- (iv) all other applicable requirements (if any) in regulations made for the purposes of this subparagraph are satisfied in relation to the application; or

- (f) the issue or sale occurs in a situation covered by regulations made for the purposes of this paragraph.

Note 1: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) The trustee of a relevant superannuation entity must only permit a person to become a standard employer-sponsor of the entity if:

- (a) the person applied to become a standard employer-sponsor of the entity using an application form; and

- (b) the application form used to apply to become a standard employer-sponsor:

- (i) was included in, or accompanied, a Product Disclosure Statement (relating to an interest in the entity) that was given to the person and that was not defective as at the time when the application was made; or

- (ii) was copied, or directly derived, by the person from a form referred to in subparagraph (i).

Note 1: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The regulations may:

- (a) provide for defences to offences based on subsection (2) or (3); and

- (b) provide for additional offences relating to the receipt or non-receipt of applications or application forms.

Note 1: A defendant bears an evidential burden in relation to a defence. See subsection 13.3(3) of the *Criminal Code*.

Note 2: For the limit on penalties for offences against the regulations, see paragraph 1364(2)(w).

Section 1016B

1016B If Statement lodged with ASIC, financial product is not to be issued or sold before specified period

(1) If:

- (a) a copy of a Product Disclosure Statement has been lodged with ASIC; and
- (b) the financial product to which the Statement relates is not able to be traded on any financial market (whether in Australia or elsewhere);

the responsible person must not issue or sell a financial product, pursuant to an application made in response to the Statement, until the period of 7 days (or that period as extended under subsection (2)) after lodgment of the Statement has ended.

Note 1: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) ASIC may extend the period by notice in writing to the responsible person. The period as extended must end no more than 14 days after lodgment.

1016C Minimum subscription condition must be fulfilled before issue or sale

If a Product Disclosure Statement for a financial product states that a financial product to which the Statement relates will not be issued or sold unless:

- (a) applications for a minimum number of financial products of that kind are received; or
- (b) a minimum amount is raised;

the responsible person must not issue or sell a financial product of that kind, pursuant to an application made in response to the Statement, if that condition has not been satisfied. For the purpose of working out whether the condition has been satisfied, a person who has agreed to take a financial product as underwriter is taken to have applied for that product.

Note 1: Statements in a Supplementary Product Disclosure Statement are taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Section 1016D

Note 1A: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this section is an offence (see subsection 1311(1)).

1016D Condition about ability to trade on a market must be fulfilled before issue or sale

- (1) If a Product Disclosure Statement for a financial product states or implies that a financial product to which the Statement relates will be able to be traded on a financial market (whether in Australia or elsewhere), the responsible person must only issue or sell a financial product of that kind, pursuant to an application made in response to the Statement, if:
- (a) the product is able to be traded on that market; or
 - (b) an application has, within 7 days after the relevant date (see subsection (3)), been made to the operator of that market for the taking of such action as is necessary to enable financial products of that kind to be traded on that market.

Paragraph (b) ceases to apply to the financial product at the end of the period of 3 months starting on the relevant date.

Note 1: Statements in a Supplementary Product Disclosure Statement are taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Note 1A: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Issue or transfer void if quotation condition not fulfilled

- (2) If a Product Disclosure Statement for a financial product states or implies that the financial product is to be quoted on a financial market (whether in Australia or elsewhere) and:
- (a) an application has not, within 7 days after the relevant date (see subsection (3)), been made to the operator of that market for the taking of such action as is necessary to enable financial products of that kind to be traded on that market; or
 - (b) the product is not able to be traded on that market at the end of 3 months after the relevant date;
- then:

Section 1016E

- (c) an issue or transfer to a person of a financial product of that kind is void if:
 - (i) the issue or transfer is pursuant to an application made in response to the Statement; or
 - (ii) the person should have been given the Statement; and
- (d) if:
 - (i) an issue or transfer of a financial product to a person is void because of paragraph (c); and
 - (ii) the responsible person received money from that person on account of the issue or transfer—the responsible person must, as soon as practicable, return the money to that person.

Note 1: Paragraphs (c) and (d) do not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with paragraph (d) is an offence (see subsection 1311(1)).

The relevant date

- (3) For the purposes of this section, the **relevant date** in relation to an express or implied statement is:
 - (a) if the statement is express or implied in a Product Disclosure Statement, disregarding the effect of section 1014D—the date of the Product Disclosure Statement; or
 - (b) if the statement is express or implied in a Supplementary Product Disclosure Statement—the date of the Supplementary Product Disclosure Statement; or
 - (c) if the statement is express or implied in a Replacement Product Disclosure Statement (whether or not it is express or implied in the earlier Product Disclosure Statement it replaces)—the date of the Replacement Product Disclosure Statement.

1016E Choices open to person making the offer if disclosure condition not met or Product Disclosure Statement defective

- (1) This section applies if:

Section 1016E

- (a) a Product Disclosure Statement for a financial product states that a financial product to which the Statement relates will not be issued or sold unless:
 - (i) applications for a minimum number of financial products of that kind are received; or
 - (ii) a minimum amount is raised;and that condition is not satisfied within 4 months after the relevant date (see subsections (3) and (4)); or
- (b) a Product Disclosure Statement for a financial product states or implies that a financial product to which the Statement relates will be able to be traded on a financial market (whether in Australia or elsewhere) and:
 - (i) an application has not, within 7 days after the relevant date (see subsection (4)), been made to the operator of that market for the taking of such action as is necessary to enable financial products of that kind to be traded on that market; or
 - (ii) at the end of the period of 3 months starting on the relevant date, financial products of that kind are not able to be traded on that market; or
- (c) in relation to a Product Disclosure Statement for a financial product, the responsible person becomes aware that the Product Disclosure Statement was defective as at the time when it was prepared, or that it became or has become defective as at some later time.

Note: Information and statements in a Supplementary Product Disclosure Statement are taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

- (2) If this section applies, the responsible person must, in relation to any application for financial products of the relevant kind that is made in response to the Product Disclosure Statement (the ***first Product Disclosure Statement***) and that has not resulted in an issue or sale of financial products of that kind, comply with one of the following paragraphs:
 - (a) the responsible person must repay the money they received from the applicant; or
 - (aa) the responsible person must give the applicant:
 - (i) a new Product Disclosure Statement for the financial products, and an additional statement that identifies the respects in which the new Product Disclosure Statement

Section 1016E

- is materially different from the first Product Disclosure Statement; and
- (ii) 1 month to withdraw their application and be repaid; or
- (b) the responsible person must give the applicant:
- (i) a Supplementary Product Disclosure Statement that changes the statement referred to in paragraph (1)(a) or (b), or that corrects the deficiency referred to in paragraph (1)(c); and
- (ii) 1 month to withdraw their applications and be repaid; or
- (ba) the responsible person must issue or sell the financial products to the applicant and give them:
- (i) a new Product Disclosure Statement for the financial products, and an additional statement that identifies the respects in which the new Product Disclosure Statement is materially different from the first Product Disclosure Statement; and
- (ii) 1 month to return the financial products and be repaid; or
- (c) the responsible person must issue or sell the financial products to the applicant and give them:
- (i) a Supplementary Product Disclosure Statement that changes the statement referred to in paragraph (1)(a) or (b), or that corrects the deficiency referred to in paragraph (1)(c); and
- (ii) 1 month to return the financial products and be repaid.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: If the responsible person chooses the option given by paragraph (aa) or (b), that option does not require the responsible person to wait until the end of the month referred to in subparagraph (aa)(ii) or (b)(ii) before going ahead and issuing or selling the financial products to the applicant if the applicant indicates before then that they still wish to proceed with the application.

Note 3: However, if the responsible person chooses the option given by paragraph (aa) or (b), whether the responsible person may go ahead and issue or sell the financial products to the applicant at the end of the month referred to in subparagraph (aa)(ii) or (b)(ii) (or earlier, as mentioned in note 2) is affected by this subsection and sections 1016A to 1016E (including as those provisions are affected by subsections (2A) and (2B) of this section).

Note 4: If the responsible person chooses the option given by paragraph (c), sections 1016A to 1016D do not prohibit the issue or sale of the

Section 1016E

financial products under that paragraph (see subsection (2C) of this section).

- (2A) If, in accordance with paragraph (2)(aa), the responsible person gives the applicant a new Product Disclosure Statement for the financial products and the additional statement referred to in subparagraph (2)(aa)(i):
- (a) subsection (2), and sections 1016B, 1016C, 1016D and 1016E, apply in relation to the application, from the time when the applicant is given the new Product Disclosure Statement (the ***correction time***), as if the application had been made in response to the new Product Disclosure Statement; and
 - (b) if:
 - (i) the reason for giving the new Product Disclosure Statement was that the responsible person became aware that the first Product Disclosure Statement was defective as at the time when it was prepared, or had become defective by the time the application was made; and
 - (ii) the financial products are ***relevant financial products*** as defined in section 1016A;section 1016A applies in relation to the application, from the correction time, as if the first Product Disclosure Statement had instead contained the content of the new Product Disclosure Statement.

Note 1: Because of paragraph (a):

- (a) if this section applies to the new Product Disclosure Statement, the responsible person's ability to proceed to issue or sell the financial products pursuant to the application will be affected by subsection (2), and by sections 1016B, 1016C and 1016D, as those provisions apply in relation to the new Product Disclosure Statement (even though the application was actually made in response to the first Product Disclosure Statement); and
- (b) sections 1016B, 1016C and 1016D, as they relate to the first Product Disclosure Statement, cease to apply in relation to the application.

Note 2: Because of paragraph (b), the application may be an ***eligible application*** as defined in section 1016A, even though the first Product Disclosure Statement was actually defective as at the time when the application was made.

(2B) If:

Section 1016E

- (a) in accordance with paragraph (2)(b), the responsible person gives the applicant a Supplementary Product Disclosure Statement that relates to the financial products; and
- (b) the reason for giving the Supplementary Product Disclosure Statement was that the responsible person became aware that the first Product Disclosure Statement was defective as at the time when it was prepared, or had become defective by the time the application was made; and
- (c) the financial products are *relevant financial products* as defined in section 1016A;

section 1016A applies in relation to the application, from the time when the applicant is given the Supplementary Product Disclosure Statement, as if the Supplementary Product Disclosure Statement had been given to the applicant before the application was made.

Note 1: Because of this subsection and section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements), the application may be an *eligible application* as defined in section 1016A, even though the Supplementary Product Disclosure Statement was not actually given until after the time when the application was made.

Note 2: The responsible person's ability to proceed to issue or sell the financial products pursuant to the application will be affected by subsection (2), and by sections 1016B, 1016C and 1016D, as those provisions apply in relation to the first Product Disclosure Statement as affected by the Supplementary Product Disclosure Statement and any other Supplementary Product Disclosure Statements.

(2BA) If Subdivision DA applies:

- (a) for the purposes of subsection (2), instead of giving the applicant a Supplementary Product Disclosure Statement, the responsible person may give the applicant a Replacement Product Disclosure Statement; and
- (b) if the responsible person gives the applicant a Replacement Product Disclosure Statement, subsection (2B) applies as if references in that subsection to a Supplementary Product Disclosure Statement were references to the Replacement Product Disclosure Statement.

(2C) If the responsible person chooses to comply with paragraph (2)(c), nothing in sections 1016A to 1016D applies to the issue or sale of the financial products under that paragraph.

Note: This subsection affects the elements of the offences under sections 1016A to 1016D, and so it is not an exception in relation to

Section 1016F

which a defendant bears an evidential burden under subsection 13.3(3) of the *Criminal Code*.

- (3) For the purpose of working out whether the condition referred to in paragraph (1)(a) has been satisfied, a person who has agreed to take a financial product as an underwriter is taken to have applied for that financial product.
- (4) For the purposes of paragraphs (1)(a) and (b), the **relevant date** in relation to an express or implied statement is:
 - (a) if the statement is express or implied in a Product Disclosure Statement, disregarding the effect of section 1014D—the date of the Product Disclosure Statement; or
 - (b) if the statement is express or implied in a Supplementary Product Disclosure Statement—the date of the Supplementary Product Disclosure Statement; or
 - (c) if the statement is express or implied in a Replacement Product Disclosure Statement (whether or not it is express or implied in the earlier Product Disclosure Statement it replaces)—the date of the Replacement Product Disclosure Statement.
- (5) For the purposes of this section, **defective**, when used in relation to a Product Disclosure Statement at a particular time, means that the Product Disclosure Statement, if it had been given to a person at that time, would have been **defective** as defined in Subdivision A of Division 7.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

1016F Remedies for person acquiring financial product under defective Product Disclosure Document

- (1) Subject to this section, if a financial product is issued or sold to a person (the **client**) in contravention of section 1016E, the client has the right to return the product and to have the money they paid to acquire the product repaid. This is so even if the responsible person is being wound up.
- (2) If the responsible person:
 - (a) is a body corporate; and
 - (b) does not repay the money as required by subsection (1);

Section 1016F

the directors of the responsible person are personally liable to repay the money.

- (3) The right to return the product must be exercised by notifying the responsible person in one of the following ways:
- (a) in writing; or
 - (b) electronically; or
 - (c) in any other way specified in the regulations.
- Also, if the regulations require the client to comply with other requirements in order to exercise the right to return the product, those other requirements must be complied with.
- (4) The right to return the product can only be exercised during the period of 1 month starting on the date of the issue or sale of the product to the client.
- (5) On the exercise of the right to return the product:
- (a) if the product is constituted by a legal relationship between the client and the issuer of the product—that relationship is, by force of this section, terminated with effect from that time without penalty to the client; and
 - (b) any contract for the acquisition of the product by the client is, by force of this section, terminated with effect from that time without penalty to the client.
- (6) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (5)) to apply if the right to return a financial product is exercised.
- (7) The regulations may do any or all of the following:
- (a) provide that a specified subclass of financial products that would otherwise be covered by this section is excluded from this section;
 - (b) provide additional requirements to be satisfied before this section applies in relation to a class or subclass of financial products;
 - (c) provide that this section does not apply in relation to the provision of a financial product in specified circumstances.

Section 1017A

Division 3—Other disclosure obligations of the issuer of a financial product

1017A Obligation to give additional information on request

Obligation to give information

- (1) The following people may request the person who is the responsible person for a Product Disclosure Statement for a financial product under Division 2 to provide further information about the product:
 - (a) a person who:
 - (i) has been or should have been given, or who has obtained, the Product Disclosure Statement for the financial product; and
 - (ii) is not a holder of the financial product;
 - (b) a financial services licensee;
 - (c) an authorised representative of a financial services licensee;
 - (e) a person who is not required to hold an Australian financial services licence because the person is covered by:
 - (i) paragraph 911A(2)(j); or
 - (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or
 - (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l).
- (2) The responsible person must give the person the information if:
 - (a) the financial product is offered in this jurisdiction or the Product Disclosure Statement is given or obtained in this jurisdiction; and
 - (b) the responsible person has previously made the information generally available to the public; and
 - (c) the information might reasonably influence a person's decision, as a retail client, whether to acquire a financial product to which the Statement relates; and
 - (d) it is reasonably practicable for the responsible person to give the person the information; and
 - (e) the person pays any charge payable under subsection (5).

Section 1017A

The responsible person does not need to give information that is contained in the Product Disclosure Statement.

Note 1: Paragraph (b)—This requirement means that the responsible person does not have to disclose material that is confidential because it is:

- (a) an internal working document; or
- (b) personal information about another person; or
- (c) a trade secret or other information that has a commercial value that would be reduced or destroyed by the disclosure; or
- (d) material that the responsible person owes another a person a duty not to disclose.

Note 2: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

- (3) The responsible person must take reasonable steps to ensure that, as soon as practicable after receiving the request, and in any event within one month, subsection (2) is complied with.

Manner of giving information

- (4) The responsible person may give the person making the request the information:
- (a) by making a document containing the information available for inspection by the person:
 - (i) at a suitable place (having adequate facilities for the person to inspect and photocopy the document); and
 - (ii) during normal business hours; or
 - (b) in some other way that is agreed between the responsible person and the person making the request.

Issuer or seller may charge for giving information

- (5) The responsible person may require the person making the request to pay a charge for obtaining the information.
- (6) The amount of the charge must not exceed the reasonable costs that the responsible person incurs that are reasonably related to giving the information (including any costs incurred in photocopying the document containing the information).

Note: This would include the costs of searching for, obtaining and collating the information.

Section 1017B

1017B Ongoing disclosure of material changes and significant events

Issuer to notify holders of changes and events

(1) If:

- (a) a person (the **holder**) acquired a financial product as a retail client (whether or not it was acquired from the issuer); and
- (b) either:
 - (i) the financial product was offered in this jurisdiction; or
 - (ii) the holder applied for the financial product in this jurisdiction; and
- (c) the product is not specified in regulations made for the purposes of this paragraph; and
- (d) the circumstances in which the product was acquired are not specified in regulations made for the purposes of this paragraph;

the issuer must, in accordance with subsections (3) to (8), notify the holder of changes and events referred to in subsection (1A).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

The changes and events that must be notified

(1A) The changes and events that must be notified are:

- (a) any material change to a matter, or significant event that affects a matter, being a matter that would have been required to be specified in a Product Disclosure Statement for the financial product prepared on the day before the change or event occurs; and
- (b) any other change, event or other matter of a kind specified in regulations made for the purposes of this paragraph.

Note: Paragraph (a) applies whether or not a Product Disclosure Statement for the financial product was in fact prepared (or required to be prepared) on the day before the change or event occurs.

(2) The issuer does not need to give the notice if the financial product is a managed investment product that is an ED security.

Note 1: The continuous disclosure provisions in Chapter 6CA (sections 674-677) apply to managed investment products that are ED securities.

Section 1017B

Note 2: A defendant bears an evidential burden in relation to the matters in this subsection.

- (3) The issuer must notify the holder in one of the following ways:
- (a) in writing; or
 - (b) electronically; or
 - (c) in a way specified in the regulations.
- (4) The notice must give the holder the information that is reasonably necessary for the holder to understand the nature and effect of the change or event.

Time for notifying holders

- (5) The time within which the issuer must give the notice is set out in the following table:

Time for giving notice of change or event		
	Nature of change or event	Time for giving notice
1	Change or event is not an increase in fees or charges	Subject to subsection (6), before the change or event occurs or as soon as practicable after, but not more than 3 months after, the change or event occurs
2	Change is an increase in fees or charges	30 days before the change takes effect

- (6) If the change or event is not an increase in fees or charges, the notice may be given more than 3 months after the change or event occurs if:
- (a) the issuer reasonably believes that the event is not adverse to the holder's interests and accordingly the holder would not be expected to be concerned about the delay in receiving the information; and
 - (b) the notice is given no later than 12 months after the change or event occurs.
- (7) If the change or event might result in an increase in fees or charges, this section applies to the change or event as if it would result in an increase in fees or charges.

Section 1017C

- (8) In any proceedings against the issuer for an offence based on subsection (1), it is a defence if the issuer took reasonable steps to ensure that the other person would be notified of the matters required by subsection (1) in accordance with subsections (3) to (8).

Note: A defendant bears an evidential burden in relation to the matters in subsection (8). See subsection 13.3(3) of the *Criminal Code*.

- (9) In this section:

fees or charges does not include fees or charges payable under a law of the Commonwealth or of a State or Territory.

1017C Information for existing holders of superannuation products and RSA products

Application

- (1) This section applies to the issuer of a financial product if the product is:
- (a) a superannuation product; or
 - (b) an RSA product.

Information for concerned person related to a superannuation product

- (2) If the financial product is a superannuation product, then, subject to subsection (4), the issuer must, on request by a concerned person, give the concerned person information that the concerned person reasonably requires for the purposes of:
- (a) understanding any benefit entitlements that the concerned person may have, has or used to have under the superannuation product; or
 - (b) understanding the main features of:
 - (i) the relevant sub-plan; or
 - (ii) if there is no relevant sub-plan—the superannuation entity; or
 - (c) making an informed judgment about the management and financial condition of:
 - (i) the superannuation entity; and
 - (ii) the relevant sub-plan (if any); or

Section 1017C

- (d) making an informed judgment about the investment performance of:
 - (i) the relevant sub-plan; or
 - (ii) if there is no relevant sub-plan—the superannuation entity; or
- (e) understanding the particular investments of:
 - (i) the superannuation entity; and
 - (ii) the relevant sub-plan (if any).

The information must be given in accordance with the other requirements of this section.

Note 1: Subsection (9) defines *concerned person* and *relevant sub-plan*.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Information for concerned person related to an RSA product

- (2A) If the financial product is an RSA product, then, subject to subsection (4), the issuer must, on request by a concerned person, give the concerned person information that the concerned person reasonably requires for the purposes of:
 - (a) understanding any benefit entitlements that the concerned person may have, has or used to have under the RSA product; or
 - (b) understanding the main features of the RSA product.

The information must be given in accordance with the other requirements of this section.

Note 1: Subsection (9) defines *concerned person*.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Information for employer-sponsor related to a superannuation product

- (3) If the financial product is a superannuation product, then, subject to subsection (4), the issuer must, on request by an employer-sponsor, give the employer-sponsor information that the employer-sponsor reasonably requires for the purposes of:
 - (a) understanding the kinds of benefits to which the employer-sponsor's employees are entitled or will or may become entitled; or

Section 1017C

- (b) understanding the main features of:
 - (i) the relevant sub-plan; or
 - (ii) if there is no relevant sub-plan—the superannuation entity; or
- (c) making an informed judgment about the management and financial condition of:
 - (i) the superannuation entity; and
 - (ii) the relevant sub-plan (if any); or
- (d) making an informed judgment about the investment performance of:
 - (i) the relevant sub-plan; or
 - (ii) if there is no relevant sub-plan—the superannuation entity; or
- (e) a matter related to the *Superannuation Guarantee (Administration) Act 1992*.

The information must be given in accordance with the other requirements of this section.

Note 1: Subsection (9) defines *relevant sub-plan*.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Information for employer related to an RSA product

- (3A) If the financial product is an RSA product, then, subject to subsection (4), the issuer must, on request by an employer who made an application to acquire the RSA product on behalf of an employee, give the employer information that the employer reasonably requires for the purposes of:
 - (a) understanding the kinds of benefits to which the employer's employees are entitled or will or may become entitled; or
 - (b) understanding the main features of the RSA product; or
 - (c) a matter related to the *Superannuation Guarantee (Administration) Act 1992*.

The information must be given in accordance with the other requirements of this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Exceptions

- (4) This section does not require (and does not, by implication, authorise) the disclosure of:
- (a) internal working documents of the issuer; or
 - (b) information or documents that would disclose, or tend to disclose:
 - (i) personal information of another person if, in the circumstances, the disclosure would be unreasonable; or
 - (ii) trade secrets or other information having a commercial value that would be reduced or destroyed by the disclosure; or
 - (c) information or documents in relation to which the issuer owes to another person a duty of non-disclosure.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

Specific requirements

- (5) The issuer must, on request in writing by a person who is a concerned person, an employer-sponsor (if the financial product is a superannuation product) or an employer referred to in subsection (3A) (if the financial product is an RSA product), give the person:
- (a) a copy of a prescribed document (to the extent the issuer has access to the document) specified in the request; or
 - (b) prescribed information (to the extent to which the issuer has or has access to the information) specified in the request.
- The document or information must be given in accordance with the other requirements of this section.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (6) Subsection (5) does not apply if the issuer is the trustee of a self-managed superannuation fund.

Documents may be made available for inspection

- (7) It is sufficient compliance with a requirement imposed by this section on the issuer to give information, or to give a copy of a document, to a person (the *client*) if:

Section 1017D

- (a) a document containing the information; or
 - (b) a copy of the document;
- is made available for inspection by the issuer:
- (c) at a suitable place (having adequate facilities for the person to inspect and photocopy the document); and
 - (d) during normal business hours;
- or as otherwise agreed between the issuer for the financial product and the client.

Time for compliance

- (8) The issuer must comply with a request to give information, or a copy of a document, as soon as practicable. The issuer must, in any event, make reasonable efforts to comply with the request within 1 month of receiving the request.

Definitions

- (9) In this section:

concerned person:

- (a) in relation to a superannuation product—means a person who:
 - (i) is, or was within the preceding 12 months, a member of the superannuation entity; or
 - (ii) is a beneficiary of the superannuation entity; or
- (b) in relation to an RSA product—means a person who:
 - (i) is, or was within the preceding 12 months, a holder of the RSA product; or
 - (ii) has a right or a claim under the RSA product.

relevant sub-plan, in relation to a superannuation product, has the meaning given by the regulations.

1017D Periodic statements for retail clients for financial products that have an investment component

- (1) If:
 - (a) a person (the ***holder***) of a financial product acquired the financial product as a retail client (whether or not it was acquired from the issuer); and

Section 1017D

- (b) the product is:
 - (i) a managed investment product; or
 - (ii) a superannuation product; or
 - (iii) an RSA product; or
 - (iiia) an FHSA product; or
 - (iv) an investment life insurance product; or
 - (v) a deposit product; or
 - (vi) specified in regulations made for the purposes of this paragraph; and
- (c) either:
 - (i) the financial product was offered in this jurisdiction; or
 - (ii) the holder applied for the financial product in this jurisdiction;

the issuer of the product must, in accordance with subsections (2) to (6), give the holder a periodic statement for each reporting period during which the holder holds the product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The following provisions apply in relation to reporting periods:
 - (a) each reporting period lasts for a period, not exceeding 1 year, determined by the issuer;
 - (b) the first reporting period starts when the holder acquired the product;
 - (c) each subsequent reporting period starts at the end of the preceding reporting period;
 - (d) if the holder ceases to hold the product, the period starting at the end of the preceding reporting period and ending when the holder ceases to hold the product is a reporting period.
- (3) The periodic statement must be given as soon as practicable after, and in any event within 6 months after, the end of the reporting period to which it relates.
- (4) The periodic statement must give the holder the information that the issuer reasonably believes the holder needs to understand his or her investment in the financial product.
- (5) The periodic statement must include the following if they are relevant to the financial product:

Section 1017D

- (a) opening and closing balances for the reporting period;
 - (b) the termination value of the investment at the end of the reporting period (to the extent to which it is reasonably practicable to calculate that value for the investment or a component of the investment);
 - (c) details of transactions in relation to the product during the reporting period as required by regulations made for the purposes of this paragraph;
 - (d) any increases in contributions in relation to the financial product by the holder or another person during the reporting period;
 - (e) return on investment during the reporting period (on an individual basis if reasonably practicable to do so and otherwise on a fund basis);
 - (f) details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement;
 - (g) details prescribed by regulations made for the purposes of this paragraph.
- (5A) Unless in accordance with the regulations:
- (a) for information to be disclosed in accordance with paragraphs (5)(a), (b), (c), (d) and (e), any amounts are to be stated in dollars; and
 - (b) for any other information in relation to amounts paid by the holder of the financial product during the period, any amounts are to be stated in dollars.
- (6) The periodic statement must be given in one of the following ways:
- (a) in writing; or
 - (b) electronically; or
 - (c) in a way specified in the regulations.
- (7) The periodic statement need not be given if the issuer has already given the holder all the information that would be included in the periodic statement if it were to be given.
- Note: A defendant bears an evidential burden in relation to the matters in this subsection.

1017DA Trustees of superannuation entities—regulations may specify additional obligations to provide information

- (1) The regulations may:
 - (a) require the trustee of a superannuation entity to do all or any of the following:
 - (i) provide information to the holder of a superannuation product (being an interest in that entity) with information relating to the management, financial condition and investment performance of the entity and/or of any relevant sub-plan (within the meaning of section 1017C);
 - (ii) provide information to the holder or former holder of a superannuation product (being an interest in that entity), or to any other person to whom benefits under the product are payable, with information relating to his or her benefit entitlements;
 - (iii) provide information to the holder of a superannuation product (being an interest in the entity) with information about arrangements for dealing with inquiries and/or complaints relating to the product; or
 - (b) require an RSA provider to do either or both of the following:
 - (i) provide information to the holder or former holder of an RSA product provided by the RSA provider, or to any other person to whom benefits under the product are payable, with information relating to his or her benefit entitlements;
 - (ii) provide information to the holder of an RSA product provided by the RSA provider with information about arrangements for dealing with inquiries and/or complaints relating to the product.
- (2) Without limiting subsection (1), regulations made for the purposes of that subsection may deal with all or any of the following:
 - (a) what information is to be provided;
 - (b) when information is to be provided;
 - (c) how information is to be provided.
- (3) The trustee of a superannuation entity, or an RSA provider, must provide information in accordance with any applicable

Chapter 7 Financial services and markets

Part 7.9 Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

Division 3 Other disclosure obligations of the issuer of a financial product

Section 1017E

requirements of regulations made for the purposes of subsection (1).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) In this section:

RSA provider has the same meaning as in the *Retirement Savings Accounts Act 1997*.

superannuation entity has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

1017E Dealing with money received for financial product before the product is issued

(1) This section applies to money paid to:

- (a) an issuer (the **product provider**) of financial products; or
- (b) a seller (the **product provider**) of financial products in relation to which the seller has prepared a Product Disclosure Statement;

if:

- (c) the money is paid to acquire, or acquire an increased interest in, one or more of those financial products from the product provider (whether or not the acquisition would be by a person as a retail client); and
- (d) the product provider does not, for whatever reason, issue or transfer the product or products, or the increased interest, immediately after receiving the money; and
- (e) either:
 - (i) the financial product or increased interest was offered in this jurisdiction; or
 - (ii) the application for the financial product or increased interest was made in this jurisdiction; or
 - (iii) the money was received in this jurisdiction.

(2) The product provider must ensure that the money is paid into an account that satisfies these requirements:

- (a) the account is:
 - (i) with an Australian ADI; or

Section 1017E

- (ii) of a kind prescribed by regulations made for the purposes of this paragraph;
and is designated as an account for the purposes of this section of this Act; and
- (b) the only money paid into the account is:
 - (i) money to which this section applies; or
 - (ii) interest on the amount from time to time standing to the credit of the account; and
- (c) if regulations made for the purposes of this paragraph impose additional requirements—the requirements so imposed by the regulations.

The money must be paid into the account on the day it is received by the product provider, or on the next business day.

Note: See section 1021O for related offences.

- (2A) Subject to subsection (2C), the money is taken to be held in trust by the product provider for the benefit of the person who paid the money.
- (2C) The regulations may:
 - (a) provide that subsection (2A) does not apply in relation to money in specified circumstances; and
 - (b) provide for matters relating to the taking of money to be held in trust (including, for example, terms on which the money is taken to be held in trust and circumstances in which it is no longer taken to be held in trust).
- (3) The money must only be taken out of the account if:
 - (a) it is taken out for the purpose of return to the person by whom it was paid; or
 - (b) the product is issued or transferred to, or in accordance with the instructions of, that person; or
 - (c) it is taken out for a purpose specified by regulations made for the purposes of this paragraph; or
 - (d) it is taken out in a situation specified by regulations made for the purposes of this paragraph.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 1017F

- (4) The product provider must:
- (a) return the money; or
 - (b) issue or transfer the product to, or in accordance with the instructions of, the person who paid the money; or
 - (c) if the money is taken out:
 - (i) for a purpose specified by regulations made for the purposes of paragraph (3)(c); or
 - (ii) in a situation specified by regulations made for the purposes of paragraph (3)(d);do any action required, by regulations made for the purposes of this paragraph, after taking out that money;
- either:
- (d) before the end of one month starting on the day on which the money was received; or
 - (e) if it is not reasonably practicable to do so before the end of that month—by the end of such longer period as is reasonable in the circumstances.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (5) The product provider may, for the purposes of this section, maintain a single account or 2 or more accounts.
- (6) Nothing in this section, or in regulations made for the purposes of this section, makes the body (not being the product provider) that the account is with under paragraph (2)(a) subject to any liability merely because of a failure by the product provider to comply with any of the provisions of this section or those regulations.

1017F Confirming transactions

Transactions to which this section applies

- (1) This section applies in relation to a transaction involving a financial product if:
- (a) a person (the **holder**) acquired the product as a retail client; and
 - (b) the transaction is:
 - (i) the transaction by which the holder acquired the product; or

Section 1017F

- (ii) a transaction that occurs while the holder holds the product, including a transaction by which the holder disposes of all or part of the product (and see also subsection (3)); and
- (c) the transaction is not one that does not require confirmation because of subsection (4); and
- (d) the holder has not, in accordance with regulations made for the purposes of paragraph (9)(d), waived their right to be provided with confirmation of the transaction; and
- (e) either:
 - (i) the financial product was offered to, or acquired by, the holder in this jurisdiction; or
 - (ii) the transaction takes place in this jurisdiction.

Note: This section extends to financial products that are securities (see section 1010A).

Obligation to confirm transactions

- (2) The person (the **responsible person**) specified in column 3 of an item in the following table must provide the holder with confirmation of the transaction specified in column 2 of the same item. The confirmation must be provided in accordance with subsections (5) to (8).

Who bears the obligation to confirm a transaction		
Item	Transaction	Whose obligation?
1	transaction by which the holder acquired the financial product, unless that transaction was a sale pursuant to an offer to which section 1012C applies	the issuer of the product
2	transaction by which the holder acquired the financial product, where that transaction was a sale pursuant to an offer to which section 1012C applies	the seller of the product
3	any other transaction in relation to the financial product that occurs while the holder holds the product, other than a disposal of all or part of the product	the issuer of the product

Chapter 7 Financial services and markets

Part 7.9 Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

Division 3 Other disclosure obligations of the issuer of a financial product

Section 1017F

Who bears the obligation to confirm a transaction		
Item	Transaction	Whose obligation?
4	transaction by which the holder disposes of all or part of the financial product	the person specified in the regulations made for the purposes of this item

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Examples of transactions that are covered by subparagraph (1)(b)(ii)

- (3) Without limiting the generality of subparagraph (1)(b)(ii), the transactions that are covered by that subparagraph include:
- (a) varying the terms of the financial product while the holder holds the product (unless subsection (4) provides that the variation does not require confirmation); and
 - (b) the redemption or surrender of the financial product from or by the holder.

Transactions that do not require confirmation

- (4) The following transactions do not require confirmation:
- (a) a transaction consisting solely of an additional contribution towards the financial product in either of the following circumstances:
 - (i) the timing and amount, or method of calculating the amount, of the additional contribution was agreed on when the product was acquired by the holder;
 - (ii) the additional contribution is an amount that is payable under the terms of the product because of an increase in an external factor, such as a person's salary, an inflation index or a rate of a tax or levy;
 - (b) if the financial product is a security—a transaction consisting solely of a variation of the rights attaching to the security;
 - (c) if the financial product is a deposit product—any of the following transactions:
 - (i) a withdrawal from the deposit product pursuant to a cheque drawn on the account;

Section 1017F

- (ii) a deposit to, or withdrawal from, the deposit product under a direct credit arrangement or a direct debit arrangement;
- (iii) crediting interest to the deposit product;
- (iv) debiting the deposit product for fees or charges in respect of the product or transactions involving the product;
- (v) debiting the deposit product for charges or duties on deposits into, or withdrawals from, the product that are payable under a law of the Commonwealth or of a State or Territory;
- (vi) a transaction of a kind specified in regulations made for the purposes of this subparagraph;
- (d) a variation of the terms of all financial products in the class to which the financial product belongs;
- (e) a transaction of a kind specified in regulations made for the purposes of this paragraph.

Note 1: Because of subparagraph (a)(i), confirmation is not required, e.g., for regular monthly contributions to a superannuation fund.

Note 2: A defendant bears an evidential burden in relation to the matters in this subsection.

Confirmation may be provided on a transaction-by-transaction basis or by means of a standing facility

- (5) Confirmation of a transaction must be provided:
- (a) by confirming the transaction in accordance with subsections (6) to (8), to the holder as soon as is reasonably practicable after the transaction occurs; or
 - (b) subject to subsection (5A), by providing the holder with access to a facility through which they can, for themselves, get a confirmation of the transaction in accordance with subsections (6) to (8) as soon as is reasonably practicable after the transaction occurs.

An arrangement under which the holder may request or require another person to provide a confirmation does not count as a facility that satisfies paragraph (b).

Section 1017F

When confirmation may be provided by means of a standing facility

- (5A) Confirmation may only be provided by means of a facility as mentioned in paragraph (5)(b) if:
- (a) the holder concerned has agreed that confirmation of transactions involving the product may be provided by means of the facility; or
 - (b) the holder concerned:
 - (i) has, in accordance with the applicable requirements (if any) in regulations made for the purposes of this subparagraph, been informed, by or on behalf of the responsible person, about the facility and its availability to the holder as a means of obtaining confirmation of transactions involving the product; and
 - (ii) has not advised the responsible person that the holder does not agree to use the facility as a means of obtaining such confirmations.

Means of confirmation

- (6) The confirmation of the transaction:
- (a) must be:
 - (i) in writing; or
 - (ii) electronic; or
 - (iii) in some other form applicable under regulations made for the purposes of this paragraph; and
 - (b) may be provided:
 - (i) in a case to which paragraph (5)(a) applies—directly by the responsible person or through another person (such as a financial services licensee); or
 - (ii) in a case to which paragraph (5)(b) applies—through a facility provided directly by the responsible person, or provided on behalf of the responsible person by someone else.

Content of confirmation

- (7) The confirmation of the transaction must give the holder the information that the responsible person reasonably believes the holder needs (having regard to the information the holder has

Section 1017F

received before the transaction) to understand the nature of the transaction.

- (8) Without limiting subsection (7), the confirmation of the transaction must:
- (a) identify the issuer and the holder; and
 - (b) if required to be given by a person other than the issuer—identify that person; and
 - (c) give details of the transaction, including:
 - (i) the date of the transaction; and
 - (ii) a description of the transaction; and
 - (iii) subject to regulations made for the purposes of this subparagraph—any amount paid or payable by the holder in relation to the transaction; and
 - (iv) subject to any regulations made for the purposes of this subparagraph—any taxes and stamp duties payable in relation to the transaction; and
 - (d) give any other details prescribed by regulations made for the purposes of this paragraph.

Regulations may provide for modification or waiver of confirmation obligation

- (9) The regulations may do all or any of the following:
- (a) modify subsection (2) to change the person required to provide confirmation of a transaction;
 - (b) modify subsections (5) and (6) to expand on or change the way in which confirmation of a transaction must be provided in particular circumstances;
 - (c) modify subsections (7) and (8) to expand on or change the information that must be included in the confirmation of a transaction in particular circumstances;
 - (d) specify the circumstances in which a person may waive the right to be provided with confirmation of a transaction, and specify how such a waiver may be made.

Section 1017G

1017G Certain product issuers and regulated persons must meet appropriate dispute resolution requirements

(1) If:

- (a) particular financial products are, or have been, available for acquisition (whether by issue or sale) by a person or persons as retail clients; and
- (b) the issue or sale of those products is not covered by an Australian financial services licence;

both the issuer, and any regulated person obliged under subsection 1012C(5), (6) or (8) to give a retail client a Product Disclosure Statement for one or more of those financial products, must each have a dispute resolution system complying with subsection (2).

Note 1: If the issue of particular financial products is covered by an Australian financial services licence, the requirement to have a dispute resolution system relating to the issue of the products is imposed by paragraph 912A(1)(g).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) To comply with this subsection, a dispute resolution system must consist of:

- (a) an internal dispute resolution procedure that:
 - (i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and
 - (ii) covers complaints, against the person required to have the system, made by retail clients in relation to financial services provided in relation to any of those products; and
- (b) membership of one or more external dispute resolution schemes that:
 - (i) is, or are, approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and
 - (ii) covers, or together cover, complaints (other than complaints that may be dealt with by the Superannuation Complaints Tribunal established by section 6 of the *Superannuation (Resolution of Complaints) Act 1993*), against the person required to have the system, made by retail clients in relation to

Section 1017G

financial services provided in relation to any of those products.

- (3) Regulations made for the purposes of subparagraph (2)(a)(i) or (2)(b)(i) may also deal with the variation or revocation of:
- (a) standards or requirements made by ASIC; or
 - (b) approvals given by ASIC.

Section 1018A

Division 4—Advertising for financial products

1018A Advertising or other promotional material for financial product must refer to Product Disclosure Statement

Advertisements and promotional material must identify issuer (or issuer and seller) and refer to Product Disclosure Statement

- (1) Subject to this section, if a particular financial product is available for acquisition by persons as retail clients (whether or not it is also available for acquisition by persons as wholesale clients) by way of issue, or pursuant to sale offers to which section 1012C applies or will apply, a person must only:
 - (a) advertise the product; or
 - (b) publish a statement that is reasonably likely to induce people to acquire the product;
if the advertisement or statement:
 - (c) identifies:
 - (i) if the product is available by way of issue—the issuer of the product; or
 - (ii) if the product is available pursuant to sale offers to which section 1012C applies or will apply—the issuer of the product and the seller of the product; and
 - (d) indicates that a Product Disclosure Statement for the product is available and where it can be obtained; and
 - (e) indicates that a person should consider the Product Disclosure Statement in deciding whether to acquire, or to continue to hold, the product.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (2) Subject to this section, if a particular financial product, or proposed financial product, is not available for acquisition by persons as retail clients but it is reasonably likely that the product will become so available (whether or not it is, or will also become, available for acquisition by persons as wholesale clients) by way of issue, or pursuant to sale offers to which section 1012C will apply, a person must only:
 - (a) advertise the product; or

Section 1018A

- (b) publish a statement that is reasonably likely to induce people to acquire the product;
if the advertisement or statement:
 - (c) identifies:
 - (i) if the product is likely to be so available by way of issue—the issuer of the product; or
 - (ii) if the product is likely to be so available pursuant to sale offers to which section 1012C will apply—the issuer of the product and the seller of the product; and
 - (d) indicates that a Product Disclosure Statement for the product will be made available when the product is released or otherwise becomes available; and
 - (e) indicates when and where the Product Disclosure Statement is expected to be made available; and
 - (f) indicates that a person should consider the Product Disclosure Statement in deciding whether to acquire, or continue to hold, the product.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Subsection (2) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(4)).

Distribution of disclosure document

- (3) A person may distribute a Product Disclosure Statement without contravening subsection (1) or (2). This does not apply if an order under section 1020E is in force in relation to the product.

Note 1: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code*.

Note 2: Subsection (3) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(5)).

General exceptions

- (4) An advertisement or publication does not contravene subsection (1) or (2) if it:
 - (a) relates to a financial product that is able to be traded on a financial market and consists of a notice or report by the issuer of the product, or one of its officers, about its affairs to the market operator; or

Section 1018A

- (b) consists solely of a notice or report of a general meeting of the issuer; or
- (c) consists solely of a report about the issuer that is published by the issuer and:
 - (i) does not contain information that materially affects affairs of the issuer, other than information previously made available in a Product Disclosure Statement that has been distributed or disclosure document that has been lodged with ASIC, an annual report or a notice or report referred to in paragraph (a) or (b); and
 - (ii) does not refer (whether directly or indirectly) to the offer of the financial product; or
- (d) is a news report, or is genuine comment, in the media relating to:
 - (i) a Product Disclosure Statement that has been distributed or disclosure document that has been lodged with ASIC; or
 - (ii) information contained in such a Statement or document; or
 - (iii) a notice or report covered by paragraph (a), (b) or (c); or
- (e) is a report about the financial products of the issuer published by someone who is not:
 - (i) the issuer; or
 - (ii) acting at the instigation of, or by arrangement with, the issuer; or
 - (iii) a director of the issuer; or
 - (iv) a person who has an interest in the success of the issue or sale of the financial product.

Paragraphs (d) and (e) do not apply if anyone gives consideration or another benefit for publishing the report.

Note: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code*.

Liability of publishers

- (5) A person does not contravene subsection (1) or (2) by publishing an advertisement or statement if the person:
 - (a) publishes it in the ordinary course of a media business; and

Section 1018B

- (b) did not know, and had no reason to suspect, that its publication would amount to a contravention of a provision of this section.

Note: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code*.

Meaning of media

- (6) For the purposes of this section, the *media* consists of:
- (a) newspapers and magazines; and
 - (b) radio and television broadcasting services; and
 - (c) electronic services (including services provided through the Internet) that:
 - (i) are operated on a commercial basis; and
 - (ii) are similar to newspapers, magazines or radio or television broadcasts.

1018B Prohibition on advertising personal offers covered by section 1012E

- (1) A person must not advertise an offer, or intended offer, of financial products that would not need a Product Disclosure Statement because of section 1012E.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A person does not contravene subsection (1) by publishing an advertisement or statement if the person:
- (a) publishes it in the ordinary course of a media business; and
 - (b) did not know, and had no reason to suspect, that a Product Disclosure Statement was needed.

For this purpose, *media* has the same meaning as it has in section 1018A.

Note: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code*.

Section 1019A

Division 5—Cooling-off periods

1019A Situations in which this Division applies

- (1) Subject to subsection (2), this Division applies if:
 - (a) a financial product of one of the following classes is provided in this jurisdiction to a person as a retail client after the commencement of this Chapter:
 - (i) risk insurance products;
 - (ii) investment life insurance products;
 - (iii) managed investment products;
 - (iiia) FHSA products;
 - (iv) superannuation products;
 - (v) RSA products; and
 - (b) the product is provided to the person:
 - (i) by way of issue; or
 - (ii) by way of sale pursuant to an offer to which section 1012C applies.
- (2) The regulations may do any or all of the following:
 - (a) provide that a specified subclass of financial products that would otherwise be covered by a subparagraph of paragraph (1)(a) are excluded from that subparagraph;
 - (b) provide additional requirements to be satisfied before this Division applies in relation to a class or subclass of financial products;
 - (c) provide that this Division does not apply in relation to the provision of a financial product in specified circumstances.
- (3) In this Division:
 - (a) the person referred to in paragraph (1)(a) is the *client*; and
 - (b) the person who issues or sells the product to the client is the *responsible person*.

1019B Cooling-off period for return of financial product

- (1) Subject to this section, the client has the right to return the financial product to the responsible person and to have the money

Section 1019B

they paid to acquire the product repaid. This is so even if the responsible person is being wound up.

- (2) The right to return the product must be exercised by notifying the responsible person in one of the following ways:
- (a) in writing; or
 - (b) electronically; or
 - (c) in any other way specified in the regulations.
- Also, if the regulations require the client to comply with other requirements in order to exercise the right to return the product, those other requirements must be complied with.
- (3) The right to return the product can only be exercised during the period of 14 days starting on the earlier of:
- (a) the time when the confirmation requirement (if applicable) is complied with; or
 - (b) the end of the 5th day after the day on which the product was issued or sold to the client.
- (4) For the purposes of subsection (3), the confirmation requirement is complied with when:
- (a) the client receives confirmation, as mentioned in paragraph 1017F(5)(a), of the transaction by which they acquired the product; or
 - (b) confirmation of that transaction is available to the client by a facility as mentioned in paragraph 1017F(5)(b).
- (5) The right to return the product (and have money paid to acquire it repaid) cannot be exercised at any time after:
- (a) the client has (whether before or after the start of the period referred to in subsection (3)) exercised a right or power that they have under the terms applicable to the product; or
 - (b) the time (whether before or after the start of the period referred to in subsection (3)) at which, under the terms applicable to the product, the client's rights or powers in respect of the product end.

Note: So, e.g.:

- (a) if the product is a contract of insurance, the right to return cannot be exercised after the client has made a claim under the contract of insurance; and

Section 1019B

- (b) if the product is a contract of insurance covering a period of only one week, the right to return cannot be exercised after the end of that week.
- (5A) The regulations may specify other circumstances in which the right to return the product (and have money paid to acquire it repaid) cannot be exercised.
- (6) On the exercise of the right to return the product:
 - (a) if the product is constituted by a legal relationship between the client and the issuer of the product—that relationship is, by force of this section, terminated with effect from that time without penalty to the client; and
 - (b) any contract for the acquisition of the product by the client is, by force of this section, terminated with effect from that time without penalty to the client.
- (7) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (6)) to apply if the right to return a financial product is exercised.
- (8) The regulations may provide that, in specified circumstances, the amount to be repaid on exercise of the right to return a financial product is to be increased or reduced in accordance with the regulations.

Division 5A—Unsolicited offers to purchase financial products off-market

1019C Definitions

In this Division:

date of offer has the meaning given by subsection 1019I(1).

offeree, in relation to an offer to which this Division applies, has the meaning given by subsection 1019D(1).

offeror, in relation to an offer to which this Division applies, has the meaning given by subsection 1019D(1).

offer to which this Division applies means an offer to which this Division applies because of section 1019D.

1019D Offers to which this Division applies

- (1) This Division applies to an offer in relation to which the following paragraphs are satisfied:
 - (a) the offer is an unsolicited offer to purchase a financial product made by a person (the *offeror*) to another person (the *offeree*);
 - (b) the offer is made otherwise than on a licensed market;
 - (c) one or more of the following apply:
 - (i) the offer is made in the course of a business of purchasing financial products;
 - (ii) the offeror was not in a personal or business relationship with the offeree before the making of the offer;
 - (iii) the offer is made in circumstances specified in regulations made for the purposes of this subparagraph;
 - (d) the offer is not:
 - (i) made to the issuer of the financial products; or
 - (ii) to buy back shares under a buy-back authorised by section 257A; or

Chapter 7 Financial services and markets

Part 7.9 Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

Division 5A Unsolicited offers to purchase financial products off-market

Section 1019E

- (iii) made under a compromise or arrangement approved at a meeting held as a result of an order under subsection 411(1) or (1A); or
 - (iv) to acquire securities under an off-market bid; or
 - (v) to compulsorily acquire or buy out securities under Chapter 6A; or
 - (vi) to acquire shares from a dissenting shareholder under section 414; or
 - (vii) made in relation to particular financial products that are specified in regulations made for the purposes of this subparagraph; or
 - (viii) made in circumstances that are specified in regulations made for the purposes of this subparagraph;
 - (e) the offer is made or received in this jurisdiction.
- (2) The regulations may clarify:
- (a) when an offer is, or is not, made in the course of a business of purchasing financial products; or
 - (b) when an offeror was, or was not, in a previous personal or business relationship with an offeree.

Regulations made for the purposes of this subsection have effect despite anything else in this section.

1019E How offers are to be made

- (1) An offer to which this Division applies must not be made otherwise than by sending an offer document in printed or electronic form to the offeree in accordance with the following requirements:
- (a) the document must be sent to an address of the offeree (which may be an electronic address);
 - (b) either the envelope or the container in which it is sent, or the message that accompanies it, must be addressed to the offeree.
- (2) The offer document must be sent to the offeree as soon as practicable after the date of offer.

1019F Prohibition on inviting offers to sell

A person must not invite another person to make an offer to sell a financial product in circumstances in which, if the invitation were instead an offer to purchase the financial product, that offer would be an offer to which this Division applies.

1019G Duration and withdrawal of offers

- (1) An offer to which this Division applies cannot remain open more than 12 months after the date of offer.
- (2) The offer may be withdrawn by the offeror at any time, but not within 1 month of the date of offer.
- (3) The offer may only be withdrawn by the offeror by sending a withdrawal document in printed or electronic form to the offeree in accordance with paragraphs 1019E(1)(a) and (b). The withdrawal document must identify the offeror and be dated.
- (4) A purported withdrawal of the offer contrary to subsection (2) or (3) is ineffective.

1019H Terms of offer cannot be varied

- (1) The terms of an offer to which this Division applies, as set out in the offer document, cannot be varied.
- (2) A purported variation of the terms of the offer is ineffective.
- (3) This section does not:
 - (a) affect the offeror's obligation under section 1019J to update the market value of the financial product to which the offer relates; or
 - (b) prevent the offeror from withdrawing the offer in accordance with section 1019G or paragraph 1019J(2)(a) and making another offer on different terms; or
 - (c) prevent the offeree from making a counter-offer on different terms.

Section 1019I

1019I Contents of offer document

- (1) The offer document by which an offer to which this Division applies is made must identify the offeror and be dated (this date is the *date of offer*).
- (2) The offer document must also contain the following:
 - (a) the price at which the offeror wishes to purchase the financial products;
 - (b) if the financial product is able to be traded on a licensed market and there is a market value for the product as traded on that market—the market value of the product as at the date of offer;
 - (c) if paragraph (b) does not apply—a fair estimate of the value of the product as at the date of offer, and an explanation of the basis on which that estimate was made;
 - (d) the period during which the offer remains open (which must be consistent with subsection 1019G(1));
 - (e) a statement to the effect that the offer may be withdrawn by sending a withdrawal document to the offeree, but generally not within 1 month of the date of offer;
 - (f) any other information specified in regulations made for the purposes of this paragraph.
- (3) The regulations may clarify:
 - (a) the manner in which a fair estimate of the value of a financial product (see paragraph (2)(c)) is to be worked out; and
 - (b) the level of detail required in the explanation of the basis on which the estimate was made.Regulations made for the purposes of this subsection have effect despite anything else in this section.
- (4) The offer document must be worded and presented in a clear, concise and effective manner.

1019J Obligation to update market value

- (1) This section applies if:
 - (a) the offer document by which an offer to which this Division applies is made states the market value of the financial

Section 1019J

product to which the offer relates as at the date of the offer;
and

- (b) while the offer remains open, there is an increase or decrease in the market value of the product when compared to:
 - (i) unless subparagraph (ii) applies—the market value (the ***currently stated value***) stated as mentioned in paragraph (a); or
 - (ii) if this section has previously applied in relation to the offer and one or more supplementary offer documents have been sent to the offeree—the market value (the ***currently stated value***) stated as mentioned in paragraph (3)(c) in the supplementary offer document most recently sent to the offeree; and
 - (c) the increase or decrease, expressed as a percentage of the currently stated value, exceeds the percentage specified in the regulations for the purposes of this paragraph.
- (2) The offeror must, within 10 business days of this section applying because of a particular increase or decrease in value:
- (a) withdraw the offer by sending a withdrawal document, in printed or electronic form, to the offeree in accordance with paragraphs 1019E(1)(a) and (b):
 - (i) that identifies the offeror and that is dated; and
 - (ii) that contains a statement to the effect that the offer is withdrawn because of a change in the market value of the product, and that withdrawal for this reason is permitted even within 1 month of the date of offer; or
 - (b) send a supplementary offer document (see subsection (3)) in printed or electronic form to the offeree in accordance with paragraphs 1019E(1)(a) and (b).

Nothing in section 1019G affects the effectiveness of a withdrawal of the offer under paragraph (a) of this subsection.

- (3) A supplementary offer document must:
- (a) identify the offer to which it relates; and
 - (b) be dated; and
 - (c) state the market value of the financial product to which the offer relates as at that date; and
 - (d) state the price that was stated in the offer document as required by paragraph 1019I(2)(a), and contain a statement to

Section 1019K

the effect that this is still the price at which the offeror wishes to purchase the product and that the terms of the offer remain unchanged; and

- (e) contain a statement to the effect that the document has been prepared because the market value of the product has changed.
- (4) A supplementary offer document must be worded and presented in a clear, concise and effective manner.
- (5) In this section, a reference to stating a market value of a financial product includes a reference to purporting to state the market value of the product.

1019K Rights if requirements of Division not complied with

First situation covered by this section—offers to which this Division applies

- (1) This section applies if, in relation to an offer to which this Division applies, the offeree (the **seller**) accepts the offer and enters into a contract for the sale of the financial product to the offeror (the **buyer**), and one or more of the following paragraphs applies:
 - (a) section 1019E was not complied with in relation to the offer;
 - (b) the offer was accepted after the period referred to in subsection 1019G(1);
 - (c) the offeror gave the offeree an offer document and either:
 - (i) the offer document did not comply with section 1019I; or
 - (ii) there was a misleading or deceptive statement in the offer document;
 - (d) in a situation to which section 1019J applies, either:
 - (i) subsection 1019J(2) was not complied with; or
 - (ii) subsection 1019J(2) was complied with, but the offeree did not receive the withdrawal document, or the supplementary offer document, as the case requires, until after the offeree had accepted the offer;
 - (e) in a situation to which section 1019J applies, the offeror gave the offeree a supplementary offer document and either:
 - (i) the supplementary offer document did not comply with subsection 1019J(3); or

Section 1019K

- (ii) there was a misleading or deceptive statement in the supplementary offer document.

Second situation covered by this section—invitations prohibited by section 1019F

- (2) This section applies if, in response to an invitation prohibited by section 1019F, a person (the **seller**) makes an offer to sell a financial product to the person who made the invitation (the **buyer**), and that person accepts the offer and enters into a contract for the purchase of that financial product from the seller.

Seller's right to refuse to transfer, or to seek the return of, the financial product

- (3) The seller has:
 - (a) the right to refuse to transfer the financial product to the buyer; or
 - (b) if the seller has already transferred the financial product to the buyer—the right to have the financial product returned to the seller, if the buyer still holds the product.

The seller's right under paragraph (a) or (b) is conditional on the seller repaying any money that has been paid to the seller for the purchase of the financial product.

How the seller's right is to be exercised

- (4) The seller's right under subsection (3) must be exercised by notifying the buyer in one of the following ways:
 - (a) in writing;
 - (b) electronically;
 - (c) in any other way specified in regulations made for the purposes of this paragraph.

Also, if the regulations require the seller to comply with other requirements in order to exercise that right, those other requirements must be complied with.

- (5) The seller's right under subsection (3) can only be exercised during the period of 30 days starting on the day the contract was entered into.

Chapter 7 Financial services and markets

Part 7.9 Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

Division 5A Unsolicited offers to purchase financial products off-market

Section 1019K

Effect of exercise of seller's right

- (6) On the exercise of the seller's right under subsection (3), the contract referred to in subsection (1) or (2) is, by force of this section, terminated from that time without penalty to the seller.

Regulations may provide for certain matters

- (7) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (6)) to apply if the seller's right under subsection (3) is exercised.
- (8) The regulations may provide that, in specified circumstances, the amount to be repaid as mentioned in subsection (3) is to be increased or reduced in accordance with the regulations.

Division 6—Miscellaneous

1020A Offers etc. relating to certain managed investment schemes not to be made in certain circumstances

- (1) A person must not engage in conduct of a kind referred to in subsection (2) in relation to a financial product described in paragraph 764A(1)(ba) (which relates to certain managed investment schemes that are not registered schemes) if the managed investment scheme concerned needs to be, or will need to be, registered and has not been registered. This is so even if it is proposed to register the scheme.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Subject to subsection (3), the kinds of conduct that must not be engaged in in relation to such a managed investment product are as follows:
- (a) making a recommendation, as described in subsection 1012A(3), that is received in this jurisdiction;
 - (b) making an offer, as described in subsection 1012B(3) or 1012C(3), that is received in this jurisdiction;
 - (c) accepting an offer, made as described in subsection 1012B(3) or (4), that was received in this jurisdiction.
- (3) Subsection (2) does not apply to a recommendation or offer made in a situation to which a subsection of section 1012D, other than subsection 1012D(1), applies.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

1020B Prohibition of certain short sales of securities, managed investment products and certain other financial products

- (1) In this section:

section 1020B products means:

- (a) securities; or
- (b) managed investment products; or
- (c) financial products referred to in paragraph 764A(1)(j); or

Section 1020B

- (d) financial products of any other kind prescribed by regulations made for the purposes of this definition.
- (2) Subject to this section and the regulations, a person must only, in this jurisdiction, sell section 1020B products to a buyer if, at the time of the sale:
 - (a) the person has or, if the person is selling on behalf of another person, that other person has; or
 - (b) the person believes on reasonable grounds that the person has, or if the person is selling on behalf of another person, that other person has;a presently exercisable and unconditional right to vest the products in the buyer.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3) For the purposes of subsection (2):
 - (a) a person who, at a particular time, has a presently exercisable and unconditional right to have section 1020B products vested in the person, or in accordance with the directions of the person, has at that time a presently exercisable and unconditional right to vest the products in another person; and
 - (b) a right of a person to vest section 1020B products in another person is not conditional merely because the products are charged or pledged in favour of another person to secure the repayment of money.
- (4) Subsection (2) does not apply in relation to a sale of section 1020B products by a person who, before the time of sale, has entered into a contract to buy those products and who has a right to have those products vested in the person that is conditional only upon all or any of the following:
 - (a) payment of the consideration in respect of the purchase;
 - (b) the receipt by the person of a proper instrument of transfer in respect of the products;
 - (c) the receipt by the person of the documents that are, or are documents of title to, the products.
- (7) For the purposes of this section, a person who:
 - (a) purports to sell section 1020B products; or

Section 1020D

- (b) offers to sell section 1020B products; or
 - (c) holds himself, herself or itself out as entitled to sell section 1020B products; or
 - (d) instructs a financial services licensee to sell section 1020B products;
- is taken to sell the products.

1020D Part cannot be contracted out of

A condition of a contract for the acquisition of a financial product is void if it provides that a party to the contract is:

- (a) required or bound to waive compliance with any requirement of this Part (or of regulations made for the purposes of this Part); or
- (b) if the acquisition occurs in circumstances in which the party is required by a provision of this Part to have been given a Product Disclosure Statement for the product—taken to have notice of any contract, document or matter not specifically referred to in a Product Disclosure Statement or Supplementary Product Disclosure Statement given to the party.

1020E Stop orders by ASIC

- (1) This section applies if:
 - (a) either:
 - (i) a disclosure document or statement is defective (see subsection (11)); or
 - (ia) a disclosure document or statement does not comply with a requirement of this Part that it be worded and presented in a clear, concise and effective manner; or
 - (ii) an advertisement or statement of a kind referred to in subsection 1018A(1) or (2) that relates to financial products is defective (see subsection (11)); or
 - (b) an issuer of financial products is in breach of section 1017G.
- (2) ASIC may order that:
 - (a) if paragraph (1)(a) applies—specified conduct in respect of the financial products to which the document, advertisement or statement relates; or

Section 1020E

- (b) if paragraph (1)(b) applies—specified conduct in respect of financial products issued by that issuer;
must not be engaged in while the order is in force.
- (3) The order may include a statement that specified conduct engaged in contrary to the order will be regarded as not complying with the requirements of a specified provision of this Part.
- (4) Before making an order under subsection (2), ASIC must:
 - (a) hold a hearing; and
 - (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.
- (5) If ASIC considers that any delay in making an order under subsection (2) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order under that subsection. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.
- (6) At any time during the hearing, ASIC may make an interim order under subsection (2). The interim order lasts until:
 - (a) ASIC makes an order under subsection (2) after the conclusion of the hearing; or
 - (b) the interim order is revoked;whichever happens first.
- (7) The order under subsection (2) must be in writing and must be served on:
 - (a) unless paragraph (b) or (c) applies—the issuer of the financial products concerned; or
 - (b) if paragraph (1)(a) applies and the document, advertisement or statement relates to a sale or proposed sale of the financial products—the seller of the financial products; or
 - (c) if subparagraph (1)(a)(i) applies and the disclosure document or statement is an offer document of a kind referred to in section 1019E or a supplementary offer document of a kind referred to in section 1019J—the offeror referred to in subsection 1019D(1).

Section 1020F

- (8) The person on whom the order is served must take reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (9) The person on whom the order is served, or a person who is aware of the order, must not engage in conduct contrary to the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (10) If the person on whom the order is served, or a person who is aware of the order, engages in conduct contrary to the order, any relevant statement included in the order under subsection (3) has effect accordingly. This applies in addition to any other consequence that is provided for by this Act.

- (11) In this section:

defective:

- (a) in relation to a disclosure document or statement—has the same meaning as in Subdivision B of Division 7; and
- (b) in relation to an advertisement or statement of a kind referred to in subsection 1018A(1) or (2) that relates to financial products—means:
 - (i) there is a misleading or deceptive statement in the advertisement or statement; or
 - (ii) there is an omission from the advertisement or statement of material required by paragraph 1018A(1)(c), (d) or (e), or paragraph 1018A(2)(c), (d), (e) or (f), to be included in the advertisement or statement.

disclosure document or statement has the same meaning as it has in Subdivision B of Division 7.

1020F Exemptions and modifications by ASIC

- (1) ASIC may:
- (a) exempt a person or class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or

Section 1020F

- (c) declare that this Part applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (5)):
 - (a) the text of the declaration was made available by ASIC on the Internet; or
 - (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.
- (7) For the purpose of this section, the ***provisions of this Part*** include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

- (8) To avoid doubt, a declaration under paragraph (1)(c) may specify omissions, modifications or variations that have any or all of the following effects:
 - (a) suspending, prohibiting or limiting:
 - (i) any form of short selling of financial products; or

Section 1020G

- (ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;
- (b) varying requirements under this Part that apply to:
 - (i) any form of short selling of financial products; or
 - (ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;
- (c) removing some or all requirements under this Part that apply to:
 - (i) any form of short selling of financial products; or
 - (ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;
- (d) imposing requirements that apply to:
 - (i) any form of short selling of financial products; or
 - (ii) any transaction that has the same or substantially similar market effect as a short sale of financial products.

1020G Exemptions and modifications by regulations

- (1) The regulations may:
 - (a) exempt a person or class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or
 - (c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (3) For the purpose of this section, the *provisions of this Part* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relates to provisions of this Part.

Section 1021A

Division 7—Enforcement

Subdivision A—Offences

1021A Overview

This Subdivision contains provisions creating offences by reference to various rules contained in preceding Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

1021B Definitions

(1) In this Subdivision:

defective, in relation to a disclosure document or statement, means:

- (a) there is a misleading or deceptive statement in the disclosure document or statement; or
- (b) if it is a Product Disclosure Statement—there is an omission from the Product Disclosure Statement of material required by section 1013C, other than material required by section 1013B or 1013G; or
- (c) if it is a Supplementary Product Disclosure Statement that is given for the purposes of section 1014E—there is an omission from the Supplementary Product Disclosure Statement of material required by that section; or
- (d) if it is information required by paragraph 1012G(3)(a)—there is an omission from the information of material required by that paragraph;

being a statement, or an omission, that is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product concerned.

Note: In determining whether a Product Disclosure Statement is defective, the effect of section 1014D must be taken into account (section 1014D takes information and statements in a Supplementary Product Disclosure Statement to be included in the Product Disclosure Statement it supplements).

Section 1021B

disclosure document or statement means:

- (a) a Product Disclosure Statement; or
- (b) a Supplementary Product Disclosure Statement; or
- (c) information required by paragraph 1012G(3)(a).

regulated person has the same meaning as it has in Division 2.

(1A) For the avoidance of doubt, if section 1012J (information must be up to date) is not complied with in relation to a Product Disclosure Statement, then, for the purposes of the definition of ***defective*** in subsection (1):

- (a) if the circumstance constituting the non-compliance is that particular information included in the Product Disclosure Statement is not as up to date as section 1012J requires it to be—the information so included constitutes a misleading statement in the Product Disclosure Statement; and
- (b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Product Disclosure Statement—the failure to include the information constitutes an omission from the Statement of material required by section 1013C.

Note 1: The effect of section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements) must be taken into account in determining whether section 1012J is complied with in relation to a Product Disclosure Statement.

Note 2: Whether the inclusion of out of date information, or the failure to include information, results in the Product Disclosure Statement being ***defective*** as defined in subsection (1) depends on whether the materiality test set out in that definition is satisfied.

(2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement, or to information, of a kind referred to in a paragraph of the definition of ***disclosure document or statement*** in subsection (1) includes a reference to something purporting to be a document or statement, or to be information, of that kind.

Section 1021C

1021C Offence of failing to give etc. a disclosure document or statement

Strict liability offence

- (1) A person (the **providing entity**) commits an offence if:
- (a) the providing entity:
 - (i) is required by a provision of this Part to give another person a Product Disclosure Statement or a Supplementary Product Disclosure Statement (the **required disclosure document or statement**); or
 - (ii) is required by paragraph 1012G(3)(a) to orally communicate information (the **required disclosure document or statement**) to another person; and
 - (b) the providing entity does not:
 - (i) if subparagraph (a)(i) applies—give (in accordance with section 1015C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so; or
 - (ii) if subparagraph (a)(ii) applies—orally communicate to the other person anything purporting to be the information required by paragraph 1012G(3)(a) by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Ordinary offence

- (3) A person (the **providing entity**) commits an offence if:
- (a) the providing entity:
 - (i) is required by a provision of this Part to give another person a Product Disclosure Statement or a Supplementary Product Disclosure Statement (the **required disclosure document or statement**); or
 - (ii) is required by paragraph 1012G(3)(a) to orally communicate information (the **required disclosure document or statement**) to another person; and

Section 1021C

- (b) the providing entity does not:
 - (i) if subparagraph (a)(i) applies—give (in accordance with section 1015C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so; or
 - (ii) if subparagraph (a)(ii) applies—orally communicate to the other person anything purporting to be the information required by paragraph 1012G(3)(a) by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

Defence for authorised representative

- (4) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1) or (3), it is a defence if:
 - (a) the licensee had provided the representative with information or instructions about the giving or communication of disclosure documents or statements; and
 - (b) the representative's failure to give or communicate the required disclosure document or statement occurred because the representative was acting in reliance on that information or those instructions; and
 - (c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

Circumstances in which a person is taken not to contravene this section

- (5) If:
 - (a) a person does not give another person a Product Disclosure Statement for a financial product because of section 1012DAA or 1012DA; and
 - (b) a notice was given under subsection 1012DAA(2) or 1012DA(5); and

Section 1021D

- (c) the notice purported to comply with subsection 1012DAA(7) or 1012DA(6) but did not actually comply with that subsection;

the person is taken not to contravene this section.

1021D Offence of preparer of defective disclosure document or statement giving the document or statement knowing it to be defective

- (1) A person commits an offence if:
 - (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
 - (b) the person knows that the disclosure document or statement is defective; and
 - (c) the person:
 - (i) gives (see subsection (3)) another person the disclosure document or statement in circumstances in which it is required by a provision of this Part to be given to the other person; or
 - (ii) gives (see subsection (3)), or makes available to, another person the disclosure document or statement reckless as to whether the other person will or may rely on the information in it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) A person commits an offence if:
 - (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
 - (b) the person knows that the disclosure document or statement is defective; and
 - (c) the person gives (see subsection (3)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (1)(c)(i) or (ii).
- (3) In this section, **give** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021E Offence of preparer of defective disclosure document or statement giving the document or statement (whether or not known to be defective)

- (1) A person commits an offence if:
- (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
 - (b) the disclosure document or statement is defective; and
 - (c) the person:
 - (i) gives (see subsection (5)) another person the disclosure document or statement in circumstances in which it is required by a provision of this Part to be given to the other person; or
 - (ii) gives (see subsection (5)), or makes available to, another person a disclosure document or statement, reckless as to whether the other person will or may rely on the information in it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) A person commits an offence if:
- (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
 - (b) the disclosure document or statement is defective; and
 - (c) the person gives (see subsection (5)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (1)(c)(i) or (ii).
- (3) For the purposes of an offence based on subsection (1) or (2), strict liability applies to the physical element of the offence specified in paragraph (1)(b) or (2)(b).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (4) In any proceedings against a person for an offence based on subsection (1) or (2), it is a defence if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

Section 1021F

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

- (5) In this section, **give** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021F Offence of regulated person (other than preparer) giving disclosure document or statement knowing it to be defective

- (1) A regulated person commits an offence if:
- (a) another person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
 - (b) the regulated person knows that the disclosure document or statement is defective; and
 - (c) the regulated person:
 - (i) gives (see subsection (2)) another person the disclosure document or statement in circumstances in which it is required by a provision of this Part to be given to the other person; or
 - (ii) gives (see subsection (2)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person will or may rely on the information in it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) In this section, **give** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021FA Paragraph 1012G(3)(a) obligation—offences relating to communication of information

Offence where information known to be defective

- (1) A person (the **providing entity**) commits an offence if:
- (a) the providing entity communicates information required by paragraph 1012G(3)(a) to another person in circumstances in which the providing entity is required to do so; and
 - (b) the providing entity knows that the information is defective.

Section 1021FB

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D and 1012E.

Offence whether or not information known to be defective

- (2) A person (the **providing entity**) commits an offence if:
- (a) the providing entity communicates information required by paragraph 1012G(3)(a) to another person in circumstances in which the providing entity is required to do so; and
 - (b) the information is defective.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D and 1012E.

- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical element of the offence specified in paragraph (2)(b).

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Defences

- (4) In any proceedings against a person for an offence based on subsection (1) or (2), it is a defence if the person took reasonable steps to ensure that the information communicated would not be defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

- (5) In any proceedings against a person for an offence based on subsection (2), it is a defence if the information communicated was defective because of information, or an omission from information, provided to the person (whether in a document or otherwise) by the issuer of the financial product concerned.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

1021FB Paragraph 1012G(3)(a) obligation—offences relating to information provided by product issuer for communication by another person

Product issuer knows information is defective

- (1) The issuer of a financial product commits an offence if:

Section 1021FB

- (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
 - (i) for the purpose of the information being communicated under paragraph 1012G(3)(a); or
 - (ii) knowing that it is likely that the information will be so communicated; and
- (b) the issuer knows that, if the person communicates the provided information for the purpose of paragraph 1012G(3)(a), the information communicated will be defective.

Product issuer knows information is not all the required information

- (2) The issuer of a financial product commits an offence if:
 - (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
 - (i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
 - (ii) knowing that it is likely that it will be so communicated; and
 - (b) the provided information relates to a matter or matters, but the issuer knows that it is not all of the information relating to the matter or matters that is required to be so communicated; and
 - (c) the issuer is reckless as to whether the person will or may communicate information for the purposes of paragraph 1012G(3)(a) on the basis that the provided information is all the information relating to the matter or matters that is required to be so communicated.

Product issuer provides information that results in information required by paragraph 1012G(3)(a) being defective

- (3) The issuer of a financial product commits an offence if:
 - (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
 - (i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
 - (ii) knowing that it is likely that it will be so communicated; and
-

Section 1021FB

- (b) the person communicates the information for the purpose of paragraph 1012G(3)(a); and
 - (c) the information communicated is defective because it includes the provided information (whether or not it is defective for other reasons).
- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of the offence specified in paragraph (3)(c).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Defence to subsection (3) offence

- (5) In any proceedings against the issuer of a financial product for an offence based on subsection (3), it is a defence if the issuer took reasonable steps to ensure that the information they provided would not be such as to make the information communicated for the purpose of paragraph 1012G(3)(a) defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

Product issuer does not provide all the required information

- (6) The issuer of a financial product commits an offence if:
- (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
 - (i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
 - (ii) knowing that it is likely that it will be so communicated; and
 - (b) the provided information relates to a matter or matters, but it is not all of the information relating to the matter or matters that is required to be so communicated; and
 - (c) the person communicates information for the purpose of paragraph 1012G(3)(a) on the basis that the provided information is all the information relating to the matter or matters that is required to be so communicated; and
 - (d) the information communicated is defective because it includes only that information about the matter or matters (whether or not it is also defective for other reasons).

Section 1021G

- (7) For the purposes of an offence based on subsection (6), strict liability applies to the physical elements of the offence specified in paragraphs (6)(b) and (d).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Defence to subsection (6) offence

- (8) In any proceedings against the issuer of a financial product for an offence based on subsection (6), it is a defence if the issuer took reasonable steps to ensure that the information they provided about the matter or matters would be all the information about the matter or matters that would be required by paragraph 1012G(3)(a) to be communicated.

Note: A defendant bears an evidential burden in relation to the matters in subsection (8). See subsection 13.3(3) of the *Criminal Code*.

1021G Offence of financial services licensee failing to ensure authorised representative gives etc. disclosure documents or statements as required

A financial services licensee commits an offence if the licensee does not take reasonable steps to ensure that an authorised representative of the licensee complies with their obligations under this Part to give or communicate disclosure documents or statements as and when required by this Part.

1021H Offences if a Product Disclosure Statement (or Supplementary PDS) does not comply with certain requirements

- (1) A person commits an offence if:
- (a) the person prepares (or has someone else prepare for them) a Product Disclosure Statement, a Supplementary Product Disclosure Statement or a Replacement Product Disclosure Statement (the *disclosure document*); and
 - (b) the disclosure document does not comply with:
 - (i) if it is a Product Disclosure Statement—section 1013B or 1013G or subsection 942DA(3); or
 - (ii) if it is a Supplementary Product Disclosure Statement—section 1013G, 1014B or 1014C; or

Section 1021I

- (iii) if it is a Replacement Product Disclosure Statement—
subsection 942DA(3), section 1013G or subsection
1014K(1), (2) or (3); and
- (c) the person:
 - (i) gives (see subsection (3)) another person the disclosure
document in circumstances in which it is required by a
provision of this Part to be given to the other person; or
 - (ii) gives (see subsection (3)), or makes available to,
another person the disclosure document, reckless as to
whether the other person will or may rely on the
information in it; or
 - (iii) gives (see subsection (3)), or makes available to,
another person the disclosure document, reckless as to
whether the other person, or someone else, will or may
give it, or make it available, to another person as
mentioned in subparagraph (i) or (ii).

Note: A defendant bears an evidential burden in relation to the matters in
sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) For the purposes of an offence based on subsection (1), strict
liability applies to paragraph (b) of that subsection.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) In this section, *give* means give by any means (including orally),
and is not limited to giving in accordance with section 1015C.

**1021I Offence of giving disclosure document or statement that has
not been prepared by the appropriate person**

- (1) A regulated person commits an offence if:
 - (a) the regulated person:
 - (i) gives (see subsection (2)) another person a disclosure
document or statement (not being information required
by paragraph 1012G(3)(a)) in circumstances in which it
is required by a provision of this Part to be given to the
other person; or
 - (ii) gives (see subsection (2)), or makes available to,
another person a disclosure document or statement (not
being information required by paragraph 1012G(3)(a)),
reckless as to whether the other person will or may rely
on the information in it; and

Section 1021J

- (b) the disclosure document or statement has not been prepared by, or on behalf of, the person required by section 1013A to prepare it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) In this section, **give** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021J Offences if preparer etc. of disclosure document or statement becomes aware that it is defective

- (1) A person commits an offence if:
 - (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
 - (b) the person becomes aware that the disclosure document or statement is defective; and
 - (c) the person does not, as soon as practicable, take reasonable steps to ensure that any regulated person to whom the disclosure document or statement has been provided for further distribution is given a direction that satisfies one of more of the following subparagraphs:
 - (i) a direction not to distribute the disclosure document or statement;
 - (ii) if it is a Product Disclosure Statement—a direction not to distribute the Product Disclosure Statement unless it is accompanied by a Supplementary Product Disclosure Statement that corrects the deficiency;
 - (iii) if it is a Product Disclosure Statement or a Supplementary Product Disclosure Statement—a direction not to distribute the Product Disclosure Statement or Supplementary Product Disclosure Statement without first altering it in a way that is specified in the direction, being a way that corrects the deficiency and that complies with section 1015E.
- (2) A regulated person commits an offence if:
 - (a) the person is given a direction referred to in paragraph (1)(c); and
 - (b) the person does not comply with the direction.

Section 1021K

- (3) A regulated person commits an offence if:
 - (a) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)) has been provided to the person for distribution; and
 - (b) the person becomes aware that the disclosure document or statement is defective; and
 - (c) the person does not take reasonable steps to notify the person by whom, or on whose behalf, the disclosure document or statement was prepared of the particulars of the deficiency.
- (4) In this section, a reference to **distributing** a disclosure document or statement includes (but is not limited to) giving the document or statement to another person in purported compliance with a requirement of this Part.

1021K Offence of unauthorised alteration of Product Disclosure Statement (or Supplementary PDS)

- (1) A person commits an offence if:
 - (a) the person engages in conduct that results in an alteration of a Product Disclosure Statement or a Supplementary Product Disclosure Statement that has been prepared by or on behalf of another person (the **responsible person**); and
 - (b) the alteration results in the Product Disclosure Statement or Supplementary Product Disclosure Statement becoming defective, or more defective than it previously was; and
 - (c) the alteration is not made with the authority of the responsible person; and
 - (d) either:
 - (i) the person, in purported compliance with a provision of this Part, gives (see subsection (2)) the altered Product Disclosure Statement or Supplementary Product Disclosure Statement to another person; or
 - (ii) the person gives (see subsection (2)), or makes available to, another person the altered Product Disclosure Statement or Supplementary Product Disclosure Statement, reckless as to whether the other person will or may rely on the information in it; or

Section 1021L

- (iii) the person gives (see subsection (2)), or makes available to, another person the altered Product Disclosure Statement or Supplementary Product Disclosure Statement, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (i) or (ii).

- (2) In this section, *give* means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021L Offences of giving, or failing to withdraw, consent to inclusion of defective statement

- (1) A person commits an offence if:
 - (a) they consent to the inclusion of a statement (the *consented material*) in a Product Disclosure Statement or a Supplementary Product Disclosure Statement as mentioned in paragraph 1013K(1)(a); and
 - (b) either:
 - (i) there is a misleading or deceptive statement in the consented material; or
 - (ii) there is an omission of information from the consented material; and
 - (c) the statement or omission is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product concerned.
- (2) A person commits an offence if:
 - (a) they consent to the inclusion of a statement (the *consented material*) in a Product Disclosure Statement or a Supplementary Product Disclosure Statement as mentioned in paragraph 1013K(1)(a); and
 - (b) they become aware that either:
 - (i) there is a misleading or deceptive statement in the consented material; or
 - (ii) there is an omission of information from the consented material;being a statement, or an omission, that:

Section 1021M

- (iii) is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product concerned; or
- (iv) results in the Product Disclosure Statement or the Supplementary Product Disclosure Statement being defective, or more defective than it would otherwise be; and
- (c) they do not withdraw their consent after becoming aware of the matter mentioned in paragraph (b).

1021M Offences relating to keeping and providing copies of Product Disclosure Statements (or Supplementary PDSs)

Strict liability offence

- (1) A person commits an offence if:
 - (a) the person is required by section 1015D:
 - (i) to notify ASIC that a Product Disclosure Statement or a Supplementary Product Disclosure Statement is in use; or
 - (ii) to keep a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement for a particular period; or
 - (iii) to make a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement available to ASIC; or
 - (iv) to comply with a request from a person for a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement; and
 - (b) the person does not comply with that requirement.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Ordinary offence

- (3) A person commits an offence if:
 - (a) the person is required by section 1015D:

Section 1021N

- (i) to notify ASIC that a Product Disclosure Statement or a Supplementary Product Disclosure Statement is in use; or
 - (ii) to keep a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement for a particular period; or
 - (iii) to make a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement available to ASIC; or
 - (iv) to comply with a request from a person for a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement; and
- (b) the person does not comply with that requirement.

1021N Offence of failing to provide additional information requested under section 1017A

A person (the *responsible person*) commits an offence if:

- (a) a request is made to them by another person, in accordance with subsection 1017A(1), to provide further information about a financial product; and
- (b) the responsible person is required by subsection 1017A(2) to give the other person the information; and
- (c) the other person has paid any charge in respect of the request, being a charge that is in accordance with subsections 1017A(5) and (6); and
- (d) the responsible person does not take reasonable steps to ensure that, as soon as practicable after receiving the request, and in any event within one month, the information is provided to the other person in accordance with subsection 1017A(4).

1021O Offences of issuer or seller of financial product failing to pay money into an account as required

Strict liability offence

- (1) An issuer or seller of financial products commits an offence if:

Section 1021P

- (a) the issuer or seller is required by subsection 1017E(2) to pay particular money into an account in accordance with that subsection; and
 - (b) the issuer or seller does not pay the money into an account in accordance with that subsection.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Ordinary offence

- (3) An issuer or seller of financial products commits an offence if:
 - (a) the issuer or seller is required by subsection 1017E(2) to pay particular money into an account in accordance with that subsection; and
 - (b) the issuer or seller does not pay the money into an account in accordance with that subsection.

1021P Offences relating to offers to which Division 5A applies

Failure to comply with requirements of section 1019E relating to how offers are made

- (1) A person commits an offence if:
 - (a) the person makes an offer; and
 - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
 - (c) in making the offer, the person fails to comply with a requirement of section 1019E.

Contravening section 1019F by inviting offers to sell

- (2) A person commits an offence if:
 - (a) the person invites another person to make an offer to sell a financial product; and
 - (b) in making the invitation, the person contravenes section 1019F.

Failure to comply with requirements of section 1019G relating to duration and withdrawal of offers

- (3) A person commits an offence if:
-

Section 1021P

- (a) the person makes an offer; and
- (b) the offer is an offer to which Division 5A applies (see section 1019D); and
- (c) either:
 - (i) the offer remains open for longer than is permitted by subsection 1019G(1); or
 - (ii) in purporting to withdraw the offer, the person fails to comply with a requirement of subsection 1019G(2) or (3).

Failure to comply with requirements of section 1019I relating to price or value

- (4) A person commits an offence if:
 - (a) the person makes an offer; and
 - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
 - (c) the person gives the offeree an offer document; and
 - (d) either:
 - (i) the offer document does not comply with paragraph 1019I(2)(a), (b) or (c); or
 - (ii) material of a kind referred to in paragraph 1019I(2)(a), (b) or (c) that is included in the offer document is misleading or deceptive.

Failure to comply with other requirements of section 1019I

- (5) A person commits an offence if:
 - (a) the person makes an offer; and
 - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
 - (c) the person gives the offeree an offer document; and
 - (d) either:
 - (i) the offer document does not comply with subsection 1019I(1), or paragraph 1019I(2)(d), (e) or (f); or
 - (ii) material of a kind referred to in subsection 1019I(1), or paragraph 1019I(2)(d), (e) or (f), that is included in the offer document is misleading or deceptive.

Section 1022A

Failure to comply with requirements of section 1019J

- (6) A person commits an offence if:
- (a) the person makes an offer; and
 - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
 - (c) section 1019J applies because of an increase or decrease in the market value of the financial product to which the offer relates; and
 - (d) one of the following subparagraphs applies:
 - (i) the person fails to comply with subsection 1019J(2) in relation to that increase or decrease; or
 - (ii) the person gives the offeree a supplementary offer document in relation to that increase or decrease, but that document does not comply with subsection 1019J(3); or
 - (iii) the person gives the offeree a supplementary offer document in relation to that increase or decrease, but material of a kind referred to in subsection 1019J(3) that is included in that document is misleading or deceptive.

Subdivision B—Civil liability

1022A Definitions

- (1) In this Subdivision:

defective, in relation to a disclosure document or statement, means:

- (a) there is a misleading or deceptive statement in the disclosure document or statement; or
- (b) if it is a Product Disclosure Statement—there is an omission from the Product Disclosure Statement of material required by section 1013C, other than material required by section 1013B or 1013G; or
- (c) if it is a Supplementary Product Disclosure Statement that is given for the purposes of section 1014E—there is an omission from the Supplementary Product Disclosure Statement of material required by that section; or
- (d) if it is information required by paragraph 1012G(3)(a)—there is an omission from the information of material required by that paragraph; or

Section 1022A

- (e) if it is an offer document of a kind referred to in section 1019E—there is an omission from the document of material required by section 1019I; or
- (f) if it is a supplementary offer document of a kind referred to in section 1019J—there is an omission from the document of material required by subsection 1019J(3).

Note: In determining whether a Product Disclosure Statement is defective, the effect of section 1014D must be taken into account (section 1014D takes information and statements in a Supplementary Product Disclosure Statement to be included in the Product Disclosure Statement it supplements).

disclosure document or statement means:

- (a) a Product Disclosure Statement; or
- (b) a Supplementary Product Disclosure Statement; or
- (c) information required by paragraph 1012G(3)(a); or
- (d) an offer document of a kind referred to in section 1019E; or
- (e) a supplementary offer document of a kind referred to in section 1019J.

regulated person has the same meaning as it has in Division 2.

- (1A) For the avoidance of doubt, if section 1012J (information must be up to date) is not complied with in relation to a Product Disclosure Statement, then, for the purposes of the definition of ***defective*** in subsection (1):

- (a) if the circumstance constituting the non-compliance is that particular information included in the Product Disclosure Statement is not as up to date as section 1012J requires it to be—the information so included constitutes a misleading statement in the Product Disclosure Statement; and
- (b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Product Disclosure Statement—the failure to include the information constitutes an omission from the Statement of material required by section 1013C.

Note: The effect of section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements) must be taken into account in determining whether section 1012J is complied with in relation to a Product Disclosure Statement.

Section 1022B

- (2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement, or to information, of a kind referred to in a paragraph of the definition of ***disclosure document or statement*** in subsection (1) includes a reference to something purporting to be a document or statement, or to be information, of that kind.

1022B Civil action for loss or damage

- (1) This section applies in the following situations:
- (a) a person:
 - (i) is required by a provision of this Part to give another person (the ***client***) a Product Disclosure Statement or a Supplementary Product Disclosure Statement (the ***required disclosure document or statement***); and
 - (ii) does not give (in accordance with section 1015C) the client anything purporting to be the required disclosure document or statement by the time they are required to do so; or
 - (aa) a person makes an offer to which Division 5A applies (see section 1019D) to another person (the ***client***) otherwise than by sending the client an offer document in accordance with section 1019E; or
 - (ab) a person makes an invitation prohibited by section 1019F to another person (the ***client***); or
 - (ac) a person:
 - (i) is required by subsection 1019J(2), in relation to an offer made to another person (the ***client***), to send the client a withdrawal document or a supplementary offer document; and
 - (ii) does not send (in accordance with paragraphs 1019E(1)(a) and (b)) the client anything purporting to be either of those things by the time they are required to do so; or
 - (b) a person:
 - (i) is required by paragraph 1012G(3)(a) to orally communicate information (the ***required disclosure document or statement***) to another person (the ***client***); and
-

Section 1022B

- (ii) does not orally communicate to the other person anything purporting to be the information required by that paragraph by the time they are required to do so; or
- (c) a person:
 - (i) gives another person (the *client*) a disclosure document or statement (other than an offer document of a kind referred to in section 1019E or a supplementary offer document of a kind referred to in section 1019J) that is defective in circumstances in which a disclosure document or statement is required by a provision of this Part to be given to the client; or
 - (ia) makes an offer to which Division 5A applies (see section 1019D) by sending another person (the *client*) an offer document in accordance with section 1019E, but that offer document is defective; or
 - (ib) in a situation to which section 1019J applies, sends a person (the *client*) a supplementary offer document in accordance with that section but that supplementary offer document is defective; or
 - (ii) is a regulated person and gives, or makes available to, another person (the *client*) a disclosure document or statement, being a Product Disclosure Statement or a Supplementary Product Disclosure Statement, that is defective, reckless as to whether the client will or may rely on the information in it; or
- (d) a person:
 - (i) gives consent to the inclusion of a statement in a Product Disclosure Statement or a Supplementary Product Disclosure Statement as mentioned in subsection 1021L(1), disregarding paragraph 1021L(1)(c); or
 - (ii) does not take reasonable steps to withdraw such a statement as mentioned in subsection 1021L(2), disregarding subparagraphs 1021L(2)(b)(iii) and (iv); or
- (e) a person contravenes section 1017B or 1017D.

In paragraph (c), *give* means give by any means (including orally), and is not limited to giving in accordance with section 1015C or paragraph 1012G(3)(a).

Section 1022B

- (2) In a situation to which this section applies, if a person suffers loss or damage:
- (a) if paragraph (1)(a) applies—because the client was not given the disclosure document or statement that they should have been given; or
 - (aa) if paragraph (1)(aa) applies—because the client was not sent an offer document in accordance with section 1019E; or
 - (ab) if paragraph (1)(ab) applies—because the client received an invitation prohibited by section 1019F rather than being sent an offer document in accordance with section 1019E; or
 - (ac) if paragraph (1)(ac) applies—because the client was not sent a withdrawal document or a supplementary offer document as required by subsection 1019J(2); or
 - (b) if paragraph (1)(b) applies—because the information required by paragraph 1012G(3)(a) was not communicated to the client; or
 - (c) if paragraph (1)(c) applies—because the disclosure document or statement the client was given or sent was defective; or
 - (d) if paragraph (1)(d) applies—because the consent referred to in that paragraph was given, or was not withdrawn, as the case requires; or
 - (e) if paragraph (1)(e) applies—because of the contravention referred to in that paragraph;
- the person may recover the amount of the loss or damage by action against the, or a, liable person (see subsections (3) to (5)), whether or not that person (or anyone else) has been convicted of an offence in respect of the matter referred to in paragraph (a), (aa), (ab), (ac), (b), (c), (d) or (e).
- (3) For the purposes of subsection (2), the, or a, **liable person** is:
- (a) if paragraph (1)(a), (aa), (ab), (ac) or (b) applies—subject to subsection (4), the person first-referred to in that paragraph; or
 - (aa) if paragraph (1)(c) applies and the disclosure document or statement is information required by paragraph 1012G(3)(a)—subject to subsection (5A), the person first-referred to in paragraph (1)(c) of this section; or
 - (b) if paragraph (1)(c) (other than subparagraph (1)(c)(ia) or (ib)) applies and the disclosure document or statement is not

Section 1022B

information required by paragraph 1012G(3)(a)—subject to subsection (5):

- (i) the person by whom, or on whose behalf, the disclosure document or statement was prepared; and
 - (ii) each other person involved in the preparation of the disclosure document or statement who, directly or indirectly, caused the disclosure document or statement to be defective or contributed to it being defective; or
 - (ba) if subparagraph (1)(c)(ia) or (ib) applies—the person who made the offer; or
 - (c) if paragraph (1)(d) applies—the person who gave the consent; or
 - (d) if paragraph (1)(e) applies—the person who contravened the provision concerned.
- (4) If paragraph (1)(a) or (b) applies, or paragraph (1)(c) applies so far as it relates to information required by paragraph 1012G(3)(a), and the person who would, but for this subsection, be the liable person is an authorised representative, the authorised representative is not the liable person and the following paragraphs apply:
- (a) if the authorised representative is an authorised representative of only one financial services licensee—that financial services licensee is the liable person;
 - (b) if the authorised representative is an authorised representative of more than one financial services licensee:
 - (i) if, under the rules in section 917C, one of those licensees is responsible for the person's conduct—that licensee is the (or a) liable person; or
 - (ii) if, under the rules in section 917C, 2 or more of those licensees are jointly and severally responsible for the person's conduct—each of those licensees is a liable person.
- (4A) For the purposes of paragraph (4)(b):
- (a) section 917C is taken to apply, despite section 917F; and
 - (b) section 917D is taken not to apply.
- (5) If:
- (a) paragraph (1)(c) (other than subparagraph (1)(c)(ia) or (ib)) applies; and

Section 1022B

- (b) an alteration was made to the disclosure document or statement (not being information required by paragraph 1012G(3)(a)) before it was given to the client; and
- (c) the alteration made the disclosure document or statement defective, or more defective than it would otherwise have been; and
- (d) the alteration was not made by, or with the authority of, the person who would, but for this subsection, be a liable person because of subparagraph (3)(b)(i);

then, so far as a person has suffered loss or damage because the disclosure document or statement was defective because of the alteration, the person who made the alteration is a liable person, rather than the person referred to in paragraph (d).

(5A) If:

- (a) paragraph (3)(aa) applies; and
- (b) the person referred to in that paragraph is not the issuer, or an authorised representative of the issuer, of the financial product to which the required disclosure document or statement relates; and
- (c) the required disclosure document or statement was defective because of information, or an omission from information, provided to that person (whether in a document or otherwise) by the issuer of the product;

the issuer of the product is the liable person, rather than the person who would otherwise be the liable person because of paragraph (3)(aa) or subsection (4).

- (6) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.
- (7) A person is not liable under subsection (2) in a situation described in paragraph (1)(c) if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.
- (7A) If subsection (5A) applies, the issuer of the financial product is not liable under subsection (2) if the issuer took reasonable steps to ensure that the information provided as mentioned in paragraph (5A)(c) would not be such as to make the required disclosure document or statement defective.

Section 1022C

- (8) This section does not affect any liability that a person has under any other law.

1022C Additional powers of court to make orders

- (1) The court dealing with an action under subsection 1022B(2) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:
- (a) make an order declaring void a contract entered into by the client referred to in that subsection for or relating to a financial product or a financial service; and
 - (b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.
- (2) Without limiting paragraph (1)(b), the orders that may be made under that paragraph include (but are not limited to) an order for the return of money paid by a person, and/or an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

**Part 7.10—Market misconduct and other
prohibited conduct relating to financial
products and financial services**

Division 1—Preliminary

1040A Content of Part

This Part deals in Division 2 with various kinds of prohibited conduct, other than insider trading. The insider trading prohibitions are contained in Division 3.

Section 1041A

Division 2—The prohibited conduct (other than insider trading prohibitions)

1041A Market manipulation

A person must not take part in, or carry out (whether directly or indirectly and whether in this jurisdiction or elsewhere):

- (a) a transaction that has or is likely to have; or
- (b) 2 or more transactions that have or are likely to have; the effect of:
 - (c) creating an artificial price for trading in financial products on a financial market operated in this jurisdiction; or
 - (d) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)).

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see section 1317S.

1041B False trading and market rigging—creating a false or misleading appearance of active trading etc.

- (1) A person must not do, or omit to do, an act (whether in this jurisdiction or elsewhere) if that act or omission has or is likely to have the effect of creating, or causing the creation of, a false or misleading appearance:
 - (a) of active trading in financial products on a financial market operated in this jurisdiction; or
 - (b) with respect to the market for, or the price for trading in, financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see Division 4 and section 1317S.

Section 1041B

- (2) For the purposes of subsection (1), a person is taken to have created a false or misleading appearance of active trading in particular financial products on a financial market if the person:
- (a) enters into, or carries out, either directly or indirectly, any transaction of acquisition or disposal of any of those financial products that does not involve any change in the beneficial ownership of the products; or
 - (b) makes an offer (the ***regulated offer***) to acquire or to dispose of any of those financial products in the following circumstances:
 - (i) the offer is to acquire or to dispose of at a specified price; and
 - (ii) the person has made or proposes to make, or knows that an associate of the person has made or proposes to make:
 - (A) if the regulated offer is an offer to acquire—an offer to dispose of; or
 - (B) if the regulated offer is an offer to dispose of—an offer to acquire;the same number, or substantially the same number, of those financial products at a price that is substantially the same as the price referred to in subparagraph (i).
- Note: The circumstances in which a person creates a false or misleading appearance of active trading in particular financial products on a financial market are not limited to the circumstances set out in this subsection.
- (3) For the purposes of paragraph (2)(a), an acquisition or disposal of financial products does not involve a change in the beneficial ownership if:
- (a) a person who had an interest in the financial products before the acquisition or disposal; or
 - (b) an associate of such a person;
- has an interest in the financial products after the acquisition or disposal.
- (4) The reference in paragraph (2)(a) to a transaction of acquisition or disposal of financial products includes:
- (a) a reference to the making of an offer to acquire or dispose of financial products; and

Section 1041C

- (b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to acquire or dispose of financial products.

1041C False trading and market rigging—artificially maintaining etc. trading price

- (1) A person must not (whether in this jurisdiction or elsewhere) enter into, or engage in, a fictitious or artificial transaction or device if that transaction or device results in:
 - (a) the price for trading in financial products on a financial market operated in this jurisdiction being maintained, inflated or depressed; or
 - (b) fluctuations in the price for trading in financial products on a financial market operated in this jurisdiction.
- Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.
- Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see Division 4 and section 1317S.
- (2) In determining whether a transaction is fictitious or artificial for the purposes of subsection (1), the fact that the transaction is, or was at any time, intended by the parties who entered into it to have effect according to its terms is not conclusive.

1041D Dissemination of information about illegal transactions

A person must not (whether in this jurisdiction or elsewhere) circulate or disseminate, or be involved in the circulation or dissemination of, any statement or information to the effect that the price for trading in financial products on a financial market operated in this jurisdiction will, or is likely to, rise or fall, or be maintained, because of a transaction, or other act or thing done, in relation to those financial products, if:

- (a) the transaction, or thing done, constitutes or would constitute a contravention of section 1041A, 1041B, 1041C, 1041E or 1041F; and
- (b) the person, or an associate of the person:
 - (i) has entered into such a transaction or done such an act or thing; or

Section 1041E

- (ii) has received, or may receive, directly or indirectly, a consideration or benefit for circulating or disseminating, or authorising the circulation or dissemination of, the statement or information.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)). For defences to a prosecution based on this section, see Division 4.

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see Division 4 and section 1317S.

1041E False or misleading statements

- (1) A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:
 - (a) the statement or information is false in a material particular or is materially misleading; and
 - (b) the statement or information is likely:
 - (i) to induce persons in this jurisdiction to apply for financial products; or
 - (ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or
 - (iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and
 - (c) when the person makes the statement, or disseminates the information:
 - (i) the person does not care whether the statement or information is true or false; or
 - (ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

- (2) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1), paragraph (1)(a) is a

Section 1041F

physical element, the fault element for which is as specified in paragraph (1)(c).

- (3) For the purposes of an offence based on subsection (1), strict liability applies to subparagraphs (1)(b)(i), (ii) and (iii).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

1041F Inducing persons to deal

- (1) A person must not, in this jurisdiction, induce another person to deal in financial products:
- (a) by making or publishing a statement, promise or forecast if the person knows, or is reckless as to whether, the statement is misleading, false or deceptive; or
 - (b) by a dishonest concealment of material facts; or
 - (c) by recording or storing information that the person knows to be false or misleading in a material particular or materially misleading if:
 - (i) the information is recorded or stored in, or by means of, a mechanical, electronic or other device; and
 - (ii) when the information was so recorded or stored, the person had reasonable grounds for expecting that it would be available to the other person, or a class of persons that includes the other person.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

- (2) In this section:

dishonest means:

- (a) dishonest according to the standards of ordinary people; and
 - (b) known by the person to be dishonest according to the standards of ordinary people.
- (3) This section applies in relation to the following conduct as if that conduct were dealing in financial products:
- (a) applying to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act*

Section 1041G

- 1993) of a superannuation entity (within the meaning of that Act);
- (b) permitting a person to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
- (c) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA product.

1041G Dishonest conduct

- (1) A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I.

- (2) In this section:

dishonest means:

- (a) dishonest according to the standards of ordinary people; and
- (b) known by the person to be dishonest according to the standards of ordinary people.

1041H Misleading or deceptive conduct (civil liability only)

- (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

- (2) The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:
- (a) dealing in a financial product;

Section 1041H

- (b) without limiting paragraph (a):
 - (i) issuing a financial product;
 - (ii) publishing a notice in relation to a financial product;
 - (iii) making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;
 - (iv) applying to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
 - (v) permitting a person to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
 - (vi) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with a beneficiary of that entity as such a beneficiary;
 - (vii) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with an employer-sponsor (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer-sponsor, of that entity as such an employer-sponsor or associate;
 - (viii) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA product;
 - (ix) an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*) dealing with an employer (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer, who makes an application, on behalf of an employee (within the meaning of that Act) of the employer, for the employee to become the holder of an RSA product, as such an employer;
 - (x) carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).

Section 1041I

(3) Conduct:

(a) that contravenes:

- (i) section 670A (misleading or deceptive takeover document); or
- (ii) section 728 (misleading or deceptive fundraising document); or

(b) in relation to a disclosure document or statement within the meaning of section 953A; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

1041I Civil action for loss or damage for contravention of sections 1041E to 1041H

- (1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

(1A) Subsection (1) has effect subject to section 1044B.

Note: Section 1044B may limit the amount that the person may recover for a contravention of section 1041H (Misleading or deceptive conduct) from the other person or from another person involved in the contravention.

(1B) Despite subsection (1), if:

- (a) a person (the *claimant*) makes a claim under subsection (1) in relation to:

- (i) economic loss; or
- (ii) damage to property;

caused by conduct of another person (the *defendant*) that was done in contravention of section 1041H; and

Section 1041J

- (b) the claimant suffered the loss or damage:
 - (i) as a result partly of the claimant's failure to take reasonable care; and
 - (ii) as a result partly of the conduct referred to in paragraph (a); and
- (c) the defendant:
 - (i) did not intend to cause the loss or damage; and
 - (ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Note: Division 2A also applies proportionate liability to a claim for damages under this section for a contravention of section 1041H.

- (2) An action under subsection (1) may be begun at any time within 6 years after the day on which the cause of action arose.
- (3) This section does not affect any liability that a person has under any other law.
- (4) Section 1317S (which provides for relief from liability) applies in relation to liability under subsection (1) as if:
 - (a) the sections referred to in subsection (1) were civil penalty provisions; and
 - (b) proceedings under subsection (1) were eligible proceedings.

Note: Relief from liability under this section may also be available (depending on the circumstances) under Division 4.

1041J Sections of this Division have effect independently of each other

Subject to any express provision to the contrary, the various sections in this Division have effect independently of each other, and nothing in any of the sections limits the scope or application of any of the other sections.

**1041K Division applies to certain conduct to the exclusion of State
Fair Trading Acts provisions**

- (1) This section applies to conduct:
- (a) that contravenes:
 - (i) section 670A (misleading or deceptive takeover document); or
 - (ii) section 728 (misleading or deceptive fundraising document); or
 - (b) that relates to a disclosure document or statement within the meaning of section 953A; or
 - (c) that relates to a disclosure document or statement within the meaning of section 1022A.

For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

- (2) This Division operates in relation to conduct to which this section applies to the exclusion of the provisions of the State Fair Trading Act of any State or Territory.

Section 1041L

Division 2A—Proportionate liability for misleading and deceptive conduct

1041L Application of Division

- (1) This Division applies to a claim (an *apportionable claim*) if the claim is a claim for damages made under section 1041I for:
 - (a) economic loss; or
 - (b) damage to property;caused by conduct that was done in a contravention of section 1041H.
- (2) For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
- (3) In this Division, a *concurrent wrongdoer*, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
- (4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).
- (5) For the purposes of this Division, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

1041M Certain concurrent wrongdoers not to have benefit of apportionment

- (1) Nothing in this Division operates to exclude the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if:
 - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or
 - (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Division) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Division.

1041N Proportionate liability for apportionable claims

- (1) In any proceedings involving an apportionable claim:
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
 - (b) the court may give judgment against the defendant for not more than that amount.
- (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
 - (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and
 - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Division) are relevant.
- (3) In apportioning responsibility between defendants in the proceedings:
 - (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
 - (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
- (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.
- (5) A reference in this Division to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings

Section 1041O

(except as a plaintiff) whether joined under this Division, under rules of court or otherwise.

1041O Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware

- (1) If:
 - (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the *other person*) may be a concurrent wrongdoer in relation to the claim; and
 - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
 - (i) the identity of the other person; and
 - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and
 - (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.
- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

1041P Contribution not recoverable from defendant

A defendant against whom judgment is given under this Division as a concurrent wrongdoer in relation to an apportionable claim:

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and
- (b) cannot be required to indemnify any such wrongdoer.

1041Q Subsequent actions

- (1) In relation to an apportionable claim, nothing in this Division or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

1041R Joining non-party concurrent wrongdoer in the action

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

1041S Application of Division

Nothing in this Division:

- (a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

Section 1042A

Division 3—The insider trading prohibitions

Subdivision A—Preliminary

1042A Definitions

In this Division:

able to be traded has a meaning affected by section 1042E.

Division 3 financial products means:

- (a) securities; or
- (b) derivatives; or
- (c) interests in a managed investment scheme; or
- (ca) debentures, stocks or bonds issued or proposed to be issued by a government; or
- (d) superannuation products, other than those prescribed by regulations made for the purposes of this paragraph; or
- (e) any other financial products that are able to be traded on a financial market.

generally available, in relation to information, has the meaning given by section 1042C.

information includes:

- (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and
- (b) matters relating to the intentions, or likely intentions, of a person.

inside information means information in relation to which the following paragraphs are satisfied:

- (a) the information is not generally available;
- (b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

Section 1042B

material effect, in relation to a reasonable person's expectations of the effect of information on the price or value of Division 3 financial products, has the meaning given by section 1042D.

procure has a meaning affected by section 1042F.

relevant Division 3 financial products, in relation to particular inside information, means the Division 3 financial products referred to in paragraph (b) of the definition of **inside information**.

1042B Application of Division

This Division applies to:

- (a) acts and omissions within this jurisdiction in relation to Division 3 financial products (regardless of where the issuer of the products is formed, resides or located and of where the issuer carries on business); and
- (b) acts and omissions outside this jurisdiction (and whether in Australia or not) in relation to Division 3 financial products issued by:
 - (i) a person who carries on business in this jurisdiction; or
 - (ii) a body corporate that is formed in this jurisdiction.

1042C When information is generally available

- (1) For the purposes of this Division, information is **generally available** if:
 - (a) it consists of readily observable matter; or
 - (b) both of the following subparagraphs apply:
 - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in Division 3 financial products of a kind whose price might be affected by the information; and
 - (ii) since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or
 - (c) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
 - (i) information referred to in paragraph (a);
 - (ii) information made known as mentioned in subparagraph (b)(i).

Section 1042D

- (2) None of the paragraphs of subsection (1) limits the generality of any of the other paragraphs of that subsection.

1042D When a reasonable person would take information to have a *material effect* on price or value of Division 3 financial products

For the purposes of this Division, a reasonable person would be taken to expect information to have a *material effect* on the price or value of particular Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.

1042E Division 3 financial products taken to be *able to be traded* despite suspensions or section 794D directions

Particular Division 3 financial products that are ordinarily able to be traded on a licensed market are taken, for the purposes of this Division, to be *able to be traded* on that market even though trading in those products on that market is suspended by action taken by the market licensee, or is contrary to a direction given to the market licensee by ASIC under subsection 794D(2).

1042F Inciting, inducing or encouraging an act or omission constitutes *procuring* the omission

- (1) For the purposes of this Division, but without limiting the meaning that the expression *procure* has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to *procure* the act or omission by the other person.
- (2) Subsection (1) does not limit the application in relation to provisions in this Division of:
- (a) section 6 of the *Crimes Act 1914*; or
 - (b) section 11.1, 11.2, 11.4 or 11.5 of the *Criminal Code*.

1042G Information in possession of officer of body corporate

- (1) For the purposes of this Division:
 - (a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer; and
 - (b) if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing; and
 - (c) if an officer of a body corporate, in that capacity, is reckless as to a circumstance or result, it is to be presumed that the body corporate is reckless as to that circumstance or result; and
 - (d) for the purposes of paragraph 1043M(2)(b), if an officer of a body corporate ought reasonably to know any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate ought reasonably to know that matter or thing.
- (2) This section does not limit the application of section 769B in relation to this Division.

1042H Information in possession of partner or employee of partnership

- (1) For the purposes of this Division:
 - (a) a member of a partnership is taken to possess any information:
 - (i) which another member of the partnership possesses and which came into the other member's possession in the other member's capacity as a member of the partnership; or
 - (ii) which an employee of the partnership possesses and which came into his or her possession in the course of the performance of duties as such an employee; and
 - (b) if a member or employee of a partnership knows any matter or thing because the member or employee is such a member or employee, it is to be presumed that every member of the partnership knows that matter or thing; and

Section 1043A

- (c) if a member or employee of a partnership, in that capacity, is reckless as to a circumstance or result, it is to be presumed that every member of the partnership is reckless as to that circumstance or result; and
 - (d) for the purposes of paragraph 1043M(2)(b), if a member or employee of a partnership ought reasonably to know any matter or thing because he or she is such a member or employee, it is to be presumed that every member of the partnership ought reasonably to know that matter or thing.
- (2) This section does not limit the application of section 769B in relation to this Division.

Subdivision B—The prohibited conduct

1043A Prohibited conduct by person in possession of inside information

- (1) Subject to this Subdivision, if:
 - (a) a person (the *insider*) possesses inside information; and
 - (b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of *inside information* in section 1042A are satisfied in relation to the information;the insider must not (whether as principal or agent):
 - (c) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or
 - (d) procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see section 1043M.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.
- (2) Subject to this Subdivision, if:
 - (a) a person (the *insider*) possesses inside information; and

Section 1043B

- (b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of *inside information* in section 1042A are satisfied in relation to the information; and
 - (c) relevant Division 3 financial products are able to be traded on a financial market operated in this jurisdiction;
the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:
 - (d) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or
 - (e) procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.
- Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see section 1043M.
- Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.
- (3) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1) or (2):
 - (a) paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(b); and
 - (b) paragraph (2)(a) is a physical element, the fault element for which is as specified in paragraph (2)(b).

1043B Exception for withdrawal from registered scheme

Subsection 1043A(1) does not apply in respect of a member's withdrawal from a registered scheme if the amount paid to the member on withdrawal is calculated (so far as is reasonably practicable) by reference to the underlying value of the assets of the financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme to which the member's interest relates, less any reasonable charge for acquiring the member's interest.

Section 1043C

1043C Exception for underwriters

- (1) Subsection 1043A(1) does not apply in respect of:
 - (a) applying for or acquiring securities or managed investment products under an underwriting agreement or a sub-underwriting agreement; or
 - (b) entering into an agreement referred to in paragraph (a); or
 - (c) disposing of securities or managed investment products acquired under an agreement referred to in paragraph (a).
- (2) Subsection 1043A(2) does not apply in respect of:
 - (a) the communication of information in relation to securities or managed investment products to a person solely for the purpose of procuring the person to enter into an underwriting agreement in relation to any such securities or managed investment products; or
 - (b) the communication of information in relation to securities or managed investment products by a person who may be required under an underwriting agreement to apply for or acquire any such securities or managed investment products if the communication is made to another person solely for the purpose of procuring the other person to do either or both of the following:
 - (i) enter into a sub-underwriting agreement in relation to any such securities or managed investment products;
 - (ii) apply for any such securities or managed investment products.

1043D Exception for acquisition pursuant to legal requirement

Subsection 1043A(1) does not apply in respect of the acquisition of financial products pursuant to a requirement imposed by this Act.

1043E Exception for information communicated pursuant to a legal requirement

Subsection 1043A(2) does not apply in respect of the communication of information pursuant to a requirement imposed by the Commonwealth, a State, a Territory or any regulatory authority.

Section 1043F

1043F Chinese wall arrangements by bodies corporate

A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement at any time merely because of information in the possession of an officer or employee of the body corporate if:

- (a) the decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer or employee; and
- (b) it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and
- (c) the information was not so communicated and no such advice was so given.

1043G Chinese wall arrangements by partnerships etc.

- (1) The members of a partnership do not contravene subsection 1043A(1) by entering into a transaction or agreement at any time merely because one or more (but not all) of the members, or an employee or employees of the partnership, are in actual possession of information if:
 - (a) the decision to enter into the transaction or agreement was taken on behalf of the partnership by any one or more of the following persons:
 - (i) a member or members who are taken to have possessed the information merely because another member or other members, or an employee or employees of the partnership, were in possession of the information;
 - (ii) an employee or employees of the partnership who was not or were not in possession of the information; and
 - (b) the partnership had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and

Section 1043H

- (c) the information was not so communicated and no such advice was so given.
- (2) A member of a partnership does not contravene subsection 1043A(1) by entering into a transaction or agreement otherwise than on behalf of the partnership merely because the member is taken to possess information that is in the possession of another member or an employee of the partnership.

1043H Exception for knowledge of person's own intentions or activities

A natural person does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because the person is aware that he or she proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.

1043I Exception for bodies corporate

- (1) A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because the body corporate is aware that it proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.
- (2) Subject to subsection (3), a body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because an officer or employee of the body corporate is aware that the body corporate proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.
- (3) Subsection (2) does not apply unless the officer or employee of the body corporate became aware of the matters referred to in that subsection in the course of the performance of duties as such an officer or employee.

1043J Exception for officers or agents of body corporate

- (1) Subject to subsection (2), a person (the *first person*) does not contravene subsection 1043A(1) by entering into a transaction or agreement on behalf of a person (the *second person*) in relation to financial products issued by another person (the *third person*) merely because the first person is aware that the second person proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the third person or by a fourth person.
- (2) Subsection (1) does not apply unless the first person became aware of the matters referred to in that subsection in the course of the performance of duties as an officer or employee of the second person or in the course of acting as an agent of the second person.

1043K Transactions by holder of financial services licence or a representative of the holder of such a licence

A person (the *agent*) does not contravene subsection 1043A(1) by applying for, acquiring, or disposing of, or entering into an agreement to apply for, acquire, or dispose of, financial products that are able to be traded on a licensed market if:

- (a) the agent is a financial services licensee or a representative of a financial services licensee; and
- (b) the agent entered into the transaction or agreement concerned on behalf of another person (the *principal*) under a specific instruction by the principal to enter into that transaction or agreement; and
- (c) the licensee had in operation, at the time when that transaction or agreement was entered into, arrangements that could reasonably be expected to ensure that any information in the possession of the licensee, or of any representative of the licensee, as a result of which the person in possession of the information would be prohibited by subsection 1043A(1) from entering into that transaction or agreement was not communicated to the agent and that no advice with respect to the transaction or agreement was given to the principal or to the agent by a person in possession of the information; and
- (d) the information was not so communicated and no such advice was so given; and

Section 1043L

- (e) the principal is not an associate of the licensee or of any representative of the licensee;

but nothing in this section affects the application of subsection 1043A(1) in relation to the principal.

1043L A specific situation in which a compensation order under section 1317HA may be made

Situation to which this section applies

(1) If:

- (a) a person (the *insider*) possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of Division 3 financial products (other than derivatives); and
- (b) the insider knows that, or is reckless as to whether:
 - (i) the information is not generally available; and
 - (ii) if the information were generally available, it might have a material effect on the price or value of those Division 3 financial products; and
- (c) the insider (whether as principal or agent) in contravention of subsection 1043A(1):
 - (i) applies for, acquires, or disposes of, or enters into an agreement to apply for, acquire, or dispose of, any such Division 3 financial products; or
 - (ii) procures another person to apply for, acquire, or dispose of, or to enter into an agreement to apply for, acquire, or dispose of, any such Division 3 financial products;

the following subsections apply.

Compensation for damage suffered by person applying for the Division 3 financial products

- (2) If the insider applied for or agreed to apply for, or procured another person to apply for or to agree to apply for, the Division 3 financial products, the issuer of the products may, by action under section 1317HA, recover as compensation for damage suffered by the issuer, the amount (if any) by which the price described in the first of the following paragraphs was less than the price described in the second of those paragraphs:

Section 1043L

- (a) the price at which the products were applied for, or agreed to be applied for, by the insider or the other person;
- (b) the price at which they would have been likely to have been disposed of in a disposal made at the time of the application or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

Compensation for damage suffered by person disposing of the Division 3 financial products

- (3) If the insider acquired or agreed to acquire, or procured another person to acquire or to agree to acquire, the Division 3 financial products from a person (in this subsection and subsection (5) called the **disposer**) who did not possess the information, the disposer may, by action under section 1317HA, recover, as compensation for damage suffered by the disposer, the amount (if any) by which the price described in the first of the following paragraphs was less than the price described in the second of those paragraphs:
 - (a) the price at which the financial products were acquired, or agreed to be acquired, by the insider or the other person from the disposer;
 - (b) the price at which they would have been likely to have been acquired in an acquisition made at the time of the first-mentioned acquisition or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

Compensation for damage suffered by person acquiring the Division 3 financial products

- (4) If the insider disposed of or agreed to dispose of, or procured another person to dispose of or to agree to dispose of, the Division 3 financial products to a person (in this subsection and subsection (5) called the **acquirer**) who did not possess the information, the acquirer may, by action under section 1317HA, recover, as compensation for damage suffered by the acquirer, the amount (if any) by which the price described in the first of the

Section 1043L

following paragraphs was greater than the price described in the second of those paragraphs:

- (a) the price at which the financial products were disposed of, or agreed to be disposed of, by the insider or the other person to the acquirer;
- (b) the price at which they would have been likely to have been disposed of in a disposal made at the time of the first-mentioned disposal or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

Additional situations in which issuer may recover

- (5) In addition to any action that may be brought as provided by subsection (3) or (4), the issuer of the financial products may, in the case of an acquisition or disposal of, or an agreement to acquire or dispose of, the financial products by the insider or another person in the circumstances mentioned in that subsection, by action under section 1317HA, recover, as compensation for damage suffered by the issuer:
 - (a) in the case of an acquisition or agreement to acquire the financial products—the amount (if any) by which the price described in the first of the following subparagraphs was less than the price described in the second of those subparagraphs:
 - (i) the price at which the financial products were acquired, or agreed to be acquired, by the insider or other person from the disposer;
 - (ii) the price at which they were likely to have been acquired in an acquisition made at the time of the first-mentioned acquisition or the time of the agreement, as the case may be, if the information had been generally available; or
 - (b) in the case of a disposal or an agreement to dispose of financial products—the amount (if any) by which the price described in the first of the following subparagraphs was greater than the price described in the second of those subparagraphs:

Section 1043L

- (i) the price at which the financial products were disposed of, or agreed to be disposed of, by the insider or other person to the acquirer;
- (ii) the price at which they would have been likely to have been disposed of at the time of the first-mentioned disposal or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

ASIC may take action for benefit of issuer

- (6) ASIC may, if it considers that it is in the public interest to do so, bring an action in accordance with subsection (2) or (5) in the name of, and for the benefit of, an issuer of Division 3 financial products for the recovery of an amount that the issuer is entitled to recover by virtue of that subsection.

Relief from liability

- (7) In an action brought against a person in accordance with this section because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person's possession, the court may relieve the person wholly or partly from liability if it appears to the court that the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1042C(1)(b)(i).

Special provision for registered schemes—treatment of amount recovered in respect of subsection (2) loss

- (8) If:
 - (a) the responsible entity for a registered scheme; or
 - (b) ASIC in the name of, and for the benefit of, the responsible entity for a registered scheme;brings an action in accordance with subsection (2) in respect of a subscription for, or any agreement to subscribe for, any interests in the scheme, any amount recovered in the action:
 - (c) is to be held by the responsible entity on behalf of the persons who, at the time of the subscription or agreement,

Section 1043M

had rights or interests in the relevant financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and

- (d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.

Special provision for registered schemes—treatment of amount recovered in respect of subsection (5) loss

- (9) If:

- (a) the responsible entity for a registered scheme; or
(b) ASIC in the name of, and for the benefit of, the responsible entity for a registered scheme;

brings an action in accordance with subsection (5) in respect of an acquisition or disposal of, or an agreement to acquire or dispose of, interests in the scheme, any amount recovered in the action:

- (c) is to be held by the responsible entity on behalf of the persons who, at the time of the disposal, acquisition or agreement, had rights or interests in the relevant financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and
(d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.

- (10) Any right of action that a person has by virtue of this section is in addition to any right that any other person has under section 1317HA.

1043M Defences to prosecution for an offence

- (1) In a prosecution of a person for an offence based on subsection 1043A(1) or (2), it is not necessary for the prosecution to prove the non-existence of facts or circumstances which, if they existed, would, by virtue of section 1043B, 1043C, 1043D, 1043E, 1043F, 1043G, 1043H, 1043I, 1043J or 1043K, preclude the act or omission from constituting a contravention of subsection 1043A(1) or (2), as the case may be, but it is a defence if the facts or circumstances existed.

Section 1043N

Note: A defendant bears an evidential burden in relation to the facts or circumstances. See subsection 13.3(3) of the *Criminal Code*.

- (2) In a prosecution brought against a person for an offence based on subsection 1043A(1) because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person's possession:
- (a) it is a defence if the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1042C(1)(b)(i); and
 - (b) it is a defence if the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.

Note: A defendant bears an evidential burden in relation to the matters referred to in paragraphs (a) and (b). See subsection 13.3(3) of the *Criminal Code*.

- (3) In a prosecution against a person for an offence based on subsection 1043A(2) because the person communicated information, or caused information to be communicated, to another person:
- (a) it is a defence if the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1042C(1)(b)(i); and
 - (b) it is a defence if the other person knew, or ought reasonably to have known, of the information before the information was communicated.

Note: A defendant bears an evidential burden in relation to the matters referred to in paragraphs (a) and (b). See subsection 13.3(3) of the *Criminal Code*.

1043N Relief from civil liability

In proceedings against a person under Part 9.4B (including under section 1317HA) relating to a contravention of subsection 1043A(1) or (2), the court may relieve the person wholly or partly from liability if it appears to the court that:

- (a) in any case—the circumstances in any of the sections referred to in subsection 1043M(1) applied; or

Section 1043O

- (b) in the case of subsection 1043A(1)—the circumstance referred to in paragraph 1043M(2)(a) or (b) applied; or
- (c) in the case of subsection 1043A(2)—the circumstance referred to in paragraph 1043M(3)(a) or (b) applied.

1043O Powers of Court

If, in a proceeding instituted under this Act, the Court finds that a contravention of section 1043A has occurred, the Court may, in addition to any other orders that it may make under any other provision of this Act, make such order or orders as it thinks just, including, but without limiting the generality of the above, any one or more of the following orders:

- (a) an order restraining the exercise of rights attached to Division 3 financial products;
- (b) an order restraining the issue of Division 3 financial products;
- (c) an order restraining the acquisition or disposal of Division 3 financial products;
- (d) an order directing the disposal of Division 3 financial products;
- (e) an order vesting Division 3 financial products in ASIC;
- (f) an order cancelling an agreement for the acquisition or disposal of Division 3 financial products;
- (g) an order cancelling an Australian financial services licence;
- (h) for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing a specified act.

Division 4—Defences, relief and limits on liability

1044A General defence or relief for publishers

- (1) It is a defence to a prosecution for an offence based on a provision of this Part committed by the publication of an advertisement if:
- (a) the defendant was, at that time, a person whose business it was to publish or arrange for the publication of advertisements; and
 - (b) they received the advertisement for publication in the ordinary course of that business and did not know, and had no reason to believe, that its publication would amount to an offence against that provision.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1). See subsection 13.3(3) of the *Criminal Code*.

- (2) In proceedings against a person under:
- (a) Part 9.4B (including under section 1317H or 1317HA) relating to a contravention of a civil penalty provision that is in this Part; or
 - (b) section 1041I relating to a contravention of a provision to which that section applies;
- the court may relieve the person wholly or partly from liability if it appears to the court that the circumstances mentioned in paragraphs (1)(a) and (b) applied.

1044B Limit on liability for misleading or deceptive conduct

State or Territory professional standards law limits liability

- (1) A professional standards law of a State, the Australian Capital Territory or the Northern Territory applies to limit occupational liability relating to an action for contravention of section 1041H in the same way as it limits occupational liability arising under a law of the State or Territory.

Note: Section 1041H prohibits misleading or deceptive conduct by a person in relation to a financial product or financial service.

Section 1044B

- (2) However, the professional standards law applies for that purpose:
- (a) only in relation to a scheme that was prescribed by the regulations at the time (the *contravention time*) of the contravention; and
 - (b) as if the scheme were in force under that law at the contravention time in the form the scheme would have been in if:
 - (i) the scheme had not been amended or revoked under that law since the scheme was first prescribed; and
 - (ii) the modifications (if any) prescribed by the regulations at the contravention time had been made to the scheme.

Which State's or Territory's professional standards law applies?

- (3) For the purposes of working out whether a professional standards law of a particular State or Territory applies under subsection (1) in relation to a particular contravention of section 1041H, choice of law rules operate in relation to the contravention in the same way as they operate in relation to a tort.

Definitions

- (4) In this section:

modifications includes additions, omissions and substitutions.

occupation includes profession and trade.

occupational association means a body:

- (a) that represents the interests of persons who have the same occupation; and
- (b) whose membership is limited principally to such persons.

occupational liability means civil liability arising directly or vicariously from anything done or omitted by a member of an occupational association in the course of his or her occupation.

professional standards law means a law providing for the limitation of occupational liability by reference to schemes for limiting that liability that were formulated and published in accordance with that law.

Division 5—Miscellaneous

1045A Exemptions and modifications by regulations

- (1) The regulations may:
 - (a) exempt a person or class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or
 - (c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (2) For the purpose of this section, the *provisions of this Part* include:
 - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Part 7.11—Title and transfer

Division 1—Title to certain securities

1070A Nature of shares and certain other interests in a company or registered scheme

- (1) A share, other interest of a member in a company or interest of a person in a registered scheme:
 - (a) is personal property; and
 - (b) is transferable or transmissible as provided by:
 - (i) the company's, or scheme's, constitution; or
 - (ii) the operating rules of a prescribed CS facility if they are applicable; and
 - (c) is capable of devolution by will or by operation of law.
- (2) Paragraph (1)(c) has effect subject to:
 - (a) in the case of a company:
 - (i) the company's constitution (if any); and
 - (ii) any replaceable rules that apply to the company; and
 - (iii) the operating rules of a prescribed CS facility if they apply to the share or interest; and
 - (b) in the case of a scheme:
 - (i) the scheme's constitution; and
 - (ii) the operating rules of a prescribed CS facility if they apply to the interest.
- (3) Subject to subsection (1):
 - (a) the laws applicable to ownership of, and dealing with, personal property apply to a share, other interest of a member in a company or interest of a person in a registered scheme as they apply to other property; and
 - (b) equitable interests in respect of a share, interest of a member in a company or other interest of a person in a registered scheme may be created, dealt with and enforced as in the case of other personal property.

Section 1070B

- (4) For the purposes of any law, a share, other interest of a member in a company or interest of a person in a registered scheme is taken to be situated:
- (a) if the share, interest in a company, or interest in a registered scheme is entered on the register kept under section 169—in the State or Territory where that register is kept; or
 - (b) if the share or interest in the company is entered on an overseas branch register kept under section 178—in the foreign country where that register is kept.

1070B Numbering of shares

- (1) Except as provided in subsection (2), a company must ensure that each share in the company is distinguished by an appropriate number.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Despite subsection (1):
- (a) if at any time all the issued shares in a company, or all the issued shares in a company of a particular class:
 - (i) are fully paid up; and
 - (ii) rank equally for all purposes;none of those shares is required to have a distinguishing number so long as each of those shares remains fully paid up, and ranks equally for all purposes with all shares of the same class for the time being issued and fully paid up; and
 - (b) if:
 - (i) all the issued shares in a company are evidenced by certificates in accordance with section 1070C; and
 - (ii) each certificate is distinguished by an appropriate number; and
 - (iii) that number is recorded in the register of members;none of those shares is required to have a distinguishing number; and
 - (c) a share need not have a distinguishing number if the operating rules of a prescribed CS facility through which it is able to be transferred provide that the share need not have a distinguishing number.

Section 1070C

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

1070C Matters to be specified in share certificate

- (1) A company must ensure that a certificate it issues specifying the shares held by a member of the company states:

- (a) the name of the company and the fact that it is registered under this Act; and
- (b) the class of the shares; and
- (c) the amount (if any) unpaid on the shares.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A certificate issued in accordance with subsection (1) specifying shares held by a member of a company is prima facie evidence of the title of the member to the shares.
- (3) A failure to comply with subsection (1) does not affect the rights of a holder of shares.

1070D Loss or destruction of title documents for certain securities

- (1) This section applies to the following securities:
- (a) shares in a company;
 - (b) debentures of a company;
 - (c) interests in a registered scheme.
- (2) This section applies to an interest in a registered scheme as if:
- (a) references to a company were instead references to the responsible entity of the registered scheme; and
 - (b) references to the directors of a company were instead references to the directors of the responsible entity of the registered scheme.
- (3) A company must, in accordance with subsection (4), issue a duplicate certificate or other title document for securities if:
- (a) the certificate or document is lost or destroyed; and
 - (b) the owner of the securities applies to the company for the duplicate in accordance with subsection (5); and
 - (c) the owner complies with any requirements made in accordance with subsection (6).

Section 1070D

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The company must issue the duplicate:
 - (a) if the company requires the payment of an amount not exceeding the amount prescribed by regulations made for the purposes of this paragraph—within 21 days after the payment is received by the company or within such longer period as ASIC approves; or
 - (b) in a case to which paragraph (a) does not apply—within 21 days after the application is made or within such longer period as ASIC approves.
- (5) The application must be accompanied by:
 - (a) a statement in writing that the certificate or other document:
 - (i) has been lost or destroyed; and
 - (ii) has not been pledged, sold or otherwise disposed of; and
 - (b) if the certificate or other document has been lost—a statement in writing that proper searches have been made; and
 - (c) an undertaking in writing that if the certificate or other document is found or received by the owner it will be returned to the company.
- (6) The directors of the company may, before accepting an application for the issue of a duplicate certificate, require the applicant to do either or both of the following:
 - (a) place an advertisement in a daily newspaper circulating in a place specified by the directors stating that:
 - (i) the certificate or other document has been lost or destroyed; and
 - (ii) the owner intends, after the end of 14 days after the publication of the advertisement, to apply to the company for a duplicate certificate;
 - (b) give a bond for an amount equal to at least the current market value of the securities indemnifying the company against loss following the production of the original certificate or other document.

Section 1070D

(7) If:

- (a) a certificate or other title document for securities is cancelled in reliance on the operating rules of a prescribed CS facility;
and
- (b) having regard to those provisions, the certificate or other document should not have been cancelled;

this section applies to the certificate or other document as though it were destroyed on its cancellation.

Division 2—Transfer of certain securities

Subdivision A—General provisions

1071A Application of the Subdivision to certain securities

- (1) This Subdivision applies to the following securities:
 - (a) shares in a company;
 - (b) debentures of a company;
 - (c) interests in a registered scheme.
- (2) This Subdivision applies to an interest in a registered scheme as if:
 - (a) references to a company were instead references to the responsible entity of the registered scheme; and
 - (b) references to the constitution of a company were instead references to the constitution of the registered scheme; and
 - (c) references to members of a company were instead references to members of the registered scheme.

1071B Instrument of transfer

- (1) This section does not apply to a transfer of a security through a prescribed CS facility.
- (2) Subject to subsection (5), a company must only register a transfer of securities if a proper instrument of transfer (see subsections (3) and (4)) has been delivered to the company. This is so despite:
 - (a) anything in its constitution; or
 - (b) anything in a deed relating to debentures.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) An instrument of transfer is not a proper instrument of transfer for the purposes of subsection (2) if it does not show the details, specified in the regulations, in relation to the company concerned.
- (4) If the transfer of the securities is covered by Division 3 of this Part, then (in addition to subsection (3)), the instrument is not a proper instrument of transfer for the purposes of subsection (2) unless it is

Section 1071B

a sufficient transfer of the securities under regulations made for the purposes of that Division.

- (5) Subsection (2) does not prejudice the power of the company to register, as the holder of securities, a person to whom the right to the securities has devolved by will or by operation of law.
- (6) Subsections (7) to (13) deal with a transfer of a security of a dead holder by the dead holder's personal representative. They deal with the transfer differently depending on whether the personal representative is a local representative or not.
- (7) The personal representative is a **local representative** if the representative is duly constituted as a personal representative under the law of the State or Territory in which the security is situated.

Note: Subsection 1070A(4) provides that the security is situated where the relevant register is kept.

- (8) If the personal representative is a local representative, a transfer of the security by the representative is as valid as if the representative had been registered as the holder of the security at the time when the instrument of transfer was executed.
 - (9) If:
 - (a) the personal representative is not a local representative; and
 - (b) the representative:
 - (i) executes an instrument of transfer of the security to the representative or to another person; and
 - (ii) delivers the instrument to the company; and
 - (iii) delivers to the company with the instrument a statement in writing made by the representative to the effect that, to the best of the representative's knowledge, information and belief, no grant of representation of the estate of the deceased holder has been applied for or made in the State or Territory in which the security is located and no application for such a grant will be made; and
 - (c) the statement is made within 3 months immediately before the date on which the statement is delivered to the company;
- the company must (subject to subsection (10)) register the transfer and pay to the representative any dividends or other money accrued

Section 1071C

in respect of the security up to the time when the instrument was executed.

- (10) Subsection (9) does not operate so as to require the company to do anything that it would not have been required to do if the personal representative were a local representative.
- (11) A transfer or payment made under subsection (9) and a receipt or acknowledgment of such a payment is, for all purposes, as valid and effectual as if the personal representative were a local representative.
- (12) For the purposes of this section, an application by a personal representative of a dead person for registration as the holder of a security in place of the dead person is taken to be an instrument of transfer effecting a transfer of the security to the personal representative.
- (13) The production to a company of a document that is, under the law of a State or Territory, sufficient evidence of probate of the will, or letters of administration of the estate, of a dead person having been granted to a person, is sufficient evidence of the grant (for the company's purposes). This is so despite:
 - (a) anything in its constitution; or
 - (b) in a deed relating to debentures.

1071C Occupation need not appear in transfer document, register etc.

- (1) A document transferring securities need not state the occupation of the transferor or transferee and, if it is signed by a person, the signature need not be witnessed.
- (2) Subsection (1) applies despite anything in:
 - (a) the constitution of:
 - (i) a company; or
 - (ii) a body referred to in paragraph 1073C(a) or (b); or
 - (b) the terms and conditions on which securities are created or issued.
- (3) The omission from a register, certificate, document transferring securities or other document relating to a security, of a statement of the occupation of a person who is, or is entitled to be, registered as

Section 1071D

the holder of the security does not breach any law, constitution, trust deed or other document relating to the securities.

1071D Registration of transfer at request of transferor

- (1) A written application by the transferor of a security of a company for the transferee's name to be entered in the appropriate register is as effective (for the company's purposes) as if it were an application by the transferee. The application is subject to the same conditions as it would be if it had been made by the transferee.
- (2) If the transferor of a security of a company requests the company in writing to do so, the company must, by written notice, require a person who has possession, custody or control of either or both of the following:
 - (a) any title documents for the security;
 - (b) the instrument of transfer of the security;to bring it or them into the office of the company within a specified period, to have the document cancelled or rectified and the transfer registered or otherwise dealt with.
- (3) The period specified under subsection (2) must be not less than 7 and not more than 28 days after the date of the notice.
- (4) If a person refuses or fails to comply with a notice given under subsection (2), the transferor may apply to the Court for the issue of a summons for that person to appear before the Court and show cause why the documents mentioned in the notice should not be delivered up or produced as required by the notice.
- (5) The Court may:
 - (a) if the person appears:
 - (i) examine the person upon oath or affirmation; and
 - (ii) receive other evidence; and
 - (b) if the person does not appear after being duly served with the summons—receive evidence in the person's absence; and
 - (c) in either case order the person to deliver up such documents to the company upon such terms or conditions as the Court considers just and reasonable.

The costs of the summons and of proceedings on the summons are in the discretion of the Court.

Section 1071E

- (6) Lists of documents required to be brought in under subsection (2) but not brought in in accordance with a requirement made under subsection (2) or delivered up in accordance with an order under subsection (5), must be:
- (a) exhibited in the office of the company; and
 - (b) advertised in the *Gazette* and in such newspapers and at such times as the company thinks fit.

1071E Notice of refusal to register transfer

If a company refuses to register a transfer of a security of the company, it must, within 2 months after the date on which the transfer was lodged with it, give the transferee notice of the refusal.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

1071F Remedy for refusal to register transfer or transmission

- (1) If a relevant authority in relation to a company:
- (a) refuses or fails to register; or
 - (b) refuses or fails to give its consent or approval to the registration of;
- a transfer or transmission of securities of the company, the transferee or transmittee may apply to the Court for an order under this section.
- (2) If the Court is satisfied on the application that the refusal or failure was without just cause, the Court may:
- (a) order that the transfer or transmission be registered; or
 - (b) make such other order as it thinks just and reasonable, including:
 - (i) in the case of a transfer or transmission of shares—an order providing for the purchase of the shares by a specified member of the company or by the company; and
 - (ii) in the case of a purchase by the company—an order providing for the reduction accordingly of the capital of the company.
- (3) In this section:

relevant authority, in relation to a company, means:

Section 1071G

- (a) a person who has, 2 or more persons who together have, or a body that has, authority to register a transfer or transmission of securities of the company; or
- (b) a person, 2 or more persons, or a body, whose consent or approval is required before a transfer or transmission of securities of the company is registered.

1071G Certification of transfers

- (1) The certification by a company of an instrument of transfer of securities of the company:
 - (a) is taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on the face of them show prima facie title to the securities in the transferor named in the instrument of transfer; and
 - (b) is not taken as a representation that the transferor has any title to the securities.
- (2) If a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to the person as if the certification had been made fraudulently.
- (3) A certification may be expressed to be limited to 42 days or any longer period from the date of certification. If it is, the company and its officers and employees are not, in the absence of fraud, liable in respect of the registration of any transfer of securities comprised in the certification after the end of:
 - (a) the period so limited; or
 - (b) any extension of that period given by the company;if the instrument of transfer has not, within that period, been lodged with the company for registration.
- (4) For the purposes of this section:
 - (a) an instrument of transfer is taken to be certified if it bears the words “certificate lodged” or words to the like effect; and
 - (b) the certification of an instrument of transfer is taken to be made by a company if:
 - (i) the person issuing the instrument is a person authorised to issue certified instruments of transfer on the company’s behalf; and

Section 1071H

- (ii) the certification is signed by a person authorised to certify transfers on the company's behalf or by an officer of the company or of a body corporate so authorised; and
- (c) a certification that purports to be authenticated by a person's signature or initials (whether handwritten or not) is taken to be signed by the person unless it is shown that the signature or initials:
 - (i) was not or were not placed there by the person; and
 - (ii) was not or were not placed there by any other person authorised to use the signature or initials;for the purpose of certifying transfers on the company's behalf.

1071H Duties of company with respect to issue of certificates

- (1) Subject to subsection (2), within 2 months after a company issues a security, the company must:
 - (a) complete and have ready for delivery to the holder of the security all the appropriate certificates or other title documents in connection with the issue of the security; and
 - (b) unless otherwise instructed by the holder, send or deliver the completed certificates or other title documents to:
 - (i) the holder; or
 - (ii) if the holder has instructed the company in writing to send them to a nominated person—that person.Paragraph (a) has effect in relation to shares subject to the conditions on which the shares are issued.
- (2) If the operating rules of a prescribed CS facility 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 issue of a security in specified circumstances; or
 - (b) the only document required by subsection (1) to be completed and delivered by a company in relation to the issue of a security in specified circumstances is the document required by the provision;the provision has effect accordingly.

Section 1071H

- (3) Within one month after the date on which a transfer of a security is lodged with a company, the company must:
- (a) complete and have ready for delivery to the transferee all the appropriate transfer and title documents in connection with the transfer; and
 - (b) unless otherwise instructed by the transferee, send or deliver the completed documents to:
 - (i) the transferee; or
 - (ii) if the transferee has instructed the company in writing to send them to a nominated person—that person.

This subsection does not apply to a transfer that the company is for any reason entitled to refuse to register and does not register.

- (4) The only document required by subsection (3) to be completed and delivered by a company in relation to a transfer covered by the operating rules of a prescribed CS facility is the document (if any) that those rules require to be completed and delivered.
- (5) A company need not comply:
- (a) with subsection (1) in relation to the issue of a security; or
 - (b) with subsection (3) in relation to a transfer of a security;
- if the person to whom the security is issued, or the transferee, has:
- (c) applied to ASIC for the making of a declaration under this subsection; and
 - (d) been declared by ASIC, by writing published in the *Gazette*, to be a person in relation to whom this section does not apply.
- (6) If:
- (a) either:
 - (i) if subsection (1) applies—the holder referred to in that subsection serves a notice on the company requiring the company to remedy a contravention of that subsection; or
 - (ii) if subsection (3) applies—the transferee referred to in that subsection serves a notice on the company requiring the company to remedy a contravention of that subsection; and
 - (b) the company fails to remedy the contravention within 10 days after the service of the notice; and

Section 1072A

- (c) the person entitled to have the documents delivered to him or her applies to the Court for an order under this subsection; the Court may make an order directing the company and any officer or employee of the company to remedy the contravention within such period as is specified in the order.
- (7) An order under subsection (6) may provide that all costs of, and incidental to, the application are to be borne by:
- (a) the company; or
 - (b) any officer or employee of the company who was involved in the contravention;
- in such proportions as the Court thinks just and reasonable.

Subdivision B—Special provisions for shares**1072A Transmission of shares on death** (*replaceable rule—see section 135*)*If shares not held jointly*

- (1) If a shareholder who does not own shares jointly dies, the company will recognise only the personal representative of the deceased shareholder as being entitled to the deceased shareholder's interest in the shares.
- (2) If the personal representative gives the directors the information they reasonably require to establish the representative's entitlement to be registered as holder of the shares:
 - (a) the personal representative may:
 - (i) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or
 - (ii) by giving a completed transfer form to the company, transfer the shares to another person; and
 - (b) the personal representative is entitled, whether or not registered as the holder of the shares, to the same rights as the deceased shareholder.
- (3) On receiving an election under subparagraph (2)(a)(i), the company must register the personal representative as the holder of the shares.

Section 1072B

- (4) A transfer under subparagraph (2)(a)(ii) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

If shares held jointly

- (5) If a shareholder who owns shares jointly dies, the company will recognise only the survivor as being entitled to the deceased shareholder's interest in the shares. The estate of the deceased shareholder is not released from any liability in respect of the shares.

1072B Transmission of shares on bankruptcy (*replaceable rule—see section 135*)

- (1) If a person entitled to shares because of the bankruptcy of a shareholder gives the directors the information they reasonably require to establish the person's entitlement to be registered as holder of the shares, the person may:
- (a) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or
 - (b) by giving a completed transfer form to the company, transfer the shares to another person.
- (2) On receiving an election under paragraph (1)(a), the company must register the person as the holder of the shares.
- (3) A transfer under paragraph (1)(b) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.
- (4) This section has effect subject to the *Bankruptcy Act 1966*.

1072C Rights of trustee of estate of bankrupt shareholder

- (1) If:
- (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.

Section 1072C

- (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:
 - (i) meetings of the company; or
 - (ii) documents, including notices of such meetings; or
 - (iii) voting; or
 - (iv) inspection of the company's records;
- 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;
- 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.
- (6) If:
- (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
 - (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.
-

Section 1072D

- (7) 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).
- (8) Nothing in this section limits the generality of anything else in it.
- (9) This section has effect despite anything in the company's constitution.

1072D Transmission of shares on mental incapacity (*replaceable rule—see section 135*)

- (1) If a person entitled to shares because of the mental incapacity of a shareholder gives the directors the information they reasonably require to establish the person's entitlement to be registered as the holder of the shares:
 - (a) the person may:
 - (i) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or
 - (ii) by giving a completed transfer form to the company, transfer the shares to another person; and
 - (b) the person is entitled, whether or not registered as the holder of the shares, to the same rights as the shareholder.
- (2) On receiving an election under subparagraph (1)(a)(i), the company must register the person as the holder of the shares.
- (3) A transfer under subparagraph (1)(a)(ii) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

Section 1072E**1072E Trustee etc. may be registered as owner of shares**

- (1) In this section:

share, in relation to a body corporate, means a share in the body that is registered in a register kept in this jurisdiction.

- (2) A trustee, executor or administrator of the estate of a dead person who was the registered holder of a share in a corporation may be registered as the holder of that share as trustee, executor or administrator of that estate.
- (3) A trustee, executor or administrator of the estate of a dead person who was entitled in equity to a share in a corporation may, with the consent of:
- (a) the corporation; and
 - (b) the registered holder of that share;
- be registered as the holder of that share as trustee, executor or administrator of that estate.

- (4) If:

- (a) a person (the *administrator*) is appointed, under a law of a State or Territory relating to the administration of the estates of persons who, through mental or physical infirmity, are incapable of managing their affairs, to administer the estate of a person who is so incapable; and
- (b) the incapable person is the registered holder of a share in a corporation;

the administrator may be registered as the holder of that share as administrator of that estate.

- (5) If:

- (a) a person (the *administrator*) is appointed, under a law of a State or Territory relating to the administration of the estates of a person who, through mental or physical infirmity, are incapable of managing their affairs, to administer the estate of a person who is so incapable; and
- (b) the incapable person is entitled in equity to a share in a corporation;

the administrator may, with the consent of the corporation and of the registered holder of that share, be registered as the holder of the share as administrator of that estate.

Section 1072E

- (6) If:
- (a) by virtue of the *Bankruptcy Act 1966*, a share in a body corporate, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy; and
 - (b) the bankrupt is the registered holder of that share;
- the Official Trustee may be registered as the holder of that share as the Official Trustee in Bankruptcy.
- (7) If:
- (a) by virtue of the *Bankruptcy Act 1966*, a share in a body corporate, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy; and
 - (b) the bankrupt is entitled in equity to that share;
- the Official Trustee may, with the consent of the body and of the registered holder of that share, be registered as the holder of that share as the Official Trustee in Bankruptcy.
- (8) A person registered under subsection (2), (3), (4), (5), (6) or (7), is, while registered as mentioned in that subsection:
- (a) subject to the same liabilities in respect of the share as those to which he, she or it would have been subject if the share had remained, or had been, as the case requires, registered in the name of the dead person, the incapable person or the bankrupt, as the case may be; and
 - (b) subject to no other liabilities in respect of the share.
- (9) Shares in a corporation registered in a register and held by a trustee in respect of a particular trust may, with the consent of the corporation, be marked in the register in such a way as to identify them as being held in respect of the trust.
- (10) Except as provided in this section and section 169:
- (a) no notice of a trust, whether express, implied or constructive, must be entered on a register kept in this jurisdiction or be receivable by ASIC; and
 - (b) no liabilities are affected by anything done under a preceding subsection of this section or under section 169; and
 - (c) nothing so done affects the body corporate concerned with notice of a trust.

Section 1072F

- (11) A person must, within one month after beginning to hold shares in a proprietary company as trustee for, or otherwise on behalf of or on account of, a body corporate, serve on the company notice in writing that the person so holds the shares.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1072F Registration of transfers (*replaceable rule—see section 135*)

- (1) A person transferring shares remains the holder of the shares until the transfer is registered and the name of the person to whom they are being transferred is entered in the register of members in respect of the shares.
- (2) The directors are not required to register a transfer of shares in the company unless:
- (a) the transfer and any share certificate have been lodged at the company's registered office; and
 - (b) any fee payable on registration of the transfer has been paid; and
 - (c) the directors have been given any further information they reasonably require to establish the right of the person transferring the shares to make the transfer.
- (3) The directors may refuse to register a transfer of shares in the company if:
- (a) the shares are not fully-paid; or
 - (b) the company has a lien on the shares.
- (4) The directors may suspend registration of transfers of shares in the company at the times and for the periods they determine. The periods of suspension must not exceed 30 days in any one calendar year.

1072G Additional general discretion for directors of proprietary companies to refuse to register transfers (*replaceable rule—see section 135*)

The directors of a proprietary company may refuse to register a transfer of shares in the company for any reason.

Section 1072H

1072H Notices relating to non-beneficial and beneficial ownership of shares

- (1) If, upon registration of a transfer of shares in a company, the transferee would hold non-beneficially particular shares (the **relevant shares**), being all or any of the shares to which the transfer relates, the transferee must only lodge the instrument of transfer with the company for registration of the transfer if the instrument of transfer includes a notice that:

- (a) contains a statement to the effect that, upon registration of the transfer, the transferee will hold the relevant shares non-beneficially; and
- (b) sets out particulars of the relevant shares; and
- (c) is signed by or on behalf of the transferee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The fact that a person has failed to comply with subsection (1) does not affect the validity of the registration of a transfer of shares in a company.

- (3) If:

- (a) an instrument of transfer of shares in a company includes a notice of the kind referred to in paragraph (1)(c) and is lodged with the company for registration of the transfer; and
- (b) upon registration of the transfer, the transferee holds beneficially particular shares (in this subsection called the **relevant shares**), being all or any of the shares particulars of which are set out in the notice;

then, before the end of 14 days beginning on registration of the transfer, the transferee must, whether or not the transferee begins before the end of that period to hold all or any of the relevant shares non-beneficially, give to the company a notice that:

- (c) sets out the name and address of the transferee; and
- (d) contains a statement to the effect that, as from registration of the transfer, the transferee holds the relevant shares beneficially; and
- (e) sets out particulars of the relevant shares; and
- (f) is signed by or on behalf of the transferee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 1072H

(4) If:

- (a) an instrument of transfer of shares in a company is lodged with the company for registration of the transfer; and
- (b) upon registration of the transfer, the transferee holds non-beneficially particular shares (in this subsection called the **relevant shares**), being all or any of the shares to which the instrument of transfer relates (other than, in a case in which the instrument of transfer includes a notice of the kind referred to in paragraph (1)(c), the shares particulars of which are set out in the notice);

then, before the end of 14 days beginning on registration of the transfer, the transferee must, whether or not the transferee begins before the end of that period to hold any of the relevant shares beneficially, give to the company a notice that:

- (c) sets out the name and address of the transferee; and
- (d) contains a statement to the effect that, as from registration of the transfer, the transferee holds the relevant shares non-beneficially; and
- (e) sets out particulars of the relevant shares; and
- (f) is signed by or on behalf of the transferee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) If:

- (a) at a particular time, a person holds beneficially shares in a company; and
- (b) immediately after that time, the person holds non-beneficially particular shares (in this subsection called the **relevant shares**), being all or any of the shares referred to in paragraph (a);

then, before the end of 14 days beginning at that time, the person must, whether or not the person recommences before the end of that period to hold any of the relevant shares beneficially, give to the company a notice that:

- (c) sets out the name and address of the person; and
- (d) contains a statement to the effect that, after that time, the person holds the relevant shares non-beneficially; and
- (e) specifies that time and sets out particulars of the relevant shares; and
- (f) is signed by or on behalf of the person.

Section 1072H

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(6) If:

- (a) at a particular time, a person holds non-beneficially shares in a company; and
- (b) immediately after that time, the person holds beneficially particular shares (in this subsection called the **relevant shares**), being all or any of the shares referred to in paragraph (a);

then, before the end of 14 days beginning at that time, the person must, whether or not the person recommences before the end of that period to hold any of the relevant shares non-beneficially, give to the company a notice that:

- (c) sets out the name and address of the person; and
- (d) contains a statement to the effect that, after that time, the person holds the relevant shares beneficially; and
- (e) specifies that time and sets out particulars of the relevant shares; and
- (f) is signed by or on behalf of the person.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7) In proceedings under, or for an offence based on a provision of, this section, a person is, unless the contrary is established, presumed to have been aware at a particular time of a circumstance of which an employee or agent of the person, being an employee or agent having duties or acting in relation to the transfer to, or ownership by, the person of a share or shares in the company concerned, was aware at that time.

(8) For the purposes of this section and of section 169:

- (a) if, at a particular time, a person:
 - (i) holds shares in a capacity other than that of sole beneficial owner; or
 - (ii) without limiting the generality of subparagraph (i), holds shares as trustee for, as nominee for, or otherwise on behalf of or on account of, another person;the first-mentioned person is taken to hold the shares non-beneficially at that time; and

Section 1072H

- (b) a person who holds shares at a particular time is taken to hold the shares beneficially at that time unless the person holds the shares non-beneficially at that time.

Section 1073A

**Division 3—Transfer of certain securities effected
otherwise than through a prescribed CS facility**

1073A Application of the Division to certain securities

- (1) This Division applies to the following securities:
 - (a) shares in a company;
 - (b) debentures of a company;
 - (c) interests in a registered scheme, being interests that are covered by regulations made for the purposes of this paragraph;
 - (d) rights (whether existing or future, and whether contingent or not) to acquire, by way of issue, a security referred to in paragraph (a), (b) or (c) (whether or not on payment of any money or for any other consideration);
 - (e) securities declared by ASIC under section 1073E to be securities to which the regulations apply.
- (2) This Division applies to an interest in a registered scheme as if:
 - (a) references to a company were instead references to the responsible entity of the registered scheme; and
 - (b) references to the constitution of a company were instead references to the constitution of the registered scheme; and
 - (c) references to members of a company were instead references to members of the registered scheme.

1073B Definitions

In this Division, unless the contrary intention appears:

transfer of a financial product means:

- (a) a change in the ownership of the financial product; or
- (b) if the financial product is a right—the renunciation and transfer of the right.

transfer document for the transfer of a financial product means a document, or electronic message or other electronic communication, by which the financial product is transferred.

1073C Application of Division to certain bodies as if they were companies

This Division applies to the following as if they were companies:

- (a) a body corporate (other than a company) that:
 - (i) is incorporated in a State or Territory in this jurisdiction; and
 - (ii) is prescribed by regulations made for the purposes of this subparagraph;
- (b) an unincorporated society, association or body, that:
 - (i) is formed or established in a State or Territory in this jurisdiction; and
 - (ii) is included in the official list of a licensed market; and
 - (iii) is prescribed by regulations made for the purposes of this paragraph.

1073D Regulations may govern transfer of certain securities

- (1) The regulations may make provision in relation to transfers of securities that are not effected through a prescribed CS facility.

Regulations may make provision in relation to the transfer of securities

- (2) The regulations may specify:
 - (a) the way in which a security may be transferred, including:
 - (i) the forms (if any) to be used; and
 - (ii) what amounts to a proper or sufficient transfer of a security; and
 - (b) the legal effect of a proper or sufficient transfer of a security; and
 - (c) the rights, liabilities and obligations of a person in relation to the transfer of a security, including the rights, liabilities and obligations of:
 - (i) the transferor and transferee; and
 - (ii) any other person involved in the transfer; and
 - (d) the circumstances in which a person will be taken to be involved in the transfer of a security for the purposes of the regulations; and

Section 1073D

- (e) the circumstances in which a person is required not to register, or give effect to, a transfer.

Sufficient transfer

- (3) Without limiting paragraph (2)(a), the regulations may:
 - (a) specify the requirements for a document to be a sufficient transfer of a security; and
 - (b) provide that a document meeting specified requirements may be used:
 - (i) as a proper instrument of transfer for the purposes of section 1071B; and
 - (ii) as an instrument of transfer for the purposes of any other law or instrument governing or relating to the security.

Rights and liabilities in relation to transfer

- (4) Without limiting paragraph (2)(c), the regulations may provide that a person:
 - (a) is taken to have:
 - (i) agreed to do, to accept or to be bound by a particular thing; or
 - (ii) done a particular thing; or
 - (iii) given particular warranties; or
 - (iv) done particular things on behalf of another person; or
 - (b) is taken to be authorised to do particular things on behalf of another person; or
 - (c) is taken to be bound by a particular act; or
 - (d) is liable to indemnify another person against particular loss or damage; or
 - (e) is entitled to assume a particular matter without inquiry.

Person involved in transfer

- (5) Without limiting paragraph (2)(d), the regulations may provide for any of the following to be taken to be involved in a transfer of securities:
 - (a) a person who carries on a financial services business and who arranges for the transfer; and

Section 1073E

- (b) a person who operates a financial market on which the securities are sold; and
- (c) a person who operates a licensed CS facility through which the securities are transferred; and
- (d) a company with which the transfer is lodged for registration; and
- (e) an associate of a person who is involved in the transfer.

The regulations may specify the circumstances in which a person will be taken to be an associate of another person for the purposes of the regulations.

Offences

- (6) Without limiting subsection (2), the regulations may provide for offences in relation to:
 - (a) the use, or purported use, of a stamp of a person who:
 - (i) carries on a financial services business; or
 - (ii) operates a financial market; or
 - (iii) operates a clearing and settlement facility; or
 - (b) the execution of a document, or the transmission of an electronic message or other electronic communication, that may be used as a sufficient transfer under this Division; or
 - (c) the lodgment of a transfer document or title document for a security with the issuer of the security; or
 - (d) the use of identifying codes in relation to transfers of securities.

Jurisdiction

- (7) The regulations may apply to conduct engaged in in this jurisdiction or elsewhere.

1073E ASIC may extend regulations to securities not otherwise covered

- (1) ASIC may, by writing, declare that:
 - (a) particular securities; or
 - (b) a particular class of securities;are securities to which this Division, and regulations made for the purposes of section 1073D, apply.

Section 1073F

Note: The securities in respect of which a declaration under this subsection may be made are not limited to those covered by paragraphs 1073A(1)(a) to (d).

- (2) ASIC may specify in the declaration modifications of the regulations that are to have effect in relation to the application of this Division and the regulations to the securities, or the class of securities, to which the declaration relates.
- (3) A declaration under subsection (1) has effect accordingly.
- (4) ASIC must cause a copy of a declaration under subsection (1) to be published in the *Gazette*.
- (5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under subsection (1) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (4)):
 - (a) the text of the declaration was made available by ASIC on the Internet; or
 - (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

1073F Operation of this Division and regulations made for its purposes

- (1) This section deals with the effect of the provisions of:
 - (a) this Division; and
 - (b) the regulations made for the purposes of this Division.
- (2) The provisions apply in relation to a transfer of securities despite anything to the contrary in:
 - (a) this Act (other than this Division); or
 - (b) another law, or instrument, relating to the transfer of the securities.
- (3) Except as provided in the provisions, the provisions do not affect the terms and conditions on which securities are sold.

Section 1073F

- (4) Nothing in the provisions affects any right of the issuer of a security to refuse:
 - (a) to acknowledge or register a person as the holder of a security; or
 - (b) to issue a security to a person;
on a ground other than an objection to the form of document, or electronic message or other electronic communication, that is lodged with or sent to the issuer and purports to transfer the security to the person.
- (5) The registration of a transfer, or the issue, of a security by means of a transfer effected in accordance with regulations made for the purposes of this Division does not breach any law, constitution, trust deed or other instrument relating to financial products.
- (6) Nothing in the provisions prevents or affects the use of:
 - (a) any other form of transfer of securities; or
 - (b) any other mode of executing a document transferring securities;that is otherwise permitted by law.
- (7) A transfer of a security by or to a trustee or legal representative may be effected by means of a transfer in accordance with regulations made for the purposes of this Division. The transfer may be so effected despite the means required by any law or the provisions of the instrument (if any) creating, or having effect in relation to, the trust or will under which the trustee or legal representative is appointed.
- (8) In subsection (7):
legal representative means:
 - (a) the executor, original or by representation, of a will of a dead person; or
 - (b) the administrator of the estate of a dead person.

Section 1074A

Division 4—Transfer of financial products effected through prescribed CS facility

1074A Financial products to which this Division applies

This Division only applies in relation to particular financial products and a prescribed CS facility if regulations made for the purposes of this section provide that all financial products, or a class of financial products that includes the financial products, are financial products to which this Division applies in relation to the prescribed CS facility (whether or not they are also products to which this Division applies in relation to other prescribed CS facilities).

1074B Definitions

In this Division, unless the contrary intention appears:

transfer of a financial product has the meaning given by section 1073B.

transfer document for the transfer of a financial product has the meaning given by section 1073B.

1074C Operating rules of prescribed CS facility may deal with transfer of title

- (1) The operating rules of a prescribed CS facility may deal with the transfer of financial products through the facility.
- (2) Without limiting subsection (1), the operating rules of a prescribed CS facility may deal with the way in which a financial product may be transferred, including specifying:
 - (a) the financial products that may be transferred through the facility; and
 - (b) how financial products are transferred through the facility; and
 - (c) the person or body (if any) authorised to determine whether a transfer substantially complies with the operating rules of the facility.

Section 1074D

- (3) Nothing in subsection (1) or (2) confers a discretion to deal with a matter in the operating rules of a prescribed CS facility if there is an obligation under section 822A for that matter to be dealt with in those rules.

1074D Valid and effective transfer if operating rules complied with

- (1) If a transfer of a financial product is effected:
- (a) through a prescribed CS facility; and
 - (b) in accordance with the operating rules of the facility;
- the transfer is valid and effective for the purposes of any law or instrument governing or relating to the way in which the financial product may be transferred.
- (2) For the purposes of this section, the transfer of a financial product is taken to be, and always to have been, effected in accordance with the operating rules of a prescribed CS facility if the person or body authorised to do so under those rules determines that the transfer substantially complies with those rules.

1074E Regulations may govern transfer of financial products in accordance with operating rules of prescribed CS facility

Transfers that regulations may deal with

- (1) The regulations may make provision in relation to transfers of financial products effected:
- (a) through a prescribed CS facility; and
 - (b) in accordance with the operating rules of the facility.

Regulations may make provision in relation to the transfer of financial products

- (2) The regulations may specify:
- (a) the legal effect of a transfer of a financial product through the facility in accordance with its operating rules; and
 - (b) the rights, liabilities and obligations of a person in relation to the transfer of a financial product through the facility, including the rights, liabilities and obligations of:
 - (i) the transferor and transferee; and
 - (ii) any other person involved in the transfer; and

Section 1074E

- (c) the circumstances in which a person will be taken to be involved in the transfer of a financial product for the purposes of the regulations; and
- (d) the circumstances in which a person is required not to register, or give effect to, a transfer through the facility; and
- (e) the circumstances in which a person is required not to refuse or fail to register, or give effect to, a transfer through the facility; and
- (f) the circumstances in which a transfer through the facility will be taken to have been made in accordance with the rules of a prescribed CS facility; and
- (g) the circumstances in which a person will be taken to be the holder of a financial product for the purposes of:
 - (i) a meeting; or
 - (ii) paying or transferring money or property to a person because the person holds or held a financial product; or
 - (iii) issuing a financial product to a person because the person holds or held a financial product; or
 - (iv) conferring a right on a person because the person holds or held a financial product.

Rights and liabilities in relation to transfer

- (3) Without limiting paragraph (2)(b), the regulations may provide that a person:
 - (a) is taken to have:
 - (i) agreed to do, to accept or to be bound by a particular thing; or
 - (ii) done a particular thing; or
 - (iii) given particular warranties; or
 - (iv) done particular things on behalf of another person; or
 - (b) is taken to be authorised to do particular things on behalf of another person (even if the person has died); or
 - (c) is taken to be bound by a particular act; or
 - (d) is liable to indemnify another person against particular loss or damage; or
 - (e) is entitled to assume a particular matter without inquiry.

Person involved in transfer

- (4) Without limiting paragraph (2)(c), the regulations may provide for any of the following to be taken to be involved in a transfer of a financial product:
- (a) a person who carries on a financial services business and who arranges for the transfer;
 - (b) a person who operates a financial market on which the financial product is sold;
 - (c) a person who operates a licensed CS facility through which the product is transferred;
 - (d) the issuer of the product;
 - (e) an associate of a person who is involved in the transfer.

The regulations may specify the circumstances in which a person will be taken to be an associate of another person for the purposes of the regulations.

Offences

- (5) Without limiting subsection (2), the regulations may provide for offences in relation to:
- (a) the lodgment of a transfer document or title document for a financial product with the issuer of the product; or
 - (b) the use of identifying codes in relation to transfers of financial products; or
 - (c) contraventions of the operating rules of a prescribed CS facility.

Civil liability

- (6) The regulations may also:
- (a) provide for the liability of a person who contravenes the operating rules of a prescribed CS facility to compensate a person for loss or damage the person suffers because of the conduct engaged in in contravention of those rules; and
 - (b) specify the period within which an action for compensation must be begun.
- (7) The regulations do not affect a liability that a person has under any other law.

Section 1074F

Jurisdiction

- (8) The regulations may apply to conduct engaged in in this jurisdiction or elsewhere.

1074F Issuer protected from civil liability for person's contravention of prescribed CS facility's certificate cancellation rules

If:

- (a) a person contravenes the certificate cancellation provisions of a prescribed CS facility in relation to the transfer of a particular financial product through the facility; and
- (b) the issuer of the financial product is not involved in the contravention;

the issuer is not liable to an action or other proceeding for damages in relation to the person's contravention.

1074G Operation of this Division and regulations made for its purposes

- (1) This section deals with the effect of the provisions of:
 - (a) this Division; and
 - (b) the regulations made for the purposes of this Division.
- (2) The provisions apply in relation to a transfer of financial products despite anything to the contrary in:
 - (a) this Act (other than this Division); or
 - (b) another law, or instrument, relating to the transfer of the financial products.
- (3) Except as provided in the provisions, the provisions do not affect the terms and conditions on which financial products are sold.
- (4) Nothing in the provisions (other than in regulations made for the purpose of paragraph 1074E(2)(e)) affects any right of the issuer of a financial product to refuse:
 - (a) to acknowledge or register a person as the holder of a financial product; or
 - (b) to issue a financial product to a person;on a ground other than an objection to the form of document, or electronic message or other electronic communication, that is

lodged with or sent to the issuer and purports to transfer the financial product to the person.

- (5) The registration of a transfer, or the issue, of a financial product by means of a transfer effected in accordance with the operating rules of a prescribed CS facility does not breach any law, constitution, trust deed or other instrument relating to financial products.
- (6) Nothing in the provisions (other than in regulations made for the purpose of paragraph 1074E(2)(d)) prevents or affects the use of:
 - (a) any other form of transfer of financial products; or
 - (b) any other mode of executing a document transferring financial products;that is otherwise permitted by law.
- (7) A transfer of a financial product by or to a trustee or legal representative may be effected by means of a transfer in accordance with the operating rules of a prescribed CS facility despite any law or the provisions of the instrument (if any) creating, or having effect in relation to, the trust or will under which the trustee or legal representative is appointed.
- (8) In subsection (7):
legal representative means:
 - (a) the executor, original or by representation, of a will of a dead person; or
 - (b) the administrator of the estate of a dead person.

Division 5—Exemptions and modifications

1075A ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt specified financial products, or a specified class of financial products, from a provision of this Part; or
 - (b) declare that this Part applies to specified financial products, or a specified class of financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) ASIC's power to grant an exemption or make a declaration under this section may be exercised in relation to financial products, or a class of financial products, only if ASIC is satisfied that:
 - (a) if the exemption were granted or the declaration were made, the interests of the holders of those financial products, or of financial products in that class, would continue to have adequate protection; and
 - (b) the granting of the exemption or the making of the declaration would make the transfer of those financial products, or of financial products in that class, more efficient.
- (3) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Part; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all financial products, specified financial products or a specified class of financial products; and
 - (d) relate to any other matter generally or as specified.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

Section 1075A

- (6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(b) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (5)):

- (a) the text of the declaration was made available by ASIC on the Internet; or
- (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

- (7) For the purposes of this section, the *provisions of this Part* include:
- (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
 - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

Part 7.12—Miscellaneous

Division 1—Qualified privilege

1100A Qualified privilege for information given to ASIC

- (1) A person has qualified privilege in respect of the giving of any information to ASIC that the person is required to give under this Chapter or regulations made for the purposes of this Chapter.
- (2) A person or body that is:
 - (a) a market licensee; or
 - (b) a CS facility licensee; or
 - (c) a person acting under an arrangement to supervise a licensed market or licensed facility; or
 - (d) a foreign person or body responsible for the supervision of the operation in a foreign country of a financial market or clearing and settlement facility;also has qualified privilege in respect of the giving of any information to ASIC in connection with the performance or exercise of ASIC's functions or powers under, or in relation to, this Chapter or regulations made for the purposes of this Chapter.
- (3) A person or body that has qualified privilege under subsection (1) or (2) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

1100B Qualified privilege for the conduct of market licensees and CS facility licensees

- (1) A market licensee, or CS facility licensee, has qualified privilege in respect of actions (including the giving of information) done in connection with:
 - (a) the performance, or purported performance, of the licensee's obligations under this Act; or
 - (b) the exercise or performance, or purported exercise or performance, of the licensee's powers, functions or obligations under the operating rules of the market or facility

Section 1100B

concerned, if the licensee believes, on reasonable grounds, that the action is necessary:

- (i) in the case of a market licensee—to ensure the market operates in a fair, orderly and transparent way; or
- (ii) in the case of a CS facility licensee—to ensure the facility's services are provided in a fair and effective manner or to reduce systemic risk in the provision of those services.

- (2) A market licensee, or CS facility licensee, has qualified privilege in respect of the giving of information:
 - (a) to the operator of a financial market (regardless of where the market is operated) for the purpose of assisting the operator to ensure that market operates in a fair, orderly and transparent way; or
 - (b) to the operator of a clearing and settlement facility (regardless of where the facility is operated) for the purpose of assisting the operator to ensure that facility's services are provided in a fair and effective manner or to reduce systemic risk.
- (3) Despite subsections (1) and (2), a market licensee does not have qualified privilege in respect of the giving of information if:
 - (a) an entity included on the market's official list gave the information to the licensee under a provision of this Act or of the market's operating rules; and
 - (b) this Act, or those rules, expressly or impliedly authorised the entity to limit the purposes for which it gave the information to the licensee; and
 - (c) when giving the information to the licensee, the entity limited those purposes as so authorised; and
 - (d) the giving of the information by the licensee is not solely for one or more of the limited purposes.
- (4) The protections given by this section apply to the giving of information whether or not the recipient of the information has an interest in the information.

Section 1100C

1100C Qualified privilege for information given to market licensees and CS facility licensees etc.

A person has qualified privilege in respect of the giving of information if:

- (a) the person gives the information to any of the following persons or bodies:
 - (i) a market licensee;
 - (ii) a CS facility licensee;
 - (iii) a person acting under an arrangement to supervise a licensed market or licensed CS facility;
 - (iv) a foreign person or body responsible for the supervision of the operation in a foreign country of a financial market or clearing and settlement facility; and
- (b) the information is in relation to a contravention or suspected contravention of this Act or the operating rules of the market or facility concerned.

1100D Extension of protections given by this Division

The protections given by this Division to a person or body in respect of conduct extend to officers, employees and representatives of the person or body.

Division 2—Other matters**1101A Approved codes of conduct**

- (1) ASIC may, on application, approve codes of conduct that relate to any aspect of the activities of:
 - (a) financial services licensees; or
 - (b) authorised representatives of financial services licensees; or
 - (c) issuers of financial products;being activities in relation to which ASIC has a regulatory responsibility. The approval must be in writing.
- (2) ASIC may, on application, approve a variation of an approved code of conduct. The approval must be in writing.
- (3) ASIC must not approve a code of conduct, or a variation of a code of conduct, unless it is satisfied that:
 - (a) the code, or the code as proposed to be varied, is not inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and
 - (b) it is appropriate to approve the code, having regard to the following matters, and to any other matters that ASIC considers are relevant:
 - (i) the ability of the applicant to ensure that persons who hold out that they comply with the code will comply with the code as in force from time to time; and
 - (ii) the desirability of codes of conduct being harmonised to the greatest extent possible.
- (4) ASIC may revoke an approval of a code of conduct:
 - (a) on application by the person who applied for the approval; or
 - (b) if ASIC is no longer satisfied as mentioned in subsection (3).The revocation must be in writing.

Section 1101B

1101B Power of Court to make certain orders

Court's power to make orders in relation to certain contraventions

- (1) The Court may make such order, or orders, as it thinks fit if:
- (a) on the application of ASIC, it appears to the Court that a person:
 - (i) has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services; or
 - (ii) has contravened a condition of an Australian market licence, Australian CS facility licence or Australian financial services licence; or
 - (iii) has contravened a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility; or
 - (v) has contravened a condition on an exemption from the requirement to hold an Australian market licence or an Australian CS facility licence; or
 - (vi) is about to do an act with respect to dealing in financial products or providing a financial service that, if done, would be such a contravention; or
 - (b) on the application of a market licensee, it appears to the Court that a person has contravened the operating rules, or the compensation rules (if any), of a licensed market operated by the licensee; or
 - (c) on the application of a CS facility licensee, it appears to the Court that a person has contravened a provision of the operating rules of a licensed CS facility operated by the licensee; or
 - (d) on the application of a person aggrieved by an alleged contravention by another person of a provision of the operating rules, or the compensation rules (if any), of a licensed market, it appears to the Court that:
 - (i) the other person did contravene the provision or condition; and
 - (ii) the applicant is aggrieved by the contravention.

However, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person.

Note: For examples of orders the Court could make, see subsection (4).

Section 1101B

- (2) For the purposes of paragraph (1)(d), if a body corporate contravenes a provision of the operating rules of a licensed market, a person who holds financial products of the body corporate that are able to be traded on the licensed market is taken to be a person aggrieved by the contravention.
- (3) Subsection (2) does not limit the circumstances in which a person may be aggrieved by a contravention for the purposes of paragraph (1)(d).

Examples of orders the Court may make

- (4) Without limiting subsection (1), some examples of orders the Court may make under subsection (1) include:
 - (a) an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to financial products or financial services, if the person has persistently contravened, or is continuing to contravene:
 - (i) a provision or provisions of this Chapter; or
 - (ii) a provision or provisions of any other law relating to dealing in financial products or providing financial services; or
 - (iii) a condition on an Australian market licence, Australian CS facility licence or Australian financial services licence; or
 - (v) a condition of an exemption from a requirement to hold an Australian market licence or Australian CS facility licence; or
 - (vi) a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility; or
 - (b) an order giving directions about complying with a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility to a person (or the directors of the body corporate, if the person is a body corporate) who contravened the provision; and
 - (c) an order requiring a person to disclose to the public or to specified persons, in accordance with the order, specified information that the person to whom the order is directed possesses or to which that person has access, if the person:

Section 1101B

- (i) contravened a provision of the operating rules of a licensed market or a condition relating to the disclosure or provision of information; or
 - (ii) was involved in such a contravention; and
- (d) an order requiring a person to publish advertisements in accordance with the order at that person's expense, if the person:
 - (i) contravened a provision of the operating rules of a licensed market, or a condition relating to the disclosure or provision of information; or
 - (ii) was involved in such a contravention; and
- (e) an order restraining a person from acquiring, disposing of or otherwise dealing with any financial products that are specified in the order; and
- (f) an order restraining a person from providing any financial services that are specified in the order; and
- (g) an order appointing a receiver of property (see subsection (9)) of a financial services licensee; and
- (h) an order declaring a contract relating to financial products or financial services to be void or voidable; and
- (i) an order directing a person to do or refrain from doing a specified act, if that order is for the purpose of securing compliance with any other order under this section; and
- (j) any ancillary order considered to be just and reasonable in consequence of the making of an order under any of the preceding provisions of this subsection.

Interim orders

- (5) Before considering an application to the Court under subsection (1), the Court may make an interim order of the kind applied for to apply pending the determination of the application, if in the opinion of the Court it is desirable to do so.
- (6) However, if ASIC, a market licensee or a CS facility licensee applies for an order under subsection (1), the Court must not require the applicant, or any other person, to give any undertakings as to damages as a condition of making an interim order under subsection (5).

Section 1101B*Power to give notice of applications*

- (7) Before making an order under subsection (1), the Court may do either or both of the following:
- (a) direct that notice of the application be given to such persons as it thinks fit;
 - (b) direct that notice of the application be published in such manner as it thinks fit.

Powers of receivers appointed under Court orders

- (8) A person appointed by order of the Court under subsection (1) as a receiver of the property (see subsection (12)) of a financial services licensee:
- (a) may require the financial services licensee to:
 - (i) deliver to the person any property of which the person has been appointed receiver; or
 - (ii) give to the person all information concerning that property that may reasonably be required; and
 - (b) may acquire and take possession of any property of which the person has been appointed receiver; and
 - (c) may deal with any property that the person has acquired, or of which the person has taken possession, in any way in which the financial services licensee might lawfully have dealt with the property; and
 - (d) has such other powers in respect of the property as the Court specifies in the order.

Duty to comply with order

- (10) A person must not, without reasonable excuse, contravene:
- (a) an order under this section; or
 - (b) a requirement imposed under paragraph (8)(a) or (8)(d) by a receiver appointed by order of the Court under subsection (1).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 1101C

Power to rescind or vary order

- (11) The Court may rescind or vary an order made by it under this section or suspend the operation of such an order.
- (12) In this section:

compensation rules has the same meaning as in Part 7.5.

property, in relation to a financial services licensee, includes:

- (a) money; or
- (b) financial products; or
- (c) documents of title to financial products; or
- (d) other property;

entrusted to, or received on behalf of, any other person by the financial services licensee or another person in the course of, or in connection with, a financial services business carried on by the financial services licensee.

1101C Preservation and disposal of records etc.

Registers

- (1) A person who is required by a provision of this Chapter to keep a register in relation to a business carried on by the person must preserve it for 5 years after the day on which the last entry was made in the register.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Financial records

- (2) A person who is required by a provision of this Chapter to keep any financial record in relation to a business carried on by the person must preserve it for 7 years after the transactions covered by the record are completed.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 1101D*Other records*

- (3) A person who is required by a provision of this Chapter or the regulations to keep any other record must preserve it for 5 years after the day on which the last entry was made in the record.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Exceptions

- (4) Registers and records must be preserved in accordance with this section (even if the person stops carrying on the business to which they relate during the period for which they must be preserved), unless:
- (a) the regulations provide that those documents, or a class to which they belong, need not be preserved; and
 - (b) any conditions specified in or under those regulations have been complied with.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

1101D Destruction of records by ASIC

ASIC may destroy or otherwise dispose of any document that is lodged under, or for the purposes of, a provision of this Chapter if:

- (a) ASIC is of the opinion that it is no longer necessary or desirable to retain it; and
- (b) it has been in the possession of ASIC for such period as is specified in the regulations, either generally or in relation to a particular document or class of documents.

1101E Concealing etc. of books

- (1) A person must not:
- (a) conceal, destroy, mutilate or alter a book:
 - (i) relating to the business carried on by a financial services licensee or an authorised representative of such a licensee; or
 - (ii) required under a provision of this Chapter to be kept by a market licensee, a CS facility licensee, a financial services licensee or an authorised representative of a financial services licensee; or

Section 1101F

- (b) send such a book out of this jurisdiction.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) In any proceedings against a person for an offence based on subsection (1), it is a defence if the person did not act with intent to:
 - (a) defraud; or
 - (b) defeat the objects of this Chapter; or
 - (c) prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power, under this Chapter.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

1101F Falsification of records

- (1A) A person must not engage in conduct that results in the falsification of:
 - (a) a book required to be kept by a provision of this Chapter; or
 - (b) a register or any accounting or other record referred to in section 1101C.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (1) If matter that is used, or intended to be used, in connection with:
 - (a) the keeping of a book required to be kept by a provision of this Chapter; or
 - (b) a register or any accounting or other record referred to in section 1101C;is recorded or stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person must not:
 - (c) record or store by means of that device matter that the person knows to be false in a material particular or materially misleading; or
 - (d) destroy, remove or falsify matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling other matter to be recorded or stored, by means of that device; or

Section 1101G

- (e) fail to record or store matter by means of that device, with intent to falsify any entry made or intended to be compiled, wholly or in part, from that matter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) In any proceedings against a person for an offence based on subsection (1A) or (1), it is a defence if it is proved that the person acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

1101G Precautions against falsification of records

A person required by a provision of this Chapter to keep a book or record must take reasonable precautions for guarding against falsification of the book or record and for facilitating discovery of any falsification.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1101GA How Part 9.3 applies to books required to be kept by this Chapter etc.

- (1) In this section:

Chapter 7 book means:

- (a) a book (by whatever name it is known) that a provision of this Chapter requires to be kept; or
 - (b) a document lodged under, or for the purposes of, a provision of this Chapter; or
 - (c) a book relating to the business carried on by a financial services licensee or an authorised representative of a financial services licensee; or
 - (d) a register or accounting record referred to in section 1101C.
- (2) Part 9.3 does not apply in relation to a Chapter 7 book except as provided in the following paragraphs:
 - (a) section 1303 applies to a Chapter 7 book;

Section 1101H

- (b) section 1305, and subsections 1306(5) and (6), apply to a Chapter 7 book as if references in section 1305 to a body corporate were instead references to a person;
- (c) regulations made for the purposes of this paragraph may provide that other provisions of Part 9.3 apply in relation to a Chapter 7 book, or a class of Chapter 7 books, with such modifications (if any) as are specified in the regulations.

1101H Contravention of Chapter does not generally affect validity of transactions etc.

- (1) Subject to subsection (2), a failure to comply with any requirement of this Chapter (including requirements in regulations made for the purposes of this Chapter) does not affect the validity or enforceability of any transaction, contract or other arrangement.
- (2) Subsection (1) has effect subject to any express provision to the contrary in:
 - (a) this Chapter; or
 - (b) regulations made for the purposes of another provision of this Chapter; or
 - (c) regulations referred to in subsection (3).
- (3) Regulations made for the purposes of this subsection may provide that a failure to comply with a specified requirement referred to in subsection (1) has a specified effect on the validity or enforceability of a transaction, contract or arrangement.

1101I Gaming and wagering laws do not affect validity of contracts relating to financial products

Despite any law of a State or Territory in this jurisdiction about gaming and wagering:

- (a) a person may enter into a contract that is a financial product; and
- (b) the contract is valid and enforceable.

1101J Delegation

The Minister may delegate any of the Minister's powers under this Chapter to:

- (a) ASIC; or

Section 1101J

- (b) a member of ASIC (within the meaning of section 9 of the *Australian Securities and Investments Commission Act 2001*); or
- (c) a staff member (within the meaning given by subsection 5(1) of that Act) who is an SES employee (within the meaning of section 34 of the *Public Service Act 1999*) or who holds an office or position that is at a level equivalent to that of an SES employee.

Chapter 8—Mutual recognition of securities offers

Part 8.1—Preliminary

1200A Definitions

- (1) In this Chapter:

foreign recognition scheme means the provisions of a law of a recognised jurisdiction that are prescribed by the regulations as comprising a foreign recognition scheme for the purposes of this Chapter.

law of a recognised jurisdiction includes law of part of a recognised jurisdiction.

offer securities includes:

- (a) invite applications for the issue of securities; and
- (b) invite offers to purchase securities.

offeror, of securities, means:

- (a) in relation to an offer of a kind prescribed by the regulations—a person of a kind prescribed by the regulations; and
- (b) otherwise—the person who has the capacity, or who agrees, to issue or transfer the securities if the offer is accepted.

recognised jurisdiction means a foreign country prescribed by the regulations as a recognised jurisdiction.

recognised offer has the meaning given by section 1200B.

securities means:

- (a) a share in a body; or
- (b) a debenture of a body; or
- (c) an interest in a managed investment scheme; or
- (d) a legal or equitable right or interest in a security or interest covered by paragraph (a), (b) or (c); or

Section 1200A

- (e) an option to acquire, by way of issue, an interest or right covered by paragraph (a), (b), (c) or (d).
- (2) For the purposes of this Chapter, paragraph (b) of the definition of *debenture* in section 9 is taken to include a reference to an undertaking by an institution, authorised by or under the law of a recognised jurisdiction as a deposit-taking institution (however described), to repay money deposited with it, or lent to it, in the ordinary course of its banking business.
- (3) For the purposes of this Chapter:
 - (a) paragraph (c) of the definition of *managed investment scheme* in section 9 is taken to include a reference to a partnership that, if this Act applied to it, would not need to be incorporated or formed under an Australian law because of regulations made for the purposes of subsection 115(2); and
 - (b) paragraph (i) of the definition of *managed investment scheme* in section 9 is taken to include a reference to a scheme operated by an institution, authorised by or under the law of a recognised jurisdiction as a deposit-taking institution (however described), in the ordinary course of its banking business.

Part 8.2—Foreign offers that are recognised in this jurisdiction

Division 1—Recognised offers

1200B When an offer is a recognised offer

- (1) An offer of securities becomes a *recognised offer*, in relation to a recognised jurisdiction, on the day the offer is first made in this jurisdiction, if the conditions in section 1200C are met in relation to the offer on that day.
- (2) The offer continues to be a recognised offer after that day, even if a condition in section 1200C ceases to be met after that day.
- (3) If, at the time an offer is first made in this jurisdiction, the offer would be a recognised offer but for a failure to meet the condition in subsection 1200C(5) or (6) that ASIC is satisfied is minor or technical, ASIC may declare in writing that the offer is a recognised offer within the meaning of subsection (1).
- (4) If ASIC makes a declaration under subsection (3) in relation to an offer, the condition is taken to have been met at the time the offer was first made in this jurisdiction.
- (5) A declaration under subsection (3) is not a legislative instrument.

1200C Conditions that must be met to be a recognised offer

- (1) For the purposes of subsection 1200B(1), the conditions that must be met are those set out in this section.
- (2) The person offering the securities must be:
 - (a) a person incorporated by or under the law of the recognised jurisdiction; or
 - (b) a natural person resident in the recognised jurisdiction; or
 - (c) a legal person established by or under the law of the recognised jurisdiction; or

Section 1200D

- (d) a person of a kind prescribed by regulations made in relation to the recognised jurisdiction for the purposes of this paragraph.
- (3) The person offering the securities must not be banned under section 1200P.
- (4) The offer must be an offer of a kind prescribed by the regulations in relation to the recognised jurisdiction.
- (5) At least 14 days before the day on which the offer is first made in this jurisdiction, the person making the offer must have lodged with ASIC:
 - (a) a notice in the prescribed form (if any) of the person's intention to make a recognised offer; and
 - (b) the documents and information required to be lodged under section 1200D.
- (6) If:
 - (a) before the offer is first made in this jurisdiction; and
 - (b) after a document or information was lodged with ASIC under section 1200D;either:
 - (c) an event of a kind mentioned in the table in subsection 1200G(9) happened; or
 - (d) the address for service in this jurisdiction of the person proposing to offer the securities changed;the person making the offer must have lodged with ASIC:
 - (e) if paragraph (c) applies—the document or information that would have been required to have been lodged under subsection 1200G(9) for the event if that subsection had applied; and
 - (f) if paragraph (d) applies—the changed address for service.

1200D Required documents and information

- (1) For the purposes of paragraph 1200C(5)(b), the documents and information required to be lodged under this section are:
 - (a) any offer document required by the law of the recognised jurisdiction; and

Section 1200D

- (b) the warning statement that is to be included with an offer document in this jurisdiction (which, if regulations are in force for the purposes of section 1200E, must comply with those regulations); and
 - (c) unless paragraph (d) applies—the constitution of the body whose securities are to be the subject of the offer; and
 - (d) if the securities that are to be the subject of the offer are interests in a managed investment scheme, rights or interests in such interests, or options to acquire such interests by way of issue—the constituent document of the scheme; and
 - (e) details, in the prescribed form (if any), of any exemption from the securities law of the recognised jurisdiction that applies, but not exclusively, to the offer or to the offeror in relation to the offer; and
 - (f) if the offeror is relying on subsection (2)—notice of the document or information that is not being lodged because of the offeror’s reliance on that subsection; and
 - (g) an address for service in this jurisdiction, in the prescribed form (if any); and
 - (h) a copy of any exemption from the securities law of the recognised jurisdiction that applies exclusively to the offer or to the offeror; and
 - (i) any other documents or information prescribed by the regulations.
- (2) For the purposes of this Chapter, a person is taken to have lodged a document or information under this section if:
- (a) the document or information has been lodged under Division 2 or 3 of Part 5B.2; or
 - (b) the document or information is not required to be lodged because of section 601CDA or 601CTA.
- (3) For the purposes of this Chapter, a person is taken to have lodged a document or information under this section if the person lodged the document or information in compliance with subsection 1200C(6).

1200E Warning statement

The regulations may, in relation to offer documents used in this jurisdiction for recognised offers, prescribe either or both of the following:

- (a) statements to be included with those documents that relate to the status of an offer as a recognised offer and the laws that regulate the offer;
- (b) details to be given in statements to be included with those documents that relate to the status of an offer as a recognised offer and the laws that regulate the offer.

Division 2—Effect of a recognised offer

1200F Effect of a recognised offer

- (1) The provisions listed in the table do not apply, in relation to a recognised offer, to the things specified in the table for those provisions.

Note: Recognised offers must comply with Division 3 instead.

Provisions that do not apply in relation to a recognised offer		
Item	These provisions:	do not apply, in relation to the offer, to:
1	Chapter 2L	if the recognised offer is an offer of debentures—the offeror.
2	Chapter 5C	if the recognised offer is an offer of interests in a managed investment scheme—the operator of the managed investment scheme.
3	Chapter 6D, other than sections 736 and 738	(a) the recognised offer; or (b) the offeror of the recognised offer; or (c) any offer document for the offer.
4	Parts 7.6, 7.7 and 7.8, other than section 992AA	(a) the issue or disposal of a security under the recognised offer; or (b) general advice (within the meaning of Chapter 7) contained in any offer document for the offer; or (c) general advice contained in an advertisement for the recognised offer issued by, or on behalf of, the offeror; or (d) the provision of a custodial or depository service (within the meaning of Chapter 7) in relation to interests in a managed investment scheme that are the subject of the recognised offer.
5	Part 7.9, other than section 1020B	the offeror of the recognised offer.

Section 1200F

- (2) Despite subsection (1), the regulations may:
- (a) apply a provision listed in the table in subsection (1) to a person or class of persons; or
 - (b) apply a provision listed in the table in subsection (1) to a security or class of securities; or
 - (c) provide that a provision listed in the table in subsection (1) applies with the modifications specified in the regulations.

Division 3—Ongoing conditions for recognised offers

1200G Offering conditions

When the offering conditions apply

- (1) The offering conditions in this section apply in relation to a recognised offer until the recognised offer closes in this jurisdiction.

Note: Failure to comply with an offering condition is an offence (see sections 1200Q and 1311).

Offering conditions

- (2) The offer must be made in the recognised jurisdiction as well as in this jurisdiction.
- (3) The offeror must meet the conditions in subsections 1200C(2) and (3).
- (4) The offer must meet the condition in subsection 1200C(4).
- (5) The offer must comply with the law of the recognised jurisdiction.
- (6) There must be no person concerned in the management of the offeror:
 - (a) who is disqualified from managing corporations for the purposes of Part 2D.6; or
 - (b) who is disqualified from being concerned in the management of the offeror under the law of the recognised jurisdiction; or
 - (c) who is subject to a banning order under section 920A; or
 - (d) who is subject to a court order under paragraph 921A(2)(a).
- (7) An offer document provided to a person in this jurisdiction must have included with it:
 - (a) the warning statement lodged under subsection 1200D(1) for that offer document; or
 - (b) if a changed warning statement is lodged with ASIC under subsection 1200G(9)—the changed warning statement.

Section 1200G

- (8) The offeror must, on request by a person in this jurisdiction, provide a copy of the constitution or constituent document lodged under paragraph 1200D(1)(c) or (d).
- (9) If an event mentioned in an item of this table occurs in relation to the offer or offeror, the offeror must lodge with ASIC the document, statement or notice specified in the table for that event, by the time specified for that event.

Offering condition under subsection (9)			
Item	If:	the offeror must lodge with ASIC:	by this time:
1	a change is made to an offer document, or any other document, required by the law of the recognised jurisdiction in relation to the offer	a copy of the document as changed	no later than 7 days after the day on which the offeror notified (or should have notified) the home regulator of the change.
2	a change is made to the warning statement that is included with the offer document in this jurisdiction	a copy of the warning statement as changed	no later than 7 days after the day on which the offeror notified (or should have notified) the home regulator of the change.
3	a supplementary or replacement offer document is required by the law of the recognised jurisdiction	a copy of the supplementary or replacement offer document	no later than 7 days after the day on which the supplementary or replacement offer document is (or should have been) lodged with the home regulator.
4	a change is made to the constitution or constituent document lodged under paragraph 1200D(1)(c) or (d)	a copy of the constitution or constituent document as changed	no later than 7 days after the day on which the offeror notified (or should have notified) the home regulator of the change.

Chapter 8 Mutual recognition of securities offers

Part 8.2 Foreign offers that are recognised in this jurisdiction

Division 3 Ongoing conditions for recognised offers

Section 1200G

Offering condition under subsection (9)			
Item	If:	the offeror must lodge with ASIC:	by this time:
5	the home regulator makes, changes or revokes an exemption that applies, but not exclusively, to the offer or the offeror under the law of the recognised jurisdiction	written notice in the prescribed form (if any) of the details of the exemption, change or revocation	no later than 14 days after the making, change or revocation occurs.
6	the home regulator makes, changes or revokes an exemption that applies exclusively to the offer or the offeror under the law of the recognised jurisdiction	a copy of the exemption, the exemption as changed, or notice in the prescribed form (if any) of the details of the revocation	no later than 7 days after the making, change or revocation occurs.
7	the home regulator begins enforcement action, or exercises a power it has under law, in relation to the offeror or offer	written notice in the prescribed form (if any) of the details of the action taken or power exercised	no later than 7 days after the action is taken or the power is exercised.

(10) For the purposes of this Chapter, a person is taken to have lodged a document under subsection (9) if:

- (a) the document has been lodged under Division 2 or 3 of Part 5B.2; or
- (b) the document is not required to be lodged because of section 601CDA or 601CTA.

(11) If:

- (a) an event mentioned in the table in subsection (9) occurs while the offering conditions in this section apply; and
- (b) the time by which an offeror is required to lodge a document, statement or notice with ASIC because of that event is after the offering conditions cease to apply;

Section 1200H

then, for the purposes of this section and paragraph 1200Q(1)(b), the offering conditions are taken to continue to apply until that time in relation to the offer to the extent necessary to require the offeror to lodge the document, statement or information by that time.

- (12) The offer must meet any other conditions prescribed by the regulations.

Home regulator

- (13) For the purposes of subsection (9), the **home regulator** for a recognised jurisdiction is an authority in the recognised jurisdiction whose functions under the law of the recognised jurisdiction include functions equivalent to any of those of ASIC under this Act and that is prescribed by the regulations as the home regulator for that jurisdiction.
- (14) If there is more than one authority in a recognised jurisdiction whose functions include functions under the law of the recognised jurisdiction equivalent to any of those of ASIC under this Act and that is prescribed under subsection (13), the regulations may prescribe the matters in relation to which that authority is to be regarded as the home regulator.

1200H Address for service condition

When the address for service condition applies

- (1) The address for service condition in this section applies in relation to a recognised offer:
- (a) until the end of the last day on which a person who resides in this jurisdiction could acquire securities under the offer; and
 - (b) if a person who resides in this jurisdiction acquires securities under the offer—at all times when the offeror's records indicate that someone who resides in this jurisdiction holds securities in the class of securities that was the subject of the recognised offer.

Note: Failure to comply with the address for service condition is an offence (see sections 1200Q and 1311).

Section 1200J

Address for service condition

- (2) The offeror must lodge with ASIC written notice, in the prescribed form (if any), of any change in its address for service in this jurisdiction, no later than the end of the seventh day after the day on which the address changed.
- (3) If:
- (a) the offeror's address for service in this jurisdiction changes while the address for service condition in this section applies; and
 - (b) the time by which the offeror is required to lodge notice with ASIC because of the change is after the address for service condition ceases to apply;
- then, for the purposes of this section and subparagraph 1200Q(2)(b)(i), the address for service condition is taken to continue to apply until that time to the extent necessary to require the offeror to lodge notice by that time.

1200J Dispute resolution condition

When the dispute resolution condition applies

- (1) The dispute resolution condition in this section applies, to a person who is or who has been the offeror of a recognised offer, at all times when the person's records indicate that someone who resides in this jurisdiction holds securities in the class of securities that was the subject of the recognised offer.

Note: Failure to comply with the dispute resolution condition is an offence (see sections 1200Q and 1311).

Dispute resolution condition

- (2) The person must have a dispute resolution process that complies with subsection 1017G(2), if the recognised offer was an offer of:
- (a) interests in a managed investment scheme; or
 - (b) rights or interests in such interests, or options to acquire such interests by way of issue.

Exemption from the dispute resolution condition

- (3) ASIC may, on application by a person in the prescribed form (if any), grant the person an exemption from the dispute resolution condition in this section, subject to any conditions specified in the exemption.
- (4) If ASIC grants a person an exemption under subsection (3), then, for the purposes of this Chapter, the person is taken to comply with the dispute resolution condition in this section for so long as the exemption is in force.
- (5) ASIC may, in relation to an exemption under subsection (3):
 - (a) vary, or impose, a condition in relation to the exemption; or
 - (b) revoke the exemption.
- (6) A variation, imposition or revocation under subsection (5) takes effect:
 - (a) if the person has an address for service in this jurisdiction—when it is served on the person at that address; or
 - (b) if the person does not have an address for service in this jurisdiction—on publication in the *Gazette*.

Division 4—Modification of provisions of this Act

1200K Additional operation of section 675 (continuous disclosure)

In relation to a disclosing entity that has been the offeror of a recognised offer, section 675 also has the operation it would have if paragraph 675(2)(c) were replaced by the following paragraph:

- (c) the information is not required, by the law of the recognised jurisdiction to which the offer relates, to be included in a supplementary or replacement offer document; and

1200L Pre-offer advertising

Offers that need a disclosure document

- (1) Subsection 734(4) also has the operation it would have if:
 - (a) the reference in that subsection to a disclosure document that has been lodged with ASIC were a reference to an offer document lodged with ASIC for the purposes of this Chapter; and
 - (b) the reference in that subsection to section 739 were a reference to section 1200N.
- (2) Subsection 734(5) also has the operation it would have if:
 - (a) references in that subsection to a disclosure document were references to an offer document that complies with the law of a recognised jurisdiction; and
 - (b) references in that subsection to completing an application form were references to completing an application process under the law of that recognised jurisdiction.
- (3) Subsection 734(6) also has the operation it would have if:
 - (a) references in that subsection to a disclosure document were references to an offer document lodged with ASIC for the purposes of this Chapter; and
 - (b) references in that subsection to completing an application form were references to completing an application process under the law of the recognised jurisdiction to which the offer relates.

Section 1200M

Offers that need a Product Disclosure Statement

- (4) Subsection 1018A(2) also has the operation it would have if:
 - (a) a reference in that subsection to a Product Disclosure Statement were a reference to an offer document that complies with the law of a recognised jurisdiction; and
 - (b) a reference in that subsection to sale offers to which section 1012C will apply were a reference to sale offers to which section 1012C would apply if the financial product, when made available, were not made available under a recognised offer.
- (5) Subsection 1018A(3) also has, in relation to subsection 1018A(2), the operation it would have if:
 - (a) the reference in that subsection to a Product Disclosure Statement were a reference to an offer document that complies with the law of a recognised jurisdiction; and
 - (b) the reference to section 1020E were a reference to section 1200N.

1200M Modification by the regulations

The regulations may modify a provision of this Act in relation to its application in respect of a recognised offer or a proposed offer of securities that may become a recognised offer.

Division 5—ASIC's powers in relation to recognised offers

1200N Stop orders

- (1) If, in relation to a thing mentioned in an item of this table, ASIC is satisfied of the matters specified in the table item for that thing, ASIC may make either or both of the orders specified in the table item about that thing.

Stop orders			
Item	If, in relation to:	ASIC is satisfied that:	ASIC may order:
1	(a) an offer document lodged under paragraph 1200D(1)(a); or (b) a warning statement lodged under paragraph 1200D(1)(b); or (c) a document or information lodged under paragraph 1200D(1)(i)	there is a misleading or deceptive statement in, or a material omission from, the document, statement or information	(a) that no offers, issues, sales or transfers of the securities to which the document, statement or information relates be made while the order is in force; (b) that specified conduct in respect of those securities, or in respect of the document, statement or information, must not be engaged in while the order is in force.

Section 1200N

Stop orders			
Item	If, in relation to:	ASIC is satisfied that:	ASIC may order:
2	a document, statement or notice lodged under subsection 1200G(9)	the change results in there being a misleading or deceptive statement in, or a material omission from, the document, statement or notice	<p>(a) that no offers, issues, sales or transfers of the securities to which the document, statement or notice relates be made while the order is in force;</p> <p>(b) that specified conduct in respect of those securities, or in respect of the document, statement or notice, must not be engaged in while the order is in force.</p>
3	<p>(a) an advertisement of securities the subject of a recognised offer; or</p> <p>(b) a published statement that is reasonably likely to induce people to acquire securities the subject of a recognised offer</p>	there is a misleading or deceptive statement in, or a material omission from, the advertisement or statement	<p>(a) that no offers, issues, sales or transfers of the securities to which the advertisement or statement relates be made while the order is in force;</p> <p>(b) that specified conduct in respect of those securities, or in respect of the advertisement or statement, must not be engaged in while the order is in force.</p>

Chapter 8 Mutual recognition of securities offers**Part 8.2** Foreign offers that are recognised in this jurisdiction**Division 5** ASIC's powers in relation to recognised offers

Section 1200N

Stop orders			
Item	If, in relation to:	ASIC is satisfied that:	ASIC may order:
4	an offer document lodged under paragraph 1200D(1)(a)	a new circumstance has arisen since lodgment and that circumstance would have been required by the law of the recognised jurisdiction to be included in the offer document, if the circumstance had arisen before the document was lodged with the home regulator (as defined in subsection 1200G(13))	(a) that no offers, issues, sales or transfers of the securities to which the document relates be made while the order is in force; (b) that specified conduct in respect of those securities, or in respect of the document, must not be engaged in while the order is in force.
5	a notice of intention to make a recognised offer lodged under paragraph 1200C(5)(a)	one or more of the requirements in section 1200C is not met in relation to the proposed offer	(a) that no offers, issues, sales or transfers of the securities that are proposed to be offered be made while the order is in force; (b) that specified conduct in respect of those securities must not be engaged in while the order is in force.
6	a recognised offer	an offering condition in section 1200G, the address for service condition in section 1200H or the dispute resolution condition in section 1200J is not being met	(a) that no offers, issues, sales or transfers of the securities be made while the order is in force; (b) that specified conduct in respect of those securities must not be engaged in while the order is in force.

- (2) The order may include a statement that specified conduct engaged in contrary to the order will be regarded as not meeting a specified ongoing condition in Division 3.
- (3) Before making an order under subsection (1), ASIC must:
 - (a) hold a hearing; and
 - (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.
- (4) If ASIC considers that any delay in making an order under subsection (1) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.
- (5) At any time during the hearing, ASIC may make an interim order. The interim order lasts until:
 - (a) ASIC makes an order under subsection (1) after the conclusion of the hearing; or
 - (b) the interim order is revoked;whichever happens first.
- (6) An order under subsection (1), (4) or (5) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer securities or not to engage in specified conduct.
- (7) The person on whom the order is served must take reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (8) The person on whom the order is served, or a person who is aware of the order, must not engage in conduct contrary to the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (9) A statement under subsection (2) has effect accordingly in relation to a person on whom the order is served, or who is aware of it, who engages in conduct contrary to the order. This applies in addition to any other consequence that is provided for in this Act.

Section 1200P

1200P Ban on making subsequent recognised offers

- (1) ASIC may declare in writing that a person is, for the time specified in the declaration (which must be no longer than 5 years from the day the declaration takes effect), banned from making a recognised offer if:
 - (a) the person, or an associate of the person, has been convicted (whether or not in this jurisdiction) of an offence constituted by conduct engaged in in relation to a recognised offer; or
 - (b) a court in this jurisdiction has made a civil penalty order against the person, or an associate of the person, for a contravention in relation to a recognised offer; or
 - (c) a court in a recognised jurisdiction has made an order against the person, or an associate of the person, for a contravention of the law of the recognised jurisdiction (other than an offence) in relation to an offer that is a recognised offer in this jurisdiction.
- (2) Before making the declaration, ASIC must give the person an opportunity:
 - (a) to appear, or be represented, at a hearing before ASIC that takes place in private; or
 - (b) to make submissions to ASIC on the matter.

This subsection does not apply if the person does not have an address for service in this jurisdiction.
- (3) ASIC may, in writing, vary or cancel the declaration, on ASIC's own initiative or on application lodged by the person in the prescribed form (if any) together with any prescribed documents, if ASIC is satisfied that a circumstance on which ASIC based the declaration has changed.
- (4) If ASIC proposes to reject an application by the person to vary or cancel the declaration, ASIC must give the person an opportunity:
 - (a) to appear, or be represented, at a hearing before ASIC that takes place in private; or
 - (b) to make submissions to ASIC on the matter.

- (5) The declaration, and any variation or cancellation of the declaration, takes effect:
 - (a) if the person to whom the declaration applies has an address for service in this jurisdiction—when it is served on the person at that address; or
 - (b) if the person to whom the declaration applies does not have an address for service in this jurisdiction—when it is published in the *Gazette* under subsection (7).
- (6) A declaration that is served on a person under paragraph (5)(a) must be accompanied by a statement of ASIC's reasons for the declaration.
- (7) ASIC must publish a notice in the *Gazette* as soon as practicable after making, varying or cancelling the declaration. The notice:
 - (a) must state when the action takes or took effect; and
 - (b) in the case of the making of a declaration—set out a copy of the declaration; and
 - (c) in the case of the varying of a declaration—set out a copy of the declaration as varied.
- (8) A declaration under this section is not a legislative instrument.

1200Q Offence of breaching an ongoing condition

- (1) A person commits an offence if, at any particular time:
 - (a) the person is the offeror of a recognised offer; and
 - (b) an offering condition in section 1200G applies in relation to the offer; and
 - (c) the condition is not met in relation to the offer.
- (2) A person commits an offence if:
 - (a) the person is or has been the offeror of a recognised offer; and
 - (b) at any particular time:
 - (i) the address for service condition in section 1200H; or
 - (ii) the dispute resolution condition in section 1200J; applies in relation to the offer; and
 - (c) the condition is not met in relation to the offer.

Division 6—Miscellaneous

1200R Service of documents

- (1) For the purposes of any law, a document may be served on a person who is, or who has been, the offeror of a recognised offer by leaving it at, or posting it to, the person's address for service in this jurisdiction.
- (2) The person's address for service in this jurisdiction is:
 - (a) the address lodged under paragraph 1200D(1)(g); or
 - (b) if a change to that address has been lodged with ASIC under section 1200H—the changed address, on and from the later of:
 - (i) the day that is 7 days after the day on which the change (or, if more than one change has been lodged, the latest change) was lodged; or
 - (ii) the day specified in the notice of change as the day from which the change is to take effect.
- (3) This section does not affect:
 - (a) any other provision of this Act, or any provision of another law, that permits a document to be served in a different way; or
 - (b) the power of a court to authorise a document to be served in a different way.
- (4) This section does not apply in relation to a person who is, or who has been, the offeror of a recognised offer if the address for service condition in section 1200H does not apply to the person.

Part 8.3—Offers made under foreign recognition schemes

1200S Notice to ASIC

If:

- (a) a body proposes to make an offer of securities in a recognised jurisdiction under a foreign recognition scheme; and
- (b) under the foreign recognition scheme, the offer is to be regulated by the law of this jurisdiction;

the body must lodge with ASIC written notice, in the prescribed form (if any), of its intention to make the offer under the foreign recognition scheme, no later than the time it notifies the recognised jurisdiction of that intention.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1200T Extension of this Act to recognised jurisdictions

(1) If:

- (a) a body proposes to make, or is making, an offer of securities in a recognised jurisdiction under a foreign recognition scheme; and
- (b) under the foreign recognition scheme, the offer is to be regulated by the law of this jurisdiction;

this Act applies in the recognised jurisdiction in relation to the offer as if it were an offer being made in this jurisdiction.

(2) Despite subsection (1), the regulations may:

- (a) exempt a person or class of persons from all or specified provisions of this Act as it applies by force of subsection (1); or
- (b) exempt a security or a class of securities from all or specified provisions of this Act as it applies by force of subsection (1); or

Section 1200U

- (c) provide that a provision of this Act as it applies by force of subsection (1) applies with the modifications specified in the regulations.

1200U ASIC stop order for advertising in a recognised jurisdiction

- (1) If ASIC is satisfied that:

- (a) an offer of securities is being made or has been made in a recognised jurisdiction under a foreign recognition scheme; and
- (b) there is a contravention of section 734 or 1018A (as they apply by force of section 1200T) constituted by conduct in the recognised jurisdiction in relation to the offer;

ASIC may order that no offers, issues, sales or transfers of the securities the subject of the offer be made in the recognised jurisdiction while the order is in force.

- (2) Before making an order under subsection (1), ASIC must:

- (a) hold a hearing; and
- (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.

- (3) If ASIC considers that any delay in making an order under subsection (1) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.

- (4) At any time during the hearing, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order lasts until:

- (a) ASIC makes an order under subsection (1) after the conclusion of the hearing; or
- (b) the interim order is revoked;

whichever happens first.

- (5) An order under subsection (1), (3) or (4) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer securities.

Section 1200U

- (6) The person on whom the order is served must take reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (7) The person on whom the order is served, or a person who is aware of the order, must not engage in conduct contrary to the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Corporations Act 2001

Act No. 50 of 2001 as amended

This compilation was prepared on 12 January 2009
taking into account amendments up to Act No. 146 of 2008

Volume 5 includes: Table of Contents
 Chapters 9 and 10 (ss. 1274 – 1484)
 Schedules 3 and 4
 Note 1
 Table of Acts
 Act Notes
 Table of Amendments
 Note 2
 Table A

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Contents

Chapter 9—Miscellaneous	1
Part 9.1—Registers and registration of documents	1
1274 Registers	1
1274AA Register of disqualified company directors and other officers	6
1274A Obtaining information from certain registers	7
1274B Use, in court proceedings, of information from ASIC’s national database	8
1274C ASIC certificate	8
1275 Relodging of lost registered documents	8
Part 9.2—Registration of auditors and liquidators	10
Division 1—Interpretation	10
1276 Definitions	10
Division 2—Registration	11
1279 Application for registration as auditor or liquidator	11
1280 Registration of auditors	11
1280A Approval of auditing competency standard	13
1281 Auditor-General taken to be registered as auditor	13
1282 Registration of liquidators	14
1283 Registration of official liquidators	16
1284 Insurance to be maintained by liquidators	16
1285 Register of Auditors	17
1286 Registers of Liquidators and Official Liquidators	17
1287 Notification of certain matters	19
1287A Annual statements by registered company auditors	20
1288 Annual statements by registered liquidators	20
1289 Auditors and other persons to enjoy qualified privilege in certain circumstances	21
Division 2A—Conditions on registration of auditors	24
1289A ASIC may impose conditions on registration	24
Division 3—Cancellation or suspension of registration	25
1290 Cancellation at request of registered person	25
1290A Cancellation on certain grounds	25
1291 Official liquidators	26
1292 Powers of Board in relation to auditors and liquidators	26
1294 Board to give opportunity for hearing etc.	30
1294A Pre-hearing conference	31
1295 Board may remove suspension	31
1296 Notice of Board’s decision	32

1297	Time when Board's decision comes into effect	33
1298	Effect of suspension	34
1298A	Transfer of books.....	34
Part 9.2A—Authorised audit companies		36
Division 1—Registration		36
1299A	Application for registration as authorised audit company	36
1299B	Eligibility for registration as an authorised audit company	36
1299C	Registration as authorised audit company	37
1299D	Registration may be subject to conditions	37
1299E	Register of authorised audit companies	38
1299F	Notification of certain matters	38
1299G	Annual statements by authorised audit company	39
Division 2—Cancellation or suspension of registration		41
1299H	Cancellation at request of registered person	41
1299I	Cancellation or suspension in other cases.....	41
1299J	Notice of cancellation or suspension	41
1299K	Time when ASIC's decision comes into effect.....	41
1299L	Effect of suspension	42
1299M	Effect of cancellation.....	42
Part 9.3—Books		43
1300	Inspection of books.....	43
1301	Location of books on computers.....	43
1302	Location of registers	45
1303	Court may compel compliance	46
1304	Translations of instruments	46
1305	Admissibility of books in evidence	46
1306	Form and evidentiary value of books	46
1307	Falsification of books	47
Part 9.4—Offences		49
Division 1A—Application of the Criminal Code		49
1308A	Application of <i>Criminal Code</i>	49
Division 1—Specific offences		50
1308	False or misleading statements	50
1309	False information etc.	52
1310	Obstructing or hindering ASIC etc.	54
Division 2—Offences generally		55
1311	General penalty provisions	55
1312	Penalties for bodies corporate.....	56
1313	Penalty notices.....	56

1313A	Offences committed partly in and partly out of the jurisdiction.....	60
1314	Continuing offences.....	60
1315	Proceedings: how taken.....	63
1316	Time for instituting criminal proceedings.....	64
1316A	Privilege against self-incrimination not available to bodies corporate in Corporations Act criminal proceedings	64
1317	Certain persons to assist in prosecutions	65
Part 9.4AAA—Protection for whistleblowers		66
1317AA	Disclosures qualifying for protection under this Part	66
1317AB	Disclosure that qualifies for protection not actionable etc.....	67
1317AC	Victimisation prohibited.....	68
1317AD	Right to compensation.....	69
1317AE	Confidentiality requirements for company, company officers and employees and auditors.....	69
Part 9.4A—Review by Administrative Appeals Tribunal of certain decisions		71
1317A	Definitions.....	71
1317B	Applications for review	71
1317C	Excluded decisions	71
1317D	Notice of reviewable decision and review rights	72
Part 9.4AA—Infringement notices for alleged contraventions of continuous disclosure provisions		74
1317DA	Definitions	74
1317DAB	Purpose and effect of this Part.....	75
1317DAC	Issue of infringement notice	76
1317DAD	Statement of reasons must be given	77
1317DAE	Matters to be included in infringement notice	78
1317DAF	Effect of issue and compliance with infringement notice	80
1317DAG	Effect of failure to comply with infringement notice	82
1317DAH	Compliance period for infringement notice	85
1317DAI	Withdrawal of infringement notice.....	85
1317DAJ	Publication in relation to infringement notices.....	86
Part 9.4B—Civil consequences of contravening civil penalty provisions		89
1317DA	Definitions.....	89
1317E	Declarations of contravention.....	89
1317F	Declaration of contravention is conclusive evidence.....	90
1317G	Pecuniary penalty orders	90
1317H	Compensation orders—corporation/scheme civil penalty provisions	91

1317HA	Compensation orders—financial services civil penalty provisions	92
1317J	Who may apply for a declaration or order	93
1317K	Time limit for application for a declaration or order	94
1317L	Civil evidence and procedure rules for declarations of contravention and civil penalty orders	94
1317M	Civil proceedings after criminal proceedings	94
1317N	Criminal proceedings during civil proceedings	95
1317P	Criminal proceedings after civil proceedings	95
1317Q	Evidence given in proceedings for penalty not admissible in criminal proceedings	96
1317R	ASIC requiring person to assist	96
1317S	Relief from liability for contravention of civil penalty provision	97
Part 9.5—Powers of Courts		99
1318	Power to grant relief	99
1319	Power of Court to give directions with respect to meetings ordered by the Court	100
1321	Appeals from decisions of receivers, liquidators etc.	100
1322	Irregularities	101
1323	Power of Court to prohibit payment or transfer of money, financial products or other property	103
1324	Injunctions	106
1324A	Provisions relating to prosecutions	109
1324B	Order to disclose information or publish advertisements	109
1325	Other orders	109
1325A	Orders if contravention of Chapter 6, 6A, 6B or 6C	111
1325B	Court may order bidder to make offers	112
1325C	Unfair or unconscionable agreements, payments or benefits	113
1325D	Contravention due to inadvertence etc	114
1325E	Orders to secure compliance	115
1326	Effect of sections 1323, 1324 and 1325	115
1327	Power of Court to punish for contempt of Court	115
Part 9.6—Proceedings		116
1330	ASIC's power to intervene in proceedings	116
1331	Civil proceedings not to be stayed	116
1332	Standard of proof	116
1333	Evidence of contravention	117
1335	Costs	117
1336	Vesting of property	118

Part 9.6A—Jurisdiction and procedure of Courts	119
Division 1—Civil jurisdiction	119
Subdivision A—Preliminary	119
1337A Operation of Division	119
Subdivision B—Conferral of jurisdiction	120
1337B Jurisdiction of Federal Court and State and Territory Supreme Courts	120
1337C Jurisdiction of Family Court and State Family Courts.....	121
1337D Jurisdiction of courts (decisions to prosecute and related criminal justice process decisions made by Commonwealth officers)	121
1337E Jurisdiction of lower courts	123
1337F Appeals.....	123
1337G Courts to act in aid of each other	124
Subdivision C—Transfer of proceedings	124
1337H Transfer of proceedings by the Federal Court and State and Territory Supreme Courts.....	124
1337J Transfer of proceedings by Family Court and State Family Courts	126
1337K Transfer of proceedings in lower courts	128
1337L Further matters for a court to consider when deciding whether to transfer a proceeding.....	129
1337M Transfer may be made at any stage.....	129
1337N Transfer of documents	130
1337P Conduct of proceedings	130
1337Q Rights of appearance	131
1337R Limitation on appeals	131
Subdivision D—Rules of court	131
1337S Rules of the Federal Court.....	131
1337T Rules of the Supreme Court.....	132
1337U Rules of the Family Court	133
Division 2—Criminal jurisdiction	134
1338A Operation of Division	134
1338B Jurisdiction of courts	134
1338C Laws to be applied.....	136
Part 9.7—Unclaimed property	138
1339 ASIC to deal with unclaimed property	138
1340 No liability to pay calls on shares etc.	138
1341 Entitlement to unclaimed property	138
1342 Commonwealth or ASIC not liable for loss or damage	139
1343 Disposal of securities if whereabouts of holder unknown	139

1343A	Disposal of interests in registered scheme if whereabouts of member unknown	140
Part 9.9—Miscellaneous		141
1344	Use of ABN.....	141
1345A	Minister may delegate prescribed functions and powers under this Act	141
1346	Non-application of rule against perpetuities to certain schemes	141
1348	Operation of Life Insurance Act	142
1349	Privilege against exposure to penalty—disqualification etc.	142
1350	Compensation for compulsory acquisition	145
Part 9.10—Fees imposed by the Corporations (Fees) Act 2001 and the Corporations (Review Fees) Act 2003		146
1351	Fees are payable to the Commonwealth	146
1354	Lodgment of document without payment of fee.....	147
1355	Doing act without payment of fee.....	147
1356	Effect of sections 1354 and 1355.....	147
1359	Waiver and refund of fees	147
1360	Debts due to the Commonwealth.....	148
1362	Payment of fee does not give right to inspect or search.....	148
Part 9.12—Regulations		149
1363	Definitions.....	149
1364	Power to make regulations	149
1365	Scope of particular regulations	151
1366	Verifying or certifying documents.....	151
1367	Documents lodged by an agent.....	151
1368	Exemptions from Chapter 6D or 7.....	152
1369	Penalty notices.....	152
1369A	State termination of reference.....	153
Chapter 10—Transitional provisions		154
Part 10.1—Transition from the old corporations legislation		154
Division 1—Preliminary		154
1370	Object of Part.....	154
1371	Definitions.....	155
1372	Relationship of Part with State validation Acts	159
1373	References to things taken or deemed to be the case etc.	160
1374	Existence of several versions of old corporations legislation does not result in this Part operating to take same thing to be done several times under new corporations legislation etc.	161
1375	Penalty units in respect of pre-commencement conduct remain at \$100	162

1376	Ceasing to be a referring State does not affect previous operation of this Part	162
Division 2—Carrying over registration of companies		163
1377	Division has effect subject to Division 7 regulations.....	163
1378	Existing registered companies continue to be registered	163
Division 3—Carrying over the old Corporations Regulations		165
1379	Division has effect subject to Division 7 regulations.....	165
1380	Old Corporations Regulations continue to have effect	165
Division 4—Court proceedings and orders		166
1381	Division has effect subject to Division 7 regulations.....	166
1382	Definitions	166
1383	Treatment of court proceedings under or related to the old corporations legislation—proceedings other than federal corporations proceedings.....	168
1384	Treatment of court proceedings under or related to the old corporations legislation—federal corporations proceedings.....	170
1384A	Appeals etc. in relation to some former federal corporations proceedings.....	172
1384B	Effect of decisions and orders made in federal corporations proceedings before commencement.....	172
1385	References to proceedings and orders in the new corporations legislation.....	173
Division 5—Other specific transitional provisions		175
1386	Division has effect subject to Division 7 regulations.....	175
1387	Certain applications lapse on the commencement	175
1388	Carrying over the Partnerships and Associations Application Order	175
1389	Evidentiary certificates	175
1390	Preservation of nomination of body corporate as SEGC	176
1391	Preservation of identification of satisfactory records.....	176
1392	Retention of information obtained under old corporations legislation of non-referring State	176
1393	Transitional provisions relating to section 1351 fees.....	177
1394	Transitional provisions relating to securities exchange fidelity fund levies	177
1395	Transitional provisions relating to National Guarantee Fund levies	178
1396	Transitional provisions relating to futures organisation fidelity fund levies	179
Division 6—General transitional provisions relating to other things done etc. under the old corporations legislation		181
1397	Limitations on scope of this Division	181

1398	Provisions of this Division may have an overlapping effect.....	182
1399	Things done by etc. carried over provisions continue to have effect.....	182
1400	Creation of equivalent rights and liabilities to those that existed before the commencement under carried over provisions of the old corporations legislation	184
1401	Creation of equivalent rights and liabilities to those that existed before the commencement under repealed provisions of the old corporations legislation	185
1402	Old corporations legislation time limits etc.	186
1403	Preservation of significance etc. of events or circumstances	187
1404	References in the new corporations legislation generally include references to events, circumstances or things that happened or arose before the commencement	188
1405	References in the new corporations legislation to that legislation or the new ASIC legislation generally include references to corresponding provisions of the old corporations legislation or old ASIC legislation.....	189
1406	Carrying over references to corresponding previous laws	190
1407	References to old corporations legislation in instruments	191
1408	Old transitional provisions continue to have their effect	192
Division 7—Regulations dealing with transitional matters		195
1409	Regulations may deal with transitional matters	195
Part 10.2—Transitional provisions relating to the Financial Services Reform Act 2001		196
Division 1—Transitional provisions relating to the phasing-in of the new financial services regime		196
Subdivision A—Preliminary		196
1410	Definitions.....	196
Subdivision B—Treatment of existing markets		198
1411	When is a market being operated immediately before the FSR commencement?	198
1412	Treatment of proposed markets that have not started to operate by the FSR commencement	198
1413	Obligation of Minister to grant licences covering main existing markets.....	200
1414	Section 1413 markets—effect of licences and conditions	202
1415	Section 1413 markets—preservation of old Corporations Act provisions during transition period	205
1416	Section 1413 markets—powers for regulations to change how the old and new Corporations Act apply during the transition period.....	205
1417	Section 1413 markets—additional provisions relating to previously unregulated services.....	206

1418	Treatment of exempt stock markets and exempt futures markets (other than markets with no identifiable single operator)	207
1419	Treatment of exempt stock markets and exempt futures markets that do not have a single identifiable operator	209
1420	Treatment of stock markets of approved securities organisations	210
1421	Treatment of special stock markets for unquoted interests in a registered scheme	212
1422	Treatment of other markets that were not unauthorised	213
Subdivision C—Treatment of existing clearing and settlement facilities		214
1423	When is a clearing and settlement facility being operated immediately before the FSR commencement?	214
1424	Treatment of proposed clearing and settlement facilities that have not started to operate by the FSR commencement	214
1424A	Treatment of unregulated clearing and settlement facilities operated by holders of old Corporations Act approvals	216
1425	Obligation of Minister to grant licences covering main existing facilities	217
1426	Section 1425 facilities—effect of licences and conditions	219
1427	Section 1425 facilities—powers for regulations to change how the old and new Corporations Act apply during the transition period	220
1428	Section 1425 facilities—additional provisions relating to previously unregulated services	221
1429	Treatment of other clearing and settlement facilities	222
Subdivision D—Treatment of people who carry on financial services businesses and their representatives		223
1430	Meaning of <i>regulated principal</i> , <i>regulated activities</i> and <i>relevant old legislation</i>	223
1431	Parts 7.6, 7.7 and 7.8 of the amended Corporations Act generally do not apply to a regulated principal during the transition period	226
1432	Continued application of relevant old legislation	228
1433	Streamlined licensing procedure for certain regulated principals	229
1434	Special licences for insurance multi-agents during first 2 years after FSR commencement	230
1435	Licensing decisions made within the first 2 years of the FSR commencement—regard may be had to conduct and experience of applicant or related body corporate that currently provides same or similar services	232
1436	Treatment of representatives—general	232
1436A	Treatment of representatives—insurance agents	234
1437	Exemptions and modifications by ASIC	236

Subdivision E—Product disclosure requirements	237
1438 New product disclosure provisions do not apply to existing products during transition period.....	237
1439 Offences against new product disclosure provisions—additional element for prosecution to prove if conduct occurs after opting-in and before the end of the first 2 years	240
1440 Continued application of certain provisions of old disclosure regimes during transition period.....	241
1441 Certain persons who are not yet covered by Parts 7.6, 7.7 and 7.8 of the amended Corporations Act are required to comply with Part 7.9 obligations as if they were regulated persons	242
1442 Exemptions and modifications by ASIC.....	242
Subdivision F—Certain other product-related requirements	243
1442A Deferred application of hawking prohibition.....	243
1442B Deferred application of confirmation of transaction and cooling-off provisions etc.	244
Division 2—Other transitional provisions	246
1443 Definitions.....	246
1444 Regulations may deal with transitional, saving or application matters	247
1445 ASIC determinations may deal with transitional, saving or application matters.....	249
Part 10.3—Transitional provisions relating to the Corporations Legislation Amendment Act 2003	252
1446 Application of subparagraph 262(1)(g)(iii)	252
1447 Application of sections 601AB and 601PB	252
1448 Application of amendments made by Schedule 4 to the <i>Corporations Legislation Amendment Act 2003</i>	252
Part 10.4—Transitional provisions relating to the Financial Services Reform Amendment Act 2003	253
1449 Definition	253
1450 Application of Part 10.2 to Chapter 7 as amended by Schedule 2 to the amending Act	253
1451 Provisions relating to the scope of the amendments of Chapter 7 made by Schedule 2	254
1452 Amendments of section 1274	255
Part 10.5—Transitional provisions relating to the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004	256
1453 Definitions.....	256
1454 Audit reforms in Schedule 1 to the amending Act (auditing standards and audit working papers retention rules).....	256

1455	Audit reforms in Schedule 1 to the amending Act (adoption of auditing standards made by accounting profession before commencement)	257
1456	Audit reforms in Schedule 1 to the amending Act (new competency standard provisions)	258
1457	Audit reforms in Schedule 1 to the amending Act (new annual statement requirements for auditors)	258
1458	Audit reforms in Schedule 1 to the amending Act (imposition of conditions on existing registration as company auditor)	258
1459	Audit reforms in Schedule 1 to the amending Act (application of items 62 and 63)	258
1460	Audit reforms in Schedule 1 to the amending Act (non-audit services disclosure)	259
1461	Audit reforms in Schedule 1 to the amending Act (auditor appointment)	259
1462	Audit reforms in Schedule 1 to the amending Act (auditor independence)	259
1463	Audit reforms in Schedule 1 to the amending Act (auditor rotation)	261
1464	Audit reforms in Schedule 1 to the amending Act (listed company AGMs)	261
1465	Schedule 2 to the amending Act (financial reporting)	261
1466A	Schedule 2A to the amending Act (true and fair view)	262
1466	Schedule 3 to the amending Act (proportionate liability)	262
1467	Schedule 4 to the amending Act (enforcement)	262
1468	Schedule 5 to the amending Act (remuneration of directors and executives)	262
1469	Schedule 6 to the amending Act (continuous disclosure)	263
1470	Schedule 7 to the amending Act (disclosure rules)	263
1471	Schedule 8 to the amending Act (shareholder participation and information)	264

Part 10.8—Transitional provisions relating to the Corporations

Amendment (Takeovers) Act 2007 265

1478	Application of amendments of the takeovers provisions	265
------	---	-----

Part 10.9—Transitional provisions relating to the Corporations

Amendment (Insolvency) Act 2007 266

1479	Definition	266
1480	Schedule 1 to the amending Act (improving outcomes for creditors)	266
1481	Schedule 2 to the amending Act (deterring corporate misconduct)	269
1482	Schedule 3 to the amending Act (improving regulation of insolvency practitioners)	269

1483	Schedule 4 to the amending Act (fine-tuning voluntary administration).....	270
Part 10.10 Transitional provisions relating to the Corporations Amendment (Short Selling) Act 2008 273		
1484	Declarations under paragraph 1020F(1)(c) relating to short selling	273
Schedule 3—Penalties		275
Schedule 4—Transfer of financial institutions and friendly societies		306
Part 1—Preliminary		306
1	Definitions	306
Part 2—Financial institutions that became companies		309
Division 1—Registration and its consequences		309
3	Background (registration of transferring financial institution as company).....	309
4	Rules applied to transferring institution that was registered as a company under the transfer provisions	309
11	Transferring financial institution under external administration.....	310
Division 2—Membership		313
12	Institution that became a company limited by shares	313
13	Institution that became a company limited by guarantee.....	314
14	Institution becoming a company limited by shares and guarantee	315
15	Redeemable preference shares that were withdrawable shares.....	315
16	Liability of members on winding up.....	316
Division 3—Share capital		317
17	Share capital	317
18	Application of no par value rule	317
19	Calls on partly-paid shares	318
20	References in contracts and other documents to par value	318
Part 4—The transition period		320
25	ASIC may direct directors of a company to modify its constitution	320
27	When certain modifications of a company’s constitution under an exemption or declaration take effect	321
Part 5—Demutualisations		323
29	Disclosure for proposed demutualisation.....	323
30	ASIC’s exemption power	325

31	Coverage of disclosure statement	326
32	Registration of disclosure statement	326
33	Expert's report	328
34	Unconscionable conduct in relation to demutualisations	328
35	Orders the Court may make	329
Part 6—Continued application of fundraising provisions of the Friendly Societies Code		331
36	Friendly Societies Code to apply to offers of interests in benefit funds	331
Part 7—Transitional provisions		333
37	Unclaimed money	333
38	Modification by regulations	334
39	Regulations may deal with transitional, saving or application matters	335
Notes		337

Chapter 9—Miscellaneous

Part 9.1—Registers and registration of documents

1274 Registers

- (1) ASIC must, subject to this Act, keep such registers as it considers necessary in such form as it thinks fit.
- (2) A person may:
 - (a) inspect any document lodged with ASIC, not being:
 - (iaa) a notice lodged under subsection 205D(3); or
 - (i) an application under section 1279; or
 - (ia) a document lodged under a provision of Chapter 7 (other than subsection 792C(1), section 1015B or section 1015D); or
 - (ii) a document lodged under section 1287, 1287A or 1288; or
 - (iii) a document lodged under paragraph 1296(2)(b); or
 - (iv) a report made or lodged under section 422, 438D or 533; or
 - (v) a document that has been destroyed or otherwise disposed of; or
 - (b) require a certificate of the registration of a company or any other certificate authorised by this Act to be given by ASIC; or
 - (c) require a copy of or extract from any document that the person is entitled to inspect pursuant to paragraph (a) or any certificate referred to in paragraph (b) to be given, or given and certified, by ASIC.
- (2A) For the purposes of subsections (2) and (5), a document given to ASIC by a market operator (whether or not pursuant to a provision of this Act) that contains information that the market operator has made available to participants in the market is taken to be a document lodged with ASIC.

Note: For example, a document given to ASIC for the purposes of subsection 792C(1) will be covered by this subsection.

Section 1274

- (2B) For the purposes of subsections (2) and (5), information or a copy of a document that is not required to be lodged with ASIC because of section 601CDA or 601CTA is taken to be a document lodged with ASIC if an authority mentioned in the section has given the information or document to ASIC.
- (2C) For the purposes of subsections (2) and (5), information or a copy of a document that is taken to be lodged with ASIC because of paragraph 1200D(2)(b) or 1200G(10)(b) is taken to be a document lodged with ASIC if an authority mentioned in section 601CDA or 601CTA has given the information or document to ASIC.
- (2D) For the purposes of subsections (2) and (5), each of the following is taken to be a document lodged with ASIC if a copy has been given to ASIC by APRA:
 - (a) benefit fund rules that have been approved by APRA under section 16L of the *Life Insurance Act 1995*;
 - (b) an amendment of benefit fund rules that has been approved by APRA under section 16Q of the *Life Insurance Act 1995*;
 - (c) consequential amendments of a company's constitution that have been approved by APRA under section 16U or 16V of the *Life Insurance Act 1995*.
- (3) If a reproduction or transparency of a document or certificate is produced for inspection, a person is not entitled pursuant to paragraph (2)(a) to require the production of the original of that document or certificate.
- (4) The reference in paragraph (2)(c) to a document or certificate includes, where a reproduction or transparency of that document or certificate has been incorporated with a register kept by ASIC, a reference to that reproduction or transparency and, where such a reproduction or transparency has been so incorporated, a person is not entitled pursuant to that paragraph to a copy of or extract from the original of that document or certificate.
- (4A) A person is not entitled under paragraph (2)(a) to require the production of the original of a document or certificate if ASIC keeps by means of a mechanical, electronic or other device a record of information set out in the document or certificate and:
 - (a) ASIC produces to the person for inspection a writing that sets out what purports to be the contents of the document or certificate; or

- (b) ASIC causes to be displayed for the person what purports to be the contents of the document or certificate and, as at the time of the displaying, the person has not asked for the production of a writing of the kind referred to in paragraph (a).

(4B) Where:

- (a) a person makes under paragraph (2)(c) a requirement that relates to a document or certificate; and
- (b) ASIC keeps by means of a mechanical, electronic or other device a record of information set out in the document or certificate; and
- (c) pursuant to that requirement, ASIC gives a writing or document that sets out what purports to be the contents of:
 - (i) the whole of the document or certificate; or
 - (ii) a part of the document or certificate;

then, for the purposes of that paragraph, ASIC is taken to have given, pursuant to that requirement:

- (d) if subparagraph (c)(i) applies—a copy of the document or certificate; or
- (e) if subparagraph (c)(ii) applies—an extract from the document or certificate setting out that part of it.

(4C) Where:

- (a) the requirement referred to in paragraph (4B)(a) includes a requirement that the copy or extract be certified; and
- (b) pursuant to that requirement, ASIC gives a writing or document as mentioned in paragraph (4B)(c);

then:

- (c) ASIC may certify that the writing or document sets out the contents of the whole or part of the document or certificate, as the case requires; and
- (d) the writing or document is, in a proceeding in a court, admissible as prima facie evidence of the information contained in it.

- (5) A copy of or extract from any document lodged with ASIC, and certified by ASIC, is, in any proceeding, admissible in evidence as of equal validity with the original document.

Note: See also subsection (2A) for when certain documents are taken to have been lodged with ASIC.

Section 1274

- (6) The reference in subsection (5) to a document includes, where a reproduction or transparency of that document has been incorporated with a register kept by ASIC, a reference to that reproduction or transparency.
- (7) In any proceeding:
 - (a) a certificate by ASIC that, at a date or during a period specified in the certificate, no company was registered under this Act by a name specified in the certificate is to be received as prima facie evidence that at that date or during that period, as the case may be, no company was registered by that name under this Act; and
 - (b) a certificate by ASIC that a requirement of this Act specified in the certificate:
 - (i) had or had not been complied with at a date or within a period specified in the certificate; or
 - (ii) had been complied with at a date specified in the certificate but not before that date;is to be received as prima facie evidence of matters specified in the certificate; and
 - (c) a certificate by ASIC that, during a period specified in the certificate, a particular company was registered, or taken to be registered, under this Act is to be received as prima facie evidence that, during that period, that company was registered under this Act.
- (7A) A certificate issued by ASIC stating that a company has been registered under this Act is conclusive evidence that:
 - (a) all requirements of this Act for its registration have been complied with; and
 - (b) the company was duly registered as a company under this Act on the date specified in the certificate.
- (8) If ASIC is of opinion that a document submitted for lodgment:
 - (a) contains matter contrary to law; or
 - (b) contains matter that, in a material particular, is false or misleading in the form or context in which it is included; or
 - (c) because of an omission or misdescription has not been duly completed; or
 - (d) contravenes this Act; or

Section 1274

- (e) contains an error, alteration or erasure;
ASIC may refuse to register or receive the document and may request:
 - (f) that the document be appropriately amended or completed and resubmitted; or
 - (g) that a fresh document be submitted in its place; or
 - (h) where the document has not been duly completed, that a supplementary document in the prescribed form be lodged.
- (9) ASIC may require a person who submits a document for lodgment to produce to ASIC such other document, or to give to ASIC such information, as ASIC thinks necessary in order to form an opinion whether it may refuse to receive or register the first-mentioned document.
- (10) ASIC may, if in the opinion of ASIC it is no longer necessary or desirable to retain them, destroy or dispose of:
 - (a) in relation to a body corporate:
 - (i) any return of allotment of shares for cash that has been lodged for not less than 2 years; or
 - (ii) any balance-sheet that has been lodged for not less than 7 years or any document creating or evidencing a charge, or the complete or partial satisfaction of a charge, where a memorandum of satisfaction of the charge has been registered for not less than 7 years; or
 - (iii) any other document (other than the constitution or any other document affecting it) that has been lodged or registered for not less than 15 years; or
 - (c) any document a transparency of which has been incorporated with a register kept by ASIC.
- (11) If a body corporate or other person, having made default in complying with:
 - (a) any provision of this Act or of any other law that requires the lodging in any manner of any return, account or other document or the giving of notice to ASIC of any matter; or
 - (b) any request of ASIC to amend or complete and resubmit any document or to submit a fresh document;fails to make good the default within 14 days after the service on the body or person of a notice requiring it to be done, a court may, on an application by any member or creditor of the body or by

Section 1274AA

ASIC, make an order directing the body or any officer of the body or the person to make good the default within such time as is specified in the order.

- (12) Any such order may provide that all costs of and incidental to the application are to be borne by the body or by any officers of the body responsible for the default or by the person.
- (13) A person must not contravene an order made under subsection (11).
- (14) Nothing in this section prejudices the operation of any law imposing penalties on a body corporate or its officers or on another person in respect of a default mentioned in subsection (11).
- (15) Where information about a person is included on a register kept by ASIC, ASIC may at any time, in writing, require that person to give ASIC specified information about the person, being information of the kind included on that register.
- (16) The person must provide the information within such reasonable period, and in such form, as are specified by ASIC.
- (17) An offence based on subsection (9), (13) or (16) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

1274AA Register of disqualified company directors and other officers

- (1) ASIC must keep a register of persons who have been disqualified from managing corporations under:
 - (a) section 206C, 206D, 206E, 206EA or 206F of this Act; or
 - (b) a provision of a law of a State or Territory that:
 - (i) was in force at any time before the commencement of this Act; and
 - (ii) corresponds, in whole or in part, to one of the provisions referred to in paragraph (a).
- (2) The register must contain a copy of:
 - (a) every order made by the Court under section 206C, 206D or 206E; and
 - (aa) every court order referred to in section 206EA; and

Section 1274A

- (b) every notice that was served under subsection 206F(3); and
- (c) each permission given under subsection 206F(5); and
- (d) every order lodged under subsection 206G(4); and
- (e) every order, notice or permission that was made, served, given or lodged under a provision of a law of a State or Territory that:
 - (i) was in force at any time before the commencement of this Act; and
 - (ii) corresponds, in whole or in part, to one of the provisions referred to in paragraph (a), (b), (c) or (d).
- (3) Subsections 1274(2) and (5) apply to a copy of an order, notice or permission referred to in subsection (2) as if that copy were a document lodged with ASIC.
- (4) A reference in this section to a provision of a law of a State or Territory includes a provision as applied as a law of that State or Territory.

1274A Obtaining information from certain registers

- (1) In this section:

data processor means a mechanical, electronic or other device for the processing of data.

register means a register kept by ASIC under this Act.

search includes inspect.

- (2) ASIC may permit a person to search, otherwise than by using a data processor, a prescribed register.
- (3) ASIC may permit a person to search a prescribed register by using a data processor in order to obtain prescribed information from the register.
- (4) ASIC may make available to a person prescribed information (in the form of a document or otherwise) that ASIC has obtained from a prescribed register by using a data processor.
- (5) Nothing in this section limits:
 - (a) a power or function that ASIC has apart from this section; or
 - (b) a right that a person has apart from this section.

Section 1274B

1274B Use, in court proceedings, of information from ASIC's national database

- (1) In this section:

data processor means a mechanical, electronic or other device for processing data.

- (2) In a proceeding in a court, a writing that purports to have been prepared by ASIC is admissible as prima facie evidence of the matters stated in so much of the writing as sets out what purports to be information obtained by ASIC, by using a data processor, from the national database. In other words, the writing is proof of such a matter in the absence of evidence to the contrary.
- (3) A writing need not bear a certificate or signature in order to be taken to purport to have been prepared by ASIC.
- (4) Nothing in this section limits, or is limited by, section 1274 or 1274A.

1274C ASIC certificate

ASIC may certify that a person was a director or secretary of a company at a particular time or during a particular period. In the absence of evidence to the contrary, a certificate is proof of the matters stated in it.

Note: See section 1274B for the evidentiary status of documents prepared by ASIC from the national database.

1275 Relodging of lost registered documents

- (1) Where a document forming part of the constitution of, or any other document relating to, a body corporate has, since being lodged, been lost or destroyed, a person may apply to ASIC for leave to lodge a copy of the document as originally lodged.
- (2) Where such an application is made, ASIC may direct that notice of the application be given to such persons and in such manner as it thinks fit.
- (3) Whether or not an application has been made to ASIC under subsection (1), ASIC, upon being satisfied:
- (a) that an original document has been lost or destroyed; and

Section 1275

- (b) of the date of the lodging of that document; and
 - (c) that a copy of that document produced to ASIC is a correct copy;
- may certify upon the copy that it is so satisfied and grant leave for the copy to be lodged in the manner required by law in respect of the original.
- (4) Upon the lodgment the copy has, and is taken to have had from such date as is mentioned in the certificate as the date of the lodging of the original, the same force and effect for all purposes as the original.
- (5) A decision of the Tribunal varying or setting aside a decision of ASIC to certify and grant leave under subsection (3) may be lodged with ASIC and is to be registered by it, but no payments, contracts, dealings, acts or things made, had or done in good faith before the registration of the Tribunal's decision and upon the faith of and in reliance upon the certificate are to be invalidated or affected by the Tribunal's decision.
- (6) Where a transparency of a document referred to in subsection (1) has been incorporated with a register kept by ASIC and is lost or destroyed as referred to in that subsection, this section applies as if the document of which it is a transparency had been so lost or destroyed.

Part 9.2—Registration of auditors and liquidators

Division 1—Interpretation

1276 Definitions

In this Part, unless the contrary intention appears:

body corporate includes a Part 5.7 body.

decision, in relation to the Board, means, in Division 3, a decision of the Board under that Division and includes a refusal to exercise a power under section 1292.

registered means registered under Division 2.

Division 2—Registration

1279 Application for registration as auditor or liquidator

- (1) A natural person may make an application to ASIC:
 - (a) for registration as an auditor; or
 - (b) for registration as a liquidator; or
 - (c) for registration as a liquidator of a specified body corporate, being a body corporate that is to be wound up under this Act.
- (2) An application under this section:
 - (a) must be lodged with ASIC; and
 - (b) must contain such information as is prescribed in the regulations; and
 - (c) must be in the prescribed form.

1280 Registration of auditors

- (2) Subject to this section, where an application for registration as an auditor is made under section 1279, ASIC must grant the application and register the applicant as an auditor if:
 - (a) the applicant satisfies subsection (2A) or (2B); and
 - (b) ASIC is satisfied that the applicant has either:
 - (i) satisfied all the components of an auditing competency standard approved by ASIC under section 1280A; or
 - (ii) had such practical experience in auditing as is prescribed; and
 - (c) ASIC is satisfied that the applicant is capable of performing the duties of an auditor and is otherwise a fit and proper person to be registered as an auditor;but otherwise ASIC must refuse the application.
- (2A) The applicant satisfies this subsection if the applicant:
 - (a) holds a degree, diploma or certificate from a prescribed university or another prescribed institution in Australia; and
 - (b) has, in the course of obtaining that degree, diploma or certificate, passed examinations in such subjects, under whatever name, as the appropriate authority of the university

Section 1280

or other institution certifies to ASIC to represent a course of study:

- (i) in accountancy (including auditing) of not less than 3 years duration; and
 - (ii) in commercial law (including company law) of not less than 2 years duration; and
 - (c) has satisfactorily completed a course in auditing prescribed by the regulations for the purposes of this paragraph.
- (2B) The applicant satisfies this subsection if the applicant has other qualifications and experience that, in ASIC's opinion, are equivalent to the requirements mentioned in subsection (2A).
- (3) ASIC must not register as an auditor a person who is disqualified from managing corporations under Part 2D.6.
- (4) Subject to subsection (8), ASIC may refuse to register as an auditor a person who is not resident in Australia.
- (5) Where ASIC grants an application by a person for registration as an auditor, ASIC must cause to be issued to the person a certificate by ASIC stating that the person has been registered as an auditor and specifying the day on which the application was granted.
- (7) A registration under this section is taken to have taken effect at the beginning of the day specified in the certificate as the day on which the application for registration was granted and remains in force until:
- (a) the registration is cancelled by ASIC or the Board; or
 - (b) the person who is registered dies.
- (8) ASIC must not refuse to register a person as an auditor unless ASIC has given the person an opportunity to appear at a hearing before ASIC and to make submissions and give evidence to ASIC in relation to the matter.
- (9) Where ASIC refuses an application by a person for registration as an auditor, ASIC must, not later than 14 days after the decision, give to the person a notice in writing setting out the decision and the reasons for it.

1280A Approval of auditing competency standard

- (1) ASIC may, on application by any person, approve an auditing competency standard for the purposes of paragraph 1280(2)(b). The approval must be in writing.
- (2) If, on application by a person, ASIC approves an auditing competency standard under subsection (1), ASIC may, on application by that person, approve a variation of the standard. The approval must be in writing.
- (3) ASIC must not approve an auditing competency standard, or a variation of an auditing competency standard, unless it is satisfied that:
 - (a) the standard, or the standard as proposed to be varied, provides that a person's performance against each component of the standard is to be appropriately verified by a person who:
 - (i) is a registered company auditor; and
 - (ii) has sufficient personal knowledge of the person's work to be able to give that verification; and
 - (b) the standard, or the standard as proposed to be varied, is not inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and
 - (c) the standard adequately addresses the level of practical experience needed for registration as a company auditor; and
 - (d) the standard is harmonised to the greatest extent possible with other approved auditing competency standards.
- (4) ASIC may revoke an approval of an auditing competency standard:
 - (a) on application by the person who applied for the approval; or
 - (b) if ASIC is no longer satisfied as mentioned in subsection (3).The revocation must be in writing.

1281 Auditor-General taken to be registered as auditor

- (1) A person who holds office as, or is for the time being exercising the powers and performing the duties of:
 - (a) the Auditor-General; or

Section 1282

- (b) the Auditor-General of a State or Territory in this jurisdiction;

is taken, despite any other provision of this Part, to be registered as an auditor.
- (2) A person to whom the Auditor-General of the Commonwealth, or of a State or Territory, delegates:
 - (a) the function of conducting an audit; or
 - (b) the power to conduct an audit;

is taken to be registered as an auditor under this Part for the purposes of applying Chapter 2M to the audit.

1282 Registration of liquidators

- (2) Subject to this section, where an application for registration as a liquidator is made under section 1279, ASIC must grant the application if:
 - (a) the applicant:
 - (ii) holds a degree, diploma or certificate from a prescribed university or another prescribed institution in Australia and has passed examinations in such subjects, under whatever name, as the appropriate authority of the university or other institution certifies to ASIC to represent a course of study in accountancy of not less than 3 years duration and in commercial law (including company law) of not less than 2 years duration; or
 - (iii) has other qualifications and experience that, in the opinion of ASIC, are equivalent to the qualifications mentioned in subparagraph (ii); and
 - (b) ASIC is satisfied as to the experience of the applicant in connection with externally-administered bodies corporate; and
 - (c) ASIC is satisfied that the applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator;

but otherwise ASIC must refuse the application.
- (3) Where an application for registration as a liquidator of a specified body corporate is made under section 1279, ASIC must grant the application and register the applicant as a liquidator of that body if ASIC is satisfied that the applicant has sufficient experience and

ability, and is a fit and proper person, to act as liquidator of the body, having regard to the nature of the property or business of the body and the interests of its creditors and contributories, but otherwise ASIC must refuse the application.

- (4) ASIC must not register as a liquidator, or as a liquidator of a specified body corporate, a person who is disqualified from managing corporations under Part 2D.6.
- (5) Subject to subsection (10), ASIC may refuse to register as a liquidator or as a liquidator of a specified body corporate a person who is not resident in Australia.
- (6) Where:
 - (a) ASIC grants an application by a person for registration as a liquidator or as a liquidator of a specified body corporate; and
 - (b) the person has complied with the requirements of section 1284;ASIC must cause to be issued to the person a certificate by ASIC:
 - (c) stating that the person has been registered as a liquidator or as a liquidator of a specified body corporate; and
 - (d) specifying a day as the day of the beginning of the registration, being:
 - (i) the day on which ASIC granted the application; or
 - (ii) the day on which the person complied with the requirements of section 1284;whichever was the later; and
 - (e) in the case of a person who is registered under subsection (3) as a liquidator of a specified body corporate—setting out the name of that body.
- (8) The registration of a person as a liquidator under subsection (2) comes into force at the beginning of the day specified in the certificate as the day of the beginning of the registration and remains in force until:
 - (a) the registration is cancelled by ASIC or by the Board; or
 - (b) the person dies.
- (9) The registration of a person as a liquidator of a specified body corporate under subsection (3) comes into force at the beginning of

Section 1283

the day specified in the certificate as the day of the beginning of the registration and remains in force until:

- (a) the registration is cancelled by ASIC or by the Board; or
 - (b) the person dies; or
 - (c) the body corporate is dissolved or deregistered.
- (10) ASIC must not refuse to register a person as a liquidator, or as a liquidator of a specified body corporate, unless ASIC has given the person an opportunity to appear at a hearing before ASIC and to make submissions and give evidence to ASIC in relation to the matter.
- (11) Where ASIC refuses an application by a person for registration as a liquidator, or as a liquidator of a specified body corporate, ASIC must, not later than 14 days after the decision, give to the person notice in writing setting out the decision and the reasons for it.

1283 Registration of official liquidators

- (1) ASIC may register as an official liquidator a natural person who is a registered liquidator.
- (2) A person who is registered as an official liquidator is entitled, upon request, to be issued with a certificate of his or her registration.
- (3) ASIC may register under subsection (1) as official liquidators as many registered liquidators as it thinks fit.

1284 Insurance to be maintained by liquidators

- (1) A person who is registered as a liquidator, or as a liquidator of a specified body corporate, must maintain:
 - (a) adequate and appropriate professional indemnity insurance; and
 - (b) adequate and appropriate fidelity insurance;for claims that may be made against the person in connection with externally-administered bodies corporate.
- (2) If the registration of a person as a liquidator, or as a liquidator of a specified body corporate, came into force before the commencement of this subsection, subsection (1) does not apply to the person at any time before 1 July 2008.

1285 Register of Auditors

- (1) ASIC must cause a Register of Auditors to be kept for the purposes of this Act and must cause to be entered in the Register in relation to a person who is registered as an auditor:
 - (a) the name of the person; and
 - (b) the day on which the application by that person for registration as an auditor was granted; and
 - (c) the address of the principal place where the person practises as an auditor and the address of the other places (if any) at which he or she so practises; and
 - (d) if the person practises as an auditor as a member of a firm or under a name or style other than his or her own name—the name of that firm or the name or style under which he or she so practises; and
 - (e) particulars of any suspension of the person's registration, under Division 2, as an auditor and of any action taken in respect of the person under paragraph 1292(9)(a), (b) or (c);and may cause to be entered in the Register in relation to a person who is registered as an auditor such other particulars as ASIC considers appropriate.
- (2) Where a person ceases to be registered as an auditor, ASIC must cause to be removed from the Register of Auditors the name of the person and any other particulars entered in the Register in relation to that person.
- (3) A person may inspect and make copies of, or take extracts from, the Register of Auditors.

1286 Registers of Liquidators and Official Liquidators

- (1) ASIC must cause a Register of Liquidators to be kept for the purposes of this Act and must cause to be entered in the Register:
 - (a) in relation to a person who is registered as a liquidator:
 - (i) the name of the person; and
 - (ii) the day of the beginning of the registration of that person as a liquidator; and
 - (iii) the address of the principal place where the person practises as a liquidator and the addresses of the other places (if any) at which he or she so practises; and

Section 1286

- (iv) if the person practises as a liquidator as a member of a firm or under a name or style other than his or her own name—the name of that firm or the name or style under which he or she so practises; and
 - (v) particulars of any suspension of the registration of the person as a liquidator or as a liquidator of a specified body corporate, and of any action taken in respect of the person under paragraph 1292(9)(a), (b) or (c); and
 - (b) in relation to a person who is registered as a liquidator of a specified body corporate:
 - (i) the name of the person; and
 - (ii) the name of the body corporate; and
 - (iii) the day of commencement of the registration of the person as a liquidator of the body corporate; and
 - (iv) the address of the principal place where the person proposes to perform his or her functions as the liquidator of the body corporate; and
 - (v) if the person practises a profession as a member of a firm or under a name or style other than his or her own name, being a profession by virtue of which he or she is qualified to be appointed as a liquidator of the body corporate—the name and address of that firm or the name or style under which he or she so practises; and
 - (vi) particulars of any suspension or deemed suspension of the registration of the person as a liquidator of that body corporate or as a liquidator of a specified body corporate, and of any action taken in respect of the person under paragraph 1292(9)(a), (b) or (c);
- and may cause to be entered in the Register in relation to a person who is registered as a liquidator, or as a liquidator of a specified body corporate, such other particulars as ASIC considers appropriate.
- (2) ASIC must cause a Register of Official Liquidators to be kept for the purposes of this Act and must cause to be entered in the Register the name, and such other particulars as ASIC considers appropriate, of any person registered as an official liquidator.
 - (3) Where a person ceases to be registered as a liquidator, as a liquidator of a specified body corporate or as an official liquidator, ASIC must cause to be removed from the Register of Liquidators

or from the Register of Official Liquidators, as the case may be, the name of the person and any other particulars entered in that Register in relation to that person.

- (4) A person may inspect and make copies of, or take extracts from, the Register of Liquidators or the Register of Official Liquidators.

1287 Notification of certain matters

- (1) Where:

- (a) a person who is a registered company auditor ceases to practise as an auditor; or
- (b) a change occurs in any matter particulars of which are required by paragraph 1285(1)(a), (c) or (d) to be entered in the Register of Auditors in relation to a person who is a registered company auditor;

the person must, not later than 21 days after the occurrence of the event concerned, lodge, in the prescribed form, particulars in writing of that event.

- (2) Where:

- (a) a person who is a registered liquidator ceases to practise as a liquidator; or
- (b) a change occurs in any matter particulars of which are required by subparagraph 1286(1)(a)(i), (iii) or (iv) to be entered in the Register of Liquidators in relation to a person who is a registered liquidator;

the person must, not later than 21 days after the occurrence of the event concerned, lodge, in the prescribed form, particulars in writing of that event.

- (3) Where:

- (a) a person who is registered as a liquidator of a specified body corporate ceases to act as a liquidator in the winding up of that body; or

Section 1287A

- (b) a change occurs in any matter particulars of which are required by subparagraph 1286(1)(b)(i), (ii), (iv) or (v) to be entered in the Register of Liquidators in relation to a person who is registered as a liquidator of a specified body corporate;
the person must, not later than 21 days after the occurrence of the event concerned, lodge, in the prescribed form, particulars in writing of that event.
- (4) If a person who is registered as an auditor, as a liquidator or as a liquidator of a specified corporate body is disqualified from managing corporations under Part 2D.6, then, within a period of 3 days after they become disqualified, they must lodge written particulars in the prescribed form of the circumstances because of which they become disqualified.

1287A Annual statements by registered company auditors

- (1) A person who is a registered company auditor must, within one month after the end of:
 - (a) the period of 12 months beginning on the day on which the person's registration begins; and
 - (b) each subsequent period of 12 months;lodge with ASIC a statement in respect of that period.
- (1A) A statement under subsection (1):
 - (a) must contain such information as is prescribed in the regulations; and
 - (b) must be in the prescribed form.
- (2) ASIC may, on the application of the person made before the end of the period for lodging a statement under subsection (1), extend, or further extend, that period.

1288 Annual statements by registered liquidators

- (3) A person who is a registered liquidator must, within one month after the end of:
 - (a) the period of 12 months beginning on the day on which the person's registration begins; and

- (b) each subsequent period of 12 months;
lodge a statement in respect of that period of 12 months setting out such information as is prescribed.
- (4) ASIC may, on the application of a registered liquidator made before the end of the period for lodging a statement under subsection (3), extend, or further extend, that period.
- (5) ASIC may, by notice in writing served on the person, require a person who is registered as a liquidator of a specified body corporate to lodge, within a period specified in the notice, a statement in respect of a period specified in the notice setting out such information as is prescribed.

1289 Auditors and other persons to enjoy qualified privilege in certain circumstances

Qualified privilege for auditor

- (1) An auditor has qualified privilege in respect of:
 - (a) a statement that the auditor makes (orally or in writing) in the course of the auditor's duties as auditor; or
 - (b) a statement that the auditor makes (orally or in writing) on:
 - (i) a directors' report under section 298 or 306; or
 - (ii) a statement, report or other document that is taken, for any purpose, to be part of that report; or
 - (c) notifying ASIC of a matter under section 311; or
 - (d) a disclosure made by the auditor in response to a notice given to the auditor under subsection 30A(1) or 225A(5) of the ASIC Act.

Note: If the auditor is an audit company, the company has qualified privilege under this subsection in respect of statements made, and notices given, by individuals on behalf of the company if those statements and notices can be properly attributed to the company.

Qualified privilege for registered company auditor acting on behalf of audit company

- (2) If the auditor is an audit company, a registered company auditor acting on behalf of the company has qualified privilege in respect of:

Section 1289

- (a) a statement that the registered company auditor makes (orally or in writing) in the course of the performance, on the behalf of the company, of the company's duties as auditor; or
- (b) a statement that the registered company auditor makes (orally or in writing), on behalf of the company, on:
 - (i) a directors' report under section 298 or 306; or
 - (ii) any statement, report or other document that is taken, for any purpose, to be part of that report; or
- (c) a notification of a matter that the registered company auditor gives ASIC, on behalf of the company, under section 311; or
- (d) a disclosure made by the registered company auditor in response to a notice given to the audit company under subsection 225A(5) of the ASIC Act.

Extent of auditor's duties—answering questions put to auditor by members

- (3) For the purposes of this section, an auditor's duties as auditor include:
 - (a) answering questions put to the auditor (or the auditor's representative) at an AGM; and
 - (b) providing answers to questions that are submitted to the auditor under section 250PA.

Qualified privilege for person representing auditor at AGM

- (4) A person who represents an auditor at an AGM has qualified privilege in respect of any statement that the person makes in the course of representing the auditor at that AGM.

Qualified privilege for subsequent publication

- (5) A person has qualified privilege in respect of the publishing of a document that:
 - (a) is prepared by an auditor in the course of the auditor's duties; or
 - (b) required by or under this Act to be lodged (whether or not the document has been lodged).
- (6) A person has qualified privilege in respect of the publishing of any statement:
 - (a) made by an auditor as mentioned in subsection (1); or

Section 1289

- (b) made by a registered company auditor as mentioned in subsection (2); or
- (c) made by a person as mentioned in subsection (4).

Division 2A—Conditions on registration of auditors

1289A ASIC may impose conditions on registration

- (1) Under this section, ASIC may impose only conditions of a kind specified in the regulations.
- (2) Subject to this section, ASIC may, at any time, by giving written notice to a person registered as an auditor:
 - (a) impose conditions, or additional conditions, on their registration; and
 - (b) vary or revoke conditions imposed on their registration.
- (3) ASIC may do so:
 - (a) on its own initiative; or
 - (b) if the registered company auditor lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

- (4) Except where conditions are varied on the application of the registered company auditor, ASIC may only impose conditions or additional conditions, or vary the conditions, on registration after giving the auditor an opportunity:
 - (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC in relation to the matter.

This subsection does not apply to ASIC imposing conditions at the time when the applicant is registered.

Division 3—Cancellation or suspension of registration

1290 Cancellation at request of registered person

- (1) Where a person who is registered as an auditor, as a liquidator, as a liquidator of a specified body corporate or as an official liquidator requests ASIC to cancel his or her registration, ASIC may cancel the registration of that person as an auditor, as a liquidator, as a liquidator of that body corporate or as an official liquidator, as the case may be.
- (2) A decision of ASIC under subsection (1) to cancel the registration of a person as an auditor, as a liquidator, as a liquidator of a specified body corporate or as an official liquidator comes into effect as soon as practicable upon the making of the decision.

1290A Cancellation on certain grounds

- (1) If a person who is registered as a liquidator, as a liquidator of a specified body corporate or as an official liquidator:
 - (a) becomes an insolvent under administration; or
 - (b) becomes disqualified from managing corporations under Part 2D.6; or
 - (c) contravenes subsection 1284(1);ASIC may cancel the registration of that person as a liquidator, as a liquidator of that body corporate or as an official liquidator, as the case may be.
- (2) If ASIC decides under subsection (1) to cancel the registration of a person as a liquidator, as a liquidator of a specified body corporate or as an official liquidator:
 - (a) ASIC must, not later than 14 days after the decision, give the person a written notice:
 - (i) setting out the decision; and
 - (ii) the reasons for it; and
 - (b) the decision comes into effect at the end of the day on which that notice is given to the person.
- (3) A failure of ASIC to comply with subsection (2) does not affect the validity of the decision.

Section 1291

- (4) Subsection (1) does not limit section 1291 or 1292.
- (5) Sections 1291 and 1292 do not limit subsection (1) of this section.

1291 Official liquidators

- (1) ASIC may, at any time, cancel, or suspend for a specified period, the registration as an official liquidator of a person who is so registered.
- (2) ASIC may, at any time, require a person registered as an official liquidator to give an undertaking to refrain from engaging in specified conduct except on specified conditions.
- (3) Where ASIC decides to exercise a power under subsection (1) or (2), ASIC must, not later than 14 days after the decision, give to the person a notice in writing setting out the decision and the reasons for it, but the validity of the decision is not affected by failure of ASIC to do so.
- (4) A decision of ASIC under subsection (1) to cancel or suspend the registration of a person as an official liquidator comes into effect at the end of the day on which there is given to the person a notice of the decision, being a notice of the kind referred to in subsection (3).

1292 Powers of Board in relation to auditors and liquidators

- (1) The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as an auditor to be dealt with under this section that, before, at or after the commencement of this section:
 - (a) the person has:
 - (ia) contravened section 324DB; or
 - (i) contravened section 1287A; or
 - (ia) failed to comply with a condition of the person's registration as an auditor; or
 - (ii) ceased to be resident in Australia; or
 - (b) the person either:
 - (i) has not performed any audit work during a continuous period of not less than 5 years; or

Section 1292

- (ii) has not performed any significant audit work during a continuous period of not less than 5 years;
and, as a result, has ceased to have the practical experience necessary for carrying out audits for the purposes of this Act;
or
 - (d) the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:
 - (i) the duties of an auditor; or
 - (ii) any duties or functions required by an Australian law to be carried out or performed by a registered company auditor;or is otherwise not a fit and proper person to remain registered as an auditor;
- by order, cancel, or suspend for a specified period, the registration of the person as an auditor.
- (1A) In determining for the purposes of subparagraph (1)(b)(ii) whether audit work performed by a person is significant, have regard to:
- (a) the nature of the audit; and
 - (b) the extent to which the person was involved in the audit; and
 - (c) the level of responsibility the person assumed in relation to the audit.
- (2) The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section:
- (a) the person has:
 - (i) contravened section 1288; or
 - (ii) ceased to be resident in Australia; or
 - (d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:
 - (i) the duties of a liquidator; or
 - (ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;or is otherwise not a fit and proper person to remain registered as a liquidator;
- by order, cancel, or suspend for a specified period, the registration of the person as a liquidator.

Section 1292

- (3) The Board may, if it is satisfied on an application by ASIC for a person who is registered as a liquidator of a specified body corporate to be dealt with under this section that, before, at or after the commencement of this section:

(a) the person has:

- (i) contravened subsection 1288(5); or
- (ii) ceased to be resident in Australia; or

(d) that the person has failed, whether in or outside this jurisdiction, to carry out adequately and properly the duties of a liquidator in respect of the winding up of that body corporate or is otherwise not a fit and proper person to remain registered as a liquidator of that body corporate;

by order, cancel, or suspend for a specified period, the registration of the person as a liquidator of that body corporate.

- (4) Where:

(a) ASIC applies to the Board for a person who is registered as an auditor to be dealt with under this section; and

(b) the person is also registered as a liquidator or as a liquidator of a specified body corporate;

the Board may, in addition to making an order under subsection (1), if it is satisfied as to any of the matters specified in paragraph (2)(a) or (d) or (3)(a) or (d), make an order cancelling, or suspending for a specified period, the registration of the person as a liquidator or as a liquidator of that body, as the case may be, and, where the Board makes such an order, the order is, for the purposes of this Division, taken to have been made under subsection (2) or (3), as the case may be.

- (5) Where:

(a) ASIC applies to the Board for a person who is registered as a liquidator to be dealt with under this section; and

(b) the person is also registered as an auditor or as a liquidator of a specified body corporate;

the Board may, in addition to making an order under subsection (2), if it is satisfied as to any of the matters specified in paragraph (1)(a) or (d) or (3)(a) or (d), make an order cancelling, or suspending for a specified period, the registration of the person as an auditor or as a liquidator of that body, as the case may be, and, where the Board makes such an order, the order is, for the purposes

of this Division, taken to have been made under subsection (1) or (3), as the case may be.

(6) Where:

(a) ASIC applies to the Board for a person who is registered as a liquidator of a specified body corporate to be dealt with under this section; and

(b) the person is also registered as an auditor or as a liquidator; the Board may, in addition to making an order under subsection (3), if it is satisfied as to any of the matters specified in paragraph (1)(a) or (d) or (2)(a) or (d), make an order cancelling, or suspending for a specified period, the registration of the person as an auditor or as a liquidator, as the case may be, and, where the Board makes such an order, the order is, for the purposes of this Division, taken to have been made under subsection (1) or (2), as the case may be.

(7) The Board must, if it is satisfied on an application by ASIC or APRA for a prescribed person to be dealt with under this section:

(a) that the person is disqualified from managing corporations under Part 2D.6; or

(b) that the person is incapable, because of mental infirmity, of managing his or her affairs;

by order, cancel each prescribed registration of the person.

(8) In subsection (7) and in this subsection:

prescribed person means a person who is registered as an auditor, as a liquidator or as a liquidator of a specified body corporate.

prescribed registration, in relation to a prescribed person, means a registration of the person as an auditor, as a liquidator or as the liquidator of a specified body corporate.

(9) Where, on an application by ASIC or APRA for a person who is registered as an auditor, as a liquidator or as a liquidator of a specified body corporate to be dealt with under this section, the Board is satisfied that the person has failed to carry out or perform adequately and properly any of the duties or functions mentioned in paragraph (1)(d), (2)(d) or (3)(d), as the case may be, or is otherwise not a fit and proper person to remain registered as an auditor, liquidator or liquidator of that body, as the case may be,

Section 1294

the Board may deal with the person in one or more of the following ways:

- (a) by admonishing or reprimanding the person;
 - (b) by requiring the person to give an undertaking to engage in, or to refrain from engaging in, specified conduct;
 - (c) by requiring the person to give an undertaking to refrain from engaging in specified conduct except on specified conditions;
- and, if a person fails to give an undertaking when required to do so under paragraph (b) or (c), or contravenes an undertaking given pursuant to a requirement under that paragraph, the Board may, by order, cancel, or suspend for a specified period, the registration of the person as an auditor, as a liquidator or as a liquidator of a specified body corporate, as the case may be.
- (10) The Board's powers under subsection (9) may be exercised in addition to, or in substitution for, the exercise of the Board's powers to cancel or suspend a registration under subsections (1) to (6).
 - (11) The Board may exercise any of its powers under this Division in relation to a person as a result of conduct engaged in by the person whether or not that conduct constituted or might have constituted an offence, and whether or not any proceedings have been brought or are to be brought in relation to that conduct.
 - (12) This section has effect subject to section 1294.

1294 Board to give opportunity for hearing etc.

- (1) The Board must not:
 - (a) cancel or suspend the registration of a person as an auditor, as a liquidator or as a liquidator of a specified body corporate; or
 - (b) deal with a person in any of the ways mentioned in subsection 1292(9);unless the Board has given the person an opportunity to appear at a hearing held by the Board and to make submissions to, and adduce evidence before, the Board in relation to the matter.
- (2) Where subsection (1) requires the Board to give a person an opportunity to appear at a hearing and to make submissions to, and bring evidence before, the Board in relation to a matter, the Board

must give ASIC and APRA an opportunity to appear at the hearing and to make submissions to, and bring evidence before, the Board in relation to the matter.

1294A Pre-hearing conference

- (1) If subsection 1294(1) requires the Board to give a person an opportunity to appear at a hearing and to make submissions to, and bring evidence before, the Board in relation to a matter, the Chairperson of the Board may, if he or she considers that it would assist in the conduct of the hearing to do so, convene one or more conferences with the person.
- (2) The Chairperson of the Board may allow any of the following persons to attend a conference:
 - (a) a representative of ASIC;
 - (b) a representative of APRA;
 - (c) any other person.
- (3) The Chairperson of the Board must give written notice of a conference to ASIC and APRA at least 14 days before the conference.
- (4) At a conference, the Chairperson of the Board may, on behalf of the Board:
 - (a) fix a date or dates for the hearing; and
 - (b) give directions about the time within which submissions are to be made to the Board in relation to the matter; and
 - (c) give directions about the time within which evidence is to be brought before the Board in relation to the matter; and
 - (d) give directions as to the procedure to be followed at or in connection with the hearing.

1295 Board may remove suspension

- (1) Where a registration of a person is suspended, the Board may, on an application by the person or of its own motion, by order, terminate the suspension.
- (2) An order under subsection (1) has effect accordingly.

Section 1296

1296 Notice of Board's decision

(1) Where the Board decides to exercise any of its powers under section 1292 in relation to a person, or decides that it is required to make an order under subsection 1292(7) in relation to a person, the Board must, within 14 days after the decision:

- (a) give to the person a notice in writing setting out the decision and the reasons for it; and
- (b) lodge a copy of the notice referred to in paragraph (a); and
- (c) cause to be published in the *Gazette* a notice in writing setting out the decision.

(1A) If:

- (a) the Board decides to exercise the power, or makes the order, on the basis of particular conduct engaged in by the person; and
- (b) the person engaged in that conduct in the course of participating in the conduct of an audit on behalf of an audit firm or audit company;

the notice under paragraph (1)(c) may identify the audit firm or audit company.

(1B) If the Board:

- (a) decides to exercise any of its powers under section 1292 in relation to a person; or
- (b) decides that it is required to make an order under subsection 1292(7) in relation to a person;

then, in addition to meeting the requirements of subsection (1), the Board may take such steps as it considers reasonable and appropriate to publicise:

- (c) the decision; and
- (d) the reasons for the decision.

Without limiting this, the Board may make the decision and reasons available on the Internet.

(1C) If:

- (a) the Board decides to exercise the power under section 1292, or makes the order under subsection 1292(7), on the basis of particular conduct engaged in by the person; and

Section 1297

- (b) the person engaged in that conduct in the course of participating in the conduct of an audit on behalf of an audit firm or audit company;a publication under subsection (1B) may identify the audit firm or audit company.
- (2) Where the Board decides to refuse to exercise its powers under section 1292 in relation to a person, or decides that it is not required to make an order under subsection 1292(7) in relation to a person, the Board must, within 14 days after the decision:
 - (a) give to the person a notice in writing setting out the decision and the reasons for it; and
 - (b) lodge a copy of the notice referred to in paragraph (a).
- (3) The validity of a decision of the Board is not affected by failure of the Board to comply with subsection (1) or (2), as the case requires, in relation to the decision.

1297 Time when Board's decision comes into effect

- (1) Subject to subsection (2) and to sections 41 and 44A of the Administrative Appeals Tribunal Act 1975, an order made by the Board cancelling or suspending the registration of a person as an auditor, as a liquidator or as a liquidator of a specified body corporate comes into effect:
 - (a) at the end of the day on which there is given to the person a paragraph 1296(1)(a) notice of the decision pursuant to which the order is made; or
 - (b) at the end of such longer period (not exceeding 90 days) as the Board determines.
- (2) Where the Board makes an order of a kind referred to in subsection (1), it may, in order to enable an application to be made to the Tribunal for review of the decision to make the order, determine that the order is not to come into effect until a specified time or until the happening of a specified event.
- (3) The Board may at any time vary or revoke a determination made under subsection (2), including such a determination that has been varied at least once before.
- (4) A determination in force under subsection (2) has effect accordingly.

Section 1298

1298 Effect of suspension

A person whose registration as an auditor, as a liquidator, as a liquidator of a specified body corporate or as an official liquidator is suspended is, except for the purposes of subsections 1285(2) and 1286(3), section 1287 (other than paragraphs 1287(1)(a), (2)(a) and (3)(a)), sections 1287A and 1288 and this Division, taken not to be registered as an auditor, liquidator, liquidator of that body corporate or official liquidator, as the case may be, so long as the registration is suspended.

1298A Transfer of books

- (1) If:
- (a) the registration of a person as a liquidator, as a liquidator of a specified body corporate or as an official liquidator is cancelled or suspended; and
 - (b) immediately before the cancellation or suspension, as the case may be, came into effect, the person had in his or her possession one or more books relating to an externally administered body corporate; and
 - (c) any of the following subparagraphs applies:
 - (i) the person was a liquidator of the externally administered body corporate;
 - (ii) the person was a receiver, or a receiver and manager, of property of the externally administered body corporate;
 - (iii) the person was the administrator of the externally administered body corporate;
 - (iv) the person was the administrator of a deed of company arrangement for the externally administered body corporate; and
 - (d) another person is or becomes:
 - (i) a liquidator of the externally administered body corporate; or
 - (ii) a receiver, or a receiver and manager, of property of the externally administered body corporate; or
 - (iii) the administrator of the externally administered body corporate; or
 - (iv) the administrator of a deed of company arrangement for the externally administered body corporate;

Section 1298A

the first-mentioned person must, as soon as practicable, transfer those books to that other person.

- (2) If the books are in electronic form, they may be transferred electronically.

Part 9.2A—Authorised audit companies

Division 1—Registration

1299A Application for registration as authorised audit company

- (1) A company may apply to ASIC for registration as an authorised audit company.
- (2) An application under this section:
 - (a) must contain such information as is prescribed in the regulations; and
 - (b) must be in the prescribed form.

1299B Eligibility for registration as an authorised audit company

A company is eligible to be registered as an authorised audit company if and only if:

- (a) each of the directors of the company:
 - (i) is a registered company auditor; and
 - (ii) is not disqualified from managing a corporation under Part 2D.6; and
- (b) each share in the company is held and beneficially owned by a person who is:
 - (i) an individual; or
 - (ii) the legal personal representatives of an individual; and
- (c) a majority of the votes that may be cast at a general meeting of the company attach to shares in the company that are held and beneficially owned by individuals who are registered company auditors; and
- (d) ASIC is satisfied that the company has adequate and appropriate professional indemnity insurance for claims that may be made against the company in relation to the audit of companies and registered schemes for the purposes of this Act; and
- (e) the company is not an externally-administered body corporate.

1299C Registration as authorised audit company

- (1) ASIC must grant the application and register the company as an authorised audit company if the company is eligible to be registered as an authorised audit company. Otherwise ASIC must refuse the application.
- (2) If ASIC grants the company's application, ASIC must issue to the company a certificate by ASIC stating that the company has been registered as an authorised audit company and specifying the day on which the application was granted.
- (3) The company's registration under this section takes effect at the beginning of the day specified in the certificate as the day on which the application for registration was granted and remains in force until:
 - (a) the registration is cancelled by ASIC; or
 - (b) the company is wound up.
- (4) ASIC must not refuse to register the company as an authorised audit company unless ASIC has given the company an opportunity to be represented at a hearing before ASIC and to make submissions and give evidence to ASIC in relation to the matter.
- (5) If ASIC refuses the company's application, ASIC must, not later than 14 days after the decision, give to the company a notice in writing setting out the decision and the reasons for it.

1299D Registration may be subject to conditions

- (1) The company's registration as an authorised audit company is subject to:
 - (a) the provisions of this Part; and
 - (b) the conditions or restrictions specified in the regulations; and
 - (c) any other conditions or restrictions determined by ASIC.
- (2) ASIC may determine conditions or restrictions for the purposes of paragraph (1)(c) either at the time when the company is registered as an authorised audit company or subsequently.
- (3) ASIC determines a condition or restriction by written notice to the company.

Section 1299E

1299E Register of authorised audit companies

- (1) ASIC must keep a Register of Authorised Audit Companies for the purposes of this Act.
- (2) In relation to each authorised audit company, ASIC must enter in the Register:
 - (a) the name of the company; and
 - (b) the company's ACN or ABN; and
 - (c) the day on which the company's registration under section 1299C took effect; and
 - (d) the address of the company's registered office; and
 - (e) the address of the principal place where the company practises as an auditor and the address of the other places (if any) at which the company so practises; and
 - (f) the name and address of:
 - (i) each director of the company; and
 - (ii) each person who performs a chief executive officer function (within the meaning of section 295A) in relation to the company; and
 - (g) the details of any conditions or restrictions determined under paragraph 1299D(1)(c) in relation to the registration; and
 - (h) details of any suspension of the registration.
- (3) ASIC may enter in the Register in relation to the company any other details that ASIC considers appropriate.
- (4) If a company ceases to be registered as an authorised audit company, ASIC must remove the entry in relation to the company from the Register.
- (5) A person may inspect and make copies of, or take extracts from, the Register.

1299F Notification of certain matters

- (1) An authorised audit company must notify ASIC if a condition or restriction to which the company's registration is subject is contravened.
- (2) The notice under subsection (1) must:
 - (a) set out details of the contravention; and

Section 1299G

- (b) be given within 14 days after the company becomes aware of the contravention; and
 - (c) be lodged with ASIC in the prescribed form.
- (3) An authorised audit company must notify ASIC if:
 - (a) details of a matter are required by subsection 1299E(2) to be entered in the Register of Authorised Audit Companies in relation to the company; and
 - (b) a change occurs in that matter while the company is registered as an authorised audit company.
- (4) The notice under subsection (3) must:
 - (a) set out details of the change; and
 - (b) be given within 28 days after the change occurs; and
 - (c) be lodged with ASIC in the prescribed form.
- (5) A company that applies for registration as an authorised audit company must notify ASIC if:
 - (a) details of a matter would be required by subsection 1299E(2) to be entered in the Register of Authorised Audit Companies in relation to the company if it were to be registered; and
 - (b) a change occurs in that matter before the application is granted or rejected.
- (6) The notice under subsection (5) must:
 - (a) set out details of the change; and
 - (b) be given within 28 days after the change occurs; and
 - (c) be lodged with ASIC in the prescribed form.

1299G Annual statements by authorised audit company

- (1) A company that is an authorised audit company must, within one month after the end of:
 - (a) the period of 12 months beginning on the day on which the company became registered as an authorised audit company; and
 - (b) each subsequent period of 12 months;lodge with ASIC a statement in respect of that period.

Section 1299G

- (1A) A statement under subsection (1):
 - (a) must contain such information as is prescribed in the regulations; and
 - (b) must be in the prescribed form.
- (2) ASIC may, on the application of an authorised audit company made before the end of the period for lodging a statement under subsection (1), extend, or further extend, that period.
- (3) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (4) A director of a company must take all reasonable steps to comply with, or to secure compliance with, subsection (1).

Division 2—Cancellation or suspension of registration

1299H Cancellation at request of registered person

- (1) ASIC may cancel a company's registration as an authorised audit company if the company requests ASIC to cancel the registration.
- (2) ASIC must take the steps necessary to cancel the registration as soon as practicable after the request is made.

1299I Cancellation or suspension in other cases

ASIC may cancel or suspend a company's registration as an authorised audit company if:

- (a) the company ceases to be eligible to be registered as an authorised audit company; or
- (b) the company fails to meet conditions or observe restrictions imposed on the company's registration as an authorised audit company.

Note: See section 1299K for when the cancellation takes effect.

1299J Notice of cancellation or suspension

- (1) If ASIC decides to cancel or suspend a company's registration as an authorised audit company under section 1299I, ASIC must, within 14 days after the decision:
 - (a) give to the company written notice setting out the decision and the reasons for it; and
 - (b) publish written notice of the decision in the *Gazette*.
- (2) The validity of a decision by ASIC is not affected by a failure by ASIC to comply with subsection (1) in relation to the decision.

1299K Time when ASIC's decision comes into effect

- (1) A decision by ASIC to cancel or suspend a company's registration as an authorised audit company comes into effect at the end of the day on which the company is given notice of the decision under paragraph 1299J(1)(a). This subsection has effect subject to

Section 1299L

subsection (2) and to sections 41 and 44A of the *Administrative Appeals Tribunal Act 1975*.

- (2) ASIC may, in order to enable an application to be made to the Tribunal for review of the decision to cancel or suspend the registration, determine that the decision to cancel or suspend the company's registration as an authorised audit company is not to come into effect until:
 - (a) a specified time; or
 - (b) the happening of a specified event.
- (3) ASIC may at any time vary or revoke a determination made under subsection (2), including such a determination that has been varied at least once before.
- (4) A determination in force under subsection (2) has effect accordingly.

1299L Effect of suspension

A company whose registration as an authorised audit company is suspended is, except for the purposes of subsection 1299E(4), sections 1299F and 1299G and this Division, taken not to be registered as an authorised audit company so long as the registration is suspended.

1299M Effect of cancellation

If a company's registration as an authorised audit company is cancelled (whether under section 1299H or 1299I), each appointment of the company as auditor for a company or registered scheme for the purposes of this Act that is in force on the day on which the cancellation decision takes effect is terminated at the end of that day.

Note: This means that the authorised audit company ceases to be auditor without resigning and that the position of auditor for the company or scheme will immediately become vacant unless there is another auditor who has been appointed, and who can continue to act, as auditor for the company or registered scheme.

Part 9.3—Books

1300 Inspection of books

- (1) A book that is by this Act required to be available for inspection must, subject to and in accordance with this Act, be available for inspection at the place where, in accordance with this Act, it is kept and at all times when the registered office in this jurisdiction of the body corporate concerned is required to be open to the public.
- (2) If any register kept by a company or a foreign company for the purposes of this Act is kept at a place other than the registered office of the company or foreign company, that place must be open to permit the register to be inspected during the same hours as those during which the registered office of the company or foreign company is required to be open to the public.
- (2A) If a person asks a proprietary company in writing to inspect a particular book of the company that the person has a right to inspect, the company must make it available within 7 days, for inspection by the person at the place where it is required to be kept.
- (2B) An offence based on subsection (2A) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (3) A person permitted by this Act to inspect a book may make copies of, or take extracts from, the book and any person who refuses or fails to allow a person so permitted to make a copy of, or take an extract from, the book is guilty of an offence.
- (4) An offence based on subsection (3) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

1301 Location of books on computers

- (1) This section applies if:
 - (a) a corporation records, otherwise than in writing, matters (*the stored matters*) this Act requires to be contained in a book; and

Section 1301

- (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
 - (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
 - (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.
- (2) Subject to subsection (4), the corporation is taken to have complied with the requirements of this Act as to the location of the book, but only in so far as the book is required to contain the stored matters.
- (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:
- (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;
- 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.

1302 Location of registers

- (1) A register that is required by section 271 to be kept by a company must be kept at the registered office or at an office at the principal place of business in this jurisdiction of the company but:
 - (a) if the work of making up the register is done at another office of the company in this jurisdiction, it may be kept at that other office; or
 - (b) if the company arranges with some other person to make up the register on its behalf and the office of that other person at which the work is done is in this jurisdiction, it may be kept at that office; or
 - (c) if ASIC approves, it may be kept at another office in this jurisdiction, being an office of the company or of another person.
- (3) If default is made in complying with subsection (1) in its application to any register of a company, the company, any officer or employee of the company who is in default, and any person who has arranged with the company to make up the register on its behalf and is in default, are each guilty of an offence.
- (4) A company must, within 7 days after any register of the company to which subsection (1) applies is first kept at an office other than the registered office or the principal office, as the case may be, lodge notice of the address of the office where the register is kept and must, within 7 days after any change in the place at which the register is kept, lodge notice of the change.
- (5) If default is made in complying with subsection (4) in its application to any register of a company, the company and any officer of the company who is in default are each guilty of an offence.
- (6) An offence based on subsection (3) or (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (7) In this section, unless the contrary intention appears, **company** includes a registered body.

Section 1303

1303 Court may compel compliance

If any person in contravention of this Act refuses to permit the inspection of any book or to supply a copy of any book, the Court may by order compel an immediate inspection of the book or order the copy to be supplied.

1304 Translations of instruments

- (1) Where under this Act a person is required to lodge an instrument or a certified copy of an instrument and the instrument is not written in English, the person must lodge at the same time a certified translation of the instrument into English.
- (2) Where under this Act a body corporate is required to make an instrument available for inspection and the instrument is not written in English, the body corporate must keep at its registered office or, if it does not have a registered office, at its principal office in this jurisdiction, a certified translation of the instrument into English.
- (3) In this section, *instrument* includes any certificate, contract or other document.

1305 Admissibility of books in evidence

- (1) A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is *prima facie* evidence of any matter stated or recorded in the book.
- (2) A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).

1306 Form and evidentiary value of books

- (1) A book that is required by this Act to be kept or prepared may be kept or prepared:
 - (a) by making entries in a bound or looseleaf book; or
 - (b) by recording or storing the matters concerned by means of a mechanical, electronic or other device; or
 - (c) in any other manner approved by ASIC.

Section 1307

- (2) Subsection (1) does not authorise a book to be kept or prepared by a mechanical, electronic or other device unless:
 - (a) the matters recorded or stored will be capable, at any time, of being reproduced in a written form; or
 - (b) a reproduction of those matters is kept in a written form approved by ASIC.
- (3) A corporation must take all reasonable precautions, including such precautions (if any) as are prescribed, for guarding against damage to, destruction of or falsification of or in, and for discovery of falsification of or in, any book or part of a book required by this Act to be kept or prepared by the corporation.
- (4) Where a corporation records or stores any matters by means of a mechanical, electronic or other device, any duty imposed by this Act to make a book containing those matters available for inspection or to provide copies of the whole or a part of a book containing those matters is to be construed as a duty to make the matters available for inspection in written form or to provide a document containing a clear reproduction in writing of the whole or part of them, as the case may be.
- (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:
 - (a) because of this Act, a book that this Act 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;a written reproduction of that matter as so recorded or stored is prima facie evidence of that matter.
- (6) A writing that purports to reproduce a matter recorded or stored by means of a mechanical, electronic or other device is, unless the contrary is established, taken to be a reproduction of that matter.

1307 Falsification of books

- (1) An officer, former officer, employee, former employee, member or former member of a company who engages in conduct that results

Section 1307

in the concealment, destruction, mutilation or falsification of any securities of or belonging to the company or any books affecting or relating to affairs of the company is guilty of an offence.

- (2) Where matter that is used or intended to be used in connection with the keeping of any books affecting or relating to affairs of a company is recorded or stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person who:
- (a) records or stores by means of that device matter that the person knows to be false or misleading in a material particular; or
 - (b) engages in conduct that results in the destruction, removal or falsification of matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling or recovering other matter to be recorded or stored by means of that device; or
 - (c) having a duty to record or store matter by means of that device, fails to record or store the matter by means of that device:
 - (i) with intent to falsify any entry made or intended to be compiled, wholly or in part, from matter so recorded or stored; or
 - (ii) knowing that the failure so to record or store the matter will render false or misleading in a material particular other matter so recorded or stored;

contravenes this subsection.

- (3) It is a defence to a charge arising under subsection (1) or (2) if the defendant proves that he, she or it acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

Note: A defendant bears a legal burden in relation to the matter mentioned in subsection (3), see section 13.4 of the *Criminal Code*.

Part 9.4—Offences

Division 1A—Application of the Criminal Code

1308A Application of *Criminal Code*

Subject to this Act, Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Division 1—Specific offences

1308 False or misleading statements

- (1) A corporation must not advertise or publish:
 - (a) a statement of the amount of its capital that is misleading; or
 - (b) a statement in which the total of all amounts paid and unpaid on shares in the company is stated but the amount of paid up capital or the amount of any charge on uncalled capital is not stated.
- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) A person who, in a document required by or for the purposes of this Act or lodged with or submitted to ASIC, makes or authorises the making of a statement that to the person's knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to the person's knowledge misleading in a material respect, is guilty of an offence.
- (3) A person who makes or authorises the making of a statement that is based on information that to the person's knowledge:
 - (a) is false or misleading in a material particular; or
 - (b) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect;is, for the purposes of subsection (2), taken to have made or authorised the making of a statement that to the person's knowledge was false or misleading in a material particular.
- (3A) A person is not liable to be proceeded against for an offence in consequence of a regulation made under section 1364 as well as for an offence against subsection (2) of this section.
- (4) A person who, in a document required by or for the purposes of this Act or lodged:
 - (a) makes or authorises the making of a statement that is false or misleading in a material particular; or

- (b) omits or authorises the omission of any matter or thing without which the document is misleading in a material respect;
without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading, as the case may be, is guilty of an offence.
- (5) A person who makes or authorises the making of a statement without having taken reasonable steps to ensure that the information on which the statement was based:
 - (a) was not false or misleading in a material particular; and
 - (b) did not have omitted from it a matter or thing the omission of which would render the information misleading in a material respect;is, for the purposes of subsection (4), taken to have made or authorised the making of a statement without having taken reasonable steps to ensure that the statement was not false or misleading.
- (6) For the purposes of subsections (2) and (4), where:
 - (a) at a meeting, a person votes in favour of a resolution approving, or otherwise approves, a document required by or for the purposes of this Act or required to be lodged; and
 - (b) the document contains a statement that, to the person's knowledge, is false or misleading in a material particular, or omits any matter or thing without which the document is, to the person's knowledge, misleading in a material respect;the person is taken to have authorised the making of the statement or the omission of the matter or thing.
- (7) For the purposes of this section, a statement, report or other document that:
 - (a) relates to affairs of a company or of a subsidiary of a company; and
 - (b) is not itself required by this Act to be laid before the company in general meeting; and

Section 1309

- (c) is attached to or included with a report of the directors provided under section 314 to members of the company or laid before the company at an annual general meeting of the company;is taken to be part of the report referred to in paragraph (c).
- (8) A person must not, in connection with an application for an Australian CS facility licence, Australian financial services licence or Australian market licence:
 - (a) make a statement that is false or misleading in a material particular knowing it to be false or misleading; or
 - (b) omit to state any matter or thing knowing that because of that omission the application is misleading in a material respect.
- (9) For the purposes of this section:
 - (a) a notice under subsection 708AA(2), 708A(5), 1012DAA(2) or 1012DA(5) is taken to be a notice required for the purposes of this Act; and
 - (b) a notice under subsection 708AA(2), 708A(5), 1012DAA(2) or 1012DA(5) is taken to be misleading in a material respect if it fails to comply with paragraph 708AA(7)(d), 708A(6)(e), 1012DAA(7)(e) or 1012DA(6)(f).

1309 False information etc.

- (1) An officer or employee of a corporation who makes available or gives information, or authorises or permits the making available or giving of information, to:
 - (a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation; or
 - (b) if the corporation is taken for the purposes of Chapter 2M to be controlled by another corporation—an auditor of the other corporation; or
 - (c) an operator of a financial market (whether the market is operated in Australia or elsewhere) or an officer of such a market;being information, whether in documentary or any other form, that relates to the affairs of the corporation and that, to the knowledge of the officer or employee:
 - (d) is false or misleading in a material particular; or

- (e) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect; is guilty of an offence.
- (2) An officer or employee of a corporation who makes available or gives information, or authorises or permits the making available or giving of information, to:
 - (a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation; or
 - (b) if the corporation is taken for the purposes of Chapter 2M to be controlled by another corporation—an auditor of the other corporation; or
 - (c) an operator of a financial market (whether the market is operated in Australia or elsewhere) or an officer of such a market;being information, whether in documentary or any other form, relating to the affairs of the corporation that:
 - (d) is false or misleading in a material particular; or
 - (e) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect;without having taken reasonable steps to ensure that the information:
 - (f) was not false or misleading in a material particular; and
 - (g) did not have omitted from it a matter or thing the omission of which rendered the information misleading in a material respect;is guilty of an offence.
- (3) The references in subsections (1) and (2) to a person making available or giving, or authorising or permitting the making available or giving of, information relating to the affairs of a corporation include references to a person making available or giving, or authorising or permitting the making available or giving of, information as to the state of knowledge of that person with respect to the affairs of the corporation.
- (4) Where information is made available or given to a person referred to in paragraph (1)(a), (b) or (c) or (2)(a), (b) or (c) in response to a question asked by that person, the question and the information are to be considered together in determining whether the information was false or misleading.

Section 1310

- (5) For the purposes of this section:
- (a) a notice under subsection 708AA(2), 708A(5), 1012DAA(2) or 1012DA(5) is taken to be a notice required for the purposes of this Act; and
 - (b) a notice under subsection 708AA(2), 708A(5), 1012DAA(2) or 1012DA(5) is taken to be misleading in a material respect if it omits information that is excluded information for the purposes of section 708AA, 708A, 1012DAA or 1012DA.
- (6) Paragraphs (1)(a) and (b) do not apply in relation to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note: Similar offences are created in relation to Aboriginal and Torres Strait Islander corporations under section 561-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

1310 Obstructing or hindering ASIC etc.

A person must not, without lawful excuse, obstruct or hinder ASIC, or any other person, in the performance or exercise of a function or power under this Act.

Division 2—Offences generally

1311 General penalty provisions

- (1) A person who:
- (a) does an act or thing that the person is forbidden to do by or under a provision of this Act; or
 - (b) does not do an act or thing that the person is required or directed to do by or under a provision of this Act; or
 - (c) otherwise contravenes a provision of this Act;
- is guilty of an offence by virtue of this subsection, unless that or another provision of this Act provides that the person:
- (d) is guilty of an offence; or
 - (e) is not guilty of an offence.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (1A) Paragraphs (1)(a), (b) and (c) only apply to a provision in the following list if a penalty, pecuniary or otherwise, is set out in Schedule 3 for that provision, or for a provision or provisions in which that provision is included:
- (a) Chapters 2A, 2B and 2C;
 - (b) Parts 2F.2 and 2F.3;
 - (c) Chapters 2G, 2H, 2J, 2M (other than Part 2M.4), 2N, 2P and 5A;
 - (d) Parts 5B.1 and 5B.3;
 - (da) Chapter 6CA;
 - (db) Chapter 7;
 - (dc) Chapter 8;
 - (e) Chapter 10.
- (2) Subject to section 1312, a person who is guilty of an offence against this Act, whether by virtue of subsection (1) or otherwise, is punishable, on conviction, by a penalty not exceeding the penalty applicable to the offence.
- (3) Where:
- (a) subsection (1) operates in relation to a provision of this Act so as to make a person guilty of an offence; or

Section 1312

- (b) a provision of this Act (other than this section) provides that a person is, in circumstances referred to in the provision, guilty of an offence;
and a penalty, pecuniary or otherwise, is set out in Schedule 3 for that provision, or for a provision or provisions in which that provision is included, the penalty applicable to the offence is the penalty so set out.
- (4) Where a provision of this Act (other than this section) provides that the penalty applicable to a contravention of a particular provision of this Act is a specified penalty, pecuniary or otherwise, the penalty applicable to an offence constituted by a contravention of the particular provision is the specified penalty.
- (5) Except as provided in subsection (3) or (4) or in a provision of this Act (other than this section), the penalty applicable to the offence is a fine of 5 penalty units.
- (6) An offence based on subsection (1) for which the penalty is set out in subsection (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

1312 Penalties for bodies corporate

Where a body corporate is convicted of an offence against this Act, the penalty that the court may impose is a fine not exceeding 5 times the maximum amount that, but for this section, the court could impose as a pecuniary penalty for that offence.

1313 Penalty notices

- (1) Where ASIC has reason to believe that a person has committed a prescribed offence, ASIC may, subject to subsection (2), give the person a notice in the prescribed form:
- (a) alleging that the person has committed the prescribed offence and giving the prescribed particulars in relation to the prescribed offence; and
 - (b) setting out the prescribed penalty in respect of the prescribed offence; and
 - (c) stating:
 - (i) in the case of a prescribed offence constituted by a failure to do a particular act or thing:

Section 1313

- (A) that the obligation to do the act or thing continues despite the service of the notice or the payment of the prescribed penalty; and
 - (B) that if, within the period specified in the notice (being a period of at least 21 days), the person pays the prescribed penalty to the authority specified in the notice and does the act or thing, no further action will be taken against the person in relation to the prescribed offence; and
 - (C) that if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice or has not done the act or thing, proceedings may be instituted against the person; or
 - (ii) in the case of a prescribed offence, not being an offence constituted by a failure to do a particular act or thing:
 - (A) that if, within the period specified in the notice (being a period of at least 21 days), the person pays the prescribed penalty to the authority specified in the notice, no further action will be taken against the person in relation to the prescribed offence; and
 - (B) that if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice, proceedings may be instituted against the person.
- (2) Subsection (1) does not empower ASIC:
- (a) to give a person more than one notice under that subsection in relation to an alleged commission by that person of a particular prescribed offence; or
 - (b) to give a person a notice under that subsection in relation to a prescribed offence unless proceedings could be instituted against that person for that offence in accordance with section 1316.
- (3) A notice under subsection (1) may be given to a natural person either personally or by post.

Section 1313

- (4) Where a notice under subsection (1) is given to a person in relation to a prescribed offence constituted by a failure to do a particular act or thing:
- (a) if, within the period specified in the notice, the person pays the prescribed penalty to the authority specified in the notice, and does the act or thing—no proceedings may be instituted against the person in respect of the prescribed offence; or
 - (b) if, at the end of the period specified in the notice, the person has paid the prescribed penalty to the authority specified in the notice but has not done the act or thing—no proceedings may be instituted against the person in respect of the prescribed offence, but the obligation to do that act or thing continues, and section 1314 applies in relation to the continued failure to do that act or thing as if, on the day on which the person so paid the prescribed penalty, the person had been convicted of an offence constituted by a failure to do that act or thing; or
 - (c) if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice but had done the act or thing—proceedings may be instituted against the person in respect of the prescribed offence; or
 - (d) if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice and has not done the act or thing—the obligation to do that act or thing continues, and proceedings may be instituted against the person in respect of the prescribed offence.
- (5) Where a notice under subsection (1) is given to a person in relation to a prescribed offence, not being an offence constituted by a failure to do a particular act or thing:
- (a) if, within the period specified in the notice, the person pays the prescribed penalty to the authority specified in the notice—no proceedings may be instituted against the person in respect of the prescribed offence; or
 - (b) if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice—proceedings may be instituted against the person in respect of the prescribed offence.

- (6) The payment of an amount by a person pursuant to a notice served on the person under this section in relation to a prescribed offence is not taken for any purpose to be an admission by that person of any liability in connection with the alleged commission of the prescribed offence.
- (7) Except as provided by paragraphs (4)(a) and (b) and (5)(a), this section does not affect the operation of any provision of this Act, of the regulations, of the rules or of any other Act in relation to the institution of proceedings in respect of offences that are prescribed offences for the purposes of this section.
- (8) In this section:

authority includes a person.

prescribed offence means:

- (a) a subsection 1311(5) offence; or
- (b) an offence against this Act that the regulations prescribe for the purposes of this section.

prescribed penalty, in relation to a prescribed offence in relation to which ASIC may give, or has given, to a person a notice under subsection (1), means:

- (a) if the offence is a subsection 1311(5) offence:
 - (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
 - (B) otherwise—a penalty of the amount so prescribed; or
 - (ii) otherwise:
 - (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.

- (b) otherwise—a penalty of the amount that the regulations prescribe in relation to the offence.

Section 1313A

subsection 1311(5) offence means an offence the penalty applicable to which is provided for by subsection 1311(5).

1313A Offences committed partly in and partly out of the jurisdiction

Where:

- (a) a person does or omits to do an act outside this jurisdiction; and
 - (b) if that person had done or omitted to do that act in this jurisdiction, the person would, by reason of also having done or omitted to do an act in this jurisdiction, have been guilty of an offence against this Act;
- the person is guilty of that offence.

1314 Continuing offences

(1) Where:

- (a) by or under a provision, an act is or was required to be done within a particular period or before a particular time; and
 - (b) failure to do the act within that period or before that time constitutes an offence; and
 - (c) the act is not done within that period or before that time;
- then:
- (d) the obligation to do the act continues, after that period has ended or that time has passed, and whether or not a person is or has been convicted of a primary substantive offence in relation to failure to do the act, until the act is done; and
 - (e) subsections (3) and (4) apply.

(2) Where:

- (a) by or under a provision, an act is or was required to be done but neither a period nor a time for the doing of the Act is or was specified; and
 - (b) failure to do the act constitutes an offence; and
 - (c) a person is or has been convicted of a primary substantive offence in relation to failure to do the act;
- then:
- (d) the obligation to do the act continues, despite the conviction, until the act is done; and

(e) subsections (3) and (4) apply.

(3) Where:

(a) at a particular time, a person is or was first convicted of a substantive offence, or is or was convicted of a second or subsequent substantive offence, in relation to failure to do the act; and

(b) the failure to do the act continued after that time;

then:

(c) the person is, in relation to failure to do the act, guilty of a further offence in respect of so much of the period throughout which the failure to do the act continued or elapsed after that time and before the relevant day in relation to the further offence; and

(d) for the purposes of this Act and of the *Crimes Act 1914*, the further offence is taken to be constituted by failure to do the act during so much of that period as so elapsed.

(4) Where:

(a) the provision referred to in paragraph (1)(a) or (2)(a), as the case may be, provides or provided that:

(i) an officer or employee of a body corporate; or

(ii) a person;

who is or was in default, or is or was involved in a contravention constituted by the failure to do the act, is or was guilty of an offence or contravenes or contravened a provision of this Act; and

(b) throughout a particular period (in this subsection called the ***relevant period***):

(i) the failure to do the act continued; and

(ii) a person (in this subsection called the ***derivative offender***) is or was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the failure to do the act; and

(iii) in a case where subparagraph (a)(i) applies—the derivative offender is or was an officer or employee of the body;

then:

(c) in a case where either or both of the following events occurs or occur:

Section 1314

- (i) a person is or was convicted, before or during the relevant period, of a primary substantive offence in relation to failure to do the act;
 - (ii) the derivative offender is or was convicted, before or during the relevant period, of a primary derivative offence in relation to failure to do the act;
- the derivative offender is, in relation to failure to do the act, guilty of an offence (in this paragraph called the ***relevant offence***) in respect of so much (if any) of the relevant period as elapsed:
- (iii) after the conviction referred to in subparagraph (i) or(ii), or after the earlier of the convictions referred to in subparagraphs (i) and (ii), as the case may be; and
 - (iv) before the relevant day in relation to the relevant offence; and
- (d) in a case where, at a particular time during the relevant period, the derivative offender is or was first convicted of a secondary derivative offence, or is or was convicted of a second or subsequent secondary derivative offence, in relation to failure to do the act—the derivative offender is, in relation to failure to do the act, guilty of a further offence in respect of so much of the relevant period as elapsed after that time and before the relevant day in relation to the further offence.
- (5) Where a person is guilty, by virtue of subsection (3) or (4), of an offence in respect of the whole or a part of a particular period, the penalty applicable to the offence is a fine of the amount obtained by multiplying half a penalty unit by the number of days in that period, or in that part of that period, as the case may be.
- (6) In this section:
- act*** includes thing.
- primary derivative offence***, in relation to failure to do an act, means an offence (other than an offence of which a person is guilty by virtue of this section) of which a person is or was guilty by virtue of being an officer of a corporation, or a person, who is or was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to failure to do the act.

primary substantive offence, in relation to a failure to do an act, means an offence (other than an offence of which a person is or was guilty by virtue of this section) constituted by failure to do the act, or by failure to do the act within a particular period or before a particular time.

provision means a section, or a subsection of a section, of this Act.

relevant day, in relation to an offence of which a person is guilty by virtue of this section, means:

- (a) in a case where the information relating to the offence specifies a day in relation to the offence for the purposes of this section, being a day not later than the day on which the information is laid—the day the information so specifies; or
- (b) in any other case—the day on which the information relating to the offence is laid.

required includes directed.

secondary derivative offence, in relation to failure to do an act, means an offence or further offence of which a person is, in relation to failure to do the act, guilty by virtue of paragraph (4)(c) or (d).

substantive offence, in relation to failure to do an act, means:

- (a) a primary substantive offence in relation to failure to do the act; or
 - (b) a further offence of which a person is, in relation to failure to do the act, guilty by virtue of subsection (3).
- (7) For the purposes of subsection (4), a provision of this Act is, whether or not it expressly provides as mentioned in paragraph (4)(a), taken to provide that a person who is or was involved in a contravention constituted by a failure to do an act required by the provision contravenes or contravened that provision.

1315 Proceedings: how taken

- (1) Subject to this Act, in any proceedings for an offence against this Act, any information, charge, complaint or application may be laid or made by:
 - (a) ASIC; or

Section 1316

- (b) a Commission delegate; or
 - (c) another person authorised in writing by the Minister to institute the proceedings.
- (2) A delegation for the purposes of paragraph (1)(b), or an authorisation for the purposes of paragraph (1)(c), may relate to all offences, or to specified offences, against this Act.
- (3) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983*.

1316 Time for instituting criminal proceedings

Despite anything in any other law, proceedings for an offence against this Act may be instituted within the period of 5 years after the act or omission alleged to constitute the offence or, with the Minister's consent, at any later time.

1316A Privilege against self-incrimination not available to bodies corporate in Corporations Act criminal proceedings

- (1) In a Corporations Act criminal proceeding, a body corporate is not entitled to refuse or fail to comply with a requirement:
 - (a) to answer a question or give information; or
 - (b) to produce a book or any other thing; or
 - (c) to do any other act whatever;on the ground that the answer or information, production of the book or other thing, or doing that other act, as the case may be, might tend:
 - (d) to incriminate the body (whether in respect of an offence to which the proceeding relates or otherwise); or
 - (e) to make the body liable to a penalty (whether in respect of anything to which the proceeding relates or otherwise).
- (2) Subsection (1) applies whether or not the body concerned is a defendant in the proceeding or in any other proceeding.
- (3) In this section:

Corporations Act criminal proceeding means a proceeding in a court when exercising jurisdiction in respect of a criminal matter arising under this Act.

1317 Certain persons to assist in prosecutions

- (1) Where a prosecution in respect of an offence against this Act has been instituted, or ASIC is of the opinion that a prosecution in respect of an offence against this Act ought to be instituted, against a person (in this section referred to as the *defendant*), ASIC may:
 - (a) if the defendant is a natural person—require any person who is or was a partner, employee or agent of the defendant; or
 - (b) if the defendant is a body corporate—require any person who is or was an officer, employee or agent of the defendant;to assist in the prosecution, and the person who is so required must give all assistance in connection with the prosecution that that person is reasonably able to give.
- (2) ASIC must not make such a requirement as is mentioned in subsection (1) of a person who, in the opinion of ASIC, is or is likely to be a defendant in the proceedings or is or has been such a person's lawyer.
- (3) If a person to whom paragraph (1)(a) or (b) relates fails to give assistance as required by subsection (1), the person contravenes this section and, without affecting any penalty to which the person may be liable for the contravention, the Court may, on the application of ASIC, order the person to comply with the requirement within such time, and in such manner, as the Court orders.
- (4) In this section, *agent*, in relation to the defendant, includes a banker of the defendant and a person engaged as an auditor by the defendant, whether that person is an employee or an officer of the defendant or not.

Section 1317AA

Part 9.4AAA—Protection for whistleblowers

1317AA Disclosures qualifying for protection under this Part

- (1) A disclosure of information by a person (the *discloser*) qualifies for protection under this Part if:
- (a) the discloser is:
 - (i) an officer of a company; or
 - (ii) an employee of a company; or
 - (iii) a person who has a contract for the supply of services or goods to a company; or
 - (iv) an employee of a person who has a contract for the supply of services or goods to a company; and
 - (b) the disclosure is made to:
 - (i) ASIC; or
 - (ii) the company's auditor or a member of an audit team conducting an audit of the company; or
 - (iii) a director, secretary or senior manager of the company; or
 - (iv) a person authorised by the company to receive disclosures of that kind; and
 - (c) the discloser informs the person to whom the disclosure is made of the discloser's name before making the disclosure; and
 - (d) the discloser has reasonable grounds to suspect that the information indicates that:
 - (i) the company has, or may have, contravened a provision of the Corporations legislation; or
 - (ii) an officer or employee of the company has, or may have, contravened a provision of the Corporations legislation; and
 - (e) the discloser makes the disclosure in good faith.

Note: Under section 1405, the reference to a provision of the Corporations legislation includes a reference to a corresponding provision of the old corporations legislation of the States and Territories.

Section 1317AB

- (2) A reference in subsection (1) to a person contravening a provision of the Corporations legislation includes a reference to a person committing an offence against, or based on, a provision of this Act.

Note: This subsection causes section 11.6 of the *Criminal Code* to operate in relation to such references.

1317AB Disclosure that qualifies for protection not actionable etc.

- (1) If a person makes a disclosure that qualifies for protection under this Part:
- (a) the person is not subject to any civil or criminal liability for making the disclosure; and
 - (b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the person on the basis of the disclosure.

Note: This subsection does not provide that the person is not subject to any civil or criminal liability for conduct of the person that is revealed by the disclosure.

- (2) Without limiting subsection (1):
- (a) the person has qualified privilege in respect of the disclosure; and
 - (b) a contract to which the person is a party may not be terminated on the basis that the disclosure constitutes a breach of the contract.
- (3) Without limiting paragraphs (1)(b) and (2)(b), if a court is satisfied that:
- (a) a person (the *employee*) is employed in a particular position under a contract of employment with another person (the *employer*); and
 - (b) the employee makes a disclosure that qualifies for protection under this Part; and
 - (c) the employer purports to terminate the contract of employment on the basis of the disclosure;
- the court may order that the employee be reinstated in that position or a position at a comparable level.

Section 1317AC

1317AC Victimisation prohibited

Actually causing detriment to another person

- (1) A person (the **first person**) contravenes this subsection if:
- (a) the first person engages in conduct; and
 - (b) the first person's conduct causes any detriment to another person (the **second person**); and
 - (c) the first person intends that his or her conduct cause detriment to the second person; and
 - (d) the first person engages in his or her conduct because the second person or a third person made a disclosure that qualifies for protection under this Part.

Threatening to cause detriment to another person

- (2) A person (the **first person**) contravenes this subsection if:
- (a) the first person makes to another person (the **second person**) a threat to cause any detriment to the second person or to a third person; and
 - (b) the first person:
 - (i) intends the second person to fear that the threat will be carried out; or
 - (ii) is reckless as to causing the second person to fear that the threat will be carried out; and
 - (c) the first person makes the threat because a person:
 - (i) makes a disclosure that qualifies for protection under this Part; or
 - (ii) may make a disclosure that would qualify for protection under this Part.

Officers and employees involved in contravention

- (3) If a company contravenes subsection (1) or (2), any officer or employee of the company who is involved in that contravention contravenes this subsection.

Threats

- (4) For the purposes of subsection (2), a threat may be:
- (a) express or implied; or

Section 1317AD

- (b) conditional or unconditional.
- (5) In a prosecution for an offence against subsection (2), it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

1317AD Right to compensation

If:

- (a) a person (the *person in contravention*) contravenes subsection 1317AC(1), (2) or (3); and
- (b) a person (the *victim*) suffers damage because of the contravention;

the person in contravention is liable to compensate the victim for the damage.

1317AE Confidentiality requirements for company, company officers and employees and auditors

- (1) A person (the *offender*) is guilty of an offence against this subsection if:
 - (a) a person (the *discloser*) makes a disclosure of information (the *qualifying disclosure*) that qualifies for protection under this Part; and
 - (b) the qualifying disclosure relates to a contravention or possible contravention of a provision of the Corporations legislation by:
 - (i) a company; or
 - (ii) an officer or employee of the company; and
 - (c) the qualifying disclosure is made to:
 - (i) the company's auditor or a member of an audit team conducting an audit of the company; or
 - (ii) a director, secretary or senior manager of the company; or
 - (iii) a person authorised by the company to receive disclosures of that kind; and
 - (d) the offender is:
 - (i) the company's auditor or a member of an audit team conducting an audit of the company; or

Section 1317AE

- (ii) a director, secretary or senior manager of the company; or
 - (iii) a person authorised by the company to receive disclosures of that kind; or
 - (iv) the company; or
 - (v) any officer or employee of the company; and
 - (e) the offender discloses one of the following (the ***confidential information***):
 - (i) the information disclosed in the qualifying disclosure;
 - (ii) the identity of the discloser;
 - (iii) information that is likely to lead to the identification of the discloser; and
 - (f) the confidential information is information that the offender obtained directly or indirectly because of the qualifying disclosure; and
 - (g) either:
 - (i) the offender is the person to whom the qualifying disclosure is made; or
 - (ii) the offender is a person to whom the confidential information is disclosed in contravention of this section and the offender knows that the disclosure of the confidential information to the offender was unlawful or made in breach of confidence; and
 - (h) the disclosure referred to in paragraph (e) is not authorised under subsection (2).
- (2) The disclosure referred to in paragraph (1)(e) is authorised under this subsection if it:
- (a) is made to ASIC; or
 - (b) is made to APRA; or
 - (c) is made to a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or
 - (d) is made to someone else with the consent of the discloser.

Part 9.4A—Review by Administrative Appeals Tribunal of certain decisions

1317A Definitions

In this Part:

decision has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

1317B Applications for review

- (1) Subject to this Part, applications may be made to the Tribunal for review of a decision made under this Act by:
 - (a) the Minister; or
 - (b) ASIC; or
 - (c) the Companies Auditors and Liquidators Disciplinary Board.
- (2) For the purposes of this Act and the *Administrative Appeals Tribunal Act 1975*, ASIC and APRA are taken to be persons whose interests are affected by a decision made under this Act by the Companies Auditors and Liquidators Disciplinary Board.

1317C Excluded decisions

Section 1317B does not apply in relation to:

- (a) a decision in respect of which any provision in the nature of an appeal or review is expressly provided by this Act; or
- (b) a decision that is declared by this Act to be conclusive or final or is embodied in a document declared by this Act to be conclusive evidence of an act, matter or thing; or
- (c) a decision by ASIC not to consent to the referral of a financial report to the Financial Reporting Panel under Subdivision C of Division 9 of Part 2M.3; or
- (d) a decision made by ASIC in the performance of a function, or in the exercise of a power, under section 601CC or 601CL or Chapter 5A; or

Section 1317D

- (e) a decision by ASIC to refuse to exercise a power under section 601CC or 601CL or Chapter 5A; or
- (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; or
- (ga) a decision of ASIC under section 655A; or
- (gb) a decision of ASIC under section 673 in relation to securities of the target of a takeover bid during the bid period; or
- (gc) a decision by ASIC whether to make an application under section 657C, 657G, 659B, 1325A, 1325B or 1325C; or
- (gd) a decision of the Minister under Division 1 of Part 7.4; or
- (ge) a decision of ASIC under section 1101A; or
- (h) a decision to make a determination under subsection 1317D(3); or
- (i) a decision of ASIC to issue an infringement notice under section 1317DAC; or
- (j) a decision of ASIC to withdraw, or not to withdraw, an infringement notice under section 1317DAI.

1317D Notice of reviewable decision and review rights

- (1) This section applies if the Minister, ASIC or the Companies Auditors and Liquidators Disciplinary Board (the *decision maker*) makes a decision to which section 1317B applies.
- (2) Subject to subsection (3), the decision maker must take such steps as are reasonable in the circumstances to give to each person whose interests are affected by the decision notice, in writing or otherwise:
 - (a) of the making of the decision; and
 - (b) of the person's right to have the decision reviewed by the Tribunal.
- (3) Subsection (2) does not require the decision maker to give notice to a person affected by the decision or to the persons in a class of persons affected by the decision, if the decision maker determines that giving notice to the person or persons is not warranted, having regard to:

Section 1317D

- (a) the cost of giving notice to the person or persons; and
 - (b) the way in which the interests of the person or persons are affected by the decision.
- (4) A failure to comply with this section does not affect the validity of the decision.
- (5) The fact that a person has not been given notice of the decision because of a determination under subsection (3) constitutes special circumstances for the purposes of subsection 29(6) of the *Administrative Appeals Tribunal Act 1975*.

Section 1317DAA

Part 9.4AA—Infringement notices for alleged contraventions of continuous disclosure provisions

1317DAA Definitions

- (1) In this Part:

compensation proceedings means:

- (a) proceedings under section 1317HA; and
- (b) proceedings under section 12GF of the ASIC Act in relation to a contravention of section 12DA of that Act; and
- (c) any other proceedings by a person for compensation for loss or damage suffered by the person.

compliance period for an infringement notice has the meaning affected by section 1317DAH.

contravention proceedings means proceedings under section 1101B by a person referred to in paragraph 1101B(1)(b) or (d).

enforcement proceedings means proceedings under section 793C by a person referred to in paragraph 793C(1)(b), (c) or (d).

infringement notice means an infringement notice issued under section 1317DAC.

penalty and disclosure proceedings means the proceedings referred to in column 3 of the table in subsection 1317DAG(2).

public interest proceedings means proceedings under section 50 of the ASIC Act.

- (2) For the purposes of applying this Part to a disclosing entity that is an undertaking to which interests in a registered scheme relate:
- (a) references to the disclosing entity are taken to be references to the responsible entity for the registered scheme; and
 - (b) references to a financial report for a financial year being lodged by a disclosing entity are taken to be references to

Section 1317DAB

- such a report being lodged by the responsible entity in relation to the scheme; and
- (c) references to securities of a disclosing entity are taken to be references to interests in the registered scheme; and
 - (d) references to a disclosing entity being convicted of an offence based on subsection 674(2) or 675(2) are taken to be references to the responsible entity being convicted of such an offence in relation to the registered scheme; and
 - (e) references to a civil penalty order under Part 9.4B being made against a disclosing entity in relation to a contravention of subsection 674(2) or 675(2) are taken to be references to such an order being made against the responsible entity in relation to the registered scheme; and
 - (f) references to a disclosing entity having breached an enforceable undertaking given to ASIC under section 93AA of the ASIC Act in relation to the requirements of subsection 674(2) or 675(2) are taken to be references to the responsible entity having breached such an undertaking given in relation to the registered scheme.

1317DAB Purpose and effect of this Part

- (1) The purpose of this Part is to provide for the issue of an infringement notice to a disclosing entity for an alleged contravention of subsection 674(2) or 675(2) as an alternative to proceedings for civil penalties under Part 9.4B.
- (2) This Part does not:
 - (a) require an infringement notice to be issued to the disclosing entity for the alleged contravention of subsection 674(2) or 675(2); or
 - (b) affect the liability of the disclosing entity to civil or criminal proceedings in relation to the alleged contravention of subsection 674(2) or 675(2) if:
 - (i) an infringement notice is not issued to the disclosing entity for the alleged contravention; or
 - (ii) an infringement notice issued to the disclosing entity for the alleged contravention is withdrawn under section 1317DAI; or

Section 1317DAC

- (c) prevent a Court from imposing a higher penalty than the penalty specified in the infringement notice if the disclosing entity does not comply with the infringement notice.

1317DAC Issue of infringement notice

Issue of infringement notice

- (1) Subject to section 1317DAD, if ASIC has reasonable grounds to believe that a disclosing entity has contravened subsection 674(2) or 675(2), ASIC may issue an infringement notice to the disclosing entity.
- (2) ASIC issues the infringement notice to the disclosing entity by serving it on the disclosing entity.
- (3) ASIC must not issue more than one infringement notice to the disclosing entity for the same alleged contravention of subsection 674(2) or 675(2).

ASIC must have regard to certain matters

- (4) In determining whether to issue an infringement notice to a listed disclosing entity for an alleged contravention of subsection 674(2), ASIC must have regard to:
 - (a) any guidelines issued by the relevant market operator for the listed disclosing entity that relate to the provisions of the listing rules referred to in subsection 674(1); and
 - (b) any other relevant matter.

Infringement notice does not have effect

- (5) The infringement notice does not have any effect if the infringement notice:
 - (a) is issued more than 12 months after the day on which the contravention of subsection 674(2) or 675(2) is alleged to have occurred; or
 - (b) relates to more than one alleged contravention of subsection 674(2) or 675(2) by the disclosing entity.

1317DAD Statement of reasons must be given

Statement of reasons

- (1) Before issuing the infringement notice, ASIC must:
 - (a) give the disclosing entity a written statement that sets out ASIC's reasons for believing that the disclosing entity has contravened subsection 674(2) or 675(2); and
 - (b) give a representative of the disclosing entity an opportunity to:
 - (i) appear at a private hearing before ASIC; and
 - (ii) give evidence to ASIC; and
 - (iii) make submissions to ASIC;in relation to the alleged contravention of subsection 674(2) or 675(2).
- (2) If the disclosing entity is a listed disclosing entity, ASIC must consult with the relevant market operator for the disclosing entity before giving the disclosing entity the statement under this subsection.
- (3) ASIC does not need to consult the relevant market operator under subsection (2) if:
 - (a) the disclosing entity is the relevant market operator; or
 - (b) the disclosing entity conducts a business in competition with a business conducted by the relevant market operator.

Limit on the use of evidence or information given to ASIC

- (4) Evidence or information that a representative of the disclosing entity gives ASIC under paragraph (1)(b) in relation to the alleged contravention of subsection 674(2) or 675(2) is:
 - (a) not admissible in evidence against the disclosing entity in any proceedings; and
 - (b) not admissible in evidence against a representative of the disclosing entity in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Section 1317DAE

1317DAE Matters to be included in infringement notice

- (1) The infringement notice:
 - (a) must state the day on which it is issued; and
 - (b) must state the name and address of the disclosing entity to whom it is issued; and
 - (c) must state that it is being issued by ASIC; and
 - (d) must state that ASIC may publish details of the disclosing entity's compliance with the infringement notice under section 1317DAJ if the disclosing entity complies with the notice; and
 - (e) must give details of the alleged contravention by the disclosing entity, including:
 - (i) the date of the alleged contravention; and
 - (ii) the particular provision that was contravened; and
 - (f) must state the maximum pecuniary penalty that a Court could impose under Part 9.4B in relation to the alleged contravention; and
 - (g) must specify the penalty that is payable in relation to the alleged contravention; and
 - (h) must state that the penalty is payable to ASIC on behalf of the Commonwealth; and
 - (i) if it is alleged that the disclosing entity contravened subsection 674(2)—may specify information that the disclosing entity must notify to the relevant market operator in accordance with the provisions of the listing rules referred to in subsection 674(1); and
 - (j) if it is alleged that the disclosing entity contravened subsection 675(2)—may require the disclosing entity to lodge a document with ASIC that contains specified information; and
 - (k) must explain the effect of sections 1317DAF, 1317DAG and 1317DAH; and
 - (l) must state that the disclosing entity may make written representations to ASIC seeking the withdrawal of the infringement notice; and
 - (m) must contain any other matters that are prescribed in the regulations.

Section 1317DAE

- (2) Subject to subsection (3), the penalty specified in the infringement notice under paragraph (1)(g) for an alleged contravention of subsection 674(2) is:
 - (a) \$100,000 if the disclosing entity is a Tier 1 entity; or
 - (b) \$66,000 if the disclosing entity is a Tier 2 entity; or
 - (c) \$33,000 if the disclosing entity is a Tier 3 entity.
- (3) The penalty specified in the infringement notice under paragraph (1)(g) for an alleged contravention of subsection 674(2) is:
 - (a) \$100,000 if the disclosing entity is a Tier 2 entity; or
 - (b) \$66,000 if the disclosing entity is a Tier 3 entity;if:
 - (c) the disclosing entity has at any time been convicted of an offence based on subsection 674(2) or 675(2); or
 - (d) a civil penalty order under Part 9.4B has at any time been made against the disclosing entity in relation to a contravention of subsection 674(2) or 675(2); or
 - (e) the disclosing entity has at any time breached an enforceable undertaking given to ASIC under section 93AA of the ASIC Act in relation to the requirements of subsection 674(2) or 675(2).
- (4) Subject to subsection (5), the penalty specified in the infringement notice under paragraph (1)(g) for an alleged contravention of subsection 675(2) is \$33,000.
- (5) The penalty specified in the infringement notice under paragraph (1)(g) for an alleged contravention of subsection 675(2) is \$66,000 if:
 - (a) the disclosing entity has at any time been convicted of an offence based on subsection 674(2) or 675(2); or
 - (b) a civil penalty order under Part 9.4B has at any time been made against the disclosing entity in relation to a contravention of subsection 674(2) or 675(2); or
 - (c) the disclosing entity has at any time breached an enforceable undertaking given to ASIC under section 93AA of the ASIC Act in relation to the requirements of subsection 674(2) or 675(2).

Section 1317DAF

- (6) For the purposes of this section:
- (a) a disclosing entity is:
 - (i) a **Tier 1 entity** if its market capitalisation on the relevant day exceeds \$1,000 million; and
 - (ii) a **Tier 2 entity** if its market capitalisation on the relevant day exceeds \$100 million but does not exceed \$1,000 million; and
 - (iii) a **Tier 3 entity** if its market capitalisation on the relevant day does not exceed \$100 million or it is not possible to work out its market capitalisation on the relevant day because it has not lodged a financial report with ASIC before the relevant day; and
 - (b) the **relevant day** for an infringement notice is the last day of the financial year in relation to which the latest financial report by the disclosing entity has been lodged with ASIC before the infringement notice is issued.
- (7) This is how to work out a disclosing entity's **market capitalisation** on the relevant day:
- (a) for each class of security of the disclosing entity that is a quoted security:
 - (i) work out the closing price, on the relevant day, for securities in that class on the prescribed financial market on which the securities are quoted; and
 - (ii) multiply that price by the number of securities in that class on issue on the relevant day (as shown in the financial report lodged with ASIC for the period that ends on the relevant day); and
 - (b) add up the amounts obtained under paragraph (a): the result is the disclosing entity's market capitalisation on the relevant day.

Disregard quoted securities of the disclosing entity that are options.

1317DAF Effect of issue and compliance with infringement notice

Circumstances in which this section applies

- (1) This section applies if subsection (2) or (3) is satisfied.

Section 1317DAF

- (2) This subsection is satisfied if:
 - (a) the compliance period for the infringement notice has not ended; and
 - (b) the infringement notice is not withdrawn under section 1317DAI; and
 - (c) subsection (3) has not been satisfied.
- (3) This subsection is satisfied if, within the compliance period for the infringement notice, the disclosing entity:
 - (a) pays the penalty specified in the infringement notice; and
 - (b) either:
 - (i) if it is alleged in the infringement notice that the disclosing entity contravened subsection 674(2)—notifies the relevant market operator, in accordance with the provisions of the listing rules referred to in subsection 674(1), of any information specified in the infringement notice; or
 - (ii) if it is alleged in the infringement notice that the disclosing entity contravened subsection 675(2)—lodges any required document with ASIC that contains the information specified in the infringement notice.

Note: If this subsection is satisfied, ASIC must not withdraw the infringement notice, see section 1317DAI.

No contravention etc. by the disclosing entity

- (4) The disclosing entity is not, by reason only of subsection (3) being satisfied, regarded as:
 - (a) having contravened the provision specified in the infringement notice; or
 - (b) having been convicted of an offence constituted by the same conduct that constituted the alleged contravention of the provision specified in the infringement notice.

No proceedings may be started etc.

- (5) Subject to subsection (6), no proceedings (whether criminal or civil) may be started or continued against the disclosing entity in relation to:
 - (a) the alleged contravention of the provision specified in the infringement notice; or

Section 1317DAG

- (b) an offence constituted by the same conduct that constituted the alleged contravention.
- (6) Subsection (5) does not apply to the following proceedings:
 - (a) compensation proceedings, contravention proceedings, enforcement proceedings and public interest proceedings that relate to the alleged contravention of the provision specified in the infringement notice;
 - (b) proceedings to enforce the following orders of a Court:
 - (i) an order made in relation to proceedings referred to in paragraph (a);
 - (ii) an order made under subsection 1335(2) in relation to proceedings referred to in paragraph (a) other than public interest proceedings;
 - (c) any other proceedings in respect of a breach of an order referred to in paragraph (b);
 - (d) an appeal to a Court against the following decisions or orders of a Court:
 - (i) a decision or order made in relation to proceedings referred to in paragraph (a);
 - (ii) a decision or order made under subsection 1335(2) in relation to the proceedings referred to in paragraph (a) other than public interest proceedings.
- (7) To avoid doubt, subsection (5) does not prevent ASIC from:
 - (a) making an order under section 91 of the ASIC Act; or
 - (b) bringing proceedings to enforce the order.

1317DAG Effect of failure to comply with infringement notice

Circumstances in which this section applies

- (1) This section applies if an infringement notice issued to a disclosing entity is not withdrawn under section 1317DAI.

Effect of failure to comply with infringement notice

- (2) If the disclosing entity fails to do a thing specified in column 2 of the following table within the compliance period for the infringement notice, the disclosing entity is liable to the proceedings specified in column 3 of the following table:

Section 1317DAG

Effect of failure to comply with infringement notice		
Column 1	Column 2	Column 3
Item	If the disclosing entity fails to:	the disclosing entity is liable to:
1	pay the penalty specified in the infringement notice	proceedings under Part 9.4B for: (a) a declaration of contravention; and (b) a pecuniary penalty order; in relation to the alleged contravention of the provision specified in the infringement notice.
2	notify the relevant market operator, in accordance with the provisions of the listing rules referred to in subsection 674(1), of any information specified in the infringement notice if it is alleged in the infringement notice that the disclosing entity contravened subsection 674(2)	proceedings for an order under section 1324B in relation to the alleged contravention of the provision specified in the infringement notice.
3	lodge any required document with ASIC that contains the information specified in the infringement notice if it is alleged in the infringement notice that the disclosing entity contravened subsection 675(2)	proceedings for an order under section 1324B in relation to the alleged contravention of the provision specified in the infringement notice.

No other proceedings may be started etc.

- (3) Subject to subsection (4), no other proceedings (whether criminal or civil) may be started or continued against the disclosing entity in relation to:
- (a) the alleged contravention of the provision specified in the infringement notice; or
 - (b) an offence constituted by the same conduct that constituted the alleged contravention.

Section 1317DAG

- (4) Subsection (3) does not apply to the following proceedings:
 - (a) compensation proceedings, contravention proceedings, enforcement proceedings and public interest proceedings that relate to the alleged contravention of the provision specified in the infringement notice;
 - (b) proceedings to enforce the following orders of a Court:
 - (i) an order made in relation to penalty and disclosure proceedings;
 - (ii) an order made in relation to proceedings referred to in paragraph (a);
 - (iii) an order made under subsection 1335(2) in relation to penalty and disclosure proceedings;
 - (iv) an order made under subsection 1335(2) in relation to proceedings referred to in paragraph (a) other than public interest proceedings;
 - (c) any other proceedings in respect of a breach of an order referred to in paragraph (b);
 - (d) an appeal to a Court against the following decisions or orders of a Court:
 - (i) a decision or order made in relation to penalty and disclosure proceedings;
 - (ii) a decision or order made in relation to proceedings referred to in paragraph (a);
 - (iii) a decision or order made under subsection 1335(2) in relation to penalty and disclosure proceedings;
 - (iv) a decision or order made under subsection 1335(2) in relation to proceedings referred to in paragraph (a) other than public interest proceedings.
- (5) To avoid doubt, subsection (3) does not prevent ASIC from:
 - (a) making a determination under subsection 708AA(3), 708A(2), 713(6), 1012DAA(3), 1012DA(2) or 1013FA(3) of this Act; or
 - (b) making an order under section 91 of the ASIC Act; or
 - (c) accepting an undertaking under section 93AA of the ASIC Act; or
 - (d) bringing proceedings to enforce the determination, order or undertaking.

Section 1317DAH

1317DAH Compliance period for infringement notice

- (1) Subject to this section, the compliance period for an infringement notice is a period of 28 days beginning on the day after the day on which the infringement notice is issued.
- (2) ASIC may extend, by notice in writing, the compliance period for the infringement notice if ASIC is satisfied that it is appropriate to do so.
- (3) Only one extension may be given and the extension must not be for longer than 28 days.
- (4) Notice of the extension must be given to the disclosing entity that was issued with the infringement notice.
- (5) A failure to comply with subsection (4) does not affect the validity of the extension.
- (6) If ASIC extends the compliance period for an infringement notice, a reference in this Act to the compliance period for an infringement notice is taken to be a reference to the compliance period as so extended.

1317DAI Withdrawal of infringement notice

Disclosing entity may seek withdrawal

- (1) If an infringement notice is issued to a disclosing entity, the disclosing entity may make written representations to ASIC seeking the withdrawal of the infringement notice.
- (2) Evidence or information that a representative of the disclosing entity gives ASIC in the course of making representations under subsection (1) is:
 - (a) not admissible in evidence against the disclosing entity in any proceedings; and
 - (b) not admissible in evidence against a representative of the disclosing entity in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Section 1317DAJ

Withdrawal

- (3) Subject to subsection (4), ASIC may withdraw the infringement notice (whether or not the disclosing entity has made representations seeking the withdrawal) if ASIC is satisfied that it is appropriate to do so.
- (4) ASIC must not withdraw the infringement notice if subsection 1317DAF(3) is satisfied.

Withdrawal notice

- (5) The withdrawal must be made by notice in writing and must be given to the disclosing entity.
- (6) The withdrawal notice must state:
 - (a) the name and address of the disclosing entity; and
 - (b) the day on which the infringement notice was issued to the disclosing entity; and
 - (c) that the infringement notice is withdrawn; and
 - (d) that civil proceedings under Part 9.4B may be brought against the disclosing entity for a contravention of the provision specified in the infringement notice; and
 - (e) that a prosecution for an offence based on the provision specified in the infringement notice may be brought against the disclosing entity.

Refund of penalty

- (7) If:
 - (a) the disclosing entity pays the penalty specified in the infringement notice; and
 - (b) the infringement notice is withdrawn after the disclosing entity pays the penalty;ASIC must refund to the disclosing entity an amount equal to the amount paid.

1317DAJ Publication in relation to infringement notices

- (1) If:
 - (a) ASIC issues an infringement notice to a disclosing entity; and

Section 1317DAJ

- (b) subsection 1317DAF(3) (compliance with the infringement notice) is satisfied;
- ASIC may publish details of the disclosing entity's compliance with the infringement notice under subsection (2) or (3) or under both of those subsections.
- (2) ASIC publishes details of the disclosing entity's compliance with the infringement notice under this subsection if it publishes a copy of the infringement notice in the *Gazette* together with the following statements:
- (a) a statement that the disclosing entity has complied with the infringement notice;
 - (b) a statement that compliance with the notice is not an admission of guilt or liability;
 - (c) a statement that the disclosing entity is not regarded as having contravened the provision specified in the notice.
- (3) ASIC publishes details of the disclosing entity's compliance with the infringement notice under this subsection if:
- (a) ASIC issues a statement (whether written or oral) about the disclosing entity's compliance with the infringement notice; and
 - (b) the statement is limited to an accurate summary of the infringement notice including:
 - (i) the name of the disclosing entity; and
 - (ii) the amount of the penalty payable under the notice in relation to the alleged contravention; and
 - (iii) the conduct specified in the notice as the conduct in relation to which the infringement notice was issued;together with the following statements:
 - (iv) a statement that the disclosing entity has complied with the infringement notice;
 - (v) a statement that compliance with the notice is not an admission of guilt or liability;
 - (vi) a statement that the relevant disclosing entity is not regarded as having contravened the provision specified in the notice.

Section 1317DAJ

- (4) ASIC must not otherwise publish details of:
 - (a) an infringement notice; or
 - (b) a disclosing entity's compliance with an infringement notice.
- Failure to comply with this subsection is not an offence.

Part 9.4B—Civil consequences of contravening civil penalty provisions

1317DA Definitions

In this Act:

corporation/scheme civil penalty provision means a provision referred to in subsection 1317E(1), other than a financial services civil penalty provision.

financial services civil penalty provision means a provision referred to in any of paragraphs 1317E(1)(ja) to (jg).

1317E Declarations of contravention

- (1) If a Court is satisfied that a person has contravened 1 of the following provisions, it must make a declaration of contravention:
- (a) subsections 180(1) and 181(1) and (2), 182(1) and (2), 183(1) and (2) (officers' duties);
 - (b) subsection 209(2) (related parties rules);
 - (c) subsections 254L(2), 256D(3), 259F(2) and 260D(2) (share capital transactions);
 - (d) subsection 344(1) (requirements for financial reports);
 - (e) subsection 588G(2) (insolvent trading);
 - (f) subsection 601FC(5) (duties of responsible entity)
 - (g) subsection 601FD(3) (duties of officers of responsible entity)
 - (h) subsection 601FE(3) (duties of employees of responsible entity)
 - (i) subsection 601FG(2) (acquisition of interest in scheme by responsible entity)
 - (j) subsection 601JD(3) (duties of members)
 - (ja) subsection 674(2), 674(2A), 675(2) or 675(2A) (continuous disclosure);
 - (jb) section 1041A (market manipulation);
 - (jc) subsection 1041B(1) (false trading and market rigging—creating a false or misleading appearance of active trading etc.);

Section 1317F

- (jd) subsection 1041C(1) (false trading and market rigging—artificially maintaining etc. market price);
- (je) section 1041D (dissemination of information about illegal transactions);
- (jf) subsection 1043A(1) (insider trading);
- (jg) subsection 1043A(2) (insider trading);
- (k) subclause 29(6) of Schedule 4.

These provisions are the ***civil penalty provisions***.

Note: Once a declaration has been made ASIC can then seek a pecuniary penalty order (section 1317G) or (in the case of a corporation/scheme civil penalty provision) a disqualification order (section 206C).

- (2) A declaration of contravention must specify the following:
 - (a) the Court that made the declaration;
 - (b) the civil penalty provision that was contravened;
 - (c) the person who contravened the provision;
 - (d) the conduct that constituted the contravention;
 - (e) if the contravention is of a corporation/scheme civil penalty provision—the corporation or registered scheme to which the conduct related.

1317F Declaration of contravention is conclusive evidence

A declaration of contravention is conclusive evidence of the matters referred to in subsection 1317E(2).

1317G Pecuniary penalty orders

Corporation/scheme civil penalty provisions

- (1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to \$200,000 if:
 - (a) a declaration of contravention by the person has been made under section 1317E; and
 - (aa) the contravention is of a corporation/scheme civil penalty provision; and
 - (b) the contravention:
 - (i) materially prejudices the interests of the corporation or scheme, or its members; or

Section 1317H

- (ii) materially prejudices the corporation's ability to pay its creditors; or
- (iii) is serious.

Financial services civil penalty provisions

- (1A) A Court may order a person to pay the Commonwealth a pecuniary penalty of the relevant maximum amount if:
- (a) a declaration of contravention by the person has been made under section 1317E; and
 - (b) the contravention is of a financial services civil penalty provision; and
 - (c) the contravention:
 - (i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or
 - (ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or
 - (iii) is serious.
- (1B) The relevant maximum amount is:
- (a) \$200,000 for an individual; or
 - (b) \$1 million for a body corporate.

Penalty a civil debt etc.

- (2) The penalty is a civil debt payable to ASIC on the Commonwealth's behalf. ASIC or the Commonwealth may enforce the order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

1317H Compensation orders—corporation/scheme civil penalty provisions

Compensation for damage suffered

- (1) A Court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if:

Section 1317HA

- (a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme; and
- (b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

Damage includes profits

- (2) In determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.

Damage includes diminution of value of scheme property

- (3) In determining the damage suffered by the scheme for the purposes of making a compensation order, include any diminution in the value of the property of the scheme.
- (4) If the responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to scheme property. If anyone else is ordered to compensate the scheme, the responsible entity may recover the compensation on behalf of the scheme.

Recovery of damage

- (5) A compensation order may be enforced as if it were a judgment of the Court.

1317HA Compensation orders—financial services civil penalty provisions

Compensation for damage suffered

- (1) A Court may order a person (the **liable person**) to compensate another person (including a corporation), or a registered scheme, for damage suffered by the person or scheme if:
 - (a) the liable person has contravened a financial services civil penalty provision; and
 - (b) the damage resulted from the contravention.
-

Section 1317J

The order must specify the amount of compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

Damage includes profits

- (2) In determining the damage suffered by a person or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention.

Damage to scheme includes diminution of value of scheme property

- (3) In determining the damage suffered by a registered scheme for the purposes of making a compensation order, include any diminution in the value of the property of the scheme.
- (4) If the responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to the scheme property. If anyone else is ordered to compensate the scheme, the responsible entity may recover the compensation on behalf of the scheme.

Recovery of damage

- (5) A compensation order may be enforced as if it were a judgment of the Court.

1317J Who may apply for a declaration or order

Application by ASIC

- (1) ASIC may apply for a declaration of contravention, a pecuniary penalty order or a compensation order.

Application by corporation

- (2) The corporation, or the responsible entity for the registered scheme, may apply for a compensation order.

Note: An application for a compensation order may be made whether or not a declaration of contravention has been made under section 1317E.

- (3) The corporation, or the responsible entity for the registered scheme, may intervene in an application for a declaration of

Section 1317K

contravention or a pecuniary penalty order in relation to the corporation or scheme. The corporation or responsible entity is entitled to be heard on all matters other than whether the declaration or order should be made.

Compensation order relating to financial services civil penalty provision—any other person who suffers damage may apply

- (3A) Any other person who suffers damage in relation to a contravention, or alleged contravention, of a financial services civil penalty provision may apply for a compensation order under section 1317HA.

Note: An application for a compensation order may be made whether or not a declaration of contravention has been made under section 1317E.

No one else may apply

- (4) No person may apply for a declaration of contravention, a pecuniary penalty order or a compensation order unless permitted by this section.
- (5) Subsection (4) does not exclude the operation of the *Director of Public Prosecutions Act 1983*.

1317K Time limit for application for a declaration or order

Proceedings for a declaration of contravention, a pecuniary penalty order, or a compensation order, may be started no later than 6 years after the contravention.

1317L Civil evidence and procedure rules for declarations of contravention and civil penalty orders

The Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for:

- (a) a declaration of contravention; or
- (b) a pecuniary penalty order.

1317M Civil proceedings after criminal proceedings

A court must not make a declaration of contravention or a pecuniary penalty order against a person for a contravention if the person has been convicted of an offence constituted by conduct

Section 1317N

that is substantially the same as the conduct constituting the contravention.

1317N Criminal proceedings during civil proceedings

- (1) Proceedings for a declaration of contravention or pecuniary penalty order against a person are stayed if:
 - (a) criminal proceedings are started or have already been started against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.
- (2) The proceedings for the declaration or order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the declaration or order are dismissed.

1317P Criminal proceedings after civil proceedings

- (1) Subject to subsection (2), criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether:
 - (a) a declaration of contravention has been made against the person; or
 - (b) a pecuniary penalty order has been made against the person; or
 - (c) a compensation order has been made against the person; or
 - (d) the person has been disqualified from managing a corporation under Part 2D.6; or
 - (e) an order has been made against the person by ASIC under section 920A (banning orders) or by the Court under section 921A (disqualification by Court).
- (2) Subsection (1) does not apply if:
 - (a) an infringement notice is issued to the person for an alleged contravention of subsection 674(2) or 675(2); and
 - (b) the infringement notice is not withdrawn under section 1317DAI.

Section 1317Q

1317Q Evidence given in proceedings for penalty not admissible in criminal proceedings

Evidence of information given or evidence of production of documents by an individual is not admissible in criminal proceedings against the individual if:

- (a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of a civil penalty provision (whether or not the order was made); and
- (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

1317R ASIC requiring person to assist

- (1) ASIC may require a person to give all reasonable assistance in connection with:
 - (a) an application for a declaration of contravention or a pecuniary penalty order; or
 - (b) criminal proceedings for an offence against this Act.
- (2) ASIC can require the person to assist in connection with an application for a declaration or order if, and only if:
 - (a) it appears to ASIC that someone other than the person required to assist may have contravened a civil penalty provision; and
 - (b) ASIC suspects or believes that the person required to assist can give information relevant to the application.
- (3) ASIC can require the person to assist in connection with criminal proceedings if, and only if:
 - (a) it appears to ASIC that the person required to assist is unlikely to be a defendant in the proceedings; and
 - (b) the person required to assist is, in relation to a person who is or should be a defendant in the proceedings:
 - (i) an employee or agent (including a banker or auditor) of the other person; or

Section 1317S

- (ii) if the other person is a corporation—an officer or employee of the other person; or
 - (iii) if the other person is an individual—a partner of the other person.
- (4) ASIC can require the person to assist regardless of whether:
 - (a) an application for the declaration or penalty order has actually been made; or
 - (b) criminal proceedings for the offence have actually begun.
- (5) The person cannot be required to assist if they are or have been a lawyer for:
 - (a) in an application for a declaration or penalty order—the person suspected of the contravention; or
 - (b) in criminal proceedings—a defendant or likely defendant in the proceedings.
- (6) The requirement to assist must be given in writing.
- (7) The Court may order the person to comply with the requirement in a specified way. Only ASIC may apply to the Court for an order under this subsection.

Note: The person must comply with the requirement and may commit an offence if they do not, even if there is no order under this subsection (see section 104 and subsection 1311(1)).
- (8) This section does not limit and is not limited by section 49 of the ASIC Act.

1317S Relief from liability for contravention of civil penalty provision

- (1) In this section:

eligible proceedings:

- (a) means proceedings for a contravention of a civil penalty provision (including proceedings under section 588M, 588W, 1317H or 1317HA); and
- (b) 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, 1317H or 1317HA).

Section 1317S

- (2) If:
- (a) eligible proceedings are brought against a person; and
 - (b) in the proceedings it appears to the court that the person has, or may have, contravened a civil penalty provision but that:
 - (i) the person has acted honestly; and
 - (ii) having regard to all the circumstances of the case (including, where applicable, those connected with the person's appointment as an officer, or employment as an employee, of a corporation or of a Part 5.7 body), the person ought fairly to be excused for the contravention;
- 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.
- (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
 - (b) when that action was taken; and
 - (c) the results of that action.
- (4) If a person thinks that eligible proceedings will or may be begun against them, they 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.
- (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
 - (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.
- (7) Nothing in this section limits, or is limited by, section 1318.

Part 9.5—Powers of Courts

1318 Power to grant relief

- (1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.
- (2) Where a person to whom this section applies has reason to apprehend that any claim will or might be made against the person in respect of any negligence, default, breach of trust or breach of duty in a capacity as such a person, the person may apply to the Court for relief, and the Court has the same power to relieve the person as it would have had under subsection (1) if it had been a court before which proceedings against the person for negligence, default, breach of trust or breach of duty had been brought.
- (3) Where a case to which subsection (1) applies is being tried by a judge with a jury, the judge after hearing the evidence may, if he or she is satisfied that the defendant ought pursuant to that subsection to be relieved either wholly or partly from the liability sought to be enforced against the person, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge thinks proper.
- (4) This section applies to a person who is:
 - (a) an officer or employee of a corporation; or
 - (b) an auditor of a corporation, whether or not the person is an officer or employee of the corporation; or
 - (c) an expert in relation to a matter:
 - (i) relating to a corporation; and

Section 1319

- (ii) in relation to which the civil proceeding has been taken or the claim will or might arise; or
 - (d) a receiver, receiver and manager, liquidator or other person appointed or directed by the Court to carry out any duty under this Act in relation to a corporation.
- (5) This section does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note: Similar provision is made in relation to Aboriginal and Torres Strait Islander corporations under section 576-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

1319 Power of Court to give directions with respect to meetings ordered by the Court

Where, under this Act, the Court orders a meeting to be convened, the Court may, subject to this Act, give such directions with respect to the convening, holding or conduct of the meeting, and such ancillary or consequential directions in relation to the meeting, as it thinks fit.

1321 Appeals from decisions of receivers, liquidators etc.

- (1) A person aggrieved by any act, omission or decision of:
- (a) a person administering a compromise, arrangement or scheme referred to in Part 5.1; or
 - (b) a receiver, or a receiver and manager, of property of a corporation; or
 - (c) an administrator of a company; or
 - (ca) an administrator of a deed of company arrangement executed by a company; or
 - (d) a liquidator or provisional liquidator of a company;
- may appeal to the Court in respect of the act, omission or decision and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit.
- (2) Paragraph (1)(b) does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note: Similar provision is made in relation to Aboriginal and Torres Strait Islander corporations under section 576-10 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

1322 Irregularities

- (1) In this section, unless the contrary intention appears:
 - (a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and
 - (b) a reference to a procedural irregularity includes a reference to:
 - (i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and
 - (ii) a defect, irregularity or deficiency of notice or time.
- (2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.
- (3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.
- (3AA) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the inability of a person to access the notice of meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.

Note: Under paragraph 249J(3)(cb), a company may, in certain circumstances, give a member notice of a meeting by notifying the member that the notice of meeting is available and how the member may access the notice of meeting.
- (3A) If a member does not have a reasonable opportunity to participate in a meeting of members, or part of a meeting of members, held at

Section 1322

2 or more venues, the meeting will only be invalid on that ground if:

- (a) the Court is of the opinion that:
 - (i) a substantial injustice has been caused or may be caused; and
 - (ii) the injustice cannot be remedied by any order of the Court; and
 - (b) the Court declares the meeting or proceeding (or that part of it) invalid.
- (3B) If voting rights are exercised in contravention of subsection 259D(3) (company controlling entity that holds shares in it), the meeting or the resolution on which the voting rights were exercised will only be invalid on that ground if:
- (a) the court is of the opinion that:
 - (i) a substantial injustice has been caused or may be caused; and
 - (ii) the injustice cannot be remedied by any order of the court; and
 - (b) the court declares the meeting or resolution invalid.
- (4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
- (a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;
 - (b) an order directing the rectification of any register kept by ASIC under this Act;
 - (c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
 - (d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the

Section 1323

application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit.

- (5) An order may be made under paragraph (4)(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.
- (6) The Court must not make an order under this section unless it is satisfied:
 - (a) in the case of an order referred to in paragraph (4)(a):
 - (i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
 - (ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or
 - (iii) that it is just and equitable that the order be made; and
 - (b) in the case of an order referred to in paragraph (4)(c)—that the person subject to the civil liability concerned acted honestly; and
 - (c) in every case—that no substantial injustice has been or is likely to be caused to any person.

1323 Power of Court to prohibit payment or transfer of money, financial products or other property

- (1) Where:
 - (a) an investigation is being carried out under the ASIC Act or this Act in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of this Act; or
 - (b) a prosecution has been begun against a person for a contravention of this Act; or
 - (c) a civil proceeding has been begun against a person under this Act;

and the Court considers it necessary or desirable to do so for the purpose of protecting the interests of a person (in this section called an ***aggrieved person***) to whom the person referred to in paragraph (a), (b) or (c), as the case may be, (in this section called the ***relevant person***), is liable, or may be or become liable, to pay

Section 1323

money, whether in respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property, the Court may, on application by ASIC or by an aggrieved person, make one or more of the following orders:

- (d) an order prohibiting a person who is indebted to the relevant person or to an associate of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed;
- (e) an order prohibiting a person holding money, financial products or other property, on behalf of the relevant person, or on behalf of an associate of the relevant person, from paying all or any of the money, or transferring, or otherwise parting with possession of, the financial products or other property, to, or to another person at the direction or request of, the person on whose behalf the money, financial products or other property, is or are held;
- (f) an order prohibiting the taking or sending out of this jurisdiction, or out of Australia, by a person of money of the relevant person or of an associate of the relevant person;
- (g) an order prohibiting the taking, sending or transfer by a person of financial products or other property of the relevant person, or of an associate of the relevant person:
 - (i) from a place in this jurisdiction to a place outside this jurisdiction (including the transfer of financial products from a register in this jurisdiction to a register outside this jurisdiction); or
 - (ii) from a place in Australia to a place outside Australia (including the transfer of financial products from a register in Australia to a register outside Australia);
- (h) an order appointing:
 - (i) if the relevant person is a natural person—a receiver or trustee, having such powers as the Court orders, of the property or of part of the property of that person; or
 - (ii) if the relevant person is a body corporate—a receiver or receiver and manager, having such powers as the Court orders, of the property or of part of the property of that person;

Section 1323

- (j) if the relevant person is a natural person—an order requiring that person to deliver up to the Court his or her passport and such other documents as the Court thinks fit;
 - (k) if the relevant person is a natural person—an order prohibiting that person from leaving this jurisdiction, or Australia, without the consent of the Court.
- (2A) A reference in paragraph (1)(g) or (h) to property of a person includes a reference to property that the person holds otherwise than as sole beneficial owner, for example:
- (a) as trustee for, as nominee for, or otherwise on behalf of or on account of, another person; or
 - (b) in a fiduciary capacity.
- (2B) Subsection (2A) is to avoid doubt, is not to limit the generality of anything in subsection (1) and is not to affect by implication the interpretation of any other provision of this Act.
- (2) An order under subsection (1) prohibiting conduct may prohibit the conduct either absolutely or subject to conditions.
 - (3) Where an application is made to the Court for an order under subsection (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.
 - (4) On an application under subsection (1), the Court must not require the applicant or any other person, as a condition of granting an interim order under subsection (3), to give an undertaking as to damages.
 - (5) Where the Court has made an order under this section on a person's application, the Court may, on application by that person or by any person affected by the order, make a further order discharging or varying the first-mentioned order.
 - (6) An order made under subsection (1) or (2) may be expressed to operate for a specified period or until the order is discharged by a further order under this section.
 - (7) Nothing in this section affects the powers that the Court has apart from this section.
-

Section 1324

- (8) This section has effect subject to the *Bankruptcy Act 1966*.
- (9) A person must not contravene an order by the Court under this section that is applicable to the person.
- (10) An offence based on subsection (9) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

1324 Injunctions

- (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
 - (a) a contravention of this Act; or
 - (b) attempting to contravene this Act; or
 - (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
 - (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
 - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
 - (f) conspiring with others to contravene this Act;the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.
- (1A) For the purposes of subsection (1):
 - (a) a contravention of this Act affects the interests of a creditor or member of a company if the insolvency of the company is an element of the contravention; and
 - (b) a company's contravention of:
 - (i) paragraph 257A(1)(a) (share buy-back not to prejudice ability to pay creditors); or
 - (ia) paragraph 256B(1)(b) (share capital reduction not to prejudice ability to pay creditors); or
 - (ii) paragraph 260A(1)(a) (financial assistance for share acquisition not to prejudice company or shareholders or ability to pay creditors);

Section 1324

affects the interests of a creditor or member of the company;
and

- (c) a company's contravention of paragraph 256B(1)(a) (fair and reasonable test for share capital reduction) affects the interests of a member of the company.

This subsection does not limit subsection (1) in any way.

- (1B) If the ground relied on in an application for an injunction is conduct or proposed conduct of a company or other person that it is alleged constitutes, or would constitute:

- (a) a contravention of paragraph 256B(1)(a) or (b), section 257A or paragraph 260A(1)(a); or
- (b) a contravention of a provision of this Act involving the insolvency of the company because of:
 - (i) the company making a reduction of its share capital to which Division 1 of Part 2J.1 applies; or
 - (ii) the company buying back its shares; or
 - (iii) the company giving financial assistance to which Part 2J.3 applies;

the Court must assume that the conduct constitutes, or would constitute, a contravention of that paragraph, section or provision unless the company or person proves otherwise.

- (2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by this Act to do, the Court may, on the application of:
 - (a) ASIC; or
 - (b) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing;grant an injunction, on such terms as the Court thinks appropriate, requiring the first-mentioned person to do that act or thing.
- (3) Where an application for an injunction under subsection (1) or (2) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that that subsection applies.
- (4) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

Section 1324

- (5) The Court may discharge or vary an injunction granted under subsection (1), (2) or (4).
- (6) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
 - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (7) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
 - (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
 - (b) whether or not the person has previously refused or failed to do that act or thing; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (8) Where ASIC applies to the Court for the grant of an injunction under this section, the Court must not require the applicant or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages.
- (9) In proceedings under this section against a person the Court may make an order under section 1323 in respect of the person.
- (10) Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.

Section 1324A

1324A Provisions relating to prosecutions

In the prosecution of a person for an offence in respect of a contravention of a provision of Chapter 5C, 6CA or 6D or Part 7.10, the Court may do either or both of the following:

- (a) grant an injunction under section 1324 against the person in relation to:
 - (i) the conduct that constitutes, or is alleged to constitute, the offence; or
 - (ii) other conduct of that kind
- (b) make an order under section 1324B in respect of the person.

1324B Order to disclose information or publish advertisements

Without limiting section 1324, if, on the application of ASIC, the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Chapter 5C, 6CA or 6D or Part 7.10, the Court may make either or both of the following orders against that person or a person involved in the contravention:

- (a) an order requiring the person to whom it is directed to disclose, in the manner specified in the order, to:
 - (i) the public; or
 - (ii) a particular person; or
 - (iii) a particular class of persons;the information, or information of a kind, that is specified in the order and is in the person's possession or to which the person has access;
- (b) an order requiring the person to whom it is directed to publish, at the person's own expense, in the manner and at times specified in the order, advertisements whose terms are specified in, or are to be determined in accordance with, the order.

1325 Other orders

- (1) Where, in a proceeding instituted under, or for a contravention of, Chapter 5C, 6CA or 6D or Part 7.10, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, 6CA or 6D or

Section 1325

Part 7.10, the Court may, whether or not it grants an injunction, or makes an order, under any other provision of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

- (2) The Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, 6CA or 6D or Part 7.10, or on the application of ASIC in accordance with subsection (3) on behalf of such a person or 2 or more such persons, make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.
- (3) Where, in a proceeding instituted for a contravention of Chapter 5C, 6CA or 6D or Part 7.10 or instituted by ASIC under section 1324, a person is found to have engaged in conduct in contravention of Chapter 5C, 6CA or 6D or Part 7.10, ASIC may make an application under subsection (2) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct, but ASIC must not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.
- (4) An application under subsection (2) may be made within 6 years after the day on which the cause of action arose.
- (5) The orders referred to in subsections (1) and (2) are:
 - (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or

Section 1325A

a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after a specified day before the order is made; and

- (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after a specified day before the order is made; and
- (c) an order refusing to enforce any or all of the provisions of such a contract; and
- (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage; and
- (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage; and
- (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the person's own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage.

(5A) Subsections (1) and (2) have effect subject to section 1044B.

Note: Section 1044B may limit the liability, under an order under subsection (1) or (2) of this section, of a person for his or her contravention of section 1041H (Misleading or deceptive conduct) or involvement in such a contravention.

- (6) Where an application is made for an order under this section against a person, the Court may make an order under section 1323 in respect of the person.

1325A Orders if contravention of Chapter 6, 6A, 6B or 6C

- (1) The Court may make any order or orders (including a remedial order) that it considers appropriate if a person:
 - (a) contravenes a provision of Chapter 6, 6A, 6B or 6C; or

Section 1325B

- (b) contravenes a condition on a consent given by ASIC under section 652B; or
- (c) states in a notice under section 672B about securities that they do not know particular information about:
 - (i) the securities; or
 - (ii) someone who has a relevant interest in, or has given instructions in relation to, the securities.

Note 1: Section 9 defines *remedial order*.

Note 2: Sections 659B and 659C deal with court proceedings during and after a takeover bid.

- (2) The Court may make any order or orders (including a remedial order) that it considers appropriate if:
 - (a) the consideration offered under a takeover bid is or includes securities; and
 - (b) the offers under the bid or the bidder's statement states or implies that the securities will be able to be traded on a financial market (whether in Australia or elsewhere) and:
 - (i) an application for admission to quotation is not made within 7 days after the start of the bid period; or
 - (ii) permission for admission to quotation is not granted within 7 days after the end of the bid period.

Note: Section 9 defines *remedial order*.

- (3) An order under this section may be made on application by the following:
 - (a) ASIC;
 - (b) the company, or the responsible entity of the registered scheme, whose securities are involved in the contravention;
 - (c) a member or former member of that company or scheme;
 - (d) a person from whom the relevant interest in the securities were acquired;
 - (e) a person whose interests are affected by the contravention.

1325B Court may order bidder to make offers

- (1) If a bidder making a takeover bid for a class of securities contravenes section 631 by failing to make offers under the bid within time and ASIC applies for an order under this section, the Court may:

Section 1325C

- (a) order the bidder to send, to each holder of securities in that class, an offer to which the bidder's statement relates within a specified time; and
 - (b) make any ancillary orders it thinks appropriate including orders that the bidder:
 - (i) send notices setting out specified information with the offer; and
 - (ii) send copies of the notice within a specified period to the target and, if the target is listed, to the relevant market operator; and
 - (iii) lodge a copy of the notice with ASIC within a specified period.
- (2) Offers sent in accordance with an order under this section are taken to be made under a takeover bid.

1325C Unfair or unconscionable agreements, payments or benefits

- (1) The Court may make orders under subsection (2) if:
- (a) a body corporate gives, or enters into an agreement to give, a director or secretary of the body corporate or a related body corporate a benefit (including a payment or an agreement to employ them, or engage their services, for a fixed period); and
 - (b) the agreement is entered into or the benefit is given:
 - (i) within 12 months after the start of the bid period for a takeover bid for the securities of the body corporate or a related body corporate; or
 - (ii) at a time when the directors of the body corporate have reason to believe that a takeover bid is to be made in respect of securities of the body corporate or a related body corporate; and
 - (c) the Court is satisfied that the agreement or benefit was unfair or unconscionable having regard to the interests of the body corporate.
- (2) The Court may:
- (a) declare the agreement, or any part of it, to be void or to have always been void; or
 - (b) direct a person to whom a benefit is given, or another specified person, to:

Section 1325D

- (i) make a payment or transfer property to the body corporate; or
 - (ii) do any other act for the benefit of the body corporate; or
 - (c) make any other order it considers appropriate.
- (3) This section does not apply to an agreement or benefit that has been approved by an ordinary resolution of the body corporate (whether before or after the agreement was entered into or the benefit given) with no vote being cast by the person who is to receive the benefit or their associates.
- (4) An order under this section may be made on application by:
 - (a) the body corporate; or
 - (b) ASIC; or
 - (c) members who together hold shares carrying at least 10% of the votes attached to voting shares in the body corporate or a related body corporate;within 12 months, or any longer period that the Court thinks appropriate in the circumstances, after the agreement is entered into or the benefit given.

1325D Contravention due to inadvertence etc.

- (1) The Court may declare that any act, document or matter:
 - (a) is not invalid merely because a person has contravened a provision of Chapter 6, 6A, 6B or 6C; and
 - (b) has had effect at all times as if there had been no contravention;if the Court is satisfied that the contravention ought to be excused in all the circumstances.
- (2) An application for an order under subsection (1) may be made by any interested person.
- (3) If the Court is satisfied that in all the circumstances a contravention of a provision of Chapter 6, 6A, 6B or 6C ought to be excused, the Court must not make an order under section 1325A, 1325B or 1325C other than:
 - (a) an order restraining the exercise of voting or other rights attached to securities; or

Section 1325E

- (b) an order that an exercise of voting or other rights attached to securities be disregarded.
- (4) In determining whether or not a contravention of a provision by a person ought to be excused, have regard to the contravention being caused by any of the following:
 - (a) the person's inadvertence or mistake;
 - (b) the person not having been aware of a relevant fact or occurrence;
 - (c) circumstances beyond the control of the person.
- (5) This section applies notwithstanding anything contained in any other provision of this Chapter.

1325E Orders to secure compliance

In order to secure compliance with an order under section 1325A, 1325B or 1325C, the Court may direct a person to:

- (a) do a specified act; or
- (b) refrain from doing a specified act.

1326 Effect of sections 1323, 1324 and 1325

Nothing in any of sections 1323, 1324, 1324A, 1324B, and 1325 limits the generality of anything else in any of those sections.

1327 Power of Court to punish for contempt of Court

Nothing in a provision of this Act that provides:

- (a) that a person must not contravene an order of the Court; or
 - (b) that a person who contravenes an order of the Court contravenes a provision of this Act or is guilty of an offence;
- affects the powers of the Court in relation to the punishment of contempts of the Court.

Part 9.6—Proceedings

1330 ASIC’s power to intervene in proceedings

- (1) ASIC may intervene in any proceeding relating to a matter arising under this Act.
- (2) Where ASIC intervenes in a proceeding referred to in subsection (1), ASIC is taken to be a party to the proceeding and, subject to this Act, has all the rights, duties and liabilities of such a party.
- (3) Without limiting the generality of subsection (2), ASIC may appear and be represented in any proceeding in which it wishes to intervene pursuant to subsection (1):
 - (a) by a staff member of ASIC; or
 - (b) by a natural person to whom, or by an officer or employee of a person or body to whom or to which, ASIC has delegated its functions and powers under this Act or such of those functions and powers as relate to a matter to which the proceeding relates; or
 - (c) by solicitor or counsel.

1331 Civil proceedings not to be stayed

No civil proceedings under this Act are to be stayed merely because the proceeding discloses, or arises out of, the commission of an offence.

1332 Standard of proof

Where, in proceedings other than proceedings for an offence, it is necessary to establish, or for the Court to be satisfied, for any purpose relating to a matter arising under this Act, that:

- (a) a person has contravened a provision of this Act; or
- (b) default has been made in complying with a provision of this Act; or
- (c) an act or omission was unlawful by virtue of a provision of this Act; or

Section 1333

- (d) a person has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to a contravention, or a default in complying with, a provision of this Act;

it is sufficient if the matter referred to in paragraph (a), (b), (c) or (d) is established, or the Court is so satisfied, as the case may be, on the balance of probabilities.

1333 Evidence of contravention

For the purposes of this Act, a certificate that:

- (a) purports to be signed by the Registrar or other proper officer of an Australian court; and
- (b) states:
 - (i) that a person was convicted by that court on a specified day of a specified offence; or
 - (ii) that a person charged before that court with a specified offence was, on a specified day, 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 conviction was quashed or set aside, or that the finding was set aside or reversed, as the case may be, conclusive evidence:

- (c) if subparagraph (b)(i) applies—that the person was convicted of the offence on that day; and
- (d) if the offence was constituted by a contravention of a provision of a law—that the person contravened that provision.

1335 Costs

- (1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
- (1A) Subsection (1) does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Section 1336

Note: Similar provision is made in relation to Aboriginal and Torres Strait Islander corporations under section 581-20 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

- (2) The costs of any proceeding before a court under this Act are to be borne by such party to the proceeding as the court, in its discretion, directs.

1336 Vesting of property

- (1) Where an order is made by a court under this Act vesting property in a person:
- (a) subject to subsection (2), the property forthwith vests in the person named in the order without any conveyance, transfer or assignment; and
 - (b) the person who applied for the order must, within 7 days after the passing and entering of the order, lodge an office copy of the order with such person (if any) as is specified for the purpose in the order.
- (2) Where:
- (a) the property to which an order referred to in subsection (1) relates is property the transfer or transmission of which may be registered under a law of the Commonwealth, of a State or of a Territory; and
 - (b) that law enables the registration of such an order;
- the property, notwithstanding that it vests in equity in the person named in the order, does not vest in that person at law until the requirements of the law referred to in paragraph (a) have been complied with.
- (3) Where:
- (a) property vests in a person by force of this Act; and
 - (b) the property is property the transfer or transmission of which may be registered under a law of the Commonwealth, of a State or of a Territory; and
 - (c) that law enables the person to be registered as the owner of that property;
- that property, notwithstanding that it vests in equity in that person by force of this Act, does not vest in that person at law until the requirements of the law referred to in paragraph (b) have been complied with.

Part 9.6A—Jurisdiction and procedure of Courts

Division 1—Civil jurisdiction

Subdivision A—Preliminary

1337A Operation of Division

- (1) This Division deals with:
 - (a) the jurisdiction of courts in respect of civil matters arising under the Corporations legislation; and
 - (b) the jurisdiction of courts in respect of matters arising under the *Administrative Decisions (Judicial Review) Act 1977* involving or related to decisions made under the Corporations legislation by Commonwealth authorities and officers of the Commonwealth; and
 - (c) the jurisdiction of courts in civil matters in respect of decisions made by officers of the Commonwealth to prosecute persons for offences against the Corporations legislation and related criminal justice process decisions.
- (2) This Division operates to the exclusion of:
 - (a) the *Jurisdiction of Courts (Cross-vesting) Act 1987*; and
 - (b) section 39B of the *Judiciary Act 1903*.
- (3) This Division does not limit the operation of the provisions of the *Judiciary Act 1903* other than section 39B.
- (4) Without limiting subsection (3), this Division does not limit the operation of subsection 39(2) of the *Judiciary Act 1903* in relation to civil matters arising under the Corporations legislation.
- (5) Nothing in this Division affects any other jurisdiction of any court.

Section 1337B

Subdivision B—Conferral of jurisdiction

**1337B Jurisdiction of Federal Court and State and Territory
Supreme Courts**

- (1) Jurisdiction is conferred on the Federal Court of Australia with respect to civil matters arising under the Corporations legislation.
- (2) Subject to section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, jurisdiction is conferred on the Supreme Court of:
 - (a) each State; and
 - (b) the Capital Territory; and
 - (c) the Northern Territory;with respect to civil matters arising under the Corporations legislation.
- (3) Despite section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, jurisdiction is conferred on the Supreme Court of:
 - (a) each State; and
 - (b) the Capital Territory; and
 - (c) the Northern Territory;with respect to matters arising under that Act involving or related to decisions made, or proposed or required to be made, under the Corporations legislation by a Commonwealth authority or an officer of the Commonwealth.

Note 1: The Federal Court also has jurisdiction with respect to these matters under that Act.

Note 2: A Supreme Court may be required to transfer a proceeding with respect to such a matter to the Federal Court: see subsection 1337H(3).
- (4) Subsection (3) applies to a decision made, or proposed or required to be made:
 - (a) whether or not in the exercise of a discretion; and
 - (b) whether before or after that subsection commences.
- (5) The jurisdiction conferred on a Supreme Court by subsection (2) or (3) is not limited by any limits to which any other jurisdiction of that Supreme Court may be subject.
- (6) This section has effect subject to section 1337D.

1337C Jurisdiction of Family Court and State Family Courts

- (1) Jurisdiction is conferred on the Family Court with respect to civil matters arising under the Corporations legislation.
- (2) Subject to section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, jurisdiction is conferred on each State Family Court with respect to civil matters arising under the Corporations legislation.
- (3) The jurisdiction conferred on a State Family Court by subsection (2) is not limited by any limits to which any other jurisdiction of the State Family Court may be subject.
- (4) This section has effect subject to section 1337D.

1337D Jurisdiction of courts (decisions to prosecute and related criminal justice process decisions made by Commonwealth officers)

- (1) If a decision to prosecute a person for an offence against the Corporations legislation has been made by an officer or officers of the Commonwealth and the prosecution is proposed to be commenced in a State or Territory court:
 - (a) neither the Federal Court nor the Family Court has jurisdiction with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against the officer or officers in relation to that decision; and
 - (b) jurisdiction with respect to any such matter is conferred on the Supreme Court of the State or Territory in which the prosecution is proposed to be commenced.
- (2) Subject to subsection (3), at any time when:
 - (a) a prosecution for an offence against the Corporations legislation is before a State or Territory court; or
 - (b) an appeal arising out of such a prosecution is before a State or Territory court;the following apply:
 - (c) neither the Federal Court nor the Family Court has jurisdiction with respect to any matter in which the person who is or was the defendant in the prosecution seeks a writ of mandamus or prohibition or an injunction against an officer

Section 1337D

or officers of the Commonwealth in relation to a related criminal justice process decision;

- (d) jurisdiction with respect to any such matter is conferred on the Supreme Court of the State or Territory in which the prosecution or appeal is before a court.
- (3) Subsection (2) does not apply where a person has applied for a writ of mandamus or prohibition, or an injunction, against an officer or officers of the Commonwealth in relation to a related criminal justice process decision before the commencement of a prosecution for an offence against a law of the Commonwealth, or of a State or a Territory.
- (4) Where subsection (3) applies, the prosecutor may apply to the court for a permanent stay of the proceedings referred to in that subsection and the court may grant such a stay if the court determines that:
 - (a) the matters that are the subject of the proceedings are more appropriately dealt with in the criminal justice process; and
 - (b) a stay of proceedings will not substantially prejudice the person.
- (5) Subsections (1), (2), (3) and (4) have effect despite anything in this Act or in any other law. In particular:
 - (a) neither this Act, nor any other law, has the effect of giving the Federal Court or the Family Court jurisdiction contrary to subsection (1) or (2); and
 - (b) neither section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, nor any other law, has the effect of removing from the Supreme Court of a State, the Capital Territory or the Northern Territory the jurisdiction given to that Court by subsection (1) or (2).
- (6) In this section:

appeal includes an application for a new trial and a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge.

related criminal justice process decision, in relation to an offence, means a decision (other than a decision to prosecute) made in the criminal justice process in relation to the offence, including:

Section 1337E

- (a) a decision in connection with the investigation, committal for trial or prosecution of the defendant; and
- (b) a decision in connection with the appointment of investigators or inspectors for the purposes of such an investigation; and
- (c) a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant; and
- (d) a decision requiring the production of documents, the giving of information or the summoning of persons as witnesses; and
- (e) a decision in connection with an appeal arising out of the prosecution.

1337E Jurisdiction of lower courts

- (1) Subject to section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, jurisdiction is conferred on the lower courts of:
 - (a) each State; and
 - (b) the Capital Territory; and
 - (c) the Northern Territory;with respect to civil matters (other than superior court matters) arising under the Corporations legislation.
- (2) The jurisdiction conferred on a lower court by subsection (1):
 - (a) is subject to the court's general jurisdictional limits, so far as they relate to:
 - (i) the amounts; or
 - (ii) the value of property;with which the court may deal; but
 - (b) is not subject to the court's other jurisdictional limits.

1337F Appeals

- (1) An appeal may not be instituted from a decision of the Federal Court to:
 - (a) a State or Territory court; or
 - (b) the Family Court.
- (2) An appeal may not be instituted from a decision of a court of the Capital Territory to:

Section 1337G

- (a) a court of a State or the Northern Territory; or
 - (b) the Family Court.
- (3) An appeal may not be instituted from a decision of a court (not being a State Family Court) of a State or the Northern Territory to:
 - (a) the Federal Court; or
 - (b) a court of another State or Territory; or
 - (c) the Family Court; or
 - (d) a State Family Court of that State.
- (4) An appeal may not be instituted from a decision of the Family Court to:
 - (a) the Federal Court; or
 - (b) a State or Territory court.
- (5) An appeal may not be instituted from a decision of a State Family Court of a State to:
 - (a) the Federal Court; or
 - (b) a court of another State or Territory; or
 - (c) except in accordance with the law of the State under which the State Family Court is constituted—the Supreme Court of that State.

1337G Courts to act in aid of each other

All courts having jurisdiction in:

- (a) civil matters arising under the Corporations legislation; or
- (b) matters referred to in subsection 1337B(3);

and the officers of, or under the control of, those courts must severally act in aid of, and be auxiliary to, each other in all those matters.

Subdivision C—Transfer of proceedings

1337H Transfer of proceedings by the Federal Court and State and Territory Supreme Courts

- (1) This section applies to a proceeding (the *relevant proceeding*) in a court (the *transferor court*) if:
 - (a) the relevant proceeding is:

Section 1337H

- (i) a proceeding with respect to a civil matter arising under the Corporations legislation; or
 - (ii) a subsection 1337B(3) proceeding; and
 - (b) the transferor court is:
 - (i) the Federal court; or
 - (ii) a State or Territory Supreme Court.
- (2) Subject to subsections (3), (4) and (5), if it appears to the transferor court that, having regard to the interests of justice, it is more appropriate for:
- (a) the relevant proceeding; or
 - (b) an application in the relevant proceeding;
- to be determined by another court that has jurisdiction in the matters for determination in the relevant proceeding or application, the transferor court may transfer the relevant proceeding or application to that other court.
- (3) If:
- (a) the relevant proceeding is a subsection 1337B(3) proceeding; and
 - (b) the transferor court is a State or Territory Supreme Court; the transferor court must transfer the relevant proceeding to the Federal Court unless the matter for determination in it arises out of, or relates to, another proceeding pending in any court of that State or Territory that:
 - (c) arises, or a substantial part of which arises, under the Corporations legislation; and
 - (d) is not a subsection 1337B(3) proceeding;
- regardless of which proceeding was commenced first.
- (4) Even if subsection (3) does not require a State or Territory Supreme Court to transfer a subsection 1337B(3) proceeding to the Federal Court, it may nevertheless do so if it considers that to be appropriate, having regard to the interests of justice, including the desirability of related proceedings being heard in the same State or Territory.
- (5) If:
- (a) the relevant proceeding is a subsection 1337B(3) proceeding in relation to a matter; and
 - (b) the transferor court is the Federal Court;
-

Section 1337J

the transferor court may only transfer the relevant proceeding, or an application in the relevant proceeding, to a State or Territory Supreme Court if:

- (c) the matter arises out of, or relates to, another proceeding pending in any court of that State or Territory that:
 - (i) arises, or a substantial part of which arises, under the Corporations legislation; and
 - (ii) is not a subsection 1337B(3) proceeding; regardless of which proceeding was commenced first; and
 - (d) the transferor court considers the transfer to be appropriate, having regard to the interests of justice, including the desirability of related proceedings being heard in the same jurisdiction.
- (6) Nothing in this section confers on a court jurisdiction that the court would not otherwise have.
- (7) The fact that some references in this section to the interests of justice include the desirability of related proceedings being heard in the same jurisdiction does not of itself mean that other references to the interests of justice, in this section or elsewhere in this Act, do not include that matter.

1337J Transfer of proceedings by Family Court and State Family Courts

- (1) This section applies to a proceeding (the *relevant proceeding*) in a court (the *transferor court*) if:
- (a) the relevant proceeding is with respect to a civil matter arising under the Corporations legislation; and
 - (b) the transferor court is:
 - (i) the Family Court of Australia; or
 - (ii) a State Family Court.
- (2) If it appears to the transferor court:
- (a) that the relevant proceeding arises out of, or is related to, another proceeding pending in:
 - (i) the Federal Court; or
 - (ii) another State or Territory court;

Section 1337J

and that the court in which the other proceeding is pending is the most appropriate court to determine the relevant proceeding; or

- (b) that having regard to:
- (i) whether, in the transferor court's opinion, apart from this Division, the relevant proceeding, or a substantial part of it, would have been incapable of being instituted in the transferor court; and
 - (ii) the extent to which, in the transferor court's opinion, the matters for determination in the relevant proceeding are matters not within the transferor court's jurisdiction apart from this Division; and
 - (iii) the interests of justice;

the Federal Court, or another State or Territory court, is the most appropriate court to determine the relevant proceeding; or

- (c) that it is otherwise in the interests of justice that the Federal Court, or another State or Territory court, determine the relevant proceeding;

the transferor court must transfer the relevant proceeding to the Federal Court or to that other court.

- (3) Subject to subsection (2), if it appears to the transferor court:

- (a) that the relevant proceeding arises out of, or is related to, another proceeding pending in another court that is:

- (i) the Family Court of Australia; or
- (ii) a State Family Court;

and that has jurisdiction under section 1337C in the matters for determination in the relevant proceeding and that the other court is the most appropriate court to determine the relevant proceeding; or

- (b) that it is otherwise in the interests of justice that the relevant proceeding be determined by another court that is:

- (i) the Family Court of Australia; or
- (ii) a State Family Court;

and that has jurisdiction under section 1337C in the matters for determination in the relevant proceeding;

the transferor court must transfer the relevant proceeding to the other court.

Section 1337K

- (4) If:
 - (a) the transferor court transfers the relevant proceeding to another court; and
 - (b) it appears to the transferor court that:
 - (i) there is another proceeding pending in the transferor court that arises out of, or is related to, the relevant proceeding; and
 - (ii) it is in the interests of justice that the other court also determine the other proceeding;the transferor court must also transfer the other proceeding to the other court.
- (5) Nothing in this section confers on a court jurisdiction that the court would not otherwise have.

1337K Transfer of proceedings in lower courts

- (1) This section applies to a proceeding (the *relevant proceeding*) in a court (the *transferor court*) if:
 - (a) the relevant proceeding is with respect to a civil matter arising under the Corporations legislation; and
 - (b) the transferor court is a lower court of a State or Territory.
- (2) If it appears to the transferor court that, having regard to the interests of justice, it is more appropriate for:
 - (a) the relevant proceeding; or
 - (b) an application in the relevant proceeding;to be determined by another court that has jurisdiction in the matters for determination in the relevant proceeding or application, the transferor court may take action under whichever of subsections (3) and (4) applies.
- (3) If the other court is also a lower court, the transferor court may transfer the relevant proceeding or application to the other court.
- (4) If the other court is a superior court, the transferor court may:
 - (a) transfer the relevant proceeding or application to the relevant Supreme Court; and
 - (b) recommend that the relevant proceeding or application be transferred by the Supreme Court to the other court.

Section 1337L

- (5) The relevant Supreme Court is not bound to comply with a recommendation under subsection (4) and it may instead decide:
 - (a) to deal with the relevant proceeding or application itself; or
 - (b) to transfer the relevant proceeding or application to some other court (which could be the transferor court).
- (6) Nothing in this section allows the relevant Supreme Court to transfer the relevant proceeding or application to another court otherwise than in accordance with section 1337H and the other requirements of this Division.
- (7) Nothing in this section confers on a court jurisdiction that the court would not otherwise have.
- (8) In this section:

relevant Supreme Court means the Supreme Court of the State or Territory of which the transferor court is a court.

1337L Further matters for a court to consider when deciding whether to transfer a proceeding

In deciding whether to transfer under section 1337H, 1337J or 1337K a proceeding or application, a court must have regard to:

- (a) the principal place of business of any body corporate concerned in the proceeding or application; and
- (b) the place or places where the events that are the subject of the proceeding or application took place; and
- (c) the other courts that have jurisdiction to deal with the proceeding or application.

1337M Transfer may be made at any stage

A court may transfer under section 1337H, 1337J or 1337K a proceeding or application:

- (a) on the application of a party made at any stage; or
- (b) of the court's own motion.

Section 1337N

1337N Transfer of documents

If, under section 1337H, 1337J or 1337K, a court (the *transferor court*) transfers a proceeding, or an application in a proceeding, to another court:

- (a) the Registrar or other proper officer of the transferor court must transmit to the Registrar or other proper officer of the other court all documents filed in the transferor court in respect of the proceeding or application, as the case may be; and
- (b) the other court must proceed as if:
 - (i) the proceeding had been originally instituted in the other court; and
 - (ii) the same proceedings had been taken in the other court as were taken in the transferor court; and
 - (iii) in a case where an application is transferred—the application had been made in the other court.

1337P Conduct of proceedings

- (1) Subject to sections 1337S, 1337T and 1337U, if it appears to a court that, in determining a matter for determination in a proceeding, the court will, or will be likely to, be exercising relevant jurisdiction, the rules of evidence and procedure to be applied in dealing with that matter are to be the rules that:
 - (a) are applied in a superior court in Australia or in an external Territory; and
 - (b) the court considers appropriate to be applied in the circumstances.
- (2) If a proceeding is transferred or removed to a court (the *transferee court*) from another court (the *transferor court*), the transferee court must deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court.

Section 1337Q

(3) In this section:

relevant jurisdiction means:

- (a) jurisdiction conferred on the Federal Court of Australia or the Family Court with respect to civil matters arising under the Corporations Legislation; or
- (b) jurisdiction conferred on a court of a State, the Capital Territory or the Northern Territory with respect to matters referred to in subsection 1337B(3).

1337Q Rights of appearance

- (1) This section applies if a proceeding (the *transferred proceeding*) in a court (the *transferor court*) is transferred to another court (the *transferee court*) under this Division.
- (2) A person who is entitled to practise as a barrister or a solicitor, or as both a barrister and a solicitor, in the transferor court has the same entitlements to practise in relation to:
 - (a) the transferred proceeding; and
 - (b) any other proceeding out of which the transferred proceeding arises or to which the transferred proceeding is related, being another proceeding that is to be determined together with the transferred proceeding;in the transferee court that the person would have if the transferee court were a federal court exercising federal jurisdiction.

1337R Limitation on appeals

An appeal does not lie from a decision of a court:

- (a) in relation to the transfer of a proceeding under this Division; or
- (b) as to which rules of evidence and procedure are to be applied pursuant to subsection 1337P(1).

Subdivision D—Rules of court

1337S Rules of the Federal Court

- (1) The power to make rules of court conferred by section 59 of the *Federal Court of Australia Act 1976* extends to making rules of court:

Section 1337T

- (a) with respect to proceedings, and the practice and procedure, of the Federal Court of Australia under the Corporations legislation; and
- (b) with respect to any matter or thing that is:
 - (i) required or permitted by the Corporations legislation to be prescribed by rules within the meaning of the Corporations legislation; or
 - (ii) necessary or convenient to be prescribed by such rules for carrying out or giving effect to the Corporations legislation; and
- (c) without limitation, with respect to costs, and with respect to rules about meetings ordered by the Federal Court of Australia.

- (2) In this section:

Corporations legislation does not include rules of court.

1337T Rules of the Supreme Court

- (1) The Judges of the Supreme Court of the Capital Territory, or a majority of them, may make rules of court:
 - (a) with respect to proceedings, and the practice and procedure, of that court under the Corporations legislation; and
 - (b) with respect to any matter or thing that is:
 - (i) required or permitted by the Corporations legislation to be prescribed by rules within the meaning of the Corporations legislation; or
 - (ii) necessary or convenient to be prescribed by such rules for carrying out or giving effect to the Corporations legislation; and
 - (c) without limitation, with respect to costs, and with respect to rules as to meetings ordered by that Court.
- (2) When a lower court of the Capital Territory is exercising jurisdiction with respect to matters arising under the Corporations legislation, the court must apply the rules of court made under subsection (1), with such alterations as are necessary.

- (3) In this section:

Corporations legislation does not include rules of court.

1337U Rules of the Family Court

- (1) The power to make rules of court conferred by section 123 of the *Family Law Act 1975* extends to making rules of court:
 - (a) with respect to proceedings, and the practice and procedure, of the Family Court under the Corporations legislation; and
 - (b) with respect to any matter or thing that is:
 - (i) required or permitted by the Corporations legislation to be prescribed by rules within the meaning of the Corporations legislation; or
 - (ii) necessary or convenient to be prescribed by such rules for carrying out or giving effect to the Corporations legislation; and
 - (c) without limitation, with respect to costs, and with respect to rules about meetings ordered by the Family Court.

- (2) In this section:

Corporations legislation does not include rules of court.

Division 2—Criminal jurisdiction

1338A Operation of Division

- (1) This Division provides in relation to the jurisdiction of courts in respect of criminal matters arising under the Corporations legislation and so provides to the exclusion of sections 68, 70 and 70A of the *Judiciary Act 1903*.
- (2) This Division does not limit the operation of the provisions of the *Judiciary Act 1903* other than sections 68, 70 and 70A.
- (3) Without limiting subsection (2), this Division does not limit the operation of subsection 39(2) of the *Judiciary Act 1903* in relation to criminal matters arising under the Corporations legislation.

1338B Jurisdiction of courts

- (1) Subject to this section, the several courts of each State, the Capital Territory and the Northern Territory exercising jurisdiction:
 - (a) with respect to:
 - (i) the summary conviction; or
 - (ii) the examination and commitment for trial on indictment; or
 - (iii) the trial and conviction on indictment;
of offenders or persons charged with offences against the laws of the State, the Capital Territory or the Northern Territory, and with respect to:
 - (iv) their sentencing, punishment and release; or
 - (v) their liability to make reparation in connection with their offences; or
 - (vi) the forfeiture of property in connection with their offences; or
 - (vii) the proceeds of their crimes; and
 - (b) with respect to the hearing and determination of:
 - (i) proceedings connected with; or
 - (ii) appeals arising out of; or

Section 1338B

- (iii) appeals arising out of proceedings connected with;
any such trial or conviction or any matter of a kind referred
to in subparagraph (a)(iv), (v), (vi) or (vii);
have the equivalent jurisdiction with respect to offenders or
persons charged with offences against the Corporations legislation.
- (2) The jurisdiction conferred by subsection (1) is not to be exercised
with respect to the summary conviction, or examination and
commitment for trial, of any person except by a magistrate.
- (3) The jurisdiction conferred by subsection (1) includes jurisdiction in
accordance with provisions of a relevant law of a State, the Capital
Territory or the Northern Territory, and:
 - (a) the reference in paragraph (1)(b) to “any such trial or
conviction” includes a reference to any conviction or
sentencing in accordance with the provisions of a relevant
law; and
 - (b) unless the contrary intention appears, a reference to
jurisdiction conferred by subsection (1) includes a reference
to such included jurisdiction.
- (4) A person may be dealt with in accordance with a relevant law even
if, apart from this section, the offence concerned:
 - (a) would be required to be prosecuted on indictment; or
 - (b) would be required to be prosecuted either summarily or on
indictment.
- (5) For the purposes of the application of a relevant law as provided by
subsection (3):
 - (a) a reference in that law to an indictable offence is taken to
include a reference to an offence that may be prosecuted on
indictment; and
 - (b) in order to determine the sentence that may be imposed on a
person by a court pursuant to the relevant law, the person is
taken to have been prosecuted and convicted on indictment in
that court.
- (6) Subject to subsection (8), the jurisdiction conferred on a State or
Territory court by subsection (1) is conferred despite any limits as
to locality of the jurisdiction of that court under the law of that
State or Territory.

Section 1338C

(7) If:

- (a) jurisdiction is conferred on a State or Territory court in relation to the summary conviction of persons charged with offences against the Corporations legislation by subsection (1); and
 - (b) the court is satisfied that it is appropriate to do so, having regard to all the circumstances including the public interest; the court may decline to exercise that jurisdiction in relation to an offence committed in another State or Territory.
- (8) The jurisdiction conferred on a court of a State or the Northern Territory by subsection (1) in relation to:
- (a) the examination and commitment for trial on indictment; and
 - (b) the trial and conviction on indictment;
- of offenders or persons charged with offences against the Corporations legislation is conferred only in relation to:
- (c) offences committed outside Australia; and
 - (d) offences committed, begun or completed in the State or the Territory concerned.

(9) In this section:

appeal includes an application for a new trial and a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge.

Australia does not include the coastal sea.

relevant law means a law providing that where, in proceedings before a court, a person pleads guilty to a charge for which he or she could be prosecuted on indictment, the person may be committed, to a court having jurisdiction to try offences on indictment, to be sentenced or otherwise dealt with without being tried in that last-mentioned court.

1338C Laws to be applied

- (1) Subject to this Division, the laws of a State, the Capital Territory or the Northern Territory respecting:
- (a) the arrest and custody in the State or Territory of offenders or persons charged with offences; and

Section 1338C

- (b) criminal procedure in the State or Territory in relation to such persons; and
 - (c) the rules of evidence applied in criminal procedure in the State or Territory in relation to such persons;
- apply in the State or Territory, so far as they are applicable, to persons who are charged with offences against the Corporations legislation.
- (2) In this section:

criminal procedure means the procedure for:

- (a) the summary conviction; and
 - (b) the examination and commitment for trial on indictment; and
 - (c) the trial and conviction on indictment; and
 - (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any related proceedings;
- of offenders or persons charged with offences, and includes the procedure for holding accused persons to bail.

Part 9.7—Unclaimed property

1339 ASIC to deal with unclaimed property

- (1) Unclaimed property held by ASIC is to be dealt with in accordance with this Part.

Note: Unclaimed property is held by ASIC for and on behalf of the Commonwealth (see subsections 8(3) and (4) of the ASIC Act).

- (2) If property becomes unclaimed property, ASIC must:
 - (a) in the case of money—credit the amount of the money to the Companies and Unclaimed Moneys Special Account; or
 - (b) otherwise—sell or dispose of the property as it thinks fit and credit the amount of the proceeds to the Companies and Unclaimed Moneys Special Account.

1340 No liability to pay calls on shares etc.

Where unclaimed property is or includes shares in a body corporate, neither the Commonwealth nor ASIC is subject to any obligation:

- (a) to pay any calls; or
- (b) to make any contribution to the debts and liabilities of the body corporate; or
- (c) to discharge any other liability; or
- (d) to do any other act or thing;

in respect of the shares, whether the obligation arises before or after the shares become unclaimed property, but this section does not affect the right of a body corporate to forfeit a share.

1341 Entitlement to unclaimed property

- (1) If an amount is not debited from the Companies and Unclaimed Moneys Special Account in accordance with this section within 6 years after that amount was originally credited to the Account under subsection 1339(2), that amount must be debited from the Account.

Section 1342

Note: Despite being debited from the Companies and Unclaimed Moneys Special Account, the amount remains part of the Consolidated Revenue Fund.

- (2) If:
- (a) a person claims to be entitled to an amount credited to the Companies and Unclaimed Moneys Special Account under subsection 1339(2); and
 - (b) ASIC is satisfied that the person is entitled to that amount; ASIC must:
 - (c) unless paragraph (d) applies—pay the amount to the person and debit that amount from the Account; or
 - (d) if the amount has already been debited from the Account under subsection (1)—pay the amount to the person out of money appropriated by the Parliament for the purpose.
- (3) A person who is dissatisfied with the decision of ASIC in respect of a claim made by the person in accordance with subsection (2) may appeal to the Court and the Court may confirm, disallow or vary the decision of ASIC.
- (4) Where a person claims to be entitled to money that has been paid to another person in accordance with this section, neither the Commonwealth nor ASIC is under any liability to that first-mentioned person in respect of that money, but, if the first-mentioned person is entitled to that money, that person may recover that money from the other person.

1342 Commonwealth or ASIC not liable for loss or damage

Neither the Commonwealth nor ASIC is liable for any loss or damage suffered by a person arising out of the exercise of, or the failure to exercise, any of the powers which are conferred on ASIC under this Part or which ASIC has in relation to unclaimed property.

1343 Disposal of securities if whereabouts of holder unknown

Where a person has been shown in an appropriate register of a company as the holder of securities of the company for a period of at least 6 years and the company has, for a period of at least 6 years:

Section 1343A

- (a) had reasonable grounds for believing that the person was not residing at the address shown in the register as the person's address; and
 - (b) on each occasion during that last-mentioned period when, whether or not in accordance with a provision of this Act, it sought to communicate with the person, being unable after the exercise of reasonable diligence to do so;
- the company may, by executing a transfer for and on behalf of the person, transfer to ASIC:
- (c) the securities; and
 - (d) any rights in respect of the securities;
- to be dealt with under this Part.

1343A Disposal of interests in registered scheme if whereabouts of member unknown

If, during a period of at least 6 years while a person has been shown in the register of members of a registered scheme as the holder of interests in the scheme:

- (a) the responsible entity has had reasonable grounds for believing that the person was not residing at the address shown in the register as their address; and
- (b) the responsible entity's attempts to communicate with the person have been made using reasonable diligence but have all been unsuccessful;

the responsible entity may, by executing a transfer for and on behalf of the person, transfer the interests and any rights in respect of them to ASIC to be dealt with under this Part.

Part 9.9—Miscellaneous

1344 Use of ABN

Despite any provision in this Act or any other Act, in any case where:

- (a) the ACN of a company; or
- (b) the ARBN of a registered body; or
- (c) the ARSN of a registered scheme;

is required or permitted to be used under a law of the Commonwealth administered by ASIC, the ABN of the company, body or scheme may be used instead if the last 9 digits of the ABN are the same, and in the same order, as the last 9 digits of the ACN, ARBN or ARSN.

1345A Minister may delegate prescribed functions and powers under this Act

- (1) The Minister may, by signed instrument, delegate to an officer of the Department such of the Minister's functions and powers under this Act as are prescribed.
- (1A) The Minister may, by signed instrument, delegate the function or power under subsection 147(2) or 601DC(2) to:
 - (a) a member of ASIC (within the meaning of paragraph (a) of the definition of *member* in subsection 5(1) of the *Australian Securities and Investments Commission Act 2001*); or
 - (b) a staff member of ASIC.
- (2) A delegate is, in the performance or exercise of a delegated function or power, subject to the Minister's directions.

1346 Non-application of rule against perpetuities to certain schemes

- (1) The rules of law relating to perpetuities do not apply, and are taken never to have applied, to the trusts of any fund or scheme for the benefit of any employee of a corporation, whether the fund or scheme was established before, or is established after, the commencement of this section.

Section 1348

(2) In this section:

- (a) a reference to a corporation includes a reference to a body corporate or society incorporated or formed, or otherwise duly constituted, whether before, at or after the commencement of this section, by or under:
 - (i) a law of the Commonwealth, of a State or Territory, of an external Territory or of a country outside Australia and the external Territories; or
 - (ii) letters patent or a royal charter; and
- (b) a reference to a fund or scheme includes a reference to a provident, superannuation, sick, accident, assurance, unemployment, pension or co-operative benefit fund, scheme, arrangement or provision or other like fund, scheme, arrangement or provision; and
- (c) a reference to an employee of a corporation includes a reference to:
 - (i) a director of the corporation; and
 - (ii) a spouse, child, grandchild, parent or any dependant of an employee or of a director of the corporation.

1348 Operation of Life Insurance Act

Nothing in this Act is taken to affect any of the provisions of the *Life Insurance Act 1995*.

1349 Privilege against exposure to penalty—disqualification etc.

Court or Tribunal proceeding

- (1) In the case of:
 - (a) a civil or criminal proceeding under, or arising out of, this Act or the ASIC Act; or
 - (b) a proceeding before the Tribunal arising out of this Act or the ASIC Act;
- a person is not entitled to refuse or fail to comply with a requirement:
- (c) to answer a question or give information; or
 - (d) to produce a book or any other thing; or
 - (e) to do any other act whatever;

Section 1349

on the ground that the answer or information, production of the book or other thing, or doing that other act, as the case may be, might tend to make the person liable to a penalty by way of:

- (f) a disqualification under Part 2D.6 of this Act; or
 - (g) a declaration under section 853C of this Act; or
 - (h) a suspension or cancellation under section 915B of this Act; or
 - (i) a suspension or cancellation under section 915C of this Act; or
 - (j) a banning order under section 920A of this Act; or
 - (k) an order under section 921A of this Act; or
 - (l) a cancellation or suspension under Division 3 of Part 9.2 of this Act; or
 - (m) a requirement to give an undertaking under paragraph 1292(9)(b) or (c) of this Act; or
 - (n) a cancellation or suspension under Division 2 of Part 9.2A of this Act.
- (2) Subsection (1) applies whether or not the person is a defendant in, or a party to, the proceeding or any other proceeding.

Statutory requirement

- (3) A person is not entitled to refuse or fail to comply with a requirement under this Act or the ASIC Act:
- (a) to answer a question or give information; or
 - (b) to produce a book or any other thing; or
 - (c) to do any other act whatever;
- on the ground that the answer or information, production of the book or other thing, or doing that other act, as the case may be, might tend to make the person liable to a penalty by way of:
- (d) a disqualification under Part 2D.6 of this Act; or
 - (e) a declaration under section 853C of this Act; or
 - (f) a suspension or cancellation under section 915B of this Act; or
 - (g) a suspension or cancellation under section 915C of this Act; or
 - (h) a banning order under section 920A of this Act; or
 - (i) an order under section 921A of this Act; or

Section 1349

- (j) a cancellation or suspension under Division 3 of Part 9.2 of this Act; or
- (k) a requirement to give an undertaking under paragraph 1292(9)(b) or (c) of this Act; or
- (l) a cancellation or suspension under Division 2 of Part 9.2A of this Act.

Admissibility

- (4) Paragraph 597(12A)(d) of this Act, and paragraph 68(3)(b) of the ASIC Act, do not apply to a proceeding for the imposition of a penalty by way of:
 - (a) a disqualification under Part 2D.6 of this Act; or
 - (b) a declaration under section 853C of this Act; or
 - (c) a suspension or cancellation under section 915B of this Act; or
 - (d) a suspension or cancellation under section 915C of this Act; or
 - (e) a banning order under section 920A of this Act; or
 - (f) an order under section 921A of this Act; or
 - (g) a cancellation or suspension under Division 3 of Part 9.2 of this Act; or
 - (h) a requirement to give an undertaking under paragraph 1292(9)(b) or (c) of this Act; or
 - (i) a cancellation or suspension under Division 2 of Part 9.2A of this Act.

Other provisions

- (5) Subsections (1) and (3) have effect despite anything in:
 - (a) section 1317L; or
 - (b) any other provision of this Act; or
 - (c) the ASIC Act; or
 - (d) the *Administrative Appeals Tribunal Act 1975*.

Definition

- (6) In this section:

penalty includes forfeiture.

1350 Compensation for compulsory acquisition

- (1) If:
- (a) apart from this section, the operation of this Act would result in the acquisition of property from a person otherwise than on just terms; and
 - (b) the acquisition would be invalid because of paragraph 51(xxxi) of the Constitution;
- the person who acquires the property is liable to pay compensation of a reasonable amount to the person from whom the property is acquired in respect of the acquisition.
- (2) If the 2 people do not agree on the amount of the compensation, the person to whom compensation is payable may institute proceedings in the Court for the recovery of such reasonable amount as the court determines from the other person.
- (3) Any damages or compensation recovered or other remedy given in a proceeding that is commenced otherwise than under this section is to be taken into account in assessing compensation payable in a proceeding that is commenced under this section and that arises out of the same event or transaction.
- (4) In this section:
- acquisition of property* has the same meaning as in paragraph 51(xxxi) of the Constitution.
- just terms* has the same meaning as in paragraph 51(xxxi) of the Constitution.

Section 1351

Part 9.10—Fees imposed by the Corporations (Fees) Act 2001 and the Corporations (Review Fees) Act 2003

1351 Fees are payable to the Commonwealth

- (1) The fees imposed under the *Corporations (Fees) Act 2001* are payable to the Commonwealth.
- (2) The fees imposed under the *Corporations (Review Fees) Act 2003* are payable to the Commonwealth.
- (3) The date on which a fee imposed under the *Corporations (Review Fees) Act 2003* becomes due and payable is worked out under this table.

Due date for review fees		
Item	For a review fee imposed on...	The due date is...
1	a company	2 months after the review date to which the fee relates
2	a registered scheme	2 months after the review date to which the fee relates
3	a registered Australian body	the date prescribed by the regulations
4	a natural person registered as an auditor under Part 9.2	the date prescribed by the regulations
5	a natural person registered as a liquidator under Part 9.2	the date prescribed by the regulations
6	a person holding an Australian financial services licence under Part 7.6	the date prescribed by the regulations

- (4) However, a fee imposed under the *Corporations (Review Fees) Act 2003* is not payable to the Commonwealth by a company in relation to a review date in a year if:
 - (a) both of the following apply:

Section 1354

- (i) ASIC has given notice of the proposed deregistration of the company in accordance with subsection 601AA(4);
- (ii) the review date for that year falls in the 2 month period before or after the publication of the relevant *Gazette* notice; or
- (b) in the case of a company, a registered scheme or a registered Australian body—the company, scheme or body has, in a previous year, paid the fee in respect of the review date for that year in accordance with regulations made under the *Corporations (Review Fees) Act 2003* for the purposes of this section.

1354 Lodgment of document without payment of fee

- (1) This section applies where:
 - (a) a fee is payable under section 1351 for the lodgment of a document; and
 - (b) the document was submitted for lodgment without payment of the fee.
- (2) The document is not taken not to have been lodged merely because of non-payment of the fee.

1355 Doing act without payment of fee

If a fee is payable under section 1351 for a matter involving the doing of an act by the Minister or ASIC, the Minister or ASIC may refuse to do that act until the fee is paid.

1356 Effect of sections 1354 and 1355

Sections 1354 and 1355 have effect despite anything in another Part of this Act.

1359 Waiver and refund of fees

Nothing in this Part, the *Corporations (Fees) Act 2001* or the *Corporations (Review Fees) Act 2003* prevents the Commonwealth from:

Section 1360

- (a) waiving or reducing, in a particular case or in particular classes of cases, fees that would otherwise be payable under this Act; or
- (b) refunding, in whole or in part, in a particular case or in particular classes of cases, fees paid under this Act.

1360 Debts due to the Commonwealth

ASIC may, on behalf of the Commonwealth, recover a debt due under this Part.

1362 Payment of fee does not give right to inspect or search

To avoid doubt, nothing in this Part, and nothing done under this Part:

- (a) imposes on ASIC a duty to allow the inspection or search of a register or document, or to make available information; or
- (b) confers a right to inspect or search a register or document or to have information made available;

except so far as such a duty or right would, but for the effect of section 1355, exist under a provision of another Part of this Act or under some other law.

Part 9.12—Regulations

1363 Definitions

In this Part, unless the contrary intention appears:

prescribed means prescribed by the regulations.

the regulations means the regulations made under section 1364.

1364 Power to make regulations

- (1) The Governor-General may make regulations prescribing matters:
 - (a) required or permitted by this Act to be prescribed by regulations; or
 - (b) necessary or convenient to be prescribed by such regulations for carrying out or giving effect to this Act.
- (2) Without limiting subsection (1), the regulations may make provision:
 - (c) for or in relation to the keeping of registers by ASIC, the lodging of documents with ASIC, the registration of documents by ASIC, the time and manner of lodging or registration, and the requirements with which documents lodged or to be lodged are to comply; and
 - (d) prescribing forms for the purposes of this Act and the method of verifying any information required by or in those forms; and
 - (e) prescribing the manner in which, the persons by whom, and the directions or requirements in accordance with which, the forms prescribed for the purposes of this Act, or any of them, are required or permitted to be signed, prepared, or completed, and generally regulating the signing, preparation and completion of those forms, or any of them; and
 - (f) for or in relation to the convening of, conduct of, and procedure and voting at, meetings of creditors, meetings of eligible employee creditors, meetings of contributories and meetings of holders of debentures, and joint meetings of creditors and members of companies, the number of persons

Section 1364

required to constitute a quorum at any such meeting, the sending of notices of meetings to persons entitled to attend at meetings, the lodging of copies of notices of, and of resolutions passed at, meetings, and generally regulating the conduct of, and procedure at, any such meeting; and

- (g) prescribing the persons by whom, and the circumstances and manner in which, proxies may be appointed and generally regulating the appointment and powers of proxies; and
- (h) for or in relation to the proving of debts in the winding up of a company, the manner of proving debts and the time within which debts are required or permitted to be proved and generally regulating the proving of debts; and
- (j) prescribing the manner in which a liquidator appointed by the Court may:
 - (i) exercise powers and perform functions under subsection 478(1); and
 - (ii) exercise any powers conferred, and perform any duties imposed, on the liquidator by regulations made for the purposes of subsection 488(1); and
- (k) prescribing the manner in which a liquidator in a voluntary winding up may exercise powers and perform functions under section 506; and
- (m) prescribing times for the lodging of any documents; and
- (n) prescribing penalties for late payment of a review fee imposed by the *Corporations (Review Fees) Act 2003*; and
- (o) prescribing that, in relation to the payment of a fee imposed by the *Corporations (Fees) Act 2001* or the *Corporations (Review Fees) Act 2003*, in the event that the fee is paid by electronic means, a refund of an amount or proportion of the fee is payable; and
- (s) for or in relation to the giving to ASIC of information in addition to, or in variation of, the information contained in a prescribed form lodged with it; and
- (t) for or in relation to the times within which information required to be given to ASIC under this Act must be so given; and
- (u) for or in relation to the manner in which:
 - (i) orders made under this Act may be served on persons affected by the orders; and

Section 1365

- (ii) documents that are required or permitted by this Act to be served on a person may be so served; and
- (w) prescribing penalties not exceeding 50 penalty units for contraventions of the regulations.

1365 Scope of particular regulations

Except as otherwise expressly provided in this Act, the regulations may be of general or specially limited application or may differ according to differences in time, locality, place or circumstance.

1366 Verifying or certifying documents

The regulations may:

- (a) where documents required by or under this Act to be lodged in accordance with this Act are required to be verified or certified and no manner of verification or certification is prescribed by or under this Act—require that the documents or any of them be verified or certified by statement in writing made by such persons as are prescribed by the regulations; and
- (b) where no express provision is made in this Act for verification or certification of documents—require that the documents be verified or certified by statement in writing by such persons as are prescribed.

1367 Documents lodged by an agent

The regulations may provide, in such cases as are prescribed, that, if a document that is required by or under this Act to be lodged is signed or lodged on behalf of a person by an agent duly authorised by writing, there must be:

- (a) lodged with; or
- (b) endorsed on; or
- (c) annexed to;

that document, the original, or a verified copy, of the authority.

Section 1368

1368 Exemptions from Chapter 6D or 7

The regulations may provide that, subject to any prescribed terms and conditions, Chapter 6D or 7, or specified provisions of Chapter 6D or 7:

- (a) do not have effect in relation to a specified person or class of persons; or
- (b) have effect in relation to a specified person or class of persons to such extent only as is prescribed; or
- (c) do not have effect in relation to a specified transaction or class of transactions; or
- (d) do not have effect in relation to a specified transaction or class of transactions entered into by a specified person or class of persons;

and may provide that a contravention of a prescribed term or condition is an offence against the regulations.

1369 Penalty notices

- (1) The regulations:
 - (a) may prescribe offences against this Act (not being offences the penalties applicable to which include a term of imprisonment or a pecuniary penalty that exceeds \$1,000), or offences against the regulations, for the purposes of section 1313; and
 - (b) must, in relation to each offence that is prescribed under this subsection:
 - (i) prescribe the particulars of that offence that are to be given in a notice served on a person under that section in relation to the offence; and
 - (ii) prescribe the amount of the penalty (being not more than half the amount of the penalty applicable to the offence) that is payable in respect of the offence under a notice served on a person under that section in relation to the offence.
- (2) In subsection (1), a reference to a penalty applicable to an offence is a reference to the penalty that is applicable to that offence because of any of the provisions of section 1311.

Section 1369A

- (3) The particulars of an offence required to be prescribed by subparagraph (1)(b)(i) may be prescribed by being set out in the form prescribed for the purposes of section 1313 in relation to the offence.

1369A State termination of reference

- (1) The regulations may make provision in relation to circumstances that arise because a State ceases to be a referring State.

Note: For example, the regulations may prevent companies that have their registered office or financial records in the State from committing offences and give them time to relocate their office or records.

- (2) Without limiting subsection (1), regulations made under that subsection may modify the operation of this Act in relation to the circumstances dealt with in the regulations.

Chapter 10—Transitional provisions

Part 10.1—Transition from the old corporations legislation

Division 1—Preliminary

1370 Object of Part

- (1) Subject to subsection (3), the object of this Part is to provide for a smooth transition from the regime provided for in the old corporations legislation of the States and Territories in this jurisdiction to the regime provided for in the new corporations legislation, so that individuals, bodies corporate and other bodies are, to the greatest extent possible, put in the same position immediately after the commencement as they would have been if:
 - (a) that old corporations legislation had, from time to time when it was in force, been valid Commonwealth legislation applying throughout those States and Territories; and
 - (b) the new corporations legislation (to the extent it contains provisions that correspond to provisions of the old corporations legislation as in force immediately before the commencement) were a continuation of that old corporations legislation as so applying.
- Note: The new corporations legislation contains provisions that correspond to most of the provisions of the old corporations legislation. Generally, the only exceptions to this are provisions of the old corporations legislation that related to the fact that the Corporations Law operated separately in each of the States and Territories (rather than as a single national law).
- (2) In resolving any ambiguity as to the meaning of any of the other provisions of this Part, an interpretation that is consistent with the object of this Part is to be preferred to an interpretation that is not consistent with that object.
- (3) This Part does contain some provisions (for example, subsection 1400(4)) which apply or extend to matters under the old corporations legislation of any non-referring State.

1371 Definitions

(1) In this Part:

carried over provision of the old corporations legislation of a State or Territory in this jurisdiction means a provision of the old corporations legislation of that State or Territory that:

- (a) was in force immediately before the commencement; and
- (b) corresponds to a provision of the new corporations legislation.

commencement means the commencement of this Act.

corresponds has a meaning affected by subsections (2), (3) and (4).

instrument means:

- (a) any instrument of a legislative character (including an Act or regulations) or of an administrative character; or
- (b) any other document.

liability includes a duty or obligation.

made includes issued, given or published.

new corporations legislation means:

- (a) this Act; and
- (b) the new Corporations Regulations (as amended and in force from time to time) and any other regulations made under this Act; and
- (c) the laws of the Commonwealth referred to in paragraph (c) of the definition of ***old corporations legislation***, being those laws as they apply after the commencement; and
- (d) the preserved instruments.

new Corporations Regulations means the regulations that, because of section 1380, have effect as if they were made under section 1364.

old application Act for a State or Territory means:

- (a) in the case of New South Wales—the *Corporations (New South Wales) Act 1990* of New South Wales as in force from time to time before the commencement; or

Section 1371

- (b) in the case of Victoria—the *Corporations (Victoria) Act 1990* of Victoria as in force from time to time before the commencement; or
- (c) in the case of Queensland—the *Corporations (Queensland) Act 1990* of Queensland as in force from time to time before the commencement; or
- (d) in the case of Western Australia—the *Corporations (Western Australia) Act 1990* of Western Australia as in force from time to time before the commencement; or
- (e) in the case of South Australia—the *Corporations (South Australia) Act 1990* of South Australia as in force from time to time before the commencement; or
- (f) in the case of Tasmania—the *Corporations (Tasmania) Act 1990* of Tasmania as in force from time to time before the commencement; or
- (g) in the case of the Australian Capital Territory—the old Corporations Act; or
- (h) in the case of the Northern Territory—the *Corporations (Northern Territory) Act 1990* of the Northern Territory as in force from time to time before the commencement.

old Corporations Act means the *Corporations Act 1989* as in force from time to time before the commencement.

old Corporations Law means:

- (a) when used in relation to a particular State or Territory—the Corporations Law of that State or Territory, within the meaning of the old application Act for that State or Territory, as in force from time to time before the commencement; or
- (b) when used in general terms—the Corporations Law set out in section 82 of the old Corporations Act as in force from time to time before the commencement.

old corporations legislation of a particular State or Territory means:

- (a) the old Corporations Law and old Corporations Regulations of that State or Territory, and any instruments made under that Law or those Regulations; and
- (b) the old application Act for that State or Territory, and any instruments made under that Act; and

(c) either:

- (i) when used in relation to a State or the Northern Territory—the laws of the Commonwealth as applying in relation to the old Corporations Law and the old Corporations Regulations of the State or Territory from time to time before the commencement as laws of, or for the government of, that State or Territory because of Part 8 of the old Application Act for that State or Territory, and any instruments made under those laws as so applying; or
- (ii) when used in relation to the Australian Capital Territory—the laws of the Commonwealth referred to in subparagraph (i), but as applying of their own force in relation to the old Corporations Law and old Corporations Regulations of the Territory, and any instruments made under those laws as so applying.

old Corporations Regulations means:

- (a) when used in relation to a particular State or Territory—the Corporations Regulations of that State or Territory, within the meaning of the old application Act for that State or Territory, as in force from time to time before the commencement; or
- (b) when used in general terms—the regulations made under section 22 of the old Corporations Act as in force from time to time before the commencement.

order, in relation to a court, includes any judgment, conviction or sentence of the court.

pre-commencement right or liability has the meaning given by subsection 1400(1) or 1401(1).

preserved instrument means an instrument that, because of section 1399, has effect after the commencement as if it were made under a provision of the new corporations legislation.

right includes an interest or status.

substituted right or liability has the meaning given by subsection 1400(2) or 1401(3).

Section 1371

this Part includes regulations made for the purposes of any of the provisions of this Part.

- (2) Subject to subsection (4), for the purposes of this Part, a provision or part (the *old provision or part*) of the old corporations legislation of a State or Territory *corresponds* to a provision or part (the *new provision or part*) of the new corporations legislation (and vice versa) if:

- (a) the old provision or part and the new provision or part are substantially the same, unless the regulations specify that the 2 provisions or parts do not correspond; or
- (b) the regulations specify that the 2 provisions or parts correspond.

Note: The range of provisions of the new corporations legislation that may be corresponding provisions for the purposes of this Part is affected by sections 1401 and 1408, which take certain provisions of the old corporations legislation to be included in the new corporations legislation.

- (3) For the purposes of paragraph (2)(a), differences of all or any of the following kinds are not sufficient to mean that 2 provisions or parts are not substantially the same:
- (a) differences in the numbering of the provisions or parts;
 - (b) differences of a minor technical nature (for example, differences in punctuation, or differences that are attributable to the correction of incorrect cross references);
 - (c) the fact that one of the provisions refers to a corresponding previous law and the other does not;
 - (d) that fact that:
 - (i) the old provision or part allowed a court to exercise powers on its own motion but the new provision or part does not; or
 - (ii) the old provision or part required a court to apply a criterion of public interest but the new provision or part requires a court to apply a criterion of justice and equity; or
 - (iii) the new provision or part requires ASIC to take account of public interest but the old provision or part did not;
 - (e) other differences that are attributable to the fact that the new corporations legislation applies as a Commonwealth law throughout this jurisdiction;

- (f) other differences of a kind prescribed by the regulations for the purposes of this paragraph.

This subsection is not intended to otherwise limit the circumstances in which 2 provisions or parts are, for the purposes of paragraph (2)(a), substantially the same.

- (4) The regulations may provide that a specified provision of the old corporations legislation of a State or Territory does, or does not, correspond to a specified provision of the new corporations legislation.

1372 Relationship of Part with State validation Acts

- (1) This Part applies to an invalid administrative action of a Commonwealth authority or an officer of the Commonwealth (within the meaning of a State validation Act) as if the circumstances that made the authority's or officer's action an invalid administrative action had not made the action invalid.

Note 1: So, for example, in determining whether the purported registration of a company is an action to which this Part (in particular Division 2) applies, the circumstances that made the action an invalid administrative action for the purposes of a State validation Act are to be disregarded.

Note 2: For the status and effect of invalid administrative actions in relation to times before the commencement, see the State validation Acts.

- (2) However, if there are other circumstances that affect or may affect the validity of the action, neither this section, nor anything else in this Part, is taken to negate the effect of those other circumstances.

- (3) If:

- (a) a person would have had a right or liability under a provision (the ***old provision***) of the old corporations legislation of a State if the circumstances that made the authority's or officer's action an invalid administrative action (within the meaning of the State validation Act of that State) had not made the action invalid; and
- (b) the effect of that State validation Act in relation to that action is to declare that the person has, and is taken always to have had, the same rights and liabilities as they would have had under the old provision if the invalid administrative action had been taken, or purportedly taken, at the relevant time by

Section 1373

a duly authorised State authority or officer of the State
(within the meaning of that Act);

this Part applies as if:

- (c) a reference to a right or liability arising under the old corporations legislation included a reference to the right or liability that the person is declared to have by the State validation Act; and
- (d) that right or liability arose under the old provision.

(4) In this section:

State validation Act means an Act of a State in this jurisdiction under which certain administrative actions (within the meaning of that Act) taken, or purportedly taken, at or before the commencement by Commonwealth authorities or officers of the Commonwealth (within the meaning of that Act) pursuant to functions or powers (the **relevant functions or powers**) conferred, or purportedly conferred, by or under laws that include the old application Act for that State have, and are deemed always to have had, the same force and effect for all purposes as they would have had if:

- (a) they had been taken, or purportedly taken by a State authority or officer of the State (within the meaning of that Act); and
- (b) the relevant functions or powers had been duly conferred on those authorities or officers.

1373 References to things taken or deemed to be the case etc.

If:

- (a) a law of a State or Territory in this jurisdiction had effect before the commencement:
 - (i) to take or deem something to have happened or to be the case, or to have a particular effect, under or for the purposes of the old corporations legislation of that State or Territory (or a provision of that legislation); or
 - (ii) to give something an effect for the purposes of the old corporations legislation of that State or Territory (or a provision of that legislation) that it would not otherwise have had; and
- (b) that effect was continuing immediately before the commencement;

this Part applies as if that thing had actually happened or were actually the case, or as if that thing actually had that other effect.

Note: So, for example, if a provision of the old corporations legislation, or another law, of a State or Territory in this jurisdiction took a company to be registered under Part 2A.2 of the old Corporations Law of the State or Territory, this Part applies as if the company were actually registered under that Part.

1374 Existence of several versions of old corporations legislation does not result in this Part operating to take same thing to be done several times under new corporations legislation etc.

If, apart from this section, a provision of this Part (the *transitional provision*) would, because each State or Territory in this jurisdiction had its own old corporations legislation (containing parallel provisions) before the commencement, operate so that:

- (a) a particular thing done before the commencement would be taken to be done, or have effect, 2 or more times by, under or for the purposes of, a provision of this Act; or
- (b) a right or liability would be created 2 or more times in respect of a particular event, circumstance or thing that happened before the commencement; or
- (c) a particular result or effect would be produced 2 or more times for the purposes of the new corporations legislation in relation to the same matter;

the transitional provision is taken to operate so that:

- (d) if paragraph (a) applies—the thing is taken to be done or have effect only once by, under, or for the purposes of, the provision of the new corporations legislation; or
- (e) if paragraph (b) applies—the right or liability is created only once in respect of the event, circumstance or thing; or
- (f) if paragraph (c) applies—the result or effect is produced only once in relation to the matter.

Note: So, for example, if a body (because of the operation of section 102A of the old Corporations Law) was registered under section 601CB of the old Corporations Law of several States and Territories and those registrations were still in force immediately before the commencement, section 1399 does not apply separately to each of those registrations.

Section 1375

1375 Penalty units in respect of pre-commencement conduct remain at \$100

- (1) If, because of this Part, an offence can be prosecuted after the commencement in respect of conduct that occurred solely before the commencement, the amount of a penalty unit in respect of that offence is \$100.
- (2) If, because of this Part, section 1314 of this Act applies to conduct that started before the commencement and that continued after the commencement, then, for the purposes of the application of that section to that conduct (including the post-commencement conduct), the amount of a penalty unit is \$100.
- (3) This section has effect despite section 4AA of the *Crimes Act 1914*.

1376 Ceasing to be a referring State does not affect previous operation of this Part

If, after the commencement, a State ceases to be a referring State, that does not undo or affect:

- (a) the effects that this Part has already had in relation to matters connected with that State; or
- (b) the ongoing effect of this Act as it operates because of the effects referred to in paragraph (a).

Division 2—Carrying over registration of companies

1377 Division has effect subject to Division 7 regulations

This Division has effect subject to regulations made for the purposes of Division 7.

1378 Existing registered companies continue to be registered

- (1) If:
- (a) before the commencement, a company was registered under Part 2A.2 of the old Corporations Law of a State or Territory in this jurisdiction; and
 - (b) that registration was still in force immediately before the commencement;
- the registration of the company has effect (and may be dealt with) after the commencement as if it were a registration of the company under Part 2A.2 of this Act as a company of whichever of the company types listed in subsection (2) corresponds to its previous class and type.

Note: The carrying over of other matters (for example, the registration of registered managed investment schemes and of registered bodies) is covered by the more general transitional provisions in Division 6.

- (2) The company types are as follows:
- (a) a proprietary company limited by shares;
 - (b) an unlimited proprietary company;
 - (c) a proprietary company limited both by shares and by guarantee;
 - (d) a public company limited by shares;
 - (e) an unlimited public company;
 - (f) a company limited by guarantee;
 - (g) a public company limited both by shares and by guarantee;
 - (h) a no liability company.
- (3) The application of subsection (1) in relation to the registration of a company does not have the effect of creating that company as a new legal entity. Rather, it has the effect of continuing the existence of the legal entity that is that company with the same

Chapter 10 Transitional provisions

Part 10.1 Transition from the old corporations legislation

Division 2 Carrying over registration of companies

Section 1378

characteristics and attributes as it had immediately before the commencement. The date of the company's first registration remains the same (see subsection 1402(2)), and a new certificate of registration does not need to be issued.

Note: The company will, for example, retain the same name, ACN, constitution and registered office as it had immediately before the commencement. Its certificate of registration will (because of section 1399) have effect as if it were issued under section 118 of this Act.

- (4) The State or Territory in which the company is taken to be registered is the State or Territory under whose old Corporations Law the company was registered immediately before commencement. This subsection has effect subject to subsection 119A(3).

Note: For the general provisions about jurisdiction of incorporation and jurisdiction of registration, see section 119A.

Division 3—Carrying over the old Corporations Regulations

1379 Division has effect subject to Division 7 regulations

This Division has effect subject to regulations made for the purposes of Division 7.

1380 Old Corporations Regulations continue to have effect

The old Corporations Regulations that were made for the purposes of provisions of the old Corporations Law that correspond to provisions of this Act and that were in force immediately before the commencement continue to have effect (and may be dealt with) after the commencement as if:

- (a) they were regulations in force under section 1364 of this Act; and
- (b) they were made for the purposes of the corresponding provisions of this Act.

Division 4—Court proceedings and orders

1381 Division has effect subject to Division 7 regulations

This Division has effect subject to regulations made for the purposes of Division 7.

1382 Definitions

(1) In this Division:

appeal or review proceeding, in relation to an order of a court, means a proceeding by way of appeal, or otherwise seeking review, of the order.

enforcement proceeding, in relation to an order made by a court, means:

- (a) a proceeding to enforce the order; or
- (b) any other proceeding in respect of a breach of the order.

federal corporations proceeding means a proceeding of any of the following kinds that, immediately before the commencement, was before a court:

- (a) a proceeding in respect of a matter arising under the *Administrative Decisions (Judicial Review) Act 1977* involving or related to a decision made under a provision of the old corporations legislation of a State or Territory in this jurisdiction;
- (b) a proceeding for a writ of mandamus or prohibition, or an injunction, against an officer or officers of the Commonwealth (within the meaning of section 75 of the Constitution) in relation to a matter to which a provision of the old corporations legislation of a State or Territory in this jurisdiction applied;
- (ba) a proceeding that relates to a matter to which a provision of the *Corporations Act 1989* applied (other than a proceeding that relates to a matter to which a provision of the Corporations Law of the Australian Capital Territory applied);

- (bb) a proceeding in relation to a matter to which a provision of the old corporations legislation of a State or Territory in this jurisdiction applied:
 - (i) in which the Commonwealth was seeking an injunction or a declaration; or
 - (ii) to which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, was a party;
- (bc) any other proceeding in relation to a matter to which a provision of the old corporations legislation of a State in this jurisdiction applied that was in the exercise of federal jurisdiction;
- (bd) any other proceeding in relation to a matter to which a provision of the old corporations legislation of a Territory in this jurisdiction applied that would be covered by paragraph (bc) if the Territory had been a State;
- (c) a proceeding in the court's accrued federal jurisdiction in relation to a matter to which a provision of the old corporations legislation of a State or Territory in this jurisdiction applied.

interlocutory application means an application that:

- (a) is made during the course of a proceeding; and
- (b) is for an order that is incidental to the principal object of that proceeding, including, for example:
 - (i) an order about the conduct of that proceeding; or
 - (ii) an order assisting a party to that proceeding to present their case in that proceeding; or
 - (iii) an order protecting or otherwise dealing with property that is the subject matter of that proceeding;but not including an order making a final determination of existing rights or liabilities.

interlocutory order means:

- (a) an order made in relation to an interlocutory application; or
- (b) an order or direction about the conduct of a proceeding.

interlocutory proceeding means a proceeding:

- (a) dealing only with; or
 - (b) to the extent it deals with;
- an interlocutory application.

Section 1383

primary proceeding means a proceeding other than an interlocutory proceeding.

proceeding means a proceeding, whether criminal or civil, before a court.

- (2) For the purposes of this Part, if an interlocutory proceeding relates to a proceeding that is itself an interlocutory proceeding, the first-mentioned proceeding is taken to relate also to the primary proceeding to which the second-mentioned proceeding relates.

1383 Treatment of court proceedings under or related to the old corporations legislation—proceedings other than federal corporations proceedings

- (1) This section applies to a proceeding, other than a federal corporations proceeding, in relation to which the following paragraphs are satisfied:
- (a) the proceeding was started in a court before the commencement; and
 - (b) the proceeding was:
 - (i) under a provision of the old corporations legislation of a State or Territory in this jurisdiction; or
 - (ii) brought as, or connected with, a prosecution for an offence against a provision of the old corporations legislation of a State or Territory in this jurisdiction; and
 - (c) the proceeding was not an enforcement proceeding, or an appeal or review proceeding, in relation to an order of a court; and
 - (d) the proceeding had not been concluded or terminated before the commencement; and
 - (e) either:
 - (i) if the proceeding is a primary proceeding—no final determination of any of the existing rights or liabilities at issue in the proceeding had been made before the commencement; or
 - (ii) if the proceeding is an interlocutory proceeding—this section applies to the primary proceeding to which the interlocutory proceeding relates.

- (2) In this section:
- (a) the proceeding to which this section applies is called the *old proceeding*; and
 - (b) the provision of the old corporations legislation referred to in whichever of subparagraphs (1)(b)(i) and (ii) applies is called the *relevant old provision*.
- (3) A proceeding (the *new proceeding*) equivalent to the old proceeding is, on the commencement, taken to have been brought in the same court, exercising federal jurisdiction:
- (a) if subparagraph (1)(b)(i) applies—under the provision of the new corporations legislation that corresponds to the relevant old provision; or
 - (b) if subparagraph (1)(b)(ii) applies—as, or connected with, a prosecution for an offence against the provision of the new corporations legislation that corresponds to the relevant old provision.

To the extent that the old proceeding, before the commencement, related to pre-commencement rights or liabilities, the new proceeding relates to the substituted rights and liabilities in relation to those pre-commencement rights or liabilities

Note 1: See sections 1400 and 1401 for the creation of substituted rights and liabilities.

Note 2: In all cases, there will be a provision of the new corporations legislation that corresponds to the relevant old provision, either because:

- (a) the new corporations legislation actually contains a provision that corresponds to the relevant old provision; or
 - (b) the new corporations legislation, because of section 1401 or 1408, is taken to include the relevant old provision (whether with or without modifications), in which case the provision so taken to be included will be the corresponding provision.
- (4) The following provisions apply in relation to the new proceeding:
- (a) the parties to the new proceeding are the same as the parties to the old proceeding;
 - (b) subject to subsections (5) and (6), and to any order to the contrary made by the court, the court must deal with the new proceeding as if the steps that had been taken for the purposes of the old proceeding before the commencement had been taken for the purposes of the new proceeding.

Section 1384

(5) If:

- (a) an interlocutory order was made before the commencement for the purpose of, or in relation to, the old proceeding; and
- (b) that interlocutory order was in force immediately before the commencement;

the rights and liabilities of all persons (including rights and liabilities arising wholly or partly because of conduct occurring before the commencement) are declared to be, for all purposes, the same as if the interlocutory order had instead been made by the same court, in the exercise of federal jurisdiction, for the purpose of, or in relation to, the new proceeding.

(6) The court may make orders doing all or any of the following:

- (a) cancelling or varying rights or liabilities that a person has because of subsection (5);
- (b) substituting other rights or liabilities for rights or liabilities a person has because of subsection (5);
- (c) adding rights or liabilities to the rights or liabilities a person has because of subsection (5);
- (d) enforcing, or otherwise dealing with conduct contrary to, a right or liability a person has because of subsection (5) in the same way as it could enforce, or deal with, the right, liability or conduct if the right or liability had arisen under or because of an order made by the court in the exercise of federal jurisdiction under the new corporations legislation.

1384 Treatment of court proceedings under or related to the old corporations legislation—federal corporations proceedings

(1) This section applies to a proceeding in relation to which the following paragraphs are satisfied:

- (a) the proceeding was started in a court before the commencement; and
- (b) the proceeding was a federal corporations proceeding that related to a matter to which a provision of the old corporations legislation of a State or Territory in this jurisdiction applied; and
- (c) the proceeding had not been concluded or terminated before the commencement.

- (2) In this section:
- (a) the proceeding to which this section applies is called the *continued proceeding*; and
 - (b) the provision of the old corporations legislation referred to in paragraph (1)(b) is called the *relevant old provision*.
- (3) Subject to subsection (4):
- (a) the continued proceeding continues after the commencement in the same court as if it were, and always had been, a proceeding in relation to a matter to which the provision of the new corporations legislation that corresponds to the relevant old provision applies; and
 - (b) to the extent that the proceeding, before the commencement, related to pre-commencement rights or liabilities, the proceeding, as continued, relates, and as so continuing is taken always to have related, to the substituted rights and liabilities in relation to those pre-commencement rights or liabilities
- Note 1: See sections 1400 and 1401 for the creation of substituted rights and liabilities.
- Note 2: In all cases, there will be a provision of the new corporations legislation that corresponds to the relevant old provision, either because:
- (a) the new corporations legislation actually contains a provision that corresponds to the relevant old provision; or
 - (b) the new corporations legislation, because of section 1401 or 1408, is taken to include the relevant old provision (whether with or without modifications), in which case the provision so taken to be included will be the corresponding provision.
- (4) Subject to any order to the contrary made by the court, the court must deal with the continued proceeding as if:
- (a) the steps that had been taken for the purposes of the proceeding before the commencement had been taken for the purpose of the proceeding as continued by this section; and
 - (b) any orders made in relation to the proceeding before the commencement had been made in relation to the proceeding as continued by this section.

Section 1384A

1384A Appeals etc. in relation to some former federal corporations proceedings

- (1) This section applies to a proceeding in relation to which all of the following paragraphs are satisfied:
 - (a) the proceeding was started in a court before the commencement;
 - (b) the proceeding was a federal corporations proceeding that related to a matter to which a provision of the old corporations legislation of a State or Territory in this jurisdiction applied; and
 - (c) the proceeding had been concluded or terminated before the commencement.
- (2) A decision or order made in the proceeding may be appealed against, or otherwise reviewed, as if it had been made in a proceeding that related to a matter to which a provision of this Act applied.
- (3) An order made in the proceeding may be enforced as if it had been made in a proceeding that related to a matter to which a provision of this Act applied.

1384B Effect of decisions and orders made in federal corporations proceedings before commencement

- (1) For the avoidance of doubt, if:
 - (a) a proceeding was started in a court before the commencement; and
 - (b) the proceeding was a federal corporations proceeding that related to a matter to which a provision of the old corporations legislation of a State or Territory in this jurisdiction applied; and
 - (c) a decision was made or an order given in the proceeding before the commencement;the decision or order continues to have effect after the commencement despite the provision of the old corporations legislation ceasing to have effect.
- (2) This section does not limit the operation of section 1384 in relation to the decision or order.

1385 References to proceedings and orders in the new corporations legislation

- (1) Subject to subsection (5), a reference in the new corporations legislation to the taking of a proceeding, or a step in a proceeding, in a court under or in relation to a part or provision of the new corporations legislation includes a reference to the taking of a proceeding, or the equivalent step in a proceeding:
 - (a) before the commencement under or in relation to the corresponding part or provision of the old corporations legislation of a State or Territory; or
 - (b) after the commencement under or in relation to the corresponding part or provision of the old corporations legislation of a State or Territory in this jurisdiction, as that legislation continues to have effect after the commencement.
- (2) Subject to subsections (3), (4) and (5), a reference in the new corporations legislation to an order made by a court under or in relation to a part or provision of the new corporations legislation includes a reference to an order made:
 - (a) before the commencement under or in relation to the corresponding part or provision of the old corporations legislation of a State or Territory; or
 - (b) after the commencement under or in relation to the corresponding part or provision of the old corporations legislation of a State or Territory in this jurisdiction, as that legislation continues to have effect after the commencement.
- (3) Nothing in subsection (2) is taken to produce a result that would:
 - (a) make a person liable, under the new corporations legislation, to any penalty (whether civil or criminal) provided for in an order referred to in paragraph (2)(a) or (b); or
 - (b) enable an enforcement proceeding, or an appeal or review proceeding, in relation to such an order to be taken in a court under the new corporations legislation; or
 - (c) enable proceedings by way of appeal, or other review, of such an order to be taken in a court under the new corporations legislation.
- (4) If, after the commencement, an order referred to in paragraph (2)(a) or (b) is varied or set aside on appeal or review,

Chapter 10 Transitional provisions

Part 10.1 Transition from the old corporations legislation

Division 4 Court proceedings and orders

Section 1385

subsection (2) applies, or is taken to have applied, from the time from which the variation or setting aside takes or took effect, as if:

- (a) if the order is varied—the order had been made as so varied;
or
 - (b) if the order is set aside—the order had not been made.
- (5) The regulations may provide that subsection (1) or (2) does not apply in relation to a particular reference or class of references in the new corporations legislation.

Division 5—Other specific transitional provisions

1386 Division has effect subject to Division 7 regulations

This Division has effect subject to regulations made for the purposes of Division 7.

1387 Certain applications lapse on the commencement

- (1) An application:
 - (a) under section 117 for the registration of a company; or
 - (b) under section 601BC for the registration of a body as a company;that was made by a person before the commencement, but that had not been dealt with by the commencement, lapses on the commencement.
- (2) Any fee that was paid in respect of the application must be returned to the person, unless it is, with the person's permission, credited against the fee payable in respect of another application the person makes under this Act after the commencement.

1388 Carrying over the Partnerships and Associations Application Order

The application order in force immediately before the commencement for paragraph 115(b) of the old Corporations Law of each State and Territory in this jurisdiction continues to have effect (and may be dealt with) after the commencement as if it were a regulation in force under section 1364 of this Act made for the purposes of subsection 115(2) of this Act.

1389 Evidentiary certificates

- (1) A certificate by ASIC (whether issued before or after the commencement) stating that a company was registered under the old Corporations Law of a State or Territory in this jurisdiction is conclusive evidence that:
 - (a) all requirements of that Law for the company's registration were complied with; and

Section 1390

- (b) the company was duly registered as a company under that Law on the date (if any) specified in the certificate.
- (2) A certificate issued before the commencement under pre-Corporations Law legislation (see subsection (3)) by the authority responsible for administering that legislation stating that a body was registered as a company under that legislation or other pre-Corporations Law legislation is conclusive evidence that:
 - (a) all requirements of that legislation for the company's registration were complied with; and
 - (b) the company was duly registered as a company under that legislation on the date (if any) specified in the certificate.
- (3) In subsection (2):

pre-Corporations Law legislation means legislation that was, for the purposes of the old Corporations Law of a State or Territory in this jurisdiction, a corresponding previous law in relation to that old Corporations Law.

1390 Preservation of nomination of body corporate as SEGC

The nomination in force immediately before the commencement under section 67 of the old Corporations Act continues to have effect (and may be dealt with) after the commencement as if it were a nomination under section 925A of this Act.

1391 Preservation of identification of satisfactory records

A notice in force immediately before the commencement under section 70 of the old Corporations Act continues to have effect (and may be dealt with) after the commencement as if it were a notice under subsection 147(5) of this Act.

1392 Retention of information obtained under old corporations legislation of non-referring State

If a particular State is not a referring State on the commencement, that does not mean that ASIC must then remove from, or cease to retain in, a database or register it maintains information that ASIC obtained before the commencement under or because of (whether in whole or in part) the operation of the old corporations legislation of that State.

1393 Transitional provisions relating to section 1351 fees

- (1) If:
- (a) either:
 - (i) before the commencement, a person paid an amount as required by section 1351 of the old Corporations Law of a State or Territory in respect of a particular matter; or
 - (ii) after the commencement, a person pays an amount as required by subsection 9(2) of the *Corporations (Fees) Act 2001* in respect of a particular matter; and
 - (b) a fee is also payable under section 1351 of this Act in respect of the same matter;
- the payment they made or make as mentioned in subparagraph (a)(i) or (ii) is taken to satisfy their liability to pay the fee referred to in paragraph (b).

- (2) If:
- (a) before the commencement, a person paid a deposit as required by section 1357 of the old Corporations Law of a State or Territory in respect of a particular matter; and
 - (b) a fee is payable under section 1351 of this Act in respect of the same matter;
- the deposit must be applied against the liability to pay the fee.

1394 Transitional provisions relating to securities exchange fidelity fund levies

- (1) If:
- (a) before the commencement, a person paid an amount as required by subsection 902(1) of the old Corporations Law of a State or Territory in order to be admitted to:
 - (i) membership of a securities exchange; or
 - (ii) membership of a partnership in a member firm recognised by a securities exchange; and
 - (b) that person had not been so admitted by the commencement of this Act;
- the payment they made before the commencement is taken to satisfy their liability to pay the levy referred to in subsection 902(1) of this Act in respect of their admission after the commencement to that securities exchange or firm.

Section 1395

- (2) If:
- (a) either:
 - (i) before the commencement, a person paid an amount as required by subsection 902(2) of the old Corporations Law of a State or Territory to a securities exchange in respect of a year some or all of which occurs after the commencement of this Act; or
 - (ii) after the commencement, a person pays an amount as required by subsection 8(3) of the *Corporations (Securities Exchanges Levies) Act 2001* in respect of a year some or all of which occurs after the commencement of this Act; and
 - (b) a levy is also payable under subsection 902(2) of this Act in respect of the securities exchange and the year;
- the payment they made or make as mentioned in subparagraph (a)(i) or (ii) is taken to satisfy their liability to pay the levy referred to in paragraph (b).
- (3) If, before the commencement, a person paid an amount to a securities exchange as required by subsection 902(2) of the old Corporations Law of a State or Territory, that payment is to be counted, for the purposes of:
- (a) the reference in paragraph (a) of the definition of ***relevant person*** in subsection 903(1) of this Act; and
 - (b) subsection 903(5) of this Act;
- as if it were a payment of a kind referred to in that paragraph or that subsection, as the case requires.

1395 Transitional provisions relating to National Guarantee Fund levies

- (1) If:
- (a) either:
 - (i) before the commencement, a person paid an amount as required by section 938 of the old Corporations Law of a State or Territory in respect of a particular transaction; or
 - (ii) after the commencement, a person pays an amount of levy imposed by subsection 6(1) of the *Corporations (National Guarantee Fund Levies) Act 2001* in respect of a particular transaction; and
-

- (b) a levy is also payable under section 938 of this Act in respect of the same transaction;
the payment they made or make as mentioned in subparagraph (a)(i) or (ii) is taken to satisfy their liability to pay the levy referred to in paragraph (b).
- (2) Subject to subsection (3), a determination of a matter (other than a rate or rates, or an amount) in force immediately before the commencement for the purposes of section 938, 940 or 941 of the old Corporations Law of a State or Territory in this jurisdiction continues to have effect (and may be dealt with) after the commencement of this Act as if it were:
- (a) in the case of a determination for the purposes of section 938—a determination for the purposes of section 938 of this Act; or
 - (b) in the case of a determination for the purposes of section 940—a determination for the purposes of section 940 of this Act; or
 - (c) in the case of a determination for the purposes of section 941—a determination for the purposes of section 941 of this Act.
- (3) Nothing in subsection (2) is taken to produce a result that a levy is payable by a person in respect of the same matter in respect of which levy is imposed on the person by subsection 6(1), (2) or (3) of the *Corporations (National Guarantee Fund Levies) Act 2001*.

1396 Transitional provisions relating to futures organisation fidelity fund levies

- (1) If:
- (a) before the commencement, a person paid an amount as required by subsection 1234(1) of the old Corporations Law of a State or Territory in order to be admitted to membership of a futures organisation; and
 - (b) that person had not been so admitted by the commencement of this Act;
- the payment they made before the commencement is taken to satisfy their liability to pay the levy referred to in subsection 1234(1) of this Act in respect of their admission after the commencement to that futures organisation.

Section 1396

(2) If:

(a) either:

- (i) before the commencement, a contributing member of a futures organisation paid an amount as required by subsection 1234(2) of the old Corporations Law of a State or Territory to a futures organisation in respect of a year some or all of which occurs after the commencement of this Act; or
- (ii) after the commencement, a person pays an amount as required by subsection 6(1) of the *Corporations (Futures Organisations Levies) Act 2001* in respect of a year some or all of which occurs after the commencement of this Act; and

(b) a levy is also payable under subsection 1234(2) of this Act in respect of the futures organisation and the year;

the payment they made or make as mentioned in subparagraph (a)(i) or (ii) is taken to satisfy their liability to pay the levy referred to in paragraph (b).

Division 6—General transitional provisions relating to other things done etc. under the old corporations legislation

1397 Limitations on scope of this Division

- (1) This Division has effect subject to:
 - (a) the provisions of Divisions 2, 3, 4 and 5 (which deal with matters in more specific terms); and
 - (b) regulations made for the purposes of Division 7.
- (2) Nothing in this Division applies to:
 - (a) an order made by a court before the commencement; or
 - (b) a right or liability under an order made by a court before the commencement; or
 - (c) a right to:
 - (i) appeal to a court against an order made by a court before the commencement;
 - (ii) apply to a court for review of such an order; or
 - (iii) bring an appeal or review proceeding, or an enforcement proceeding, within the meaning of section 1382, in respect of such an order; or
 - (d) subject to subsection (3)—a proceeding taken (including an appeal, review or enforcement proceeding) in a court before the commencement, or a step in such a proceeding.

Note: Division 4 deals with court orders and proceedings made or begun before the commencement, and with related matters.
- (3) Despite paragraph (2)(d), sections 1400 and 1401 apply to any right or liability to which a proceeding to which section 1383 or 1384 applies relates.
- (4) Nothing in this Division applies to a liability under section 902, 904, 938, 940, 941, 1234, 1235 or 1351 of the old Corporations Law of a State or Territory in this jurisdiction to pay a contribution, levy or fee.

Chapter 10 Transitional provisions

Part 10.1 Transition from the old corporations legislation

Division 6 General transitional provisions relating to other things done etc. under the old corporations legislation

Section 1398

Note: These liabilities are preserved as taxes by provisions of the following Acts:

- (a) the *Corporations (Securities Exchanges Levies) Act 2001*;
 - (b) the *Corporations (National Guarantee Fund Levies) Act 2001*;
 - (c) the *Corporations (Futures Organisations Levies) Act 2001*;
 - (d) the *Corporations (Fees) Act 2001*.
- (5) Except as mentioned in subsections (1) to (4), nothing in Division 2, 3, 4 or 5, or in regulations made for the purposes of Division 7, is intended to limit the generality of the provisions in this Division.

1398 Provisions of this Division may have an overlapping effect

The provisions of this Division deal at a broad level with concepts and matters in a way that is intended to achieve the object of this Part as set out in section 1370. Some of the provisions of this Division will (depending on the situation) have an effect that overlaps or interacts to some extent with the effect of other provisions of this Division. This is intended, and the provisions of this Division should be not be regarded as dealing with mutually exclusive situations.

1399 Things done by etc. carried over provisions continue to have effect

- (1) Subject to this section, a thing that:
- (a) was done before the commencement by, under, or for the purposes of, a carried over provision of the old corporations legislation of a State or Territory in this jurisdiction; and
 - (b) had an ongoing significance (see subsections (4) and (5)) immediately before the commencement for the purposes of that legislation;
- has effect (and may be dealt with) after the commencement, for the purposes of the new corporations legislation, as if it were done by, under, or for the purposes of, the corresponding provision of the new corporations legislation.

Note: This section covers all kinds of things done, including things of a coercive nature or done for coercive purposes.

Section 1399

- (2) Examples of things done include:
- (a) the making of an instrument or order (but not including the making of an order by a court); and
 - (b) the making of an application or claim (but not including the making of an application or claim to a court); and
 - (c) the granting of an application or claim (but not including the granting of an application or claim by a court); and
 - (d) the making of an appointment or delegation; and
 - (e) the commencement of a procedure or the taking of a step in a procedure (but not including the commencement of a proceeding in a court); and
 - (f) the establishment of a register or fund; and
 - (g) requiring a person to do, or not to do, something (but not including a requirement contained in an order made by a court); and
 - (h) the giving of a notice or document.
- (3) The examples in subsection (2) are not intended to limit the generality of the language of subsection (1).
- (4) Subject to subsection (5), for the purposes of this section, a thing done by, under, or for the purposes of, a carried over provision of the old corporations legislation of a State or Territory had an ***ongoing significance*** immediately before the commencement for the purposes of that legislation if:
- (a) if the thing done was the making of an instrument or order—the instrument or order was still in force immediately before the commencement; or
 - (b) if the thing done was the making of an application or claim—the application or claim had not been decided, and had not otherwise ceased to have effect, before the commencement; or
 - (c) if the thing done was the granting of an application or claim—the thing granted had not been revoked, and had not otherwise ceased to have effect, before the commencement; or
 - (d) if the thing done was the making of an appointment or delegation—the appointment or delegation had not been revoked, and had not otherwise ceased to have effect, before the commencement; or
-

Chapter 10 Transitional provisions

Part 10.1 Transition from the old corporations legislation

Division 6 General transitional provisions relating to other things done etc. under the old corporations legislation

Section 1400

- (e) if the thing done was the commencement of a procedure or the taking of a step in a procedure—the procedure was still in progress immediately before the commencement or was otherwise still having an effect; or
 - (f) if the thing done was the establishment of a register or fund—the register or fund was still in existence immediately before the commencement; or
 - (g) if the thing done was requiring a person to do, or not to do something—the requirement was still in force immediately before the commencement; or
 - (h) if the thing done was the giving of a notice or document, or the doing of some other thing—the notice or document (or the giving of the notice or document), or the thing (or the doing of the thing), had an ongoing effect or significance immediately before the commencement for the purposes of the old corporations legislation of the State or Territory.
- (5) The regulations may provide that a specified thing done under, or for the purposes of, a carried over provision of the old corporations legislation of a State or Territory did, or did not, have an ongoing significance immediately before the commencement for the purposes of that legislation.

1400 Creation of equivalent rights and liabilities to those that existed before the commencement under carried over provisions of the old corporations legislation

- (1) Subject to subsection (4), this section applies in relation to a right or liability (the *pre-commencement right or liability*), whether civil or criminal, that:
- (a) was acquired, accrued or incurred under a carried over provision of the old corporations legislation of a State or Territory in this jurisdiction; and
 - (b) was in existence immediately before the commencement.
- However, this section does not apply to a right or liability under an order made by a court before the commencement.
- (2) On the commencement, the person acquires, accrues or incurs a right or liability (the *substituted right or liability*), equivalent to the pre-commencement right or liability, under the corresponding provision of the new corporations legislation (as if that provision

Section 1401

applied to the conduct or circumstances that gave rise to the pre-commencement right or liability).

Note: If a time limit applied in relation to the pre-commencement right or liability under the old corporations legislation, that same time limit (calculated from the same starting point) will apply under the new corporations legislation to the substituted right or liability—see subsection 1402(3).

- (3) A procedure, proceeding or remedy in respect of the substituted right or liability may be instituted after the commencement under the new corporations legislation (as if that provision applied to the conduct or circumstances that gave rise to the pre-commencement right or liability).

Note: For pre-commencement proceedings in respect of substituted rights and liabilities, see sections 1383 and 1384.

- (4) If, immediately before the commencement, a person had an accrued right to make a claim under a provision of Part 7.10 of the old Corporations Law of a State that is not a referring State (and so is not in this jurisdiction), this section applies in relation to that right in the same way as it would have applied if the State had been a referring State.

Note: Except to the extent provided in this subsection, this Part does not create rights and liabilities that are equivalent to those that existed under the old corporations legislation of a non-referring State.

1401 Creation of equivalent rights and liabilities to those that existed before the commencement under repealed provisions of the old corporations legislation

- (1) This section applies in relation to a right or liability (the *pre-commencement right or liability*), whether civil or criminal, that:

- (a) was acquired, accrued or incurred under a provision of the old corporations legislation of a State or Territory in this jurisdiction that was no longer in force immediately before the commencement; and
- (b) was in existence immediately before the commencement.

However, this section does not apply to a right or liability under an order made by a court before the commencement.

Chapter 10 Transitional provisions

Part 10.1 Transition from the old corporations legislation

Division 6 General transitional provisions relating to other things done etc. under the old corporations legislation

Section 1402

- (2) For the purposes of subsections (3) and (4), the new corporations legislation is taken to include:
- (a) the provision of the old corporations legislation (with such modifications (if any) as are necessary) under which the pre-commencement right or liability was acquired, accrued or incurred; and
 - (b) the other provisions of the old corporations legislation (with such modifications (if any) as are necessary) that applied in relation to the pre-commencement right or liability.

- (3) On the commencement, the person acquires, accrues or incurs a right or liability (the *substituted right or liability*), equivalent to the pre-commencement right or liability, under the provision taken to be included in the new corporations legislation by paragraph (2)(a) (as if that provision applied to the conduct or circumstances that gave rise to the pre-commencement right or liability).

Note: If a time limit applied in relation to the pre-commencement right or liability under the old corporations legislation, that same time limit (calculated from the same starting point) will apply under the new corporations legislation to the substituted right or liability—see subsection 1402(3).

- (4) A procedure, proceeding or remedy in respect of the substituted right or liability may be instituted after the commencement under the provisions taken to be included in the new corporations legislation by subsection (2) (as if those provisions applied to the conduct or circumstances that gave rise to the pre-commencement right or liability).

Note: For pre-commencement proceedings in respect of substituted rights and liabilities, see sections 1383 and 1384.

1402 Old corporations legislation time limits etc.

- (1) An old corporations legislation time limit (see subsection (4)):
- (a) the starting point of which:
 - (i) was known or had been determined before the commencement (whether that starting point occurred or would occur before, on or after the commencement); or
 - (ii) would have become known, or have been determined, after the commencement if the old corporations legislation of the relevant State or Territory had

Section 1403

continued to apply (whether that starting point would have occurred before, on or after the commencement); and

(b) that had not ended at or before the commencement; continues to run, or starts or started to run, as if that same time limit (starting from the same starting point) were applicable under the new corporations legislation.

(2) If:

(a) under the old corporations legislation, a process (for example, the winding up of a company), a status of a person or body (for example, a body's registration as a company or a person's status as a registered liquidator), or an instrument, commenced from a particular time before the commencement; and

(b) that process, status or instrument is continued after the commencement for the purposes of the new corporations legislation by a provision of this Part;

that process, status or instrument as so continued is still taken to have commenced from the time referred to in paragraph (a).

(3) If an old corporations legislation time limit related to a pre-commencement right or liability, the same time limit applies in relation to the substituted right or liability.

(4) In this section:

old corporations legislation time limit includes:

(a) a period for the doing of a thing specified or determined under a provision of the old corporations legislation of a State or Territory; or

(b) a period specified or determined under a provision of the old corporations legislation of a State or Territory as the duration of a particular instrument or status.

1403 Preservation of significance etc. of events or circumstances

(1) An event, circumstance or other thing:

(a) that occurred or arose before the commencement under or as mentioned in a provision of the old corporations legislation of a State or Territory in this jurisdiction; and

Chapter 10 Transitional provisions

Part 10.1 Transition from the old corporations legislation

Division 6 General transitional provisions relating to other things done etc. under the old corporations legislation

Section 1404

- (b) that had a particular significance, status or effect for the purposes of a carried over provision of that legislation (including because of an interpretive provision);

has that same significance, status and effect after the commencement for the purposes of the provision of the new corporations legislation that corresponds to that carried over provision.

Note: So, for example:

- (a) if a company took action before the commencement that had the result for the purposes of section 200B of the old Corporations Law of making a superannuation fund a prescribed superannuation fund in relation to the company, that action has that same effect for the purposes of section 200B of this Act; and
 - (b) a delay that could have been taken into account for the purposes of subsection 874(1) of the old Corporations Law also counts for the purposes of subsection 874(1) of this Act.
- (2) Without limiting subsection (1), an event, circumstance or other thing had a particular significance for the purposes of a carried over provision of the old corporations legislation of a State or Territory in this jurisdiction if:
- (a) the carried over provision created an obligation in respect of the event, circumstance or thing (whenever it arose); or
 - (b) the carried over provision provided for the event, circumstance or thing to be dealt with in a particular way; or
 - (c) the carried over provision stated that the event, circumstance or thing (whenever it arose) was to be disregarded for the purposes of that provision or was not covered by that provision.

1404 References in the new corporations legislation generally include references to events, circumstances or things that happened or arose before the commencement

- (1) Subject to this section, a reference in the new corporations legislation to an event, circumstance or thing of a particular kind that happens or arises, or that has happened or arisen, is taken to include a reference to an event, circumstance or thing of that kind that happened or arose at a time before the commencement, unless a contrary intention is expressed. The fact that the provision uses only the present tense in referring to an event, circumstance or

Section 1405

thing is not, of itself, to be regarded as an expression of a contrary intention.

Note: So, for example, if a provision of the new corporations legislation refers to a person who consents to a course of action, that reference (in the absence of an express provision to the contrary) will not be limited to consents given after the commencement and will cover a consent given before the commencement.

- (2) Nothing in subsection (1) is taken to produce a result that a right or liability exists under a provision of the new corporations legislation that relates solely to events, circumstances or things that occurred before the commencement.

Note: Instead, an equivalent right or liability will be created by section 1400 or 1401.

- (3) The regulations may provide that subsection (1) does not apply in relation to a particular reference or class of references in the new corporations legislation.

1405 References in the new corporations legislation to that legislation or the new ASIC legislation generally include references to corresponding provisions of the old corporations legislation or old ASIC legislation

- (1) Subject to subsection (4), a reference in the new corporations legislation to:
- (a) an Act, or regulations or another instrument that is part of the new corporations legislation; or
 - (b) a provision or group of provisions of such an Act, regulations or other instrument;
- is taken, in relation to events, circumstances or things that happened or arose at a time before the commencement when the old corporations legislation was in force, to include (in the absence of an express provision to the contrary) a reference to the corresponding part, provision or provisions of the old corporations legislation of the States and Territories in this jurisdiction.
- (2) Subject to subsection (4), a reference in the new corporations legislation to:
- (a) an Act, or regulations or some other instrument that is part of the new ASIC legislation; or

Chapter 10 Transitional provisions

Part 10.1 Transition from the old corporations legislation

Division 6 General transitional provisions relating to other things done etc. under the old corporations legislation

Section 1406

- (b) a provision or group of provisions of such an Act, regulations or other instrument;
- is taken, in relation to events, circumstances or things that happened or arose at a time before the commencement when the old corporations legislation was in force, to include (in the absence of an express provision to the contrary) a reference to the corresponding part, provision or provisions of the old ASIC legislation of the Commonwealth, of the States in this jurisdiction and of the Northern Territory.
- (3) In subsection (2):
 - (a) *new ASIC legislation* and *old ASIC legislation* have the same meanings as they have in Part 16 of the *Australian Securities and Investments Commission Act 2001*; and
 - (b) the question whether a provision or part of the old ASIC legislation corresponds to a provision of part of the new ASIC legislation is to be determined in the same way as it is determined for the purposes of Part 16 of the *Australian Securities and Investments Commission Act 2001*.
- (4) The regulations may provide that subsection (1) or (2) does not apply in relation to a particular reference or class of references in the new corporations legislation.

1406 Carrying over references to corresponding previous laws

- (1) If a carried over provision of the old corporations legislation of a State or Territory in this jurisdiction contained a reference (whether in its own terms or by operation of another provision) to:
 - (a) a corresponding previous law (as defined for the purposes of that provision or provisions including that provision); or
 - (b) a thing done by, under, or for the purposes of, such a law;the corresponding provision of the new corporations legislation is taken to contain an equivalent reference to that previous law, or to such a thing done by, under, or for the purposes of, that previous law.
- (2) The following references in the old corporations legislation of the States and Territories in this jurisdiction are covered by subsection (1) in the same way as they would be if they used the “corresponding previous law” form of words:

Section 1407

- (a) the reference in subsection 1274AA(1) to a “previous Law”;
- (b) the reference in subparagraph 1274AA(2)(b)(ii) to a “previous law of this jurisdiction before the commencement of this Part that corresponds”;
- (c) any other references prescribed by the regulations for the purposes of this subsection.

1407 References to old corporations legislation in instruments

- (1) Subject to subsection (2), a reference in, or taken immediately before the commencement to be in, an instrument, other than:
 - (a) an Act of a State, the Australian Capital Territory, the Northern Territory or Norfolk Island; or
 - (b) an instrument made under such an Act;to:
 - (c) an Act, or to regulations or some other instrument, that is part of the old corporations legislation (whether the reference is in general terms or in relation to a particular State or Territory in this jurisdiction); or
 - (d) to a provision or group of provisions of such an Act, regulations or other instrument;

is taken, after the commencement, to include a reference to the corresponding part, provision or provisions of the new corporations legislation (unless there is no such corresponding part, provision or provisions).

Note: This section will, for example, apply to:

- (a) a reference in another Commonwealth Act to the Corporations Law; or
 - (b) a reference in the Corporations Regulations to the Corporations Law; or
 - (c) a reference in a company’s constitution to a particular provision of the Corporations Law.
- (2) The regulations may do either or both of the following:
 - (a) provide that subsection (1) does not apply in relation to prescribed references in prescribed instruments;
 - (b) provide that subsection (1) has effect in relation to prescribed references in prescribed instruments as if, in that subsection, the words “to be” were substituted for the words “to include”.

Section 1408

1408 Old transitional provisions continue to have their effect

- (1) Subject to subsection (3), this Act has the same effect, after the commencement, as it would have if:
- (a) the transitional provisions (see subsections (6) and (7)) of the old Corporations Laws of the States and Territories in this jurisdiction (as in force from time to time before the commencement) had been part of this Act; and
 - (b) those transitional provisions produced the same results or effects (to the greatest extent possible) for the purposes of this Act as they produced for the purposes of those old Corporations Laws.

- (2) Without limiting subsection (1) (but subject to subsection (3)), if a transitional provision of the old Corporations Law of a State or Territory in this jurisdiction could, if it had continued in force after the commencement, have operated to give rise to rights and liabilities (including civil or criminal liabilities) in relation to acts or omissions occurring after the commencement, this Act is taken to include that transitional provision (with such modifications (if any) as are necessary).

Note: In relation to acts or omissions that occurred before the commencement, equivalent rights and liabilities are created by sections 1400 and 1401.

- (3) The regulations may determine how a matter dealt with in a transitional provision of the old Corporations Law of a State or Territory in this jurisdiction is to be dealt with under or in relation to the new corporations legislation (including by creating offences). The regulations have effect despite subsections (1) and (2), but subject to subsection (5).

Note: In creating offences, the regulations are subject to the limitation imposed by section 1375.

- (4) For the purpose of determining whether the new corporations legislation includes a provision that corresponds to a provision of the old corporations legislation of a State or Territory, and for the purpose of any reference in this part to a corresponding provision of the new corporations legislation, this Act is taken to include the transitional provisions of the old corporations legislation of the States and Territories, as they have effect because of subsections (1) and (2).

Section 1408

- (5) Nothing in subsection (1) or (2), or in regulations made for the purposes of subsection (3), is taken to produce a result that a right or liability exists under a transitional provision as it has effect because of subsection (1) or (2), or exists under regulations made for the purposes of subsection (3), that relates solely to events, circumstances or things that occurred before the commencement.

Note: Instead, an equivalent right or liability will be created by section 1400 or 1401.

- (6) Subject to subsection (7), for the purposes of this section, a **transitional provision** is any of the provisions of the old Corporations Laws of the States and Territories in this jurisdiction listed in the following table.

Transitional provisions of old Corporations Law	
Item	Provisions
1	subsection 87(1A)
2	subsection 88(1A)
3	sections 109E to 109G and section 109T
4	section 268A
5	section 275
6	section 275A
7	Subsections 319(4), (5) and (6)
8	section 601
9	subsection 774(7)
10	subsection 895(3)
11	subsection 977(4)
12	subsection 990(2)
13	section 993
14	subsection 1228(3)
15	subsections 1274(17) and (18)
16	subsections 1288(1), (2) and (6)
17	paragraph 1311(1A)(f) and subsection 1311(3A)
18	section 1336A
19	Chapter 11, other than section 1416

Chapter 10 Transitional provisions

Part 10.1 Transition from the old corporations legislation

Division 6 General transitional provisions relating to other things done etc. under the old corporations legislation

Section 1408

Transitional provisions of old Corporations Law

Item Provisions

- | | |
|----|---|
| 20 | Schedule 4, other than the following provisions: <ul style="list-style-type: none">(a) subclauses 7(3), 8(2) and 9(4);(b) clauses 11 to 16;(c) subclause 17(2);(d) clauses 18 and 19;(e) clauses 20, 25 and 27;(f) Parts 5, 6 and 7. |
|----|---|
-

- (7) The regulations may provide that certain provisions are to be taken to be included in, or omitted from, the table in subsection (6). The table then has effect as if the provisions were so included in it or omitted from it.

Division 7—Regulations dealing with transitional matters

1409 Regulations may deal with transitional matters

- (1) The regulations may deal with matters of a transitional nature relating to the transition from the application of provisions of the old corporations legislation of the States and Territories in this jurisdiction to the application of provisions of the new corporations legislation. The regulations have effect despite anything else in this Part, other than section 1375.
- (2) Without limiting subsection (1), the regulations may provide for a matter to be dealt with, wholly or partly, in any of the following ways:
 - (a) by applying (with or without modifications) to the matter:
 - (i) provisions of the old corporations legislation of the States and Territories in this jurisdiction, as in force immediately before the commencement or at some earlier time; or
 - (ii) provisions of the new corporations legislation; or
 - (iii) a combination of provisions referred to in subparagraphs (i) and (ii);
 - (b) by otherwise specifying rules for dealing with the matter;
 - (c) by specifying a particular consequence of the matter, or of an outcome of the matter, for the purposes of the new corporations legislation.
- (3) The regulations may provide that certain provisions of this Part are taken to be modified as set out in the regulations. Those provisions then have effect as if they were so modified.
- (4) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations for the purposes of this section may be expressed to take effect from a date before the regulations are registered under that Act.
- (5) In this section:
matters of a transitional nature also includes matters of an application or saving nature.

Part 10.2—Transitional provisions relating to the Financial Services Reform Act 2001

Division 1—Transitional provisions relating to the phasing-in of the new financial services regime

Subdivision A—Preliminary

1410 Definitions

- (1) In this Division, unless the contrary intention appears:

amended Corporations Act means this Act as in force after the FSR commencement.

associated provisions, in relation to provisions (the *core provisions*) of a particular Act as in force at a particular time, include (but are not limited to):

- (a) any regulations or other instruments that are or were in force for the purposes of any of the core provisions at that time; and
- (b) any interpretation provisions that apply or applied in relation to any of the core provisions at that time (whether or not they also apply or applied for other purposes); and
- (c) any provisions relating to liability (civil or criminal) that apply or applied in relation to any of the core provisions at that time (whether or not they also apply or applied for other purposes); and
- (d) any provisions that limit or limited, or that otherwise affect or affected, the operation of any of the core provisions at that time (whether or not they also limit or limited, or affect or affected, the operation of other provisions).

class, in relation to financial products, has a meaning affected by regulations made for the purposes of subsection (2).

FSR commencement means the commencement of item 1 of Schedule 1 to the *Financial Services Reform Act 2001*.

Section 1410

old Corporations Act means this Act as in force immediately before the FSR commencement.

regulated activities, in relation to a regulated principal, has the meaning given by section 1430.

regulated principal has the meaning given by section 1430.

relevant old legislation, in relation to a regulated principal, has the meaning given by section 1430.

transition period:

- (a) in relation to a market to which section 1414, 1418, 1420, 1421 or 1422 applies—has the meaning given by subsection (2) of that section; and
 - (b) in relation to a market to which section 1417 applies and the additional products referred to in that section—has the meaning given by subsection 1417(2); and
 - (c) in relation to a clearing and settlement facility to which section 1426 or 1429 applies—has the meaning given by subsection (2) of that section; and
 - (d) in relation to a clearing and settlement facility to which section 1428 applies and the additional products referred to in that section—has the meaning given by subsection 1428(2); and
 - (e) in relation to a regulated principal—has the meaning given by subsection 1431(1); and
 - (f) in relation to a financial product to which section 1438 applies—has the meaning given by subsection (3) of that section.
- (1A) Other expressions used in this Part that are defined in Division 2 of Part 7.1 have the same meanings as they are given by that Division. This has effect subject to:
- (a) any contrary intention in a provision of this Part; or
 - (b) regulations made for the purposes of this paragraph.
- (2) The regulations may include provisions identifying, or providing for the identification of, what constitutes a ***class*** of financial products for the purposes of a provision or provisions of this Division.

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1411

- (3) If a provision of this Division (the *transitional provision*) provides for a provision of this or another Act (the *preserved provision*), as in force immediately before the FSR commencement, to continue to apply to or in relation to a person, thing or matter:
- (a) the preserved provision so continues to apply only to the extent (if any) to which it is expressed in terms that cover the person, thing or matter; and
 - (b) the transitional provision is not taken to extend the scope of the preserved provision (otherwise than by giving it a continued operation).

Subdivision B—Treatment of existing markets

1411 When is a market being operated immediately before the FSR commencement?

Subject to section 1412, in this Subdivision, a reference to a market *being operated immediately before the FSR commencement* is a reference to a market that had not permanently ceased to operate before the FSR commencement, even if trading on the market was not actually occurring immediately before the FSR commencement (for example, because of a routine temporary closure of the market).

1412 Treatment of proposed markets that have not started to operate by the FSR commencement

- (1) This section applies in relation to the following proposed markets, other than any such market that starts to operate before the FSR commencement:
- (a) a market proposed to be operated by Bendigo Stock Exchange Ltd, or by ASX Futures Exchange Pty Limited, that is identified in writing by the Minister as being a proposed market to which this section applies;
 - (b) any other proposed market identified in, or in accordance with, regulations made for the purposes of this paragraph.

For this purpose, a *proposed market* is a market that a person has, before the FSR commencement, indicated an intention that they propose to operate.

Section 1412

- (2) This Subdivision applies in relation to a proposed market to which this section applies subject to the following paragraphs:
- (a) subject to paragraphs (b), (c) and (d), this Subdivision applies in relation to the proposed market as if the market, as proposed to be operated, were in fact being operated immediately before the FSR commencement;
 - (b) if, taking account of the effect of paragraph (a), section 1413 applies in relation to the proposed market, that section applies in relation to the proposed market:
 - (i) as if the Minister's obligation to grant a licence, and impose conditions, under subsection 1413(2) in relation to the market does not arise unless and until the market operator lodges with ASIC a notice in relation to the market under subsection (3) of this section, and does not arise at all if no such notice is given to ASIC by the end of 6 months after the FSR commencement; and
 - (ii) as if subsection 1413(3) provided for a licence so granted under subsection 1413(2) in relation to the market, and the conditions subject to which it is granted, to be taken to have had effect from the day (the **start day**) specified in the subsection (3) notice as the day on which the market started to operate; and
 - (iii) as if subsection 1413(6) were omitted; and
 - (iv) as if the references in subsection 1413(8) to the FSR commencement were instead references to the start day;
 - (c) if:
 - (i) taking account of the effect of paragraph (a), section 1418, 1420, 1421 or 1422 applies to the proposed market; and
 - (ii) the market operator does not lodge with ASIC a notice in relation to the market under subsection (3) of this section by the end of 6 months after the FSR commencement;that section ceases to apply in relation to the proposed market at the end of that period;
 - (d) if a provision of this Subdivision provides for a provision of the old Corporations Act to continue to apply in relation to the proposed market, then (without limiting the generality of subsection 1410(3)), while the proposed market remains non-operational, the provision of the old Corporations Act

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1413

only applies in relation to the proposed market to the extent (if any) to which it would, disregarding the effect of paragraph (a), apply in relation to the proposed market.

- (3) If a proposed market to which this section applies starts to operate on a day during the period of 6 months starting on the FSR commencement, the operator must, as soon as practicable, and in any event within 7 days, lodge with ASIC written notice of the fact that the market started to operate on that day.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) ASIC must, within a reasonable time, give the Minister a notice it receives under subsection (3).

1413 Obligation of Minister to grant licences covering main existing markets

- (1) This section applies to each market being operated immediately before the FSR commencement in relation to which any of the following paragraphs applies:
- (a) the market was a stock market operated by the Australian Stock Exchange Limited;
 - (b) the market was a stock market operated by a body corporate covered by an approval in force under subsection 769(2) of the old Corporations Act;
 - (c) the market was a futures market operated by a body corporate covered by an approval in force under subsection 1126(2) of the old Corporations Act.
- (2) Subject to subsections (3) and (4), the Minister must, in relation to each market to which this section applies, grant the operator of the market a licence, and impose conditions on that licence, in accordance with the following requirements:
- (a) the licence must be described as an Australian market licence;
 - (b) the licence must be granted subject to the following conditions:
 - (i) a condition specifying the market as the market that the licence authorises the licensee to operate;

Section 1413

- (ii) a condition specifying, as the classes of financial products that can be dealt with on the market, the classes that are appropriate for the market under subsection (5);
 - (iii) if the Minister considers that the licensee should have clearing and settlement arrangements for transactions effected through the market—a condition specifying the type of clearing and settlement arrangements that are adequate.
- (3) Subject to subsection (6), a licence that subsection (2) requires to be granted must be granted on, or as soon as practicable after, the FSR commencement. If it is granted after the FSR commencement, it, and the conditions subject to which it is granted, are taken to have had effect from that commencement.
- (4) Sections 795D (more than one licence in the same document) and 795E (more than one market covered by the same licence) of the amended Corporations Act apply in relation to the granting of licences, and licences granted, under this section as if the licences were, or were being, granted under section 795B of that Act. If, pursuant to section 795E, a single licence is granted under this section in respect of several separate markets, paragraph (2)(b) of this section must be complied with separately in the licence document in relation to each of those markets.
- (5) For the purposes of subparagraph (2)(b)(ii), the classes of financial products that are *appropriate* for a market to which this section applies are as follows:
 - (a) for a market described in paragraph (1)(a) or (b)—securities, within the meaning of section 92 of the old Corporations Act as applying for the purposes of Part 7.2 of the old Corporations Act, and agreements of a kind to which section 92A of the old Corporations Act applied immediately before the FSR commencement (or would have applied after the FSR commencement if that section, and any associated provisions, had continued to have effect);
 - (b) for a market described in paragraph (1)(c)—futures contracts, within the meaning of section 72 of the old Corporations Act, and agreements of a kind to which section 72A of the old Corporations Act applied immediately before the FSR commencement (or would have applied after the FSR commencement).

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1414

commencement if that section, and any associated provisions, had continued to have effect).

- (6) Despite anything in subsection (3), the Minister may, under this section, grant a licence, and impose conditions on the licence, at any time during the period starting on the commencement of this section and ending on the FSR commencement on the basis that matters known to the Minister in relation to the market concerned will continue to be the case up to the FSR commencement. If the Minister does so:
- (a) the licence and conditions come into effect on the FSR commencement, and not before; and
 - (b) the Minister may vary or revoke the licence, or any of the conditions, before the FSR commencement if the Minister considers it appropriate to do so having regard to the provisions of this section concerning the granting of licences and the imposition of conditions; and
 - (c) the licence and conditions do not come into effect on the FSR commencement if, immediately before the FSR commencement, the market is not a market to which this section applies.
- (7) If the Minister grants a licence under this section, the Minister must give the operator of the market written notice of:
- (a) the grant of the licence, and the conditions imposed on the licence; and
 - (b) any subsequent revocation or variation under subsection (6) of the licence or conditions.
- (8) A notice advising of the grant of a licence under this section must contain a statement to the effect that the licence and conditions will not take effect until the FSR commencement, or will be taken to have had effect from the FSR commencement, as the case requires.

1414 Section 1413 markets—effect of licences and conditions

- (1) Subject to subsections (2) to (4):
- (a) a licence granted under section 1413 that authorises the operation of a market is, for the purposes of the amended Corporations Act (other than this section), taken to have been granted (and to have been properly granted) under section 795B of the amended Corporations Act; and

Section 1414

- (b) conditions imposed under section 1413 on the licence are, for the purposes of the amended Corporations Act (other than this section), taken to have been imposed (and to have been properly imposed) under section 796A of the amended Corporations Act.

Note 1: Section 795C of the amended Corporations Act (publication of notice of licence grant) applies to the grant of the licence.

Note 2: The conditions may be varied or revoked, and additional conditions may be imposed, under section 796A of the amended Corporations Act.

- (2) Subject to subsection (4), the relevant new legislation (see subsection (6)) does not apply in relation to the market during the period (the *transition period*) starting on the FSR commencement and ending on whichever of the following first occurs:
 - (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) conditions on the licence are varied or revoked, or additional conditions are imposed on the licence, pursuant to an application by the licensee under subsection 796A(2) of the amended Corporations Act;
 - (c) the licensee has lodged with ASIC notice in writing that it wants to take advantage of the compensation arrangements under Division 3 of Part 7.5 of the amended Corporations Act:
 - (i) from a specified date, being a date that is after the notice is given to ASIC and that is after compensation arrangements for the market have been approved under Division 3 of Part 7.5 of the amended Corporations Act (see also subsection (4)); or
 - (ii) from the end of a specified period, being a period that is described as starting when compensation arrangements for the market are approved under Division 3 of Part 7.5 of the amended Corporations Act (see also subsection (4)) and that ends after the notice is given to ASIC;and that date arrives or period ends.
- (3) A notice (the *original notice*) given for the purposes of paragraph (2)(c) may, before the date, or the end of the period, specified in the original notice as mentioned in that paragraph:

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1414

- (a) be varied to specify another date or period, being a date or period that would satisfy the requirements of subparagraph (2)(c)(i) or (ii) if the reference in that subparagraph to when the notice (being the original notice) is given to ASIC were instead a reference to when the notice of variation is given to ASIC under this subsection; or
- (b) be revoked.

The variation or revocation must be made by notice in writing lodged with ASIC.

- (4) If the relevant new legislation in relation to a market includes Part 7.5 of the amended Corporations Act, then, despite subsection (2), Division 3 of that Part applies to the market during the transition period to the extent necessary for the operator to apply to have compensation arrangements for the market approved before the end of the transition period, and for that application to be determined. However, any approval of the arrangements under that Division does not take effect until immediately after the end of the transition period.
- (5) The annual report of the licensee (see section 792F of the amended Corporations Act) for a financial year in which part of the transition period occurs, other than a financial year in which the transition period ends, must include information about:
 - (a) the steps taken in the year; and
 - (b) the steps proposed to be taken in the next year;to ensure that the relevant new legislation will be complied with by the time the transition period ends.
- (6) In this section:

relevant new legislation, in relation to a market, means:

 - (a) section 793A of the amended Corporations Act; and
 - (b) unless the market is a market to which Division 4 of Part 7.5 of the amended Corporations Act applies—Part 7.5 of the amended Corporations Act.

1415 Section 1413 markets—preservation of old Corporations Act provisions during transition period

Preservation of compensation regimes

- (1) If, during the transition period in relation to a market the operation of which is authorised by a licence granted under section 1413, Part 7.5 of the amended Corporations Act does not apply in relation to the market (except as provided in subsection 1414(4)) because of subsection 1414(2), Part 7.9, or Part 8.6, as the case requires, of the old Corporations Act, and any associated provisions, continue to apply in relation to the market during the transition period.

Preservation of certain ongoing requirements

- (2) During the transition period in relation to a market:
- (a) the operation of which is authorised by a licence granted under section 1413; and
 - (b) that, immediately before the FSR commencement, was a securities exchange to which section 769A of the old Corporations Act applied;
- the following provisions continue to apply in relation to the market:
- (c) paragraphs 769A(1)(c) and (e) of the old Corporations Act, and any associated provisions;
 - (d) section 769B of the old Corporations Act (but only as applying in relation to paragraphs 769A(1)(c) and (e) of the old Corporations Act), and any associated provisions.

1416 Section 1413 markets—powers for regulations to change how the old and new Corporations Act apply during the transition period

- (1) The regulations may do all or any of the following in relation to a market the operation of which is authorised by a licence granted under section 1413:
- (a) provide that some or all of the provisions (the *relevant old legislation*) that would otherwise continue to apply in relation to the market because of section 1415 do not apply in relation to the market;

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1417

- (b) provide that some or all of the relevant old legislation applies in relation to the market with specified modifications during some or all of the transition period for the market;
 - (c) provide that some or all of the relevant new legislation (within the meaning of section 1414) in relation to the market applies in relation to the market during some or all of the transition period for the market;
 - (d) provide that specified provisions of the amended Corporations Act (including relevant new legislation), and any associated provisions, apply in relation to the market during some or all of the transition period for the market with specified modifications.
- (2) Regulations made for the purposes of subsection (1) have effect despite anything in sections 1414 and 1415.
- (3) Subsection (1) gives a full power to disapply, apply and modify provisions as mentioned in that subsection, including for reasons that do not have an express or implied connection with the transition to the relevant new legislation.

Note: So (for example), a change to the day-to-day operation of the relevant old legislation as continuing to apply may be achieved by a modification under paragraph (1)(b) (whether that change is to an existing rule, or is the addition of a new rule).

1417 Section 1413 markets—additional provisions relating to previously unregulated services

- (1) This section applies to a financial market in relation to which the following paragraphs are satisfied:
- (a) a licence is granted under section 1413 to the operator of the market; and
 - (b) the conditions on the licence specify, as the classes of financial products that can be dealt with on the market, the classes of financial products specified in whichever of paragraphs 1413(5)(a) and (b) is applicable; and
 - (c) immediately before the commencement, other financial products (the *additional products*) were also dealt with on the market, and the fact that the market dealt with those products did not constitute a contravention of a provision of the old Corporations Act.

Section 1418

- (2) Subject to subsection (3), section 791 of the amended Corporations Act does not apply in relation to the market in so far as all or any of the additional products are dealt with on the market during the period (the *transition period*) starting on the FSR commencement and ending on whichever of the following first occurs:
 - (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) the licensee applies, under subsection 796A(2) of the amended Corporations Act, to have the conditions on the licence varied or revoked, or to have additional conditions imposed on the licence.
- (3) The regulations may, in relation to a market to which this section applies and the additional products, provide that specified provisions (including section 791A) of the amended Corporations Act, and any associated provisions, apply in relation to a market to which this section applies and the additional products during some or all of the transition period for the market and the products with specified modifications.

1418 Treatment of exempt stock markets and exempt futures markets (other than markets with no identifiable single operator)

- (1) This section applies to the following markets:
 - (a) stock markets being operated immediately before the FSR commencement that were, at that time, covered by a declaration (the *declaration of exemption*) in force immediately before the FSR commencement under subsection 771(1) of the old Corporations Act;
 - (b) futures markets being operated immediately before the FSR commencement that were, at that time, covered by a declaration (the *declaration of exemption*) in force immediately before the FSR commencement under subsection 1127(1) of the old Corporations Act.

However it does not apply to any market to which section 1419 applies.

- (2) Subject to subsection (5), section 791A of the amended Corporations Act does not apply in relation to a stock market or futures market to which this section applies during the period (the

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1418

transition period) starting on the FSR commencement and ending on whichever of the following first occurs:

- (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) the operator of the market is granted a licence under section 795B of the amended Corporations Act covering the operation of the market;
 - (c) the Minister makes an exemption under section 791C of the amended Corporations Act covering the market;
 - (d) the declaration of exemption is revoked.
- (3) Subject to subsections (4) and (5), Part 7.2 (in the case of a stock market), or Part 8.2 (in the case of a futures market), and any associated provisions, (the *relevant old legislation*) of the old Corporations Act continue to apply in relation to a stock market or futures market to which this section applies during the transition period for the market.
- (4) The declaration of exemption (including any conditions specified in the declaration) for a stock market or futures market to which this section applies cannot be varied during the transition period for the market so as to cover the market providing services that were not covered by the declaration as in force immediately before the FSR commencement. However, it may be varied in other ways, or revoked, by the Minister in writing.
- (5) The regulations may do all or any of the following:
- (a) provide that some or all of the relevant old legislation does not apply in relation to a stock market or futures market to which this section applies during some or all of the transition period for the market;
 - (b) provide that some or all of the relevant old legislation applies in relation to a stock market or futures market to which this section applies with specified modifications during some or all of the transition period for the market;
 - (c) provide that specified provisions of the amended Corporations Act (including section 791A), and any associated provisions, apply in relation to a stock market or futures market to which this section applies during some or all of the transition period for the market with specified modifications.
-

1419 Treatment of exempt stock markets and exempt futures markets that do not have a single identifiable operator

- (1) This section applies to the following markets:
- (a) stock markets being operated immediately before the FSR commencement:
 - (i) that were, at that time, covered by a declaration (the *declaration of exemption*) in force immediately before the FSR commencement under subsection 771(1) of the old Corporations Act; but
 - (ii) that did not have a single person who could be identified as the operator of the market;
 - (b) futures markets being operated immediately before the FSR commencement:
 - (i) that were, at that time, covered by a declaration (the *declaration of exemption*) in force immediately before the FSR commencement under subsection 1127(1) of the old Corporations Act; but
 - (ii) that did not have a single person who could be identified as the operator of the market.
- (2) In this section:
- exempted participant*, in relation to a market to which this section applies, means a person:
- (a) who is covered by the declaration of exemption (otherwise than in their capacity as a representative of another person who is covered by the declaration); and
 - (b) whose activities connected with the market after the FSR commencement are activities that, but for this section, would be required by section 911A of the amended Corporations Act to be covered by an Australian financial services licence.
- (3) Subject to subsections (4) and (5), Part 7.2 (in the case of a stock market), or Part 8.2 (in the case of a futures market), and any associated provisions, (the *relevant old legislation*) of the old Corporations Act continue to apply in relation to an exempted participant and a stock market or futures market to which this section applies during any period during which section 1431 provides that the relevant new legislation (within the meaning of

Section 1420

subsection 1431(1)) does not apply in relation to the exempted participant's activities connected with the market.

- (4) The declaration of exemption (including any conditions specified in the declaration) for a stock market or futures market to which this section applies cannot:

- (a) be varied during the transition period for an exempted participant and the market so as to cover the market providing services that were not covered by the declaration as in force immediately before the FSR commencement; or
- (b) be varied after the FSR commencement so as to cover a person or persons it did not cover immediately before the commencement.

However, it may be varied in other ways, or revoked, by the Minister in writing.

- (5) The regulations may do either or both of the following:

- (a) provide that some or all of the relevant old legislation does not apply in relation to an exempted participant and a market to which this section applies during some or all of the transition period for the exempted participant and the market;
- (b) provide that some or all of the relevant old legislation applies in relation to an exempted participant and a market to which this section applies with specified modifications during some or all of the transition period for the exempted participant and the market.

1420 Treatment of stock markets of approved securities organisations

- (1) This section applies to each stock market being operated immediately before the FSR commencement by a body corporate covered by an approval (the *instrument of approval*) in force immediately before the FSR commencement under subsection 770(2) of the old Corporations Act, other than a stock market to which section 1413 applies.
- (2) Subject to subsections (3) and (5), section 791A of the amended Corporations Act does not apply in relation to a stock market to which this section applies during the period (the *transition period*) starting on the FSR commencement and ending on whichever of the following first occurs:

Section 1420

- (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) the operator of the market is granted a licence under section 795B of the amended Corporations Act covering the operation of the market;
 - (c) the Minister makes an exemption under section 791C of the amended Corporations Act covering the market;
 - (d) the instrument of approval is revoked.
- (3) Subject to subsections (4) and (5), Parts 7.2 and 7.9, and any associated provisions, (the *relevant old legislation*) of the old Corporations Act continue to apply in relation to a stock market to which this section applies during the transition period for the market.
- (4) The instrument of approval (including any conditions specified in the instrument) for a stock market to which this section applies cannot be varied during the transition period for the market so as to cover the market providing services that were not covered by the instrument as in force immediately before the FSR commencement. However it may be varied in other ways, or revoked, by the Minister in writing.
- (5) The regulations may do all or any of the following:
 - (a) provide that some or all of the relevant old legislation does not apply in relation to a stock market to which this section applies during some or all of the transition period for the market;
 - (b) provide that some or all of the relevant old legislation applies in relation to a stock market to which this section applies with specified modifications during some or all of the transition period for the market;
 - (c) provide that specified provisions of the amended Corporations Act (including section 791A), and any associated provisions, apply in relation to a stock market to which this section applies during some or all of the transition period for the market with specified modifications.

Section 1421

1421 Treatment of special stock markets for unquoted interests in a registered scheme

- (1) This section applies to each stock market being operated before the FSR commencement by a body corporate covered by an approval (the *instrument of approval*) in force immediately before the FSR commencement under subsection 770A(2) of the old Corporations Act.
- (2) Subject to subsection (5), section 791A of the amended Corporations Act does not apply in relation to a stock market to which this section applies during the period (the *transition period*) starting on the FSR commencement and ending on whichever of the following first occurs:
 - (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) the operator of the market is granted a licence under section 795B of the amended Corporations Act covering the operation of the market;
 - (c) the Minister makes an exemption under section 791C of the amended Corporations Act covering the market;
 - (d) the instrument of approval is revoked.
- (3) Subject to subsections (4) and (5), Part 7.2, and any associated provisions, (the *relevant old legislation*) of the old Corporations Act continue to apply in relation to a stock market to which this section applies during the transition period for the market.
- (4) The instrument of approval (including any conditions specified in the instrument) for a stock market to which this section applies cannot be varied during the transition period for the market so as to cover the market providing services that were not covered by the instrument as in force immediately before the FSR commencement. However it may be varied in other ways, or revoked, by the Minister in writing.
- (5) The regulations may do all or any of the following:
 - (a) provide that some or all of the relevant old legislation does not apply in relation to a stock market to which this section applies during some or all of the transition period for the market;

Section 1422

- (b) provide that some or all of the relevant old legislation applies in relation to a stock market to which this section applies during some or all of the transition period for the market with specified modifications;
- (c) provide that specified provisions (including section 791A) of the amended Corporations Act, and any associated provisions, apply in relation to a stock market to which this section applies during some or all of the transition period for the market with specified modifications.

1422 Treatment of other markets that were not unauthorised

- (1) This section applies to each market in relation to which the following paragraphs are satisfied:
 - (a) the market is a financial market within the meaning of the amended Corporations Act;
 - (b) the market was being operated immediately before the FSR commencement;
 - (c) the market is not a market to which section 1413, 1418, 1419, 1420 or 1421 applies;
 - (d) the market was not an unauthorised stock market or an unauthorised futures market (as defined in section 9 of the old Corporations Act) immediately before the FSR commencement.
- (2) Subject to subsection (3), section 791A of the amended Corporations Act does not apply in relation to a market to which this section applies during the period (the ***transition period***) starting on the FSR commencement and ending on whichever of the following first occurs:
 - (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) the operator of the market is granted a licence under section 795B of the amended Corporations Act covering the operation of the market;
 - (c) the Minister makes an exemption under section 791C of the amended Corporations Act covering the market;
 - (d) the market starts to provide services in respect of a class or classes of financial products in respect of which it did not provide services immediately before the commencement.

Section 1423

- (3) The regulations may, in relation to a market to which this section applies, provide that specified provisions (including section 791A) of the amended Corporations Act, and any associated provisions, apply in relation to the market during some or all of the transition period for the market with specified modifications.

Subdivision C—Treatment of existing clearing and settlement facilities

1423 When is a clearing and settlement facility being operated immediately before the FSR commencement?

Subject to section 1424, in this Subdivision, a reference to a clearing and settlement facility *being operated immediately before the FSR commencement* is a reference to a clearing and settlement facility that had not permanently ceased to operate before the FSR commencement, even if the clearing and settlement of transactions by means of the facility was not actually occurring immediately before the FSR commencement (for example, because of a routine temporary closure of the facility).

1424 Treatment of proposed clearing and settlement facilities that have not started to operate by the FSR commencement

- (1) This section applies in relation to any proposed clearing and settlement facilities identified in, or in accordance with, regulations made for the purposes of this subsection. For this purpose, a *proposed clearing and settlement facility* is a clearing and settlement facility that a person has, before the FSR commencement, indicated an intention that they propose to operate.
- (2) This Subdivision applies in relation to a proposed clearing and settlement facility to which this section applies subject to the following paragraphs:
- (a) subject to paragraphs (b), (c) and (d), this Subdivision applies in relation to the proposed facility as if the facility, as proposed to be operated, were in fact being operated immediately before the FSR commencement;

Section 1424

- (b) if, taking account of the effect of paragraph (a), section 1425 applies in relation to the proposed facility, that section applies in relation to the proposed facility:
 - (i) as if the Minister's obligation to grant a licence, and impose conditions, under subsection 1425(2) in relation to the proposed facility does not arise unless and until the facility operator lodges with ASIC a notice in relation to the facility under subsection (3) of this section, and does not arise at all if no such notice is given to ASIC by the end of 6 months after the FSR commencement; and
 - (ii) as if subsection 1425(3) provided for a licence so granted under subsection 1425(2) in relation to the facility, and the conditions subject to which it is granted, to be taken to have had effect from the day (the **start day**) specified in the subsection (3) notice as the day on which the facility started to operate; and
 - (iii) as if subsection 1425(6) were omitted; and
 - (iv) as if the references in subsection 1425(8) to the FSR commencement were instead references to the start day;
 - (c) if:
 - (i) taking account of the effect of paragraph (a), section 1429 applies to the proposed facility; and
 - (ii) the facility operator does not lodge with ASIC a notice in relation to the facility under subsection (3) of this section by the end of 6 months after the FSR commencement;that section ceases to apply in relation to the proposed facility at the end of that period;
 - (d) if a provision of this Subdivision provides for a provision of the old Corporations Act to continue to apply in relation to the proposed facility, then (without limiting the generality of subsection 1410(3)), while the proposed facility remains non-operational, the provision of the old Corporations Act only applies in relation to the proposed facility to the extent (if any) to which it would, disregarding the effect of paragraph (a), apply in relation to the proposed facility.
- (3) If a proposed clearing and settlement facility to which this section applies starts to operate on a day during the period of 6 months

Section 1424A

starting on the FSR commencement, the operator must, as soon as practicable, and in any event within 7 days, lodge with ASIC written notice of the fact that the facility started to operate on that day.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) ASIC must, within a reasonable time, give the Minister a notice it receives under subsection (3).

1424A Treatment of unregulated clearing and settlement facilities operated by holders of old Corporations Act approvals

- (1) This section applies in relation to a clearing and settlement facility if:
- (a) the facility was being operated immediately before the FSR commencement by a body corporate in relation to which an approval under section 1131 of the old Corporations Act was in force at that time; but
 - (b) the services provided by the facility as so operated were not such that section 1128 of the old Corporations Act required the operator to be so approved.
- (2) In this section:
- (a) a reference to the *unregulated services* is a reference to the services referred to in paragraph (1)(b); and
 - (b) a reference to *regulated services* is a reference to services that, if they had been provided by the facility immediately before the commencement, would have been services to which section 1128 of the old Corporations Act applied.
- (3) For the purposes of section 1425 (as it operates of its own force, rather than because of section 1424), the facility is not to be regarded as a facility that was being operated immediately before the FSR commencement.
- (4) If the operator has, before the FSR commencement, indicated an intention that they propose to extend the services provided by the facility so that they also cover regulated services:
- (a) regulations made for the purposes of subsection 1424(1) may identify the facility as a proposed clearing and settlement facility, but only in relation to those regulated services; and

Section 1425

- (b) if they do so, section 1424, and section 1425 as it applies because of section 1424, apply in relation to the facility and those regulated services as if the facility did not already provide the unregulated services.

1425 Obligation of Minister to grant licences covering main existing facilities

- (1) This section applies to each clearing and settlement facility being operated immediately before the FSR commencement in relation to which either of the following paragraphs applies:
 - (a) the facility was being operated by the body corporate that was, for the purposes of the old Corporations Act, the securities clearing house;
 - (b) the facility was being operated by a body corporate in relation to which an approval (the *section 1131 approval*) under section 1131 of the old Corporations Act was in force at that time.
- (2) Subject to subsections (3) and (4), the Minister must, in relation to each clearing and settlement facility to which this section applies, grant the operator of the facility a licence, and impose conditions on that licence, in accordance with the following requirements:
 - (a) the licence must be described as an Australian CS facility licence;
 - (b) the licence must be granted subject to the following conditions:
 - (i) a condition specifying the facility as the facility that the licence authorises the licensee to operate;
 - (ii) a condition specifying, as the classes of financial products in respect of which the facility can provide services, the classes that are appropriate for the facility under subsection (5);
 - (iii) in the case of a facility to which paragraph (1)(b) applies—a condition to the effect that the licence only covers the facility providing services for the market or markets that were covered by the section 1131 approval.
- (3) Subject to subsection (6), a licence that subsection (2) requires to be granted must be granted on, or as soon as practicable after, the FSR commencement. If it is granted after the FSR commencement,

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1425

it, and the conditions subject to which it is granted, are taken to have had effect from that commencement.

- (4) Sections 824D (more than one licence in the same document) and 824E (more than one CS facility covered by the same licence) of the amended Corporations Act apply in relation to the granting of licences, and licences granted, under this section as if the licences were, or were being, granted under section 824B of that Act. If, pursuant to section 824E, a single licence is granted under this section in respect of several separate facilities, paragraph (2)(b) of this section must be complied with separately in the licence document in relation to each of those facilities.
- (5) For the purposes of subparagraph (2)(b)(ii), the classes of financial products that are *appropriate* for a facility to which this section applies are as follows:
 - (a) for a facility described in paragraph (1)(a)—securities, within the meaning of section 92 of the old Corporations Act as applying for the purposes of Part 7.2 of the old Corporations Act, and agreements of a kind to which section 92A of the old Corporations Act applied immediately before the FSR commencement (or would have applied after the FSR commencement if that section, and any associated provisions, had continued to have effect);
 - (b) for a facility described in paragraph (1)(b)—futures contracts, within the meaning of section 72 of the old Corporations Act, and agreements of a kind to which section 72A of the old Corporations Act applied immediately before the FSR commencement (or would have applied after the FSR commencement if that section, and any associated provisions, had continued to have effect).
- (6) Despite anything in subsection (3), the Minister may, under this section, grant a licence, and impose conditions on the licence, at any time during the period starting on the commencement of this section and ending on the FSR commencement on the basis that matters known to the Minister in relation to the clearing and settlement facility concerned will continue to be the case up to the FSR commencement. If the Minister does so:
 - (a) the licence and conditions come into effect on the FSR commencement, and not before; and

Section 1426

- (b) the Minister may vary or revoke the licence, or any of the conditions, before the FSR commencement if the Minister considers it appropriate to do so having regard to the provisions of this section concerning the granting of licences and the imposition of conditions; and
 - (c) the licence and conditions do not come into effect on the FSR commencement if, immediately before the FSR commencement, the facility is not a clearing and settlement facility to which this section applies.
- (7) If the Minister grants a licence under this section, the Minister must give the operator of the clearing and settlement facility written notice of:
 - (a) the grant of the licence, and the conditions imposed on the licence; and
 - (b) any subsequent revocation or variation under subsection (6) of the licence or conditions.
- (8) A notice advising of the grant of a licence under this section must contain a statement to the effect that the licence and conditions will not take effect until the FSR commencement, or will be taken to have had effect from the FSR commencement, as the case requires.

1426 Section 1425 facilities—effect of licences and conditions

- (1) Subject to subsections (2) to (4):
 - (a) a licence granted under section 1425 that authorises the operation of a facility is, for the purposes of the amended Corporations Act (other than this section), taken to have been granted (and to have been properly granted) under section 824B of the amended Corporations Act; and
 - (b) conditions imposed under section 1425 on the licence are, for the purposes of the amended Corporations Act (other than this section), taken to have been imposed (and to have been properly imposed) under section 825A of the amended Corporations Act.

Note 1: Section 824C of the amended Corporations Act (publication of notice of licence grant) applies to the grant of the licence.

Note 2: The conditions may be varied or revoked, and additional conditions may be imposed, under section 825A of the amended Corporations Act.

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1427

- (2) Section 822A of the amended Corporations Act does not apply in relation to the facility during the period (the *transition period*) starting on the FSR commencement and ending on whichever of the following first occurs:
 - (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) conditions on the licence are varied or revoked, or additional conditions are imposed on the licence, pursuant to an application by the licensee under subsection 825A(2) of the amended Corporations Act.
- (3) The annual report of the licensee (see section 821E of the amended Corporations Act) for a financial year in which part of the transition period occurs, other than a financial year in which the transition period ends, must include information about:
 - (a) the steps taken in the year; and
 - (b) the steps proposed to be taken in the next year;to ensure that section 822A of the amended Corporations Act will be complied with by the time the transition period ends.

1427 Section 1425 facilities—powers for regulations to change how the old and new Corporations Act apply during the transition period

- (1) The regulations may do either or both of the following in relation to a clearing and settlement facility the operation of which is authorised by a licence granted under section 1425:
 - (a) provide that section 822A of the amended Corporations Act, and any associated provisions, apply in relation to the facility during some or all the transition period for the facility;
 - (b) provide that specified provisions of the amended Corporations Act (including section 822A), and any associated provisions, apply in relation to the facility during some or all of the transition period for the facility with specified modifications.
- (2) Regulations made for the purposes of subsection (1) have effect despite anything in section 1426.

1428 Section 1425 facilities—additional provisions relating to previously unregulated services

- (1) This section applies to a clearing and settlement facility in relation to which the following paragraphs are satisfied:
 - (a) a licence is granted under section 1425 to the operator of the facility; and
 - (b) the conditions on the licence specify, as the classes of financial products in respect of which the facility can provide services, the classes of financial products specified in whichever of paragraphs 1425(5)(a) and (b) is applicable; and
 - (c) the facility also, immediately before the commencement, provided services in respect of one or more other classes of financial products (the *additional products*) and the fact that it did so did not constitute a contravention of a provision of the old Corporations Act.
- (2) Subject to subsection (3), section 820A of the amended Corporations Act does not apply in relation to the facility in so far as it provides services in respect of all or any of the additional products during the period (the *transition period*) starting on the FSR commencement and ending on whichever of the following first occurs:
 - (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) conditions on the licence are varied or revoked, or additional conditions are imposed on the licence, pursuant to an application by the licensee under subsection 825A(2) of the amended Corporations Act.
- (3) The regulations may provide that specified provisions of the amended Corporations Act (including section 820A), and any associated provisions, apply in relation to a clearing and settlement facility to which this section applies, and its provision of services in respect of all or any of the additional products, during some or all of the transition period for the facility and the products with specified modifications.

Section 1429

1429 Treatment of other clearing and settlement facilities

- (1) This section applies to each clearing and settlement facility being operated immediately before the FSR commencement in relation to which both of the following paragraphs are satisfied:
 - (a) the clearing and settlement facility is not a facility to which section 1425 applies;
 - (b) section 1128 of the old Corporations Act did not, immediately before the FSR commencement, require the operator of the facility to be a person approved under section 1131.
- (2) Subject to subsection (3), section 820A of the amended Corporations Act does not apply in relation to the facility during the period (the *transition period*) starting on the FSR commencement and ending on whichever of the following first occurs:
 - (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) the operator of the facility is granted a licence under section 824B of the amended Corporations Act covering the facility;
 - (c) the Minister makes an exemption under section 820C of the amended Corporations Act covering the facility;
 - (d) the facility starts to provide services in respect of a class or classes of financial products in respect of which it did not provide services immediately before the FSR commencement.
- (3) The regulations may provide that specified provisions of the amended Corporations Act (including section 820A), and any associated provisions, apply in relation to a clearing and settlement facility to which this section applies during some or all of the transition period for the facility with specified modifications.

Subdivision D—Treatment of people who carry on financial services businesses and their representatives

1430 Meaning of *regulated principal*, *regulated activities* and *relevant old legislation*

- (1) For the purposes of this Subdivision, a person is a ***regulated principal*** if, immediately before the FSR commencement, the person is a person described in column 2 of one of the items in the following table. The ***regulated activities*** of that person are as specified in column 3 of that item, and the ***relevant old legislation*** are as specified in column 4 of that item.

Regulated principals and regulated activities			
Item	These persons are <i>regulated principals</i>	These are the <i>regulated principal's regulated activities</i>	This is the <i>relevant old legislation</i> (if any)
1	A holder of a dealers licence within the meaning of the old Corporations Act.	The activities that the licence (as in force immediately before the FSR commencement) authorised the person to carry on.	Parts 7.3, 7.4 (other than Division 2), 7.5, 7.6 and 7.7 of the old Corporations Act, and any associated provisions.
2	A holder of an investment advisers licence within the meaning of the old Corporations Act.	The activities that the licence (as in force immediately before the FSR commencement) authorised the person to carry on.	Parts 7.3, 7.4 (other than Division 2) and 7.7 of the old Corporations Act, and any associated provisions.
3	A holder of a futures brokers licence within the meaning of the old Corporations Act.	The activities that the licence (as in force immediately before the FSR commencement) authorised the person to carry on.	Parts 8.3, 8.4 (other than section 1210) and 8.5 of the old Corporations Act, and any associated provisions.
4	A holder of a futures advisers licence within the meaning of the old Corporations Act.	The activities that the licence (as in force immediately before the FSR commencement) authorised the person to carry on.	Parts 8.3 and 8.4 (other than section 1210) of the old Corporations Act, and any associated provisions.

Chapter 10 Transitional provisions**Part 10.2** Transitional provisions relating to the Financial Services Reform Act 2001**Division 1** Transitional provisions relating to the phasing-in of the new financial services regime

Section 1430

Regulated principals and regulated activities			
Item	These persons are regulated principals	These are the regulated principal's regulated activities	This is the relevant old legislation (if any)
5	A registered insurance broker within the meaning of the <i>Insurance (Agents and Brokers) Act 1984</i> as in force immediately before the FSR commencement.	The person's business as an insurance broker within the meaning of the <i>Insurance (Agents and Brokers) Act 1984</i> as in force immediately before the FSR commencement.	All the provisions of the <i>Insurance (Agents and Brokers) Act 1984</i> as in force immediately before the FSR commencement, and any associated provisions.
6	A body regulated by APRA carrying on activities that, if carried on after the FSR commencement, would (apart from this Subdivision) be required by the amended Corporations Act to be covered by an Australian financial services licence.	The class of activities carried on by the person immediately before the FSR commencement that, if carried on after the FSR commencement, would (apart from this Subdivision) be required by the amended Corporations Act to be covered by an Australian financial services licence.	For a body regulated by APRA that was an insurer within the meaning of the <i>Insurance (Agents and Brokers) Act 1984</i> as in force immediately before the FSR commencement—all the provisions of that Act as then in force, and any associated provisions. In any other case—subject to any regulations made for the purposes of this item, there is no relevant old legislation.
7	A person who is a registered foreign insurance agent of an unauthorised foreign insurer within the meaning of the <i>Insurance (Agents and Brokers) Act 1984</i> as in force immediately before the FSR commencement.	The person's business as a foreign insurance agent.	All the provisions of the <i>Insurance (Agents and Brokers) Act 1984</i> as in force immediately before the FSR commencement, and any associated provisions.

Section 1430

Regulated principals and regulated activities			
Item	These persons are <i>regulated principals</i>	These are the regulated principal's <i>regulated activities</i>	This is the <i>relevant old</i> legislation (if any)
8	A holder of a general authority under regulation 38A of the Banking (Foreign Exchange) Regulations as in force immediately before the FSR commencement.	The activities the authority authorises its holder to carry on.	Regulations 38A and 39 of the Banking (Foreign Exchange) Regulations as in force immediately before the FSR commencement.
9	A person included in a class of persons specified in regulations made for the purposes of this item.	For a person in a class so specified, the activities identified in, or in accordance with, the regulations as being the regulated activities of a person in that class.	The provisions (if any) identified in, or in accordance with, the regulations as being the relevant old legislation for a person in that class, and any associated provisions.
10	A person who carries on any other activities (that is, activities that are not regulated activities for the purposes of any of items 1 to 9) that, if carried on after the FSR commencement, would (apart from this Subdivision) be required by the amended Corporations Act to be covered by an Australian financial services licence, except to the extent that subsection (2) excludes this item from applying.	The class of activities so carried on by the person immediately before the FSR commencement that, if carried on after the FSR commencement, would (apart from this Subdivision) be required by the amended Corporations Act to be covered by an Australian financial services licence.	There is no relevant old legislation.

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1431

- (2) Item 10 of the table in subsection (1) does not apply to a person and activities they carry on to the extent that the person's carrying on of any of those activities is in contravention of any of the provisions of the relevant old legislation for any of the other categories of regulated principals.
- (3) If a person is a regulated principal of 2 or more different kinds, this Subdivision applies separately in relation to the person in their capacity as a regulated principal of each of those kinds.

Note: This may result (depending on what action the regulated principal takes) in a regulated principal having to comply with the relevant new legislation (within the meaning of subsection 1431(1)) in respect of their activities as a regulated principal of one kind, but, at the same time, having to comply with the relevant old legislation in respect of their activities as a regulated principal of another kind.

1431 Parts 7.6, 7.7 and 7.8 of the amended Corporations Act generally do not apply to a regulated principal during the transition period

- (1) Subject to subsections (2) and (3), Parts 7.6 (other than Subdivisions A and B of Division 4, and Division 5), 7.7 and 7.8 (other than section 992A) of the amended Corporations Act (the **relevant new legislation**) do not apply to a regulated principal and their regulated activities during the period (the **transition period**) starting on the FSR commencement and ending when the first of the following events occurs:
 - (a) the period of 2 years starting on the FSR commencement ends;
 - (b) the regulated principal is granted a licence under section 913B of the amended Corporations Act that covers their regulated activities;
 - (c) the regulated principal starts to be covered by an exemption under subsection 911A(2) of the amended Corporations Act (or would start to be so covered if that subsection applied) in respect of their regulated activities;
 - (d) the regulated principal ceases (for whatever reason) to have the status that made them a regulated principal.

For the purposes of paragraph (d), **having a status** includes holding a licence, registration, approval or other similar thing, or carrying on particular activities.

Section 1431

Note 1: Because of section 1441, a regulated principal whose transition period has not ended (and so who is not required to comply with the relevant new legislation) may nonetheless be required to comply with obligations under Part 7.9 of the amended Corporations Act.

Note 2: For the treatment of representatives, see section 1436.

- (2) Division 5 of Part 7.6 of the amended Corporations Act has effect in relation to a regulated principal during the transition period subject to the following paragraphs:
- (a) the regulated principal may give and revoke authorisations under section 916A or consents under subsection 916B(3) as if the regulated principal were a financial services licensee, however, for the purposes of the provisions of the amended Corporations Act outside that Division, such an authorisation or consent is taken not to have effect unless and until the regulated principal is granted a licence under section 913B of the amended Corporations Act that covers the activities to which the authorisation or consent relates (whether or not it also covers other activities);
 - (b) a person authorised by a section 916A authorisation so made by the regulated principal may give and revoke authorisations under subsection 916B(3) as if they were an authorised representative and the regulated principal were the authorising financial services licensee, however, for the purposes of the provisions of the amended Corporations Act outside that Division, such an authorisation is taken not to have effect unless and until the regulated principal is granted a licence under section 913B of the amended Corporations Act that covers the activities to which the authorisation relates (whether or not it also covers other activities);
 - (c) the regulated principal may give and revoke consents under section 916C as if they were a financial service licensee, however, any such consent does not take effect unless and until the regulated principal is granted a licence under section 913B of the amended Corporations Act;
 - (d) section 916F applies in relation to an authorisation so made by the regulated principal during the transition period as if the period of 15 business days referred to in subsections 916F(1) and (1A) did not start unless and until the regulated principal is granted a licence under section 913B of the amended Corporations Act that covers the activities to which the authorisation relates (whether or not it also covers other

Section 1432

activities), and section 916F does not apply at all in relation to revocations so made during the transition period.

- (3) If, before paragraph (1)(a) or (d) occurs:
- (a) the regulated principal is granted a licence under section 913B of the amended Corporations Act that covers some only (the *relevant part*) of their regulated activities; or
 - (b) the regulated principal starts to be covered by an exemption under subsection 911A(2) of the amended Corporations Act in respect of some only (the *relevant part*) of their regulated activities;
- the relevant new legislation starts applying, from that time, to the relevant part of the regulated principal's regulated activities, and subsection (1) continues to apply to the person as if the regulated principal's regulated activities did not include the relevant part.
- (4) Subsection (3) has effect subject to subsection 1430(3).

1432 Continued application of relevant old legislation

- (1) Subject to subsection (2), during the transition period for a regulated principal, the relevant old legislation (if any) continues to apply, despite its repeal:
- (a) to, and in relation to, the regulated principal and their regulated activities; and
 - (b) to any other person to whom it is expressed to apply, but only in relation to matters related to the regulated principal and their regulated activities.

Note: So, for example, people may continue to be appointed as agents or representatives of the regulated principal (or to have those appointments varied or revoked) during the transition period under provisions of the relevant old legislation that deal with such matters.

- (2) If, because of subsection 1431(2), the relevant new legislation (within the meaning of subsection 1431(1)) starts to apply to part of a person's regulated activities from a particular time, the relevant old legislation (if any) stops applying, from that time, in relation to that part of those activities.

1433 Streamlined licensing procedure for certain regulated principals

- (1) This section applies to the following regulated principals:
- (a) a regulated principal of a kind referred to in any of items 1 to 5 of the table in subsection 1430(1), but not including anyone who is:
 - (i) an exempted participant for the purposes of section 1419; or
 - (ii) in a class of persons specified in, or identified in accordance with, regulations made for the purposes of subsection (3);
 - (b) a regulated principal of a kind referred to in item 9 of that table who:
 - (i) is in a class of persons specified in regulations made for the purposes of this subparagraph; and
 - (ii) is not in a class of persons specified in, or identified in accordance with, regulations made for the purposes of subsection (3).
- (2) If:
- (a) a regulated principal to whom this section applies, before the end of their transition period, applies (in accordance with section 913A of the amended Corporations Act) for a licence covering some or all of their regulated activities (but no other activities); and
 - (b) their application includes a statement (in accordance with the requirements of the application form) to the effect that they will, if granted the licence, comply with their obligations as a financial services licensee;
- the following provisions apply:
- (c) section 913B of the amended Corporations Act applies to their application as if paragraphs 913B(1)(b), (c), (ca) and (d), and subsections 913B(2) to (5), were omitted; and
 - (d) the licence condition required by subsection 914A(6) of the amended Corporations Act in relation to a licence granted pursuant to their application must specify, as the financial services that the licensee is authorised to provide, financial services that equate (as closely as possible) to the regulated activities in respect of which the application was made.

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1434

Note 1: Paragraph (c) does not limit the matters that can be taken into account under section 915C (suspension or cancellation after offering a hearing) in relation to a licence that has been granted under section 913B as it applies because of this section.

Note 2: The condition referred to in paragraph (d), as with any other conditions imposed on the licence under section 914A of the amended Corporations Act, is subject to variation or revocation in accordance with that section.

- (3) The regulations may identify classes of persons, or provide for the identification of classes of persons, who are not to be covered by this section.

1434 Special licences for insurance multi-agents during first 2 years after FSR commencement

- (1) For the purposes of this section, a person is an *insurance multi-agent* at a particular time if, at that time:
- (a) the person is an insurance intermediary (but not an insurance broker), within the meaning of the *Insurance (Agents and Brokers) Act 1984* as then in force; and
 - (b) the person has agreements with 2 or more different insurers under section 10 of that Act.
- (2) If:
- (a) a person who, immediately before the FSR commencement, is an insurance multi-agent applies in accordance with section 913A of the amended Corporations Act for a licence, during the period of 2 years starting on the FSR commencement; and
 - (b) the application is lodged at a time:
 - (i) when the person is still carrying on activities as agent for one or more of the insurers with whom, immediately before the FSR commencement, they had agreements as mentioned in paragraph (1)(b); or
 - (ii) that is not more than 6 months after the person ceased to so carry on activities as agent for any of those insurers; and
 - (c) their application includes a statement (in accordance with the requirements of the application form) to the effect that they want this section to apply to their application;
- the following provisions apply:
-

Section 1434

- (d) section 913B of the amended Corporations Act applies to their application as if the reference in paragraph 913B(1)(b) to section 912A did not include the obligations under paragraphs 912A(e) and (f);
 - (e) the licence condition required by subsection 914A(6) of the amended Corporations Act in relation to a licence granted pursuant to their application must specify, as the financial services that the licensee is authorised to provide:
 - (i) providing financial product advice in relation to risk insurance products and investment life insurance products; and
 - (ii) dealing in risk insurance products and investment life insurance products.
- (3) If the application is granted, then:
- (a) while the licence remains in force:
 - (i) paragraphs 912A(e) and (f) of the amended Corporations Act do not apply to the licensee and the financial services covered by the licence; and
 - (ii) sections 942B and 942C apply in relation to any Financial Services Guide provided by the licensee or an authorised representative of the licensee as if they included a requirement to include in the Guide a statement that the licensee is not bound by the obligations in paragraphs 912A(e) and (f) and that sets out what those obligations are; and
 - (b) the licence conditions cannot be varied so that the licence covers the licensee providing financial services other than those referred to in paragraph (2)(e); and
 - (c) the licence ceases to be in force (unless earlier revoked) at the end of the period of 2 years starting on the FSR commencement.

Section 1435

1435 Licensing decisions made within the first 2 years of the FSR commencement—regard may be had to conduct and experience of applicant or related body corporate that currently provides same or similar services

- (1) This section applies:
 - (a) if a person applies, during the period of 2 years starting on the FSR commencement, under section 913A of the amended Corporations Act for the grant of a licence covering the provision of particular financial services (the *relevant financial services*); and
 - (b) ASIC is aware that:
 - (i) the applicant; or
 - (ii) if the applicant is a body corporate—a related body corporate of the applicant;is currently (as at the time the application is being considered by ASIC) providing services that are the same as, or similar to, all or any of the relevant financial services.
- (2) In considering the matters it is required by section 913B of the amended Corporations Act to consider in deciding whether to grant the licence, ASIC may (but is not required to) have regard to the conduct and experience (including conduct and experience before the FSR commencement) of the applicant, or the related body corporate, in providing services that are the same as, or similar to, all or any of the relevant financial services (so far as ASIC is aware of such conduct and experience).
- (3) Subsection (2) is not intended to limit, by implication, the matters that ASIC can take into account under section 913B of the amended Corporations Act when considering whether to grant a licence under that section (whether pursuant to an application to which this section applies or otherwise).

1436 Treatment of representatives—general

- (1) This section applies to a person who is a representative of a regulated principal. For this purpose, a *representative* includes, but is not limited to:
 - (a) an agent (however described) of the regulated principal; and
 - (b) an employee or director of the regulated principal; and

Section 1436

- (c) any other person who, in accordance with the regulated principal's relevant old legislation as it continues to have effect in relation to the regulated principal, is authorised to carry on activities for or on behalf of the regulated principal.
 - (1A) However, if a person who, under subsection (1), would be the representative of another person is a financial services licensee in their own right, the licensee, when engaged in activities covered by their licence, is taken not to be acting as representative of that other person.
 - (2) The following provisions apply in relation to a person who is a representative of a regulated principal:
 - (a) during any period when, because of section 1431, the relevant new legislation (within the meaning of subsection 1431(1)) does not apply to the regulated principal and particular regulated activities, the relevant new legislation also does not apply to the representative when they are acting as a representative of the regulated principal in relation to any of those activities;
 - (b) during any period when, because of section 1432, relevant old legislation continues to apply to the regulated principal and particular regulated activities, that legislation also continues to apply to the representative when they are acting as a representative of the regulated principal in relation to any of those activities.
- Note 1: If a person is a representative of 2 persons, this may result in the person having to comply with the relevant new legislation in respect of what they do as a representative of one of those persons but, at the same time, having to comply with relevant old legislation in respect of what they do as a representative of the other of those persons.
- Note 2: If a person is a representative of another person who carries on 2 different sets of activities, being sets of activities in relation to which there are separate applications of this Subdivision because of subsection 1430(3), this may result in the person having to comply with the relevant new legislation in respect of what they do in relation to one of those sets of activities but, at the same time, having to comply with relevant old legislation in respect of what they do in relation to the other set of activities.
- Note 3: Because of section 1441, a representative who is not required to comply with the relevant new legislation may nonetheless be required to comply with obligations under Part 7.9 of the amended Corporations Act.

Section 1436A

1436A Treatment of representatives—insurance agents

- (1) This section has effect despite anything else in this Subdivision, including sections 1436 and 1437.
- (2) This section applies if, immediately before the FSR commencement, a person is an insurance intermediary (but not an insurance broker) within the meaning of the *Insurance (Agents and Brokers) Act 1984* as then in force because of an agreement they have with an insurer under section 10 of that Act. For the purposes of this section:
 - (a) the person is the **insurance agent**; and
 - (b) the agreement is the **authorising agreement**; and
 - (c) the matters dealt with in the provisions included in the agreement in compliance with section 10 of that Act, and any other matters included in the agreement that are related to those matters, are the **relevant matters**; and
 - (d) the insurer is the **principal**.

If, immediately before the FSR commencement, the person has more than one such agreement, this section applies separately in relation to each of those agreements.

- (3) For the purposes of this section, the **transition period** is the period starting on the FSR commencement and ending when the first of the following events occurs:
 - (a) the period of 2 years starting on the FSR commencement ends;
 - (b) the authorising agreement ceases to be in force;
 - (c) the insurance agent has lodged with ASIC notice in writing that the agent no longer wants to be covered by the *Insurance (Agents and Brokers) Act 1984*:
 - (i) from a specified date, being a date that is after the notice is given to ASIC; or
 - (ii) from the end of a specified period, being a period that ends after the notice is given to ASIC;and that date arrives or period ends;
 - (d) the insurance agent is granted a licence under section 913B (including as it has effect because of section 1434) of the amended Corporations Act that covers the insurance agent engaging in (as licensee) the range of activities that they

Section 1436A

previously engaged in as agent under the authorising agreement.

- (4) A notice (the **original notice**) given for the purposes of paragraph (3)(c) may before the date, or the end of the period, specified in the original notice as mentioned in that paragraph:
- (a) be varied to specify another date or period, being a date or period that would satisfy the requirements of subparagraph (3)(c)(i) or (ii) if the reference in that subparagraph to when the notice (being the original notice) is given to ASIC were instead a reference to when the notice of variation is given to ASIC under this subsection; or
 - (b) be revoked.

The variation or revocation must be made by notice in writing lodged with ASIC.

- (5) Subject to subsection (7), during the transition period, the *Insurance (Agents and Brokers) Act 1984* as in force immediately before the FSR commencement, and any associated provisions, (the **relevant old legislation**) continue to apply (despite the repeal of that Act) to, and in relation to, the insurance agent, the principal and the relevant matters.
- (6) Subject to subsection (7), during the transition period, the relevant new legislation (within the meaning of section 1431) does not apply to, or in relation to, the insurance agent, the principal and the relevant matters.
- (7) Regulations made for the purposes of this subsection may do either or both of the following:
- (a) provide that specified provisions of the relevant old legislation apply (with or without specified modifications), or do not apply, to the insurance agent, the principal and some or all of the relevant matters;
 - (b) provide that specified provisions of the relevant new legislation apply (with or without specified modifications), or do not apply, to the insurance agent, the principal and some or all of the relevant matters.

The regulations may provide as mentioned in paragraph (a) or (b) even after the end of the transition period.

Section 1437

- (8) If:
- (a) before the end of the transition period, or such longer period during which regulations made for the purposes of subsection (7) provide for the application of some or all of the relevant old legislation, the insurance agent engages in conduct that, under the authorising agreement as then in force, creates a right to brokerage, commission or other remuneration (which may be a present right, or a future right that is dependent on matters specified in the authorising agreement); and
 - (b) that right is still in existence immediately before the end of that period;
- the right is not taken to be brought to an end merely because of the repeal of the relevant old legislation or the enactment of the relevant new legislation, or because under this section the relevant old legislation ceases to apply and the relevant new legislation starts to apply.
- (9) Subsection (8) is not intended to affect, in any way, the determination of the question whether any other right (whether or not it is under an agreement under section 10 of the *Insurance (Agents and Brokers) Act 1984*) is in any way affected by the provisions of the *Financial Services Reform Act 2001* or the *Financial Services Reform (Consequential Provisions) Act 2001* (including the amendments made by those Acts).

1437 Exemptions and modifications by ASIC

- (1) This section applies to the following provisions:
- (a) the provisions of this Subdivision (other than section 1436A) and any associated provisions;
 - (b) the provisions of legislation that continues to apply because of subsection 1432(1) or 1436(3).
- (2) ASIC may:
- (a) exempt a person or a class of persons from some or all of the provisions to which this section applies; or
 - (b) declare that some or all of the provisions to which this section applies apply in relation to a person or a class of persons as if the provisions were modified or varied as specified in the declaration.

Section 1438

- (3) A declaration under paragraph (2)(b) may provide for the continued application (with or without modifications, and to the exclusion of provisions of the amended Corporations Act) of provisions referred to in paragraph (1)(b), even after the end of the period of 2 years starting on the FSR commencement.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (6) If conduct (including an omission) of a person would not constitute an offence if a particular declaration under paragraph (2)(b) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (5)):
 - (a) the text of the declaration was made available by ASIC on the Internet; or
 - (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

Subdivision E—Product disclosure requirements

1438 New product disclosure provisions do not apply to existing products during transition period

- (1) This section applies to all financial products issued by a person, other than financial products in a class of products that are first issued by the person after the FSR commencement.
- (2) For the purposes of this section, the *new product disclosure provisions* in relation to a financial product to which this section applies are the provisions of Part 7.9 of the amended Corporations Act that, apart from this section, would apply in relation to the financial product (whether those provisions apply to the issuer of

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1438

the product or to another person or persons), other than the following provisions:

- (a) section 1017C (information for existing holders of superannuation products and RSA products);
 - (b) section 1017DA (trustees of superannuation entities—regulations may specify additional obligations to provide information), and regulations made for the purposes of that section;
 - (c) section 1017E (dealing with money received for financial product before the product is issued);
 - (d) section 1017F (confirming transactions);
 - (e) sections 1019A and 1019B (cooling-off period for return of financial product);
 - (ea) Division 5A (unsolicited offers to purchase financial products off-market);
 - (f) sections 1020B and 1020C (short selling of securities, managed investment products and certain other financial products);
 - (g) section 1020D (Part cannot be contracted out of).
- (3) Subject to subsection (4), the new product disclosure provisions do not apply in relation to a financial product to which this section applies during the period (the *transition period*) starting on the FSR commencement and ending on whichever of the following first occurs:
- (a) the end of the period of 2 years starting on the FSR commencement;
 - (b) the date specified in a notice lodged with ASIC by the issuer of the product that relates to the product, or a class of financial products that includes the product, and that satisfies the following requirements:
 - (i) the notice must indicate that the issuer of the product wants the new product disclosure provisions to apply in relation to the product from a date specified in the notice;
 - (ii) the date specified in the notice is the FSR commencement or a later date;
 - (iii) the date specified in the notice is at least 28 days after the notice is lodged with ASIC.

Section 1438

- Note 1: A notice under paragraph (b) may be lodged during the period between the commencement of this section and the FSR commencement, or it may be lodged after the FSR commencement.
- Note 2: Subject to Division 2, the provisions covered by paragraphs (2)(a) to (f) apply from the FSR commencement in relation to all financial products to which they purport to apply.

- (4) If the date specified in a notice lodged with ASIC in accordance with paragraph (3)(b) is the FSR commencement, there is no transition period in relation to the financial product or products to which the notice relates.
- (5) A notice (the **first notice**) lodged with ASIC in accordance with paragraph (3)(b):
- (a) may, by a further notice lodged with ASIC, be varied to specify a different date (the **new date**), but only if:
 - (i) that further notice is lodged with ASIC at least 28 days before the date specified in the first notice; and
 - (ii) the new date is at least 28 days after that further notice is lodged with ASIC; and
 - (b) may, by a further notice lodged with ASIC, be revoked, but only if that further notice is lodged with ASIC at least 28 days before the date specified in the first notice.

A date that was specified in a notice before its variation or revocation in accordance with this subsection is to be disregarded for the purposes of the other provisions of this section.

- (6) If the issuer of a financial product lodges a notice with ASIC in accordance with paragraph (3)(b) that covers the product, the issuer must comply with any applicable requirements determined, by legislative instrument, by ASIC for the purposes of this subsection in relation to the following matters:
- (a) informing people about the notice and its significance; and
 - (b) informing people about any subsequent variation or revocation of the notice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (7) A determination by ASIC for the purposes of subsection (6):
- (b) may cover all financial products or one or more classes of financial products; and

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1439

- (c) may make different provision in relation to different classes of financial products.
- (8) Subject to the regulations, ASIC must take reasonable steps to ensure that, during the period of 2 years starting on the FSR commencement, information is available:
 - (a) on the Internet; and
 - (b) at offices of ASIC;about notices that have been lodged in accordance with paragraph (3)(b). The information must be updated to take account of variations and revocations of such notices.

**1439 Offences against new product disclosure provisions—
additional element for prosecution to prove if conduct
occurs after opting-in and before the end of the first 2
years**

- (1) If:
 - (a) conduct in relation to a financial product that would (apart from this section) constitute an offence against, or based on, any of the new product disclosure provisions occurred at a time:
 - (i) during the period of 2 years starting on the FSR commencement; and
 - (ii) after the date specified in a notice lodged in relation to the product in accordance with paragraph 1438(3)(b); and
 - (b) the new product disclosure provisions started to apply in relation to the product from the date specified in the notice;the conduct constitutes an offence against that provision only if (in addition to the other elements of the offence), either:
 - (c) the person knew that, or was reckless as to whether, the product issuer had lodged a notice under that paragraph that specified that date; or
 - (d) the person did not know that, and was not reckless as to whether, the product issuer had lodged a notice under that paragraph that specified that date, but the conduct would have contravened the provisions referred to in section 1440 that would have applied to and in relation to the product if those provisions had still applied when the conduct occurred.

(2) In this section:

conduct means an act, an omission to perform an act or a state of affairs.

1440 Continued application of certain provisions of old disclosure regimes during transition period

During the transition period (if any) for a financial product, the following provisions continue to apply, despite their repeal or amendment, to and in relation to the financial product:

- (a) if the product is a managed investment product—all the provisions of Chapter 6D of the old Corporations Act, other than section 722 of that Act, and any associated provisions;
- (b) if the product is a derivative—section 1210 of the old Corporations Act, and any associated provisions;
- (c) if the product is a superannuation product—the following provisions, and any associated provisions:
 - (i) section 153, and all the provisions of Divisions 3 and 4 of Part 19, of the *Superannuation Industry (Supervision) Act 1993* as in force immediately before the FSR commencement;
 - (ii) the section 153A of that Act that was provided for in Modification Declaration no. 15 as in force immediately before the FSR commencement, being a declaration of modification made under section 332 of that Act;
- (d) if the product is an RSA product—section 51, and all the provisions of Divisions 4 and 5 of Part 5, of the *Retirement Savings Accounts Act 1997* as in force immediately before the FSR commencement, and any associated provisions;
- (e) if the product is an insurance product—sections 71A and 73 of the *Insurance Contracts Act 1984* as in force immediately before the FSR commencement, and any associated provisions.

Section 1441

1441 Certain persons who are not yet covered by Parts 7.6, 7.7 and 7.8 of the amended Corporations Act are required to comply with Part 7.9 obligations as if they were regulated persons

From the time from which the new product disclosure provisions start to apply in relation to a particular financial product, the following persons must comply with those provisions in relation to that product, as if they were regulated persons as defined in section 1011B of the amended Corporations Act, even though they are not yet subject, or fully subject, to Parts 7.6, 7.7 and 7.8 of that Act:

- (a) a regulated principal;
- (b) a representative (as defined in section 1436) of a regulated principal; or
- (c) an insurance agent (as defined in section 1436A).

1442 Exemptions and modifications by ASIC

- (1) This section applies to the following provisions:
 - (a) the provisions of this Subdivision and any associated provisions;
 - (b) the provisions that continue to apply because of section 1440.
- (2) ASIC may:
 - (a) exempt a person or a class of persons, or a financial product or class of financial products, from some or all of the provisions to which this section applies; or
 - (b) declare that some or all of the provisions to which this section applies apply in relation to a person or a class of persons, or a financial product or class of financial products, as if the provisions were modified or varied as specified in the declaration.
- (3) A declaration under paragraph (2)(b) may provide for the continued application (with or without modifications, and to the exclusion of provisions of the amended Corporations Act) of provisions referred to in paragraph (1)(b), even after the end of the period of 2 years starting on the FSR commencement.

Section 1442A

- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (6) If conduct (including an omission) of a person would not constitute an offence if a particular declaration under paragraph (2)(b) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (5)):
 - (a) the text of the declaration was made available by ASIC on the Internet; or
 - (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

Subdivision F—Certain other product-related requirements

1442A Deferred application of hawking prohibition

- (1) For the purposes of this section, the *transition period* is the period starting on the FSR commencement and ending on whichever of the following first occurs:
 - (a) the day fixed by Proclamation for the purposes of this paragraph;
 - (b) the end of the period of 6 months starting on the FSR commencement.
- (2) Regulations made for the purposes of this section may provide for specified provisions of legislation that is repealed by the *Financial Services Reform Act 2001* or the *Financial Services Reform (Consequential Provisions) Act 2001*, being provisions that deal with the same or a similar matter as that dealt with in section 992A of the amended Corporations Act, to continue to apply (whether with or without specified modifications) during the transition period.

Chapter 10 Transitional provisions

Part 10.2 Transitional provisions relating to the Financial Services Reform Act 2001

Division 1 Transitional provisions relating to the phasing-in of the new financial services regime

Section 1442B

- (3) During the transition period, section 992A of the amended Corporations Act does not apply to any person, except to the extent (if any) provided for in regulations made for the purposes of this section.

1442B Deferred application of confirmation of transaction and cooling-off provisions etc.

- (1) This section applies to all financial products issued by a person, other than financial products in a class of products that are first issued by the person after the FSR commencement.
- (2) For the purposes of this section, the *transition period*, in relation to a financial product to which this section applies, is the period starting on the FSR commencement and ending on whichever of the following first occurs:
 - (a) the day fixed by Proclamation for the purposes of this paragraph;
 - (b) the end of the period of 6 months starting on the FSR commencement;
 - (c) the new product disclosure provisions (within the meaning of section 1438) start to apply in relation to the product.
- (3) Subject to subsection (5), the following provisions (the *preserved provisions*), to the extent they are relevant to a financial product to which this section applies, continue to apply, despite their repeal, in relation to the financial product during the transition period:
 - (a) Division 6 of Part 19 of the *Superannuation Industry (Supervision) Act 1993*, and any associated provisions;
 - (b) Division 7 of Part 5 of the *Retirement Savings Accounts Act 1997*, and any associated provisions;
 - (c) sections 64 and 64A of the *Insurance Contracts Act 1984*, and any associated provisions;
 - (d) any other provisions specified in regulations made for the purposes of this paragraph, and any associated provisions in relation to provisions so specified.
- (4) Subject to subsection (5), during the transition period, the following provisions (the *deferred provisions*) of the amended Corporations Act do not apply in relation to a financial product to which this section applies:

Section 1442B

- (a) section 1017F;
 - (b) sections 1019A and 1019B;
 - (c) any other provisions of Part 7.9 of the amended Corporations Act that are not part of the new product disclosure provisions (within the meaning of section 1438) and that are specified in regulations made for the purposes of this paragraph.
- (5) Regulations made for the purposes of this subsection may do either or both of the following:
- (a) provide that specified provisions of the preserved provisions apply (with or without specified modifications), or do not apply, in relation to a financial product to which this section applies;
 - (b) provide that specified provisions of the deferred provisions apply (with or without specified modifications), or do not apply, in relation to a financial product to which this section applies.
- The regulations may provide as mentioned in paragraph (a) or (b) even after the end of the transition period.

Division 2—Other transitional provisions

1443 Definitions

- (1) In this Division:

amended Corporations Act has the same meaning as in Division 1.

class, in relation to financial products, has a meaning affected by regulations made for the purposes of subsection (2).

FSR commencement has the same meaning as in Division 1.

law of the Commonwealth includes a reference to an instrument made under such a law.

new legislation means relevant legislation as in force after the FSR commencement.

old legislation means relevant legislation as in force immediately before the FSR commencement.

relevant amendments means the amendments made by:

- (a) the *Financial Services Reform Act 2001*; and
- (b) the *Financial Services Reform (Consequential Provisions) Act 2001*.

relevant legislation means the following legislation:

- (a) this Act;
 - (b) the Acts that are amended by the relevant amendments;
 - (c) regulations or other instruments made under Acts covered by paragraph (a) or (b);
 - (d) any other law of the Commonwealth, or instrument made under a law of the Commonwealth, identified in regulations made for the purposes of this paragraph.
- (2) The regulations may include provisions identifying, or providing for the identification of, what constitutes a *class* of financial products for the purposes of a provision or provisions of this Division.

1444 Regulations may deal with transitional, saving or application matters

- (1) The regulations may deal with matters of a transitional, saving or application nature relating to the relevant amendments and the transition from the application of the old legislation to the application of the new legislation. Regulations made for this purpose may make such provision as is necessary to take account of the fact that, because of Division 1, different provisions of the amended Corporations Act start applying (and different provisions of the old legislation stop applying) in relation to different people, things and matters at different times.
- (2) Regulations made for the purposes of this section are of no effect to the extent that they are inconsistent with:
 - (a) a provision of Division 1; or
 - (b) a regulation or determination made under a provision of Division 1, other than any such regulation or determination (the *other instrument*) that is expressed to have effect subject to anything in regulations made for the purposes of this section (in which case, the other instrument is of no effect, to the extent of the inconsistency).
- (3) Without limiting subsection (1), the regulations may provide for a matter to be dealt with, wholly or partly, in any of the following ways:
 - (a) by applying (with or without modifications) to the matter:
 - (i) provisions of a law of the Commonwealth; or
 - (ii) provisions of a repealed or amended law of the Commonwealth, in the form that those provisions took before the repeal or amendment; or
 - (iii) a combination of provisions referred to in subparagraphs (i) and (ii);
 - (b) by otherwise specifying rules for dealing with the matter;
 - (c) by specifying a particular consequence of the matter, or of an outcome of the matter, for the purposes of a law of the Commonwealth.
- (4) Without limiting subsections (1) and (3), the regulations may provide for the continued effect after the FSR commencement, for the purposes of the new legislation, of a thing done or instrument made, or a class of things done or instruments made, before the

Section 1444

FSR commencement, under or for the purposes of the old legislation. In the case of an instrument, or class of instruments, the regulations may (either when providing for the continued effect of the instrument or instruments or at a later time) provide for the instrument or instruments, as continuing to have effect, to have effect subject to modifications.

- (5) Without limiting subsection (4), regulations made for the purposes of that subsection may permit all or any of the following matters to be determined in writing by a specified person, or by a person included in a specified class of persons:
 - (a) the identification of a thing done or instrument made, or a class of things done or instruments made, that is to continue to have effect;
 - (b) the purpose for which a thing done or instrument made, or a class of things done or instruments made, is to continue to have effect;
 - (c) any modifications subject to which an instrument made, or a class of instruments made, is to continue to have effect.
- (6) Despite subsections 12(2) and (3) of the *Legislative Instruments Act 2003*, regulations made for the purposes of this section:
 - (a) may be expressed to take effect from a date before the regulations are registered under that Act; and
 - (b) may provide for a determination of a kind referred to in subsection (5) to take effect from a date before the determination is made (including a date before the regulations are registered under that Act).
- (7) If a relevant amendment does not commence on the FSR commencement, this section applies in relation to that amendment as if references in the other provisions of this section, and in the definitions in section 1443, to “the FSR commencement” were instead references to the commencement of the relevant amendment.
- (8) In this section:
 - matters of a transitional, saving or application nature*** includes, but is not limited to, matters related to any of the following:
 - (a) how a matter that arose or existed under the old legislation is to be dealt with under the new legislation;

- (b) the significance for the purposes of the new legislation of a matter that arose or existed under the old legislation;
- (c) how a process started but not completed under the old legislation is to be dealt with;
- (d) the preservation of concessions or exemptions (however described) that existed under the old legislation;
- (e) interpreting references to matters in terms of the new legislation so as to include references to matters in terms of the old legislation (including that legislation as it continues to have effect because of provisions of Division 1), and vice versa;
- (f) any other matters that are prescribed by regulations made for the purposes of this paragraph.

1445 ASIC determinations may deal with transitional, saving or application matters

- (1) ASIC may, by legislative instrument, make a determination dealing with matters of a transitional, saving or application nature relating to the relevant amendments and the transition from the application of the old legislation to the application of the new legislation. Determinations for this purpose may make such provision as is necessary to take account of the fact that, because of Division 1, different provisions of the amended Corporations Act start applying (and different provisions of the old legislation stop applying) in relation to different people, things and matters at different times.
- (2) A determination overrides any inconsistent regulations made for the purposes of section 1444, other than any such regulations that are expressed to have effect despite anything in a determination under this section (in which case, the determination is of no effect, to the extent of the inconsistency).
- (3) A determination is of no effect to the extent that it is inconsistent with:
 - (a) a provision of Division 1; or
 - (b) a regulation or determination made under a provision of Division 1, other than any such regulation or determination (the *other instrument*) that is expressed to have effect subject to anything in a determination under this section (in which

Section 1445

case, the other instrument is of no effect, to the extent of the inconsistency).

- (4) Without limiting subsection (1), a determination may provide for a matter to be dealt with, wholly or partly, in any of the following ways:
- (a) by applying (with or without modifications) to the matter:
 - (i) provisions of a law of the Commonwealth; or
 - (ii) provisions of a repealed or amended law of the Commonwealth, in the form that those provisions took before the repeal or amendment; or
 - (iii) a combination of provisions referred to in subparagraphs (i) and (ii);
 - (b) by otherwise specifying rules for dealing with the matter;
 - (c) by specifying a particular consequence of the matter, or of an outcome of the matter, for the purposes of a law of the Commonwealth.
- (5) Without limiting subsections (1) and (4), a determination may provide for the continued effect after the FSR commencement, for the purposes of the new legislation, of a thing done or instrument made, or a class of things done or instruments made, before the FSR commencement, under or for the purposes of the old legislation. In the case of an instrument, or class of instruments, a determination may (either when providing for the continued effect of the instrument or instruments or at a later time) provide for the instrument or instruments, as continuing to have effect, to have effect subject to modifications.
- (6) Without limiting subsection (5), a determination for the purposes of that subsection may permit all or any of the following matters to be determined in writing by a specified person, or by a person included in a specified class of persons:
- (a) the identification of a thing done or instrument made, or a class of things done or instruments made, that is to continue to have effect;
 - (b) the purpose for which a thing done or instrument made, or a class of things done or instruments made, is to continue to have effect;
 - (c) any modifications subject to which an instrument made, or a class of instruments made, is to continue to have effect.

- (7) If a relevant amendment does not commence on the FSR commencement, this section applies in relation to that amendment as if references in the other provisions of this section, and in the definitions in section 1443, to “the FSR commencement” were instead references to the commencement of the relevant amendment.

- (8) In this section:

matters of a transitional, saving or application nature includes, but is not limited to, matters related to any of the following:

- (a) how a matter that arose or existed under the old legislation is to be dealt with under the new legislation;
- (b) the significance for the purposes of the new legislation of a matter that arose or existed under the old legislation;
- (c) how a process started but not completed under the old legislation is to be dealt with;
- (d) the preservation of concessions or exemptions (however described) that existed under the old legislation;
- (e) interpreting references to matters in terms of the new legislation so as to include references to matters in terms of the old legislation (including that legislation as it continues to have effect because of provisions of Division 1), and vice versa;
- (f) any other matters that are prescribed by regulations made for the purposes of this paragraph.

Part 10.3—Transitional provisions relating to the Corporations Legislation Amendment Act 2003

1446 Application of subparagraph 262(1)(g)(iii)

The amendment made by item 8 of Schedule 5 to the *Corporations Legislation Amendment Act 2003* applies only to charges created after the commencement of that item.

1447 Application of sections 601AB and 601PB

If a company or responsible entity had an obligation to lodge an annual return before the commencement of items 31 and 36 of Schedule 1 to the *Corporations Legislation Amendment Act 2003*, sections 601AB and 601PB continue to apply to the annual return, as if the amendments made by those items had not been made.

1448 Application of amendments made by Schedule 4 to the Corporations Legislation Amendment Act 2003

If, at the time the amendments made by Schedule 4 to the *Corporations Legislation Amendment Act 2003* commence:

- (a) a company is required to lodge a notice under a provision amended by Schedule 4; and
- (b) the time within which the company must lodge the notice has not expired;

the amendments made by Schedule 4 apply to the company's requirement to lodge the notice.

Part 10.4—Transitional provisions relating to the Financial Services Reform Amendment Act 2003

1449 Definition

In this Part:

amending Act means the *Financial Services Reform Amendment Act 2003*.

1450 Application of Part 10.2 to Chapter 7 as amended by Schedule 2 to the amending Act

- (1) Subject to subsection (2), the provisions of Division 1 of Part 10.2 (including regulations and determinations made for the purposes of that Division, and the powers given by that Division to deal with matters in regulations and determinations) also apply to the provisions of Chapter 7 as amended by Schedule 2 to the amending Act.

Note: Division 1 of Part 10.2 deals with the phasing-in of the new financial services regime.

- (2) However, subsection (1) does not produce the result that a provision of Chapter 7 as amended, added or inserted by an amendment in Schedule 2 to the amending Act applies in relation to a person, matter or circumstance:
- (a) at a time that is before the commencement of the amendment; or
 - (b) contrary to section 1451.
- (3) The powers given by Division 2 of Part 10.2 to deal with matters in regulations and determinations apply in relation to the provisions of Chapter 7 as amended by Schedule 2 to the amending Act as if the amendments in Schedule 2 to the amending Act were ***relevant amendments*** for the purposes of that Division. However (in addition to subsections 1444(2) and 1445(3)) such regulations and determinations are of no effect to the extent that they are inconsistent with section 1451.

Section 1451

**1451 Provisions relating to the scope of the amendments of
Chapter 7 made by Schedule 2**

Application of amendments of section 916F

- (1) The amendments made by items 37, 38 and 39 of Schedule 2 to the amending Act do not apply to authorisations made before the commencement of the amendment, unless the relevant 10 day period for notification has not ended by the commencement of the items.
- (2) The amendment made by item 40 of Schedule 2 to the amending Act applies to revocations made after the commencement of the item.

Application of certain amendments of sections 952B and 953A

- (2A) The amendments made by items 53A and 58A of Schedule 2 to the amending Act apply in relation to the giving of Financial Services Guides after the commencement of the items.

Application of amendments of section 981H

- (3) The amendments made by items 62 and 63 of Schedule 2 to the amending Act apply, after the commencement of those items, to money paid to a person before that commencement as mentioned in subsection 981H(1), even if an agreement referred to in subsection 981H(2) was in force in relation to the money immediately before that commencement.

Application of certain amendments of section 1016A

- (3A) The amendments made by items 77A, 77B and 78C of Schedule 2 to the amending Act apply in relation to applications for financial products, and applications to become a standard employer-sponsor, whether made before or after the commencement of the items.

Application of amendments of sections 1016B to 1016E

- (3B) The amendments made by items 78D to 78T of Schedule 2 to the amending Act apply in relation to Product Disclosure Statements whether prepared or given before or after the commencement of the items.

Section 1452

Application of amendment of section 1017D

- (4) The amendment made by item 88 of Schedule 2 to the amending Act does not apply to statements prepared before the commencement of the item.

Application of amendments of section 1017E

- (5) The amendments made by items 89 and 90 of Schedule 2 to the amending Act apply, after the commencement of those items, to money paid to a person before that commencement as mentioned in subsection 1017E(1), even if an agreement referred to in subsection 1017E(2B) was in force in relation to the money immediately before that commencement.

Application of amendments of section 1020E

- (6) The amendment made by item 91 of Schedule 2 to the amending Act does not apply to disclosure documents or statements prepared before the commencement of the item.
- (7) The amendments made by items 91A, 91B and 91C of Schedule 2 to the amending Act apply to disclosure documents or statements, and to advertisements or statements of a kind referred to in subsection 1018A(1) or (2), whether prepared, given or published before or after the commencement of the items.

Application of certain amendments of sections 1021B and 1022A

- (8) The amendments made by items 95F and 96K of Schedule 2 to the amending Act apply in relation to the giving of Product Disclosure Statements after the commencement of the items.

1452 Amendments of section 1274

- (1) The amendment made by item 101 of Schedule 2 to the amending Act applies to documents even if they were lodged before the commencement of the item.
- (2) The amendment made by item 102 of Schedule 2 to the amending Act removes a reference to a repealed provision. However, the amendment does not produce the result that a document that was lodged under that provision when it was in force now becomes available for inspection under section 1274.

Part 10.5—Transitional provisions relating to the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004

1453 Definitions

In this Part:

amending Act means the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*.

old Act means this Act as in force immediately before the commencement day.

Schedule 1 commencement means the day on which Schedule 1 to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* commences.

Schedule 4 commencement means the day on which Schedule 4 to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* commences.

Schedule 5 commencement means the day on which Schedule 5 to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* commences.

Schedule 8 commencement means the day on which Schedule 8 to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* commences.

1454 Audit reforms in Schedule 1 to the amending Act (auditing standards and audit working papers retention rules)

Sections 307A, 307B and 989CA apply to:

- (a) an audit of the financial report for a financial year; or
- (b) an audit or review of the financial report for a half-year in a financial year;

if the financial year begins on or after 1 July 2004.

1455 Audit reforms in Schedule 1 to the amending Act (adoption of auditing standards made by accounting profession before commencement)

- (1) The regulations may provide that a standard specified in the regulations (as in force from time to time) is to have effect, for the purposes of this Act, as if it had been made by the AUASB under section 336 on the day specified in the regulations.
- (2) The standard must be one made or issued by the Australian Accounting Research Foundation before the Schedule 1 commencement on behalf of CPA Australia and The Institute of Chartered Accountants in Australia.
- (3) The regulations may provide that the standard is to have effect as if it specified that it applies to periods ending, or starting, on or after a date specified in the standard.
- (4) Standards prescribed under subsection (1) do not have effect as auditing standards:
 - (a) in relation to financial reports for periods ending after 30 June 2006; or
 - (b) in relation to financial reports for periods ending after a later date specified by regulations made for the purposes of subsection (1) before 30 June 2006.
- (5) A person does not commit an offence based on a contravention of section 307A, subsection 308(3A) or 309(5A) or section 989CA because an audit or review is not conducted in accordance with, or does not include a statement or disclosure required by, an auditing standard prescribed under subsection (1) if the audit or review is conducted in relation to a financial report for a period ending before that standard ceases to have effect as an auditing standard.

Note: This subsection does not prevent, however, other action being taken on the basis of the failure to comply with the auditing standard (for example, the person's failure to comply with the standard being referred to the Companies Auditors and Liquidators Disciplinary Board).

Section 1456

1456 Audit reforms in Schedule 1 to the amending Act (new competency standard provisions)

If an application by a person for registration as a registered company auditor:

- (a) is lodged with ASIC before the Schedule 1 commencement; and
 - (b) has not been determined before that day;
- section 1280 of the old Act continues to apply to the application despite the amendments made by the amending Act.

1457 Audit reforms in Schedule 1 to the amending Act (new annual statement requirements for auditors)

- (1) The requirement under section 1287A for a registered company auditor to lodge an annual statement applies from the first anniversary of the auditor's registration that occurs on or after 1 January 2005.
- (2) The first annual statement lodged under section 1287A should cover the period commencing either:
 - (a) immediately after the period covered by the last triennial statement; or
 - (b) the day on which the auditor was registered;whichever is later, and ending on the first anniversary of registration occurring on or after 1 January 2005.

1458 Audit reforms in Schedule 1 to the amending Act (imposition of conditions on existing registration as company auditor)

ASIC may impose conditions on a person's registration as a company auditor under section 1289A even if the registration took effect before the Schedule 1 commencement.

1459 Audit reforms in Schedule 1 to the amending Act (application of items 62 and 63)

The amendments made by items 62 and 63 of Schedule 1 to the amending Act apply to periods that start on or after 1 January 2005.

1460 Audit reforms in Schedule 1 to the amending Act (non-audit services disclosure)

Subsections 300(11B) to (11E) apply to an audit of the financial report for a financial year if the financial year begins on or after 1 July 2004.

1461 Audit reforms in Schedule 1 to the amending Act (auditor appointment)

- (1) Section 324AC applies to all appointments of firms as auditor (including an appointment that was made before the Schedule 1 commencement).
- (2) The appointment of a person as auditor of a company or registered scheme made before the Schedule 1 commencement under section 327 or 331AB of the old Act remains valid and effective despite the repeal of that section.
- (3) An approval by ASIC that is in force under subsection 324(12) of the old Act immediately before the Schedule 1 commencement has effect on and after the Schedule 1 commencement as if it had been given under section 324B.

1462 Audit reforms in Schedule 1 to the amending Act (auditor independence)

- (1) Section 307C applies to a financial report for financial years that start on or after 1 July 2004.
- (2) Division 3 of Part 2M.4 applies to:
 - (a) an audit of the financial report for a financial year; or
 - (b) an audit or review of the financial report for a half-year in a financial year;if the financial year begins on or after 1 July 2004.
- (2A) The following provisions of the old Act continue to apply to an audit of the financial report for a financial year, or an audit or review of the financial report for a half-year in a financial year, if the financial year begins before 1 July 2004:
 - (a) subsections 324(1) to (6) (inclusive) (other than paragraphs 324(1)(d) and (2)(d) and (e));

Section 1462

- (b) subsection 324(11);
- (c) subsection 327(4);
- (d) section 331AA (other than paragraphs 331AA(1)(d) and (2)(d) and (e)).

Subsection 331AA(4) of the old Act continues to apply as if the references in that subsection to subsections 324(7), (8), (9), (10) and (16) were omitted.

- (3) Division 3 of Part 2M.4 applies to all relationships that exist on or after the Schedule 1 commencement between an auditor and an audited body (including a relationship that exists because of circumstances that came into existence before the Schedule 1 commencement).
- (4) Without limiting subsection (3), the items in the table in subsection 324CH(1) apply to circumstances that exist on or after the Schedule 1 commencement (including circumstances that exist because of events that occurred before the Schedule 1 commencement).
- (5) Item 9 of the table in subsection 324CE(5) applies to a person who ceases to be a professional employee of the individual auditor concerned on or after the Schedule 1 commencement.
- (6) Item 10 of the table in subsection 324CE(5) applies to a person who ceases to own the business of the individual auditor concerned on or after the Schedule 1 commencement.
- (7) Item 11 of the table in subsection 324CF(5) applies to a person who ceases to be a member of the audit firm concerned on or after the Schedule 1 commencement.
- (8) Item 12 of the table in subsection 324CF(5) applies to a person who ceases to be a professional employee of the auditor firm concerned on or after the Schedule 1 commencement.
- (9) Item 11 of the table in subsection 324CG(9) applies to a person who ceases to be an officer of the audit company concerned on or after the Schedule 1 commencement.
- (10) Item 12 of the table in subsection 324CG(9) applies to a person who ceases to be a professional employee of the audit company concerned on or after the Schedule 1 commencement.

Section 1463

- (11) Section 324CI applies only if the relevant departure time for the purposes of that section occurs on or after the Schedule 1 commencement.
- (12) Section 324CJ applies only if the relevant departure time for the purposes of that section occurs on or after the Schedule 1 commencement.
- (13) Section 324CK applies to a person only if:
 - (a) the person is on the Schedule 1 commencement, or becomes after the Schedule 1 commencement, a member of the audit firm concerned or a director of the audit company concerned; and
 - (b) becomes an officer of the audited body concerned on or after the Schedule 1 commencement.

1463 Audit reforms in Schedule 1 to the amending Act (auditor rotation)

Division 5 of Part 2M.4 applies to:

- (a) an audit of the financial report for a financial year; or
- (b) an audit or review of the financial report for a half-year in a financial year;

if the financial year begins on or after 1 July 2006.

1464 Audit reforms in Schedule 1 to the amending Act (listed company AGMs)

The amendments made by Part 5 of Schedule 1 to the amending Act apply to AGMs at which financial reports for financial years that commence on or after 1 July 2004 are considered.

1465 Schedule 2 to the amending Act (financial reporting)

- (1) The amendments made by Part 1 of Schedule 2 to the amending Act apply to directors' declarations in relation to financial reports for financial years that start on or after 1 July 2004.
- (2) The amendments made by Part 2 of Schedule 2 to the amending Act apply to directors' reports for financial years that start on or after 1 July 2004.

Section 1466A

- (3) The amendments made by Part 3 of Schedule 2 apply to financial reports lodged with ASIC on or after 1 January 2004.

1466A Schedule 2A to the amending Act (true and fair view)

The amendments made by Schedule 2A to the amending Act apply to directors' reports for periods that start on or after 1 July 2004.

1466 Schedule 3 to the amending Act (proportionate liability)

The amendments made to this Act and the *Trade Practices Act 1974* by Schedule 3 to the amending Act apply to causes of action that arise on or after the day on which that Schedule commences.

1467 Schedule 4 to the amending Act (enforcement)

- (1) The amendments made by Part 2 of Schedule 4 apply to all disclosures made on or after the day on which this Act receives the Royal Assent (including a disclosure of information about circumstances that arose before that day).
- (2) Section 206BA applies to disqualifications from managing corporations that occur because of convictions on or after the Schedule 4 commencement.
- (3) The amendments made by Part 4 of Schedule 4 to the amending Act apply in relation to a contravention of a financial services civil penalty provision that occurs on or after the day on which this Act receives the Royal Assent.

1468 Schedule 5 to the amending Act (remuneration of directors and executives)

- (1) Subject to subsections (2) and (3), the amendments made by Schedule 5 to the amending Act apply to financial years commencing on or after 1 July 2004.
- (2) The amendments made by items 4, 4A and 5 of Schedule 5 to the amending Act apply to an agreement only if the agreement is entered into on or after the Schedule 5 commencement.

- (3) The amendments made by items 6, 7 and 8 of Schedule 5 to the amending Act apply to remuneration reports for financial years that start on or after 1 July 2004.

1469 Schedule 6 to the amending Act (continuous disclosure)

- (1) The amendments made by Part 1 of Schedule 6 to the amending Act apply in relation to a contravention of subsection 674(2) or 675(2) that occurs on or after the day on which this Act receives the Royal Assent.
- (2) The amendments made by Part 2 of Schedule 6 to the amending Act apply in relation to a failure by a disclosing entity to comply with subsection 674(2) or 675(2) that occurs on or after the day on which this Act receives the Royal Assent.

1470 Schedule 7 to the amending Act (disclosure rules)

- (1) The amendments made by Part 1 of Schedule 7 to the amending Act apply to a disclosure document for an offer of securities if the disclosure document is lodged with ASIC on or after the day on which this Act receives the Royal Assent.
- (2) The amendments made by Part 2 of Schedule 7 to the amending Act apply to a Product Disclosure Statement that is required to be given on or after the day on which this Act receives the Royal Assent.
- (3) The amendment made by items 10 and 11 of Schedule 7 to the amending Act applies to an offer of debentures that is made on or after the day on which this Act receives the Royal Assent.
- (4) Section 708A applies to an offer of securities for sale that is made on or after the day on which this Act receives the Royal Assent.
- (5) Section 1012DA applies to:
 - (a) a recommendation situation if the relevant conduct (within the meaning of subsection 1012A(2)); and
 - (b) a sale situation if the relevant conduct (within the meaning of subsection 1012C(2));occurs on or after the day on which this Act receives the Royal Assent.

Section 1471

1471 Schedule 8 to the amending Act (shareholder participation and information)

- (1) The amendments made by items 1 to 6, 13 and 17 of Schedule 8 to the amending Act apply to a notice of a meeting of a company's members that is given after 30 September 2004.
- (2) The amendments made by items 7 to 12 and 14 of Schedule 8 to the amending Act apply to an appointment of a proxy that is made on or after the Schedule 8 commencement.
- (2A) The amendment made by item 14A of Schedule 8 to the amending Act applies to reports for financial years that start on or after 1 July 2004.
- (3) The amendment made by item 15 of Schedule 8 to the amending Act applies to a directors' report for a financial year that starts on or after 1 July 2004.
- (4) The amendment made by item 16 of Schedule 8 to the amending Act applies to a report referred to in subsection 314(1) for a financial year that starts on or after 1 July 2004.

Part 10.8—Transitional provisions relating to the Corporations Amendment (Takeovers) Act 2007

1478 Application of amendments of the takeovers provisions

- (1) The amendments made by Schedule 1 to the *Corporations Amendment (Takeovers) Act 2007* apply in relation to an application under section 657C (including any review under section 657EA of the decision made on the application) if:
- (a) the application under section 657C is made on or after the commencement of that Schedule; or
 - (b) the application under section 657C was made before the commencement of that Schedule but the Panel has not finally disposed of the application before the commencement of that Schedule.

For the purposes of paragraph (b), the Panel does not finally dispose of an application under section 657C until the Panel has disposed of any review under section 657EA of the decision made on the application.

- (2) To avoid doubt, the amendments apply in relation to the application even if the circumstances to which the application relates arose before the commencement of Schedule 1 to the *Corporations Amendment (Takeovers) Act 2007*.

Part 10.9—Transitional provisions relating to the Corporations Amendment (Insolvency) Act 2007

1479 Definition

In this Part:

amending Act means the *Corporations Amendment (Insolvency) Act 2007*.

1480 Schedule 1 to the amending Act (improving outcomes for creditors)

- (1) The amendment made by item 4 of Schedule 1 to the amending Act, in so far as it relates to a company subject to a deed of company arrangement, applies if the administration that ended on the execution of the deed began on or after the day on which that item commences.
- (2) The amendments made by items 5 to 9 of Schedule 1 to the amending Act, in so far as they relate to the winding up of a company, apply if the relevant date is on or after the day on which those items commence.
- (3) The amendments made by items 6 to 9 of Schedule 1 to the amending Act, in so far as they relate to a company subject to a deed of company arrangement, apply if the administration that ended on the execution of the deed began on or after the day on which those items commence.
- (4) The amendments made by items 6 to 9 of Schedule 1 to the amending Act, in so far as they relate to a company to which section 433 applies, apply if the relevant date (within the meaning of that section) is on or after the day on which those items commence.
- (5) The amendment made by item 20 of Schedule 1 to the amending Act applies in relation to a receiver appointed on or after the day on which that item commences.

Section 1480

- (6) The amendments made by items 21, 24, 25, 26 and 28 of Schedule 1 to the amending Act apply to the administrator of a company if the administrator is appointed on or after the day on which those items commence.
- (7) The amendments made by items 30, 31, 32, 33, 35, 36, 37, 38, 39 and 40 of Schedule 1 to the amending Act apply in relation to the liquidator of a company if the winding up of the company begins on or after the day on which those items commence.
- (8) The amendment made by item 52 of Schedule 1 to the amending Act applies in relation to a compromise or arrangement if an application relating to the compromise or arrangement was made under subsection 411(1) on or after the day on which that item commences.
- (9) The amendments made by items 53, 54, 55, 56 and 57 of Schedule 1 to the amending Act do not apply in relation to an account opened before the day on which that item commences.
- (10) The amendments made by items 59, 60, 61, 62 and 64 of Schedule 1 to the amending Act apply in relation to a managing controller of property of a corporation if:
 - (a) the managing controller is appointed on or after the day on which those items commence; or
 - (b) the managing controller enters into possession, or takes control, of property of the corporation on or after the day on which those items commence.
- (11) Despite the amendments made by items 65 and 66 of Schedule 1 to the amending Act:
 - (a) subsection 427(1) continues to apply, in relation to an order obtained, or an appointment made, before the day on which those items commence, as if those amendments had not been made; and
 - (b) subsection 427(1A) continues to apply, in relation to an appointment made before the day on which those items commence, as if those amendments had not been made; and
 - (c) subsection 427(1B) continues to apply, in relation to an entry into possession, or a taking of control, before the day on which those items commence, as if those amendments had not been made; and

Section 1480

- (d) subsection 427(4) continues to apply, in relation to a cessation before the day on which those items commence, as if those amendments had not been made.
- (12) The amendments made by items 70, 71 and 72 of Schedule 1 to the amending Act, in so far as they relate to a company under administration, apply if the administration begins on or after the day on which those items commence.
- (13) The amendment made by item 75 of Schedule 1 to the amending Act applies to a meeting if the meeting is convened on or after the day on which that item commences.
- (14) The amendments made by items 87, 88, 92, 93 and 94 of Schedule 1 to the amending Act apply to a transfer or alteration that occurs on or after the day on which those items commence.
- (15) The amendments made by items 91, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111 and 112 of Schedule 1 to the amending Act apply in relation to a winding up of a company if the winding up begins on or after the day on which those items commence.
- (16) Despite the repeal of subsection 506(4) by item 113 of Schedule 1 to the amending Act, that subsection continues to apply, in relation to the liquidators of a company where the winding up of the company began before the day on which that item commences, as if that repeal had not happened.
- (17) Sections 434D, 434E, 434F and 434G apply in relation to persons appointed on or after the day on which those sections commence.
- (18) Section 530 applies in relation to the liquidators of a company if the winding up of the company begins on or after the day on which that section commences.
- (19) Section 530AA applies to persons appointed on or after the day on which that section commences.
- (20) Subsections 571(1) and 579E(1) of the amended Act apply in relation to a group of 2 or more companies if the winding up of each company in the group begins on or after the day on which those subsections commence.

Section 1481

1481 Schedule 2 to the amending Act (deterring corporate misconduct)

- (1) The amendment made by item 2 of Schedule 2 to the amending Act applies in relation to a compromise or arrangement if an application relating to the compromise or arrangement was made under subsection 411(1) on or after the day on which that item commences.
- (2) The amendment made by item 11 of Schedule 2 to the amending Act applies in relation to a matter that appears to a person:
 - (a) during the 6-month period ending when that item commences; or
 - (b) on or after the day on which that item commences;where the relevant date is on or after the day on which that item commences.
- (3) Section 489A applies in relation to a section 486B warrant if the warrant is issued on or after the day on which that section commences.

1482 Schedule 3 to the amending Act (improving regulation of insolvency practitioners)

- (1) The amendment made by item 7 of Schedule 3 to the amending Act applies to an application for registration if the application was made on or after the day on which that item commences.
- (2) Despite the amendment made by item 9 of Schedule 3 to the amending Act, subsection 1288(3) continues to apply, in relation to a 3-year period ending before the day on which that item commences, as if that amendment had not been made.
- (3) Subsection 1288(3) as amended by item 9 of Schedule 3 to the amending Act applies as follows:
 - (a) in the case of a person whose first 12 months of registration ends on or after the day on which that item commences—that subsection applies in relation to:
 - (i) the person's first 12 months of registration; and
 - (ii) each subsequent period of 12 months;
 - (b) in the case of a person whose first 12 months of registration ended before the day on which that item commences—that

Section 1483

subsection applies as if the reference in paragraph 1288(3)(a) to the day on which the person's registration begins (the *initial registration day*) were a reference to the last anniversary of the initial registration day that occurred before the day on which that item commences.

For this purpose, a person's *first 12 months of registration* is the period of 12 months beginning on the day on which the person's registration begins.

- (4) The amendment made by item 12 of Schedule 3 to the amending Act applies in relation to a decision made on or after the day on which that item commences.

1483 Schedule 4 to the amending Act (fine-tuning voluntary administration)

- (1) The amendments made by items 1, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 39, 40, 45, 49, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61 and 62 of Schedule 4 to the amending Act, in so far as they relate to a company under administration, apply if the administration begins on or after the day on which those items commence.
- (2) The amendments made by items 2, 3 and 4 of Schedule 4 to the amending Act apply to an appointment of an administrator if the appointment is made on or after the day on which those items commence.
- (3) The amendment made by item 8 of Schedule 4 to the amending Act applies to a transfer or alteration that occurs on or after the day on which that item commences.
- (4) The amendments made by items 23, 24, 25, 26 and 28 of Schedule 4 to the amending Act, in so far as they apply to a company that is, or is proposed to be, subject to a deed of company arrangement, apply if the administration that ends, or is to end, on the execution of the deed, began on or after the day on which those items commence.
- (5) The amendments made by items 27, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 43, 44, 46, 55, 56 and 57 of Schedule 4 to the amending Act, in so far as they relate to a company subject to a deed of company arrangement, apply if the administration that ended on

Section 1483

the execution of the deed began on or after the day on which those items commence.

- (6) Items 37 and 38 of Schedule 4 to the amending Act apply in relation to a company if the winding up of the company begins on or after the day on which those items commence.
 - (7) The amendments made by items 41 and 42 of Schedule 4 to the amending Act apply in relation to a company subject to a deed arrangement if the administration that ended on the execution of the deed began on or after the day on which those items commence.
 - (8) The amendments made by items 63, 65, 66, 67, 69 and 70 of Schedule 4 to the amending Act, in so far as they relate to the winding up of a company, apply if the relevant date is on or after the day on which those items commence.
 - (9) Section 440BA, in so far as it relates to a company under administration, applies if the administration begins on or after the day on which that section commences.
 - (10) Section 440BB does not apply to distress for rent that began to be carried out before the day on which that section commences.
 - (11) Subsections 442C(7) and (8), in so far as they relate to a company under administration, apply if the administration begins on or after the day on which those subsections commence.
 - (12) Subsections 442C(7) and (8), in so far as they relate to a company subject to a deed of company arrangement, apply if the administration that ended on the execution of the deed began on or after the day on which those subsections commence.
 - (13) Section 446C applies in relation to a company as follows:
 - (a) if the company was under administration immediately before the liquidation time referred to in that section—the administration begins on or after the day on which that section commences;
 - (b) if the company was subject to a deed of company arrangement immediately before the liquidation time referred to in that section—the administration that ended on the execution of the deed began on or after the day on which that section commences.
-

Section 1483

- (14) Subsection 588FE(2A) applies in relation to a company if the administration referred to paragraph 588FE(2A)(b) begins on or after the day on which that subsection commences.
- (15) Subsection 588FE(2B) applies in relation to a company if the administration that ended on the execution of the deed of company arrangement referred to in paragraph 588FE(2B)(b) began on or after the day on which that subsection commences.

Part 10.10 Transitional provisions relating to the Corporations Amendment (Short Selling) Act 2008

1484 Declarations under paragraph 1020F(1)(c) relating to short selling

- (1) To avoid doubt, an instrument mentioned in subsection (2) that was made at a particular time was validly made under paragraph 1020F(1)(c) at that time.
- (2) The instruments are as follows:
 - (a) ASIC Class Order [CO 08/751], registered on the Federal Register of Legislative Instruments on 22 September 2008;
 - (b) ASIC Class Order [CO 08/752], registered on the Federal Register of Legislative Instruments on 22 September 2008;
 - (c) ASIC Class Order [CO 08/753], registered on the Federal Register of Legislative Instruments on 22 September 2008;
 - (d) ASIC Class Order [CO 08/763], registered on the Federal Register of Legislative Instruments on 23 September 2008;
 - (e) ASIC Class Order [CO 08/801], registered on the Federal Register of Legislative Instruments on 24 October 2008.
- (3) To avoid doubt, an instrument (if any) that:
 - (a) was made at a time:
 - (i) after 24 October 2008; and
 - (ii) before the commencement of this section; and
 - (b) is of substantially the same nature as the instruments mentioned in subsection (2); and
 - (c) was registered on the Federal Register of Legislative Instruments:
 - (i) after 24 October 2008; and
 - (ii) before the commencement of this section;was validly made under paragraph 1020F(1)(c) at that time.
- (4) This section applies on and after 19 September 2008.

Chapter 10 Transitional provisions

Part 10.10 Transitional provisions relating to the Corporations Amendment (Short Selling) Act 2008

Section 1484

(5) In this section:

Federal Register of Legislative Instruments means the Federal Register of Legislative Instruments established under the *Legislative Instruments Act 2003*.

Schedule 3—Penalties

Note: See section 1311.

Penalties		
Item	Provision	Penalty
1	Section 111AU	200 penalty units or imprisonment for 5 years, or both.
2	Subsection 113(1)	50 penalty units or imprisonment for 1 year, or both.
3	Subsection 113(3)	5 penalty units.
4	Section 115	5 penalty units.
5	Subsection 117(5)	10 penalty units, or imprisonment for 3 months, or both.
6	Subsection 123(3)	10 penalty units, or imprisonment for 3 months, or both.
7	Subsection 136(5)	5 penalty units.
8	Subsection 139(1)	5 penalty units.
9	Subsections 142(1) and (2)	5 penalty units.
10	Subsection 143(1)	5 penalty units.
11	Section 144	10 penalty units or imprisonment for 3 months, or both.
12	Subsections 145(1) and (3)	5 penalty units.
13	Subsection 146(1)	5 penalty units.
14	Subsections 148(2), (3) and (4)	10 penalty units or imprisonment for 3 months, or both.
15	Subsection 150(2)	5 penalty units.
16	Subsection 151(2)	5 penalty units.
17	Subsections 153(1) and (2)	10 penalty units or imprisonment for 3 months, or both.
18	Subsection 156(1)	10 penalty units or imprisonment for 3 months, or both.
19	Subsection 157(2)	5 penalty units.

Penalties		
Item	Provision	Penalty
20	Subsection 158(2)	50 penalty units or imprisonment for 1 year, or both.
20A	Subsection 161A(2) or (3)	10 penalty units or imprisonment for 3 months, or both.
21	Subsection 162(3)	5 penalty units.
22	Subsection 163(5)	10 penalty units or imprisonment for 3 months, or both.
23	Subsection 165(2)	50 penalty units or imprisonment for 1 year, or both.
24	Section 168	10 penalty units or imprisonment for 3 months, or both.
25	Subsection 170(3)	10 penalty units or imprisonment for 3 months, or both.
26	Section 172	10 penalty units or imprisonment for 3 months, or both.
27	Section 173	10 penalty units or imprisonment for 3 months, or both.
28	Subsection 174(1)	10 penalty units or imprisonment for 3 months, or both.
29	Section 177	10 penalty units or imprisonment for 3 months, or both.
29A	Subsection 178A(1)	5 penalty units.
29B	Subsection 178C(1)	5 penalty units.
30	Section 184	2,000 penalty units or imprisonment for 5 years, or both.
31	Subsections 188(1) and (2)	5 penalty units.
32	Subsection 191(1)	10 penalty units or imprisonment for 3 months, or both.
33	Subsection 195(1)	5 penalty units.
34	Subsection 199B(1)	5 penalty units.
35	Subsection 200B(1)	25 penalty units or imprisonment for 6 months, or both.
36	Subsection 200C(1)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
37	Section 200D	25 penalty units or imprisonment for 6 months, or both.
38	Subsection 201D(1)	10 penalty units or imprisonment for 3 months, or both.
39	Subsection 201D(2)	5 penalty units.
40	Subsection 202B(1)	5 penalty units.
41	Subsections 203D(3) and (5)	5 penalty units.
42	Section 204A	5 penalty units.
43	Subsections 204C(1) and (2)	5 penalty units.
44	Subsections 205B(1), (2), (4) and (5)	10 penalty units or imprisonment for 3 months, or both.
45	Subsections 205C(1) and (2)	10 penalty units or imprisonment for 3 months, or both.
46	Subsection 205E(2)	10 penalty units or imprisonment for 3 months, or both.
47	Subsection 205F(1)	10 penalty units or imprisonment for 3 months, or both.
48	Subsections 205G(1), (3) and (4)	10 penalty units or imprisonment for 3 months, or both.
49	Subsection 206A(1)	50 penalty units or imprisonment for 1 year, or both.
50	Subsection 209(3)	2000 penalty units, or imprisonment for 5 years, or both.
51	Section 224	200 penalty units or imprisonment for 5 years, or both.
52	Section 225	5 penalty units.
53	Section 235	50 penalty units or imprisonment for 1 year, or both.
54	Section 237	25 penalty units or imprisonment for 6 months, or both.
55	Section 242	10 penalty units or imprisonment for 3 months, or both.
56	Subsection 242AA(3)	5 penalty units.
58	Subsection 246B(3)	5 penalty units.

Penalties		
Item	Provision	Penalty
59	Subsection 246D(6)	5 penalty units.
60	Subsections 246F(1) and (3)	5 penalty units.
61	Subsection 246G(1)	5 penalty units.
62	Section 247C	5 penalty units.
63	Subsections 249E(3) and (4)	5 penalty units.
64	Section 249K	5 penalty units.
65	Section 249Z	5 penalty units.
65A	Subsection 249L(1) or (2)	5 penalty units.
66	Subsection 250A(5)	5 penalty units.
67	Subsections 250N(1) and (2)	10 penalty units or imprisonment for 3 months, or both.
68	Subsections 250P(3) and (4)	10 penalty units or imprisonment for 3 months, or both.
68A	Subsection 250R(2)	5 penalty units.
68A	Subsections 250PA(3), (4), (6) and (9)	5 penalty units.
68B	Subsections 250RA(1) and (3)	10 penalty units.
69	Section 250S	5 penalty units.
69A	Section 250SA	5 penalty units.
70	Subsections 250T(1) and (4)	5 penalty units.
71	Subsections 251A(1) to (5)	10 penalty units or imprisonment for 3 months, or both.
72	Subsections 251B(1), (3) and (4)	5 penalty units.
73	Subsections 252C(3) and (4)	5 penalty units.
74	Section 252H	5 penalty units.
75	Section 252X	5 penalty units.
76	Subsection 252Y(5)	5 penalty units.
77	Subsections 253M(1), (2) and (3)	10 penalty units or imprisonment for 3 months, or both.

Penalties		
Item	Provision	Penalty
78	Subsections 253N(1), (3) and (4)	5 penalty units.
79	Subsection 254H(4)	5 penalty units.
80	Subsection 254L(3)	2,000 penalty units, or imprisonment for 5 years, or both.
81	Subsection 254N(2)	5 penalty units.
82	Subsection 254Q(13)	5 penalty units.
83	Section 254T	100 penalty units or imprisonment for 2 years, or both.
84	Subsections 254X(1) and (2)	5 penalty units.
85	Section 254Y	5 penalty units.
86	Subsection 256D(4)	2,000 penalty units, or imprisonment for 5 years, or both.
87	Subsection 259B(6)	5 penalty units.
88	Subsection 259D(4)	5 penalty units.
89	Subsection 259F(3)	2,000 penalty units, or imprisonment for 5 years, or both.
90	Subsection 260D(3)	2,000 penalty units, or imprisonment for 5 years, or both.
91	Subsection 283AA(1)	25 penalty units or imprisonment for 6 months, or both.
92	Subsection 283AA(3)	25 penalty units or imprisonment for 6 months, or both.
93	Section 283AB	25 penalty units or imprisonment for 6 months, or both.
94	Subsection 283AC(1)	25 penalty units or imprisonment for 6 months, or both.
95	Subsection 283AC(2)	25 penalty units or imprisonment for 6 months, or both.
96	Subsection 283BH(1)	200 penalty units or imprisonment for 5 years, or both.
97	Section 283BI	25 penalty units or imprisonment for 6 months, or both.
98	Section 283CE	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
99	Subsections 286(1) and (2)	25 penalty units or imprisonment for 6 months, or both.
100	Section 287	25 penalty units or imprisonment for 6 months, or both.
101	Section 288	25 penalty units or imprisonment for 6 months, or both.
102	Subsection 289(2)	25 penalty units or imprisonment for 6 months, or both.
103	Section 294	10 penalty units or imprisonment for 3 months, or both.
103A	Subsections 307C(1) and (2)	10 penalty units.
103B	Subsections 307A(1) and (2)	50 penalty units.
103C	Subsection 307B(1)	50 penalty units.
103D	Subsection 307B(3)	50 penalty units.
104	Subsections 308(1), (2), (3), (3A), (3C) and (4)	50 penalty units.
104A	Subsections 309(1), (2), (3), (4), (5), (5A) and (6)	50 penalty units.
105	Subsection 311(1), (2) or (3)	50 penalty units or imprisonment for 1 year, or both.
106	Subsection 312(1)	25 penalty units or imprisonment for 6 months, or both.
107	Section 313	10 penalty units or imprisonment for 3 months, or both.
108	Subsection 314(1) or (1AB)	10 penalty units or imprisonment for 3 months, or both.
109	Section 316	10 penalty units or imprisonment for 3 months, or both.
110	Subsection 317(1)	10 penalty units or imprisonment for 3 months, or both.
111	Subsections 318(1), (3) and (4)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
112	Subsection 319(1)	25 penalty units or imprisonment for 6 months, or both.
112A	Section 320	25 penalty units or imprisonment for 6 months, or both
112B	Section 321	10 penalty units or imprisonment for 3 months, or both
113	Section 322	10 penalty units or imprisonment for 3 months, or both.
114	Subsection 323(1)	25 penalty units or imprisonment for 6 months, or both.
115	Subsection 323B(1)	25 penalty units or imprisonment for 6 months, or both.
116	Subsection 323D(3)	10 penalty units or imprisonment for 3 months, or both.
116A	Section 323EE	25 penalty units.
116BA	Section 324BA	25 penalty units or imprisonment for 6 months, or both.
116BB	Subsection 324BB(1)	25 penalty units or imprisonment for 6 months, or both.
116BC	Subsection 324BB(2)	10 penalty units.
116BD	Subsections 324BC(1) and (2)	25 penalty units or imprisonment for 6 months, or both.
116BE	Subsection 324BC(3)	10 penalty units.
116CA	Subsection 324CA(1)	25 penalty units or imprisonment for 6 months, or both.
116CB	Subsections 324CA(1A) and (2)	10 penalty units.
116CC	Subsection 324CB(1)	25 penalty units or imprisonment for 6 months, or both.
116CD	Subsections 324CB(1A), (2) and (4)	10 penalty units.
116CE	Subsection 324CC(1)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
116CF	Subsections 324CC(1A), (2) and (4)	10 penalty units.
116DA	Subsection 324CE(1)	25 penalty units or imprisonment for 6 months, or both.
116DB	Subsections 324CE(1A) and (2)	10 penalty units.
116EA	Subsection 324CF(1)	25 penalty units or imprisonment for 6 months, or both.
116EB	Subsections 324CF(1A) and (2)	10 penalty units.
116FA	Subsection 324CG(1)	25 penalty units or imprisonment for 6 months, or both.
116FB	Subsections 324CG(1A) and (2)	10 penalty units.
116FC	Subsection 324CG(5)	25 penalty units or imprisonment for 6 months, or both.
116FD	Subsections 324CG(5A) and (6)	10 penalty units.
116GA	Section 324CI	25 penalty units or imprisonment for 6 months, or both.
116GB	Section 324CJ	25 penalty units or imprisonment for 6 months, or both.
116GC	Section 324CK	25 penalty units or imprisonment for 6 months, or both.
116H	Subsections 324CM(1), (2) and (3)	25 penalty units or imprisonment for 6 months, or both.
116I	Section 324DB	25 penalty units or imprisonment for 6 months, or both.
116JA	Subsection 324DC(1)	25 penalty units or imprisonment for 6 months, or both.
116JB	Subsection 324DC(2)	10 penalty units.
116KA	Subsections 324DD(1) and (2)	25 penalty units or imprisonment for 6 months, or both.
116KB	Subsection 324DD(3)	10 penalty units.

Penalties		
Item	Provision	Penalty
116LA	Subsection 327A(3)	25 penalty units or imprisonment for 6 months, or both.
116LB	Subsections 327B(1) and (3)	25 penalty units or imprisonment for 6 months, or both.
116LC	Subsection 327C(3)	25 penalty units or imprisonment for 6 months, or both.
116MA	Subsection 328A(4)	25 penalty units or imprisonment for 6 months, or both.
116MB	Subsection 328B(2)	25 penalty units or imprisonment for 6 months, or both.
116NA	Subsections 331AAA(1) and (3)	25 penalty units or imprisonment for 6 months, or both.
116NB	Subsections 331AAB(1) and (2)	25 penalty units or imprisonment for 6 months, or both.
116O	Subsection 342B(1)	5 penalty units.
117	Subsection 344(2)	2,000 penalty units, or imprisonment for 5 years, or both.
118	Subsections 346C(1) and (2)	5 penalty units.
119	Section 347A	10 penalty units.
119A	Section 347B	10 penalty units.
119B	Subsection 348D(1)	5 penalty units.
119C	Subsection 349A(1)	5 penalty units.
120	Section 428	10 penalty units or imprisonment for 3 months, or both.
121	Subsection 437C(1)	25 penalty units or imprisonment for 6 months, or both.
122	Subsection 437D(5)	25 penalty units or imprisonment for 6 months, or both.
123	Subsection 438B(4)	50 penalty units or imprisonment for 1 year, or both.
124	Subsection 438C(5)	50 penalty units or imprisonment for 1 year, or both.
124A	Subsection 446C(4)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
125	Subsection 448B(1)	25 penalty units or imprisonment for 6 months, or both.
126	Section 448C	25 penalty units or imprisonment for 6 months, or both.
127	Section 448D	25 penalty units or imprisonment for 6 months, or both.
128	Section 450E	10 penalty units.
129	Section 471A	25 penalty units or imprisonment for 6 months, or both.
130	Section 475	25 penalty units or imprisonment for 6 months, or both.
131	Subsection 486A(8)	100 penalty units or imprisonment for 2 years, or both.
132	Section 494	50 penalty units or imprisonment for 1 year, or both.
133	Section 497	10 penalty units or imprisonment for 3 months, or both.
134	Subsection 530A(6)	50 penalty units or imprisonment for 1 year, or both.
135	Subsections 530B(3) and (6)	50 penalty units or imprisonment for 1 year, or both.
136	Section 532	10 penalty units or imprisonment for 3 months, or both.
137	Subsection 541(1)	10 penalty units or imprisonment for 3 months, or both.
138	Subsection 588G(3)	2,000 penalty units, or imprisonment for 5 years, or both.
139	Subsection 590(1)	100 penalty units or imprisonment for 2 years, or both.
140	Subsection 590(5)	50 penalty units or imprisonment for 1 year, or both.
141	Subsection 592(1)	50 penalty units or imprisonment for 1 year, or both.
142	Subsection 592(6)	100 penalty units or imprisonment for 2 years, or both.

Penalties		
Item	Provision	Penalty
143	Subsection 595(1)	10 penalty units or imprisonment for 3 months, or both.
144	Subsection 596(1)	100 penalty units or imprisonment for 2 years, or both.
145	Subsection 596AB(1)	1,000 penalty units or imprisonment for 10 years, or both.
146	Subsection 596F(3)	100 penalty units or imprisonment for 2 years, or both.
147	Section 597	100 penalty units or imprisonment for 2 years, or both.
148	Subsections 597(6), (7), (10A) and (13)	100 penalty units or imprisonment for 2 years, or both.
149	Subsection 597A(3)	100 penalty units or imprisonment for 2 years, or both.
150	Subsection 601AD(5)	5 penalty units.
151	Subsection 601BC(5)	10 penalty units or imprisonment for 3 months, or both.
152	Subsections 601BH(1) and (2)	5 penalty units.
153	Subsection 601BJ(3)	5 penalty units.
154	Subsection 601BK(1)	5 penalty units.
155	Subsection 601BP(1)	5 penalty units.
156	Subsection 601BR(1)	5 penalty units.
157	Section 601CW	10 penalty units or imprisonment for 3 months, or both.
158	Subsection 601CZB(1)	10 penalty units or imprisonment for 3 months, or both.
159	Section 601CZC	10 penalty units or imprisonment for 3 months, or both.
160	Subsection 601DD(1)	5 penalty units.
161	Subsection 601DE(1)	10 penalty units or imprisonment for 3 months, or both.
162	Subsection 601DH(1)	5 penalty units.
163	Subsection 601ED(5)	200 penalty units or imprisonment for 5 years, or both.

Penalties		
Item	Provision	Penalty
163A	Subsection 601FC(6)	2,000 penalty units or imprisonment for 5 years, or both.
163B	Subsection 601FD(4)	2,000 penalty units or imprisonment for 5 years, or both.
163C	Subsection 601FE(4)	2,000 penalty units or imprisonment for 5 years, or both.
164	Subsection 601FF(3)	200 penalty units or imprisonment for 5 years, or both.
164A	Subsection 601FG(3)	2,000 penalty units or imprisonment for 5 years, or both.
164B	Subsection 601JD(4)	2,000 penalty units or imprisonment for 5 years, or both.
165	Subsection 601FL(4)	100 penalty units or imprisonment for 2 years, or both.
166	Subsection 601FM(3)	100 penalty units or imprisonment for 2 years, or both.
167	Subsection 601FQ(6)	100 penalty units or imprisonment for 2 years, or both.
168	Subsection 601HD(1)	25 penalty units or imprisonment for 6 months, or both.
168A	Subsection 601HG(4), (4A) or (4B)	50 penalty units or imprisonment for 1 year, or both.
169	Subsection 601HG(6)	25 penalty units or imprisonment for 6 months, or both.
170	Subsection 601JA(3)	100 penalty units or imprisonment for 2 years, or both.
171	Subsection 601JA(4)	25 penalty units or imprisonment for 6 months, or both.
172	Subsection 601JB(5)	25 penalty units or imprisonment for 6 months, or both.
173	Subsection 601KA(3)	25 penalty units or imprisonment for 6 months, or both.
174	Subsection 606(1)	25 penalty units or imprisonment for 6 months, or both.
175	Subsection 606(2)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
176	Subsection 606(4)	25 penalty units or imprisonment for 6 months, or both.
177	Paragraphs 614(1)(a), (b), (c) and (d)	100 penalty units or imprisonment for 2 years, or both.
178	Subsection 622(1)	25 penalty units or imprisonment for 6 months, or both.
179	Subsection 623(1)	25 penalty units or imprisonment for 6 months, or both.
180	Subsection 624(2)	25 penalty units or imprisonment for 6 months, or both.
181	Subsections 630(2), (3) and (4)	25 penalty units or imprisonment for 6 months, or both.
182	Subsection 631(1)	100 penalty units or imprisonment for 2 years, or both.
183	Subsection 631(2)	200 penalty units or imprisonment for 5 years, or both.
184	Subsection 633(1) (items 4, 5, 7, 8, 9, 11, 12, 13, 14)	25 penalty units or imprisonment for 6 months, or both.
185	Subsection 635(1) (items 5, 7, 8, 10, 11, 12, 13, 14)	25 penalty units or imprisonment for 6 months, or both.
186	Subsection 636(3)	25 penalty units or imprisonment for 6 months, or both.
187	Subsection 636(4)	10 penalty units.
188	Subsection 637(1)	25 penalty units or imprisonment for 6 months, or both.
189	Subsection 638(1)	25 penalty units or imprisonment for 6 months, or both.
190	Subsection 638(3)	25 penalty units or imprisonment for 6 months, or both.
191	Subsection 638(5)	25 penalty units or imprisonment for 6 months, or both.
192	Subsection 638(6)	10 penalty units.
193	Subsection 639(1)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
194	Subsection 640(1)	25 penalty units or imprisonment for 6 months, or both.
195	Subsection 641(1)	25 penalty units or imprisonment for 6 months, or both.
196	Section 643	25 penalty units or imprisonment for 6 months, or both.
197	Section 644	25 penalty units or imprisonment for 6 months, or both.
198	Subsections 647(1), (2) and (3)	25 penalty units or imprisonment for 6 months, or both.
199	Subsection 648A(1)	25 penalty units or imprisonment for 6 months, or both.
200	Subsections 648E(1) and (2)	25 penalty units or imprisonment for 6 months, or both.
201	Section 648G	50 penalty units or imprisonment for 1 year, or both.
202	Subsection 649C(2)	25 penalty units or imprisonment for 6 months, or both.
203	Subsection 650B(3)	25 penalty units or imprisonment for 6 months, or both.
204	Subsections 650E(5) and (6)	25 penalty units or imprisonment for 6 months, or both.
205	Subsection 650F(3)	25 penalty units or imprisonment for 6 months, or both.
206	Subsection 651A(4)	25 penalty units or imprisonment for 6 months, or both.
207	Section 651C	25 penalty units or imprisonment for 6 months, or both.
208	Subsection 652C(3)	25 penalty units or imprisonment for 6 months, or both.
209	Subsection 654A(1)	25 penalty units or imprisonment for 6 months, or both.
210	Subsection 654C(1)	25 penalty units or imprisonment for 6 months, or both.
211	Subsection 654C(3)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
212	Subsection 657F(1)	25 penalty units or imprisonment for 6 months, or both.
213	Subsection 661D(1)	25 penalty units or imprisonment for 6 months, or both.
214	Subsection 662A(1)	25 penalty units or imprisonment for 6 months, or both.
215	Subsection 663A(1)	25 penalty units or imprisonment for 6 months, or both.
216	Subsections 664D(1), (2) and (3)	25 penalty units or imprisonment for 6 months, or both.
217	Subsections 664E(2), (3) and (4)	25 penalty units or imprisonment for 6 months, or both.
218	Subsection 665A(2)	25 penalty units or imprisonment for 6 months, or both.
221	Subsection 666A(1)	25 penalty units or imprisonment for 6 months, or both.
222	Subsections 666B(2) and (3)	25 penalty units or imprisonment for 6 months, or both.
223	Subsection 667A(3)	25 penalty units or imprisonment for 6 months, or both.
224	Subsections 668A(1), (3) and (4)	25 penalty units or imprisonment for 6 months, or both.
225	Subsection 668B(1)	25 penalty units or imprisonment for 6 months, or both.
226	Subsection 670A(3)	50 penalty units or imprisonment for 1 year, or both.
227	Subsections 670C(1), (2) and (3)	25 penalty units or imprisonment for 6 months, or both.
228	Subsection 671B(1)	25 penalty units or imprisonment for 6 months, or both.
229	Subsection 672B(1)	25 penalty units or imprisonment for 6 months, or both.
229AA	Subsections 672DA(1), (2), (3), (4), (6), (7), (8) and (9)	10 penalty units.
229A	Subsection 674(2)	200 penalty units or imprisonment for 5 years, or both.

Penalties		
Item	Provision	Penalty
229B	Subsection 674(5)	100 penalty units or imprisonment for 2 years, or both.
229C	Subsection 675(2)	200 penalty units or imprisonment for 5 years, or both.
229CA	Subsection 708AA(10)	25 penalty units or imprisonment for 6 months, or both.
229D	Subsection 708A(9)	25 penalty units or imprisonment for 6 months, or both.
230	Subsection 721(5)	200 penalty units or imprisonment for 5 years, or both.
232	Subsection 722(1)	25 penalty units or imprisonment for 6 months, or both.
233	Subsection 724(1)	25 penalty units or imprisonment for 6 months, or both.
234	Subsection 725(1)	25 penalty units or imprisonment for 6 months, or both.
235	Section 726	200 penalty units or imprisonment for 5 years, or both.
236	Subsection 727(1)	200 penalty units or imprisonment for 5 years, or both.
237	Subsection 727(2)	200 penalty units or imprisonment for 5 years, or both.
238	Subsection 727(3)	200 penalty units or imprisonment for 5 years, or both.
239	Subsection 727(4)	200 penalty units or imprisonment for 5 years, or both.
240	Subsection 728(3)	200 penalty units or imprisonment for 5 years, or both.
241	Subsection 730(1)	50 penalty units or imprisonment for 1 year, or both.
242	Subsection 734(1)	25 penalty units or imprisonment for 6 months, or both.
243	Subsection 734(2)	25 penalty units or imprisonment for 6 months, or both.
244	Subsection 735(1)	10 penalty units or imprisonment for 3 months, or both.

Penalties		
Item	Provision	Penalty
245	Subsection 736(1)	25 penalty units or imprisonment for 6 months, or both.
246A	Subsection 791A(1)	500 penalty units or imprisonment for 5 years, or both.
246B	Subsection 791B(1)	500 penalty units or imprisonment for 5 years, or both.
246C	Subsection 792B(1)	100 penalty units or imprisonment for 2 years, or both.
247A	Subsection 792B(2)	100 penalty units or imprisonment for 2 years, or both.
247B	Subsection 792B(3)	100 penalty units or imprisonment for 2 years, or both.
247C	Subsection 792B(4)	100 penalty units or imprisonment for 2 years, or both.
248A	Subsection 792B(5)	100 penalty units or imprisonment for 2 years, or both.
248B	Subsection 792C(1)	100 penalty units or imprisonment for 2 years, or both.
248C	Subsection 792D(1)	25 penalty units or imprisonment for 6 months, or both.
249A	Section 792E	100 penalty units or imprisonment for 2 years, or both.
249B	Subsection 792F(1)	100 penalty units or imprisonment for 2 years, or both.
249C	Subsection 792F(2)	50 penalty units.
250A	Subsection 792F(3)	100 penalty units or imprisonment for 2 years, or both.
250B	Subsection 792G(1)	100 penalty units or imprisonment for 2 years, or both.
250C	Subsection 792G(2)	100 penalty units or imprisonment for 2 years, or both.
250D	Section 792I	50 penalty units.
251A	Subsection 793D(3)	100 penalty units or imprisonment for 2 years, or both.
251B	Subsection 794B(3)	100 penalty units or imprisonment for 2 years, or both.

Penalties		
Item	Provision	Penalty
251C	Subsection 794D(3)	100 penalty units for each day, or part of a day, in respect of which the offence is committed.
252A	Subsection 794E(2)	100 penalty units for each day, or part of a day, in respect of which the offence is committed.
252B	Subsection 798C(3)	100 penalty units or imprisonment for 2 years, or both.
252C	Subsection 798C(6)	100 penalty units or imprisonment for 2 years, or both.
253A	Subsection 798D(4)	100 penalty units or imprisonment for 2 years, or both.
253AA	Subsection 798DA(4)	100 penalty units or imprisonment for 2 years, or both.
253B	Subsection 820A(1)	500 penalty units or imprisonment for 5 years, or both.
253C	Subsection 820B(1)	500 penalty units or imprisonment for 5 years, or both.
254A	Subsection 821B(1)	100 penalty units or imprisonment for 2 years, or both.
254B	Subsection 821B(2)	100 penalty units or imprisonment for 2 years, or both.
254C	Subsection 821B(3)	100 penalty units or imprisonment for 2 years, or both.
255A	Subsection 821B(4)	100 penalty units or imprisonment for 2 years, or both.
255AA	Subsection 821BA(1)	100 penalty units or imprisonment for 2 years, or both.
255B	Subsection 821C(1)	25 penalty units or imprisonment for 6 months, or both.
255BA	Subsection 821C(3)	25 penalty units or imprisonment for 6 months, or both.
255C	Section 821D	25 penalty units or imprisonment for 6 months, or both.
256A	Subsection 821E(1)	100 penalty units or imprisonment for 2 years, or both.
256B	Subsection 821E(2)	50 penalty units.

Penalties		
Item	Provision	Penalty
256C	Subsection 821E(3)	100 penalty units or imprisonment for 2 years, or both.
257A	Subsection 822D(3)	100 penalty units or imprisonment for 2 years, or both.
257B	Subsection 823B(3)	100 penalty units or imprisonment for 2 years, or both.
257C	Subsection 823D(5)	100 penalty units for each day, or part of a day, in respect of which the offence is committed.
257D	Subsection 823E(3)	100 penalty units for each day, or part of a day, in respect of which the offence is committed.
258A	Section 850C	400 penalty units or imprisonment for 4 years, or both.
258B	Subsection 851D(8)	100 penalty units or imprisonment for 2 years, or both.
258C	Subsection 852B(2)	400 penalty units or imprisonment for 4 years, or both.
259A	Subsection 853F(1)	500 penalty units or imprisonment for 5 years, or both.
259B	Subsection 853F(2)	500 penalty units or imprisonment for 5 years, or both.
259C	Subsection 854A(5)	100 penalty units or imprisonment for 2 years, or both.
260A	Subsection 892B(1)	200 penalty units or imprisonment for 5 years, or both.
260B	Subsection 892B(4)	200 penalty units or imprisonment for 5 years, or both.
260C	Subsection 892H(1)	200 penalty units or imprisonment for 5 years, or both.
261A	Subsection 892H(2)	200 penalty units or imprisonment for 5 years, or both.
261B	Subsection 892H(3)	200 penalty units or imprisonment for 5 years, or both.
261C	Subsection 892H(6)	50 penalty units or imprisonment for 1 year, or both.
262A	Subsection 892H(7)	50 penalty units or imprisonment for 1 year, or both.

Penalties		
Item	Provision	Penalty
262B	Subsection 892K(2)	100 penalty units or imprisonment for 2 years, or both.
262C	Subsection 911A(1)	200 penalty units or imprisonment for 2 years, or both.
263A	Subsection 911B(1)	200 penalty units or imprisonment for 2 years, or both.
263B	Section 911C	50 penalty units or imprisonment for 1 year, or both.
263C	Subsection 912C(3)	25 penalty units or imprisonment for 6 months, or both.
264A	Subsection 912D(1B)	50 penalty units or imprisonment for 1 year, or both.
264B	Subsection 912D(2)	50 penalty units or imprisonment for 1 year, or both.
264C	Subsection 912E(1)	25 penalty units or imprisonment for 6 months, or both.
265A	Subsection 912F(1)	10 penalty units.
265AA	Subsection 916A(3A)	100 penalty units or imprisonment for 2 years, or both.
265AB	Subsection 916B(2A)	100 penalty units or imprisonment for 2 years, or both.
265AC	Subsection 916B(5A)	50 penalty units or imprisonment for 1 year, or both.
265AD	Subsection 916C(3)	100 penalty units or imprisonment for 2 years, or both.
265AE	Subsection 916D(2A)	100 penalty units or imprisonment for 2 years, or both.
265B	Subsection 916F(1)	25 penalty units or imprisonment for 6 months, or both.
265BA	Subsection 916F(1A)	25 penalty units or imprisonment for 6 months, or both.
265C	Subsection 916F(3)	25 penalty units or imprisonment for 6 months, or both.
266A	Subsection 916G(2)	50 penalty units or imprisonment for 1 year, or both.

Penalties		
Item	Provision	Penalty
266B	Subsection 916G(3)	50 penalty units or imprisonment for 1 year, or both.
266C	Subsection 919B(4)	25 penalty units or imprisonment for 6 months, or both.
267A	Subsection 919C(1)	50 penalty units or imprisonment for 1 year, or both.
267B	Subsection 919C(2)	50 penalty units or imprisonment for 1 year, or both.
267C	Subsection 919C(3)	50 penalty units or imprisonment for 1 year, or both.
268A	Section 919D	25 penalty units or imprisonment for 6 months, or both.
268B	Subsection 920C(2)	25 penalty units or imprisonment for 6 months, or both.
268C	Subsection 923A(1)	10 penalty units for each day, or part of a day, in respect of which the offence is committed.
269A	Subsection 923B(1)	10 penalty units for each day, or part of a day, in respect of which the offence is committed.
269AA	Subsection 942B(8)	50 penalty units or imprisonment for 1 year, or both.
269AB	Subsection 942C(8)	50 penalty units or imprisonment for 1 year, or both.
269B	Section 942E	100 penalty units or imprisonment for 2 years, or both.
269C	Section 943F	100 penalty units or imprisonment for 2 years, or both.
270A	Subsection 945A(1)	200 penalty units or imprisonment for 5 years, or both.
270B	Subsection 945A(3)	200 penalty units or imprisonment for 5 years, or both.
270C	Subsection 945B(1)	200 penalty units or imprisonment for 5 years, or both.
270CA	Subsection 946AA(4)	50 penalty units.
270CB	Subsection 946B(3A) or (9)	50 penalty units.

Penalties		
Item	Provision	Penalty
271B	Subsection 949A(2)	100 penalty units or imprisonment for 2 years, or both.
271C	Subsection 949A(5)	200 penalty units or imprisonment for 5 years, or both.
272A	Subsection 949B(2)	50 penalty units or imprisonment for 1 year, or both.
272B	Subsection 949B(4)	50 penalty units or imprisonment for 1 year, or both.
273B	Subsection 952C(1)	50 penalty units.
273C	Subsection 952C(3)	100 penalty units or imprisonment for 2 years, or both.
274A	Subsection 952D(1)	200 penalty units or imprisonment for 5 years, or both.
274B	Subsection 952D(2)	200 penalty units or imprisonment for 5 years, or both.
274C	Subsection 952E(1)	100 penalty units or imprisonment for 2 years, or both.
275A	Subsection 952E(3)	100 penalty units or imprisonment for 2 years, or both.
275B	Subsection 952F(2)	200 penalty units or imprisonment for 5 years, or both.
275C	Subsection 952F(3)	200 penalty units or imprisonment for 5 years, or both.
276A	Subsection 952F(4)	200 penalty units or imprisonment for 5 years, or both.
276B	Subsection 952G(2)	100 penalty units or imprisonment for 2 years, or both.
276C	Subsection 952G(4)	100 penalty units or imprisonment for 2 years, or both.
277A	Subsection 952G(6)	100 penalty units or imprisonment for 2 years, or both.
277B	Section 952H	200 penalty units or imprisonment for 5 years, or both.
277C	Subsection 952I(1)	10 penalty units.
278A	Subsection 952I(2)	10 penalty units.
278B	Subsection 952I(3)	10 penalty units.

Penalties		
Item	Provision	Penalty
278C	Subsection 952I(4)	10 penalty units.
279A	Subsection 952J(1)	10 penalty units.
279B	Section 952K	200 penalty units or imprisonment for 5 years, or both.
279C	Subsection 952L(1)	200 penalty units or imprisonment for 5 years, or both.
280A	Subsection 952L(2)	100 penalty units or imprisonment for 2 years, or both.
280B	Subsection 952L(3)	200 penalty units or imprisonment for 5 years, or both.
280C	Section 952M	200 penalty units or imprisonment for 5 years, or both.
281A	Subsection 982C(1)	100 penalty units or imprisonment for 2 years, or both.
281B	Subsection 982C(2)	100 penalty units or imprisonment for 2 years, or both.
281C	Section 982D	25 penalty units or imprisonment for 6 months, or both.
282A	Section 983C	25 penalty units or imprisonment for 6 months, or both.
282B	Subsection 984B(1)	(a) if the offence relates only to a contravention of requirements referred to in paragraph 984B(1)(a)—50 penalty units; (b) otherwise—100 penalty units or imprisonment for 2 years, or both.
282BA	Subsection 985D(1)	50 penalty units.
282C	Subsection 988A(1)	200 penalty units or imprisonment for 5 years, or both.
283A	Subsection 989B(1)	200 penalty units or imprisonment for 5 years, or both.
283B	Subsection 989B(2)	200 penalty units or imprisonment for 5 years, or both.
283C	Subsection 989B(3)	200 penalty units or imprisonment for 5 years, or both.
283CA	Subsections 989CA(1) and (2)	50 penalty units.

Penalties		
Item	Provision	Penalty
284A	Subsection 990B(1)	200 penalty units or imprisonment for 5 years, or both.
284B	Subsection 990B(2)	200 penalty units or imprisonment for 5 years, or both.
284C	Subsection 990B(6)	25 penalty units or imprisonment for 6 months, or both.
285A	Subsection 990D(1)	100 penalty units or imprisonment for 2 years, or both.
285B	Subsection 990D(2)	100 penalty units or imprisonment for 2 years, or both.
285C	Paragraph 990F(a)	100 penalty units or imprisonment for 2 years, or both.
286A	Subsection 990I(3)	100 penalty units or imprisonment for 2 years, or both.
286B	Subsection 990K(1)	50 penalty units or imprisonment for 1 year, or both.
286C	Subsection 991B(2)	25 penalty units or imprisonment for 6 months, or both.
287A	Subsection 991E(1)	25 penalty units or imprisonment for 6 months, or both.
287B	Subsection 991E(3)	25 penalty units or imprisonment for 6 months, or both.
287C	Subsection 991F(1)	25 penalty units or imprisonment for 6 months, or both.
288A	Subsection 991F(2)	25 penalty units or imprisonment for 6 months, or both.
288B	Subsection 991F(3)	25 penalty units or imprisonment for 6 months, or both.
288C	Subsection 992A(1)	25 penalty units or imprisonment for 6 months, or both.
288CA	Subsection 992A(3)	25 penalty units or imprisonment for 6 months, or both.
288CB	Subsection 992AA(1)	25 penalty units or imprisonment for 6 months, or both.
289A	Subsection 993B(1)	50 penalty units.

Penalties		
Item	Provision	Penalty
289B	Subsection 993B(3)	200 penalty units or imprisonment for 5 years, or both.
289C	Subsection 993C(1)	50 penalty units.
290A	Subsection 993C(3)	100 penalty units or imprisonment for 2 years, or both.
290B	Subsection 993D(1)	50 penalty units.
290C	Subsection 993D(3)	200 penalty units or imprisonment for 5 years, or both.
290CA	Subsection 1012DAA(10)	25 penalty units or imprisonment for 6 months, or both.
290D	Subsection 1012DA(9)	25 penalty units or imprisonment for 6 months, or both.
291A	Subsection 1012H(2)	100 penalty units or imprisonment for 2 years, or both.
291B	Subsection 1013I(4)	100 penalty units or imprisonment for 2 years, or both.
291C	Subsection 1013K(1)	100 penalty units or imprisonment for 2 years, or both.
292A	Subsection 1013K(2)	100 penalty units or imprisonment for 2 years, or both.
292B	Subsection 1015B(1)	100 penalty units or imprisonment for 2 years, or both.
292C	Subsection 1015D(2)	100 penalty units or imprisonment for 2 years, or both.
293A	Subsection 1015D(3)	100 penalty units or imprisonment for 2 years, or both.
293B	Subsection 1015D(4)	100 penalty units or imprisonment for 2 years, or both.
293C	Subsection 1015E(1)	100 penalty units or imprisonment for 2 years, or both.
294A	Subsection 1016A(2)	200 penalty units or imprisonment for 5 years, or both.
294B	Subsection 1016A(3)	200 penalty units or imprisonment for 5 years, or both.
294C	Subsection 1016B(1)	100 penalty units or imprisonment for 2 years, or both.

Penalties		
Item	Provision	Penalty
295A	Section 1016C	100 penalty units or imprisonment for 2 years, or both.
295B	Subsection 1016D(1)	100 penalty units or imprisonment for 2 years, or both.
295C	Paragraph 1016D(2)(d)	100 penalty units or imprisonment for 2 years, or both.
296A	Subsection 1016E(2)	100 penalty units or imprisonment for 2 years, or both.
296B	Subsection 1017B(1)	200 penalty units or imprisonment for 5 years, or both.
296C	Subsection 1017C(2)	100 penalty units or imprisonment for 2 years, or both.
296D	Subsection 1017C(2A)	100 penalty units or imprisonment for 2 years, or both.
297A	Subsection 1017C(3)	100 penalty units or imprisonment for 2 years, or both.
297AA	Subsection 1017C(3A)	100 penalty units or imprisonment for 2 years, or both.
297B	Subsection 1017C(5)	100 penalty units or imprisonment for 2 years, or both.
297C	Subsection 1017D(1)	100 penalty units or imprisonment for 2 years, or both.
297CA	Subsection 1017DA(3)	50 penalty units.
298A	Subsection 1017E(3)	100 penalty units or imprisonment for 2 years, or both.
298B	Subsection 1017E(4)	100 penalty units or imprisonment for 2 years, or both.
298C	Subsection 1017F(2)	100 penalty units or imprisonment for 2 years, or both.
299A	Subsection 1017G(1)	100 penalty units or imprisonment for 2 years, or both.
299B	Subsection 1018A(1)	100 penalty units or imprisonment for 2 years, or both.
299C	Subsection 1018A(2)	100 penalty units or imprisonment for 2 years, or both.

Penalties		
Item	Provision	Penalty
300A	Subsection 1018B(1)	100 penalty units or imprisonment for 2 years, or both.
300B	Subsection 1020A(1)	200 penalty units or imprisonment for 5 years, or both.
300C	Subsection 1020B(2)	(a) for a first offence—25 penalty units or imprisonment for 6 months, or both; (b) for a further offence—100 penalty units or imprisonment for 2 years, or both.
302A	Subsection 1020E(8)	100 penalty units or imprisonment for 2 years, or both.
302B	Subsection 1020E(9)	100 penalty units or imprisonment for 2 years, or both.
302C	Subsection 1021C(1)	50 penalty units.
303A	Subsection 1021C(3)	100 penalty units or imprisonment for 2 years, or both.
303B	Subsection 1021D(1)	200 penalty units or imprisonment for 5 years, or both.
303C	Subsection 1021D(2)	200 penalty units or imprisonment for 5 years, or both.
304A	Subsection 1021E(1)	100 penalty units or imprisonment for 2 years, or both.
304B	Subsection 1021E(2)	100 penalty units or imprisonment for 2 years, or both.
304C	Subsection 1021F(1)	200 penalty units or imprisonment for 5 years, or both.
304D	Subsection 1021FA(1)	200 penalty units or imprisonment for 5 years, or both.
304E	Subsection 1021FA(2)	100 penalty units or imprisonment for 2 years, or both.
304F	Subsection 1021FB(1)	200 penalty units or imprisonment for 5 years, or both.
304G	Subsection 1021FB(2)	200 penalty units or imprisonment for 5 years, or both.
304H	Subsection 1021FB(3)	100 penalty units or imprisonment for 2 years, or both.
304I	Subsection 1021FB(6)	100 penalty units or imprisonment for 2 years, or both.

Penalties		
Item	Provision	Penalty
305A	Section 1021G	200 penalty units or imprisonment for 5 years, or both.
305B	Subsection 1021H(1)	10 penalty units.
305C	Subsection 1021I(1)	200 penalty units or imprisonment for 5 years, or both.
306A	Subsection 1021J(1)	200 penalty units or imprisonment for 5 years, or both.
306B	Subsection 1021J(2)	100 penalty units or imprisonment for 2 years, or both.
306C	Subsection 1021J(3)	100 penalty units or imprisonment for 2 years, or both.
307A	Subsection 1021K(1)	200 penalty units or imprisonment for 5 years, or both.
307B	Subsection 1021L(1)	200 penalty units or imprisonment for 5 years, or both.
307C	Subsection 1021L(2)	200 penalty units or imprisonment for 5 years, or both.
307CA	Subsection 1021M(1)	50 penalty units.
307CB	Subsection 1021M(3)	100 penalty units or imprisonment for 2 years, or both.
308A	Section 1021N	100 penalty units or imprisonment for 2 years, or both.
308C	Subsection 1021O(1)	50 penalty units or imprisonment for 6 months, or both.
309A	Subsection 1021O(3)	200 penalty units or imprisonment for 5 years, or both.
309AA	Subsection 1021P(1)	100 penalty units or imprisonment for 2 years, or both.
309AB	Subsection 1021P(2)	100 penalty units or imprisonment for 2 years, or both.
309AC	Subsection 1021P(3)	50 penalty units.
309AD	Subsection 1021P(4)	100 penalty units or imprisonment for 2 years, or both.
309AE	Subsection 1021P(5)	50 penalty units.
309AF	Subsection 1021P(6)	50 penalty units.

Penalties		
Item	Provision	Penalty
309B	Section 1041A	200 penalty units or imprisonment for 5 years, or both.
309C	Subsection 1041B(1)	200 penalty units or imprisonment for 5 years, or both.
310A	Subsection 1041C(1)	200 penalty units or imprisonment for 5 years, or both.
310B	Section 1041D	200 penalty units or imprisonment for 5 years, or both.
310C	Subsection 1041E(1)	200 penalty units or imprisonment for 5 years, or both.
311A	Subsection 1041F(1)	200 penalty units or imprisonment for 5 years, or both.
311B	Subsection 1041G(1)	200 penalty units or imprisonment for 5 years, or both.
311C	Subsection 1043A(1)	2,000 penalty units or imprisonment for 5 years, or both.
312A	Subsection 1043A(2)	2,000 penalty units or imprisonment for 5 years, or both.
312B	Subsection 1070B(1)	10 penalty units.
312C	Subsection 1070C(1)	10 penalty units.
313A	Subsection 1070D(3)	10 penalty units.
313B	Subsection 1071B(2)	10 penalty units.
313C	Section 1071E	10 penalty units.
314A	Subsection 1072E(11)	10 penalty units.
314B	Subsection 1072H(1)	10 penalty units.
314C	Subsection 1072H(3)	10 penalty units.
315A	Subsection 1072H(4)	10 penalty units.
315B	Subsection 1072H(5)	10 penalty units.
315C	Subsection 1072H(6)	10 penalty units.
316A	Subsection 1101B(10)	100 penalty units or imprisonment for 2 years, or both.
316B	Subsection 1101C(1)	50 penalty units or imprisonment for 12 months, or both.
316C	Subsection 1101C(2)	50 penalty units or imprisonment for 12 months, or both.

Penalties		
Item	Provision	Penalty
317A	Subsection 1101C(3)	50 penalty units or imprisonment for 12 months, or both.
317B	Subsection 1101E(1)	50 penalty units or imprisonment for 12 months, or both.
317BA	Subsection 1101F(1A)	50 penalty units or imprisonment for 12 months, or both.
317C	Subsection 1101F(1)	50 penalty units or imprisonment for 12 months, or both.
318A	Section 1101G	50 penalty units or imprisonment for 12 months, or both.
322	Subsection 1200N(7)	100 penalty units or imprisonment for 2 years, or both.
323	Subsection 1200N(8)	100 penalty units or imprisonment for 2 years, or both.
324	Subsection 1200Q(1)	200 penalty units or imprisonment for 5 years, or both.
325	Subsection 1200Q(2)	200 penalty units or imprisonment for 5 years, or both.
326	Section 1200S	100 penalty units or imprisonment for 2 years, or both.
327	Subsection 1200U(6)	100 penalty units or imprisonment for 2 years, or both.
328	Subsection 1200U(7)	100 penalty units or imprisonment for 2 years, or both.
332	Section 1274	50 penalty units or imprisonment for 1 year, or both.
332A	Subsections 1299F(1), (3) and (5)	5 penalty units
332B	Subsection 1299G(1)	5 penalty units
332C	Subsection 1299G(4)	5 penalty units
333	Subsection 1300(2A)	10 penalty units or imprisonment for 3 months, or both.
334	Section 1307	100 penalty units or imprisonment for 2 years, or both.
335	Subsection 1308(2)	200 penalty units or imprisonment for 5 year, or both.

Penalties		
Item	Provision	Penalty
336	Subsection 1309(1)	200 penalty units or imprisonment for 5 year, or both.
337	Subsection 1309(2)	100 penalty units or imprisonment for 2 year, or both.
338	Subsection 1317AC(1), (2) or (3)	25 penalty units or imprisonment for 6 months, or both.
338A	Subsection 1317AE(1)	25 penalty units.
339	Section 1323	25 penalty units or imprisonment for 6 months, or both.
340	Subsections 1423(1) and (2)	5 penalty units.
341	Subsection 1431(6)	5 penalty units.
342	Section 1432	5 penalty units.
343	Subsection 1436(2)	5 penalty units.
344	Subsection 1412(3)	100 penalty units or imprisonment for 2 years, or both.
345	Subsection 1424(3)	100 penalty units or imprisonment for 2 years, or both.
346	Subsection 1438(6)	50 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Clause 1

Schedule 4—Transfer of financial institutions and friendly societies

Note: See section 1465A.

Part 1—Preliminary

1 Definitions

In this Schedule, except so far as the contrary intention appears:

AFIC Code of a State or Territory means the Australian Financial Institutions Commission Code as set out in the *Australian Financial Institutions Commission Act 1992* of Queensland as in force immediately before the transfer date and as applied as a law of the State or Territory.

building society of a State or Territory means a transferring financial institution authorised under the Financial Institutions Code of the State or Territory to operate as a building society immediately before the transfer date.

Financial Institutions Code of a State or Territory means the Financial Institutions Code set out in the *Financial Institutions (Queensland) Act 1992* as in force immediately before the transfer date and as applied as a law of the State or Territory.

Friendly Societies Code means the Friendly Societies Code set out in Schedule 1 to the **Friendly Societies (Victoria) Act 1996** as in force immediately before the transfer date.

Friendly Societies Code of a State or Territory means:

- (a) the Friendly Societies Code as applied as a law of the State or Territory; or
- (b) if the State is Western Australia—the Friendly Societies (Western Australia) Code set out in the *Friendly Societies (Western Australia) Act 1999*.

member of a transferring financial institution means a person who, immediately before the transfer date, is a member of the institution under:

- (a) the previous governing Code; or

Clause 1

- (b) the rules of the institution.

membership share means a share in a company that was a transferring financial institution:

- (a) that was taken to have been issued under clause 12 of the transfer provisions; and
- (b) that carries the rights and obligations that were conferred or imposed on the person in a capacity other than that of shareholder, by:
 - (i) the institution's rules (as in force immediately before the transfer date); and
 - (ii) the previous governing Code; and
- (c) on which no amount is paid; and
- (d) on which no amount is unpaid; and
- (e) that is not:
 - (i) transferable or transmissible; or
 - (ii) capable of devolution by will or by operation of law; and
- (f) that can be cancelled as set out in subclause 12(3).

previous governing Code for a transferring financial institution means the Code or law under which the institution is registered immediately before the transfer date.

State Supervisory Authority (SSA) for a transferring financial institution means:

- (a) the SSA for the institution within the meaning of the previous governing Code; or
- (b) in the case of The Cairns Cooperative Weekly Penny Savings Bank Limited—the Queensland Office of Financial Supervision.

transfer date means the date that is the transfer date for the purposes of the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999*.

transfer provisions of a State or Territory means Schedule 4 to the Corporations Law of the State or Territory.

transferring financial institution of a State or Territory means:

- (a) a building society of the State or Territory (that is, a society that was registered under the Financial Institutions Code of

Clause 1

- the State or Territory, and authorised to operate as a building society, immediately before the transfer date); or
- (b) a credit union of the State or Territory (that is, a society that was registered under the Financial Institutions Code of the State or Territory, and authorised to operate as a credit union, immediately before the transfer date); or
 - (c) a friendly society of the State or Territory (that is, a body that was registered as a friendly society under the Friendly Societies Code of the State or Territory immediately before the transfer date); or
 - (d) a body registered as an association under Part 12 of the Financial Institutions Code of the State or Territory immediately before the transfer date; or
 - (e) a body registered as a Special Services Provider under the AFIC Code of the State or Territory immediately before the transfer date; or
 - (f) a body registered as an association under Part 12 of the Friendly Societies Code of the State or Territory immediately before the transfer date; or
 - (g) The Cairns Cooperative Weekly Penny Savings Bank Limited referred to in section 263 of the *Financial Intermediaries Act 1996* of Queensland if:
 - (i) the State is Queensland; and
 - (ii) a determination by APRA under subitem 7(2) of the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999* is in force immediately before the transfer date.

Note: If a determination is made, the Bank will be covered by the *Banking Act 1959* from the transfer date. APRA may only make a determination if the Treasurer and the Queensland Minister responsible for the administration of the *Financial Intermediaries Act 1996* of Queensland have agreed that the Bank should be covered by the *Banking Act 1959*.

transition period means the period of 18 months starting on the transfer date.

withdrawable share of a transferring financial institution of a State or Territory means a withdrawable share within the meaning of the Financial Institutions Code of the State or Territory as in force immediately before the transfer date.

Part 2—Financial institutions that became companies

Division 1—Registration and its consequences

3 Background (registration of transferring financial institution as company)

- (1) On the transfer date, each transferring financial institution of a State or Territory was taken to be registered as a company under the Corporations Law of the State or Territory under the name under which the institution was registered under the previous governing Code immediately before the transfer date.
- (2) Subclause 3(2) of the transfer provisions governed the kind of company the transferring financial institution was registered as.
- (3) Under clause 7 of the transfer provisions, ASIC:
 - (a) gave the company an ACN; and
 - (b) kept a record of the company's registration; and
 - (c) issued a certificate to the company that stated:
 - (i) the company's name; and
 - (ii) the company's ACN; and
 - (iii) the company's type; and
 - (iv) that the company is registered as a company under the Corporations Law of the State or Territory.

4 Rules applied to transferring institution that was registered as a company under the transfer provisions

Application of section 1274 to registration documents

- (1) Subsections 1274(2) and (5) apply to the record of the company's registration referred to in paragraph 3(3)(b) of this Schedule as if it were a document lodged with ASIC.

Clause 11

ASIC may keep documents relating to company lodged while it was a registered body

- (2) ASIC may keep any of the documents relating to the company that were lodged because the company used to be a registered body.

Application of replaceable rules

- (3) The replaceable rules (as described in section 135) do not apply to the company, despite section 135, unless the company:
- (a) repealed its constitution after the transfer date and before the commencement of this Act; or
 - (b) repeals its constitution on or after the commencement of this Act.

11 Transferring financial institution under external administration

Background

- (1) Clause 11 of the transfer provisions provided that if, immediately before the transfer date, provisions of Chapter 5 of the Corporations Law of a State or Territory applied to:
- (a) a compromise or arrangement between a transferring financial institution of the State or Territory and its creditors; or
 - (b) a reconstruction of a transferring financial institution of the State or Territory; or
 - (c) a receiver or other controller of property of a transferring financial institution of the State or Territory; or
 - (d) the winding-up or dissolution of a transferring financial institution of the State or Territory;

because of Part 9 of the Financial Institutions Code, or Part 9 of the Friendly Societies Code, of the State or Territory, those provisions of Chapter 5 continued to apply to that matter after the transfer date.

Note: Clause 11 of the transfer provisions also provided that:

- (a) a matter referred to in paragraph (1)(a), (b) or (d) included an application or other step preliminary to the matter; and
- (b) any act done before the transfer date under or for the purposes of the provisions of Chapter 5 as applied by the Code were to have effect as if it had been done under or for the purposes of Chapter 5 as it applied after the transfer date.

- (2) Clause 11 of the transfer provisions also provided that if, before the transfer date, a liquidator of a transferring financial institution of a State or Territory had been appointed under:

- (a) section 341 of the Financial Institutions Code of the State or Territory; or
- (b) section 402 of the Friendly Societies Code of the State or Territory;

the institution could be wound up in accordance with the provisions of Chapter 5 of the Corporations Law of the State or Territory.

Continuing external administration under Chapter 5 of the Corporations Act 2001

- (3) If, immediately before the commencement of this Act, provisions of Chapter 5 of the Corporations Law of a State or Territory applied to:

- (a) a compromise or arrangement between a transferring financial institution of the State or Territory and its creditors; or
- (b) a reconstruction of a transferring financial institution of the State or Territory; or
- (c) a receiver or other controller of property of a transferring financial institution of the State or Territory; or
- (d) the winding-up or dissolution of a transferring financial institution of the State or Territory;

because of clause 11 of the transfer provisions, the corresponding provisions of Chapter 5 of this Act apply (as a law of the Commonwealth) to that matter after the commencement of this Act.

- (4) Subclause (3) does not limit the regulations that may be made under clause 28.
- (5) Any act done:
- (a) before the transfer date under or for the purposes of the provisions of Chapter 5 of the Corporations Law of the State or Territory as applied by the Code; or
 - (b) on or after the transfer date and before the commencement of this Act for the purposes of the provisions of Chapter 5 of the

Schedule 4 Transfer of financial institutions and friendly societies

Part 2 Financial institutions that became companies

Division 1 Registration and its consequences

Clause 11

Corporations Law of the State or Territory as applied by
clause 11 of the transfer provisions;
has effect as if it had been done under or for the purposes of
Chapter 5 of this Act as it applies after the commencement of this
Act.

Division 2—Membership

12 Institution that became a company limited by shares

Background

- (1) Clause 12 of the transfer provisions applied to a transferring financial institution of a State or Territory if the institution was taken to be registered as a company limited by shares under clause 3 of the transfer provisions.
- (2) Clause 12 of the transfer provisions provided that:
 - (a) any shares in the institution on issue immediately before the transfer date (other than withdrawable shares) became shares of the company; and
 - (b) any withdrawable shares of the institution on issue immediately before the transfer date became redeemable preference shares of the company; and
 - (c) in the case of a building society—each person who was a member of the society immediately before the transfer date, other than by virtue of only holding shares in the society, was taken to have been issued with a membership share on the transfer date; and
 - (d) in any case other than that of a building society—any person:
 - (i) who was a member of the institution immediately before the transfer date; and
 - (ii) who did not hold any shares in the institution; was taken to have been issued with a membership share on the transfer date.

Joint members of institution that became a company limited by shares

- (3) If a person who was taken to have been issued with a membership share was a joint member, they hold the membership share jointly with the other member or members of the joint membership. This is so, even if the other member, or another member, held shares in the institution immediately before the transfer date. However, the joint membership does not have any more votes because of the

Clause 13

membership share or shares than it had immediately before the transfer date.

Cancellation shares

- (4) A membership share can be cancelled at the option of the holder or the company in the circumstances (if any):
- (a) set out in the company's constitution; or
 - (b) in which the member who holds the share could have had their membership of the institution cancelled immediately before the transfer date.

Part 2J.1 does not apply to the cancellation of a membership share.

13 Institution that became a company limited by guarantee

Background

- (1) Clause 13 of the transfer provisions applied to a transferring financial institution of a State or Territory if the institution was taken to be registered as a company limited by guarantee under clause 3 of the transfer provisions.
- (2) Clause 13 of the transfer provisions provided that each person who was a member of the institution immediately before the transfer date was taken to have given a guarantee (but only for the purpose of determining whether the person is a member of the company).

Guarantees

- (3) Each person who becomes a member of the company after the commencement of this Act and before the amount of the relevant guarantee is determined is taken to have given a guarantee (but only for the purpose of determining whether the person is a member of the company).

Note: Someone who became a member after the transfer date and this Act commences was taken to have given a guarantee by clause 13 of the transfer provisions. This guarantee is preserved by sections 1373 and 1399.

- (4) If a person who is taken to have given a guarantee by subclause (2) is a joint member, they are taken to have given the guarantee jointly with the other member or members of the joint membership. However, the joint membership does not have any more votes

because of giving the guarantee or guarantees than it had immediately before the transfer date.

14 Institution becoming a company limited by shares and guarantee

Background

- (1) Clause 14 of the transfer provisions applied to a transferring financial institution of a State or Territory if the institution was taken to be registered as a company limited by shares and guarantee under clause 3 of the transfer provisions.
- (2) Clause 14 of the transfer provisions provided that each person who was a member of the institution immediately before the transfer date was taken to have given a guarantee (but only for the purpose of determining whether the person is a member of the company).

Guarantees

- (3) Each person who becomes a member of the company after this Act commences and before the amount of the relevant guarantee is determined is taken to have given a guarantee (but only for the purpose of determining whether the person is a member of the company).

Note: Someone who became a member after the transfer date and this Act commences was taken to have given a guarantee by clause 13 of the transfer provisions. This guarantee is preserved by sections 1373 and 1399.

- (4) If a person who is taken to have given a guarantee by subclause (2) is a joint member, they are taken to have given the guarantee jointly with the other member or members of the joint membership. However, the joint membership does not have any more votes because of giving the guarantee or guarantees than it had immediately before the transfer date.

15 Redeemable preference shares that were withdrawable shares

- (1) This Act applies to a redeemable preference share that was a withdrawable share of a transferring financial institution of a State or Territory immediately before the transfer date, except that:
 - (a) the share is redeemable on the same terms that the withdrawable share was withdrawable under the Financial

Clause 16

Institutions Code of the State or Territory and the institution's rules or constitution; and

- (b) the holder of the share continues to have the same rights and obligations that they had by holding the withdrawable share.

- (2) The provisions of this Act that apply to redeemable preference shares apply:

- (a) subject to subclause (1), to redeemable preference shares of a company registered under clause 3 of the transfer provisions; and

- (b) to redeemable preference shares of a company (other than a company referred to in paragraph (a)) that is permitted to use the expression *building society*, *credit union* or *credit society* under section 66 of the *Banking Act 1959*;

even if the shares are the only class of shares issued by the company.

16 Liability of members on winding up

- (1) If a transferring financial institution of a State or Territory that was registered under clause 3 of the transfer provisions is wound up, each person:

- (a) who was a past member of the institution at the time it became registered; and
- (b) who did not again become a member; and
- (c) who had not held shares in the institution;

is not liable under Division 2 of Part 5.6 on the winding up.

Note: A person who was a past member at the time of registration and who held shares in the institution may be liable as a past member under Division 2 of Part 5.6.

- (2) If a company that is registered under clause 3 of the transfer provisions is wound up, a person who is taken to have given a guarantee by subclause 13(1) or 14(1) of the transfer provisions, or clause 13 or 14 of this Schedule, is not liable under:

- (a) section 515 merely because the person is or was a member who is taken to have given a guarantee; or
- (b) section 517 or paragraph 518(b) merely because the person is taken to have given a guarantee.

Division 3—Share capital

17 Share capital

Background (transfer of certain amounts to share capital)

- (1) On registration of a transferring financial institution of a State or Territory as a company under clause 3 of the transfer provisions:
 - (a) any amount of withdrawable share capital (within the meaning of the Financial Institutions Code of the State or Territory); and
 - (b) any amount standing to the credit of its share premium account; and
 - (c) any amount standing to the credit of its capital redemption reserve;immediately before the transfer date became part of the company's share capital under clause 17 of the transfer provisions.

Use of amount standing to credit of share premium account

- (2) The company may use the amount standing to the credit of its share premium account immediately before the transfer date (if any) to:
 - (a) provide for the premium payable on redemption of debentures or redeemable preference shares issued before the transfer date; or
 - (b) write off:
 - (i) the preliminary expenses of the institution incurred before the transfer date; or
 - (ii) expenses incurred, payments made, or discounts allowed before the transfer date, in respect of any issue of shares in, or debentures of, the institution.

18 Application of no par value rule

- (1) Section 254C applies to shares issued by a transferring financial institution of a State or Territory before the transfer date as well as shares issued on and after that.

Clause 19

- (2) In relation to a share issued by the institution before the transfer date:
 - (a) the amount paid on the share is the sum of all amounts paid to the institution at any time for the share (but not including any premium); and
 - (b) the amount unpaid on the share is the difference between the issue price of the share (but not including any premium) and the amount paid on the share (see paragraph (a)).

19 Calls on partly-paid shares

The liability of a shareholder for calls in respect of money unpaid on shares issued before the transfer date by a transferring financial institution of a State or Territory (whether on account of the par value of the shares or by way of premium) is not affected by the share ceasing to have a par value.

20 References in contracts and other documents to par value

- (1) This clause applies for the purpose of interpreting and applying the following after the commencement of this Act:
 - (a) a contract entered into by a transferring financial institution of a State or Territory before the transfer date (including the institution's constitution);
 - (b) a trust deed or other document executed by or in relation to the institution before the transfer date.

Note: The interpretation and application of contracts and deeds before this Act commences was governed by clause 20 of the transfer provisions.

- (2) A reference to the par value of a share issued by a transferring financial institution of a State or Territory is taken to be a reference to:
 - (a) if the share is issued before the transfer date—the par value of the share immediately before then; or
 - (b) if the share is issued on or after the transfer date but shares of the same class were on issue immediately before then—the par value that the share would have had if it had been issued then; or
 - (c) if the share is issued on or after the transfer date and shares of the same class were not on issue immediately before then—the par value determined by the directors.

A reference to share premium is taken to be a reference to any residual share capital in relation to the share.

- (3) A reference to a right to a return of capital on a share issued by the institution is taken to be a reference to a right to a return of capital of a value equal to the amount paid in respect of the share's par value.
- (4) A reference to the aggregate par value of the institution's issued share capital is taken to be a reference to that aggregate as it existed immediately before the transfer date and:
 - (a) increased to take account of the par value of any shares issued after then; and
 - (b) reduced to take account of the par value of any shares cancelled after then.

Part 4—The transition period

25 ASIC may direct directors of a company to modify its constitution

- (1) If a company registered under clause 3 of the transition provisions has not modified its constitution so that it complies with subclause 24(1) of the transition provisions by the end of the transition period, ASIC may direct, in writing, the directors of the company to:
- (a) take the necessary or specified steps to:
 - (i) ensure that the company modifies its constitution so that it does comply; or
 - (ii) ensure that the company makes the modifications to its constitution that ASIC specifies; and
 - (b) take those steps within a specified time (which must be more than 28 days).

A direction may require the directors to take steps that are inconsistent with the company's constitution.

- (2) ASIC may issue a direction under subclause (1) before the end of the transition period if requested by a majority of directors of the company.
- (3) No civil or criminal liability arises from action taken by a director in good faith and in accordance with a direction issued under subclause (1).
- (4) A person contravenes this subclause if, without reasonable excuse, they contravene a direction under subclause (1).
- (5) A person who intentionally or recklessly contravenes a direction under subclause (1) is guilty of an offence.

Penalty: 100 penalty units or imprisonment for 2 years, or both.

27 When certain modifications of a company's constitution under an exemption or declaration take effect

- (1) If the constitution of a company registered under clause 3 of the transition provisions was modified under an exemption or declaration made under clause 26 of the transition provisions, and that modification varies or cancels, or allows the variation or cancellation of:
 - (a) rights attached to shares in a class of shares; or
 - (b) rights of members in a class of members;the following provisions apply, and to the exclusion of section 246D if it would otherwise apply.
- (2) If the company is not required to lodge a copy of the modification with ASIC by or under any other provision of this Act, the company must lodge a copy of the modification with ASIC within 14 days of the modification being made.
- (3) If:
 - (a) members in the class do not all agree (whether by resolution or written consent) to the modification of the company's constitution; or
 - (b) the members in the class did not have an opportunity to vote on or consent to the modification;10% or more of the members in the class may apply to the Court to have the modification set aside.

Note: If a company has only 1 class of shares, all members are members of the class.
- (4) An application may only be made within 1 month after the modification is lodged.
- (5) The modification takes effect:
 - (a) if no application is made to the Court to have it set aside—1 month after the modification is lodged; or
 - (b) if an application is made to the Court to have it set aside—when the application is withdrawn or finally determined.
- (6) The members of the class who want to have the modification set aside may appoint 1 or more of themselves to make the application on their behalf. The appointment must be in writing.

Clause 27

- (7) The Court may set aside the modification if it is satisfied that it would unfairly prejudice the applicants. However, the Court must confirm the modification if the Court is not satisfied of unfair prejudice.
- (8) Within 14 days after the Court makes an order, the company must lodge a copy of it with ASIC.

Part 5—Demutualisations

29 Disclosure for proposed demutualisation

- (1) If a modification of the constitution of an unlisted company registered under clause 3 of the transition provisions is proposed and the modification would have the effect of:
- (a) varying or cancelling the rights of members, or a class of members, to the reserves of the company; or
 - (b) varying or cancelling the rights of members, or a class of members, to the assets of the company on a winding up; or
 - (c) varying or cancelling the voting rights of members or a class of members; or
 - (d) otherwise varying or cancelling rights so that Part 2F.2 (Class rights) applies; or
 - (e) allowing 1 of those variations or cancellations of rights;
- the following rules apply:
- (f) notice of the meeting of the company's members at which the proposed modification is to be considered must be accompanied by the documents listed in subclause (4);
 - (g) notice of the meeting may not be shortened under subsection 249H(2);
 - (h) the company must lodge with ASIC the notice and the documents referred to in paragraphs (4)(a) and (c) within 7 days after notice of the meeting is given.
- (2) If:
- (a) an issue of shares by an unlisted company registered under clause 3 of the transition provisions would have the effect of varying or cancelling rights so that Part 2F.2 (Class rights) applies; and
 - (b) at least 1 of the following is required to approve the share issue, or variation or cancellation of rights:
 - (i) a meeting of the company's members;
 - (ii) a resolution passed at a meeting of the class of members concerned;

Clause 29

- (iii) written consent of a specified proportion of members in the class concerned;
- the following rules apply (in addition to those that apply under Part 2F.2):
 - (c) notice of the meeting or consent process must be accompanied by the documents listed in subclause (4);
 - (d) the company must lodge with ASIC the notice of the meeting or consent process and the documents referred to in paragraphs (4)(a) and (c) within 7 days after the notice is given;
 - (e) notice of the meeting may not be shortened under subsection 249H(2).
- Paragraph (c) need not be complied with to the extent that a person has already been given the documents.
- (3) ASIC may exempt a company from this Part under clause 30.
- (4) The documents that must accompany the notice are:
 - (a) a disclosure statement that:
 - (i) satisfies clause 31; and
 - (ii) ASIC has registered under clause 32; and
 - (b) in the case of a proposed modification of the constitution of a company—an estimate of the financial benefits (if any) the member will be offered if the proposed modification occurs; and
 - (c) a report by an expert that:
 - (i) states whether, in the expert's opinion, the proposed modification or share issue is in the best interests of the members of the company as a whole; and
 - (ii) gives the expert's reasons for forming that opinion; and
 - (iii) complies with subclauses 33(2) and (3).
- (5) If the company contravenes subclause (1) or (2) it is not guilty of an offence.
- (6) A person contravenes this subclause if they are involved in a contravention of subclause (1) or (2).

Note 1: This subclause is a civil penalty provision.

Note 2: Section 79 defines *involved*.

- (7) A person commits an offence if they are involved in a contravention of subclause (1) or (2) and the involvement is dishonest.

Penalty: 2,000 penalty units or imprisonment for 5 years, or both.

- (8) In this clause:

reserves includes general reserves and retained earnings of the company.

unlisted company means a company (registered under clause 3) that does not have voting shares quoted on a prescribed financial market.

30 ASIC's exemption power

- (1) If ASIC is satisfied that a company does not have a mutual structure, it may exempt the company from this Part.
- (2) If ASIC is satisfied that:
- (a) a proposed modification of the constitution of a company will not result in or allow a modification of the mutual structure of the company; or
 - (b) an issue of shares would not result in or allow a modification of the mutual structure of the company;
- it may exempt the company from this Part in relation to the proposed modification or share issue.
- (3) In determining whether the company has a mutual structure, ASIC may take into account:
- (a) the particular structure, circumstances and history of the company; and
 - (b) whether:
 - (i) each customer of the company (for example an account holder, mortgagor or policy holder) is required to be a member of the company; or
 - (ii) each member (or joint membership) has only 1 vote; and
 - (c) any other relevant matter in relation to the company or its members.

Clause 31

- (4) In determining whether the proposed modification or share issue will result in or allow a modification of the mutual structure of the company, ASIC must take into account whether the proposed modification or share issue would have the effect of converting the company into a company run for the purpose of yielding a return to shareholders.
- (5) An exemption under subclause (2) may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (6) The exemption must be in writing and ASIC must publish notice of it in the *Gazette*.
- (7) For the purposes of this clause, the *provisions of this Part* include regulations made for the purposes of this Part.

31 Coverage of disclosure statement

The disclosure statement must give all the information that members would reasonably require and expect to be given to make an informed decision about the proposed modification or share issue.

32 Registration of disclosure statement

- (1) ASIC must register the disclosure statement if satisfied that the statement adequately sets out or explains the following (if relevant):
 - (a) the variation or cancellation of members' rights
 - (b) that the proposed modification will allow the variation or cancellation of members' rights
 - (c) in relation to a share issue:
 - (i) who will and will not receive shares under the issue; and
 - (ii) the rights and obligations attached to the shares; and
 - (iii) the implications of the share issue for the management and structure of the company
 - (d) what financial benefits (if any) members will be offered if the proposed modification occurs and why the benefits are considered to be appropriate

- (e) the basis upon which members' entitlement to the financial benefits will be determined, including:
 - (i) any minimum period of membership that a member must satisfy to receive benefits; or
 - (ii) whether members must pay an amount or provide other value to receive benefits
 - (f) any preferential allocation of benefits to members, or a class of members, and how that allocation is to be determined
 - (g) any benefits officers of the company (including retiring officers) may receive (whether directly or indirectly) in connection with the proposed modification or share issue
 - (h) any other proposed changes to the company that are related to the proposed modification or share issue (for example, whether the company proposes to list its securities for quotation on a prescribed financial market or merge with another company)
 - (i) the new name of the company, if the company's name is to be changed in connection with the proposed modification or share issue, or that it is not proposed to change the company's name
 - (j) the procedural steps required to vary or cancel the members' rights
 - (k) the procedural steps required to issue the shares
 - (l) how voting on the proposed modification or share issue will take place.
- (2) In deciding whether the disclosure statement adequately sets out or explains the matters in subclause (1), ASIC may also have regard to:
- (a) the readability of the statement; and
 - (b) whether the statement would be readily comprehensible by the members of the company concerned.
- (3) The disclosure statement must include a statement to the effect that registration of the disclosure statement:
- (a) is on the basis that the statement adequately sets out or explains the matters in subclause (1); and
 - (b) does not mean that ASIC has considered whether the proposed modification or share issue is in the best interests of the members of the company as a whole.

Clause 33

- (4) Subclause (1) does not limit clause 31.

33 Expert's report

- (1) If the company obtains 2 or more reports each of which could be used for the purposes of paragraph 29(4)(c), a copy of each report must:
- (a) be lodged with ASIC; and
 - (b) be given to each member entitled to receive a disclosure statement.

Penalty: 25 penalty units or imprisonment for 6 months, or both.

- (2) The report must be by an expert who is not an associate of the company.
- (3) The report must set out details of:
- (a) any relationship between the expert and the company, including any circumstances in which the expert gives it advice, or acts on its behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with the company; and
 - (b) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion; and
 - (c) any fee, payment or other benefit (whether direct or indirect) that the expert has received or will or may receive in connection with making the report.

34 Unconscionable conduct in relation to demutualisations

- (1) A person must not engage in:
- (a) conduct that is, in all the circumstances, unconscionable; or
 - (b) conduct that is misleading or deceptive or is likely to mislead or deceive;
- in relation to:
- (c) a modification of the constitution of an unlisted company that is a modification to which this Part applies; or
 - (d) anything done in reliance on, in conjunction with or in connection with the modification; or
 - (e) a share issue to which this Part applies.

- (2) In determining whether a person has engaged in conduct that contravenes paragraph (1)(a), have regard to:
- (a) whether the person, or someone acting for the person, exerted undue influence or pressure on, or used unfair tactics against, members of the company; and
 - (b) whether the person, or someone acting for the person, engaged in conduct that resulted in a member or someone else gaining, or being in a position to gain, a benefit that the members generally did not, or would not be in a position to, gain.

This subclause does not limit subclause (1).

- (3) A person who contravenes subclause (1) is not guilty of an offence.

35 Orders the Court may make

- (1) Without limiting the Court's powers under Part 9.5, if the Court is satisfied that a person has engaged in conduct constituting a contravention of subclause 34(1), the Court may make 1 or more of the following orders:
- (a) an order requiring the person or a person involved in the contravention to disclose to the public, to a particular person or to a particular class of persons, in the manner specified in the order, specified information, or information of a specified kind, (being information that is in the possession of the person to whom the order is directed or to which that person has access)
 - (b) an order requiring the person or a person involved in the contravention to publish, at their own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order
 - (c) any order that it thinks necessary or desirable:
 - (i) to protect the rights or interests of any person affected by the conduct; or
 - (ii) to ensure, as far as possible, that a proposed modification or share issue proceeds in the manner in which it would have proceeded if the conduct had not been engaged in
 - (d) without limiting the generality of paragraph (c):

Clause 35

- (i) an order prohibiting the exercise of voting or other rights attached to specified shares; or
 - (ii) an order directing a company not to make payment, or to defer making payment, of any amount or amounts due from the company in respect of specified shares; or
 - (iii) an order prohibiting the acquisition or disposal of, or of an interest in, specified shares; or
 - (iv) an order directing the disposal of, or of an interest in, specified shares; or
 - (v) an order directing a company not to register a transfer or transmission of specified shares; or
 - (vi) an order that an exercise of the voting or other rights attached to specified shares be disregarded; or
 - (vii) an order directing a company not to issue shares to a person who holds shares in the company, being shares that were proposed to be issued to the person because the person holds shares in the company or pursuant to an offer or invitation made or issued to the person because the person holds shares in the company.
- (2) Without limiting the Court's powers under Part 9.5, if, in a proceeding, the Court is satisfied that:
 - (a) a person has engaged in conduct constituting a contravention of subclause 34(1); and
 - (b) a member of the company has suffered, or is likely to suffer, loss or damage because of that conduct;the Court may make the orders that it thinks are appropriate to compensate the member (in whole or in part) or to prevent or reduce the loss or damage, including:
 - (c) an order directing the person or a person who was involved in the contravention to refund money or return property to the member
 - (d) an order directing the person or a person who was involved in the contravention to pay to the member the amount of the loss or damage
 - (e) an order listed in paragraph (1)(d).
- (3) An application for an order under this clause may be made by ASIC or a member of the company.

Part 6—Continued application of fundraising provisions of the Friendly Societies Code

36 Friendly Societies Code to apply to offers of interests in benefit funds

- (1) The following apply as a law of the Commonwealth as from the transfer date:
 - (a) Divisions 2 and 3 of Part 4B of the Friendly Societies Code
 - (b) Division 2 of Part 1, and Division 1 of Part 4B, of that Code to the extent to which they provide for the interpretation of terms used in the Divisions referred to in paragraph (a)
 - (c) sections 28, 29 and 128 of that Code to the extent to which they apply for the purposes of the Divisions referred to in paragraph (a)
 - (d) the regulations in force immediately before the transfer date under Part 4B of that Code to the extent to which they were made for the purposes of the provisions referred to in paragraphs (a), (b) and (c)
 - (e) standards adopted by that Code for the purposes of the provisions referred to in paragraphs (a), (b) and (c).
- (2) The provisions referred to in subclause (1) apply as if:
 - (a) references in the provisions to a society were references to a friendly society within the meaning of the *Life Insurance Act 1995*; and
 - (b) references to a benefit fund were references to an approved benefit fund within the meaning of the *Life Insurance Act 1995*; and
 - (c) references in the provisions to an SSA were references to ASIC; and
 - (d) references in the provisions to lodging a document were references to lodging the document with ASIC; and
 - (e) references in the provisions to the Code were references to this Act; and
 - (f) references in the provisions to Part 4B of the Code were references to the provisions applied by this clause; and

Clause 36

- (g) references to a penalty of \$20,000 were references to a penalty of 200 penalty units; and
 - (h) references to a penalty of \$5,000 were references to a penalty of 50 penalty units; and
 - (i) references to a penalty of \$2,500 were references to a penalty of 25 penalty units; and
 - (j) references to a penalty of \$1,000 were references to a penalty of 10 penalty units; and
 - (k) subsection 135(2) of the Friendly Societies Code were omitted; and
 - (l) paragraph 137(1)(e) of the Friendly Societies Code were omitted and replaced with a provision that requires a disclosure document to contain any other information that ASIC requires to be included in the document; and
 - (m) subsection 137(3) of the Friendly Societies Code were omitted and replaced with a provision that requires each copy of a disclosure document to:
 - (i) state that the document has been lodged with ASIC; and
 - (ii) specify the date of lodgment; and
 - (iii) state that ASIC takes no responsibility as to the contents of the document.
- (3) If there is an inconsistency between:
- (a) the provisions of Division 2 of Part 1, or Division 1 of Part 4B, of the Friendly Societies Code; and
 - (b) the provisions of Chapter 1 of this Act;
- the provisions of the Code prevail for the purposes of interpreting the provisions applied by subclause (1).

Part 7—Transitional provisions

37 Unclaimed money

- (1) On and from the transfer date, section 414 applies to a sum or other property that, immediately before the transfer date, is covered by section 414 as applied by:
 - (a) section 337 of the Financial Institutions Code of a State or Territory; or
 - (b) section 399 of the Friendly Societies Code of a State or Territory.
- (2) On and from the transfer date, section 544 applies to an amount of money that, immediately before the transfer date, is covered by section 544 as applied by:
 - (a) section 342 of the Financial Institutions Code of a State or Territory; or
 - (b) section 403 of the Friendly Societies Code of a State or Territory.
- (3) Sections 414 and 544, as applied by this clause, apply as if:
 - (a) references to Part 9.7 were references to the unclaimed money law of the State or Territory; and
 - (b) references to the Commission or ASIC were references to the Minister administering the unclaimed money law of the State or Territory.
- (4) In this clause:

unclaimed money law means:

- (a) the *Unclaimed Money Act 1995* of New South Wales; or
- (b) the **Unclaimed Moneys Act 1962** of Victoria; or
- (c) Part 8 of the *Public Trustee Act 1978* of Queensland; or
- (d) the *Unclaimed Money Act 1990* of Western Australia; or
- (e) the *Unclaimed Moneys Act 1891* of South Australia; or
- (f) the *Unclaimed Moneys Act 1918* of Tasmania; or
- (g) the *Unclaimed Moneys Act 1950* of the Australian Capital Territory; or

Clause 38

- (h) the *Companies (Unclaimed Assets and Moneys) Act* of the Northern Territory.

38 Modification by regulations

- (1) The regulations may modify the operation of this Act (including the provisions applied by clause 36) in relation to:
- (a) a company registered under clause 3; or
 - (b) a company that is permitted to use the expression ***building society, credit union*** or ***credit society*** under section 66 of the *Banking Act 1959*; or
 - (c) a company that is a friendly society for the purposes of the *Life Insurance Act 1995*; or
 - (d) a specified class of any of those companies.
- (2) Regulations made for the purposes of this clause may only modify this Act in relation to the following matters:
- (a) issuing, cancelling or redeeming membership shares or redeemable preference shares
 - (b) inspection of the register of members required by section 169
 - (c) giving notice of a meeting of a company's members
 - (d) members' rights to request the directors to hold a general meeting or to move a resolution at a general meeting
 - (e) issuing share certificates for membership shares or redeemable preference shares, or numbering those shares
 - (f) the publication of the names and addresses of members in the annual return
 - (g) the report to members required by section 314
 - (h) disposing of securities in a company if the whereabouts of the holder of the securities is unknown as described in section 1343
 - (i) the treatment of members who hold shares jointly or who have jointly given a guarantee
 - (j) selective buy-backs.
- (3) Regulations made for the purposes of this clause may not:
- (a) create an offence with a penalty greater than 10 penalty units; or
 - (b) increase the penalty for an existing offence; or

- (c) substitute for an existing offence an offence with a penalty greater than the penalty for the existing offence; or
- (d) modify an obligation, contravention of which will result in committing an offence, so as to make it more difficult to comply with.

39 Regulations may deal with transitional, saving or application matters

- (1) The regulations may deal with matters of a transitional, saving or application nature relating to:
 - (a) the transfer of the registration of transferring financial institutions to this Act; or
 - (b) the amendments made by Schedule 3 to the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999*.
- (2) Without limiting subclause (1), the regulations may provide for a matter to be dealt with, wholly or partly, in any of the following ways:
 - (a) by applying (with or without modifications) to the matter:
 - (i) provisions of a law of the Commonwealth, or of a State or Territory; or
 - (ii) provisions of a repealed or amended law of the Commonwealth, or of a State or Territory, in the form that those provisions took before the repeal or amendment; or
 - (iii) a combination of provisions referred to in subparagraphs (i) and (ii)
 - (b) by otherwise specifying rules for dealing with the matter
 - (c) by specifying a particular consequence of the matter, or of an outcome of the matter, for the purposes of this Act.
- (3) Without limiting subclause (1) or (2), the regulations may provide for the continued effect, for the purposes of this Act, of a thing done or instrument made, or a class of things done or instruments made, before the transfer date under or for the purposes of a provision of a previous governing Code of a transferring financial institution of a State or Territory. In the case of an instrument, or class of instruments, the regulations may provide for the instrument or instruments to continue to have effect subject to modifications.

Clause 39

- (4) Without limiting subclause (3), regulations providing for the continued effect of things done or instruments made may permit all or any of the following matters to be determined in writing by a specified person, or by a person in a specified class of persons:
 - (a) the identification of a thing done or instrument made, or a class of them, that is to continue to have effect
 - (b) the purpose for which a thing done or instrument made, or a class of them, is to continue to have effect
 - (c) any modifications subject to which an instrument made, or a class of instruments made, is to continue to have effect.
- (5) Without limiting subclause (1) or (2), the regulations may provide for the application of Chapter 5 of this Act or a similar law about external administration (in whole or in part and with or without modification) to a transferring financial institution of a State or Territory if, immediately before the transfer date:
 - (a) the institution is under external administration (however described); and
 - (b) the provisions of Chapter 5 are not already applied to it, or in relation to it, by a law of the State or Territory.
- (6) In this clause, a reference to a *law*, whether of the Commonwealth or of a State or Territory, includes a reference to an instrument made under such a law.

Table of Acts**Notes to the *Corporations Act 2001*****Note 1**

The *Corporations Act 2001* as shown in this compilation comprises Act No. 50, 2001 amended as indicated in the Tables below.

The *Corporations Act 2001* was modified by the *Corporations Regulations 2001* (Statutory Rules 2001 No. 193 as amended) the *Corporations (Change of Incorporation) Regulations 2002* (Statutory Rules 2002 No. 168 as amended). The modifications are not incorporated in this compilation.

For application, saving or transitional provisions made by the *Corporations (Repeals, Consequential and Transitional) Act 2001*, see Act No. 55, 2001. Also see the *Corporations Regulations 2001* (Statutory Rules 2001 No. 193 as amended) for transitional provisions.

For all other relevant information pertaining to application, saving or transitional provisions see Table A.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Corporations Act 2001</i>	50, 2001	28 June 2001	15 July 2001 (see <i>Gazette</i> 2001, No. S285)	
<i>Corporations (Repeals, Consequential and Transitional) Act 2001</i>	55, 2001	28 June 2001	Ss. 1–14, Schedule 2 (items 12–16) and Schedule 6: 15 July 2001 (see <i>Gazette</i> 2001, No. S285) (a)	Ss. 1–14 [see Note 1]
as amended by <i>Statute Law Revision Act 2006</i>	9, 2006	23 Mar 2006	Schedule 2 (items 11–13): (aa)	—

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Treasury Legislation Amendment (Application of Criminal Code) Act (No. 3) 2001</i>	117, 2001	18 Sept 2001	S. 4 and Schedule 1 (items 179–182, 189, 190): Royal Assent (b) Schedule 1 (items 1–178, 183–188, 191–306): 15 Dec 2001 (b)	S. 4 S. 2(2) (rep. by 146, 2001, Sch. 5 [item 10])
as amended by				
<i>Treasury Legislation Amendment (Application of Criminal Code) Act (No. 2) 2001</i>	146, 2001	1 Oct 2001	Schedule 5 (item 10): 15 Dec 2001 (c)	—
<i>General Insurance Reform Act 2001</i>	119, 2001	19 Sept 2001	Schedules 1 and 3: 1 July 2002 Remainder: Royal Assent	—
<i>Financial Services Reform Act 2001</i>	122, 2001	27 Sept 2001	Ss. 1, 2 and Schedule 3 (items 1–27): Royal Assent Remainder: 11 Mar 2002 (see <i>Gazette</i> 2001, No. GN42)	S. 2(2) (am. by 146, 2001, Sch. 5 [item 6]) S. 2(7) (rep. by 146, 2001, Sch. 5 [item 7])
as amended by				
<i>Treasury Legislation Amendment (Application of Criminal Code) Act (No. 2) 2001</i>	146, 2001	1 Oct 2001	Schedule 5 (items 6–8): 15 Dec 2001 (d)	—
<i>Statute Law Revision Act 2005</i>	100, 2005	6 July 2005	Schedule 2 (item 13): (da)	—
<i>Financial Services Reform (Consequential Provisions) Act 2001</i>	123, 2001	27 Sept 2001	Schedule 1 (items 219–222): (e) Schedule 1 (items 223, 224): Royal Assent (e)	—
<i>Treasury Legislation Amendment (Application of Criminal Code) Act (No. 2) 2001</i>	146, 2001	1 Oct 2001	S. 4 and Schedule 5 (items 4, 5): 15 Dec 2001 (f) Schedule 5 (item 3): (f)	S. 4

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Financial Services Reform (Consequential Provisions) Act 2002</i>	29, 2002	5 Apr 2002	Schedule 2: (g)	—
as amended by				
<i>Statute Law Revision Act 2005</i>	100, 2005	6 July 2005	Schedule 2 (item 16): (ga)	—
<i>Corporations Legislation Amendment Act 2003</i>	24, 2003	11 Apr 2003	Schedules 1–3 and Schedule 4 (items 1–7): 1 July 2003 Schedule 4 (item 8): (h) Schedule 5 (items 4–6): (h) Remainder: Royal Assent	—
<i>Corporations Amendment (Repayment of Directors' Bonuses) Act 2003</i>	25, 2003	11 Apr 2003	11 Apr 2003	—
<i>Crimes Legislation Enhancement Act 2003</i>	41, 2003	3 June 2003	Schedule 2 (items 1D–1F): 1 Jan 2003	—
<i>Financial Sector Legislation Amendment Act (No. 1) 2003</i>	116, 2003	27 Nov 2003	Schedule 3: 28 Nov 2003	—
<i>Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003</i>	140, 2003	17 Dec 2003	S. 4 and Schedule 1 (item 15): (i)	S. 4
<i>Financial Services Reform Amendment Act 2003</i>	141, 2003	17 Dec 2003	Schedule 1: 14 Jan 2004 Schedule 2 (items 1A, 114): Royal Assent Schedule 2 (items 1–46C, 47–72, 73–87, 89–113) and Schedules 3 and 4: 18 Dec 2003 Schedule 2 (items 46D–46F, 72A, 88, 88A): 1 July 2004	—
<i>Bankruptcy Legislation Amendment Act 2004</i>	80, 2004	23 June 2004	Schedule 1 (items 191A–191D, 212, 213, 215): 1 Dec 2004 (see <i>Gazette</i> 2004, No. GN34)	Sch. 1 (items 212, 213, 215)

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004</i>	103, 2004	30 June 2004	Schedule 1 (items 37–129, 176–178), Schedule 2 (items 1–9, 17–19), Schedule 2A and Schedules 4–7: 1 July 2004 Schedule 2 (items 12–16) and Schedules 10 and 11A: 1 Jan 2005 Schedule 3 (items 3, 4): 26 July 2004 (see <i>Gazette</i> 2004, No. GN28) Schedule 8, Schedule 9 (items 7–88) and Schedule 11 (items 3–14): (j) Schedule 12 (item 2): Royal Assent	—
<i>Treasury Legislation Amendment (Professional Standards) Act 2004</i>	118, 2004	13 July 2004	13 July 2004	—
<i>Financial Framework Legislation Amendment Act 2005</i>	8, 2005	22 Feb 2005	S. 4 and Schedule 1 (items 120, 121, 496): Royal Assent	S. 4 and Sch. 1 (item 496)
<i>Corporations Amendment Act (No. 1) 2005</i>	138, 2005	18 Nov 2005	Schedule 2: (k) Remainder: Royal Assent	—
<i>Offshore Petroleum (Repeals and Consequential Amendments) Act 2006</i>	17, 2006	29 Mar 2006	Schedule 2 (item 13): 1 July 2008 (see s. 2(1) and F2008L02273)	—
<i>Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006</i>	101, 2006	14 Sept 2006	Schedule 2 (items 29–35) and Schedule 6 (items 1, 6–11): Royal Assent	Sch. 6 (items 1, 6–11)
<i>Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Act 2006</i>	126, 2006	4 Nov 2006	Schedule 1: 1 July 2007 (see s. 2(1)) Remainder: Royal Assent	—
<i>Trade Practices Legislation Amendment Act (No. 1) 2006</i>	131, 2006	6 Nov 2006	Schedule 9 (items 16–19, 21): 1 Jan 2007 (see F2006L04026)	Sch. 9 (item 21)

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006</i>	170, 2006	12 Dec 2006	Schedule 1 (item 18): 13 Dec 2006 (see s. 2(1))	—
<i>Australian Securities and Investments Commission Amendment (Audit Inspection) Act 2007</i>	1, 2007	19 Feb 2007	Schedule 1 (item 17): 20 Feb 2007 Schedule 2: (l) Remainder: Royal Assent	—
<i>Private Health Insurance (Transitional Provisions and Consequential Amendments) Act 2007</i>	32, 2007	30 Mar 2007	Schedule 2 (item 8B): 1 Apr 2007 (see s. 2(1))	—
<i>Corporations Amendment (Takeovers) Act 2007</i>	64, 2007	15 Apr 2007	Schedule 1: 13 May 2007 Remainder: Royal Assent	—
<i>Governance Review Implementation (Treasury Portfolio Agencies) Act 2007</i>	74, 2007	5 June 2007	Schedules 1 and 2: 1 July 2007 Remainder: Royal Assent	Sch. 2 (items 1–9, 20)
<i>Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act 2007</i>	85, 2007	21 June 2007	Schedule 1 (items 1–18, 21, 22): 21 Dec 2007 Schedule 1 (items 19, 20): (m) Schedule 2: 1 Sept 2007 (see F2007L02627) Schedule 3: 19 July 2007 Remainder: Royal Assent	—

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Corporations Legislation Amendment (Simpler Regulatory System) Act 2007</i>	101, 2007	28 June 2007	Schedule 1 (items 188–197): 1 July 2007 Schedule 1 (items 198–215, 221, 222): 1 Sept 2007 (see F2007L02629) Schedule 1 (items 216–220): 28 Dec 2007 Schedule 1 (item 223): 1 July 2008 Schedule 1 (items 224–226): 1 Jan 2009 Remainder: Royal Assent	Sch. 1 (items 227–246)
as amended by				
<i>Statute Law Revision Act 2008</i>	73, 2008	3 July 2008	Schedule 2 (items 3, 4): (n)	—
<i>Corporations Amendment (Insolvency) Act 2007</i>	132, 2007	20 Aug 2007	Schedule 1 (items 1–10, 16–48, 51–120, 122–133), Schedule 2 (items 2–10, 12), Schedule 3, Schedule 4, Schedule 5 (items 3–15) and Schedule 6: 31 Dec 2007 (see F2007L03798) Schedule 1 (items 49, 50, 121) and Schedule 2 (item 11): 1 July 2008	—
<i>Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Act 2007</i>	149, 2007	24 Sept 2007	Schedule 2 (items 1, 2): 1 July 2008 Schedule 3: 22 Oct 2007	—
<i>Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007</i>	154, 2007	24 Sept 2007	Schedule 1 (items 52, 296) and Schedule 4 (items 16–30): Royal Assent Schedule 1 (items 167–172): 1 Jan 2008	Sch. 1 (item 296)
<i>First Home Saver Accounts (Consequential Amendments) Act 2008</i>	45, 2008	25 June 2008	26 June 2008	—

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Private Health Insurance Legislation Amendment Act 2008</i>	54, 2008	25 June 2008	25 June 2008	—
<i>Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008</i>	105, 2008	17 Oct 2008	Schedule 1 (item 54): (o) Schedule 3 (items 27–31): 18 Oct 2008	Sch. 3 (item 31)
<i>Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008</i>	117, 2008	21 Nov 2008	Schedule 3 (item 5): 22 Nov 2008	—
<i>Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008</i>	144, 2008	9 Dec 2008	Schedule 14 (items 130–150): 10 Dec 2008	—
<i>Corporations Amendment (Short Selling) Act 2008</i>	146, 2008	11 Dec 2008	Schedule 2 (items 1–5): 8 Jan 2009 Schedule 3 (items 1–6): [see Note 2] Remainder: Royal Assent	—

Act Notes

- (a) The *Corporations Act 2001* was amended by Schedule 2 (items 12–16) and Schedule 6 only of the *Corporations (Repeals, Consequential and Transitional) Act 2001*, subsections 2(2) and (14) of which provide as follows:
- (2) Schedules 1 and 2 commence, or are taken to have commenced, at the same time as the *Corporations Act 2001*.
 - (14) Schedule 6 commences, or is taken to have commenced, at the same time as the *Corporations Act 2001*.
- (aa) Subsection 2(1) (item 28) of the *Statute Law Revision Act 2006* provides as follows:
- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
28. Schedule 2, items 11 to 13	Immediately after the time specified in the <i>Corporations (Repeals, Consequential and Transitional) Act 2001</i> for the commencement of item 4 of Schedule 6 to that Act.	15 July 2001

- (b) The *Corporations Act 2001* was amended by Schedule 1 only of the *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 3) 2001*, subsections 2(1) and (3) of which provide as follows:
- (1) Subject to this section, this Act commences on the day mentioned in subsection 2.2(2) of the *Criminal Code*.
 - (3) Items 179 to 182 and 189 and 190 in Schedule 1 commence on the day on which this Act receives the Royal Assent.
- (c) The *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 3) 2001* was amended by Schedule 5 (item 10) only of the *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 2) 2001*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act commences on the day mentioned in subsection 2.2(2) of the *Criminal Code*.
- (d) The *Financial Services Reform Act 2001* was amended by Schedule 5 (items 6–8) only of the *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 2) 2001*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act commences on the day mentioned in subsection 2.2(2) of the *Criminal Code*.
- (da) Subsection 2(1) (item 33) of the *Statute Law Revision Act 2005* provides as follows:
- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
33. Schedule 2, item 13	Immediately after the time specified in the <i>Financial Services Reform Act 2001</i> for the commencement of item 334 of Schedule 1 to that Act.	11 March 2002

Act Notes

- (e) The *Corporations Act 2001* was amended by Schedule 1 (items 219–224) only of the *Financial Services Reform (Consequential Provisions) Act 2001*, subsections 2(3) and (4) of which provide as follows:
- (3) Items 223 and 224 of Schedule 1 commence on the day on which this Act receives the Royal Assent.
 - (4) Items 219 to 222 of Schedule 1 are taken to have commenced immediately after the commencement of the *Corporations Act 2001*. However, a person does not commit an offence if the person would not have committed the offence had those items commenced on the day on which this Act receives the Royal Assent (rather than commencing on the commencement of the *Corporations Act 2001*).
- (f) The *Corporations Act 2001* was amended by Schedule 5 (items 3–5) only of the *Treasury Legislation Amendment (Application of Criminal Code Act (No. 2) 2001*, subsections 2(1) and (3) of which provide as follows:
- (1) Subject to this section, this Act commences on the day mentioned in subsection 2.2(2) of the *Criminal Code*.
 - (3) Items 2 and 3 of Schedule 5 commence immediately after the commencement of item 1 of Schedule 1 to the *Financial Services Reform Act 2001*.
- Item 1 of Schedule 1 commenced on 11 March 2002 (see *Gazette* 2001, No. GN42).
- (g) Subsection 2(1) (items 3–5) of the *Financial Services Reform (Consequential Provisions) Act 2002* provide as follows:
- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Provision(s)	Commencement	Date/Details
3. Schedule 2, item 1	Immediately after the commencement of item 329 of Schedule 1 to the <i>Financial Services Reform Act 2001</i>	11 March 2002 (see <i>Gazette</i> 2001, No. GN42)
4. Schedule 2, items 2 to 7	Immediately after the commencement of item 1 of Schedule 1 to the <i>Financial Services Reform Act 2001</i>	11 March 2002 (see <i>Gazette</i> 2001, No. GN42)
5. Schedule 2, item 8	Immediately after the commencement of item 436 of Schedule 1 to the <i>Financial Services Reform Act 2001</i>	11 March 2002 (see <i>Gazette</i> 2001, No. GN42)

- (ga) Subsection 2(1) (item 35) of the *Statute Law Revision Act 2005* provides as follows:
- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
35. Schedule 2, item 16	Immediately after the time specified in the <i>Financial Services Reform (Consequential Provisions) Act 2002</i> for the commencement of item 7 of Schedule 2 to that Act.	11 March 2002

Act Notes

(h) Section 2(1) (items 4 and 6) of the *Corporations Legislation Amendment Act 2003* provide as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Provision(s)	Commencement	Date/Details
4. Schedule 4, item 8	Immediately after the commencement of the provisions covered by item 2 of this table	1 July 2003
6. Schedule 5, items 4, 5 and 6	Immediately after the commencement of the <i>Corporations Act 2001</i>	15 July 2001

(i) Subsection 2(1) (items 2 and 3) of the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences on the day or at the time specified in column 2 of the table.

Provision(s)	Commencement	Date/Details
2. Sections 4 and 5	Immediately after the commencement of sections 3 to 62 of the <i>Legislative Instruments Act 2003</i>	1 January 2005
3. Schedule 1	Immediately after the commencement of sections 3 to 62 of the <i>Legislative Instruments Act 2003</i>	1 January 2005

(j) Subsection 2(1) (items 2, 9, 11 and 13) of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* provide as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Provision(s)	Commencement	Date/Details
2. Schedule 1	The later of: (a) 1 July 2004; and (b) the day after this Act receives the Royal Assent.	1 July 2004 (paragraph (a) applies)
9. Schedule 5	The later of: (a) 1 July 2004; and (b) the day after this Act receives the Royal Assent.	1 July 2004 (paragraph (a) applies)
11. Schedules 8 and 9	Immediately after the commencement of the provisions covered by table item 9.	1 July 2004
13. Schedule 11	Immediately after the commencement of the provisions covered by table item 2.	1 July 2004

Act Notes

- (k) Subsection 2(1) (item 3) of the *Corporations Amendment Act (No. 1) 2005* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
3. Schedule 2	Immediately after the commencement of section 1462 of the <i>Corporations Act 2001</i> .	30 June 2004

- (l) Subsection 2(1) (item 3) of the *Australian Securities and Investments Commission Amendment (Audit Inspection) Act 2007* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
3. Schedule 2	Immediately after the commencement of Schedule 1 to the <i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004</i> .	1 July 2004

- (m) Subsection 2(1) (items 2–4 and 6) of the *Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act 2007* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
2. Schedule 1, items 1 to 18	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	21 December 2007
3. Schedule 1, item 19	Immediately after the provision(s) covered by table item 2. However, if the provision(s) covered by table item 2 commence before the provision(s) covered by table item 6, the provision(s) covered by this table item do not commence at all.	21 December 2007

Act Notes

Provision(s)	Commencement	Date/Details
4. Schedule 1, item 20	At the same time as the provision(s) covered by table item 2. However, if the provision(s) covered by table item 6 commence before or at the same time as the provision(s) covered by table item 2, the provision(s) covered by this table item do not commence at all.	Does not commence
6. Schedule 2	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	1 September 2007 (see F2007L02627)

- (n) Subsection 2(1) (items 46 and 47) of the *Statute Law Revision Act 2008* provides as follows:
- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
46. Schedule 2, item 3	Immediately after the time specified in the <i>Corporations Legislation Amendment (Simpler Regulatory System) Act 2007</i> for the commencement of item 108 of Schedule 1 to that Act.	28 June 2007
47. Schedule 2, item 4	Immediately after the time specified in the <i>Corporations Legislation Amendment (Simpler Regulatory System) Act 2007</i> for the commencement of item 112 of Schedule 1 to that Act.	28 June 2007

- (o) Subsection 2(1) (items 2 and 3) of the *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008* provides as follows:
- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
2. Schedule 1	Immediately after the provision(s) covered by table item 3.	18 October 2008
3. Schedules 2 to 5	The day after this Act receives the Royal Assent.	18 October 2008

Table of Amendments**Table of Amendments**

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Title	am. No. 122, 2001
Chapter 1	
Part 1.1	
S. 5.....	am. No. 122, 2001
S. 5A	am. No. 122, 2001
S. 5C	rs. No. 140, 2003
Part 1.2	
Division 1	
S. 6	am. No. 122, 2001
S. 7	am. No. 122, 2001
S. 9.....	am. Nos. 55, 117 and 122, 2001; Nos. 24, 25, 116 and 141, 2003; Nos. 80 and 103, 2004; Nos. 17 and 126, 2006; Nos. 64, 74, 85, 101 and 132, 2007; Nos. 45, 117 and 144, 2008
S. 9AA	ad. No. 144, 2008
S. 9A	ad. No. 101, 2007
Division 2	
S. 12	rs. No. 122, 2001
S. 13	am. No. 122, 2001
S. 14.....	rep. No. 122, 2001
S. 16.....	am. No. 122, 2001
S. 17.....	rs. No. 122, 2001
Div. 4 of Part 1.2	rep. No. 122, 2001
Ss. 23–29	rep. No. 122, 2001
Division 5A	
S. 45A	am. No. 103, 2004; No. 101, 2007
Division 6	
S. 50AAA.....	ad. No. 103, 2004
Division 7	
S. 51.....	rep. No. 122, 2001
S. 53.....	am. No. 116, 2003
S. 53AB	am. No. 80, 2004
Ss. 54–56	rep. No. 122, 2001
S. 57A	am. No. 103, 2004; No. 126, 2006
S. 60.....	ad. No. 132, 2007
S. 61.....	rep. No. 122, 2001
S. 64.....	am. No. 122, 2001
Ss. 67, 68	rep. No. 122, 2001
Ss. 71, 72	rep. No. 122, 2001
S. 72A	rep. No. 122, 2001

Table of Amendments

ad. = added or inserted	am. = amended	rep. = repealed	rs. = repealed and substituted
Provision affected	How affected		
S. 73.....	rep. No. 122, 2001		
S. 77.....	rep. No. 122, 2001		
S. 82A.....	rep. No. 103, 2004		
S. 84.....	rep. No. 122, 2001		
Ss. 87, 88.....	rep. No. 122, 2001		
S. 88B.....	ad. No. 122, 2001		
S. 91.....	rep. No. 116, 2003		
S. 92.....	am. No. 122, 2001		
Note to s. 92(1).....	rs. No. 122, 2001		
Note to s. 92(3).....	am. No. 122, 2001		
S. 92A.....	rep. No. 122, 2001		
Ss. 93, 94.....	rep. No. 122, 2001		
S. 95A.....	rep. No. 122, 2001 ad. No. 29, 2002		
S. 97.....	rep. No. 122, 2001		
Division 8			
S. 103.....	am. No. 122, 2001		
Note to s. 103(2).....	ad. No. 122, 2001		
S. 107.....	ad. No. 24, 2003		
S. 109X.....	am. No. 116, 2003		
Part 1.2A			
Division 2			
S. 111AD.....	am. No. 122, 2001		
Heading to s. 111AE.....	rs. No. 122, 2001		
S. 111AE.....	am. No. 122, 2001		
Heading to s. 111AF.....	am. No. 122, 2001; No. 85, 2007		
S. 111AF.....	am. No. 122, 2001; No. 85, 2007		
S. 111AFA.....	ad. No. 122, 2001 am. No. 85, 2007		
Heading to s. 111AH.....	am. No. 122, 2001		
S. 111AH.....	am. No. 122, 2001		
S. 111AI.....	rs. No. 85, 2007		
Division 3			
S. 111AO.....	am. No. 103, 2004		
S. 111AP.....	am. No. 122, 2001		
S. 111AQA.....	ad. No. 122, 2001 am. No. 103, 2004		
Division 4			
S. 111AR.....	am. No. 122, 2001		
Part 1.5			
S. 1 (to Part 1.5).....	am. No. 116, 2003		
S. 3 (to Part 1.5).....	am. No. 116, 2003		
Note to s. 3.7 (to Part 1.5).....	rep. No. 116, 2003		

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 4 (to Part 1.5).....	am. No. 24, 2003; No. 101, 2007
S. 5 (to Part 1.5).....	am. Nos. 24 and 116, 2003; No. 101, 2007
S. 7 (to Part 1.5).....	am. Nos. 24 and 116, 2003
S. 9 (to Part 1.5).....	am. No. 116, 2003
S. 11 (to Part 1.5).....	am. No. 116, 2003
S. 12 (to Part 1.5).....	am. No. 116, 2003
Chapter 2A	
Part 2A.1	
S. 113	am. No. 117, 2001
S. 115.....	am. No. 117, 2001
Part 2A.2	
S. 117.....	am. No. 117, 2001; No. 24, 2003
S. 123.....	am. No. 117, 2001; No. 24, 2003
Chapter 2B	
Part 2B.4	
S. 136.....	am. No. 117, 2001
S. 139	am. No. 117, 2001
S. 141.....	am. No. 122, 2001; No. 116, 2003; No. 103, 2004
Part 2B.5	
S. 142.....	am. No. 117, 2001; No. 24, 2003
Note to s. 142(1)	
Renumbered Note 1	No. 101, 2007
Note 2 to s. 142(1)	ad. No. 101, 2007
S. 143.....	am. No. 117, 2001; No. 103, 2004
S. 144.....	am. No. 117, 2001
S. 145.....	am. No. 117, 2001
S. 146.....	am. No. 117, 2001; No. 24, 2003
S. 146A	ad. No. 101, 2007
Part 2B.6	
Division 1	
S. 148.....	am. No. 117, 2001
S. 149.....	am. No. 24, 2003
S. 150.....	am. No. 117, 2001
S. 151.....	am. No. 117, 2001; No. 101, 2007
S. 153.....	am. No. 117, 2001; No. 24, 2003
S. 156.....	am. No. 117, 2001
Division 2	
S. 157.....	am. No. 117, 2001
S. 157A	ad. No. 132, 2007
S. 158.....	am. No. 117, 2001
S. 161A	ad. No. 132, 2007

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected**How affected****Part 2B.7**

S. 162.....	am. No. 117, 2001
S. 163.....	am. No. 117, 2001; No. 24, 2003
Note to s. 163(3)	am. No. 103, 2004; No. 101, 2007
S. 165.....	am. No. 117, 2001

Chapter 2C**Part 2C.1**

Heading to Part 2C.1.....	ad. No. 24, 2003
S. 168.....	am. No. 117, 2001
Note 1A to s. 168(1)	ad. No. 103, 2004
S. 169.....	am. No. 24, 2003
Note to s. 169(5A)	rs. No. 24, 2003
S. 170.....	am. Nos. 117 and 122, 2001
S. 172.....	am. No. 117, 2001
S. 173.....	am. No. 117, 2001
S. 174.....	am. No. 117, 2001
Note to s. 175(3)	ad. No. 24, 2003
S. 177.....	am. No. 117, 2001

Part 2C.2

Part 2C.2	ad. No. 24, 2003
S. 178A	ad. No. 24, 2003
S. 178B	ad. No. 24, 2003
S. 178C	ad. No. 24, 2003
S. 178D	ad. No. 24, 2003

Chapter 2D**Part 2D.1****Division 1**

S. 188.....	am. No. 117, 2001; No. 24, 2003; No. 103, 2004
Note to s. 188(1)	am. No. 116, 2003
Note to s. 188(3)	ad. No. 117, 2001
S. 190B	ad. No. 126, 2006

Division 2

S. 191.....	am. No. 117, 2001
S. 195.....	am. No. 117, 2001

Division 3

S. 197.....	am. No. 138, 2005; No. 126, 2006
-------------	----------------------------------

Part 2D.2**Division 1**

S. 199A	am. No. 103, 2004
Note 1 to s. 199A(3)	am. No. 103, 2004
S. 199B	am. No. 117, 2001

Table of Amendments

ad. = added or inserted	am. = amended	rep. = repealed	rs. = repealed and substituted
Provision affected	How affected		
Division 2			
S. 200B	am. No. 117, 2001		
S. 200C	am. No. 117, 2001		
S. 200F.....	am. No. 117, 2001		
Part 2D.3			
Division 1			
S. 201C	rep. No. 24, 2003		
S. 201D	am. No. 117, 2001		
S. 201L.....	am. No. 103, 2004		
Division 2			
S. 202B	am. No. 117, 2001		
Division 3			
S. 203D	am. No. 117, 2001		
Part 2D.4			
S. 204A	am. No. 117, 2001		
S. 204C	am. No. 117, 2001		
Note 1 to s. 204D	am. No. 103, 2004		
Part 2D.5			
S. 205A	am. No. 101, 2007		
Note to s. 205A(2)	ad. No. 101, 2007		
S. 205B	am. No. 117, 2001; No. 24, 2003; No. 101, 2007		
S. 205C	am. No. 117, 2001		
S. 205E	am. No. 117, 2001		
S. 205F.....	am. No. 117, 2001		
Heading to s. 205G	am. No. 122, 2001		
S. 205G	am. Nos. 117 and 122, 2001		
Note to s. 205G(1).....	ad. No. 24, 2003		
Note to s. 205G(3).....	ad. No. 24, 2003		
Note to s. 205G(4).....	ad. No. 24, 2003		
Part 2D.6			
S. 206A	am. No. 117, 2001		
Subhead. to s. 206B(3)	rs. No. 80, 2004		
S. 206B	am. No. 80, 2004; No. 126, 2006		
S. 206BA	ad. No. 103, 2004 am. No. 126, 2006		
S. 206C	am. No. 122, 2001; No. 126, 2006		
Note to s. 206C(1).....	rep. No. 122, 2001		
S. 206D	am. No. 103, 2004; No. 126, 2006		
S. 206E	am. No. 126, 2006		
S. 206EA	ad. No. 131, 2006		
S. 206F.....	am. No. 126, 2006		
S. 206GA.....	ad. No. 131, 2006		

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 206HB	ad. No. 126, 2006
Chapter 2E	
Part 2E.1	
Division 2	
S. 213	rs. No. 101, 2007
Division 3	
S. 219	am. No. 116, 2003
S. 220	am. No. 122, 2001
S. 225	am. No. 117, 2001
Part 2E.2	
S. 228	am. No. 144, 2008
Chapter 2F	
Part 2F.1	
S. 235	am. No. 117, 2001
Part 2F.2	
S. 246B	am. No. 117, 2001
S. 246D	am. No. 117, 2001
S. 246F	am. No. 117, 2001
Note to s. 246F(1)	ad. No. 24, 2003
S. 246G	am. No. 117, 2001
Part 2F.3	
S. 247C	am. No. 117, 2001
Chapter 2G	
Part 2G.2	
Division 2	
S. 249CA	am. No. 122, 2001
S. 249E	am. No. 117, 2001
Division 3	
S. 249HA	am. No. 122, 2001
S. 249J	am. No. 103, 2004
S. 249K	am. No. 117, 2001
S. 249L	am. No. 103, 2004
S. 249LA	ad. No. 103, 2004
Division 5	
Note to s. 249V(1)	ad. No. 103, 2004
Division 6	
S. 249X	am. No. 103, 2004
S. 249Z	am. No. 117, 2001
S. 250A	am. No. 117, 2001; No. 103, 2004
S. 250B	am. No. 103, 2004
S. 250BA	am. No. 122, 2001; No. 103, 2004
S. 250D	am. No. 103, 2004

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Division 8	
S. 250N	am. No. 117, 2001
S. 250P	am. No. 117, 2001
Ss. 250PAA, 250PAB.....	ad. No. 132, 2007
S. 250PA	ad. No. 103, 2004
S. 250R	am. No. 103, 2004
S. 250RA.....	ad. No. 103, 2004
S. 250S	am. No. 117, 2001
S. 250SA	ad. No. 103, 2004
S. 250T.....	am. No. 117, 2001; No. 103, 2004
Part 2G.3	
S. 251A	am. No. 117, 2001
S. 251AA	am. No. 122, 2001
S. 251B	am. No. 117, 2001
Part 2G.4	
Division 1	
S. 252C	am. No. 117, 2001
Division 2	
S. 252H	am. No. 117, 2001
Division 5	
S. 252X	am. No. 117, 2001
S. 252Y	am. No. 117, 2001
S. 252Z.....	am. No. 116, 2003
Division 6	
S. 253F.....	am. No. 122, 2001
Division 7	
S. 253M.....	am. No. 117, 2001
S. 253N	am. No. 117, 2001
Chapter 2H	
Part 2H.1	
S. 254G	am. No. 116, 2003
S. 254H	am. No. 117, 2001
Part 2H.3	
S. 254N	am. No. 117, 2001
S. 254Q.....	am. No. 117, 2001
Part 2H.6	
S. 254X	am. No. 117, 2001; No. 24, 2003
Note to s. 254X(1)	
Renumbered Note 1	No. 24, 2003
Note 2 to s. 254X(1)	ad. No. 24, 2003
S. 254Y	am. No. 117, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected**How affected****Chapter 2J****Part 2J.1****Division 1**

S. 256B am. No. 132, 2007

Note to s. 256C(3) ad. No. 24, 2003

S. 256E am. No. 122, 2001

Division 2

S. 257B am. No. 122, 2001

S. 257H am. No. 122, 2001

S. 257J am. No. 122, 2001

Part 2J.2

S. 259B am. No. 117, 2001

S. 259D am. No. 117, 2001

Chapter 2K**Part 2K.2**

S. 262 am. No. 24, 2003

S. 264 am. No. 101, 2007

S. 272 am. No. 101, 2007

Note to s. 273A(1) am. No. 116, 2003

S. 273B am. No. 116, 2003

Note to s. 273B(1) am. No. 116, 2003

S. 273C am. No. 116, 2003

Note to s. 273C(1) am. No. 116, 2003

S. 274 am. No. 101, 2007

Chapter 2L**Part 2L.1**

S. 283AA am. No. 117, 2001; No. 103, 2004

Note to s. 283AA(1) am. No. 103, 2004; No. 101, 2007

S. 283AB am. No. 117, 2001

S. 283AC am. No. 117, 2001

Part 2L.2

S. 283BH am. No. 117, 2001

Chapter 2M**Part 2M.1**

S. 285 am. No. 103, 2004; No. 101, 2007

Part 2M.2

S. 286 am. No. 117, 2001

S. 287 am. No. 117, 2001

S. 288 am. No. 117, 2001

S. 289 am. No. 117, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Part 2M.3	
Division 1	
S. 294.....	am. No. 117, 2001
S. 295.....	am. No. 103, 2004
S. 295A	ad. No. 103, 2004
S. 298.....	am. No. 103, 2004
S. 299A	ad. No. 103, 2004
S. 300.....	am. No. 122, 2001; No. 103, 2004
Note to s. 300(11)	am. No. 122, 2001
S. 300A	am. Nos. 55 and 122, 2001; No. 103, 2004; No. 101, 2007
Division 2	
S. 303.....	am. No. 103, 2004
S. 306.....	am. No. 103, 2004
Division 3	
S. 307.....	am. No. 103, 2004
S. 307A	ad. No. 103, 2004
S. 307B	ad. No. 103, 2004
S. 307C	ad. No. 103, 2004 am. No. 101, 2007
S. 308.....	am. No. 117, 2001; No. 103, 2004; No. 101, 2007
S. 309.....	am. No. 103, 2004
S. 311	am. No. 117, 2001 rs. No. 103, 2004
S. 312.....	am. No. 117, 2001
S. 313.....	am. No. 117, 2001
Division 4	
S. 314.....	am. No. 117, 2001; No. 103, 2004; No. 101, 2007
S. 315.....	am. No. 101, 2007
S. 316.....	am. No. 117, 2001
S. 317	am. No. 117, 2001
Note 3 to s. 317(1)	ad. No. 103, 2004
S. 318.....	am. No. 117, 2001; No. 101, 2007
Division 5	
S. 319.....	am. No. 117, 2001; No. 116, 2003; No. 101, 2007
S. 320.....	am. No. 117, 2001
S. 321	am. No. 117, 2001
S. 322.....	am. No. 117, 2001
Division 6	
S. 323.....	am. No. 117, 2001
S. 323B	am. No. 117, 2001
Division 7	
S. 323D	am. No. 117, 2001

Table of Amendments

 ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
--------------------	--------------

Division 8

S. 323DA	am. No. 122, 2001
----------------	-------------------

Division 9

Div. 9 of Part 2M.3	ad. No. 103, 2004
---------------------------	-------------------

Subdivision A

S. 323EA	ad. No. 103, 2004
----------------	-------------------

S. 323EB	ad. No. 103, 2004
----------------	-------------------

Subdivision B

S. 323EC	ad. No. 103, 2004
----------------	-------------------

S. 323ED	ad. No. 103, 2004
----------------	-------------------

S. 323EE	ad. No. 103, 2004
----------------	-------------------

S. 323EF	ad. No. 103, 2004
----------------	-------------------

Subdivision C

S. 323EG	ad. No. 103, 2004
----------------	-------------------

S. 323EH	ad. No. 103, 2004
----------------	-------------------

S. 323EI	ad. No. 103, 2004
----------------	-------------------

Subdivision D

S. 323EJ	ad. No. 103, 2004
----------------	-------------------

S. 323EK	ad. No. 103, 2004
----------------	-------------------

S. 323EL	ad. No. 103, 2004
----------------	-------------------

S. 323EM	ad. No. 103, 2004
----------------	-------------------

Part 2M.4**Division 1**

Heading to Div. 1 of	rs. No. 103, 2004
----------------------------	-------------------

Part 2M.4	
-----------	--

S. 324	rep. No. 103, 2004
--------------	--------------------

S. 324AA	ad. No. 103, 2004
----------------	-------------------

S. 324AB	ad. No. 103, 2004
----------------	-------------------

S. 324AC	ad. No. 103, 2004
----------------	-------------------

S. 324AD	ad. No. 103, 2004
----------------	-------------------

S. 324AE	ad. No. 103, 2004 am. No. 101, 2007
----------------	--

S. 324AF	ad. No. 103, 2004
----------------	-------------------

Division 2

Div. 2 of Part 2M.4	ad. No. 103, 2004
---------------------------	-------------------

S. 324BA	ad. No. 103, 2004
----------------	-------------------

S. 324BB	ad. No. 103, 2004
----------------	-------------------

S. 324BC	ad. No. 103, 2004
----------------	-------------------

S. 324BD	ad. No. 103, 2004
----------------	-------------------

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Division 3	
Div. 3 of Part 2M.4	ad. No. 103, 2004
Subdivision A	
S. 324CA	ad. No. 103, 2004
Note 2 to s. 324CA(1A)	am. No. 101, 2007
S. 324CB	ad. No. 103, 2004
Note 2 to s. 324CB(1A)	am. No. 101, 2007
S. 324CC	ad. No. 103, 2004
Note 2 to s. 324CC(1A)	am. No. 101, 2007
S. 324CD	ad. No. 103, 2004
Subdivision B	
S. 324CE	ad. No. 103, 2004 am. No. 101, 2007
Note to s. 324CE(1A)	am. No. 101, 2007
S. 324CF	ad. No. 103, 2004 am. No. 101, 2007
Note to s. 324CF(1A)	am. No. 101, 2007
S. 324CG	ad. No. 103, 2004 am. No. 101, 2007
Note to s. 324CG(1A)	am. No. 101, 2007
Note to s. 324CG(5A)	am. No. 101, 2007
S. 324CH	ad. No. 103, 2004 am. No. 101, 2007
S. 324CI	ad. No. 103, 2004 am. No. 101, 2007
S. 324CJ	ad. No. 103, 2004 am. No. 101, 2007
S. 324CK	ad. No. 103, 2004 am. No. 101, 2007
Subdivision C	
S. 324CL	ad. No. 103, 2004
Division 4	
Div. 4 of Part 2M.4	ad. No. 103, 2004
S. 324CM	ad. No. 103, 2004
Division 5	
Div. 5 of Part 2M.4	ad. No. 103, 2004
S. 324DA	ad. No. 103, 2004
S. 324DB	ad. No. 103, 2004
S. 324DC	ad. No. 103, 2004
S. 324DD	ad. No. 103, 2004

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
--------------------	--------------

Division 6

Heading to Div. 6 of ad. No. 103, 2004
Part 2M.4

Subdivision A

Heading to Subdiv. A of ad. No. 103, 2004
Div. 6 of Part 2M.4

S. 327 rep. No. 103, 2004

S. 327A ad. No. 103, 2004

S. 327B ad. No. 103, 2004
am. No. 101, 2007

S. 327C ad. No. 103, 2004

S. 327D ad. No. 103, 2004

S. 327E ad. No. 103. 2004

S. 327F ad. No. 103. 2004

S. 327G ad. No. 103. 2004

S. 327H _____ ad. No. 103, 2004

S. 3271 ad No. 103, 2004

S. 328..... rep. No. 103, 2004

S. 328A ad. No. 103. 2004

S. 328B ad. No. 103. 2004

Subdivision B

Heading to Subdiv. B of ad. No. 103, 2004
Div. 6 of Part 2M.4

S. 329..... am. No. 103, 2004

S. 330..... am. No. 103, 2004

Subdivision C

Heading to Subdiv. C of ad. No. 103, 2004
Div. 6 of Part 2M.4

Division 7

Heading to Div. 2..... rep. No. 103, 2004

Heading to Div. 7 of ad. No. 103, 2004
Part 2M.4

Subdivision A

Heading to Subdiv. A of ad. No. 103, 2004
Div. 7 of Part 2M.4

S. 331AA rep. No. 103, 2004

S. 331AB rep. No. 103, 2004

S. 331AAA..... ad. No. 103, 2004
am. No. 101, 2007

S. 331AAB..... ad. No. 103, 2004

S. 331AAC ad. No. 103, 2004

S. 331AAD ad. No. 103. 2004

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Subdivision B	
Heading to Subdiv. B of Div. 7 of Part 2M.4	ad. No. 103, 2004
S. 331AC	am. No. 103, 2004
Heading to s. 331AD	am. No. 103, 2004
S. 331AD	am. No. 103, 2004
Subdivision C	
Heading to Subdiv. C of Div. 7 of Part 2M.4	ad. No. 103, 2004
Part 2M.5	
Heading to Part 2M.5	rs. No. 103, 2004
S. 334	am. No. 154, 2007
S. 336	ad. No. 103, 2004 am. No. 154, 2007
S. 337	rs. No. 103, 2004
S. 338	ad. No. 103, 2004
S. 339	rep. No. 103, 2004
Part 2M.6	
Heading to s. 340	rs. No. 101, 2007
S. 340	am. No. 103, 2004
Heading to s. 341	rs. No. 101, 2007
S. 341	am. No. 103, 2004
Heading to s. 342	rs. No. 101, 2007
S. 342AA	ad. No. 101, 2007
S. 342AB	ad. No. 101, 2007
S. 342AC	ad. No. 101, 2007
S. 342A	ad. No. 103, 2004
S. 342B	ad. No. 103, 2004
Chapter 2N	
Heading to Chapt. 2N	rs. No. 24, 2003
Part 2N.1	
Part 2N.1	rs. No. 24, 2003
S. 345	am. No. 117, 2001 rep. No. 24, 2003
S. 345A	ad. No. 24, 2003
S. 345B	ad. No. 24, 2003
S. 345C	ad. No. 24, 2003
S. 346	am. No. 117, 2001 rep. No. 24, 2003

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
--------------------	--------------

Part 2N.2

Heading to Part 2N.2.....	rep. No. 24, 2003
Part 2N.2	ad. No. 24, 2003
S. 346A	ad. No. 24, 2003
S. 346B	ad. No. 24, 2003
S. 346C	ad. No. 24, 2003
S. 347	rep. No. 24, 2003

Part 2N.3

Part 2N.3	ad. No. 24, 2003
S. 347A	ad. No. 24, 2003
S. 347B	ad. No. 24, 2003
S. 347C	ad. No. 24, 2003
S. 348	rep. No. 24, 2003

Part 2N.4

Part 2N.4	ad. No. 24, 2003
S. 348A	ad. No. 24, 2003 am. No. 101, 2007
S. 348B	ad. No. 24, 2003
S. 348C	ad. No. 24, 2003
S. 348D	ad. No. 24, 2003 am. No. 103, 2004; No. 101, 2007
S. 349	rep. No. 24, 2003

Part 2N.5

Part 2N.5	ad. No. 24, 2003
S. 349A	ad. No. 24, 2003
S. 349B	ad. No. 24, 2003
S. 349C	ad. No. 24, 2003
S. 349D	ad. No. 24, 2003

Chapter 2P

Heading to Chapt. 2P	ad. No. 24, 2003
S. 350	rs. No. 122, 2001
S. 352	am. No. 24, 2003; No. 101, 2007
Ss. 353, 354	ad. No. 24, 2003

Chapter 5**Part 5.1**

S. 411	am. No. 116, 2003; No. 103, 2004; No. 132, 2007
--------------	---

Part 5.2

S. 417	am. No. 126, 2006
S. 418	am. No. 103, 2004
Heading to s. 421	am. No. 132, 2007
S. 421	am. No. 132, 2007
S. 421A	am. No. 132, 2007

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Heading to s. 422	am. No. 132, 2007
S. 422	am. No. 103, 2004; No. 132, 2007
S. 425	am. No. 132, 2007
S. 427	am. No. 132, 2007
S. 428	am. No. 117, 2001
Ss. 434D–434G	ad. No. 132, 2007
Part 5.3A	
Division 1	
S. 435C	am. No. 105, 2008
Division 2	
Ss. 436A–436C	am. No. 132, 2007
S. 436DA	ad. No. 132, 2007
S. 436E	am. No. 132, 2007
Note to s. 436E(3)	ad. No. 132, 2007
S. 436G	am. No. 132, 2007
Division 3	
S. 437C	am. No. 117, 2001; No. 103, 2004
S. 437D	am. No. 103, 2004
S. 437F	rs. No. 132, 2007
Division 4	
S. 438B	am. No. 117, 2001; No. 132, 2007
S. 438C	am. No. 117, 2001
S. 438D	am. No. 103, 2004
S. 438E	ad. No. 132, 2007
Division 5	
S. 439A	am. No. 132, 2007
Note to s. 439A(3)	ad. No. 132, 2007
Note to s. 439A(4)	ad. No. 132, 2007
S. 439B	am. No. 132, 2007
Division 6	
Ss. 440BA, 440BB	ad. No. 132, 2007
S. 440J	am. No. 144, 2008
S. 440JA	ad. No. 132, 2007
Division 7	
Heading to Div. 7 of Part 5.3A	rs. No. 132, 2007
Ss. 441A, 441B	am. No. 132, 2007
S. 441D	am. No. 132, 2007
S. 441JA	ad. No. 132, 2007
Division 8	
S. 442C	am. No. 132, 2007
Ss. 442CA–442CC	ad. No. 132, 2007

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected**How affected****Division 9****Subdivision A**

Ss. 443A, 443B am. No. 132, 2007

S. 443BA am. No. 123, 2001; No. 101, 2006

Subdivision B

Ss. 443D, 443E am. No. 132, 2007

Division 10

Ss. 444A, 444B am. No. 132, 2007

S. 444D am. No. 132, 2007

Ss. 444DA, 444DB ad. No. 132, 2007

S. 444F am. No. 132, 2007

S. 444GA ad. No. 132, 2007

S. 444J ad. No. 132, 2007

Division 11

S. 445C am. No. 132, 2007

S. 445CA ad. No. 132, 2007

S. 445D am. No. 132, 2007

S. 445F am. No. 132, 2007

S. 445FA ad. No. 132, 2007

Division 11A

Div. 11A of Part 5.3A ad. No. 132, 2007

S. 445J ad. No. 132, 2007

Division 12

S. 446A am. No. 132, 2007

Note to s. 446A ad. No. 132, 2007

S. 446C ad. No. 132, 2007

Division 14

S. 448B am. No. 117, 2001

S. 448C am. No. 117, 2001; No. 103, 2004; No. 132, 2007

Division 15

S. 449B am. No. 132, 2007

Note to s. 449C(5) ad. No. 132, 2007

S. 449CA ad. No. 132, 2007

S. 449E am. No. 132, 2007

Division 16

S. 450A am. No. 132, 2007

Note to s. 450A(3) ad. No. 132, 2007

S. 450B am. No. 132, 2007

Note to s. 450B ad. No. 132, 2007

S. 450C am. No. 132, 2007

Note to s. 450C ad. No. 132, 2007

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 450D	am. No. 132, 2007
Note to s. 450D	ad. No. 132, 2007
S. 450E	am. No. 117, 2001; No. 132, 2007
Part 5.4	
Division 2	
S. 459E	am. No. 123, 2001; No. 101, 2006
Part 5.4A	
S. 461	am. No. 105, 2008
S. 462	am. No. 119, 2001; No. 105, 2008
Part 5.4B	
Division 1	
S. 466	am. No. 103, 2004
S. 468	am. No. 132, 2007
S. 468A	ad. No. 132, 2007
Division 1A	
S. 471A	am. No. 117, 2001; No. 103, 2004
Division 2	
S. 473	am. No. 132, 2007
Note to s. 473(3)	ad. No. 132, 2007
Note to s. 473(4)	ad. No. 132, 2007
S. 475	am. No. 117, 2001
S. 477	am. No. 132, 2007
Division 3	
Subdivision A	
Heading to Subdiv. A of Div. 3 of Part 5.4B	ad. No. 132, 2007
S. 482	am. No. 132, 2007
S. 483	am. No. 103, 2004
S. 486A	am. No. 117, 2001; No. 103, 2004; No. 132, 2007
Note to s. 486B(1)	ad. No. 132, 2007
Subdivision B	
Subdiv. B of Div. 3 of Part 5.4B	ad. No. 132, 2007
Ss. 489A–489E	ad. No. 132, 2007
Part 5.5	
Division 1	
S. 493	am. No. 132, 2007
S. 493A	ad. No. 132, 2007
Division 2	
S. 495	am. No. 132, 2007
S. 496	am. No. 117, 2001; No. 132, 2007
Note to s. 496(2)	ad. No. 132, 2007

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
--------------------	--------------

Division 3

S. 497	am. No. 117, 2001; No. 132, 2007
Note to s. 497(2)	ad. No. 132, 2007
S. 499	am. No. 132, 2007
S. 500	am. No. 103, 2004

Division 4

S. 504	am. No. 132, 2007
S. 506	am. No. 132, 2007
S. 506A	ad. No. 132, 2007
Heading to s. 508	am. No. 132, 2007
S. 508	am. No. 132, 2007
S. 512	rep. No. 132, 2007

Part 5.6**Division 3**

S. 530	ad. No. 132, 2007
S. 530AA	ad. No. 132, 2007
S. 530A	am. No. 117, 2001; No. 103, 2004
S. 530B	am. No. 117, 2001
S. 532	am. No. 117, 2001; No. 103, 2004
S. 533	am. No. 103, 2004; No. 132, 2007
Ss. 538, 539	am. No. 132, 2007
Note to s. 539(5)	ad. No. 132, 2007

Division 4

S. 541	am. No. 117, 2001
--------------	-------------------

Division 5

Heading to s. 548	am. No. 132, 2007
S. 548	am. No. 132, 2007
S. 548A	ad. No. 132, 2007
S. 549	am. No. 132, 2007
Note to s. 550(3)	ad. No. 132, 2007

Division 6**Subdivision A**

S. 553	am. No. 132, 2007
Note 3 to s. 553(1A)	ad. No. 132, 2007
S. 553AB	ad. No. 132, 2007

Subdivision D

S. 556	am. No. 132, 2007; No. 144, 2008
S. 560	rs. No. 132, 2007

Division 7

S. 565	am. No. 132, 2007
--------------	-------------------

Division 7A

Note to s. 568A(1)	ad. No. 132, 2007
--------------------------	-------------------

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Division 8	
Div. 8 of Part 5.6	ad. No. 132, 2007
Subdivision A	
Ss. 571–579	ad. No. 132, 2007
Ss. 579A–579D	ad. No. 132, 2007
Subdivision B	
Ss. 579E–579H	ad. No. 132, 2007
Ss. 579J–579L	ad. No. 132, 2007
Subdivision C	
Ss. 579M, 579N	ad. No. 132, 2007
Ss. 579P, 579Q	ad. No. 132, 2007
Part 5.7	
S. 585	am. No. 103, 2004
S. 588	am. No. 74, 2007
Part 5.7B	
Division 1	
S. 588F	am. No. 123, 2001; No. 101, 2006
Division 2	
S. 588FDA	ad. No. 25, 2003
Ss. 588FE, 588FF	am. No. 25, 2003; No. 132, 2007
S. 588FG	am. No. 25, 2003
S. 588FGA	am. No. 123, 2001; No. 101, 2006
Division 3	
S. 588G	am. No. 117, 2001
Part 5.8	
S. 590	am. No. 117, 2001; No. 103, 2004
S. 592	am. No. 117, 2001
Note to s. 592(2)	ad. No. 117, 2001
S. 595	am. No. 117, 2001; No. 132, 2007
S. 596	am. No. 117, 2001; No. 103, 2004
Part 5.9	
Division 1	
S. 596A	am. No. 103, 2004
S. 597	am. No. 117, 2001
S. 597A	am. No. 117, 2001; No. 132, 2007
Division 3	
S. 600G	ad. No. 132, 2007
Chapter 5A	
Part 5A.1	
S. 601AB	am. No. 24, 2003
Subhead. to s. 601AD(3)	ad. No. 74, 2007
S. 601AD	am. No. 117, 2001; No. 74, 2007

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Heading to s. 601AE	am. No. 74, 2007
Subhead. to s. 601AE(2)	ad. No. 74, 2007
Subhead. to s. 601AE(4)	ad. No. 74, 2007
S. 601AE	am. No. 74, 2007
Heading to s. 601AF	am. No. 74, 2007
S. 601AF	am. No. 74, 2007
Note to s. 601AF	rs. No. 74, 2007
S. 601AH	am. No. 74, 2007
Part 5A.2	
S. 601AI	am. No. 126, 2006
S. 601AJ	am. No. 126, 2006
S. 601AK	am. No. 126, 2006
S. 601AL	am. No. 126, 2006
Chapter 5B	
Part 5B.1	
Division 1	
S. 601BC	am. No. 117, 2001; No. 24, 2003
S. 601BH	am. No. 117, 2001
S. 601BJ	am. No. 117, 2001
S. 601BK	am. No. 117, 2001
Division 2	
S. 601BP	am. No. 117, 2001
S. 601BR	am. No. 117, 2001
Part 5B.2	
Division 2	
S. 601CDA	ad. No. 85, 2007
Division 3	
S. 601CTA	ad. No. 85, 2007
S. 601CW	am. No. 117, 2001
Division 4	
S. 601CZB	am. No. 117, 2001
S. 601CZC	am. No. 117, 2001
Part 5B.3	
S. 601DD	am. No. 117, 2001
S. 601DE	am. No. 117, 2001; No. 24, 2003
Note to s. 601DE(1)	ad. No. 24, 2003
S. 601DH	am. No. 117, 2001
Chapter 5C	
Part 5C.1	
S. 601EC	rs. No. 24, 2003
S. 601ED	am. Nos. 55 and 122, 2001

Table of Amendments

 ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

 Provision affected How affected

Part 5C.2**Division 1**

Heading to s. 601FA.	am. No. 122, 2001
S. 601FA	am. No. 122, 2001
S. 601FC	am. Nos. 55 and 117, 2001; No. 101, 2007
Note to s. 601FC(1).....	rep. No. 55, 2001
S. 601FD	am. Nos. 55, 117 and 122, 2001
Note to s. 601FD(1).....	rep. No. 55, 2001
S. 601FE	am. No. 55, 2001
Note to s. 601FE(1).....	rep. No. 55, 2001
S. 601FF	am. No. 117, 2001
S. 601FG	am. No. 55, 2001
Note 1 to s. 601FG	
Renumbered Note	No. 55, 2001
Note 2 to s. 601FG	rep. No. 55, 2001

Part 5C.4

S. 601HD	am. No. 117, 2001
S. 601HG	am. No. 117, 2001; No. 103, 2004; No. 101, 2007

Part 5C.5

S. 601JA	am. No. 117, 2001; No. 103, 2004; No. 144, 2008
S. 601JB	am. No. 117, 2001; No. 103, 2004; No. 144, 2008
S. 601JD	am. Nos. 55 and 117, 2001
Note to s. 601JD(1)	rep. No. 55, 2001

Part 5C.6

S. 601KA	am. No. 117, 2001
----------------	-------------------

Part 5C.8

S. 601MB	am. No. 122, 2001
----------------	-------------------

Part 5C.10

S. 601PA	am. No. 122, 2001
S. 601PB	am. No. 24, 2003

Chapter 6

S. 602A	ad. No. 64, 2007
---------------	------------------

Part 6.1

S. 606	am. No. 117, 2001
Note to s. 606(5)	ad. No. 117, 2001
Subhead. to s. 609(3)	am. No. 122, 2001
Subhead. to s. 609(6)	rs. No. 122, 2001
S. 609	am. No. 122, 2001
Heading to s. 610	am. No. 122, 2001
Subhead. to s. 610(1)	am. No. 122, 2001
S. 610	am. No. 122, 2001
Note to s. 610(2)	am. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Part 6.2	
S. 611	am. No. 122, 2001
Part 6.4	
Division 1	
S. 618	am. No. 122, 2001
Division 2	
S. 621	am. No. 122, 2001
S. 622	am. No. 117, 2001
S. 623	am. No. 117, 2001
Division 3	
S. 624	am. No. 117, 2001
Division 4	
S. 625	am. No. 122, 2001
S. 628	am. No. 103, 2004
S. 629	am. No. 122, 2001
Note to s. 629(2)	rep. No. 122, 2001
S. 630	am. Nos. 117 and 122, 2001
Part 6.5	
Division 1	
S. 631	am. No. 117, 2001
S. 632	am. No. 122, 2001
S. 633	am. Nos. 117 and 122, 2001
S. 634	am. No. 122, 2001
S. 635	am. Nos. 117 and 122, 2001
Division 2	
S. 636	am. Nos. 117 and 122, 2001
S. 637	am. No. 117, 2001
Division 3	
S. 638	am. No. 117, 2001
S. 639	am. No. 117, 2001
S. 640	am. No. 117, 2001
S. 641	am. No. 117, 2001
Division 4	
S. 643	am. No. 117, 2001
S. 644	am. No. 117, 2001
S. 647	am. Nos. 117 and 122, 2001
Division 5	
Subdivision A	
S. 648A	am. No. 117, 2001
Subdivision C	
S. 648E	am. Nos. 117 and 122, 2001
S. 648G	am. No. 117, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 648H	am. No. 122, 2001
Subdiv. D of Div. 5	ad. No. 122, 2001
of Part 6.5	rep. No. 101, 2007
Ss. 648J–648N.....	ad. No. 122, 2001
	rep. No. 101, 2007
Ss. 648P–648U	ad. No. 122, 2001
	rep. No. 101, 2007
Part 6.6	
Division 1	
S. 649B	am. No. 122, 2001
S. 649C	am. Nos. 117 and 122, 2001
Division 2	
S. 650B	am. Nos. 117 and 122, 2001
S. 650E	am. Nos. 117 and 122, 2001
S. 650F.....	am. Nos. 117 and 122, 2001
Division 3	
S. 651A	am. No. 117, 2001
S. 651C	am. No. 117, 2001
Part 6.7	
S. 652C	am. Nos. 117 and 122, 2001
Part 6.8	
S. 653A	am. No. 122, 2001
S. 653B	am. No. 122, 2001
Part 6.9	
S. 654A	am. No. 117, 2001
Note to s. 654A(2)	ad. No. 117, 2001
S. 654C	am. No. 117, 2001
Part 6.10	
Division 2	
Heading to Div. 2	rs. No. 122, 2001
of Part 6.10	
Subdivision B	
S. 657A	am. No. 64, 2007
S. 657D	am. No. 64, 2007
S. 657EA	am. No. 64, 2007
S. 657F.....	am. No. 117, 2001
Chapter 6A	
Part 6A.1	
Division 1	
S. 661B	am. Nos. 117 and 122, 2001
S. 661C	am. No. 122, 2001
S. 661D	am. No. 117, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Division 2	
S. 662A	am. No. 117, 2001
S. 662B	am. No. 122, 2001
Division 3	
S. 663A	am. No. 117, 2001
S. 663B	am. No. 122, 2001
Part 6A.2	
Division 1	
S. 664B	am. No. 122, 2001
S. 664C	am. No. 122, 2001
S. 664D	am. No. 117, 2001
S. 664E	am. Nos. 117 and 122, 2001
Division 2	
S. 665A	am. No. 117, 2001
S. 665B	am. No. 122, 2001
Div. 3 of Part 6A.2	rep. No. 101, 2007
Ss. 665D, 665E	am. No. 117, 2001 rep. No. 101, 2007
Part 6A.3	
S. 666A	am. No. 117, 2001
S. 666B	am. No. 117, 2001
Part 6A.4	
S. 667A	am. No. 117, 2001
Part 6A.5	
S. 668A	am. No. 117, 2001
S. 668B	am. No. 117, 2001
Chapter 6B	
S. 670C	am. Nos. 117 and 122, 2001
Chapter 6C	
Part 6C.1	
Heading to s. 671B.....	am. No. 122, 2001
S. 671B	am. Nos. 117 and 122, 2001
Note to s. 671B(2)	am. No. 122, 2001
Note to s. 671B(3)	am. No. 122, 2001
Part 6C.2	
S. 672B	am. No. 117, 2001
S. 672DA.....	ad. No. 103, 2004
Chapter 6CA	
Chapt. 6CA.....	ad. No. 122, 2001
S. 674.....	ad. No. 122, 2001 am. No. 103, 2004
Note 3 to s. 674(2)	ad. No. 103, 2004

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 675.....	ad. No. 122, 2001 am. No. 103, 2004; No. 101, 2007
Note 3 to s. 675(2)	ad. No. 103, 2004
Note 4 to s. 675(2)	ad. No. 85, 2007
S. 676.....	ad. No. 122, 2001
S. 677.....	ad. No. 122, 2001
S. 678.....	ad. No. 122, 2001
Chapter 6D	
Part 6D.1	
S. 700.....	am. No. 122, 2001; No. 101, 2007
S. 701.....	rep. No. 122, 2001
S. 703A	ad. No. 122, 2001
Part 6D.2	
Division 1	
S. 704.....	am. No. 103, 2004; No. 101, 2007
S. 705.....	am. No. 101, 2007
Division 2	
S. 706.....	am. No. 101, 2007
S. 707	am. No. 122, 2001; No. 103, 2004
S. 708	am. No. 122, 2001; No. 103, 2004; Nos. 101 and 132, 2007
Note 2 to s. 708(8)	rs. No. 122, 2001
S. 708AA	ad. No. 101, 2007
Subhead. to s. 708A(1)	am. No. 101, 2007
S. 708A	ad. No. 103, 2004 am. No. 101, 2007
Division 3	
S. 709	am. No. 101, 2007
Note 1 to s. 709(4)	am. No. 101, 2007
Division 4	
S. 710.....	am. No. 122, 2001
S. 711.....	am. No. 122, 2001
S. 713.....	am. No. 122, 2001; No. 103, 2004; No. 101, 2007
S. 715A	ad. No. 103, 2004
Division 5	
S. 719.....	am. No. 103, 2004
Subhead. to s. 720	rep. No. 122, 2001
S. 721	am. No. 117, 2001
S. 722.....	am. No. 117, 2001
S. 723.....	am. Nos. 117 and 122, 2001
S. 724.....	am. Nos. 117 and 122, 2001
S. 725.....	am. No. 117, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected**How affected****Part 6D.3****Division 1**

S. 726.....	rs. No. 122, 2001
S. 727	am. No. 103, 2004; No. 101, 2007
Note to s. 727(2)	am. No. 103, 2004; No. 101, 2007
S. 730.....	am. No. 117, 2001
S. 734.....	am. Nos. 117 and 122, 2001; No. 101, 2007
Note to s. 734(4)	ad. No. 85, 2007
Note to s. 734(5)	ad. No. 85, 2007
S. 735.....	am. No. 117, 2001
S. 736.....	am. No. 117, 2001; No. 101, 2007
Note to s. 734(6)	ad. No. 85, 2007

Part 6D.4

S. 739.....	am. No. 103, 2004; No. 101, 2007
-------------	----------------------------------

Part 6D.5

Part 6D.5	ad. No. 122, 2001
S. 742.....	ad. No. 122, 2001

Chapter 7

Chapt. 7.....	rs. No. 122, 2001
---------------	-------------------

Part 7.1

S. 760.....	rep. No. 122, 2001
-------------	--------------------

Division 1

S. 760A	ad. No. 122, 2001
S. 760B	ad. No. 122, 2001
	am. No. 141, 2003
S. 761	rep. No. 122, 2001

Division 2

S. 761A	ad. No. 122, 2001
	am. No. 141, 2003; No. 101, 2007; No. 45, 2008
S. 761B	ad. No. 122, 2001
S. 761C	ad. No. 122, 2001
S. 761CA.....	ad. No. 122, 2001
S. 761D	ad. No. 122, 2001
S. 761E	ad. No. 122, 2001
	am. No. 141, 2003; No. 45, 2008
S. 761F.....	ad. No. 122, 2001
S. 761FA	ad. No. 122, 2001
S. 761G	ad. No. 122, 2001
	am. No. 101, 2007
S. 761GA.....	ad. No. 101, 2007
S. 761H	ad. No. 122, 2001
S. 762.....	rep. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Division 3	
Subdivision A	
S. 762A	ad. No. 122, 2001
S. 762B	ad. No. 122, 2001
S. 762C	ad. No. 122, 2001
S. 763	rep. No. 122, 2001
Subdivision B	
S. 763A	ad. No. 122, 2001
S. 763B	ad. No. 122, 2001
S. 763C	ad. No. 122, 2001
S. 763D	ad. No. 122, 2001
S. 763E	ad. No. 122, 2001
S. 764	rep. No. 122, 2001
Subdivision C	
S. 764A	ad. No. 122, 2001 am. No. 141, 2003; No. 45, 2008
S. 765	rep. No. 122, 2001
Subdivision D	
S. 765A	ad. No. 122, 2001 am. No. 32, 2007; No. 54, 2008
S. 766	rep. No. 122, 2001
Division 4	
S. 766A	ad. No. 122, 2001
S. 766B	ad. No. 122, 2001 am. No. 141, 2003; No. 170, 2006
S. 766C	ad. No. 122, 2001 am. No. 141, 2003
S. 766D	ad. No. 122, 2001
S. 766E	rs. No. 122, 2001 am. No. 141, 2003; No. 45, 2008
Ss. 766F–766I	rep. No. 122, 2001
Div. 3 of Part 7.1A	ad. No. 55, 2001 rep. No. 122, 2001
S. 766J	ad. No. 55, 2001 rep. No. 122, 2001
S. 767	rep. No. 122, 2001
Division 5	
S. 767A	ad. No. 122, 2001
Division 6	
S. 768A	ad. No. 122, 2001
S. 769	rep. No. 122, 2001
Division 7	
S. 769A	rs. Nos. 122 and 146, 2001
S. 769B	rs. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 769C	rs. No. 122, 2001
S. 769D	rep. No. 122, 2001
S. 770	rep. No. 122, 2001
Ss. 770A–770C	rep. No. 122, 2001
Ss. 771, 772	rep. No. 122, 2001
Ss. 772A, 772B	rep. No. 122, 2001
Ss. 773–779	rep. No. 122, 2001
Ss 779A–779H	rep. No. 122, 2001
S. 779J	rep. No. 122, 2001
Ss. 780–790	rep. No. 122, 2001
Part 7.2	
Division 1	
S. 790A	ad. No. 122, 2001
S. 791	rep. No. 122, 2001
Division 2	
S. 791A	ad. No. 122, 2001
S. 791B	ad. No. 122, 2001
S. 791C	ad. No. 122, 2001
S. 791D	ad. No. 122, 2001
S. 792	rep. No. 122, 2001
Division 3	
Subdivision A	
S. 792A	ad. No. 122, 2001
S. 792B	ad. No. 122, 2001 am. No. 103, 2004
S. 792C	ad. No. 122, 2001
S. 792D	ad. No. 122, 2001
S. 792E	ad. No. 122, 2001
S. 792F	ad. No. 122, 2001
S. 792G	ad. No. 122, 2001
S. 792H	ad. No. 122, 2001
S. 792I	ad. No. 122, 2001
S. 793	rep. No. 122, 2001
Subdivision B	
S. 793A	ad. No. 122, 2001
S. 793B	ad. No. 122, 2001
S. 793C	ad. No. 122, 2001
S. 793D	ad. No. 122, 2001
S. 793E	ad. No. 122, 2001
S. 794	rep. No. 122, 2001
Subdivision C	
S. 794A	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted	am. = amended	rep. = repealed	rs. = repealed and substituted
Provision affected	How affected		
S. 794B	ad. No. 122, 2001		
S. 794C	ad. No. 122, 2001 am. No. 41, 2003		
S. 794D	ad. No. 122, 2001		
S. 794E	ad. No. 122, 2001		
S. 795.....	rep. No. 122, 2001		
Division 4			
Subdivision A			
S. 795A	ad. No. 122, 2001		
S. 795B	ad. No. 122, 2001		
S. 795C	ad. No. 122, 2001		
S. 795D	ad. No. 122, 2001		
S. 795E	ad. No. 122, 2001		
Subdivision B			
S. 796A	ad. No. 122, 2001		
Subdivision C			
S. 797A	ad. No. 122, 2001		
S. 797B	ad. No. 122, 2001		
S. 797C	ad. No. 122, 2001		
S. 797D	ad. No. 122, 2001		
S. 797E	ad. No. 122, 2001		
S. 797F.....	ad. No. 122, 2001		
S. 797G	ad. No. 122, 2001		
S. 798.....	rep. No. 122, 2001		
Division 5			
S. 798A	ad. No. 122, 2001		
S. 798B	ad. No. 122, 2001		
S. 798C	ad. No. 122, 2001 rs. No. 101, 2007		
Heading to s. 798D	am. No. 101, 2007		
S. 798D	ad. No. 122, 2001 am. No. 101, 2007		
S. 798DA.....	ad. No. 101, 2007		
S. 798E	ad. No. 122, 2001		
S. 799.....	rep. No. 122, 2001		
S. 799A	rep. No. 122, 2001		
Ss. 800–820	rep. No. 122, 2001		
Part 7.3			
Division 1			
S. 820A	ad. No. 122, 2001		
S. 820B	ad. No. 122, 2001		
S. 820C	ad. No. 122, 2001		
S. 820D	ad. No. 122, 2001		

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
--------------------	--------------

S. 821	rep. No. 122, 2001
--------------	--------------------

Division 2**Subdivision A**

S. 821A	ad. No. 122, 2001
---------------	-------------------

S. 821B	ad. No. 122, 2001 am. No. 103, 2004
---------------	--

S. 821BA	ad. No. 122, 2001
----------------	-------------------

S. 821C	ad. No. 122, 2001
---------------	-------------------

S. 821D	ad. No. 122, 2001
---------------	-------------------

S. 821E	ad. No. 122, 2001
---------------	-------------------

S. 821F	ad. No. 122, 2001
---------------	-------------------

S. 822	rep. No. 122, 2001
--------------	--------------------

Subdivision B

S. 822A	ad. No. 122, 2001
---------------	-------------------

S. 822B	ad. No. 122, 2001
---------------	-------------------

S. 822C	ad. No. 122, 2001
---------------	-------------------

S. 822D	ad. No. 122, 2001
---------------	-------------------

S. 822E	ad. No. 122, 2001
---------------	-------------------

Subdivision C

S. 823A	ad. No. 122, 2001
---------------	-------------------

S. 823B	ad. No. 122, 2001
---------------	-------------------

S. 823C	ad. No. 122, 2001 am. No. 41, 2003
---------------	---------------------------------------

S. 823CA	ad. No. 122, 2001 am. No. 41, 2003
----------------	---------------------------------------

S. 823D	ad. No. 122, 2001
---------------	-------------------

S. 823E	ad. No. 122, 2001
---------------	-------------------

S. 824	rep. No. 122, 2001
--------------	--------------------

Division 3**Subdivision A**

S. 824A	ad. No. 122, 2001
---------------	-------------------

S. 824B	ad. No. 122, 2001
---------------	-------------------

S. 824C	ad. No. 122, 2001
---------------	-------------------

S. 824D	ad. No. 122, 2001
---------------	-------------------

S. 824E	ad. No. 122, 2001
---------------	-------------------

S. 825	rep. No. 122, 2001
--------------	--------------------

Subdivision B

S. 825A	rs. No. 122, 2001
---------------	-------------------

S. 826	rep. No. 122, 2001
--------------	--------------------

Subdivision C

S. 826A	ad. No. 122, 2001
---------------	-------------------

S. 826B	ad. No. 122, 2001
---------------	-------------------

S. 826C	ad. No. 122, 2001
---------------	-------------------

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 826D	ad. No. 122, 2001
S. 826E	ad. No. 122, 2001
S. 826F	ad. No. 122, 2001
S. 826G	ad. No. 122, 2001
S. 827	rep. No. 122, 2001
Division 4	
S. 827A	ad. No. 122, 2001
S. 827B	ad. No. 122, 2001
S. 827C	ad. No. 122, 2001
S. 827D	ad. No. 122, 2001
Ss. 828–839	rep. No. 122, 2001
Ss. 841–850	rep. No. 122, 2001
Part 7.4	
Division 1	
Subdivision A	
S. 850A	ad. No. 122, 2001
S. 850B	ad. No. 122, 2001 am. No. 154, 2007
S. 850C	ad. No. 122, 2001
S. 850D	ad. No. 122, 2001
S. 850E	ad. No. 122, 2001
S. 851	rep. No. 122, 2001
Subdivision B	
S. 851A	ad. No. 122, 2001
S. 851B	ad. No. 122, 2001
S. 851C	ad. No. 122, 2001
S. 851D	ad. No. 122, 2001
S. 851E	ad. No. 122, 2001
S. 851F	ad. No. 122, 2001
S. 851G	ad. No. 122, 2001
S. 851H	ad. No. 122, 2001
S. 851I	ad. No. 122, 2001
S. 852	rep. No. 122, 2001
Subdivision C	
S. 852A	ad. No. 122, 2001
S. 852B	ad. No. 122, 2001
S. 853	rep. No. 122, 2001
Division 2	
S. 853A	ad. No. 122, 2001
S. 853B	ad. No. 122, 2001 am. No. 103, 2004
S. 853C	ad. No. 122, 2001
S. 853D	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 853E	ad. No. 122, 2001
S. 853F	ad. No. 122, 2001
S. 853G	ad. No. 122, 2001
S. 854	rep. No. 122, 2001
Division 3	
S. 854A	ad. No. 122, 2001
S. 854B	ad. No. 122, 2001 am. No. 141, 2003
Ss. 855–865	rep. No. 122, 2001
S. 865A	rep. No. 122, 2001
Ss. 866–880	rep. No. 122, 2001
Part 7.5	
Division 1	
S. 880A	ad. No. 122, 2001
S. 880B	ad. No. 122, 2001
S. 881	rep. No. 122, 2001
Division 2	
S. 881A	ad. No. 122, 2001
S. 881B	ad. No. 122, 2001
S. 881C	ad. No. 122, 2001
S. 881D	ad. No. 122, 2001
S. 882	rep. No. 122, 2001
Division 3	
Subdivision A	
S. 882A	ad. No. 122, 2001
S. 882B	ad. No. 122, 2001
S. 882C	ad. No. 122, 2001
S. 882D	ad. No. 122, 2001
S. 883	rep. No. 122, 2001
Subdivision B	
S. 883A	ad. No. 122, 2001
S. 883B	ad. No. 122, 2001
S. 883C	ad. No. 122, 2001
S. 883D	ad. No. 122, 2001
S. 884	rep. No. 122, 2001
Subdivision C	
S. 884A	ad. No. 122, 2001
S. 884B	ad. No. 122, 2001
S. 884C	ad. No. 122, 2001
S. 885	rep. No. 122, 2001
Subdivision D	
S. 885A	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted	am. = amended	rep. = repealed	rs. = repealed and substituted
Provision affected	How affected		
S. 885B	ad. No. 122, 2001		
S. 885C	ad. No. 122, 2001		
S. 885D	ad. No. 122, 2001		
S. 885E	ad. No. 122, 2001		
S. 885F	ad. No. 122, 2001		
S. 885G	ad. No. 122, 2001		
S. 885H	ad. No. 122, 2001		
S. 885I	ad. No. 122, 2001		
S. 885J	ad. No. 122, 2001		
S. 886	rep. No. 122, 2001		
Subdivision E			
S. 886A	ad. No. 122, 2001		
S. 886B	ad. No. 122, 2001		
S. 887	rep. No. 122, 2001		
Division 4			
Subdivision A			
S. 887A	ad. No. 122, 2001		
S. 888	rep. No. 122, 2001		
Subdivision B			
S. 888A	ad. No. 122, 2001		
S. 888B	ad. No. 122, 2001		
S. 888C	ad. No. 122, 2001		
S. 888D	ad. No. 122, 2001		
S. 888E	ad. No. 122, 2001		
S. 888F	ad. No. 122, 2001		
S. 888G	ad. No. 122, 2001		
S. 888H	ad. No. 122, 2001		
S. 888I	ad. No. 122, 2001		
S. 888J	ad. No. 122, 2001		
S. 888K	ad. No. 122, 2001		
S. 889	rep. No. 122, 2001		
Subdivision C			
S. 889A	ad. No. 122, 2001		
S. 889B	ad. No. 122, 2001		
S. 889C	ad. No. 122, 2001		
S. 889D	ad. No. 122, 2001		
S. 889E	ad. No. 122, 2001		
S. 889F	ad. No. 122, 2001		
S. 889G	ad. No. 122, 2001		
S. 889H	ad. No. 122, 2001		
S. 889I	ad. No. 122, 2001		
S. 889J	ad. No. 122, 2001		

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Note to s. 889J(2).....	ad. No. 149, l2007
S. 889K	ad. No. 122, 2001
S. 890.....	rep. No. 122, 2001
Subdivision D	
S. 890A	ad. No. 122, 2001
S. 890B	ad. No. 122, 2001
S. 890C	ad. No. 122, 2001
S. 890D	ad. No. 122, 2001
S. 890E	ad. No. 122, 2001
S. 890F.....	ad. No. 122, 2001
S. 890G	ad. No. 122, 2001
S. 890H	ad. No. 122, 2001
S. 891.....	rep. No. 122, 2001
Subdivision E	
S. 891A	ad. No. 122, 2001
S. 891B	ad. No. 122, 2001
S. 891C	ad. No. 122, 2001
S. 892.....	rep. No. 122, 2001
Division 5	
S. 892A	ad. No. 122, 2001
S. 892B	ad. No. 122, 2001
S. 892C	ad. No. 122, 2001
S. 892D	ad. No. 122, 2001
S. 892E	ad. No. 122, 2001
S. 892F.....	ad. No. 122, 2001
S. 892G	ad. No. 122, 2001
S. 892H	ad. No. 122, 2001 am. No. 103, 2004
S. 892I.....	ad. No. 122, 2001
S. 892J	ad. No. 122, 2001
S. 892K	ad. No. 122, 2001
S. 893.....	rep. No. 122, 2001
Division 6	
S. 893A	ad. No. 122, 2001
Ss. 894–910	rep. No. 122, 2001
Part 7.6	
Division 1	
S. 910A	ad. No. 122, 2001
S. 911	rep. No. 122, 2001
Division 2	
S. 911A	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
S. 911B	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted	am. = amended	rep. = repealed	rs. = repealed and substituted
Provision affected	How affected		
S. 911C	ad. No. 122, 2001 am. No. 141, 2003		
S. 911D	ad. No. 122, 2001		
S. 912	rep. No. 122, 2001		
Division 3			
S. 912A	ad. No. 122, 2001 am. No. 103, 2004		
S. 912B	ad. No. 122, 2001		
S. 912C	ad. No. 122, 2001 am. No. 141, 2003		
S. 912CA	ad. No. 141, 2003		
S. 912D	ad. No. 122, 2001 am. No. 141, 2003; No. 154, 2007		
S. 912E	ad. No. 122, 2001		
S. 912F	ad. No. 122, 2001 am. No. 141, 2003		
S. 913	rep. No. 122, 2001		
Division 4			
Subdivision A			
S. 913A	ad. No. 122, 2001		
S. 913B	ad. No. 122, 2001		
S. 913C	ad. No. 122, 2001		
S. 914	rep. No. 122, 2001		
Subdivision B			
S. 914A	ad. No. 122, 2001		
S. 915	rep. No. 122, 2001		
Subdivision C			
S. 915A	ad. No. 122, 2001		
S. 915B	ad. No. 122, 2001		
S. 915C	ad. No. 122, 2001		
S. 915D	ad. No. 122, 2001		
S. 915E	ad. No. 122, 2001		
S. 915F	ad. No. 122, 2001		
S. 915G	ad. No. 122, 2001		
S. 915H	ad. No. 122, 2001		
S. 915I	ad. No. 122, 2001		
S. 915J	ad. No. 122, 2001		
S. 916	rep. No. 122, 2001		
Division 5			
S. 916A	ad. No. 122, 2001		
S. 916B	ad. No. 122, 2001		
S. 916C	ad. No. 122, 2001		
S. 916D	ad. No. 122, 2001		

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 916E	ad. No. 122, 2001
S. 916F	ad. No. 122, 2001 am. No. 141, 2003
S. 916G	ad. No. 122, 2001
S. 917	rep. No. 122, 2001
Division 6	
S. 917A	ad. No. 122, 2001 am. No. 101, 2007
S. 917B	ad. No. 122, 2001
S. 917C	ad. No. 122, 2001 am. No. 101, 2007
S. 917D	ad. No. 122, 2001
S. 917E	ad. No. 122, 2001
S. 917F	ad. No. 122, 2001
S. 918	rep. No. 122, 2001
S. 920	rep. No. 122, 2001
Division 8	
Subdivision A	
S. 920A	ad. No. 122, 2001 am. No. 141, 2003
S. 920B	ad. No. 122, 2001
S. 920C	ad. No. 122, 2001
S. 920D	ad. No. 122, 2001
S. 920E	ad. No. 122, 2001
S. 920F	ad. No. 122, 2001
S. 921	rep. No. 122, 2001
Subdivision B	
S. 921A	ad. No. 122, 2001
S. 922	rep. No. 122, 2001
Division 9	
S. 922A	ad. No. 122, 2001
S. 922B	ad. No. 122, 2001
S. 923	rep. No. 122, 2001
Division 10	
S. 923A	ad. No. 122, 2001
S. 923B	ad. No. 122, 2001
S. 924	rep. No. 122, 2001
Division 11	
Subdivision A	
S. 924A	rs. No. 122, 2001
S. 924B	rep. No. 122, 2001
Subdivision B	
S. 925A	rs. No. 122, 2001

Table of Amendments

ad. = added or inserted	am. = amended	rep. = repealed	rs. = repealed and substituted
Provision affected	How affected		
S. 925B	ad. No. 122, 2001		
S. 925C	ad. No. 122, 2001		
S. 925D	ad. No. 122, 2001		
S. 925E	ad. No. 122, 2001		
S. 925F	ad. No. 122, 2001		
S. 925G	ad. No. 122, 2001		
S. 925H	ad. No. 122, 2001		
S. 925I	ad. No. 122, 2001		
S. 926	rep. No. 122, 2001		
Division 12			
Div. 12 of Part 7.6	ad. No. 141, 2003		
S. 926A	ad. No. 141, 2003 am. No. 154, 2007		
S. 926B	ad. No. 141, 2003		
S. 927	rep. No. 122, 2001		
S. 927A	rep. No. 122, 2001		
S. 928	rep. No. 122, 2001		
Ss. 928A, 928B	rep. No. 122, 2001		
Ss. 929, 930	rep. No. 122, 2001		
Ss. 930A–930C	rep. No. 122, 2001		
Ss. 931–940	rep. No. 122, 2001		
Part 7.7			
Division 1			
S. 940A	ad. No. 122, 2001		
S. 940B	ad. No. 122, 2001		
S. 940C	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007		
S. 940D	ad. No. 122, 2001		
S. 941	rep. No. 122, 2001		
Division 2			
Subdivision A			
S. 941A	ad. No. 122, 2001		
S. 941B	ad. No. 122, 2001		
Subhead. to s. 941C(4)	am. No. 101, 2007		
S. 941C	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007		
S. 941D	ad. No. 122, 2001		
S. 941E	ad. No. 122, 2001		
S. 941F	ad. No. 122, 2001		
Subdivision B			
S. 942A	ad. No. 122, 2001		
S. 942B	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007		

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 942C	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
S. 942D	ad. No. 122, 2001
S. 942DA	ad. No. 141, 2003
S. 942E	ad. No. 122, 2001
S. 943	rep. No. 122, 2001
Subdivision C	
S. 943A	ad. No. 122, 2001
S. 943B	ad. No. 122, 2001
S. 943C	ad. No. 122, 2001
S. 943D	ad. No. 122, 2001
S. 943E	ad. No. 122, 2001
S. 943F	ad. No. 122, 2001
S. 944	rep. No. 122, 2001
Division 3	
Subdivision A	
S. 944A	ad. No. 122, 2001
S. 945	rep. No. 122, 2001
Subdivision B	
S. 945A	ad. No. 122, 2001
S. 945B	ad. No. 122, 2001
S. 946	rep. No. 122, 2001
Subdivision C	
S. 946A	ad. No. 122, 2001 am. No. 101, 2007
S. 946AA	ad. No. 101, 2007 am. No. 45, 2008
Heading to s. 946B	am. No. 101, 2007
S. 946B	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
S. 946C	ad. No. 122, 2001
S. 947	rep. No. 122, 2001
Subdivision D	
S. 947A	ad. No. 122, 2001
S. 947B	ad. No. 122, 2001 am. No. 141, 2003
S. 947C	ad. No. 122, 2001 am. No. 141, 2003
S. 947D	ad. No. 122, 2001 am. No. 141, 2003
S. 947E	ad. No. 141, 2003
S. 948	rep. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Subdivision E	
S. 948A	rs. No. 122, 2001
S. 949	rep. No. 122, 2001
Division 4	
S. 949A	ad. No. 122, 2001 am. No. 141, 2003
S. 949B	ad. No. 122, 2001
S. 950	rep. No. 122, 2001
S. 950A	rep. No. 122, 2001
S. 951	rep. No. 122, 2001
Division 6	
S. 951A	ad. No. 122, 2001
S. 951B	ad. No. 122, 2001 am. No. 141, 2003
Note to s. 951B(6)	ad. No. 141, 2003
S. 951C	ad. No. 141, 2003
S. 952	rep. No. 122, 2001
Division 7	
Subdivision A	
S. 952A	rs. No. 122, 2001
S. 952B	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
S. 952C	ad. No. 122, 2001
S. 952D	ad. No. 122, 2001
S. 952E	ad. No. 122, 2001 am. No. 101, 2007
S. 952F	ad. No. 122, 2001 am. No. 101, 2007
S. 952G	ad. No. 122, 2001 am. No. 101, 2007
S. 952H	ad. No. 122, 2001
S. 952I	ad. No. 122, 2001 am. No. 141, 2003
S. 952J	ad. No. 122, 2001 am. No. 141, 2003
S. 952K	ad. No. 122, 2001
S. 952L	ad. No. 122, 2001
S. 952M	ad. No. 122, 2001
S. 953	rep. No. 122, 2001
Subdivision B	
S. 953A	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
S. 953B	ad. No. 122, 2001 am. No. 141, 2003

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 953C	ad. No. 122, 2001
S. 954	rep. No. 122, 2001
Ss. 954A–954H	rep. No. 122, 2001
Ss. 954L–954N	rep. No. 122, 2001
Ss. 954P–954T	rep. No. 122, 2001
Ss. 954W–954Z	rep. No. 122, 2001
S. 954ZA	rep. No. 122, 2001
S. 955	rep. No. 122, 2001
S. 955A	rep. No. 122, 2001
Ss. 956–961	rep. No. 122, 2001
Ss. 961C–961G	rep. No. 122, 2001
Ss. 962–970	rep. No. 122, 2001
Ss. 970A, 970B	rep. No. 122, 2001
Ss. 971, 972	rep. No. 122, 2001
S. 972A	rep. No. 122, 2001
Ss. 973–980	rep. No. 122, 2001

Part 7.8**Division 1**

S. 980A	ad. No. 122, 2001
S. 980B	ad. No. 122, 2001
S. 981	rep. No. 122, 2001

Division 2**Subdivision A**

S. 981A	ad. No. 122, 2001
S. 981B	ad. No. 122, 2001 am. No. 141, 2003
S. 981C	ad. No. 122, 2001
S. 981D	ad. No. 122, 2001
S. 981E	ad. No. 122, 2001
S. 981F	ad. No. 122, 2001
S. 981G	ad. No. 122, 2001
S. 981H	ad. No. 122, 2001 am. No. 141, 2003
S. 982	rep. No. 122, 2001

Subdivision B

S. 982A	ad. No. 122, 2001
S. 982B	ad. No. 122, 2001
S. 982C	ad. No. 122, 2001
S. 982D	ad. No. 122, 2001
S. 983	rep. No. 122, 2001

Table of Amendments

ad. = added or inserted	am. = amended	rep. = repealed	rs. = repealed and substituted
Provision affected	How affected		
Subdivision C			
S. 983A	rs. No. 122, 2001		
S. 983B	ad. No. 122, 2001		
S. 983C	ad. No. 122, 2001		
S. 983D	ad. No. 122, 2001		
S. 983E	ad. No. 122, 2001		
S. 984	rep. No. 122, 2001		
Division 3			
S. 984A	ad. No. 122, 2001		
S. 984B	ad. No. 122, 2001		
S. 985	rep. No. 122, 2001		
Division 4			
S. 985A	ad. No. 122, 2001		
S. 985B	ad. No. 122, 2001		
S. 985C	ad. No. 122, 2001		
S. 985D	ad. No. 149, 2007		
S. 986	rep. No. 122, 2001		
Division 5			
S. 986A	ad. No. 122, 2001		
S. 986B	ad. No. 122, 2001		
S. 987	rep. No. 122, 2001		
Division 6			
Subdivision A			
S. 987A	ad. No. 122, 2001		
Subdivision B			
S. 988A	ad. No. 122, 2001		
S. 988B	ad. No. 122, 2001		
S. 988C	ad. No. 122, 2001		
S. 988D	ad. No. 122, 2001		
S. 988E	ad. No. 122, 2001		
S. 988F	ad. No. 122, 2001		
S. 988G	ad. No. 122, 2001		
Subdivision C			
S. 989A	ad. No. 122, 2001		
S. 989B	ad. No. 122, 2001		
S. 989C	ad. No. 122, 2001		
S. 989CA	ad. No. 103, 2004		
S. 989D	ad. No. 122, 2001		
Subdivision D			
S. 990A	ad. No. 122, 2001		
	rs. No. 101, 2007		

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 990B	ad. No. 122, 2001 am. No. 101, 2007
S. 990C	ad. No. 122, 2001
S. 990D	ad. No. 122, 2001
S. 990E	ad. No. 122, 2001
S. 990F	ad. No. 122, 2001
S. 990G	ad. No. 122, 2001
S. 990H	ad. No. 122, 2001
S. 990I	ad. No. 122, 2001 am. No. 103, 2004; No. 101, 2007
S. 990J	ad. No. 122, 2001
S. 990K	ad. No. 122, 2001 am. No. 103, 2004
S. 990L	ad. No. 122, 2001 rs. No. 103, 2004
Division 7	
S. 991A	ad. No. 122, 2001
S. 991B	ad. No. 122, 2001
S. 991C	ad. No. 122, 2001
S. 991D	ad. No. 122, 2001
S. 991E	ad. No. 122, 2001
S. 991F	ad. No. 122, 2001
Division 8	
S. 992A	ad. No. 122, 2001 am. No. 29, 2002; No. 141, 2003; No. 101, 2007
S. 992AA	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
S. 992B	ad. No. 122, 2001 am. No. 141, 2003
Note to s. 992B(6)	ad. No. 141, 2003
S. 992C	ad. No. 141, 2003
Division 9	
S. 993A	ad. No. 122, 2001
S. 993B	ad. No. 122, 2001
S. 993C	ad. No. 122, 2001
S. 993D	ad. No. 122, 2001
S. 995	rep. No. 122, 2001
S. 995A	rep. No. 122, 2001
Ss. 997–1001	rep. No. 122, 2001
Ss. 1001A–1001D	rep. No. 122, 2001
S. 1002	rep. No. 122, 2001
Ss. 1002A–1002H	rep. No. 122, 2001
Ss. 1002J–1002N	rep. No. 122, 2001
Ss. 1002P–1002U	rep. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 1005	rep. No. 122, 2001
Part 7.9	
Heading to Part 7.9 of Chapt. 7	rs. No. 141, 2003
Division 1	
S. 1010A	ad. No. 122, 2001 am. No. 141, 2003
S. 1010B	ad. No. 122, 2001 am. No. 141, 2003
S. 1010BA	ad. No. 101, 2007
S. 1010C	ad. No. 122, 2001
S. 1010D	ad. No. 122, 2001
Division 2	
Subdivision A	
S. 1011A	ad. No. 122, 2001
S. 1011B	ad. No. 122, 2001 am. No. 101, 2007
S. 1011C	ad. No. 122, 2001
Subdivision B	
S. 1012A	ad. No. 122, 2001 am. No. 103, 2004; No. 101, 2007
S. 1012B	ad. No. 122, 2001 am. No. 101, 2007
S. 1012C	ad. No. 122, 2001 am. No. 103, 2004
Heading to s. 1012D(10)	ad. No. 141, 2003
S. 1012D	ad. No. 122, 2001 am. No. 141, 2003; No. 103, 2004
S. 1012DAA	ad. No. 101, 2007
S. 1012DA	ad. No. 103, 2004 am. No. 101, 2007
S. 1012E	ad. No. 122, 2001
S. 1012F	ad. No. 122, 2001
S. 1012G	ad. No. 122, 2001 am. No. 141, 2003
S. 1012H	ad. No. 122, 2001
S. 1012I	ad. No. 122, 2001
S. 1012IA	ad. No. 122, 2001 am. No. 141, 2003
S. 1012J	ad. No. 122, 2001
S. 1012K	ad. No. 122, 2001
S. 1013	rep. No. 122, 2001
Subdivision C	
S. 1013A	ad. No. 122, 2001
S. 1013B	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 1013C	ad. No. 122, 2001
S. 1013D	ad. No. 122, 2001 am. No. 141, 2003; No. 103, 2004
S. 1013DA	ad. No. 122, 2001
S. 1013E	ad. No. 122, 2001 am. No. 103, 2004
S. 1013F	ad. No. 122, 2001 am. No. 141, 2003; No. 103, 2004
S. 1013FA	ad. No. 103, 2004 am. No. 101, 2007
S. 1013G	ad. No. 122, 2001
S. 1013H	ad. No. 122, 2001
S. 1013I	ad. No. 122, 2001
S. 1013J	ad. No. 122, 2001
S. 1013K	ad. No. 122, 2001
S. 1013L	ad. No. 122, 2001
S. 1013M	ad. No. 141, 2003
S. 1014	rep. No. 122, 2001
Subdivision D	
S. 1014A	ad. No. 122, 2001
Note to s. 1014A	ad. No. 101, 2007
S. 1014B	ad. No. 122, 2001
S. 1014C	ad. No. 122, 2001
S. 1014D	ad. No. 122, 2001
S. 1014E	ad. No. 122, 2001
S. 1014F	ad. No. 122, 2001
Subdivision DA	
Subdiv. DA of Div. 2 of Part 7.9	ad. No. 101, 2007
S. 1014G	ad. No. 101, 2007
S. 1014H	ad. No. 101, 2007
S. 1014J	ad. No. 101, 2007
S. 1014K	ad. No. 101, 2007
S. 1014L	ad. No. 101, 2007
S. 1015	rep. No. 122, 2001
Subdivision E	
S. 1015A	ad. No. 122, 2001
S. 1015B	ad. No. 122, 2001
S. 1015C	ad. No. 122, 2001 am. No. 141, 2003
S. 1015D	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
Note 3 to s. 1015D(2)	rep. No. 101, 2007
S. 1015E	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Subdivision F	
S. 1016A	ad. No. 122, 2001 am. No. 141, 2003; No. 45, 2008
Note to s. 1016A(2)	rep. No. 141, 2003
Note 1 to s. 1016A(2)	ad. No. 141, 2003
Note 2 to s. 1016A(2)	ad. No. 141, 2003
S. 1016B	ad. No. 122, 2001 am. No. 141, 2003
Note to s. 1016B(1)	rep. No. 141, 2003
Note 1 to s. 1016B(1)	ad. No. 141, 2003
Note 2 to s. 1016B(2)	ad. No. 141, 2003
S. 1016C	ad. No. 122, 2001 am. No. 141, 2003
Note 1A to s. 1016C	ad. No. 141, 2003
S. 1016D	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
Note 1A to s. 1016D(1)	ad. No. 141, 2003
Note to s. 1016D(2)	rep. No. 141, 2003
Note 1 to s. 1016D(2)	ad. No. 141, 2003
Note 2 to s. 1016D(2)	ad. No. 141, 2003
S. 1016E	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
Note to s. 1016E(2)	rep. No. 141, 2003
Note 1 to s. 1016E(2)	ad. No. 141, 2003
Note 2 to s. 1016E(2)	ad. No. 141, 2003
Note 3 to s. 1016E(2)	ad. No. 141, 2003
Note 4 to s. 1016E(2)	ad. No. 141, 2003
S. 1016F	ad. No. 122, 2001
Division 3	
S. 1017A	ad. No. 122, 2001
S. 1017B	ad. No. 122, 2001 am. No. 141, 2003
S. 1017C	ad. No. 122, 2001 am. No. 141, 2003
S. 1017D	ad. No. 122, 2001 am. No. 141, 2003; No. 45, 2008
S. 1017DA	ad. No. 122, 2001
S. 1017E	ad. No. 122, 2001 am. No. 141, 2003
S. 1017F	ad. No. 122, 2001
S. 1017G	ad. No. 122, 2001
Division 4	
S. 1018A	ad. No. 122, 2001
Note to s. 1018A(2) Renumbered Note 1	No. 85, 2007

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Note 2 to s. 1018A(2)	ad. No. 85, 2007
Note to s. 1018A(3)	
Renumbered Note 1	No. 85, 2007
Note 2 to s. 1018A(3)	ad. No. 85, 2007
S. 1018B	ad. No. 122, 2001
Division 5	
S. 1019A	ad. No. 122, 2001 am. No. 45, 2008
S. 1019B	ad. No. 122, 2001
Division 5A	
Div. 5A of Part 7.9	ad. No. 141, 2003
S. 1019C	ad. No. 141, 2003
S. 1019D	ad. No. 141, 2003
S. 1019E	ad. No. 141, 2003
S. 1019F	ad. No. 141, 2003
S. 1019G	ad. No. 141, 2003
S. 1019H	ad. No. 141, 2003
S. 1019I	ad. No. 141, 2003
S. 1019J	ad. No. 141, 2003
S. 1019K	ad. No. 141, 2003
Division 6	
S. 1020A	ad. No. 122, 2001
Heading to s. 1020B	rs. No. 146, 2008
S. 1020B	ad. No. 122, 2001 am. No. 146, 2008
S. 1020C	ad. No. 122, 2001 rep. No. 146, 2008
S. 1020D	ad. No. 122, 2001
S. 1020E	ad. No. 122, 2001 am. No. 141, 2003
S. 1020F	ad. No. 122, 2001 am. No. 141, 2003; No. 146, 2008
Note to s. 1020F(7)	ad. No. 141, 2003
S. 1020G	ad. No. 122, 2001 am. No. 141, 2003
Division 7	
Subdivision A	
S. 1021A	ad. No. 122, 2001 am. No. 141, 2003
S. 1021B	ad. No. 122, 2001 am. No. 141, 2003
S. 1021C	ad. No. 122, 2001 am. No. 141, 2003; No. 103, 2004; No. 101, 2007
Note to s. 1021C(1)	am. No. 103, 2004; No. 101, 2007
Note to s. 1021C(3)	am. No. 103, 2004; No. 101, 2007

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 1021D	ad. No. 122, 2001 am. No. 141, 2003
Note to s. 1021D(1)	am. No. 103, 2004; No. 101, 2007
S. 1021E	ad. No. 122, 2001 am. No. 141, 2003
Note to s. 1021E(1)	am. No. 103, 2004; No. 101, 2007
S. 1021F	ad. No. 122, 2001 am. No. 141, 2003
Note to s. 1021F(1)	am. No. 103, 2004; No. 101, 2007
S. 1021FA	ad. No. 141, 2003
S. 1021FB	ad. No. 141, 2003
S. 1021G	ad. No. 122, 2001 am. No. 141, 2003
S. 1021H	ad. No. 122, 2001 am. No. 141, 2003; No. 101, 2007
Note to s. 1021H(1)	am. No. 103, 2004; No. 101, 2007
S. 1021I	ad. No. 122, 2001 am. No. 141, 2003
Note to s. 1021I(1)	am. No. 103, 2004; No. 101, 2007
S. 1021J	ad. No. 122, 2001 am. No. 141, 2003
S. 1021K	ad. No. 122, 2001
S. 1021L	ad. No. 122, 2001
S. 1021M	ad. No. 122, 2001
S. 1021N	ad. No. 122, 2001
S. 1021O	ad. No. 122, 2001
S. 1021P	ad. No. 141, 2003
Subdivision B	
S. 1022A	ad. No. 122, 2001 am. No. 141, 2003
S. 1022B	ad. No. 122, 2001 am. No. 141, 2003
S. 1022C	ad. No. 122, 2001
Part 7.10	
Division 1	
S. 1040A	ad. No. 122, 2001
Division 2	
S. 1041A	ad. No. 122, 2001
S. 1041B	ad. No. 122, 2001
S. 1041C	ad. No. 122, 2001
S. 1041D	ad. No. 122, 2001
S. 1041E	ad. No. 122, 2001
S. 1041F	ad. No. 122, 2001
S. 1041G	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 1041H	ad. No. 122, 2001
Note 2 to s. 1041H(1)	am. No. 118, 2004
S. 1041I	ad. No. 122, 2001 am. Nos. 103 and 118, 2004
S. 1041J	ad. No. 122, 2001
S. 1041K	ad. No. 122, 2001
Division 2A	
Div. 2A of Part 7.10	ad. No. 103, 2004
S. 1041L	ad. No. 103, 2004
S. 1041M	ad. No. 103, 2004
S. 1041N	ad. No. 103, 2004
S. 1041O	ad. No. 103, 2004
S. 1041P	ad. No. 103, 2004
S. 1041Q	ad. No. 103, 2004
S. 1041R	ad. No. 103, 2004
S. 1041S	ad. No. 103, 2004
Division 3	
Subdivision A	
S. 1042A	ad. No. 122, 2001 am. No. 29, 2002
S. 1042B	ad. No. 122, 2001
S. 1042C	ad. No. 122, 2001
S. 1042D	ad. No. 122, 2001
S. 1042E	ad. No. 122, 2001
S. 1042F	ad. No. 122, 2001
S. 1042G	ad. No. 122, 2001
S. 1042H	ad. No. 122, 2001
Subdivision B	
S. 1043A	ad. No. 122, 2001
S. 1043B	ad. No. 122, 2001
S. 1043C	ad. No. 122, 2001
S. 1043D	ad. No. 122, 2001
S. 1043E	ad. No. 122, 2001
S. 1043F	ad. No. 122, 2001 am. No. 103, 2004
S. 1043G	ad. No. 122, 2001
S. 1043H	ad. No. 122, 2001 am. No. 29, 2002
S. 1043I	ad. No. 122, 2001 am. No. 29, 2002; No. 103, 2004
S. 1043J	ad. No. 122, 2001 am. No. 29, 2002 (as am. by No. 100, 2005); No. 103, 2004
S. 1043K	ad. No. 122, 2001
S. 1043L	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 1043M	ad. No. 122, 2001
S. 1043N	ad. No. 122, 2001
S. 1043O	ad. No. 122, 2001
Division 4	
Heading to Div. 4 of..... Part 7.10	rs. No. 118, 2004
S. 1044A	ad. No. 122, 2001 am. No. 103, 2004
S. 1044B	ad. No. 118, 2004
Division 5	
Div. 5 of Part 7.10	ad. No. 141, 2003
S. 1045A	ad. No. 141, 2003
Part 7.11	
Division 1	
S. 1070A	ad. No. 122, 2001
S. 1070B	ad. No. 122, 2001
S. 1070C	ad. No. 122, 2001
S. 1070D	ad. No. 122, 2001
Division 2	
Subdivision A	
S. 1071A	ad. No. 122, 2001
S. 1071B	ad. No. 122, 2001
S. 1071C	ad. No. 122, 2001
S. 1071D	ad. No. 122, 2001
S. 1071E	ad. No. 122, 2001
S. 1071F	ad. No. 122, 2001
S. 1071G	ad. No. 122, 2001 am. No. 103, 2004
S. 1071H	ad. No. 122, 2001 am. No. 103, 2004
Subdivision B	
S. 1072A	ad. No. 122, 2001
S. 1072B	ad. No. 122, 2001
S. 1072C	ad. No. 122, 2001
S. 1072D	ad. No. 122, 2001
S. 1072E	ad. No. 122, 2001
S. 1072F	ad. No. 122, 2001
S. 1072G	ad. No. 122, 2001
S. 1072H	ad. No. 122, 2001
Division 3	
S. 1073A	ad. No. 122, 2001
S. 1073B	ad. No. 122, 2001
S. 1073C	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 1073D	ad. No. 122, 2001
S. 1073E	ad. No. 122, 2001
S. 1073F.....	ad. No. 122, 2001
Division 4	
S. 1074A	ad. No. 122, 2001
S. 1074B	ad. No. 122, 2001
S. 1074C	ad. No. 122, 2001
S. 1074D	ad. No. 122, 2001
S. 1074E	ad. No. 122, 2001
S. 1074F.....	ad. No. 122, 2001
S. 1074G.....	ad. No. 122, 2001
Division 5	
S. 1075A	ad. No. 122, 2001
Note to s. 1075A(7)	ad. No. 141, 2003
Ss. 1085–1087	rep. No. 122, 2001
Ss. 1089–1091	rep. No. 122, 2001
Ss. 1091AA, 1091AB	rep. No. 122, 2001
Ss. 1091A–1091E	rep. No. 122, 2001
Ss. 1092–1096	rep. No. 122, 2001
S. 1096A	rep. No. 122, 2001
S. 1097	rep. No. 122, 2001
Ss. 1097A–1097D	rep. No. 122, 2001
Ss. 1098, 1099	rep. No. 122, 2001
S. 1099A	rep. No. 122, 2001
S. 1100	rep. No. 122, 2001
Part 7.12	
Division 1	
S. 1100A	ad. No. 122, 2001
S. 1100B	ad. No. 122, 2001
S. 1100C	ad. No. 122, 2001
S. 1100D	ad. No. 122, 2001
S. 1101	rep. No. 122, 2001
Division 2	
S. 1101A	ad. No. 122, 2001
S. 1101B	ad. No. 122, 2001 am. No. 141, 2003
S. 1101C	ad. No. 122, 2001
S. 1101D	ad. No. 122, 2001
S. 1101E	ad. No. 122, 2001
S. 1101F.....	ad. No. 122, 2001
S. 1101G	ad. No. 122, 2001
S. 1101GA.....	ad. No. 122, 2001

Table of Amendments

ad. = added or inserted	am. = amended	rep. = repealed	rs. = repealed and substituted
Provision affected	How affected		
S. 1101H	ad. No. 122, 2001		
S. 1101I.....	ad. No. 122, 2001		
S. 1101J.....	ad. No. 122, 2001		
Ss. 1102–1109.....	rep. No. 122, 2001		
Ss. 1109A–1109G.....	rep. No. 122, 2001		
Ss. 1109J–1109N.....	rep. No. 122, 2001		
S. 1109P	rep. No. 122, 2001		
Ss. 1110–1112.....	rep. No. 122, 2001		
Ss. 1112A–1112D	rep. No. 122, 2001		
S. 1113.....	rep. No. 122, 2001		
S. 1113A	rep. No. 122, 2001		
Ss. 1114–1119.....	rep. No. 122, 2001		
S. 1119A	ad. No. 146, 2001		
	rep. No. 122, 2001		
Chapter 8			
Chapt. 8.....	rep. No. 122, 2001		
	ad. No. 85, 2007		
Ss. 1120–1123.....	rep. No. 122, 2001		
Ss. 1126–1128.....	rep. No. 122, 2001		
Ss. 1131–1141	rep. No. 122, 2001		
S. 1141A	rep. No. 122, 2001		
Ss. 1142–1144.....	rep. No. 122, 2001		
S. 1144A	rep. No. 122, 2001		
S. 1145.....	rep. No. 122, 2001		
S. 1145A	rep. No. 122, 2001		
Ss. 1147–1161.....	rep. No. 122, 2001		
Ss. 1164, 1165.....	rep. No. 122, 2001		
S. 1165A	rep. No. 122, 2001		
Ss. 1166–1178.....	rep. No. 122, 2001		
Ss. 1180–1188.....	rep. No. 122, 2001		
S. 1189A	rep. No. 122, 2001		
Ss. 1190–1192.....	rep. No. 122, 2001		
S. 1192A	rep. No. 122, 2001		
Ss. 1193–1199.....	rep. No. 122, 2001		
S. 1199A	rep. No. 122, 2001		
S. 1200.....	rep. No. 122, 2001		
Part 8.1			
S. 1200A	ad. No. 85, 2007		
Part 8.2			
Division 1			
Ss. 1200B–1200E	ad. No. 85, 2007		

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Division 2	
S. 1200F.....	ad. No. 85, 2007 am. No. 146, 2008
Division 3	
Ss. 1200G, 1200H.....	ad. No. 85, 2007
S. 1200J.....	ad. No. 85, 2007
Division 4	
Ss. 1200K–1200M.....	ad. No. 85, 2007
Division 5	
S. 1200N.....	ad. No. 85, 2007
Ss. 1200P, 1200Q.....	ad. No. 85, 2007
Division 6	
S. 1200R.....	ad. No. 85, 2007
Part 8.3	
Ss. 1200S–1200U.....	ad. No. 85, 2007
Ss. 1201, 1202.....	rep. No. 122, 2001
Ss. 1204, 1205.....	rep. No. 122, 2001
S. 1205A.....	rep. No. 122, 2001
Ss. 1206–1273.....	rep. No. 122, 2001
S. 1273A.....	ad. No. 146, 2001 rep. No. 122, 2001
Chapter 9	
Part 9.1	
S. 1274.....	am. Nos. 117 and 122, 2001; Nos. 24 and 141, 2003; No. 103, 2004; Nos. 85 and 154, 2007
Note to s. 1274(5).....	ad. No. 122, 2001
S. 1274AA.....	rs. No. 103, 2004 am. No. 131, 2006
Part 9.2	
Division 2	
S. 1279.....	am. No. 103, 2004
S. 1280.....	am. No. 116, 2003; No. 103, 2004
S. 1280A.....	ad. No. 103, 2004
S. 1281.....	am. No. 103, 2004
S. 1282.....	am. No. 116, 2003; No. 132, 2007
S. 1284.....	rs. No. 132, 2007
S. 1287A.....	ad. No. 103, 2004
Heading to s. 1288.....	am. No. 103, 2004; No. 132, 2007
S. 1288.....	am. No. 103, 2004; No. 132, 2007
S. 1289.....	rs. No. 103, 2004 am. No. 1, 2007
Division 2A	
Div. 2A of Part 9.2.....	ad. No. 103, 2004

Table of Amendments

ad. = added or inserted	am. = amended	rep. = repealed	rs. = repealed and substituted
Provision affected	How affected		
S. 1289A	ad. No. 103, 2004		
Division 3			
S. 1290A	ad. No. 132, 2007		
S. 1292	am. No. 119, 2001; No. 103, 2004; No. 105, 2008		
S. 1294	am. No. 119, 2001		
S. 1294A	ad. No. 132, 2007		
S. 1296	am. No. 103, 2004; No. 132, 2007		
S. 1297	am. No. 132, 2007		
S. 1298	am. No. 103, 2004		
S. 1298A	ad. No. 132, 2007		
Part 9.2A			
Part 9.2A	ad. No. 103, 2004		
Division 1			
S. 1299A	ad. No. 103, 2004		
S. 1299B	ad. No. 103, 2004		
S. 1299C	ad. No. 103, 2004		
S. 1299D	ad. No. 103, 2004		
S. 1299E	ad. No. 103, 2004		
S. 1299F	ad. No. 103, 2004		
S. 1299G	ad. No. 103, 2004		
Division 2			
S. 1299H	ad. No. 103, 2004		
S. 1299I	ad. No. 103, 2004		
S. 1299J	ad. No. 103, 2004		
S. 1299K	ad. No. 103, 2004		
S. 1299L	ad. No. 103, 2004		
S. 1299M	ad. No. 103, 2004		
Part 9.3			
S. 1300	am. No. 117, 2001		
S. 1302	am. No. 117, 2001; No. 103, 2004		
S. 1306	am. No. 116, 2003		
S. 1307	am. No. 117, 2001; No. 103, 2004		
Note to s. 1307(3)	am. No. 117, 2001		
Part 9.4			
Division 1A			
Div. 1A of Part 9.4	ad. No. 117, 2001		
S. 1308A	ad. No. 117, 2001		
Division 1			
S. 1308	am. Nos. 117 and 122, 2001; No. 141, 2003; No. 103, 2004; No. 101, 2007		
S. 1309	am. No. 122, 2001; No. 103, 2004; No. 126, 2006; No. 101, 2007		

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Division 2	
S. 1311	am. Nos. 117 and 122, 2001; No. 24, 2003; No. 85, 2007
Note to s. 1311(1)	ad. No. 117, 2001
S. 1314	am. No. 103, 2004
Part 9.4AAA	
Part 9.4AAA	ad. No. 103, 2004
S. 1317AA	ad. No. 103, 2004
S. 1317AB	ad. No. 103, 2004
S. 1317AC	ad. No. 103, 2004
S. 1317AD	ad. No. 103, 2004
S. 1317AE	ad. No. 103, 2004
Part 9.4A	
S. 1317B	am. No. 103, 2004
S. 1317C	am. No. 122, 2001; No. 103, 2004
Part 9.4AA	
Part 9.4AA	ad. No. 103, 2004
S. 1317DAA	ad. No. 103, 2004
S. 1317DAB	ad. No. 103, 2004
S. 1317DAC	ad. No. 103, 2004
S. 1317DAD	ad. No. 103, 2004
S. 1317DAE	ad. No. 103, 2004
S. 1317DAF	ad. No. 103, 2004
S. 1317DAG	ad. No. 103, 2004 am. No. 101, 2007
S. 1317DAH	ad. No. 103, 2004
S. 1317DAI	ad. No. 103, 2004
S. 1317DAJ	ad. No. 103, 2004
Part 9.4B	
S. 1317DA	ad. No. 122, 2001 am. No. 29, 2002
S. 1317E	am. Nos. 55 and 122, 2001; No. 103, 2004
Note to s. 1317E(1)	am. No. 122, 2001
Subhead. to s. 1317G(1)	ad. No. 122, 2001
Subhead. to s. 1317G(2)	ad. No. 122, 2001
S. 1317G	am. No. 122, 2001; No. 103, 2004
Heading to s. 1317H	am. No. 122, 2001
S. 1317H	am. No. 122, 2001
Note to s. 1317H(1)	ad. No. 103, 2004
S. 1317HA	ad. No. 122, 2001
Note to s. 1317HA(1)	ad. No. 103, 2004
S. 1317J	am. No. 122, 2001
Note to s. 1317J(2)	ad. No. 103, 2004
Note to s. 1317J(3A)	ad. No. 103, 2004

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 1317P	am. No. 122, 2001; No. 103, 2004
S. 1317R	am. No. 103, 2004
S. 1317S	am. No. 103, 2004
Part 9.5	
S. 1318	am. No. 103, 2004; No. 126, 2006
S. 1321	am. No. 126, 2006
S. 1322	am. No. 103, 2004
Heading to s. 1323	am. No. 122, 2001
S. 1323	am. Nos. 117 and 122, 2001
S. 1324A	am. No. 122, 2001
S. 1324B	am. No. 122, 2001
S. 1325	am. No. 122, 2001; No. 118, 2004
S. 1325A	am. No. 122, 2001
S. 1325B	am. No. 122, 2001
Part 9.6	
S. 1335	am. No. 116, 2003; No. 126, 2006
Part 9.6A	
Division 2	
Heading to Div. 2 of Part 9.6A	rs. No. 116, 2003
Part 9.7	
S. 1339	rs. No. 74, 2007
Heading to s. 1340	am. No. 74, 2007
S. 1340	am. No. 74, 2007
Heading to s. 1341	rs. No. 74, 2007
S. 1341	am. No. 8, 2005; No. 74, 2007
Part 9.9	
S. 1344	ad. No. 24, 2003
S. 1345A	am. No. 101, 2007
S. 1349	ad. No. 132, 2007
Part 9.10	
Heading to Part 9.10	rs. No. 24, 2003
S. 1351	rs. No. 24, 2003 am. No. 101, 2007
S. 1359	am. No. 24, 2003
Part 9.12	
S. 1364	am. No. 122, 2001; No. 24, 2003; No. 132, 2007
Heading to s. 1368	am. No. 122, 2001
S. 1368	am. No. 122, 2001
Chapter 10	
Part 10.1	
Division 1	
S. 1372	am. No. 55, 2001

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Division 4	
S. 1382	am. No. 55, 2001
S. 1384A	ad. No. 55, 2001
S. 1384B	ad. No. 55, 2001
Division 6	
S. 1408	am. No. 116, 2003
Division 7	
S. 1409	am. No. 154, 2007
Part 10.2	
Part 10.2	ad. No. 123, 2001
Division 1	
Subdivision A	
S. 1410	ad. No. 123, 2001
Subdivision B	
S. 1411	ad. No. 123, 2001
S. 1412	ad. No. 123, 2001
S. 1413	ad. No. 123, 2001
S. 1414	ad. No. 123, 2001 am. No. 141, 2003
S. 1415	ad. No. 123, 2001
S. 1416	ad. No. 123, 2001 am. No. 141, 2003
S. 1417	ad. No. 123, 2001
S. 1418	ad. No. 123, 2001
S. 1419	ad. No. 123, 2001
S. 1420	ad. No. 123, 2001
S. 1421	ad. No. 123, 2001
S. 1422	ad. No. 123, 2001
Subdivision C	
S. 1423	ad. No. 123, 2001
S. 1424	ad. No. 123, 2001
S. 1424A	ad. No. 123, 2001
S. 1425	ad. No. 123, 2001
S. 1426	ad. No. 123, 2001 am. No. 141, 2003
S. 1427	ad. No. 123, 2001
S. 1428	ad. No. 123, 2001 am. No. 141, 2003
S. 1429	ad. No. 123, 2001
Subdivision D	
S. 1430	ad. No. 123, 2001
S. 1431	ad. No. 123, 2001 am. No. 141, 2003

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 1432	ad. No. 123, 2001
S. 1433	ad. No. 123, 2001
S. 1434	ad. No. 123, 2001
S. 1435	ad. No. 123, 2001
S. 1436	ad. No. 123, 2001
S. 1436A	ad. No. 123, 2001
S. 1437	ad. No. 123, 2001 am. No. 141, 2003
Subdivision E	
S. 1438	ad. No. 123, 2001 am. No. 141, 2003; No. 154, 2007
S. 1439	ad. No. 123, 2001
S. 1440	ad. No. 123, 2001
S. 1441	ad. No. 123, 2001
S. 1442	ad. No. 123, 2001 am. No. 141, 2003
Subdivision F	
S. 1442A	ad. No. 123, 2001
S. 1442B	ad. No. 123, 2001
Division 2	
S. 1443	ad. No. 123, 2001
S. 1444	ad. No. 123, 2001 am. No. 154, 2007
S. 1445	ad. No. 123, 2001 am. No. 154, 2007
Part 10.3	
Part 10.3	ad. No. 24, 2003
S. 1446	ad. No. 24, 2003
S. 1447	ad. No. 24, 2003
Heading to s. 1448	am. No. 103, 2004
S. 1448	ad. No. 24, 2003 am. No. 103, 2004
Part 10.4	
Part 10.4	ad. No. 141, 2003
S. 1449	ad. No. 141, 2003
S. 1450	ad. No. 141, 2003
S. 1451	ad. No. 141, 2003
S. 1452	ad. No. 141, 2003
Part 10.5	
Part 10.5	ad. No. 103, 2004
S. 1453	ad. No. 103, 2004
S. 1454	ad. No. 103, 2004
S. 1455	ad. No. 103, 2004 am. No. 1, 2007

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 1456.....	ad. No. 103, 2004
S. 1457.....	ad. No. 103, 2004
S. 1458.....	ad. No. 103, 2004
S. 1459.....	ad. No. 103, 2004
S. 1460.....	ad. No. 103, 2004
S. 1461.....	ad. No. 103, 2004
S. 1462.....	ad. No. 103, 2004 am. No. 138, 2005
S. 1463.....	ad. No. 103, 2004
S. 1464.....	ad. No. 103, 2004
S. 1465.....	ad. No. 103, 2004
S. 1466A.....	ad. No. 103, 2004
S. 1466.....	ad. No. 103, 2004
S. 1467.....	ad. No. 103, 2004
S. 1468.....	ad. No. 103, 2004
S. 1469.....	ad. No. 103, 2004
S. 1470.....	ad. No. 103, 2004
S. 1471.....	ad. No. 103, 2004
Part 10.8	
Part 10.8.....	ad. No. 64, 2007
S. 1478.....	ad. No. 64, 2007
Part 10.9	
Part 10.9.....	ad. No. 132, 2007
Ss. 1479–1483.....	ad. No. 132, 2007
Part 10.10	
Part 10.10.....	ad. No. 146, 2008
S. 1484.....	ad. No. 146, 2008
Schedule 2.....	rep. No. 122, 2001
Schedule 3	
Schedule 3.....	am. Nos. 55, 117, 122 and 123, 2001; Nos. 24, 116 and 141, 2003; No. 103, 2004; Nos. 85, 101, 132, 149 and 154, 2007; No. 146, 2008
Schedule 4	
Part 5	
C. 29.....	am. No. 122, 2001
C. 32.....	am. No. 122, 2001
Part 6	
C. 36.....	am. No. 116, 2003

Note 2**Note 2**

Corporations Amendment (Short Selling) Act 2008 (No. 146, 2008)

The following amendments commence on 11 December 2009 unless proclaimed earlier:

Schedule 3**1 Subsection 1010A(1)**

Omit “Divisions 5A and 6”, substitute “Divisions 5A, 5B and 6”.

2 Subsection 1010A(2)

Omit “Divisions 5A and 6”, substitute “Divisions 5A, 5B and 6”.

3 After Division 5A of Part 7.9

Insert:

**Division 5B—Disclosure etc. in relation to short sales
covered by securities lending arrangement of
listed section 1020B products**

Note: Section 1020B prohibits certain short sales of section 1020B products.

1020AA Definitions

(1) In this Division:

crossing: a ***crossing*** of section 1020B products is a sale of section 1020B products made by a financial services licensee:

- (a) on behalf of both the buyer and the seller of the products; or
- (b) on behalf of the buyer of the products and on its own behalf as seller of the products; or
- (c) on behalf of the seller of the products and on its own behalf as buyer of the products.

section 1020B products has the meaning given by subsection 1020B(1).

securities lending arrangement means an arrangement under which:

Note 2

- (a) one entity (the ***lender***) agrees that it will:
 - (i) deliver particular securities, managed investment products or other financial products to another entity (the ***borrower***) or to an entity nominated by the borrower; and
 - (ii) vest title in those products in the entity to which they are delivered; and
- (b) the borrower agrees that it will, after the lender does the things mentioned in paragraph (a):
 - (i) deliver the products (or equivalent products) to the lender or to an entity nominated by the lender; and
 - (ii) vest title in those products (or those equivalent products) in the entity to which they are delivered.
- (2) To avoid doubt, for the purposes of this Division, treat the entering into of an agreement to sell section 1020B products as the sale of the products.
- (3) To avoid doubt, for the purposes of this Division, treat a financial services licensee as making a sale on behalf of a person if the sale is, in economic substance, made by the licensee for the person.

Example: A request that the sale be made is passed from the person to the financial services licensee through a chain of intermediaries.
- (4) For the purposes of this Division, treat a crossing of section 1020B products as being made on a licensed market.

1020AB Seller disclosure

- (1) Subsection (3) applies if:
 - (a) either:
 - (i) a financial services licensee, on behalf of a person (the ***seller***), makes a sale in this jurisdiction of section 1020B products on a licensed market to a buyer; or
 - (ii) a financial services licensee (the ***seller***), on its own behalf, makes a sale in this jurisdiction of section 1020B products on a licensed market to a buyer; and
 - (b) before the time of the sale, the seller had entered into or gained the benefit of a securities lending arrangement; and

Note 2

- (c) at the time of the sale, the seller intends that the securities lending arrangement will ensure that some or all the section 1020B products can be vested in the buyer; and
 - (d) the following requirements are satisfied (if applicable):
 - (i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;
 - (ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;
 - (iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.
- (2) Subsection (3) applies regardless of whether the seller is inside or outside Australia.

Offence

- (3) The seller must:
- (a) give the entity mentioned in subsection (4) particulars specified in the regulations in relation to the circumstances mentioned in paragraphs (1)(a), (b) and (c); and
 - (b) do so:
 - (i) on or before the time specified in the regulations; and
 - (ii) in the manner specified in the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The entity is:
- (a) if subparagraph (1)(a)(i) applies:
 - (i) the financial services licensee mentioned in that subparagraph; or
 - (ii) if the regulations specify another entity—that entity; or
 - (b) if subparagraph (1)(a)(ii) applies:
 - (i) the operator of the licensed market mentioned in that subparagraph; or
 - (ii) if the regulations specify another entity—that entity.

Note 2

1020AC Licensee disclosure

- (1) Subsection (2) applies if:
 - (a) the seller mentioned in subparagraph 1020AB(1)(a)(i) gives a financial services licensee information in accordance with section 1020AB in relation to a sale of section 1020B products on a licensed market; and
 - (b) the following requirements are satisfied (if applicable):
 - (i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;
 - (ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;
 - (iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

Offence

- (2) The financial services licensee must:
 - (a) give the entity mentioned in subsection (3) particulars specified in the regulations in relation to the circumstances mentioned in paragraph (1)(a); and
 - (b) do so:
 - (i) on or before the time specified in the regulations; and
 - (ii) in the manner specified in the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) The entity is:
 - (a) the operator of the licensed market mentioned in paragraph (1)(a); or
 - (b) if the regulations specify another entity—that entity.

1020AD Public disclosure of information

- (1) Subsection (2) applies if:
 - (a) any of the following apply, in relation to a sale of section 1020B products on a licensed market:

Note 2

- (i) the seller mentioned in subparagraph 1020AB(1)(a)(ii) gives information to the operator of a licensed market (or to another entity) in accordance with section 1020AB;
 - (ii) the financial services licensee mentioned in paragraph 1020AC(1)(a) gives information to the operator of a licensed market (or to another entity) in accordance with section 1020AC;
 - (iii) if regulations for the purposes of subparagraph 1020AB(4)(a)(ii) provide that the entity to which information is to be given in accordance with section 1020AB is the operator of a licensed market (or another entity)—the seller mentioned in subparagraph 1020AB(1)(a)(i) gives information to the operator (or other entity) in accordance with that section; and
- (b) the following requirements are satisfied (if applicable):
- (i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;
 - (ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;
 - (iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

Offence

- (2) The operator (or the other entity) must:
- (a) make a public disclosure of particulars specified in the regulations in relation to the information mentioned in paragraph (1)(a); and
 - (b) do so:
 - (i) on or before the time specified in the regulations; and
 - (ii) in the manner specified in the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2

1020AE Licensee's obligation to ask seller about short sale

The financial services licensee must not make a sale in this jurisdiction of section 1020B products on a licensed market if:

- (a) the sale is on behalf of a person (the *seller*); and
- (b) the seller will be obliged under section 1020AB to give the financial services licensee information in relation to the sale; and
- (c) either or both of the following apply:
 - (i) before making the sale, the financial services licensee failed to ask the seller, orally or in writing, whether the seller will be obliged under section 1020AB to give the financial services licensee information in relation to the sale;
 - (ii) before making the sale, the financial services licensee failed to record, in writing, the seller's answer.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)).

Note 2: For the definition of *writing*, see section 25 of the *Acts Interpretation Act 1901*. For the application of the *Acts Interpretation Act 1901* to this Act, see section 5C of this Act.

1020AF Regulations

- (1) Regulations made for the purposes of this Division may specify a matter or thing differently for different kinds of persons, things or circumstances. For example, the regulations may:
 - (a) specify a matter or thing differently for different kinds of sellers mentioned in subsection 1020AB(1) or 1020AC(1); and
 - (b) specify a time differently for different kinds of circumstances.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (2) Subsection (1) does not limit the regulations that may be made for the purposes of this Division.

4 Subsection 1020B(1)

Omit "In this section", substitute "In this section and in Division 5B".

Note 2**5 Subsection 1200F(1) (table item 5)**

Omit “other than section 1020B”, substitute “other than sections 1020AB, 1020AC, 1020AD and 1020B”.

6 Schedule 3 (after table item 300A)

Insert:

300AA	Subsection 1020AB(3)	25 penalty units or imprisonment for 6 months, or both.
300AB	Subsection 1020AC(2)	25 penalty units or imprisonment for 6 months, or both.
300AC	Subsection 1020AD(2)	25 penalty units or imprisonment for 6 months, or both.
300AD	Section 1020AE	25 penalty units or imprisonment for 6 months, or both.

As at 12 January 2009 the amendments are not incorporated in this compilation.

Table A

Table A

Application, saving or transitional provisions

Treasury Legislation Amendment (Application of Criminal Code) Act (No. 3)
2001 (No. 117, 2001)

4 Application of amendments

- (1) Each amendment made by this Act applies to acts and omissions that take place after the amendment commences.
- (2) For the purposes of this section, if an act or omission is alleged to have taken place between 2 dates, one before and one on or after the day on which a particular amendment commences, the act or omission is alleged to have taken place before the amendment commences.

Treasury Legislation Amendment (Application of Criminal Code) Act (No. 2)
2001 (No. 146, 2001)

4 Application of amendments

- (1) Each amendment made by this Act applies to acts and omissions that take place after the amendment commences.
 - (2) For the purposes of this section, if an act or omission is alleged to have taken place between 2 dates, one before and one on or after the day on which a particular amendment commences, the act or omission is alleged to have taken place before the amendment commences.
-

Table A*Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* (No. 140, 2003)**4 Transitional provisions**

- (1) If legislation introduced into the Parliament before the commencing day but commencing on or after that day:
 - (a) authorises an instrument to be made in the exercise of a power delegated by the Parliament; and
 - (b) is expressed to require that instrument to be published as a statutory rule under the *Statutory Rules Publication Act 1903*; any instrument so made is taken to be an instrument referred to in paragraph 6(b) of the *Legislative Instruments Act 2003* despite the repeal by this Act of the *Statutory Rules Publication Act 1903*.
- (2) If legislation introduced into the Parliament before the commencing day but commencing on or after that day:
 - (a) authorises an instrument to be made in the exercise of a power delegated by the Parliament; and
 - (b) is expressed to declare that instrument to be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*; any instrument so made is taken to be an instrument referred to in subparagraph 6(d)(i) of the *Legislative Instruments Act 2003* despite the repeal by this Act of section 46A of the *Acts Interpretation Act 1901*.
- (3) If legislation that is in force immediately before the commencing day or that is introduced into the Parliament before that day but that commences on or after that day:
 - (a) authorised or authorises an instrument to be made in the exercise of a power delegated by the Parliament that adversely affects the rights of a person, or results in the imposition of liabilities on a person; and
 - (b) provided or provides that the instrument has effect, to the extent that it adversely affects those rights or results in the imposition of those liabilities, despite subsection 48(2) of the *Acts Interpretation Act 1901*, before the date of its notification in the *Gazette*;
 that legislation is to be construed, on and after the commencing day or the day of its commencement, whichever last occurs, as if it had

Table A

provided instead that the instrument, to the extent that it adversely affects those rights or results in the imposition of those liabilities, has effect, despite subsection 12(2) of the *Legislative Instruments Act 2003*, before its registration under that Act.

(4) If:

- (a) legislation (the **enabling legislation**) in force immediately before the commencing day:
 - (i) authorises the making of an instrument; and
 - (ii) does not declare such an instrument to be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901* but nonetheless makes provision for its disallowance by the application, with or without modification, of the provisions of Part XII of that Act; and
- (b) an instrument is made in the exercise of that authority on or after the commencing day; and
- (c) the instrument is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003* or otherwise;

the enabling legislation has effect, on and after the commencing day, as if:

- (d) it had declared such instruments to be disallowable instruments for the purposes of section 46B of the *Acts Interpretation Act 1901*; and
- (e) it had provided for such modifications of the operation of that section as are necessary to ensure that the effect of the applied provisions of Part XII of the *Acts Interpretation Act 1901* is preserved.

(5) In this section:

commencing day means the commencing day within the meaning of the *Legislative Instruments Act 2003*.

Table A

Bankruptcy Legislation Amendment Act 2004 (No. 80, 2004)

Schedule 1**212 Transitional—pre-commencement deeds and compositions**

- (1) For the purposes of this item, if a deed of assignment or a deed of arrangement was executed by a debtor and a trustee under Part X of the *Bankruptcy Act 1966* before the commencement of this item, the deed is a ***pre-commencement deed***.
- (2) For the purposes of this item, if a composition was accepted before the commencement of this item by a special resolution of a meeting of creditors under section 204 of the *Bankruptcy Act 1966*, the composition is a ***pre-commencement composition***.
- (3) Despite the repeals and amendments made by Parts 1 and 2 of this Schedule:
 - (a) the *Bankruptcy Act 1966* and regulations under that Act; and
 - (b) the Acts amended by Part 2 of this Schedule;
 continue to apply, in relation to:
 - (c) a pre-commencement deed; and
 - (d) a pre-commencement composition; and
 - (e) any matter connected with, or arising out of:
 - (i) a pre-commencement deed; or
 - (ii) a pre-commencement composition;
 as if those repeals had not happened and those amendments had not been made.

213 Transitional—pre-commencement authorities

- (1) For the purposes of this item, if:
 - (a) an authority given by a debtor under section 188 of the *Bankruptcy Act 1966* became effective before the commencement of this item; and
 - (b) as at the commencement of this item, none of the following had happened:
 - (i) the execution by the debtor and the trustee of a deed of assignment under Part X of the *Bankruptcy Act 1966*;

Table A

- (ii) the execution by the debtor and the trustee of a deed of arrangement under Part X of the *Bankruptcy Act 1966*;
- (iii) the acceptance of a composition by a special resolution of a meeting of the debtor's creditors under section 204 of the *Bankruptcy Act 1966*;

the authority is a ***pre-commencement authority***.

- (2) Despite the repeals and amendments made by Parts 1 and 2 of this Schedule:

- (a) the *Bankruptcy Act 1966* and regulations under that Act; and
- (b) the Acts amended by Part 2 of this Schedule;

continue to apply, in relation to:

- (c) a pre-commencement authority; and
- (d) the control of the debtor's property following a pre-commencement authority becoming effective; and
- (e) a meeting of the debtor's creditors called under a pre-commencement authority; and
- (f) whichever of the following is applicable:
 - (i) a deed of assignment executed after the commencement of this item by the debtor and the trustee under Part X of the *Bankruptcy Act 1966* in accordance with a special resolution of such a meeting;
 - (ii) a deed of arrangement executed after the commencement of this item by the debtor and the trustee under Part X of the *Bankruptcy Act 1966* in accordance with a special resolution of such a meeting;
 - (iii) a composition accepted after the commencement of this item by a special resolution of such a meeting; and
- (g) any other matter connected with, or arising out of:
 - (i) a pre-commencement authority; or
 - (ii) a deed of assignment mentioned in subparagraph (f)(i); or
 - (iii) a deed of arrangement mentioned in subparagraph (f)(ii); or
 - (iv) a composition mentioned in subparagraph (f)(iii);

as if those repeals had not happened and those amendments had not been made.

Table A**215 Transitional—regulations**

- (1) The regulations may make provision for matters of a transitional nature arising from the amendments made by Parts 1 and 2 of this Schedule.
- (2) The Governor-General may make regulations for the purposes of subitem (1).

Financial Framework Legislation Amendment Act 2005 (No. 8, 2005)

4 Saving of matters in Part 2 of Schedule 1

- (1) If:
 - (a) a decision or action is taken or another thing is made, given or done; and
 - (b) the thing is taken, made, given or done under a provision of a Part 2 Act that had effect immediately before the commencement of this Act;
 then the thing has the corresponding effect, for the purposes of the Part 2 Act as amended by this Act, as if it had been taken, made, given or done under the Part 2 Act as so amended.

- (2) In this section:

Part 2 Act means an Act that is amended by an item in Part 2 of Schedule 1.

Schedule 1**496 Saving provision—Finance Minister’s determinations**

If a determination under subsection 20(1) of the *Financial Management and Accountability Act 1997* is in force immediately before the commencement of this item, the determination continues in force as if it were made under subsection 20(1) of that Act as amended by this Act.

Table A

Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006
(No. 101, 2006)

Schedule 6**1 Application of Schedule 1 and 2 amendments**

Except as mentioned in items 2 and 3, the repeals and amendments made by Schedules 1 and 2 apply:

- (a) so far as they affect assessments—to assessments for the 2006-07 income year and all later income years; and
- (b) otherwise—to acts done or omitted to be done, or states of affairs existing, after the commencement of the repeals and amendments.

6 Object

The object of this Part is to ensure that, despite the repeals and amendments made by this Act, the full legal and administrative consequences of:

- (a) any act done or omitted to be done; or
- (b) any state of affairs existing; or
- (c) any period ending;

before such a repeal or amendment applies, can continue to arise and be carried out, directly or indirectly through an indefinite number of steps, even if some or all of those steps are taken after the repeal or amendment applies.

7 Making and amending assessments, and doing other things, in relation to past matters

Even though an Act is repealed or amended by this Act, the repeal or amendment is disregarded for the purpose of doing any of the following under any Act or legislative instrument (within the meaning of the *Legislative Instruments Act 2003*):

- (a) making or amending an assessment (including under a provision that is itself repealed or amended);
- (b) exercising any right or power, performing any obligation or duty or doing any other thing (including under a provision that is itself repealed or amended);

in relation to any act done or omitted to be done, any state of affairs existing, or any period ending, before the repeal or amendment applies.

Table A

Example 1: On 31 July 1999, Greg Ltd lodged its annual return under former section 160ARE of the *Income Tax Assessment Act 1936*. The return stated that the company had a credit on its franking account and that no franking deficit tax was payable for the 1998-99 franking year. Under former section 160ARH of that Act, the Commissioner was taken to have made an assessment consistent with the return.

Following an audit undertaken after the repeal of Part IIIAA of that Act, the Commissioner concludes that Greg Ltd fraudulently overfranked dividends it paid during the 1998-99 franking year, and had a franking account deficit for that franking year. As a result, the Commissioner considers that franking deficit tax and a penalty by way of additional tax are payable.

The Commissioner can amend the assessment under former section 160ARN of that Act, because item 7 of this Schedule disregards the repeal of that section for the purposes of making an assessment in relation to the 1998-99 franking year. Item 7 will also disregard the repeal of Division 11 of former Part IIIAA to the extent necessary for the Commissioner to assess Greg Ltd's liability to a penalty by way of additional tax.

Despite the repeal of sections 160ARU and 160ARV, item 9 will ensure that the general interest charge will accrue on the unpaid franking deficit tax and penalty until they are paid.

Item 7 will also preserve Greg Ltd's right, under former section 160ART of that Act, to object against the Commissioner's amended assessment (including the penalty), since the objection is the exercise of a right in relation to a franking year that ended before the repeal of Part IIIAA.

Example 2: During the 1997-98 income year, Duffy Property Ltd withheld amounts from its employees' wages as required by former Divisions 1AAA and 2 of Part VI of the *Income Tax Assessment Act 1936*. The company failed to notify the Commissioner of those amounts, and failed to remit them to the Commissioner.

Following an audit undertaken after the repeal of those Divisions, the Commissioner discovers that the withheld amounts have not been remitted. The company's records are incomplete and the Commissioner is unable to completely ascertain the extent of its liability for the withheld amounts. Under section 222AGA of that Act, the Commissioner makes an estimate of the liability.

Item 7 will disregard the repeal of section 220AAZA of that Act (which empowered the Commissioner to recover the amount of the estimate). Even though the estimate is made after the repeal, it relates to amounts withheld before the repeal.

Table A

8 Saving of provisions about effect of assessments

If a provision or part of a provision that is repealed or amended by this Act deals with the effect of an assessment, the repeal or amendment is disregarded in relation to assessments made, before or after the repeal or amendment applies, in relation to any act done or omitted to be done, any state of affairs existing, or any period ending, before the repeal or amendment applies.

9 Saving of provisions about general interest charge, failure to notify penalty or late reconciliation statement penalty

If:

- (a) a provision or part of a provision that is repealed or amended by this Act provides for the payment of:
 - (i) general interest charge, failure to notify penalty or late reconciliation statement penalty (all within the meaning of the *Income Tax Assessment Act 1936*); or
 - (ii) interest under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*; and
- (b) in a particular case, the period in respect of which the charge, penalty or interest is payable (whether under the provision or under the *Taxation Administration Act 1953*) has not begun, or has begun but not ended, when the provision is repealed or amended;

then, despite the repeal or amendment, the provision or part continues to apply in the particular case until the end of the period.

10 Repeals disregarded for the purposes of dependent provisions

If the operation of a provision (the *subject provision*) of any Act or legislative instrument (within the meaning of the *Legislative Instruments Act 2003*) made under any Act depends to any extent on an Act, or a provision of an Act, that is repealed by this Act, the repeal is disregarded so far as it affects the operation of the subject provision.

11 Schedule does not limit operation of section 8 of the *Acts Interpretation Act 1901*

This Schedule does not limit the operation of section 8 of the *Acts Interpretation Act 1901*.

Table A

Trade Practices Legislation Amendment Act (No. 1) 2006 (No. 131, 2006)

Schedule 9**21 Application**

The amendments made by this Part apply in relation to contraventions occurring after the commencement of this Part.

Governance Review Implementation (Treasury Portfolio Agencies) Act 2007
(No. 74, 2007)

Schedule 2**1 Definitions**

In this Schedule:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

Agency means:

- (a) ASIC as established under the *Australian Securities and Investments Commission Act 2001* immediately before the commencement time; or
- (b) CAMAC as established under the *Australian Securities and Investments Commission Act 2001* immediately before the commencement time; or
- (c) APRA as established under the *Australian Prudential Regulation Authority Act 1998* immediately before the commencement time.

Agency head means:

- (a) in relation to ASIC—the Chairperson of ASIC; or
- (b) in relation to CAMAC—the Convenor of CAMAC; or
- (c) in relation to APRA—the Chair of APRA.

asset means:

- (a) any legal or equitable estate or interest in real or personal property, whether actual, contingent or prospective; and
 - (b) any right, power, privilege or immunity, whether actual, contingent or prospective.
-

Table A

assets official, in relation to an asset other than land, means the person or authority who, under a law of the Commonwealth, a State or a Territory, under a trust instrument or otherwise, has responsibility for keeping a register in relation to assets of the kind concerned.

commencement time means the time when this Schedule commences.

financial liability means a liability to pay a person an amount, where the amount, or the method for working out the amount, has been determined.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

land means any legal or equitable estate or interest in real property, whether actual, contingent or prospective.

land registration official, in relation to land, means the Registrar of Titles or other proper officer of the State or Territory in which the land is situated.

liability means any liability, duty or obligation, whether actual, contingent or prospective.

member means:

- (a) in relation to ASIC—a member of ASIC; or
- (b) in relation to CAMAC—a member of CAMAC; or
- (c) in relation to APRA—an APRA member.

2 Pre-existing property, money and financial liabilities

- (1) Subject to items 3, 4 and 5 of this Schedule, any real or personal property or money that is held by ASIC or CAMAC immediately before the commencement time is taken, immediately after that time, to be held by ASIC or CAMAC for and on behalf of the Commonwealth.
 - (2) Subject to items 3, 4 and 5 of this Schedule, any financial liabilities of ASIC or CAMAC that exist immediately before the commencement time are taken, immediately after that time, to be liabilities of the Commonwealth.
 - (3) If an amount of money (the **original amount**) that is held by ASIC immediately before the commencement time is held by ASIC for and on behalf of the Commonwealth immediately after the commencement time, an amount equal to the original amount may be paid out of the Consolidated Revenue Fund, which is appropriated accordingly, for the purposes of ASIC.
-

Table A

- (4) If an amount of money (the *original amount*) that is held by CAMAC immediately before the commencement time is held by CAMAC for and on behalf of the Commonwealth immediately after the commencement time, an amount equal to the original amount may be paid out of the Consolidated Revenue Fund, which is appropriated accordingly, for the purposes of CAMAC.

3 Trust property held under Part 9.7 of the Corporations Act

Any unclaimed property held, immediately before the commencement time, on trust by ASIC to be dealt with under Part 9.7 of the *Corporations Act 2001* (as in force at that time) is taken, immediately after that time, to be held by ASIC for and on behalf of the Commonwealth to be dealt with in accordance with Part 9.7 of the *Corporations Act 2001* (as amended by Schedule 1 to this Act).

4 Vesting of other assets held on trust by ASIC

- (1) This item applies to any other assets held on trust by ASIC immediately before the commencement time.
- (2) At the commencement time, the assets to which this item applies cease to be assets held on trust by ASIC and become assets held on trust by the Commonwealth, without any conveyance, transfer or assignment. The Commonwealth becomes the successor in law in relation to those assets.

Note: ASIC may, for and on behalf of the Commonwealth, perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to assets held on trust by the Commonwealth (see subsection 8(6) of the *Australian Securities and Investments Commission Act 2001*).

5 Vesting of liabilities relating to assets held on trust

- (1) This item applies to the liabilities of ASIC in relation to assets mentioned in item 4 of this Schedule that are held on trust by ASIC immediately before the commencement time.
- (2) At the commencement time, the liabilities to which this item applies cease to be liabilities of ASIC in relation to the assets and become liabilities of the Commonwealth in relation to the assets, without any conveyance, transfer or assignment. The Commonwealth becomes the successor in law in relation to these liabilities.

Table A

6 Certificates relating to vesting of land

- (1) This item applies if:
- (a) any land vests in the Commonwealth under this Schedule; and
 - (b) there is lodged with a land registration official a certificate that:
 - (i) is signed by the Minister; and
 - (ii) identifies the land, whether by reference to a map or otherwise; and
 - (iii) states that the land has become vested in the Commonwealth under this Schedule.

Note: Certificates under paragraph (1)(b) are presumed to be authentic: see item 9 of this Schedule.

- (2) The land registration official may:
- (a) register the matter in a way that is the same as, or similar to, the way in which dealings in land of that kind are registered; and
 - (b) deal with, and give effect to, the certificate.

7 Certificates relating to vesting of assets other than land

- (1) This item applies if:
- (a) any asset other than land vests in the Commonwealth under this Schedule; and
 - (b) there is lodged with an assets official a certificate that:
 - (i) is signed by the Minister; and
 - (ii) identifies the asset; and
 - (iii) states that the asset has become vested in the Commonwealth under this Schedule.

Note: Certificates under paragraph (1)(b) are presumed to be authentic: see item 9 of this Schedule.

- (2) The assets official may:
- (a) deal with, and give effect to, the certificate as if it were a proper and appropriate instrument for transactions in relation to assets of that kind; and
 - (b) make such entries in the register as are necessary having regard to the effect of this Part.

Table A**8 Substitution of Commonwealth as a party to pending proceedings**

If any proceedings relating to an asset covered by item 4 of this Schedule, to which ASIC was a party, were pending in any court or tribunal immediately before the commencement time, the Commonwealth is substituted for ASIC, from the commencement time, as a party to the proceedings.

9 Certificates taken to be authentic

A document that appears to be a certificate made or issued under a particular provision of this Schedule:

- (a) is taken to be such a certificate; and
- (b) is taken to have been properly given;

unless the contrary is established.

20 Regulations

- (1) The Governor-General may make regulations prescribing matters:
 - (a) required or permitted by this Schedule to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Schedule.
- (2) In particular, regulations may be made prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by Schedule 1 to this Act.

Corporations Legislation Amendment (Simpler Regulatory System) Act 2007
(No. 101, 2007)

Schedule 1**227 Application of items 3, 6 and 133**

The amendments made by items 3, 6 and 133 of this Schedule apply to contribution plans offered on or after the day on which those items commence.

Table A

228 Application of items 4, 5, 86, 92, 106, 131 and 132

The amendments made by items 4, 5, 86, 92, 106, 131 and 132 of this Schedule apply to employee share schemes offered on or after the day on which those items commence.

229 Application of items 9, 10, 71 and 96

The amendments made by items 9, 10, 71 and 96 of this Schedule apply to rights issues offered on or after the day on which those items commence.

230 Application of items 8, 70, 94, 146 to 150 and 156 to 158

The amendments made by items 8, 70, 94, 146 to 150 and 156 to 158 of this Schedule apply in relation to a Product Disclosure Statement that is lodged with ASIC whether the Statement is lodged before, on or after the day the amendments commence.

231 Application of items 11 to 19 and 176 to 187

The amendments made by items 11 to 19 and 176 to 187 of this Schedule apply to a financial year that ends on or after the day on which those items commence.

232 Application of items 24 to 33, 36, 37 and 168

The amendments made by items 24 to 33, 36, 37 and 168 of this Schedule apply to a financial year that begins on or after the day on which those items commence.

233 Application of items 34, 35, 38 to 41 and 169

- (1) The amendments made by items 34, 35, 38 to 41 and 169 of this Schedule apply to a report for a financial year that ends on or after the day on which those items commence.
- (2) A company, registered scheme or disclosing entity must notify each member of the company, scheme or entity for the purposes of subsection 314(1AB) of the *Corporations Act 2001* (as inserted by item 38 of this Schedule) after that item commences.
- (3) However, subitem (2) of this item does not apply in respect of a member of a company, registered scheme or disclosing entity if the member has previously requested, under section 316 of the

Table A

Corporations Act 2001, the company, scheme or entity not to send him or her the material required by section 314 of that Act.

234 Application of items 47, 48, 50 and 52 to 59

The amendments made by items 47, 48, 50 and 52 to 59 of this Schedule apply to:

- (a) an audit of the financial report for a financial year; or
- (b) an audit or review of the financial report for a half-year in a financial year;

if the financial year begins on or after the day on which those items commence.

235 Application of items 60, 61 and 62

The amendments made by items 60, 61 and 62 apply to any person who ceases to be:

- (a) a member of an audit firm; or
- (b) a director of an audit company; or
- (c) a professional employee of an audit company;

whether the person so ceases before or after the day on which those items commence.

236 Application of items 63 and 64

The amendments made by items 63 and 64 of this Schedule apply in relation to information given to ASIC under subsection 327B(2A), (2B) or (2C), or 331AAA(2A), (2B) or (2C), of the *Corporations Act 2001* on or after the day on which that item commences.

237 Application of items 73, 75 to 77 and 84

The amendments made by items 73, 75 to 77 and 84 of this Schedule apply to offers of securities made on or after the day on which those items commence.

238 Application of items 95 and 97 to 100

The amendments made by items 95 and 97 to 100 of this Schedule apply to financial products and financial services provided on and after the day on which those items commence.

Table A

239 Saving provision for item 101

The amendment made by item 101 of this Schedule does not affect the continuity of:

- (a) any arrangement entered into for the purposes of section 798C of the *Corporations Act 2001*; or
- (b) any market listing rules made for the purposes of section 798C of the *Corporations Act 2001*;

that are in force immediately before that item commences.

240 Application of item 190

The amendment made by item 190 of this Schedule applies to a financial year that begins on or after the day on which that item commences.

241 Application of item 209

The amendment made by item 209 of this Schedule applies to a return of particulars issued on or after the day on which that item commences.

242 Application of items 210 to 215

The amendments made by items 210 to 215 of this Schedule apply to an advertisement or publication that is made on or after the day on which those items commence.

243 Application of items 216 to 218

The amendments made by items 216 to 218 of this Schedule apply in relation to the conduct of a representative on or after the day on which those items commence.

244 Application of item 221

Paragraph 1351(4)(a) of the *Corporations Act 2001* (as inserted by item 221 of this Schedule) applies to a review date that occurs on or after the day on which that item commences.

245 Application of item 223

The amendment made by item 223 of this Schedule applies in relation to events occurring on or after the day on which that item commences.

Table A

246 Application of items 224 to 226

The amendments made by items 224 to 226 of this Schedule apply in relation to events occurring on or after the day on which those items commence.

Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007 (No. 154, 2007)

Schedule 1

296 Regulations may prescribe matters

The Governor-General may make regulations prescribing matters of a transitional nature (including prescribing any saving or application provisions) in relation to the amendments or repeals made by this Schedule.

Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008 (No. 105, 2008)

Schedule 3

31 Saving

The amendments of sections 461 and 462 of the *Corporations Act 2001* made by this Part do not apply in relation to applications made before the commencement of the amendments for orders that companies be wound up.