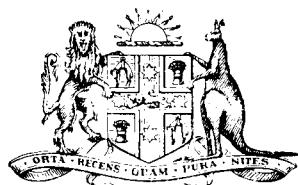


# COMPANIES (NEW SOUTH WALES) CODE

[As at 1st July, 1982]

This document contains the text of the *Companies Act 1981*, as amended, of the Commonwealth, with alterations made in accordance with the *Companies (Application of Laws) Act, 1981*, as amended, of New South Wales. Further information is contained in the note on page 664.

NEW SOUTH WALES



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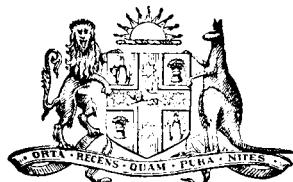
Order of Priority of Registrable Charges

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# COMPANIES (NEW SOUTH WALES) CODE

[As at 1st July, 1982]

NEW SOUTH WALES



## COMPANIES (NEW SOUTH WALES) CODE

relating to the formation of companies in New South Wales, the regulation of companies formed in New South Wales, the registration in New South Wales of certain other bodies and certain other matters.

### PART I—PRELIMINARY

#### Short title

1. This Code may be cited as the *Companies (New South Wales) Code*.

#### Commencement

2. This Code comes into operation on the day on which the *Companies (Application of Laws) Act*, 1981, commences.

#### Agreement

3. This Code shall be read and construed together with the agreement made on 22 December 1978 between the Commonwealth and the States in relation to a proposed scheme for the co-operative regulation of companies and the securities industry or, if that agreement is or has been amended or affected by another agreement, that agreement as so amended or affected.

#### Code subject to Acts

4. This Code has effect subject to and in accordance with—
  - (a) the *Companies (Application of Laws) Act*, 1981; and
  - (b) the *Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act*, 1981.

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The publication of this document was authorized by the Attorney General in accordance with section 10 of the *Companies (Application of Laws) Act*, 1981, on 9th June, 1982.

The several provisions set out in this document come into operation in New South Wales on the day on which the *Companies (Application of Laws) Act*, 1981 (except sections 1 and 2) comes into operation.

**Interpretation**

5. (1) In this Code, unless the contrary intention appears—

“accounting records” includes invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry and also includes such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up;

“annual general meeting”, in relation to a company, means a meeting of the company required to be held by section 240;

“annual return” means the return required to be made by section 263 and includes any document accompanying the return;

“authorized trustee corporation” means a body corporate that is declared by the regulations to be an authorized trustee corporation for the purposes of the provision in which the expression appears;

“articles” means articles of association;

“banker’s books” means—

- (a) books of a banking corporation, including any documents used in the ordinary business of a banking corporation;
- (b) cheques, orders for the payment of money, bills of exchange and promissory notes in the possession or under the control of a banking corporation; and
- (c) securities or documents of title to securities in the possession or under the control of a banking corporation whether by way of pledge or otherwise;

“Banking Act 1959” means the *Banking Act* 1959 of the Commonwealth as amended and in force for the time being;

“banking corporation” means—

- (a) a bank as defined in section 5 of the *Banking Act* 1959; or
- (b) \* \* \* \*
- (c) a bank constituted under a law of a State or Territory;

“Bankruptcy Act 1966” means the *Bankruptcy Act* 1966 of the Commonwealth as amended and in force for the time being;

“books” includes any register or other record of information and any accounts or accounting records, however compiled, recorded or stored, and also includes any document;

“borrowing corporation” means a corporation that is or will be under a liability to repay any money received or to be received by it in response to an invitation to the public to subscribe for or purchase debentures of the corporation or an offer to the public of debentures of the corporation for subscription or purchase but does not include a banking corporation;

“branch register” means—

- (a) in relation to a company—a branch register of members of the company kept pursuant to section 262; or
- (b) in relation to a foreign company—a branch register of members of the company kept pursuant to section 521;

“business day” means a day that is not a Saturday, a Sunday or a public holiday or bank holiday in the State;

“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 the English language;

“charge” means a charge created in any way and includes a mortgage and an agreement to give or execute a charge or mortgage, whether upon demand or otherwise;

“chargee” means the holder of a charge and includes a person in whose favour a charge is to be given or executed, whether upon demand or otherwise, pursuant to an agreement;

“Commonwealth Minister” means the Minister of State for the Commonwealth for the time being administering the *Companies Act* 1981 of the Commonwealth as amended and in force for the time being;

“*Companies (New South Wales) Code*” or “Code” means the provisions applying by reason of section 6 of the *Companies (Application of Laws) Act*, 1981;

“company” means a company incorporated or deemed to be incorporated under this Code or under any corresponding previous law of the State;

“company having a share capital” includes an unlimited company with a share capital;

“company limited by guarantee” means a company formed on the principle of having the liability of its members limited by the memorandum to the respective amounts that the members undertake to contribute to the property of the company in the event of its being wound up;

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

“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 in the event of its being wound up;
  - (ii) in the case of a company having a share capital—a holder of fully paid shares in the company; and
  - (iii) before the final determination of the persons who are contributories by virtue of sub-paragraphs (i) and (ii)—a person alleged to be such a contributory;
- (b) in relation to a body corporate to which Division 6 of Part XII applies—
  - (i) a person who is a contributory by virtue of section 471; and
  - (ii) before the final determination of the persons who are contributories by virtue of sub-paragraph (i)—a person alleged to be such a contributory; and
- (c) in relation to a no liability company—subject to section 476, a member of the company;

“corporation” means any body corporate, whether formed or incorporated within or outside the State, and includes any company, any foreign company and any recognized company but does not include—

- (a) a body corporate that is incorporated within Australia or an external Territory and is a public authority or an instrumentality or agency of the Crown;
- (b) a corporation sole;
- (c) any society, association or union registered under the *Co-operation Act, 1923*;

- (d) any society or association registered under the *Permanent Building Societies Act*, 1967;
- (e) a credit union, or an association of credit unions, or a union of associations of credit unions, registered under the *Credit Union Act*, 1969; or
- (f) any foreign company or recognized company in respect of which an exemption from compliance with—
  - (i) section 61 (1) of the *Co-operation Act*, 1923;
  - (ii) section 35 (1) of the *Permanent Building Societies Act*, 1967; or
  - (iii) section 28 (1) of the *Credit Union Act*, 1969,

is for the time being in force;

‘creditors’ voluntary winding up” means a winding up under Division 3 of Part XII, other than a members’ voluntary winding up;

“dealing in securities” means (whether as principal or agent) acquiring, disposing of, subscribing for, underwriting or sub-underwriting securities or making or offering to make, or inducing or attempting to induce a person to make or to offer to make, an agreement—

- (a) for or with respect to acquiring, disposing of, subscribing for, underwriting or sub-underwriting securities; or
- (b) the purpose or purported purpose of which is to secure a profit or gain to a person who acquires, disposes of, subscribes for, underwrites or sub-underwrites securities or to any of the parties to the agreement in relation to securities;

“debenture” includes debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a corporation in respect of money that is or may be deposited with or lent to the corporation, whether constituting a charge on property of the corporation or not, but does not include—

- (a) a document that merely acknowledges the receipt of money by a corporation in a case where, in respect of the money, the corporation issues, in compliance with section 97, a document prescribed by sub-section (2) of that section and complies with the other requirements of that section;
- (b) a cheque, order for the payment of money or bill of exchange;
- (c) a promissory note having a face value of not less than \$50,000;  
**or**

- (d) for the purposes of the application of this definition to a provision of this Code in respect of which the regulations provide that the word “debenture” does not include a prescribed document or a document included in a prescribed class of documents—that document or a document included in that class of documents, as the case may be;

“deed” includes an instrument having the effect of a deed;

“director”, in relation to a corporation, includes—

- (a) any person occupying or acting in the position of director of the corporation, by whatever name called and whether or not validly appointed to occupy or duly authorized to act in the position; and
- (b) any person in accordance with whose directions or instructions the directors of the corporation are accustomed to act;

“emoluments” means the amount or value of any money, consideration or benefit given, directly or indirectly, to a director of a corporation in connection with the management of affairs of the corporation or of any holding company or subsidiary of the corporation, 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 corporation;

“executive officer”, in relation to a corporation, means any person, by whatever name called and whether or not he is a director of the corporation, who is concerned, or takes part, in the management of the corporation;

“exempt proprietary company” means a proprietary company—

- (a) no share in which is, by virtue of sub-sections (5) and (6) of this section, deemed to be owned by a public company; and
- (b) no member of which is a public company;

“expert”, in relation to a matter, means any person whose profession or reputation gives authority to a statement made by him in relation to that matter;

“filed” means filed under this Code or any corresponding previous law of the State;

“financial year” means—

- (a) in relation to a company incorporated under a corresponding previous law of the State—

- (i) a period of 12 months, or such other period (whether longer or shorter than 12 months) not exceeding 18 months as the directors (subject to the requirements of section 240 as to the holding of annual general meetings of the company) resolve, commencing at the expiration of the period in respect of which the last profit and loss account laid before the company at an annual general meeting before the commencement of the *Companies (Application of Laws) Act*, 1981, was made out or, if no profit and loss account was made out and laid before the company at an annual general meeting before the commencement of the *Companies (Application of Laws) Act*, 1981, on the date of incorporation of the company; and
  - (ii) each period of 12 months, or such other period (whether longer or shorter than 12 months) not exceeding 18 months as the directors (subject to the requirements of section 240 as to the holding of annual general meetings of the company) resolve, commencing at the expiration of the previous financial year of the company;
- (b) in relation to a company incorporated under this Code—
- (i) a period of 12 months, or such other period (whether longer or shorter than 12 months) not exceeding 18 months as the directors (subject to the requirements of section 240 as to the holding of annual general meetings of the company) resolve, commencing on the date of incorporation of the company; and
  - (ii) each period of 12 months, or such other period (whether longer or shorter than 12 months) not exceeding 18 months as the directors (subject to the requirements of section 240 as to the holding of annual general meetings of the company) resolve, commencing at the expiration of the previous financial year of the company; and
- (c) in relation to a corporation incorporated outside the State—
- (i) if a profit and loss account of the corporation is required, under the law of the place where the corporation is incorporated, to be made out in respect of a particular period—that period; or

- (ii) in a case to which sub-paragraph (i) does not apply—  
a period in respect of which a profit and loss account of the corporation is made out;

“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;

“foreign company” means—

- (a) any body (including a society or association) incorporated outside the State, not being—  
(i) a recognized company;  
(ii) a corporation sole; or  
(iii) a body corporate that is incorporated within Australia or an external Territory and is a public authority or an instrumentality or agency of the Crown in right of the Commonwealth, in right of a State or in right of a Territory; or
- (b) an unincorporated society, association or other body formed outside the State that, under the law of its place of formation, may sue or be sued, or may hold property in the name of the secretary or other officer of the society, association or body duly appointed for that purpose and which does not have its head office or principal place of business in the State;

“guarantor corporation”, in relation to a borrowing corporation, means a corporation that has guaranteed or has agreed to guarantee the repayment of any money received or to be received by the borrowing corporation in response to an invitation to the public to subscribe for or purchase debentures of the borrowing corporation or an offer to the public of debentures of the borrowing corporation for subscription or purchase;

“home exchange”, in relation to a company, means the stock exchange designated to the company as its Home Exchange by the Australian Associated Stock Exchanges;

“industrial instrument” means—

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

“injury compensation” means compensation payable under any law relating to workers compensation;

“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 he has not been discharged; or
- (b) under the law of a country other than Australia or the law of an external Territory, has the status of an undischarged bankrupt,

and includes—

- (c) a person who has executed a deed of arrangement under Part X of the *Bankruptcy Act* 1966 or the corresponding provisions of the law of an external Territory or of the law of a country other than Australia where the terms of the deed have not been fully complied with; and
- (d) a person whose creditors have accepted a composition under Part X of the *Bankruptcy Act* 1966 or the corresponding provisions of the law of an external Territory or of the law of a country other than Australia where a final payment has not been made under that composition;

“*Insurance Act* 1973” means the *Insurance Act* 1973 of the Commonwealth as amended and in force for the time being;

“investment contract” means any contract, scheme or arrangement that, in substance and irrespective of the form of the contract, scheme or arrangement, 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 the State 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 the State or elsewhere, acquired in or under like circumstances;

“issue” includes circulate, distribute and disseminate;

“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;

“*Life Insurance Act* 1945” means the *Life Insurance Act* 1945 of the Commonwealth as amended and in force for the time being;

“limited company” means a company limited by shares or by guarantee or both by shares and by guarantee but does not include a no liability company;

“listed corporation” means a corporation that has been admitted to the official list of a stock exchange in Australia or an external Territory and has not been removed from that official list;

“lodged” means—

- (a) in relation to the Commission—lodged under this Code; or
- (b) in relation to a prescribed State authority—lodged or filed with that authority under any corresponding previous law of the State;

“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 from surface contact with the document or by the use of photo-sensitive material other than transparent photographic film;

“marketable securities” means debentures, stocks, shares or bonds of any Government, of any local government authority or of any corporation, association or society, and includes any right or option in respect of shares in any corporation and any prescribed interest;

“members’ voluntary winding up” means a winding up under Division 3 of Part XII where a declaration has been made and lodged pursuant to section 395;

“memorandum” means memorandum of association;

“minerals” means minerals in any form, whether solid, liquefied or gaseous and whether organic or inorganic;

“minimum subscription”, in relation to any shares offered to the public for subscription or for which the public are invited to subscribe, means the amount stated in the prospectus relating to the offer or invitation pursuant to paragraph 98 (1) (d) as the minimum amount that, in the opinion of the directors, must be raised by the issue of the shares;

“mining company” means a company the sole objects of which are mining purposes;

“mining purposes” means all or any 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 the State or elsewhere, but does not include quarrying operations for the sole purpose of obtaining stone for building, roadmaking or similar purposes;

“Minister” means the Minister of State for New South Wales for the time being administering the *Companies (Application of Laws) Act*, 1981;

“*National Companies and Securities Commission Act 1979*” means the *National Companies and Securities Commission Act 1979* of the Commonwealth as amended and in force for the time being;

“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;

“no liability company” means a company that does not have under its memorandum and articles a contractual right to recover calls made upon its shares from a shareholder who defaults in payment of those calls;

“nominee corporation” means a corporation whose principal business is the business of holding marketable securities as a trustee or nominee;

“officer”, in relation to a corporation, includes—

- (a) a director, secretary, executive officer or employee of the corporation;
- (b) a receiver and manager of the property or any part of the property of the corporation appointed under a power contained in an instrument;
- (c) an official manager or deputy official manager of the corporation;
- (d) a liquidator of the corporation appointed in a voluntary winding up of the corporation; and
- (e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons,

but does not include—

- (f) a receiver who is not also a manager;
- (g) a receiver and manager appointed by a court; or
- (h) a liquidator appointed by a court;

“official liquidator” means a person registered as an official liquidator under section 21 or deemed to be registered as an official liquidator under this Code;

“official manager” means a person appointed as an official manager under Part XI;

“prescribed” means prescribed by this Code, by the regulations or by the rules;

“prescribed interest” means any right to participate or any interest, whether enforceable or not and whether actual, prospective or contingent—

- (a) in any profits, assets or realization of any financial or business undertaking or scheme whether in the State or elsewhere;
- (b) in any common enterprise, whether in the State or elsewhere, in relation to which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or
- (c) in any investment contract,

whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include—

- (d) any share in, or debenture of, a corporation;
- (e) any interest in, or arising out of, a policy of life insurance;
- (f) an interest in a partnership agreement, unless the agreement or proposed agreement—
  - (i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is, or is to become, a party to the agreement or proposed agreement; or
  - (ii) is or would be an agreement, or is or would be within a class of agreements, prescribed by the regulations for the purposes of this paragraph; or
- (g) a right or interest, or a right or interest included in a class or kind of rights or interests, declared by the regulations to be an exempt right or interest, or a class or kind of exempt rights or interests, for the purposes of Division 6 of Part IV;

“prescribed State authority” means—

- (a) the Registrar of Companies;
- (b) the Commissioner for Corporate Affairs; or
- (c) the Corporate Affairs Commission;

“principal executive officer”, in relation to a company, means the principal executive officer of the company for the time being, by whatever name called, and whether or not he is a director;

“principal register”, in relation to a company, means the register of members of the company kept pursuant to section 256;

“profit and loss account” includes income and expenditure account, revenue account or any other account showing the results of the business of a corporation for a period and, if the corporation concerned is engaged in the development or exploration of natural resources, also includes an operations account or any like account and a development account or any like account;

“promoter”, in relation to a prospectus issued by or in connection with a corporation, means a promoter of the corporation who was a party to the preparation of the prospectus or of any relevant portion of the prospectus, but does not include a person by reason only of his acting in the proper performance of the functions attaching to his professional capacity or to his business relationship with a promoter of the corporation;

“proprietary company” means—

- (a) a company that, immediately before the commencement of the *Companies (Application of Laws) Act*, 1981, was a proprietary company under the provisions of the *Companies Act*, 1961;
- (b) any company incorporated as a proprietary company by virtue of section 34; or
- (c) any company converted into a proprietary company pursuant to sub-section 70 (1),

being a company that has not ceased to be a proprietary company under section 70 or 71;

“prospectus” means—

- (a) in a case where the expression is used in relation to subscribing for shares in or debentures of, or units of shares in or units of debentures of, a corporation—a written notice, circular or other instrument inviting applications or offers from the public to subscribe for, or offering to the public for subscription, shares in or debentures of, or units of shares in or units of debenture of, as the case may be, the corporation;

- (b) in a case where the expression is used in relation to the purchase of shares in or debentures of, or units of shares in or units of debentures of, a corporation—a written notice, circular or other instrument inviting applications or offers from the public to purchase, or offering to the public for purchase, shares in or debentures of, or units of shares in or units of debentures of, as the case may be, the corporation;
- (c) in a case where the expression is used in relation to shares in or debentures of, or units of shares in or units of debentures of, a corporation otherwise than as mentioned in paragraphs (a) and (b)—a written notice, circular or other instrument inviting applications or offers from the public to subscribe for or purchase, or offering to the public for subscription or purchase, shares in or debentures of, or units of shares in or units of debentures of, as the case may be, the corporation;
- (d) in a case where the expression is used in relation to a corporation otherwise than as mentioned in paragraphs (a), (b) and (c)—a written notice, circular or other instrument inviting applications or offers from the public to subscribe for or purchase, or offering to the public for subscription or purchase, any shares in or debentures of, or any units of shares in or units of debentures of, the corporation; or
- (e) in any other case where the expression is used—a written notice, circular or other instrument inviting applications or offers from the public to subscribe for or purchase, or offering to the public for subscription or purchase, any shares in or debentures of, or any units of shares in or units of debentures of, a corporation;

“public company” means a company other than a proprietary company;

“recognized company” means a body that is a company within the meaning of a provision of a law of a participating State or of a participating Territory that corresponds with this section;

“recognized foreign company” means a foreign company formed outside Australia and the external Territories that is registered as a foreign company in a participating State or a participating Territory under the provisions of the law of that State or Territory that correspond with Division 5 of Part XIII;

“registered” means registered under this Code or any corresponding previous law of the State;

- “registered company auditor” means a person registered as an auditor, or deemed to be registered as an auditor, under this Code and, in relation to a corporation that is not a company, includes a person qualified to act as the auditor of the corporation under the law of the place in which the corporation is formed;
- “registered foreign company” means a foreign company that is registered under Division 5 of Part XIII;
- “registered liquidator” means a person registered as a liquidator under sub-section 20 (1) or (2) or deemed to be registered as a liquidator under this Code;
- “regulations” means the provisions applying as regulations made under this Code by reason of section 7 of the *Companies (Application of Laws) Act*, 1981;
- “related corporation”, in relation to a corporation, means a corporation that is deemed to be related to the first-mentioned corporation by virtue of sub-section 7 (5);
- “relative”, in relation to a person, means the spouse, parent or remoter lineal ancestor, son, daughter or remoter issue, or brother or sister of the person;
- “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 a corporation, means a resolution other than a special resolution;
- “resolution for voluntary winding up” means the special resolution referred to in section 392;
- “rules” means rules of the Supreme Court of New South Wales;
- “securities”, in relation to a corporation, means—
- (a) shares in, or debentures of, the corporation;
  - (b) any unit in any such shares or debentures; and
  - (c) any prescribed interest made available by the corporation;
- “share” means share in the share capital of a corporation, and includes stock except where a distinction between stock and shares is expressed or implied;
- “sheriff” includes any person charged with the execution of a writ or other process;

“special resolution” has the meaning given to that expression by section 248;

“State Commission” means the Corporate Affairs Commission continued in existence by the *Corporate Affairs Commission Act*, 1981;

“statutory meeting” means the meeting referred to in section 239;

“statutory report” means the report referred to in section 239;

“stock exchange” means, where that expression appears in a provision for the purposes of which a regulation is in force defining that expression, a stock exchange as defined by that regulation;

“stock market” means a market, exchange or other place at which, or a facility by means of which, securities of corporations are regularly offered for sale, purchase or exchange;

“Table A” means Table A in Schedule 3;

“Table B” means Table B in Schedule 3;

“transparency”, in relation to a document, means—

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

(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;

“unit”, in relation to a share, debenture or other interest (whether a prescribed interest or not), means any right or interest, whether legal or equitable, in the share, debenture or other interest, by whatever term called, and includes any option to acquire any such right or interest in the share, debenture or other interest;

“unlimited company” means a company formed on the principle of having no limit placed on the liability of its members;

“voting share”, in relation to a body corporate, means an issued share in the body corporate 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) during a period during which a dividend (or part of a dividend) in respect of the share is in arrears;
- (b) upon a proposal to reduce the share capital of the body corporate;
- (c) upon a proposal that affects rights attached to the share;
- (d) upon a proposal to wind up the body corporate;
- (e) upon a proposal for the disposal of the whole of the property, business and undertaking of the body corporate;
- (f) during the winding up of the body corporate;

“wages”, in relation to a company, means amounts payable to or in respect of an employee of the company (whether the employee is remunerated by salary, wages, commission or otherwise) under an industrial instrument, including amounts payable by way of allowance or reimbursement but not including amounts payable in respect of leave of absence.

**(2)** For the purposes of this Code, a person shall not be regarded as a person in accordance with whose directions or instructions the directors of a body corporate are accustomed to act by reason only that the directors act on advice given by that person in the proper performance of the functions attaching to his professional capacity or to his business relationship with the other person.

**(3)** For the purposes of this Code—

- (a) a reference to an invitation to do any act or thing includes a reference to an invitation to make an offer to do that act or thing;
- (b) a reference to an invitation to the public to subscribe for or purchase debentures of a corporation includes a reference to an invitation to the public to deposit money with or lend money to a corporation; and
- (c) a reference to an offer to the public of debentures of a corporation for subscription or purchase includes a reference to an offer to the public by a corporation to accept money that is deposited with, or money that is lent to, the corporation.

**(4)** A reference in this Code to, or to the making of, an offer to the public or to, or to the issuing of, an invitation to the public shall, unless the contrary

intention appears, 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 shall not be taken to be an offer or invitation to the public if it—

- (a) is an offer or invitation to enter into an underwriting agreement;
  - (b) is made or issued to a person whose ordinary business is to buy or sell shares, debentures or prescribed interests, whether as principal or agent;
  - (c) is made or issued to existing members or debenture holders of a corporation and relates to shares in, or debentures of, that corporation;
  - (ca) is made or issued to holders of prescribed interests made available by a corporation pursuant to a deed that is an approved deed for the purposes of Division 6 of Part IV and is an offer or invitation that relates to prescribed interests made available by that corporation pursuant to the same approved deed; or
  - (d) is made or issued to existing members of a company in connection with a proposal referred to in section 409 and relates to shares in that company.
- (5) For the purposes of the definition of “exempt proprietary company” in sub-section (1), a share in a proprietary company shall be deemed to be owned by a public company if any beneficial interest in the share is held, directly or indirectly, by—
- (a) a public company;
  - (b) a proprietary company a beneficial interest in a share in which is held, directly or indirectly, by a public company; or
  - (c) a proprietary company a beneficial interest in a share in which is held, directly or indirectly, by a proprietary company a beneficial interest in a share in which is held, directly or indirectly, by—
    - (i) a public company; or
    - (ii) another proprietary company a beneficial interest in a share in which is held, directly or indirectly, otherwise than by a natural person.
- (6) For the purposes of sub-section (5) but without limiting the generality of that sub-section—

- (a) a reference in that sub-section to a public company shall be construed as including a reference to—
  - (i) a foreign company other than a foreign company that (whether or not Division 5 of Part XIII applies to it) is a foreign company of a kind referred to in sub-section 516 (7); and
  - (ii) a recognized company that is not an exempt proprietary company under the corresponding law of the participating State or participating Territory in which it is incorporated;
- (b) a reference in that sub-section to a public company or to a proprietary company shall be construed as not including a reference to a company in respect of which a licence under section 66, or under any corresponding previous law of the State, is in force; and
- (c) a person (including a corporation) shall be deemed to hold a beneficial interest in a share—
  - (i) if that person, either alone or together with another person or other persons, is entitled (otherwise than as trustee for, on behalf of, or on account of, another person) to receive, directly or indirectly, any dividends in respect of the share or to exercise, or to control the exercise of, any rights attaching to the share; or
  - (ii) if that person, being a corporation, holds any beneficial interest in a share in another corporation which holds, or a subsidiary of which holds, any beneficial interest in that first-mentioned share.

(7) For the purposes of this Code, a receiver of the whole or any part of the property of a company shall be deemed to be also a manager of the company if the receiver manages affairs of the company or has power under the terms of his appointment to manage affairs of the company.

(8) A regulation made for the purposes of sub-paragraph (f) (ii) of the definition of “prescribed interest” in sub-section (1) does not apply to an agreement or a class of agreements relating to a partnership—

- (a) being a partnership for the carrying on of a profession or trade where a person carrying on that profession or trade is required by any law of the State to be registered, licensed or otherwise authorized in order to do so; and
- (b) the business of which does not include any business other than the business of a partnership referred to in paragraph (a).

(9) The express references in this Code to companies and corporations shall not be taken to imply that references to persons do not include references to companies or corporations.

(10) In this Code—

- (a) a reference to a previous law, or provision of a previous law, or previous enactment, of New South Wales or of the State corresponding to, or to a provision of, this Code includes a reference to, or to a provision of, the *Companies Act*, 1961; and
- (b) a reference to a previous law, or provision of a previous law, or previous enactment, of another State or of a Territory corresponding to, or to a provision of, this Code includes a reference to, or to a provision of, the law of that State or Territory corresponding to the *Companies Act*, 1961.

**References to affairs of a corporation**

6. A reference in section 12 or 15, Part VII, section 320, paragraph 364 (1) (f), section 388 or 541, sub-section 560 (1) or section 564 to affairs of a corporation shall, unless the contrary intention appears, be construed as including a reference to—

- (a) the promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with another person or other persons and including transactions and dealings as agent, bailee or trustee), property (whether held alone or jointly with another person or other persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with another person or other persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the corporation;
- (b) in the case of a corporation (not being an authorized 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;
- (c) the internal management and proceedings of the corporation;
- (d) any act or thing done (including any contract made and any transaction entered into) by or on behalf of the corporation, or to or in relation to the corporation 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, the whole or any part of the property of the corporation;
  - (ii) the corporation is under official management;
  - (iii) a compromise or arrangement made between the corporation and another person or other persons is being administered; or
  - (iv) the corporation 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 any official manager or deputy official manager of the corporation, of any person administering such a compromise or arrangement or of any liquidator or provisional liquidator of the corporation;
- (e) the ownership of shares in, debentures of, and prescribed interests made available by, the corporation;
  - (f) the power of persons to exercise, or to control the exercise of, the rights to vote attached to shares in the corporation or to dispose of, or to exercise control over the disposal of, such shares;
  - (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 corporation or are or have been able to control or materially to influence the policy of the corporation;
  - (h) the circumstances under which a person acquired or disposed of, or became entitled to acquire or dispose of, shares in, debentures of, or prescribed interests made available by, the corporation;
  - (j) where the corporation has made available prescribed interests—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 any of the preceding paragraphs.

**Subsidiaries, holding companies and related corporations**

7. (1) For the purposes of this Code, a corporation shall, subject to sub-section (3), be deemed to be a subsidiary of another corporation if—
- (a) that other corporation—

- (i) controls the composition of the board of directors of the first-mentioned corporation;
- (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-mentioned corporation; or
- (iii) holds more than one-half of the issued share capital of the first-mentioned corporation (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-mentioned corporation is a subsidiary of any corporation that is that other corporation's subsidiary (including a corporation that is that other corporation's subsidiary by another application or other applications of this paragraph).

**(2)** Without limiting by implication the circumstances in which the composition of a corporation's board of directors is to be taken to be controlled by another corporation, the composition of a corporation's board of directors shall be taken to be controlled by another corporation if that other corporation, by the exercise of some power exercisable whether with or without the consent or concurrence of any other person by that other corporation, can appoint or remove all or a majority of the directors, and for the purposes of this provision that other corporation shall be deemed to have power to make such an appointment if—

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

**(3)** In determining whether one corporation is a subsidiary of another corporation—

- (a) any shares held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;
- (b) subject to paragraphs (c) and (d), any shares held or power exercisable—
  - (i) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity); or

- (ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary that is concerned only in a fiduciary capacity,  
shall be treated as held or exercisable by that other corporation;
- (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned corporation, or of a trust deed for securing any issue of such debentures, shall be disregarded; and
- (d) any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and 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 the lending of money, not being a transaction entered into with a person associated with the other corporation or its subsidiary.

**(4)** A reference in this Code to the holding company of a company or other corporation shall be read as a reference to a corporation of which that last-mentioned company or that other corporation is a subsidiary.

**(5)** Where a corporation—

- (a) is the holding company of another corporation;
- (b) is a subsidiary of another corporation; or
- (c) is a subsidiary of the holding company of another corporation,

that first-mentioned corporation and that other corporation shall, for the purposes of this Code, be deemed to be related to each other.

**(6)** For the purposes of this Code, a corporation is the ultimate holding company of another corporation if—

- (a) the other corporation is a subsidiary of the first-mentioned corporation; and
- (b) the first-mentioned corporation is not itself a subsidiary of any corporation.

**(7)** For the purposes of this Code, a corporation is a wholly-owned subsidiary of another corporation if none of the members of the first-mentioned corporation is a person other than—

- (a) that other corporation;
- (b) a nominee of that other corporation;
- (c) a subsidiary of that other corporation, being a subsidiary none of the members of which is a person other than that other corporation or a nominee of that other corporation; or
- (d) a nominee of such a subsidiary.

**Relevant interests in shares**

**8. (1)** Subject to this section, a person has a relevant interest in a share in a body corporate—

- (a) for the purposes of Division 4 of Part IV or of section 261, if that share is a voting share and that person has power—
  - (i) to exercise, or to control the exercise of, the right to vote attached to that share; or
  - (ii) to dispose of, or to exercise control over the disposal of, that share; and
- (b) for the purposes of sections 230, 231 and 232, if that person has power to dispose of, or to exercise control over the disposal of, that share.

**(2)** It is immaterial for the purposes of this section whether the power of a person—

- (a) to exercise, or to control the exercise of, the right to vote attached to a voting share in a body corporate; or
- (b) to dispose of, or exercise control over the disposal of, a share, is express or implied or formal or informal, is exercisable alone or jointly with another person or other persons, cannot be related to a particular share, or is, or is capable of being made, subject to restraint or restriction, and any such power exercisable jointly with another person or other persons shall, for those purposes, be deemed to be exercisable by either or any of those persons.

**(3)** A reference in this section to power or control includes a reference to power or control that is direct or indirect or is, or is capable of being, exercised as a result of, or by means of, or in breach of, or by revocation of, trusts, agreements, arrangements, understandings and practices, or any of them, whether or not they are enforceable, and a reference in this section to a controlling interest includes a reference to such an interest as gives control.

**(4)** For the purposes of this section, where a body corporate has power—

- (a) to exercise, or to control the exercise of, a right to vote attached to a voting share; or
- (b) to dispose of, or to exercise control over the disposal of, a share, and—
  - (c) the body corporate is, or its directors are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of a person in relation to the exercise of the power;
  - (d) a person has a controlling interest in the body corporate; or
  - (e) a person has power to exercise, or to control the exercise of, the voting power attached to not less than the prescribed percentage of the voting shares in the body corporate,

that person shall be deemed to have the same power in relation to that share as the body corporate has.

**(5)** For the purposes of paragraph (4) (e), a person shall be deemed to have the power referred to in that paragraph if—

- (a) a person associated with the first-mentioned person has that power;
- (b) persons associated with the first-mentioned person together have that power; or
- (c) the first-mentioned person and a person or persons associated with him together have that power.

**(6)** Where a person—

- (a) has entered into an agreement with respect to an issued share;
- (b) has a right relating to an issued share, whether the right is enforceable presently or in the future and whether on the fulfilment of a condition or not; or
- (c) has an option with respect to an issued share,

and, on performance of the agreement, enforcement of the right or exercise of the option, that person would have a relevant interest in the share, he shall, for the purposes of this section, be deemed to have that relevant interest in the share.

**(7)** For the purposes of this section, where a body corporate is deemed by sub-section (6) to have a relevant interest in a share and—

- (a) the body corporate or its directors are accustomed or under an obligation, whether formal or informal, to act in accordance with the

directions, instructions or wishes of a person in relation to the exercise of, or the control of the exercise of, any right to vote attached to that share, or in relation to the disposal of, or the exercise of control over the disposal of, that share;

- (b) a person has a controlling interest in the body corporate; or
- (c) a person has power to exercise, or to control the exercise of, the voting power attached to not less than the prescribed percentage of the voting shares in the body corporate,

that person shall be deemed to have a relevant interest in that share.

**(8) A relevant interest in a share shall be disregarded—**

- (a) for the purposes of Division 4 of Part IV and sections 230, 231, 232 or 261—
  - (i) if the ordinary business of the person who has the relevant interest includes the lending of money and he has authority to exercise his powers as the holder of the relevant interest only by reason of a security given for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money, not being a transaction entered into with a person associated with the first-mentioned person;
  - (ii) if the relevant interest is that of a person who has it by reason of his holding a prescribed office;
  - (iii) if the share is subject to a trust, the relevant interest is that of a trustee and—
    - (A) a beneficiary is deemed, by sub-section (6), to have a relevant interest in the share by virtue of a presently enforceable and unconditional right referred to in paragraph (b) of that sub-section; or
    - (B) the trustee is a bare trustee; or
  - (iv) if the ordinary business of the person who has the relevant interest includes dealing in securities and he has authority to exercise his powers as the holder of the relevant interest only by reason of instructions given to him by or on behalf of another person to dispose of that share on behalf of the other person in the ordinary course of business; and
- (b) for the purposes of Division 4 of Part IV or of section 261, if the relevant interest is that of a person who has it by reason only of his having been appointed as a proxy or representative to vote at a particular meeting of members, or of a class of members, of a corpora-

tion, not being an appointment in return for the making of which the person or a person associated with the person provided valuable consideration.

**(9)** For the purposes of sub-paragraph (8) (a) (iii), a trustee shall not be taken not to be a bare trustee by reason only of the fact that the trustee is entitled in his capacity as a trustee to be remunerated out of the income or property of the trust.

**(10)** A relevant interest in a share shall not be disregarded by reason only of—

- (a) its remoteness; or
- (b) the manner in which it arose.

**(11)** The regulations may provide that relevant interests, or particular classes of relevant interests, in shares in bodies corporate, or in particular classes of bodies corporate, shall, in such circumstances and subject to such conditions (if any) as are specified in the regulations, be disregarded for the purposes of the provisions of this Code referred to in sub-section (1) or for the purposes of such of those provisions as are specified in the regulations.

**(12)** A reference in this section to the prescribed percentage is a reference to 20% or, where a lesser percentage is prescribed by regulations in force for the time being for the purposes of section 11 of the *Companies (Acquisition of Shares) (New South Wales) Code*, a reference to that lesser percentage.

### **Associated persons**

**9. (1)** A reference in this Code to a person associated with another person shall be construed as a reference to—

- (a) if the other person is a corporation—
  - (i) a director or secretary of the corporation;
  - (ii) a corporation that is related to the other person; or
  - (iii) a director or secretary of such a related corporation;
- (b) where the matter to which the reference relates is the extent of a power to exercise, or to control the exercise of, the voting power attached to voting shares in a corporation—a person with whom the other person has, or proposes to enter into, an agreement, arrangement, understanding or undertaking, whether formal or informal and whether express or implied—
  - (i) by reason of which either of those persons may exercise, directly or indirectly control the exercise of, or substantially

influence the exercise of, any voting power attached to a share in the corporation;

- (ii) with a view to controlling or influencing the composition of the board of directors, or the conduct of affairs, of the corporation; or
- (iii) under which either of those persons may acquire from the other of them shares in the corporation or may be required to dispose of such shares in accordance with the directions of the other of them;
- (c) a person in concert with whom the other person is acting, or proposes to act, in respect of the matter to which the reference relates;
- (d) a person with whom the other person is, or proposes to become, associated, whether formally or informally, in any other way in respect of the matter to which the reference relates; or
- (e) if the other person has entered into, or proposes to enter into, a transaction, or has done, or proposes to do, any other act or thing, with a view to becoming associated with a person as mentioned in paragraph (b), (c) or (d)—that last-mentioned person.

**(2)** A person shall not be taken to be associated with another person by virtue of paragraph (1) (b), (c), (d) or (e) by reason only that—

- (a) one of those persons furnishes advice to, or acts on behalf of, the other person in the proper performance of the functions attaching to his professional capacity or to his business relationship with the other person;
- (b) without limiting the generality of paragraph (a), where the ordinary business of one of those persons includes dealing in securities—specific instructions are given to the person by or on behalf of the other person to acquire shares on behalf of the other person in the ordinary course of that business; or
- (c) the other person has been appointed by the first-mentioned person as a proxy or representative to exercise, at a meeting of members or of a class of members of a company, votes attached to shares of which the first-mentioned person is the holder, where the relevant interest of that other person in those shares that arises by reason of his appointment as a proxy or representative would be disregarded under sub-section 8 (8) by reason of paragraph (b) of that sub-section.

**(3)** For the purposes of paragraph (1) (b), it is immaterial that the power of a person to exercise, control the exercise of, or influence the exercise of, voting power is in any way qualified.

**PART II—ADMINISTRATION**

*Division 1—Powers of Inspection*

**Interpretation**

**10.** In this Division—

“books” includes banker’s books;

“premises” includes any structure, building, aircraft, vehicle, vessel or place (whether built upon or not) and any part of such a structure, building, aircraft, vehicle, vessel or place.

**Commission may inspect books without charge**

**11. (1)** Any book that is required by a provision of this Code to be kept by a company or by a registered foreign company shall be open for inspection without charge by a person authorized by the Commission for the purposes of this section.

**(2)** An authorization under sub-section (1) may be of general application or may be limited to inspecting a particular book or books or a particular class of books.

**Power of Commission to require production of books**

**12. (1)** The powers of the Commission under sub-section (2), or the powers of an authorized person under sub-section (3), to make a requirement of a corporation or person shall not be exercised except—

(a) for the purpose of the performance of a function or the exercise of a power by the Commission under a Code that is a relevant Code for the purposes of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act*, 1981, or under a law of a participating State or of a participating Territory that corresponds with such a relevant Code; or

(b) where the requirement relates to a matter that constitutes or may constitute—

(i) a contravention of, or failure to comply with, a provision of a relevant Code or corresponding law referred to in paragraph (a);

(ii) a contravention of, or failure to comply with, a provision of the *Companies Act*, 1961, as in force at any time or of a previous law of a participating State or participating Territory that corresponded with that Act; or

- (iii) an offence relating to a company that involves fraud or dishonesty or concerns the management of affairs of the company.

**(2)** The Commission may, at any time, by notice in writing—

(a) give a direction to—

- (i) a corporation; or
- (ii) a person who is or has been an officer or employee of, or an agent, banker, solicitor, auditor or other person acting in any capacity for or on behalf of, a corporation (including a corporation that is in the course of being wound up or has been dissolved),

requiring the production, at such time and place as are specified in the direction, of such books relating to affairs of the corporation as are so specified; or

(b) give a direction to any person requiring the production, at such time and place as are specified in the direction, of any books relating to affairs of a corporation (including a corporation that is in the course of being wound up or has been dissolved) that are in the custody or under the control of the person.

**(3)** The Commission may from time to time authorize a person, on producing (if required to do so) such evidence of his authority as is prescribed—

- (a) to require by notice in writing any corporation to produce to the authorized person forthwith or, if a time and place at which the books are to be produced are specified in the notice, at that time and place, such books relating to affairs of the corporation as are specified by the authorized person;
- (b) to require by notice in writing any person who is or has been an officer or employee of, or an agent, banker, solicitor, auditor or other person acting in any capacity for or on behalf of, a corporation (including a corporation that is in the course of being wound up or has been dissolved) to produce to the authorized person forthwith such books relating to affairs of the corporation as are specified by the authorized person; or
- (c) to require by notice in writing any person to produce to the authorized person forthwith any books relating to affairs of a corporation (including a corporation that is in the course of being wound up or has been dissolved) that are in the custody or under the control of the person.

**(4)** An authorization under sub-section (3) may be of general application or may be limited to making requirements of a particular corporation or other person or particular corporations or other persons.

**(5)** Where the Commission, or a person authorized by the Commission, requires the production of any books under this section and a person has a lien on the books, the production of the books does not prejudice the lien.

**(6)** Where a person exercises a power under this section to require another person to produce books—

- (a) if the books are produced, the first-mentioned person—
  - (i) may take possession of the books and may make copies of, or take extracts from, the books;
  - (ii) may require the other person, or any person who was party to the compilation of the books, to make a statement providing any explanation that the person concerned is able to provide as to any matter relating to the compilation of the books or as to any matter to which the books relate;
  - (iii) may retain possession of the books for such period as is necessary to enable the books to be inspected, and copies of, or extracts from, the books to be made or taken, by or on behalf of the Commission; and
  - (iv) during that period shall permit a person who would be entitled to inspect any one or more of the books if they were not in the possession of the first-mentioned person to inspect at all reasonable times such of the books as that person would be so entitled to inspect; or
- (b) if the books are not produced, the first-mentioned person may require the other person—
  - (i) to state, to the best of his knowledge and belief, where the books may be found; and
  - (ii) to identify the person who, to the best of his knowledge and belief, last had custody of the books and to state, to the best of his knowledge and belief, where that last-mentioned person may be found.

**(7)** Where this section confers a power on a person to require another person to produce books relating to affairs of a corporation, the first-mentioned person also has power to require the other person (whether or not he requires the other person to produce books and whether or not any books are produced pursuant to such a requirement), so far as the other person is able to do so, to identify property of the corporation and explain

the manner in which the corporation has kept account of that property.

(8) A person shall not be subject to any liability by reason that the person complies with a direction given or purporting to have been given under sub-section (2), or a requirement made, or purporting to have been made, under sub-section (3).

(9) A power conferred by this section to make a requirement of a person extends, if the person is a body corporate, including a body corporate that is in the course of being wound up, or was a body corporate, being a body corporate that has been dissolved, to making that requirement of any person who is or has been an officer of the body corporate.

(10) For the purposes of this section, "officer", in relation to a body corporate, includes—

- (a) a director, secretary, executive officer or employee of the body corporate;
- (b) a receiver, or a receiver and manager, of the property or any part of the property of the body corporate;
- (c) an official manager or a deputy official manager of the body corporate;
- (d) a liquidator or provisional liquidator of the body corporate; and
- (e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons.

#### **Power of magistrate to issue warrant to seize books**

13. (1) If a magistrate is satisfied, on information on oath or affirmation laid by an employee of the Commission or by another person authorized in writing by the Commission, that there are reasonable grounds for suspecting that there are on particular premises in the State any books the production of which has been required under section 12 or under a provision of a law of a participating State or of a participating Territory that corresponds with section 12 and which have not been produced in compliance with that requirement, the magistrate may issue a warrant authorizing any member of the police force of New South Wales together with any other person named in the warrant—

- (a) to enter those premises (using such force as is necessary for the purpose);

- (b) to search the premises and to break open and search any cupboard, drawer, chest, trunk, box, package or other receptacle, whether a fixture or not, in the premises;
- (c) to take possession of, or secure against interference, any books that appear to be books the production of which was so required; and
- (d) to deliver any books possession of which is so taken into the possession of a person authorized by the Commission to receive them.

**(2)** An information laid for the purposes of sub-section (1) shall state that the person laying the information suspects that there are on particular premises in the State books the production of which has been required under section 12 or under a provision of a law of a participating State or of a participating Territory that corresponds with section 12 and which have not been produced in compliance with that requirement and shall specify the grounds on which the person so suspects.

**(3)** Where a magistrate issues a warrant under sub-section (1), he shall state on the information laid under that sub-section—

- (a) which of the grounds set out in the information as required by sub-section (2) he has relied on to justify the issue of the warrant; and
- (b) particulars of any other grounds relied on by him to justify the issue of the warrant.

**(4)** There shall be stated in a warrant issued under this section—

- (a) whether entry is authorized to be made at any time of the day or night or during specified hours of the day or night; and
- (b) a date, being a date not later than 7 days after the date of issue of the warrant, upon which the warrant ceases to have effect.

**(5)** Where, under this section, a person takes possession of, or secures against interference, any books, and a person has a lien on the books, the taking of possession of the books or the securing of the books against interference does not prejudice the lien.

**(6)** Where, under this section, a person takes possession of, or secures against interference, any books, that person or any person to whose possession the books were delivered under paragraph (1) (d)—

- (a) may make copies of, or take extracts from, the books;
- (b) may require any person who was party to the compilation of the books

to make a statement providing any explanation that that person is able to provide as to any matter relating to the compilation of the books or as to any matter to which the books relate;

- (c) may retain possession of the books for such period as is necessary to enable the books to be inspected, and copies of, or extracts from, the books to be made or taken, by or on behalf of the Commission; and
- (d) during that period shall permit a person who would be entitled to inspect any one or more of those books if they were not in the possession of the first-mentioned person to inspect at all reasonable times such of those books as that person would be so entitled to inspect.

(7) The powers conferred by this section are in addition to, and not in derogation of, any other powers conferred by law.

### **Offences**

**14. (1)** A person shall not, without reasonable excuse, refuse or fail to comply with a requirement made under section 12 or 13.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(2)** A person shall not, in purported compliance with a requirement made under section 12 or 13, furnish information or make a statement that is false or misleading in a material particular.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(3)** It is a defence to a prosecution for an offence against sub-section (2) if the defendant proves that he believed on reasonable grounds that the information or statement was true and was not misleading.

**(4)** A person shall not, without reasonable excuse, obstruct or hinder—

(a) the Commission or another person in the exercise of any power under section 12; or

(b) a person executing a warrant issued under section 13.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(5)** The occupier or person in charge of any premises that a person enters pursuant to a warrant referred to in sub-section 13 (1) shall provide the last-mentioned person with all reasonable facilities and assistance for the effective exercise of his powers under the warrant.

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

(6) A person is not excused from making a statement providing an explanation as to any matter relating to the compilation of any books or as to any matter to which any books relate pursuant to a requirement made of him in accordance with section 12 or 13 on the ground that the statement might tend to incriminate him but, where the person claims before making a statement that the statement might tend to incriminate him, the statement is not admissible in evidence against him in criminal proceedings other than proceedings under this section.

(7) Subject to sub-section (6), a statement made by a person in compliance with a requirement made under section 12 or 13 may be used in evidence in any criminal or civil proceedings against the person.

**Copies or extracts of books to be admitted in evidence**

**15. (1)** Subject to this section, in any legal proceedings (whether proceedings under this Code or otherwise), a copy of or extract from a book relating to affairs of a corporation is admissible in evidence as if it were the original book or the relevant part of the original book.

(2) A copy of or extract from a book is not admissible in evidence under sub-section (1) unless it is proved that the copy or extract is a true copy of the book or of the relevant part of the book.

(3) For the purposes of sub-section (2), evidence that a copy of or extract from a book is a true copy of the book or of a part of the book may be given by a person who has compared the copy or extract with the book or the relevant part of the book and may be given either orally or by an affidavit sworn, or by a declaration made, before a person authorized to take affidavits or statutory declarations.

**Privilege****16. (1) Where—**

- (a) the Commission, or a person authorized by the Commission, makes a requirement under section 12 or 13 of a duly qualified legal practitioner in respect of a book; and
- (b) the book contains a privileged communication made by or on behalf of or to the legal practitioner in his capacity as a legal practitioner,

the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by or on behalf of whom the communication was made or, if the person is a body corporate that is under official management or in the course of being wound up, the official manager or the liquida-

tor, as the case may be, agrees to the legal practitioner complying with the requirement but, where the legal practitioner so refuses to comply with a requirement, he shall forthwith furnish, in writing, to the Commission or authorized person—

- (c) if he knows the name and address of the person to whom or by or on behalf of whom the communication was made—that name and address; and
- (d) sufficient particulars to identify the book, or the part of the book, containing the communication.

**(2) Where—**

- (a) under section 12 or 13, the Commission, or a person authorized by the Commission, requires a duly qualified legal practitioner to make a statement providing an explanation as to any matter relating to the compilation of books or as to any matter to which any books relate; and
- (b) the legal practitioner is not able to make that statement without disclosing a privileged communication made by or on behalf of or to the legal practitioner in his capacity as a legal practitioner,

the legal practitioner is entitled to refuse to comply with the requirement, except to the extent that he is able to comply with the requirement without disclosing any privileged communication referred to in paragraph (b), unless the person to whom or by or on behalf of whom the communication was made or, if the person is a body corporate that is under official management or in the course of being wound up, the official manager or the liquidator, as the case may be, agrees to the legal practitioner complying with the requirement but, where the legal practitioner so refuses to comply with a requirement, he shall forthwith furnish, in writing, to the Commissioner or authorized person—

- (c) if he knows the name and address of the person to whom or by or on behalf of whom the communication was made—that name and address; and
- (d) if the communication was made in writing—sufficient particulars to identify the document containing the communication.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**Investigation of certain matters**

**16A.** Where the Commission has reason to suspect that a person has committed an offence under a provision of this Code, the Commission may make such investigation as the Commission thinks expedient for the due administration of this Code.

*Division 2—Registration of Auditors and Liquidators*

**Application for registration as auditor or liquidator**

**17. (1)** A natural person may make an application to the Commission—

- (a) for registration as an auditor;
- (b) for registration as a liquidator; or
- (c) for registration as a liquidator of a specified corporation, being a corporation that is to be wound up pursuant to the provisions of this Code.

**(2)** An application under this section shall be made in writing as prescribed and shall contain such information as is prescribed.

**(3)** This section has effect subject to section 28.

**Registration of auditors**

**18. (1)** Subject to this section, where an application for registration as an auditor is made under section 17 and before the expiration of 6 months after the date of commencement of the *Companies (Application of Laws) Act*, 1981, by a person who was, immediately before that date, registered as a company auditor under the *Companies Act*, 1961—

- (a) the Commission shall grant the application and register the applicant as an auditor unless the Commission is satisfied that the person is not a fit and proper person to be registered as an auditor; and
- (b) if the Commission is satisfied that the person is not a fit and proper person to be registered as an auditor, the Commission shall refuse the application.

**(2)** Subject to this section, where an application for registration as an auditor (not being an application to which sub-section (1) applies) is made under section 17, the Commission shall grant the application and register the applicant as an auditor if—

- (a) the applicant—
  - (i) is a member of The Institute of Chartered Accountants in Australia, the Australian Society of Accountants or any other prescribed body;
  - (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 the Commission to represent a course of

study in accountancy (including auditing) 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 the Commission, are equivalent to the qualifications mentioned in sub-paragraph (i) or (ii);
- (b) the Commission is satisfied that the applicant has had such practical experience in auditing as is prescribed; and
- (c) the Commission 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 the Commission shall refuse the application.

**(3)** The Commission shall not register as an auditor a person who—

- (a) is prohibited, by virtue of an order made under section 562, under a corresponding provision of a previous law of the State or under any provision of a law, or a previous law, in force in another State or in a Territory that corresponds with that section, from acting as a director of, or from being concerned in or taking part in the management of, a company or other corporation; or
- (b) is, by virtue of section 227, prohibited, without the leave of the Court, from acting as a director or promoter of, or from being concerned in or taking part in the management of, a corporation.

**(4)** Subject to sub-section (8), the Commission may refuse to register as an auditor a person who is not resident in Australia.

**(5)** Where the Commission grants an application by a person for registration as an auditor, the Commission shall cause to be issued to the person a certificate by the Commission stating that the person has been registered as an auditor and specifying the date on which the application was granted.

**(6)** Where—

- (a) in a certificate issued to a person under sub-section (5) (including a certificate issued pursuant to this sub-section) a date is specified for the purposes of sub-section 26 (2); and
- (b) the person requests the Commission to alter the date so specified and surrenders the certificate to the Commission,

the Commission may cancel the certificate and issue to the person under sub-section (5), in place of the cancelled certificate, a new certificate that specifies a different date for the purposes of sub-section 26 (2).

(7) A registration under this section shall be deemed to have taken effect at the commencement of the day specified in the certificate as the date on which the application for registration was granted and remains in force until—

- (a) the registration is cancelled by the Commission or by the Companies Auditors and Liquidators Disciplinary Board constituted under the *Public Accountants Registration Act, 1945*; or
- (b) the person who is registered dies.

(8) The Commission shall not refuse to register a person as an auditor unless the Commission has afforded the person an opportunity to appear at a hearing before the Commission and to make submissions and give evidence to the Commission in relation to the matter.

(9) Where the Commission refuses an application by a person for registration as an auditor, the Commission shall, not later than 14 days after the decision, give to the person notice in writing setting out the decision and setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

#### **Auditor-General of New South Wales deemed to be registered as auditor**

19. A person who holds office as, or is for the time being exercising the powers and performing the duties of, the Auditor-General of New South Wales shall be deemed to be registered as an auditor under this Division.

#### **Registration of liquidators**

20. (1) Subject to this section, where an application for registration as a liquidator is made under section 17 and before the expiration of 6 months after the date of commencement of the *Companies (Application of Laws) Act, 1981*, by a person who was, immediately before that date, registered as a liquidator under the *Companies Act, 1961*—

- (a) the Commission shall grant the application and register the applicant as a liquidator unless the Commission is satisfied that the person is not a fit and proper person to be registered as a liquidator; or
- (b) if the Commission is satisfied that the person is not a fit and proper person to be registered as a liquidator—the Commission shall refuse the application.

**(2)** Subject to this section, where an application for registration as a liquidator (not being an application to which sub-section (1) applies) is made under section 17, the Commission shall grant the application if—

- (a) the applicant—
  - (i) is a member of The Institute of Chartered Accountants in Australia, the Australian Society of Accountants or any other prescribed body;
  - (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 the Commission 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 the Commission, are equivalent to the qualifications mentioned in sub-paragraph (i) or (ii);
- (b) the Commission is satisfied as to the experience of the applicant in connection with the winding up of corporations; and
- (c) the Commission 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 the Commission shall refuse the application.

**(3)** Where an application for registration as a liquidator of a specified corporation is made under section 17, the Commission shall grant the application and register the applicant as a liquidator of that corporation if the Commission is satisfied that the applicant has sufficient experience and ability, and is a fit and proper person, to act as liquidator of the corporation, having regard to the nature of the property or business of the corporation and the interests of its creditors and contributories, but otherwise the Commission shall refuse the application.

**(4)** The Commission shall not register as a liquidator, or as a liquidator of a specified corporation, a person who—

- (a) is prohibited, by virtue of an order made under section 562, under a corresponding provision of a previous law of the State or under any provision of a law, or a previous law, in force in another State

or in a Territory that corresponds with that section, from acting as a director of, or from being concerned in or taking part in the management of, a company or other corporation; or

- (b) is, by virtue of section 227, prohibited, without the leave of the Court, from acting as a director or promoter of, or from being concerned in or taking part in the management of, a corporation.

(5) Subject to sub-section (10), the Commission may refuse to register as a liquidator or as a liquidator of a specified corporation a person who is not resident in Australia.

(6) Where—

- (a) the Commission grants an application by a person for registration as a liquidator or as a liquidator of a specified corporation; and

- (b) the person has complied with the requirements of section 22,

the Commission shall cause to be issued to the person a certificate by the Commission—

- (c) stating that the person has been registered as a liquidator or as a liquidator of a specified corporation;

- (d) specifying a date as the date of commencement of the registration, being—

- (i) the date on which the Commission granted the application; or  
(ii) the date on which the person complied with the requirements of section 22,

whichever was the later; and

- (e) in the case of a person who is registered under sub-section (3) as a liquidator of a specified corporation—setting out the name of that corporation.

(7) Where—

- (a) in a certificate issued to a person under sub-section (6) (including a certificate issued pursuant to this sub-section) a date is specified for the purposes of sub-section 26 (2); and

- (b) the person requests the Commission to alter the date so specified and surrenders the certificate to the Commission,

the Commission may cancel the certificate and issue to the person under sub-section (6), in place of the cancelled certificate, a new certificate that specifies a different date for the purposes of sub-section 26 (2).

**(8)** The registration of a person as a liquidator under sub-section (1) or (2) comes into force at the commencement of the day specified in the certificate as the date of commencement of the registration and remains in force until—

- (a) the registration is cancelled by the Commission or by the Companies Auditors and Liquidators Disciplinary Board constituted under the *Public Accountants Registration Act, 1945*; or
- (b) the person dies.

**(9)** The registration of a person as a liquidator of a specified corporation under sub-section (3) comes into force at the commencement of the day specified in the certificate as the date of commencement of the registration and remains in force until—

- (a) the registration is cancelled by the Commission or by the Companies Auditors and Liquidators Disciplinary Board constituted under the *Public Accountants Registration Act, 1945*;
- (b) the person dies; or
- (c) the dissolution of the corporation takes effect.

**(10)** The Commission shall not refuse to register a person as a liquidator, or as a liquidator of a specified corporation, unless the Commission has afforded the person an opportunity to appear at a hearing before the Commission and to make submissions and give evidence to the Commission in relation to the matter.

**(11)** Where the Commission refuses an application by a person for registration as a liquidator, or as a liquidator of a specified corporation, the Commission shall, not later than 14 days after the decision, give to the person notice in writing setting out the decision and setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

#### **Registration of official liquidators**

**21. (1)** The Commission 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 registration.

**(3)** The Commission may, pursuant to the power conferred on it by subsection (1), register as official liquidators as many registered liquidators as it thinks fit.

#### **Security to be given by liquidators**

**22. (1)** Where the Commission grants an application by a person for registration as a liquidator or as a liquidator of a specified corporation, the person shall lodge and maintain with the local authority a security for the due performance of his duties as such a liquidator in such form and for such amount as is, from time to time, determined by the Commission in relation to that liquidator and with such surety or sureties (if any) as the Commission, from time to time, requires.

**(2)** Where a security is lodged with the local authority in accordance with sub-section (1), the security may be applied by the local authority in such circumstances, for such purposes and in such manner as is prescribed.

- (3)** The regulations may make provision for or in relation to—  
(a) the discharge in whole or part by the local authority of securities lodged pursuant to this section; and  
(b) the release by the local authority of sureties referred to in sub-section (1) from all or any of their obligations as such sureties.

**(4)** In this section, “local authority” means the State Commission.

#### **Register of Auditors**

**23. (1)** The Commission shall cause a Register of Auditors to be kept for the purposes of this Code and shall cause to be entered in the Register in relation to a person who is registered as an auditor—

- (a) the name of the person;
- (b) the date on which the application by that person for registration as an auditor was granted;
- (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 so practises;

- (d) if the person practises as an auditor as a member of a firm or under a name or style other than his own—the name of that firm or the name or style under which he so practises; and
- (e) particulars of any suspension of the registration of the person as an auditor and of any action taken in respect of the person under paragraph 27 (10) (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 the Commission considers appropriate.

**(2)** Where a person ceases to be registered as an auditor under this Division, the Commission shall 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.

#### **Registers of Liquidators and Official Liquidators**

**24. (1)** The Commission shall cause a Register of Liquidators to be kept for the purposes of this Code and shall 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;
  - (ii) the date of commencement of the registration of that person as a liquidator;
  - (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 so practises;
  - (iv) if the person practises as a liquidator as a member of a firm or under a name or style other than his own name—the name of that firm or the name or style under which he so practises; and
  - (v) particulars of any suspension of the registration of the person as a liquidator and of any action taken in respect of the person under paragraph 27 (10) (a), (b) or (c); and
- (b) in relation to a person who is registered as a liquidator of a specified corporation—
  - (i) the name of the person;
  - (ii) the name of the corporation;

- (iii) the date of commencement of the registration of the person as a liquidator of the corporation;
- (iv) the address of the principal place where the person proposes to perform his functions as the liquidator of the corporation;
- (v) if the person practises a profession as a member of a firm or under a name or style other than his own name, being a profession by virtue of which he is qualified to be appointed as a liquidator of the corporation—the name and address of that firm or the name or style under which he so practises; and
- (vi) particulars of any suspension of the registration of the person as a liquidator of that corporation and of any action taken in respect of the person under paragraph 27 (10) (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 corporation, such other particulars as the Commission considers appropriate.

**(2)** The Commission shall cause a Register of Official Liquidators to be kept for the purposes of this Code and shall cause to be entered in the Register the name, and such other particulars as the Commission considers appropriate, of any person registered as an official liquidator.

**(3)** Where a person ceases to be registered under this Division as a liquidator, as a liquidator of a specified corporation or as an official liquidator, the Commission shall 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.

#### **Notification of certain matters**

**25. (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 23 (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 shall, not later than 21 days after the occurrence of the event concerned, lodge with the Commission, 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 sub-paragraph 24 (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 shall, not later than 21 days after the occurrence of the event concerned, lodge with the Commission, in the prescribed form, particulars in writing of that event.

**(3) Where—**

- (a) a person who is registered as a liquidator of a specified corporation ceases to act as a liquidator in the winding up of that corporation; or
- (b) a change occurs in any matter particulars of which are required by sub-paragraph 24 (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 corporation,

the person shall, not later than 21 days after the occurrence of the event concerned, lodge with the Commission, in the prescribed form, particulars in writing of that event.

**(4) Where a person who is registered as an auditor, as a liquidator or as a liquidator of a specified corporation—**

- (a) becomes an insolvent under administration;
- (b) becomes, by virtue of sub-section 227 (2), prohibited, without the leave of the Court, from acting as a director or promoter of, or from being concerned in or taking part in the management of, a corporation; or
- (c) becomes prohibited, by virtue of an order made under section 562 or under a provision of a law in force in another State or in a Territory that corresponds with that section, from acting as a director of, or from being concerned in or taking part in the management of, a company or other corporation,

the person shall, not later than 3 days after the occurrence of the event concerned, lodge with the Commission, in the prescribed form, particulars in writing of that event.

**Triennial statements by registered auditors and liquidators**

**26. (1)** Where a person applies to the Commission for registration as an auditor or as a liquidator and his application is granted under section 18 or sub-section 20 (1) or (2) within one year after the commencement of the *Companies (Application of Laws) Act, 1981*, the Commission may, in the certificate issued under sub-section 18 (5) or 20 (6) (in this section referred to as the “relevant certificate”), specify a date for the purposes of sub-section (2) of this section, being a date that is not more than 3 years after the date (in this section referred to as the “commencement date”) that is, in the relevant certificate, specified pursuant to sub-section 18 (5) or 20 (6), as the case may be.

**(2)** Where, in a certificate issued to a registered company auditor or a registered liquidator under sub-section 18 (5) or 20 (6), as the case may be, a date is specified for the purposes of this sub-section, the registered company auditor or registered liquidator shall lodge with the Commission, within one month after that date, a statement setting out, in respect of the period commencing on the commencement date and ending on the first-mentioned date, such information as is prescribed.

**(3)** A person who is a registered company auditor or a registered liquidator shall, within one month after the expiration of the period of 3 years commencing—

- (a) in the case of a person to whom sub-section (2) applies—on the date specified in the relevant certificate for the purposes of sub-section (2); or
- (b) in the case of a person to whom sub-section (2) does not apply—on the commencement date,

and of each subsequent period of 3 years, lodge with the Commission a statement in respect of that period of 3 years setting out such information as is prescribed.

**(4)** The Commission may, on the application of a registered company auditor or a registered liquidator made before the expiration of the period for lodging a statement under sub-section (2) or (3), in its discretion extend, or further extend, that period.

**(5)** The Commission may, by notice in writing served on the person, require a person who is registered as a liquidator of a specified corporation to lodge with the Commission, 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 and, where such a notice is served on a person, the person shall lodge the statement as required by the notice.

#### **Cancellation or suspension of registration**

**27. (1)** Where a person who is registered as an auditor, as a liquidator, as a liquidator of a specified corporation or as an official liquidator under this Division requests the Commission to cancel his registration, the Commission may, in its discretion, cancel the registration of that person as an auditor, as a liquidator, as a liquidator of that corporation or as an official liquidator, as the case may be.

**(2)** The Commission may, at any time, in its discretion, cancel or suspend the registration as an official liquidator of a person who is so registered and the decision of the Commission cancelling or suspending the registration of a person as an official liquidator is final.

**(3)** Where the Commission decides to exercise its power under sub-section (2) to cancel or suspend the registration of a person as an official liquidator, the Commission shall, not later than 14 days after the decision, give to the person a notice in writing setting out the decision and setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

**(4)** The Board may, if it is satisfied on application by the Commission—

(a) that a person registered as an auditor under this Division—

- (i) is an insolvent under administration;
- (ii) is, by virtue of sub-section 227 (2), prohibited, without the leave of the Court, from acting as a director or promoter of, or from being concerned in or taking part in the management of, a corporation;
- (iii) is prohibited, by virtue of an order made under section 562, under a corresponding provision of a previous law of the State or under any provision of a law, or a previous law, in force in another State or in a Territory that corresponds with that section, from acting as a director of, or from being concerned in or taking part in the management of, a company or other corporation;

- (iv) is incapable, by reason of mental infirmity, of managing his affairs;
  - (v) has failed to comply with the provisions of section 26; or
  - (vi) has ceased to be resident in Australia; or
- (b) that a person registered as an auditor under this Division has failed, whether within or outside the State, to carry out adequately and properly the duties of an 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 that person as an auditor.

**(5)** The Board may, if it is satisfied on application by the Commission—

- (a) that a person registered as a liquidator under this Division—
  - (i) is an insolvent under administration;
  - (ii) is, by virtue of sub-section 227 (2), prohibited, without the leave of the Court, from acting as a director or promoter of, or from being concerned in or taking part in the management of, a corporation;
  - (iii) is prohibited, by virtue of an order made under section 562, under a corresponding provision of a previous law of the State or under any provision of a law, or a previous law, in force in another State or in a Territory that corresponds with that section, from acting as a director of, or from being concerned in or taking part in the management of, a company or other corporation;
  - (iv) is incapable, by reason of mental infirmity, of managing his affairs;
  - (v) has failed to comply with the provisions of section 26; or
  - (vi) has ceased to be resident in Australia; or
- (b) that a person registered as a liquidator under this Division has failed, whether within or outside the State, to carry out adequately and properly the duties of a 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 that person as a liquidator.

- (6) The Board may, if it is satisfied on application by the Commission—
- (a) that a person registered under this Division as the liquidator of a specified corporation—
    - (i) is an insolvent under administration;
    - (ii) is, by virtue of sub-section 227 (2), prohibited, without the leave of the Court, from acting as a director or promoter of, or from being concerned in or taking part in the management of, a corporation;
    - (iii) is prohibited, by virtue of an order made under section 562, under a corresponding provision of a previous law of the State or under any provision of a law, or a previous law, in force in another State or in a Territory that corresponds with that section, from acting as a director of, or from being concerned in or taking part in the management of, a company or other corporation;
    - (iv) is incapable, by reason of mental infirmity, of managing his affairs;
    - (v) has failed to comply with a requirement made of him under sub-section 26 (5); or
    - (vi) has ceased to be resident in Australia; or
  - (b) that a person registered under this Division as a liquidator of a specified corporation has failed, whether within or outside the State, to carry out adequately and properly the duties of a liquidator in respect of the winding up of that corporation or is otherwise not a fit and proper person to remain registered as a liquidator of that corporation,
- by order, cancel, or suspend for a specified period, the registration of that person as a liquidator of that corporation.

(7) Where the Commission makes an application to the Board under sub-section (4) in respect of a person who is also registered as a liquidator or as a liquidator of a specified corporation, the Board may, in addition to making an order under that sub-section, if it is satisfied as to any of the matters specified in paragraph (5) (a) or (b) or (6) (a) or (b), make an order cancelling, or suspending for a specified period, the registration of that person as a liquidator or as a liquidator of that corporation, as the case may be, and, where the Board makes such an order, the order shall, for the purposes of this section, be deemed to have been made under sub-section (5) or (6), as the case may be.

(8) Where the Commission makes an application to the Board under sub-section (5) in respect of a person who is also registered as an auditor or as a liquidator of a specified corporation, the Board may, in addition to making an order under that sub-section, if it is satisfied as to any of the matters specified in paragraph (4) (a) or (b) or (6) (a) or (b), make an order cancelling, or suspending for a specified period, the registration of that person as an auditor or as a liquidator of that corporation, as the case may be, and, where the Board makes such an order, the order shall, for the purposes of this section, be deemed to have been made under sub-section (4) or (6), as the case may be.

(9) Where the Commission makes an application to the Board under sub-section (6) in respect of a person who is also registered as an auditor or as a liquidator, the Board may, in addition to making an order under that sub-section, if it is satisfied as to any of the matters specified in paragraph (4) (a) or (b) or (5) (a) or (b), make an order cancelling, or suspending for a specified period, the registration of that person as an auditor or as a liquidator, as the case may be, and, where the Board makes such an order, the order shall, for the purposes of this section, be deemed to have been made under sub-section (4) or (5), as the case may be.

(10) Where, on application made by the Commission under this section in relation to a person who is registered as an auditor, as a liquidator or as a liquidator of a specified corporation, the Board is satisfied of the matters set out in paragraph (4) (b), (5) (b) or (6) (b), as the case may be, the Board may, in addition to or instead of cancelling or suspending the registration of that person as an auditor, liquidator or liquidator of that corporation, as the case may be, deal with that person in one or more of the following ways:

- (a) by imposing on that person a penalty not exceeding \$1,000;
- (b) by admonishing or reprimanding that person;
- (c) by requiring that person to give an undertaking to engage in, or to refrain from engaging in, specified conduct,

and if a person fails to give an undertaking when required to do so under paragraph (c) or contravenes or fails to comply with an undertaking given pursuant to a requirement under that paragraph, the Board may, subject to sub-section (11), 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 corporation, as the case may be.

**(11)** The Board shall not—

- (a) cancel or suspend the registration of a person as an auditor, as a liquidator, or as a liquidator of a specified corporation; or
- (b) deal with a person in any of the ways mentioned in paragraphs (10) (a), (b) and (c),

unless the Board has afforded the person an opportunity to appear at a hearing before the Board and to make submissions and give evidence to the Board in relation to the matter.

**(11A)** The Chairman or a member of the Board may summon a person to appear before the Board at a hearing held for the purposes of this section to give evidence and to produce such documents (if any) as are referred to in the summons, being documents relating to the matters that are the subject of the hearing.

**(11B)** The Board may, at a hearing, take evidence on oath or affirmation and for that purpose the Chairman or a member of the Board may—

- (a) require a person appearing at the hearing to give evidence either to take an oath or make an affirmation; and
- (b) administer an oath or affirmation to a person so appearing at the hearing.

**(11C)** The oath or affirmation to be taken or made by a person for the purposes of sub-section (11B) is an oath or affirmation that the answers he will give to the questions asked him will be true.

**(11D)** A person shall not—

- (a) insult the Chairman or a member of the Board in the performance of his functions or the exercise of his powers as a member at a hearing before the Board held for the purposes of this section;
- (b) interrupt a hearing before the Board held for the purposes of this section;
- (c) create a disturbance, or take part in creating or continuing a disturbance, in or near a place where the Board is conducting a hearing for the purposes of this section; or
- (d) do any other act that would, if the Board were a court of record, constitute contempt of that court.

Penalty: \$1,000 or imprisonment for 3 months.

**(12) Where—**

- (a) the Board conducts a hearing in relation to a person in accordance with sub-section (11); and
- (b) the Board cancels or suspends the registration of the person as an auditor, as a liquidator or as a liquidator of a specified corporation, or deals with the person in any of the ways mentioned in paragraph (10) (a), (b) or (c),

the Board may require that person to pay an amount specified by the Board, being all or part of—

- (c) the costs of and incidental to that hearing;
- (d) the costs of the Commission in relation to that hearing; or
- (e) the costs mentioned in paragraph (c) and the costs mentioned in paragraph (d).

**(13) Where—**

- (a) the Board conducts a hearing in relation to a person in accordance with sub-section (11); and
- (b) the Board refuses to make an order cancelling or suspending the registration of the person as an auditor, as a liquidator or as a liquidator of a specified corporation, as the case requires, and does not deal with the person in any of the ways mentioned in paragraphs (10) (a), (b) and (c),

the Board may require the Commission to pay an amount specified by the Board, being all or part of—

- (c) the costs of and incidental to that hearing;
- (d) the costs of the person in relation to that hearing; or
- (e) the costs mentioned in paragraph (c) and the costs mentioned in paragraph (d).

**(14)** The Board may exercise any of its powers under this section in relation to a person as a result of conduct engaged in by that person whether or not that conduct constituted or might constitute an offence, and whether or not any proceedings have been brought or are to be brought in relation to that conduct.

**(15)** Where the Board decides to exercise any of its powers under this section in relation to a person who is registered as an auditor, as a liquidator or as a liquidator of a specified corporation (other than the power to order the payment of costs by that person under sub-section (12)), the Board shall, not later than 14 days after the decision, give to the person a notice in writing setting out the decision and setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

**(16)** A decision of the Commission under sub-section (1) to cancel the registration of a person as an auditor, as a liquidator, as a liquidator of a specified corporation or as an official liquidator comes into effect forthwith upon the making of the decision.

**(17)** A decision of the Commission under sub-section (2) to cancel the registration of a person as an official liquidator comes into effect at the expiration of the day on which notice of the decision is given to the person in accordance with sub-section (3).

**(18)** Subject to sub-section (19), a decision of the Board to cancel or suspend the registration of a person as an auditor, as a liquidator or as a liquidator of a specified corporation comes into effect at the expiration of the day on which notice of the decision is given to the person in accordance with sub-section (15).

**(19)** The Board may, in its discretion, postpone the coming into effect of a decision referred to in sub-section (18) to enable the Commission or the person concerned to appeal against the decision and, where the Board so postpones the coming into effect of a decision, the decision comes into effect—

- (a) where neither the Commission nor the person concerned appeals against the decision pursuant to sub-section (26) or (27) within the prescribed period—at the expiration of that period;
- (b) where either the Commission or the person concerned appeals against the decision pursuant to sub-section (26) or (27)—
  - (i) if the Commission or the person concerned, as the case may be, withdraws the appeal before it is determined by the Court—upon the withdrawal of the appeal; or

- (ii) if the Commission or the person concerned, as the case may be, does not so withdraw the appeal and the Court confirms or modifies the decision—at a time fixed by the Court; or
- (c) where the Commission and the person concerned both appeal against the decision pursuant to sub-sections (26) and (27)—
  - (i) if both the Commission and the person concerned withdraw the appeals before they are determined by the Court—upon the withdrawal of the later of the appeals to be withdrawn; or
  - (ii) if either the Commission or the person concerned does not so withdraw its or his appeal, or neither the Commission nor the person concerned withdraws its or his appeal, and the Court confirms or modifies the decision—at a time fixed by the Court.

**(20)** A person whose registration as an auditor, as a liquidator, as a liquidator of a specified corporation or as an official liquidator is suspended shall, except for the purposes of sub-section 23 (2), 24 (3) or 26 (2), (3) or (5), be deemed not to be registered as an auditor, liquidator, liquidator of that corporation or official liquidator, as the case may be, so long as the registration is suspended.

**(21)** The amount of a penalty imposed on a person under sub-section (10) may be recovered in a court of competent jurisdiction as a debt due to the Crown.

**(22)** Where—

- (a) under sub-section (12), the Board requires a person to pay all or part of the costs of and incidental to a hearing conducted by the Board in relation to that person (whether or not the Board also requires that person to pay all or part of the costs of the Commission in relation to that hearing); or
- (b) under sub-section (13), the Board requires the Commission to pay all or part of the costs of and incidental to a hearing conducted by the Board on the application of the Commission (whether or not the Board also requires the Commission to pay all or part of the costs of the person in relation to whom the hearing was conducted),

the amount of the costs of and incidental to the hearing so required to be paid by that person or by the Commission, as the case may be, may be recovered in a court of competent jurisdiction as a debt due to the Crown.

**(23)** Where, under sub-section (12), the Board requires a person to pay all or part of the costs of the Commission in relation to a hearing conducted by the Board in relation to that person (whether or not the Board also requires that person to pay all or part of the costs of and incidental to the hearing), the amount of the costs of the Commission so required to be paid by that person may be covered in a court of competent jurisdiction as a debt due to the Crown.

**(24)** Where, under sub-section (13), the Board requires the Commission to pay all or part of the costs of a person in relation to a hearing conducted by the Board in relation to that person (whether or not the Board also requires the Commission to pay all or part of the costs of and incidental to the hearing), the amount of the costs of that person so required to be paid by the Commission may be recovered in a court of competent jurisdiction as a debt due to that person.

**(25)** Evidence of any statement made by a person at a hearing held for the purposes of this section in relation to that person shall not be admitted in evidence in criminal proceedings against that person other than proceedings in respect of the falsity of the statement.

**(26)** A person (other than the Commission) aggrieved by a decision of the Board under this section may, within such period as is prescribed, appeal to the Court, which may confirm, reverse or modify the decision and make such orders and give such directions in the matter as it thinks fit.

**(27)** The Commission may, within such period as is prescribed, appeal to the Court against a decision of the Board under this section, (including a refusal to make an order under this section) and the Court may confirm, reverse or modify the decision and make such orders and give such directions in the matter as it thinks fit.

**(28)** In this section, "Board" means the Companies Auditors and Liquidators Disciplinary Board constituted under the *Public Accountants Registration Act, 1945*.

**Certain persons not to apply for registration as auditor or liquidator**

**28. (1)** A person who has applied for registration as an auditor or liquidator under the provisions of a law of a participating State or participating Territory that correspond with this Division is not entitled to apply to the Commission for registration as an auditor or liquidator, as the case may be, under this Code before he has been notified of the results of his application.

**(2)** A person whose application for registration as an auditor or liquidator under the provisions of a law of a participating State or participating Territory that correspond with this Division has been refused is not entitled, without the leave of the Supreme Court of that State or Territory, to apply to the Commission for registration as an auditor or liquidator, as the case may be, under this Code.

**(3)** A person whose registration as an auditor or liquidator has been cancelled or suspended under the provisions of a law of a participating State or participating Territory that correspond with section 27 (other than sub-section (1)) is not entitled, without the leave of the Supreme Court of that State or Territory, to apply to the Commission for registration as an auditor or liquidator, as the case may be, under this Code.

**Certain persons deemed to be registered under this Code**

**29. (1)** A person who is registered as an auditor, as a liquidator or as an official liquidator under the provisions of a law of a participating State or participating Territory that correspond with this Division shall be deemed to be registered as an auditor, as a liquidator or as an official liquidator, as the case may be, under this Code.

**(2)** A person who is deemed to be registered as an auditor under the provision of a law of a participating State or participating Territory that corresponds with section 19 shall be deemed to be registered as an auditor under this Code.

**Auditors and other persons to enjoy qualified privilege in certain circumstances**

**30. (1)** An auditor has qualified privilege in proceedings for defamation in respect of—

- (a) any statement that he makes, orally or in writing, in the course of his duties as auditor;
- (b) any statement that he makes, orally or in writing, on a report of the directors under section 270 or the corresponding provision of a law of a participating State or of a participating Territory or on any statement, report or other document that is deemed, for any purpose, to be part of the first-mentioned report; or
- (c) the giving of any notice, or the sending of any copy of accounts, group accounts or a report, to the Commission under sub-section 285 (9) or (10).

**(2)** A person has qualified privilege in proceedings for defamation—

- (a) in respect of the publishing of any document prepared by an auditor in the course of his duties and required by or under this Code, or required by or under the corresponding law of a participating State or of a participating Territory, to be lodged with the Commission, whether or not the document has been so lodged; or
- (b) in respect of the publishing of any statement made by an auditor as mentioned in sub-section (1).

**(3)** This section does not limit or affect any right, privilege or immunity that an auditor or other person has, apart from this section, as defendant in proceedings for defamation.

*Division 3—Registers and Registration of Documents*

**Registers**

**31. (1)** The Commission shall, subject to this Code, keep such registers as it considers necessary in such form as it thinks fit.

**(2)** A person may—

- (a) inspect any document lodged with the Commission or with a prescribed State authority, not being—
  - (i) an application under section 17;

- (ii) a document lodged under section 25 or 26; or
- (iii) a document that has been destroyed or otherwise disposed of;
- (b) require a certificate of the incorporation of any company or any other certificate authorized by this Code to be given by the Commission; or
- (c) require a copy of or extract from any document that he is entitled to inspect pursuant to paragraph (a) or any certificate referred to in paragraph (b) to be given, or given and certified, by the Commission.

**(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 the Commission, 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.

**(5)** A copy of or extract from any document lodged with the Commission or with a prescribed State authority, and certified by the Commission, is, in any proceedings, admissible in evidence as of equal validity with the original document.

**(6)** The reference in sub-section (5) to a document includes, where a reproduction or transparency of that document has been incorporated with a register kept by the Commission, a reference to that reproduction or transparency.

**(7) In any proceedings—**

- (a) a certificate by the Commission that, at a date or during a period specified in the certificate, no company was registered under this Code or a corresponding previous law of the State by a name specified in the certificate shall 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 Code or any corresponding previous law of the State; and

- (b) a certificate by the Commission that a requirement of this Code 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,
- shall be received as *prima facie* evidence of matters specified in the certificate.

**(8)** If the Commission is of opinion that a document submitted for lodgment with the Commission—

- (a) contains matter contrary to law;
- (b) contains matter that, in a material particular, is false or misleading in the form or context in which it is included;
- (c) by reason of an omission or misdescription has not been duly completed;
- (d) does not comply with the requirements of this Code; or
- (e) contains an error, alteration or erasure,

the Commission may refuse to register or receive the document and may request—

- (f) that the document be appropriately amended or completed and re-submitted;
- (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)** The Commission may require a person who submits a document for lodgment with the Commission to produce to the Commission such other document, or to furnish to the Commission such information, as the Commission thinks necessary in order to form an opinion whether it may refuse to receive or register the document.

**(10)** The Commission may, if in the opinion of the Commission it is no longer necessary or desirable to retain them, destroy or dispose of—

- (a) in relation to a corporation—
  - (i) any return of allotment of shares for cash that has been lodged for not less than 2 years;

- (ii) any annual return or 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 constituent documents or any other document affecting them) that has been lodged or registered for not less than 15 years;
- (b) in relation to a corporation that has been dissolved or has ceased to be registered for not less than 15 years, any document lodged or registered; or
- (c) any document a transparency of which has been incorporated with a register kept by the Commission.

**(11)** If a corporation or other person, having made default in complying with—

- (a) any provision of this Code or of any other law that requires the lodging in any manner with the Commission of any return, account or other document or the giving of notice to the Commission of any matter; or
- (b) any request of the Commission 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 corporation or person of a notice requiring it to be done, the Court or any court of summary jurisdiction may, on an application by any member or creditor of the corporation or by the Commission, make an order directing the corporation or any officer of the corporation 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 shall be borne by the corporation or by any officers of the corporation responsible for the default or by the person.

**(13)** A corporation that, or an officer of a corporation or other person who, contravenes or fails to comply with an order under sub-section (11) is guilty of an offence.

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

**(14)** Nothing in this section prejudices the operation of any law imposing penalties on a corporation or its officers or on another person in respect of a default mentioned in sub-section (11).

**Relodging of lost registered documents**

**32.** **(1)** If, in the case of a corporation incorporated or registered in the State, any of the constituent documents of, or any other document relating to, the corporation lodged with the Commission or a prescribed State authority has been lost or destroyed, any person may apply to the Commission for leave to lodge with the Commission a copy of the document as originally lodged.

**(2)** Where such an application is made, the Commission 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 the Commission under sub-section (1), the Commission, upon being satisfied—

- (a) that an original document has been lost or destroyed;
- (b) of the date of the lodging of that document; and
- (c) that a copy of that document produced to the Commission 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 shall be deemed 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)** The Court may, by order made upon application by any person aggrieved and after notice to any other person as directed by the Court, confirm, vary or rescind the certificate, and the order may be lodged with the Commission and shall be registered by it, but no payments, contracts, dealings, acts or things made, had or done in good faith before the registration of the order and upon the faith of and in reliance upon the certificate shall be invalidated or affected by any such variation or rescission.

**(6)** Where a transparency of a document referred to in sub-section (1) has been incorporated with a register kept by the Commission and is lost or destroyed as referred to in that sub-section, the foregoing provisions of this section have effect as if the document of which it is a transparency had been so lost or destroyed.

## **PART III—CONSTITUTION OF COMPANIES**

### *Division 1—Incorporation*

#### **Formation of companies**

**33. (1)** Subject to this Code, any 5 or more persons, or, where the company to be formed will be a proprietary company, any 2 or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum and complying with the requirements as to registration, form an incorporated company.

**(2)** A company may be—

- (a) a company limited by shares;
- (b) a company limited by guarantee;
- (c) a company limited both by shares and by guarantee;
- (d) an unlimited company; or
- (e) in the case of a mining company, a no liability company.

**(3)** Subject to sub-section (4)—

- (a) an association or partnership consisting of more than 20 persons that has for its object the acquisition of gain by the association or partnership or individual members of the association or partnership shall not be formed unless it is incorporated under this Code or is formed pursuant to an Act or letters patent; and
- (b) a person who participates in the purported formation of an association or partnership in contravention of paragraph (a) is guilty of an offence.

**(4)** Where a profession or calling is declared by the Ministerial Council by notice published in the *Gazette* to be a profession or calling that may be carried on by an unincorporated association or partnership consisting of not more than the number of persons specified in the notice, an association or partnership formed for the purpose of carrying on that profession or calling and consisting of not more than that number of persons may carry on that profession or calling notwithstanding that it is not incorporated under this Code and is not formed pursuant to an Act or letters patent.

**Proprietary companies**

**34. (1)** A company having a share capital (other than a no liability company) may be incorporated as a proprietary company if a provision of its memorandum or articles—

- (a) restricts the right to transfer its shares;
- (b) limits to not more than 50 the number of its members (counting joint holders of shares as one person and not counting any person in the employment of the company or of its subsidiary or any person who, while previously in the employment of the company or of its subsidiary was, and thereafter has continued to be, a member of the company);
- (c) prohibits any invitation to the public to subscribe for, and any offer to the public to accept subscriptions for, any shares in, or debentures of, the company; and
- (d) prohibits any invitation to the public to deposit money with, and any offer to the public to accept deposits of money with, the company for fixed periods or payable at call, whether bearing or not bearing interest.

**(2)** Where, upon the commencement of the *Companies (Application of Laws) Act*, 1981, neither the memorandum nor the articles of a company that is a proprietary company by virtue of paragraph (a) of the definition of "proprietary company" in sub-section 5 (1) contains or contain the restrictions, limitations and prohibitions required by sub-section (1) of this section to be included in the memorandum or articles of a company that may be incorporated as a proprietary company, the articles of the company shall be deemed to include each such restriction, limitation or prohibition that is not so included and a restriction on the right to transfer its shares that is so deemed to be included in its articles shall be deemed to be a restriction that prohibits the transfer of shares except to a person approved by the directors of the company.

**(3)** Where a restriction, limitation or prohibition that is deemed to be included in the articles of a company under sub-section (2) is inconsistent with any provision already included in the memorandum or articles of the company, that restriction, limitation or prohibition shall, to the extent of the inconsistency, prevail.

**(4)** A proprietary company may, by special resolution, alter any restriction on the right to transfer its shares included, or deemed to be included, in its memorandum or articles or any limitation on the number of its members

included, or deemed to be included, in its memorandum or articles, but not so that the memorandum and articles of the company cease to include the limitation required by paragraph (1) (b) to be included in the memorandum or articles of a company that may be incorporated as a proprietary company.

### **Registration and incorporation**

**35. (1)** Persons desiring the incorporation of a company shall lodge the memorandum and the articles (if any) of the proposed company with the Commission together with the other documents required to be lodged by or under this Code and the Commission shall, subject to this Code, register the company by registering the memorandum and articles (if any).

**(2)** On the registration of the memorandum, the Commission shall certify under its common seal that the company is, on and from the date specified in the certificate, incorporated and that the company is—

- (a) a company limited by shares;
- (b) a company limited by guarantee;
- (c) a company limited both by shares and by guarantee;
- (d) an unlimited company; or
- (e) a no liability company,

as the case may be, and, where applicable, that it is a proprietary company.

**(3)** The Commission shall keep a copy of a certificate under sub-section (2) and sub-sections 31 (2) and (5) apply to that copy as if it were a document lodged with the Commission.

**(4)** On and from the date of incorporation specified in the certificate of incorporation, but subject to this Code, the subscribers to the memorandum, together with such other persons as from time to time become members of the company, are an incorporated company by the name set out in the memorandum.

**(5)** The company—

- (a) is capable forthwith of performing all the functions of a body corporate;
- (b) is capable of suing and being sued;
- (c) has perpetual succession and shall have a common seal; and
- (d) has power to acquire, hold and dispose of property.

(6) The members of the company have such liability as members of the company to contribute to the property of the company in a winding up of the company as is provided by this Code.

(7) The subscribers to the memorandum shall be deemed to have agreed to become members of the company and, on the incorporation of the company, each subscriber becomes such a member and his name shall be entered in the register of members of the company.

(8) Each other person who agrees to become a member of the company and whose name is entered in the register of members of the company becomes a member of the company.

(9) A company shall not be registered under sub-section (1) unless the name under which the company is proposed to be registered is reserved under section 40 in respect of the company.

#### **Membership of holding company**

**36. (1)** A corporation cannot be a member of a company that is its holding company, and any allotment or transfer of shares in a company to its subsidiary is void.

(2) Any purported acquisition of units of shares in a company that is a holding company by its subsidiary is void.

(3) Neither sub-section (1) nor (2) applies where—

(a) the subsidiary is concerned as a personal representative; or

(b) the subsidiary is concerned as a trustee and—

(i) the holding company or a subsidiary of the holding company is not beneficially interested under the trust; or

(ii) the holding company or a subsidiary of the holding company is beneficially interested under the trust only by way of a security given for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money, not being a transaction entered into with a person associated with the holding company or a subsidiary of the holding company.

(4) This section does not prevent a subsidiary that was, at the commencement of the *Companies Act*, 1961, a member of its holding company from continuing to be a member but, subject to sub-section (3), the subsidiary does not have a right to vote at meetings of the holding company or of any class of members of the holding company.

(5) This section does not prevent a subsidiary from continuing to be a member of its holding company if, at the time when it becomes a subsidiary of the holding company, it already holds shares in that holding company, but, subject to sub-section (3)—

- (a) the subsidiary does not have a right to vote at meetings of the holding company or of any class of members of the holding company; and
- (b) the subsidiary shall, within the period of 12 months or such longer period as the Court may allow after becoming the subsidiary of its holding company, dispose of all of its shares in the holding company.

(6) Subject to sub-section (3), sub-sections (1), (2), (4) and (5) apply in relation to a nominee for a corporation that is a subsidiary as if references in those sub-sections to such a corporation included references to a nominee for it.

(7) In relation to a holding company that is either a company limited by guarantee or an unlimited company, the reference in this section to shares shall, whether or not the holding company has a share capital, be construed as including a reference to the interest of its members as such, whatever the form of that interest.

#### **Requirements as to memorandum**

**37. (1)** The memorandum of a company shall be printed, divided into numbered paragraphs, dated, and signed by the persons desiring the formation of the company, and shall state, in addition to other requirements—

- (a) the name of the company;
- (b) the objects of the company;
- (c) unless the company is an unlimited company, the amount of share capital (if any) with which the company proposes to be registered and the division of that share capital into shares of a fixed amount;
- (d) if the company is a company limited by shares, that the liability of the members is limited;

- (e) if the company is a company limited by guarantee or both by shares and by guarantee, that the liability of the members is limited and that each member undertakes to contribute to the property of the company, in the event of its being wound up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company contracted before he ceases to be a member and of the costs, charges and expenses of winding up and for adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding a specified amount in addition to the amount (if any) unpaid on any shares held by him;
- (f) if the company is an unlimited company, that the liability of the members is unlimited;
- (g) if the company is a no liability company, that the acceptance of shares in the company does not constitute a contract to pay calls in respect of the shares or to make any contribution towards the debts and liabilities of the company;
- (h) the full names, addresses and occupations of the subscribers to the memorandum being natural persons, and the corporate names, and the addresses of the registered or principal offices, of the subscribers to the memorandum being corporations; and
- (j) that those subscribers are desirous of being formed into a company pursuant to the memorandum and (where the company is to have a share capital) respectively agree to take the number of shares in the capital of the company set out opposite their respective names.

**(2)** Each subscriber to the memorandum—

- (a) shall, if the company is to have a share capital, state in words—
  - (i) the number of shares (being not less than one) that he agrees to take; and
  - (ii) if the shares in the company are divided into classes, the class or the respective classes in which the shares that he agrees to take are included; and
- (b) whether or not the company is to have a share capital, shall sign the memorandum in the presence of at least one witness (not being another subscriber).

**(3)** A witness to the signature of a subscriber to the memorandum shall attest the signature and add his address.

(4) A reference in sub-section (1) or (2) to the signing of the memorandum of a company shall, in the case of the signing by a person being a body corporate, be construed as including a reference to the affixing in accordance with the constituent documents of the body corporate of the common or official seal of the body corporate to the memorandum and, where a body corporate signs the memorandum by so affixing its common or official seal, sub-section (2) does not require a witness to the affixing of that seal.

(5) A statement in the memorandum of a company limited by shares that the liability of members is limited means that the liability of the members is limited to the amount (if any) unpaid on the shares respectively held by them.

*Division 2—Names***Interpretation**

**38. (1)** For the purposes of this Division a name shall be taken to be available for reservation in the State unless the name—

- (a) is a name that is reserved or registered under this Division or, in the opinion of the Commission, so closely resembles such a name as to be likely to be mistaken for it;
- (b) is, in the opinion of the Commission, undesirable; or
- (c) is a name, or a name of a kind, that the Ministerial Council has directed the Commission not to accept for registration.

**(2)** Notwithstanding sub-section (1), a name—

- (a) that, in the opinion of the Commission, so closely resembles a name that is reserved or registered under this Division as to be likely to be mistaken for it;
- (b) that is, in the opinion of the Commission, undesirable; or
- (c) that is a name, or a name of a kind, that the Ministerial Council has directed the Commission not to accept for registration,

shall be taken to be available for reservation in the State in relation to a corporation or intended corporation if the Ministerial Council has consented to the name being reserved or registered under this Division in respect of that corporation or intended corporation.

(3) For the purposes of this Division, a name shall be taken to be available for reservation in a participating State or a participating Territory if it is available for reservation in that State or Territory under the provision of a law of that State or Territory that corresponds with this section.

(4) Where the Ministerial Council gives a direction to the Commission in accordance with paragraph (1) (c), the Commission shall cause particulars of the direction to be published in the *Gazette*.

(5) For the purposes of section 537, sub-section (2) of this section shall be taken to provide for the review by the Ministerial Council of decisions of the Commission made under paragraph (1) (a) or (b) of this section.

#### **Names of particular classes of companies**

39. (1) A limited company shall have the word "Limited" or the abbreviation "Ltd." as part of and at the end of its name.

(2) A no liability company shall have the words "No Liability" or the abbreviation "N.L." as part of and at the end of its name.

(3) A proprietary company shall have the word "Proprietary" or the abbreviation "Pty." as part of its name, inserted immediately before the word "Limited" or before the abbreviation "Ltd." or, in the case of an unlimited company, at the end of its name.

(4) A description of a company shall not be taken to be inadequate or incorrect by reason of the use of—

- (a) the abbreviation "Co." or "Coy." in lieu of the word "Company" contained in the name of the company;
- (b) the abbreviation "Pty." in lieu of the word "Proprietary" contained in the name of the company;
- (c) the abbreviation "Ltd." in lieu of the word "Limited" contained in the name of the company;
- (d) the symbol "&" in lieu of the word "and" contained in the name of the company;
- (e) the abbreviation "N.L." in lieu of the words "No Liability" contained in the name of the company; or
- (f) any of those words in lieu of the corresponding abbreviation or symbol contained in the name of the company.

**Reservation and registration of name of intended company**

**40. (1)** A person may apply in the prescribed form to the Commission for the reservation in the State of a name set out in the application as the name of an intended company.

**(2)** Subject to sub-section (3), if—

- (a) the Commission is satisfied that an application made under sub-section (1) for the reservation of a name is made in good faith; and
- (b) the name is available for reservation in the State,

the Commission shall reserve the name for a period of 2 months from the date of lodgment of the application, and, where the Commission so reserves the name, the name shall be deemed to have been reserved from that date.

**(3) Where—**

- (a) an application is made under sub-section (1) for the reservation of a name;
- (b) the application states that it is desired to reserve that name in a participating State or participating Territory; and
- (c) the name is not available for reservation in that State or Territory,

the Commission shall not reserve the name.

**(4) Where—**

- (a) a name is reserved under this section in respect of an intended company; and
- (b) the Commission registers the company by that name under section 35, the Commission shall register the name of the company in the State and, where the Commission so registers the name, the name ceases to be reserved under this section.

**(5) Where a name has been reserved under this section in respect of an intended company and—**

- (a) the name was not available for reservation in the State or in a State or Territory specified in the application for reservation as mentioned in paragraph (3) (b); or
- (b) the person who applied for the reservation of the name notifies the Commission in writing that he no longer desires the name to be reserved,

the Commission shall cancel the reservation of the name.

(6) The reservation of a name under this section in respect of an intended company does not of itself entitle the intended company to be registered by that name.

(7) The registration of a name under this section remains in force until the registration is cancelled by the Commission.

#### **Reservation of name of intended recognized company**

**41. Where—**

- (a) a name has been reserved in respect of an intended recognized company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 40 (2); and
- (b) the application for the reservation of that name stated that it was desired to reserve the name in the State,

the Commission shall reserve that name in the State and, where the name is so reserved, the reservation remains in force until that name ceases to be reserved, or until the reservation of that name is cancelled by the Commission, under the provision of the law of that State or Territory that corresponds with section 40.

#### **Registration of name of recognized company**

**42. Where—**

- (a) a name has been reserved in respect of an intended recognized company under section 41; and
- (b) the name is registered in respect of that recognized company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 40 (4),

the Commission shall register that name in the State and, where the name is so registered, the registration remains in force until it is cancelled by the Commission under this Division or until the registration of that name in the State or Territory referred to in paragraph (b) is cancelled under the law of that State or Territory.

#### **Reservation and registration of proposed new name of company**

**43. (1)** A company may apply in the prescribed form to the Commission for the reservation in the State of a name set out in the application as the name to which the company proposes to change its name.

**(2) Subject to sub-section (3), if—**

- (a) the Commission is satisfied that an application made under sub-section (1) for the reservation of a name is made in good faith; and
- (b) the name is available for reservation in the State,

the Commission shall reserve the name for a period of 2 months from the date of lodgment of the application, and, where the Commission so reserves the name, the name shall be deemed to have been reserved from that date.

**(3) Where—**

- (a) an application is made under sub-section (1) for the reservation of a name;
- (b) the application states that the present name of the company is registered in a participating State or participating Territory; and
- (c) the name in respect of which the application is made is not available for reservation in that State or Territory,

the Commission shall not reserve the name.

**(4) Where—**

- (a) a name is reserved under this section in respect of a company; and
- (b) the company changes its name to that reserved name (in this sub-section referred to as the “new name”) under section 65,

the Commission shall register the new name of the company in the State and, where the Commission so registers the new name—

- (c) the new name ceases to be reserved under this section; and
- (d) the Commission shall cancel the registration under this Division of the name by which the company was registered before it changed its name to the new name.

**(5) Where a name has been reserved under sub-section (2) in respect of a company and—**

- (a) the name was not available for reservation in the State or in a State or Territory specified in the application for reservation as mentioned in paragraph (3) (b); or
- (b) the company notifies the Commission in writing that it no longer desires the name to be reserved,

the Commission shall cancel the reservation of the name.

(6) The reservation of a name under this section in respect of a company does not of itself entitle the company to change its name to that name.

(7) The registration of a name under this section remains in force until the registration is cancelled by the Commission.

**Reservation of proposed new name of recognized company****44. Where—**

(a) a name has been reserved in respect of a recognized company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 43 (2); and

(b) the application for the reservation of that name states that the present name of the recognized company is registered in the State,

the Commission shall reserve the name referred to in paragraph (a) in the State and, where the name is so reserved, the reservation remains in force until the name ceases to be reserved, or until the reservation of the name is cancelled by the Commission, under the provision of the law of that State or Territory that corresponds with section 43.

**Registration of new name of recognized company****45. Where—**

(a) a name has been reserved in respect of a recognized company under section 44; and

(b) the name is registered in respect of that recognized company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 43 (4),

the Commission shall register that name in the State and, where the name is so registered, the registration remains in force until it is cancelled by the Commission under this Division or until the registration of that name in the State or Territory referred to in paragraph (b) is cancelled under the law of that State or Territory.

**Reservation and registration of name of intended foreign company or foreign company**

**46. (1)** A person may apply in the prescribed form to the Commission for the reservation in the State of a name set out in the application as the name of an intended foreign company that is proposed to be registered as a foreign company under Division 5 of Part XIII.

(2) A foreign company that proposes to become registered in the State under Division 5 of Part XIII may apply in the prescribed form to the Commission for the reservation in the State of a name set out in the application as the name by which the foreign company proposes to become so registered.

(3) Subject to sub-section (4), if—

- (a) the Commission is satisfied that an application made under sub-section (1) or (2) for the reservation of a name is made in good faith; and
- (b) the name is available for reservation in the State,

the Commission shall reserve the name for a period of 2 months from the date of lodgment of the application, and, where the Commission so reserves the name, the name shall be deemed to have been reserved from that date.

(4) Where—

- (a) an application is made under sub-section (1) or (2) for the reservation of a name in respect of an intended foreign company that is to be formed, or a foreign company that was formed, outside Australia and the external Territories;
- (b) the application states that it is desired to reserve that name in a participating State or participating Territory; and
- (c) the name is not available for reservation in that State or Territory,

the Commission shall not reserve the name.

(5) Where—

- (a) a name is reserved under this section in respect of an intended foreign company or a foreign company; and
- (b) the intended foreign company is formed and is registered, or the foreign company is registered, by that name as a foreign company under Division 5 of Part XIII,

the Commission shall register the name of the foreign company in the State and, where the Commission so registers the name, the name ceases to be reserved under this section.

(6) Where a name has been reserved under this section in respect of an intended foreign company or a foreign company and—

- (a) the name was not available for reservation in the State or in a State or Territory specified in the application for reservation as mentioned in paragraph (4) (b); or

- (b) the person who applied for the reservation of the name or the foreign company notifies the Commission in writing that he or it, as the case may be, no longer desires the name to be reserved,

the Commission shall cancel the reservation of the name.

**(7)** The reservation of a name under this section in respect of an intended foreign company or a foreign company does not of itself entitle the intended foreign company or the foreign company to be registered by that name under Division 5 of Part XIII.

**(8)** The registration of a name under this section remains in force until the registration is cancelled by the Commission.

**(9)** Notwithstanding anything in paragraph 38 (1) (a), a name shall not be taken, for the purposes of this section, not to be available for reservation in the State or in another State or in a Territory by reason only that the name is already reserved or registered under this Division or under the provisions of a law of the State or Territory that correspond with this Division, as the case may be, in respect of the foreign company that has applied for the reservation of the name under this section.

#### **Reservation of name of intended recognized foreign company or recognized foreign company**

##### **47. Where—**

- (a) a name has been reserved under the provision of a law of a participating State or participating Territory that corresponds with subsection 46 (3) in respect of an intended foreign company that is to be formed, or a foreign company that was formed, outside Australia and the external Territories; and
- (b) the application for the reservation of that name stated that it was desired to reserve the name in the State,

the Commission shall reserve that name in the State and, where a name is so reserved, the reservation remains in force until that name ceases to be reserved, or until the reservation of that name is cancelled by the Commission, under the provision of the law of that State or Territory that corresponds with section 46.

**Registration of name of recognized foreign company**

**48. Where—**

- (a) a name has been reserved in respect of an intended foreign company or a foreign company under section 47; and
- (b) the name is registered in respect of that foreign company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 46 (5),

the Commission shall register that name in the State and, where the name is so registered, the registration remains in force until it is cancelled by the Commission under this Division or until the registration of that name in the State or Territory referred to in paragraph (b) is cancelled under the law of that State or Territory.

**Reservation and registration of proposed new name of registered foreign company**

**49. (1)** A registered foreign company may apply in the prescribed form to the Commission for the reservation in the State of a name set out in the application as the name to which the registered foreign company has changed its name or to which the registered foreign company proposes to change its name.

**(2) Subject to sub-section (3) if—**

- (a) the Commission is satisfied that an application made under sub-section (1) for the reservation of a name is made in good faith; and
- (b) the name is available for reservation in the State,

the Commission shall reserve the name for a period of 2 months from the date of lodgment of the application, and, where the Commission so reserves the name, the name shall be deemed to have been reserved from that date.

**(3) Where—**

- (a) an application for the reservation of a name is made under sub-section (1) in respect of a foreign company formed outside Australia and the external Territories;

(b) the application states—

- (i) where the foreign company has already changed its name to the name in respect of which the application is made—that the former name of the foreign company is registered in a participating State or participating Territory; or
- (ii) where the foreign company proposes to change its name to the name in respect of which the application is made—that the present name of the foreign company is registered in a participating State or participating Territory; and

(c) the name in respect of which the application is made is not available for reservation in that State or Territory,

the Commission shall not reserve the name.

(4) Where—

- (a) a name is reserved under this section in respect of a registered foreign company; and
- (b) whether before or after the name is reserved under this section, the registered foreign company changed or changes its name to that reserved name (in this sub-section referred to as the “new name”),

the Commission shall register the new name of the registered foreign company in the State and, where the Commission so registers the new name—

(c) the new name ceases to be reserved under this section; and

(d) the Commission shall cancel the registration under this Division of the name by which the registered foreign company was registered before it changed its name to the new name.

(5) Where a name has been reserved under this section in respect of a registered foreign company and—

- (a) the name was not available for reservation in the State or in a State or Territory specified in the application for reservation as mentioned in paragraph (3) (b); or
- (b) the registered foreign company notifies the Commission in writing that it no longer desires the name to be reserved,

the Commission shall cancel the reservation of the name.

(6) The registration of a name under this section remains in force until the registration is cancelled by the Commission.

**Reservation of proposed new name of recognized foreign company****50. Where—**

- (a) a name has been reserved in respect of a recognized foreign company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 49 (2); and
- (b) the application for the reservation of that name states that the present name of the recognized foreign company is registered in the State,

the Commission shall reserve the name referred to in paragraph (a) in the State and, where the name is so reserved, the reservation remains in force until the name ceases to be reserved, or until the reservation of the name is cancelled by the Commission, under the provision of the law of that State or Territory that corresponds with section 49.

**Registration of new name of recognized foreign company****51. Where—**

- (a) a name has been reserved in respect of a recognized foreign company under section 50; and
- (b) the name is registered in respect of that recognized foreign company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 49 (4),

the Commission shall register that name in the State and, where the name is so registered, the registration remains in force until it is cancelled by the Commission under this Division or until the registration of that name in the State or Territory referred to in paragraph (b) is cancelled under the law of that State or Territory.

**Reservation and registration of name of recognized company proposing to transfer incorporation to the State**

**52. (1)** A recognized company that proposes to transfer its incorporation to the State may apply in the prescribed form to the Commission for the reservation in the State of a name set out in the application as the name by which the recognized company intends to register upon transfer of its incorporation pursuant to Division 4.

**(2) Subject to sub-section (3), if—**

- (a) the Commission is satisfied that an application made under sub-section (1) for the reservation of a name is made in good faith; and

- (b) the name is available for reservation in the State,

the Commission shall reserve the name for a period of 2 months from the date of lodgment of the application, and, where the Commission so reserves the name, the name shall be deemed to have been reserved from that date.

**(3) Where—**

- (a) an application is made under sub-section (1) for the reservation of a name;
- (b) the application states that the name of the recognized company is registered in a participating State or participating Territory; and
- (c) the name in respect of which the application is made is not available for reservation in that State or Territory,

the Commission shall not reserve the name.

**(4) Where—**

- (a) a name is reserved under this section in respect of a recognized company; and
- (b) the recognized company is registered by that name as a company pursuant to Division 4,

the Commission shall register the name of the company in the State and, where the Commission so registers the name—

- (c) the name ceases to be reserved under this section; and
- (d) if a registration of that name in respect of that recognized company is in force under any other provision of this Division, the Commission shall cancel that last-mentioned registration.

**(5) Where a name has been reserved under sub-section (2) in respect of a recognized company and—**

- (a) the name was not available for reservation in the State or in a State or Territory specified in the application for reservation as mentioned in paragraph (3) (b); or
- (b) the recognized company notifies the Commission in writing that it no longer desires the name to be reserved,

the Commission shall cancel the reservation of the name.

(6) The reservation of a name under this section in respect of a recognized company does not of itself entitle the recognized company to be registered pursuant to Division 4 by that name.

(7) The registration of a name under this section remains in force until the registration is cancelled by the Commission.

(8) Notwithstanding anything in paragraph 38 (1) (a), a name shall not be taken, for the purposes of this section, not to be available for reservation in the State or in another State or in a Territory by reason only that the name is already reserved or registered under this Division or under the provisions of a law of the State or Territory that correspond with this Division, as the case may be, in respect of the recognized company that has applied for the reservation of the name under this section.

**Reservation of name of company or recognized company proposing to transfer incorporation to participating State or Territory**

**53.** (1) Where a name has been reserved in respect of a company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 52 (2), the Commission shall reserve that name in the State.

**(2) Where—**

- (a) a name has been reserved in respect of a recognized company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 52 (2); and
- (b) the application for the reservation of that name states that the name of the recognized company is registered in the State,

the Commission shall reserve the name in respect of which the application is made in the State and, where the name is so reserved, the reservation remains in force until the name ceases to be reserved, or until the reservation of the name is cancelled by the Commission, under the provision of the law of that State or Territory that corresponds with section 52.

**Registration of name of recognized company after transfer of incorporation to participating State or Territory**

**54. Where—**

- (a) a name has been reserved in respect of a company or a recognized company under section 53; and

- (b) the name is registered under the provision of a law of a participating State or participating Territory that corresponds with sub-section 52 (4),

the Commission shall register that name in the State and, where the Commission so registers the name—

- (c) the registration remains in force until it is cancelled by the Commission under this Division or until the registration of that name in the State or Territory referred to in paragraph (b) is cancelled under the law of that State or Territory; and
- (d) if a registration of that name in respect of that company or that recognized company is in force under any other provision of this Division, the Commission shall cancel that last-mentioned registration.

**Reservation and registration of name of foreign company proposing to transfer incorporation to the State**

**55. (1)** A foreign company that proposes to transfer its incorporation to the State may apply in the prescribed form to the Commission for the reservation in the State of a name set out in the application as the name by which the foreign company intends to be registered upon transfer of its incorporation pursuant to Division 4.

**(2)** Subject to sub-section (3), if—

- (a) the Commission is satisfied that an application made under sub-section (1) for the reservation of a name is made in good faith; and
- (b) the name is available for reservation in the State,

the Commission shall reserve the name for a period of 2 months from the date of lodgment of the application, and, where the Commission so reserves the name, the name shall be deemed to have been reserved from that date.

**(3)** Where—

- (a) an application is made under sub-section (1) for the reservation of a name;
- (b) the application states that the name of the foreign company is registered in a participating State or participating Territory; and
- (c) the name in respect of which the application is made is not available for reservation in that State or Territory,

the Commission shall not reserve the name.

**(4)** Where—

- (a) a name is reserved under this section in respect of a foreign company; and
- (b) the foreign company is registered by that name as a company pursuant to Division 4,

the Commission shall register the name of the company in the State and, where the Commission so registers the name—

- (c) the name ceases to be reserved under this section; and
- (d) if a registration of that name in respect of that foreign company is in force under any other provision of this Division, the Commission shall cancel that last-mentioned registration.

**(5)** Where a name has been reserved under sub-section (2) in respect of a foreign company and—

- (a) the name was not available for reservation in the State or in a State or Territory specified in the application for reservation as mentioned in paragraph (3) (b); or
- (b) the foreign company notifies the Commission in writing that it no longer desires the name to be reserved,

the Commission shall cancel the reservation of the name.

**(6)** The reservation of a name under this section in respect of a foreign company does not of itself entitle the foreign company to be registered pursuant to Division 4 by that name.

**(7)** The registration of a name under this section remains in force until the registration is cancelled by the Commission.

**(8)** Notwithstanding anything in paragraph 38 (1) (a), a name shall not be taken, for the purposes of this section, not to be available for reservation in the State or in another State or in a Territory by reason only that the name is already reserved or registered under this Division or under the provisions of a law of the State or Territory that correspond with this Division, as the case may be, in respect of the foreign company that has applied for the reservation of the name under this section.

**Reservation of name of foreign company proposing to transfer incorporation to participating State or Territory****56.** Where—

- (a) a name has been reserved in respect of a foreign company under the provision of a law of a participating State or participating Territory that corresponds with sub-section 55 (2); and
- (b) the application for the reservation of that name states that the name of the foreign company is registered in the State,

the Commission shall reserve the name in respect of which the application was made in the State and, where the name is so reserved, the reservation remains in force until that name ceases to be reserved, or until the reservation of that name is cancelled by the Commission, under the provision of the law of that State or Territory that corresponds with section 55.

**Registration of name of foreign company that has become a recognized company after transfer of incorporation to participating State or Territory****57.** Where—

- (a) a name has been reserved in respect of a foreign company under section 56; and
- (b) the name is registered under the provision of a law of a participating State or participating Territory that corresponds with sub-section 55 (4),

the Commission shall register that name in the State and, where the Commission so registers the name—

- (c) the registration remains in force until it is cancelled by the Commission under this Division or until the registration of that name in the State or Territory referred to in paragraph (b) is cancelled under the law of that State or Territory; and
- (d) if a registration of that name in respect of that foreign company is in force under any other provision of this Division, the Commission shall cancel that last-mentioned registration.

**Extension of reservation**

**58. Where—**

- (a) at any time during a period for which a name is reserved under this Division (whether or not pursuant to the exercise on a previous occasion or previous occasions of a power under this section) an application is made to the Commission for an extension of that period; and
- (b) the Commission is satisfied that the application is made in good faith, the Commission may extend that period for a further period of 2 months.

**Notification that registration of name desired in another State or in a Territory**

**59. Where** a name is registered under this Division in respect of a company or a registered foreign company (being a foreign company formed outside Australia and the external Territories), the company or the registered foreign company may notify the Commission in writing that it desires the name to be registered in another State or in a Territory.

**Registration of name of recognized company or recognized foreign company in the State**

**60. Where—**

- (a) the Commission is notified by a recognized company or a recognized foreign company in accordance with the provision of a law of a participating State or participating Territory that corresponds with section 59 that it desires its name to be registered in the State; and
- (b) the name is available for reservation in the State,

the Commission shall register that name in the State and, where the name is so registered, the registration remains in force until it is cancelled by the Commission under this Division or until the registration of that name in the State or Territory referred to in paragraph (a) is cancelled under the law of that State or Territory.

**Notification that registration of name no longer desired in a participating State or Territory**

**61. (1) Where—**

- (a) a name has been registered under this Division in respect of a company; and
- (b) that name has been registered in respect of that company under the provisions of a law of a participating State or participating Territory that correspond with this Division,

the company may notify the Commission in writing that it no longer desires the name to be registered in that State or Territory.

**(2) Where—**

- (a) a name has been registered under this Division in respect of a registered foreign company; and
- (b) that name has been registered in respect of that registered foreign company under the provisions of a law of a participating State or participating Territory that correspond with this Division,

the registered foreign company may notify the Commission in writing that it no longer desires the name to be registered in that State or Territory.

**Cancellation of registration where registration in the State no longer desired**

**62. (1) Where—**

- (a) a name has been registered in respect of a recognized company under this Division; and
- (b) the Commission is notified by the recognized company, in accordance with the provision of a law of a participating State or participating Territory that corresponds with sub-section 61 (1), that the recognized company no longer desires the name to be registered in the State,

the Commission shall cancel the registration of the name in the State.

**(2) Where—**

- (a) a name has been registered in respect of a recognized foreign company under this Division; and

- (b) the Commission is notified in accordance with the provision of a law of a participating State or participating Territory that corresponds with sub-section 61 (2), that the recognized foreign company no longer desires the name to be registered in the State,

the Commission shall cancel the registration of the name in the State.

**Cancellation of registration where company or foreign company dissolved or foreign company ceases to be registered**

**63. (1)** Where a name has been registered under this Division in respect of a company and the company is dissolved, the Commission shall cancel the registration of that name.

**(2)** Where a name has been registered under this Division in respect of a registered foreign company and the registered foreign company is dissolved, the Commission shall cancel the registration of that name.

**(3)** Where a name has been registered under this Division in respect of a registered foreign company and the registered foreign company ceases to be registered under Division 5 of Part XIII, the Commission shall cancel the registration of that name.

**Cancellation of registration where name registered by mistake**

**64. Where—**

- (a) a name has been registered under this Division in respect of a recognized company or a recognized foreign company; and
- (b) at the time when the name was reserved under this Division or, if the name was registered under section 60, at the time when the name was so registered, the name was not available for reservation in the State,  
the Commission may cancel the registration of the name in the State.

**Change of name**

**65. (1)** A company may, by special resolution and with the approval of the Commission, change its name.

**(2)** The Commission shall not approve a change of name of a company under sub-section (1) unless the proposed new name is reserved in respect of the company under section 43.

**(3)** If the name of a company is (whether through inadvertence or otherwise and whether originally or by change of name) a name that is not available for reservation in the State, the company may, by special resolution, change its name to a name that is reserved in respect of that company under section 43 and, if the Commission so directs, shall so change it within 6 weeks after the date of direction or such longer period as the Commission allows, unless the Ministerial Council, by instrument in writing, annuls the direction, and if the company fails to comply with the direction it is guilty of an offence.

**(4)** Where the name of a company incorporated before the commencement of the *Companies Act*, 1961, pursuant to any corresponding previous law of the State has not been changed since the commencement of that Act, the Commission shall not, except with the approval of the Ministerial Council, exercise its power under sub-section (3) to direct the company to change its name.

**(5)** A change of name of a company pursuant to this Code does not operate—

- (a) to create a new legal entity;
- (b) to prejudice or affect the identity of the body corporate constituted by the company or its continuity as a body corporate;
- (c) to affect the property, or the rights or obligations, of the company; or
- (d) to render defective any legal proceedings by or against the company, and any legal proceedings that could have been continued or commenced by or against the company by its former name may be continued or commenced by or against it by its new name.

**(6)** Notwithstanding anything in paragraph 38 (1) (a), a name of a company shall not be taken, for the purposes of sub-section (3), not to be available for reservation in the State by reason only that the name is registered under this Division in respect of that company.

#### **Omission of “Limited” in names of charitable and other companies**

**66. (1)** Where it is proved to the satisfaction of the Commission that a proposed limited company—

- (a) is being formed for the purpose of providing recreation or amusement or promoting commerce, industry, art, science, religion, charity, patriotism, pension or superannuation schemes or any other object useful to the community;

- (b) will apply its profits (if any) or other income in promoting its objects; and
- (c) will prohibit the payment of any dividend to its members,

the Commission may (after requiring, if it thinks fit, the proposal to be advertised in such manner as it directs either generally or in a particular case), by licence, authorize the proposed company to be registered as a company with limited liability without the addition of the word "Limited" to its name, and the company may be registered accordingly.

**(2)** Where it is proved to the satisfaction of the Commission—

- (a) that the objects of a limited company are restricted to those specified in sub-section (1) and to objects incidental or conducive to those so specified; and
- (b) that by its memorandum or articles the company is required to apply its profits (if any) or other income in promoting its objects and is prohibited from paying any dividend to its members,

the Commission may, by licence, authorize the company to change its name to a name that does not contain the word "Limited", being a name approved by the Commission.

**(3)** A licence under this section may be issued on such conditions as the Commission thinks fit, and any conditions on which a licence is so issued are binding on the company and shall, if the Commission so directs, be inserted in the memorandum or articles of the company and the memorandum or articles may, by special resolution, be altered to give effect to any such direction.

**(4)** A company in respect of which a licence under this section is in force is exempt from complying with the provisions of this Code relating to the use of the word "Limited" as part of its name.

**(5)** The Commission may, in a licence issued to a company under this section or by notice in writing served on a company in respect of which a licence under this section is in force, exempt the company from complying with such of the provisions of this Code as are specified in the licence or notice relating to the lodging of annual returns and of returns of particulars of directors, principal executive officers and secretaries.

(7) The Commission may, by notice in writing served on a company, revoke any exemption held by the company from the provisions of this Code relating to the lodging of annual returns and of returns of particulars of directors, principal executive officers and secretaries.

(8) Subject to sub-section (9), a licence under this section may at any time be revoked by the Commission and, where a licence is so revoked—

- (a) the name of the company shall be deemed to be altered by the addition of the word "Limited" at the end of the name; and
- (b) the company ceases to enjoy the exemptions and privileges granted, by reason of the licence, by or under this Code.

(9) Before a licence is revoked, the Commission shall give to the company notice in writing of the intention of the Commission to revoke the licence and shall afford the company an opportunity to appear at a hearing before the Commission and make submissions and give evidence to the Commission in relation to the matter.

(10) Where a licence issued under this section is revoked, a provision of the memorandum of the company that was inserted in compliance with a condition on which the licence was issued may be altered in the same manner as a provision of that memorandum with respect to the objects of the company may be altered, and section 73 applies to a proposal for such an alteration accordingly.

(11) Where a licence under this section is in force in respect of a company, an alteration of the memorandum or articles of the company, not being an alteration consisting solely of a change of the name of the company, does not have any effect unless—

- (a) a statement setting out the text of the alteration or proposed alteration has been lodged with the Commission and the alteration or proposed alteration has been approved by the Commission; and
- (b) the alteration is made in accordance with the articles of the company and the provisions of this Code.

(12) Where an alteration or proposed alteration of the memorandum or articles of a company, not being an alteration consisting solely of a change of the name of the company, is approved as mentioned in paragraph (11) (a) and the alteration is made as mentioned in paragraph (11) (b), the alteration has effect notwithstanding a failure to obtain any consent or approval

required to be obtained by virtue of a provision contained in the licence referred to in sub-section (11) or a provision inserted in the memorandum or articles of the company for the purposes of sub-section (3) or the corresponding provision of a previous law of the State.

*Division 3—Powers and Status***Powers**

**67.** The powers of a company include—

- (a) power to make donations for patriotic or for charitable purposes;
- (b) power to transact any lawful business in aid of the Commonwealth in the prosecution of any war in which the Commonwealth is engaged; and
- (c) unless expressly excluded or modified by the memorandum or articles, the powers set out in Schedule 2.

**Ultra vires transactions**

**68. (1)** No act of a company (including the entering into of an agreement by the company), and no conveyance or transfer of property to or by a company, is invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance or transfer.

**(2)** Any such lack of capacity or power may be asserted or relied upon only in—

- (a) proceedings against the company by a member of the company or, where the company has issued debentures secured by a floating charge over all or any of the property of the company, by the holder of any of those debentures or the trustees for the holders of those debentures to restrain the doing of any act or acts or the conveyance or transfer of any property to or by the company;
- (b) proceedings by the company, or by a member of the company, against the present or former officers of the company; or
- (c) an application by the Commission to wind up the company.

**(3)** If the unauthorized act, conveyance or transfer sought to be restrained in any proceedings under paragraph (2) (a) is being, or is to be, performed or made pursuant to any contract to which the company is a party, the Court may, if all the parties to the contract are parties to the proceedings and if the Court deems it to be just and equitable, set aside and restrain the performance of the contract and may allow to the company or to the other parties to the contract (as the case requires) compensation for the loss or damage sustained by either of them that may result from the action of the Court in setting aside and restraining the performance of the contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the Court as a loss or damage sustained.

**Change of status****69. (1)** Subject to this section—

- (a) an unlimited company may convert to a limited company if it was not, within the previous 3 years, a limited company that became an unlimited company pursuant to paragraph (e) or any corresponding provision of a previous law of the State;
- (b) a no liability company all the issued shares in which are fully paid up may convert to a company limited by shares;
- (c) a company limited by shares may convert to a company limited both by shares and by guarantee;
- (d) a company limited by guarantee may convert to a company limited both by shares and by guarantee; and
- (e) a limited company may convert to an unlimited company.

**(2)** Where a company applies in writing to the Commission for a change of status as provided by sub-section (1) and, subject to sub-sections 73 (11), (12) and (13) as applied by sub-section (7) of this section, lodges with the application the prescribed documents relating to the application, the Commission shall issue to the company a certificate of incorporation—

- (a) appropriate to the change of status applied for; and

- (b) specifying, in addition to the particulars prescribed in respect of a certificate of incorporation of a company of that status, that the certificate is issued pursuant to this section,

and, upon the issue of such a certificate of incorporation, the company is a company having the status specified in the certificate.

(3) Where the status of a company is changed pursuant to this section, notice of the change of status shall be published by the company in such manner (if any) as the Commission directs.

(4) In sub-section (2), "prescribed documents", in relation to an application referred to in that sub-section, means—

- (a) a printed copy of a special resolution of the company—  
(i) resolving to change the status of the company and specifying the status sought;  
(ii) making such alterations to the memorandum of the company as are necessary to bring the memorandum into conformity with the requirements of this Code relating to the memorandum of a company of the status sought;  
(iii) in the case of a company that has registered articles—making such alterations and additions (if any) to the articles as are necessary to bring the articles into conformity with the requirements of this Code relating to the articles of a company of the status sought;  
(iv) in the case of a company that has no registered articles—adopting such articles (if any) as are required by this Code to be registered in respect of a company of the status sought or are proposed by the company as the registered articles of the company upon the change in its status; and  
(v) changing the name of the company to a name by which it could be registered if it were a company of the status sought;
- (b) where, by a special resolution referred to in paragraph (a), the memorandum of the company is altered or the articles of the company are altered or added to, or articles are adopted by the company—a printed copy of the memorandum as altered, the articles as altered or added to, or the articles adopted, as the case may be; and

- (c) in the case of an application by a limited company to convert to an unlimited company—
- (i) the prescribed form of assent to the application subscribed by or on behalf of all the members of the company; and
  - (ii) a statement in writing by a director or secretary of the company verifying that the persons by whom or on whose behalf such a form of assent is subscribed constitute the whole membership of the company and, if a member has not subscribed the form himself, that the director or secretary making the statement has taken all reasonable steps to satisfy himself that each person who subscribed the form was lawfully empowered so to do.

(5) The provisions of sub-sections 72 (2) to (10), inclusive, do not apply to or in relation to an application under this section or to any prescribed documents in relation to the application.

(6) A special resolution passed for the purposes of an application under this section takes effect only upon the issue under this section of a certificate of incorporation of the company to which the resolution relates.

(7) With such modifications as are necessary, sub-sections 73 (6) to (13), inclusive, apply to and in respect of the proposal, passing and lodging, and the cancellation or confirmation by the Court, of a special resolution relating to a change of status as if it were a special resolution under section 73.

(8) A change in the status of a company pursuant to this section does not operate—

- (a) to create a new legal entity;
- (b) to prejudice or affect the identity of the body corporate constituted by the company or its continuity as a body corporate;
- (c) to affect the property, or the rights or obligations, of the company; or
- (d) to render defective any legal proceedings by or against the company,

and any legal proceedings that could have been continued or commenced by or against the company before the change in its status may, notwithstanding the change in its status, be continued or commenced by or against it after the change in its status.

**Change from public to proprietary company or from  
proprietary to public company**

**70. (1)** A public company having a share capital (other than a no liability company) may convert to a proprietary company by lodging with the Commission a copy of a special resolution—

- (a) determining to convert to a proprietary company and specifying an appropriate alteration to its name; and
- (b) altering the provisions of its memorandum or articles so far as is necessary to impose the restrictions, limitations and prohibitions referred to in sub-section 34 (1).

**(2)** A proprietary company may, subject to anything contained in its memorandum or articles, convert to a public company by lodging with the Commission a copy of a special resolution determining to convert to a public company and specifying an appropriate alteration to its name, and thereupon the restrictions, limitations and prohibitions referred to in sub-section 34 (1) as included in or deemed to be included in the memorandum or articles of the company cease to form part of the memorandum or articles.

**(3)** On compliance by a company with the provisions of sub-section (1) or (2) and on the issue of a certificate of incorporation of the company altered accordingly, the company is a proprietary company or a public company, as the case requires.

**(4)** With such modifications as are necessary, sub-sections 73 (6) to (13), inclusive, apply in respect of the proposal, passing and lodging, and the cancellation or confirmation by the Court, of a special resolution relating to the conversion of a company pursuant to sub-section (1) or (2) of this section as if it were a special resolution under section 73.

**(5)** A conversion of a company pursuant to sub-section (1) or (2) does not operate—

- (a) to create a new legal entity;
- (b) to prejudice or affect the identity of the body corporate constituted by the company or its continuity as a body corporate;
- (c) to affect the property, or the rights or obligations, of the company; or
- (d) to render defective any legal proceedings by or against the company, and any legal proceedings that could have been continued or commenced by or against the company before the conversion may, notwithstanding the conversion, be continued or commenced by or against it after the conversion.

**Default in complying with requirements as to proprietary companies**

**71. (1)** Where, on the application of the Commission with respect to a proprietary company or of any member or creditor of a proprietary company, the Court is satisfied that default has been made in relation to the company in complying with a prohibition of a kind specified in paragraph 34 (1) (c) or (d) that is included, or is deemed to be included, in the memorandum or articles of the company, the Court may, by order, determine that, on such date as the Court specifies in its order, the company ceased to be a proprietary company.

**(2)** Where—

- (a) default has been made in relation to a proprietary company in complying with a limitation of a kind specified in paragraph 34 (1) (b) that is included, or is deemed to be included, in the memorandum or articles of the company;
- (b) a proprietary company has been convicted of an offence under sub-section (7) of this section;
- (c) the memorandum or articles of a proprietary company have been so altered that they no longer include restrictions, limitations or prohibitions of the kinds specified in sub-section 34 (1); or
- (d) a proprietary company has ceased to have a share capital,

the Commission may, by notice in writing served on the company, determine that, on such date as is specified in the notice, the company ceased to be a proprietary company.

**(3)** Where, under this section, the Court or the Commission determines that a company has ceased to be a proprietary company—

- (a) the company is a public company and shall be deemed to have been a public company on and from the date specified in the order or notice;
- (b) the company shall, on the date so specified, be deemed to have changed its name by the omission from the name of the word "Proprietary" or the abbreviation "Pty.", as the case requires; and
- (c) where an order has been made under sub-section (1)—the company shall, within a period of 14 days after the date of the order, lodge with the Commission an office copy of the order.

(4) Where the Court is satisfied that a default or alteration referred to in sub-section (1) or (2) has occurred but that it was accidental or due to inadvertence or to some other sufficient cause or that on other grounds it is just and equitable to grant relief, the Court may, on such terms and conditions as to the Court seem just and expedient, determine that the company has not ceased to be a proprietary company.

(5) A company that, by virtue of a determination made under this section, has become a public company shall not convert to a proprietary company without the leave of the Court.

(6) If a company fails to comply with paragraph (3) (c), the company and any officer of the company who is in default are each guilty of an offence.

(7) Where any subscription for shares in or debentures of, or any deposit of money with, a proprietary company is arranged by or through a solicitor, broker, agent or any other person (whether an officer of the company or not) who invites the public to make use of his services in arranging investments or holds himself out to the public as being in a position to arrange investments, the company and any person, including any officer of the company, who is a party to the arrangement are each guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(8) Where default is made in relation to a proprietary company in complying with any restriction, limitation or prohibition of a kind specified in sub-section 34 (1) that is included, or deemed to be included, in the memorandum or articles of the company, the company and any officer of the company who is in default are each guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months or both.

(9) An act or transaction is not invalid by reason of the commission of an offence against sub-section (7) or (8).

#### **General provisions as to alteration of memorandum**

**72. (1)** The memorandum of a company may be altered to the extent and in the manner provided by this Code but not otherwise.

**(2)** Subject to any other provision of this Code requiring the lodging with the Commission of any resolution of a company, any order of the Court, or any other document, affecting the memorandum of a company, the company shall, within 14 days after the passing of any such resolution, the making of

any such order or the execution of any such document, lodge with the Commission a copy of the resolution, an office copy of the order or a copy of the document, as the case may be.

(3) Where an alteration or alterations in the memorandum of a company has or have been made (whether before or after the commencement of the *Companies (Application of Laws) Act*, 1981), the company shall, on being required by the Commission to do so, lodge with the Commission a printed copy of the memorandum as altered by the alteration or alterations.

(4) If a company contravenes or fails to comply with sub-section (2) or (3), the company and any officer of the company who is in default are each guilty of an offence.

(5) The Commission shall register every resolution, order or other document lodged with it under this Code that affects the memorandum of a company, and, except in the case of a resolution under section 121, the alteration of the memorandum to which the resolution, order or other document relates shall take effect on, and not before, the registration of the resolution, order or other document.

(6) Where a resolution, order or other document has been registered by the Commission under sub-section (5)—

- (a) in the case of an order—the Commission shall certify the registration of the order; and
- (b) in the case of a resolution or other document—the Commission shall, if so requested by the company, certify the registration of the resolution or document.

(7) A certificate of the Commission as to the registration of an order is conclusive evidence that all the requirements of this Code with respect to the alteration to which the order relates and any confirmation of that alteration have been complied with.

(8) Notice of the registration shall be published in such manner (if any) as the Court or the Commission directs.

(9) The Commission shall, where appropriate, issue a certificate of incorporation in accordance with the alteration made to the memorandum.

(10) The Commission shall keep a copy of a certificate issued under sub-section (9), and sub-sections 31 (2) and (5) apply to that copy as if it were a document lodged with the Commission.

**Alterations of provisions of memorandum**

**73. (1)** Subject to this section, a company may, by special resolution, alter the provisions of its memorandum with respect to the objects or powers of the company.

**(2)** Subject to this section, sub-section 78 (3) and section 320, if a provision of the memorandum of a company could lawfully have been contained in the articles of the company, the company may, unless the memorandum prohibits the alterations of that provision, alter that provision by special resolution.

**(3)** The memorandum of a company may provide that a special resolution altering or adding to a provision contained in the memorandum, being a provision that could lawfully have been contained in the articles of the company, does not have any effect unless and until a further requirement specified in the memorandum has been complied with.

**(4)** Without limiting the generality of sub-section (3), the further requirement referred to in that sub-section may be a requirement—

- (a) that the relevant special resolution be passed by a majority consisting of a greater number of members than is required to constitute the resolution as a special resolution;
- (b) that the consent or approval of a particular person be obtained; or
- (c) that a particular condition be fulfilled.

**(5)** Nothing in sub-section (2) permits the alteration of a provision of the memorandum of a company that relates to rights to which only members included in a particular class of members are entitled.

**(6)** Notice of a general meeting specifying the intention to propose, as a special resolution, a resolution for the alteration of the provisions of the memorandum of a company with respect to the objects or powers of the company shall be given—

- (a) to all members;
- (b) to all trustees for debenture holders; and
- (c) if there are no trustees for, or for a particular class of, debenture holders—to all debenture holders, or all debenture holders of that class, as the case may be, whose names are, at the time of the posting of the notice, known to the company.

(7) The Court may, in the case of any person or class of persons, for such reasons as seem sufficient to the Court, dispense with the notice referred to in sub-section (6).

(8) If an application for the cancellation of an alteration is made to the Court in accordance with this section by—

- (a) in the case of an alteration of a provision or provisions of the memorandum with respect to the objects or powers of a company—the holders of not less than 10% in nominal value of the company's debentures; or
- (b) in the case of any alteration of a provision or provisions of the memorandum—the holders of not less, in the aggregate, than 10% in nominal value of the company's issued share capital or any class of that capital or, if the company is not limited by shares, not less than 10% of the company's members,

the alteration does not have any effect except so far as it is confirmed by the Court.

(9) The application shall be made within 21 days after the date on which the resolution altering the provision or provisions of the memorandum of the company was passed, and may be made, on behalf of the persons entitled to make the application, by such one or more of their number as they appoint in writing for the purpose.

(10) On the application, the Court shall have regard to the rights and interests of the members of the company or of any class of them as well as to the rights and interests of the creditors and may do all or any of the following:

- (a) if the Court thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase (otherwise than by the company or a subsidiary of the company) of the interests of dissentient members;
- (b) give such directions and make such orders as the Court thinks expedient for facilitating or carrying into effect any such arrangement;
- (c) make an order cancelling the alteration or confirming the alteration either wholly or in part and on such terms and conditions as the Court thinks fit.

(11) Notwithstanding any other provision of this Code, a copy of a resolution altering a provision or provisions of the memorandum of a company as provided by sub-section (1) or (2) shall not be lodged with the Commission before the expiration of 21 days after the passing of the resolution or, if an application to the Court has been made, before the application has been determined by the Court, whichever is the later.

(12) If an application has not been made to the Court in accordance with this section, a copy of the resolution shall be lodged with the Commission by the company within 14 days after the expiration of the 21 days referred to in sub-section (11).

(13) If an application has been made to the Court in accordance with this section, a copy of the resolution, together with an office copy of the order of the Court, shall be lodged with the Commission by the company within 14 days after the application has been determined by the Court.

### **Articles of association**

74. (1) There may, in the case of a company limited by shares or a no liability company, and there shall, in the case of a company limited by guarantee or limited both by shares and by guarantee or an unlimited company, be registered with the memorandum, articles signed by the subscribers to the memorandum prescribing regulations for the company.

(2) Articles shall be—

- (a) printed;
- (b) divided into numbered paragraphs; and
- (c) signed by each subscriber to the memorandum in the presence of at least one witness (not being another subscriber).

(3) A witness to a signature to the articles of a subscriber to the memorandum shall attest the signature and add his address.

(4) A reference in sub-section (1) to the signing of the articles of a company shall, in the case of the signing by a person being a body corporate, be construed as including a reference to the affixing in accordance with the constituent documents of the body corporate of the common or official seal of the body corporate to the articles and, where a body corporate signs the articles by so affixing its common or official seal, sub-section (2) does not require a witness to the affixing of that seal.

(5) In the case of an unlimited company that has a share capital, the articles shall state the amount of share capital with which the company proposes to be registered and the division of that share capital into shares of a fixed amount.

**Adoption of Table A or B**

**75. (1)** Articles may—

- (a) in the case of a company other than a no liability company—adopt all or any of the regulations contained in Table A; or
- (b) in the case of a no liability company—adopt all or any of the regulations contained in Table B.

**(2)** In the case of a company limited by shares incorporated after the commencement of the *Companies (Application of Laws) Act*, 1981, if articles are not registered, or if articles are registered then in so far as the articles do not exclude or modify the regulations contained in Table A, those regulations shall, so far as applicable, be the articles of the company in the same manner and to the same extent as if they were contained in registered articles.

**(3)** In the case of a no liability company incorporated after the commencement of the *Companies (Application of Laws) Act*, 1981, if articles are not registered, or if articles are registered then in so far as the articles do not exclude or modify the regulations contained in Table B, those regulations shall, so far as applicable, be the articles of the company in the same manner and to the same extent as if they were contained in registered articles.

**Alteration of articles**

**76. (1)** Subject to this Code, a company may by special resolution alter or add to its articles.

**(2)** The memorandum of a company may provide that a special resolution altering or adding to the articles of the company does not have any effect unless and until a further requirement specified in the memorandum has been complied with.

**(3)** Without limiting the generality of sub-section (2), the further requirement referred to in that sub-section may be a requirement—

- (a) that the relevant special resolution be passed by a majority consisting of a greater number of members than is required to constitute the resolution as a special resolution;
- (b) that the consent or approval of a particular person be obtained; or
- (c) that a particular condition be fulfilled.

(4) Subject to this Code, an alteration or addition so made in the articles is, on and from the date of the special resolution or such later date as is specified in the resolution, as valid as if originally contained in the articles and is subject in like manner to alteration by special resolution.

(5) Subject to this section, a company has the power, and shall be deemed always to have had the power, to amend its articles—

- (a) in the case of a company other than a no liability company—by the adoption of all or any of the regulations contained in Table A; or
- (b) in the case of a no liability company—by the adoption of all or any of the regulations contained in Table B,

by reference only to the regulations in the Table or to the numbers of particular regulations contained in the Table, without being required in the special resolution effecting the amendment to set out the text of the regulations so adopted.

#### **Memorandum and articles of companies limited by guarantee**

77. (1) In the case of a company limited by guarantee and not having a share capital and registered on or after 1 January 1937, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member is void.

(2) For the purposes of the provisions of this Code relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles or in any resolution of a company limited by guarantee and registered on or after 1 January 1937 purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital notwithstanding that the nominal amount or number of the shares or interests is not specified by the memorandum or articles or the resolution, as the case may be.

#### **Effect of memorandum and articles**

78. (1) Subject to this Code, the memorandum and articles, when registered, bind the company and the members of the company to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

(2) Subject to the provisions of this Code relating to no liability companies, all money payable by a member to the company under the memorandum or articles is a debt due by him to the company, and is of the nature of a specialty debt.

(3) Notwithstanding anything in the memorandum or articles of a company, no member of the company, unless either before or after the alteration is made he agrees in writing to be bound by the alteration concerned, is bound by an alteration made in the memorandum or articles after the date on which he became a member so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company.

#### **Copies of memorandum and articles**

79. (1) A company shall, on being so required by a member, send to him a copy of the memorandum and of the articles (if any) of the company—

- (a) if the company requires the payment of an amount not exceeding the prescribed amount—within 21 days after the payment is received by the company or within such longer period as the Commission approves; or
- (b) in a case to which paragraph (a) does not apply—within 21 days after the request was made or within such longer period as the Commission approves.

(2) Where an alteration is made in the memorandum or articles of a company, a copy of the memorandum or articles shall not be issued by the company after the date of alteration unless—

- (a) the copy is in accordance with the memorandum or articles as altered by the alteration; or
- (b) a printed copy of the order or resolution making the alteration is annexed to the copy of the memorandum or articles and the particular clauses or articles affected are indicated in ink.

(3) Where an alteration or alterations in the articles of a company has or have been made (whether before or after the commencement of the *Companies (Application of Laws) Act, 1981*), the company shall, on being required by the Commission to do so, lodge with the Commission a printed copy of the articles as altered by the alteration or alterations.

(4) Where an agreement a copy of which is required to be lodged with the Commission under section 251 affects the memorandum or articles of a company, a copy of the memorandum or articles shall not be issued, and a copy of the articles shall not be lodged with the Commission, by the company after the agreement is entered into, unless a copy of the agreement is annexed to the copy of the memorandum or articles.

(5) If a company contravenes or fails to comply with this section, the company and any officer of the company who is in default are each guilty of an offence.

**Confirmation of contracts and authentication and execution of documents**

**80.** (1) In so far as the formalities of making, varying or discharging a contract are concerned, a person acting under the express or implied authority of a company may make, vary or discharge a contract in the name of or on behalf of the company in the same manner as if that contract were made, varied or discharged by a natural person.

(2) The making, variation or discharging of a contract in accordance with sub-section (1) is effectual in law and binds the company and other parties to the contract.

(3) A contract or other document executed, or purporting to have been executed, whether before or after the commencement of the *Companies (Application of Laws) Act*, 1981, under the common seal of a company is not invalid by reason only that a person attesting the affixing of the common seal was in any way, whether directly or indirectly, interested in that contract or other document or in the matter to which that contract or other document relates.

(4) This section does not prevent a company from making, varying or discharging a contract under its common seal.

(5) This section does not apply to the making, variation or discharging of a contract before the commencement of the *Companies (Application of Laws) Act*, 1981, but shall apply whether the company gives its authority before or after the commencement of the *Companies (Application of Laws) Act*, 1981.

(6) This section does not affect the operation of a law that requires some consent or sanction to be obtained, or some procedure to be complied with, in relation to the making, variation or discharge of a contract.

(7) A document or proceeding requiring authentication by a company may be authenticated by the signature of an officer of the company and need not be authenticated under the common seal of the company.

(8) A company may, by writing under its common seal, empower a person, either generally or in respect of a specified matter or specified matters, as its agent or attorney to execute deeds on its behalf, and a deed signed by such an agent or attorney on behalf of the company and under his seal or, subject to sub-sections (10) and (11), under the appropriate official seal of the company, binds the company and has the same effect as if it were under the common seal of the company.

(9) The authority of an agent or attorney empowered pursuant to sub-section (8), as between the company and a person dealing with him, continues during the period (if any) mentioned in the instrument conferring the authority or, if no period is so mentioned, until notice of the revocation or termination of his authority has been given to the person dealing with him.

(10) A company the objects of which require or comprise the transaction of business outside the State may, if authorized by its articles, have for use outside the State in place of its common seal one or more official seals, each of which shall be a facsimile of the common seal of the company with the addition on its face of the name of every place where it is to be used.

(11) The person affixing such an official seal shall, in writing under his hand, certify on the instrument to which it is affixed the date on which and the place at which it is affixed.

(12) A document sealed with such an official seal shall be deemed to be sealed with the common seal of the company.

#### **Ratification of contracts made before formation of company**

**81. (1)** In this section—

- (a) a reference to a non-existent company purporting to enter into a contract shall be construed as a reference to—
  - (i) a person executing a contract in the name of a company, where no such company exists; or
  - (ii) a person purporting to enter into a contract as agent or trustee for a proposed company;
- (b) a reference to a person who purports to execute a contract on behalf of a non-existent company shall be construed as a reference to a person who executes a contract or purports to enter into a contract as mentioned in sub-paragraph (a) (i) or (ii);

- (c) a reference, in relation to the purported entry into a contract by a non-existent company, to the formation of the company shall be construed as a reference to—
  - (i) where a person has executed a contract in the name of a company and no such company exists—the formation of a company that, having regard to all the circumstances, is reasonably identifiable with the company in the name of which the person executed the contract; or
  - (ii) where a person has purported to enter into a contract as agent or trustee for a proposed company—the formation of a company that, having regard to all the circumstances, is reasonably identifiable with the proposed company.

**(2)** Where—

- (a) a non-existent company purports to enter into a contract; and
- (b) the company is formed within a reasonable time after the contract is purported to be entered into,

the company may, within a reasonable time after it is formed, ratify the contract.

**(3)** Where a company ratifies a contract as provided by sub-section (2), the company is bound by, and entitled to the benefit of, that contract as if the company had been formed before the contract was entered into and had been a party to that contract.

**(4)** Where a non-existent company purports to enter into a contract and—

- (a) the company is not formed within a reasonable time after the contract is purported to be entered into; or
- (b) the company is formed within such a reasonable time but does not ratify the contract within a reasonable time after the company is formed,

the other party or each of the other parties to the contract may, subject to sub-sections (6) and (9), recover from the person or any one or more of the persons who purported to execute the contract on behalf of the non-existent company an amount of damages equivalent to the amount of damages for which that party could have obtained a judgment against the company if—

- (c) where the company has not been formed as mentioned in paragraph (a)—the company had been formed, and had ratified the contract as provided by sub-section (2); or

- (d) where the company has been formed as mentioned in paragraph (b)—the company had ratified the contract as provided by subsection (2),

**and** the contract had been discharged by reason of a breach of the contract constituted by the refusal or failure of the company to perform any obligations under the contract.

**(5) Where—**

- (a) proceedings are brought to recover damages under sub-section (4) in relation to a contract purported to be entered into by a non-existent company; and

- (b) the company has been formed,

**the court in which the proceedings are brought may, if it thinks it just and equitable to do so, make either or both of the following orders:**

- (c) an order directing the company to transfer or pay to any party to the contract who is named in the order, any property, or an amount not exceeding the value of any benefit, received by the company as a result of the contract;

- (d) an order that the company pay the whole or a specified portion of any damages that, in those proceedings, the defendant has been, or is, found liable to pay.

**(6) Where, in proceedings to recover damages under sub-section (4) in relation to a contract purported to be entered into by a non-existent company, the court in which the proceedings are brought makes an order under paragraph (5) (c), the court may refuse to award any damages in the proceedings or may award an amount of damages that is less than the amount that the court would have awarded if the order had not been made.**

**(7) Where—**

- (a) a non-existent company purports to enter into a contract;

- (b) the company is formed, and ratifies the contract as provided by subsection (2);

- (c) the contract is discharged by a breach of the contract constituted by a refusal or failure of the company to perform all or any of its obligations under the contract; and

- (d) the other party or any one or more of the other parties to the contract brings or bring proceedings against the company for damages for breach of the contract,

the court in which the proceedings are brought may, subject to sub-section (9), if it thinks it just and equitable to do so, order the person or any one or more of the persons who purported to execute the contract on behalf of the company to pay to the person or persons by whom the proceedings are brought the whole or a specified portion of any damages that the company has been, or is, found liable to pay to the person or persons by whom the proceedings are brought.

(8) Where a person purports, whether alone or together with another person or other persons, to execute a contract on behalf of a non-existent company, the other party to the contract, or any of the other parties to the contract, may, by writing signed by that party, consent to the first-mentioned person being exempted from any liability in relation to the contract.

(9) Where a person has, as provided by sub-section (8), consented to another person being exempted from liability in relation to a contract that the other person purported to execute on behalf of a non-existent company—

- (a) notwithstanding sub-section (4), that first-mentioned person is not entitled to recover damages from that other person in relation to that contract; and
- (b) a court shall not, in proceedings under sub-section (7), order that other person to pay to the first-mentioned person any damages, or any proportion of the damages, that the company has been, or may be, found liable to pay to that first-mentioned person.

(10) If—

- (a) a non-existent company purports to enter into a contract;
- (b) the company is formed; and
- (c) the company and the other party or other parties to the contract enter into a contract in substitution for the first-mentioned contract,

any liabilities to which the person who purported to execute the first-mentioned contract on behalf of the company is subject under this section in relation to the first-mentioned contract (including liabilities under an order made by a court under this section) are, by force of this sub-section, deemed to be discharged.

**(11)** Any rights or liabilities of a person under this section (including rights or liabilities under an order made by a court under this section) in relation to a contract are in substitution for any rights that the person would have, or any liabilities to which the person would be subject, as the case may be, apart from this section, in relation to the contract.

**(12) Where—**

- (a) a person purports to enter into a contract as trustee for a proposed company; and
- (b) the company is formed within a reasonable time after the person purports to enter into the contract but does not ratify the contract within a reasonable time after the company is formed,

then, notwithstanding any rule of law or equity, the trustee does not have any right of indemnity against the company in respect of the contract.

**(13)** For the purposes of this section, a contract may be ratified by a company in the same manner as a contract may be made by a company under section 80 and the provisions of section 80 have effect as if—

- (a) the references in that section to making a contract were references to ratifying a contract; and
- (b) the reference in sub-section (3) of that section to a contract executed, or purporting to have been executed, under the common seal of a company were a reference to a contract ratified, or purporting to have been ratified, under the common seal of a company.

**Prohibition of carrying on business with fewer than statutory minimum number of members**

**82. (1)** If, at any time, the number of members of a company (counting joint holders of shares as one person) is reduced—

- (a) in the case of a proprietary company—below 2; or
- (b) in the case of any other company—below 5,

and the company carries on business for more than 6 months while the number is so reduced, every person who, at any time when the company so carries on business after those 6 months, is a member of the company and is aware that the company is carrying on business with fewer than 2 or 5 members, as the case may be—

- (c) is severally liable for the payment of any debt of the company contracted at a time when—
  - (i) the company so carries on business after those 6 months; and
  - (ii) he is a member,and may be severally sued for payment of that debt; and
- (d) is guilty of an offence.

**(2)** Sub-section (1) does not apply in relation to a company the whole of the issued shares of which are held by a holding company that is a company within the meaning of this Code or of the corresponding law of a participating State or a participating Territory.

#### *Division 4—Transfer of Incorporation*

##### **Certificate authorizing application for transfer of incorporation**

**83. (1)** A company may apply to the Commission for a certificate authorizing the company to make an application for registration as a company under the corresponding law of a participating State or participating Territory.

**(2)** An application under sub-section (1)—

- (a) shall be in the prescribed form; and
- (b) shall be accompanied by—

- (i) a declaration in writing signed by the directors of the company or, in the case of a company having more than 2 directors, a majority of the directors, to the effect that they have made an inquiry into the affairs of the company and that at a meeting of directors have formed the opinion that the company will be able to pay its debts as they fall due; and
- (ii) a statement of affairs of the company showing, in the prescribed form, the assets and liabilities of the company made up to the latest practicable date before the making of the application.

**(3)** Where a company applies, under sub-section (1), for a certificate authorizing the company to make an application for registration as a company under the corresponding law of a participating State or participating Territory, the Commission shall issue the certificate if—

- (a) the company has passed a special resolution approving the application for the certificate;
- (b) the company has given to its creditors, in a manner approved by the Commission, notice of its intention to apply for such a certificate;
- (c) the name of the company is reserved under a provision of a law of that State or Territory that corresponds with section 52;
- (d) the Commission is not aware of any failure of the company to comply with any requirement of this Code that is applicable to it;
- (e) the Commission is not aware of any other reason why the certificate should not be granted; and
- (f) the Minister has consented to the issuing of the certificate, but otherwise the Commission shall refuse to issue the certificate.

**(4)** A certificate may be issued under sub-section (3) subject to such conditions as are specified in the certificate.

**(5)** A company is not entitled to make an application under sub-section (1) if—

- (a) the company is in the course of being wound up or an application to wind up the company has been filed and has not been dealt with;
- (b) a receiver, or a receiver and manager, has been appointed, and is acting, in respect of the property or part of the property of the company;
- (c) the company is under official management; or
- (d) the company has entered into a compromise or arrangement with another person or other persons and the administration of the compromise or arrangement has not been concluded or an application has been made to the Court for the approval of such a compromise or arrangement and has not been dealt with.

**(6)** With such modifications as are necessary, sub-sections 73 (6) to (13), inclusive, apply to and in respect of the proposal, passing and lodging, and the cancellation or confirmation by the Court, of a special resolution relating to an application for a certificate under this section as if it were a special resolution under section 73.

**Application by recognized company for registration under Division**

**84.** (1) Subject to sub-section (3), a recognized company may apply to the Commission to be registered as a company under this Code.

(2) An application by a recognized company under sub-section (1)—

- (a) shall be in the prescribed form;
- (b) shall be accompanied by—

- (i) a certificate issued not earlier than 1 month before the date on which the application is lodged to that recognized company under the provision of the law of the State or Territory in which the recognized company was incorporated that corresponds with sub-section 83 (3);
- (ia) notice in the prescribed form of the address of the proposed registered office of the recognized company in the State; and
- (ii) a certified copy of each of such documents as are specified by the Commission; and

(c) shall be lodged with the Commission.

(3) A recognized company is not entitled to make an application under sub-section (1) if—

- (a) the recognized company is in the course of being wound up or an application to wind up the recognized company has been lodged and has not been dealt with;
- (b) a receiver, or a receiver and manager, has been appointed, and is acting, in respect of the property or part of the property of the recognized company;
- (c) the recognized company is under official management; or
- (d) the recognized company has entered into a compromise or arrangement with another person or other persons and the administration of the compromise or arrangement has not been concluded or an application has been made to a court for the approval of such a compromise or arrangement and has not been dealt with.

**Application by foreign company for registration under Division**

**85.** (1) Subject to sub-section (2), a corporation that was incorporated or formed—

- (a) in a State other than a participating State;

- (b) in a Territory other than a participating Territory; or
- (c) outside Australia and the external Territories,

may apply to the Commission to be registered under this Code as a company of one of the following classes:

- (d) a company limited by shares;
- (e) a company limited by guarantee;
- (f) a company limited both by shares and by guarantee;
- (g) an unlimited company;
- (h) in the case of a mining company—a no liability company.

**(2)** A corporation is not entitled to make an application under sub-section (1) if—

- (a) the corporation is in the course of being wound up or an application to wind up the corporation has been lodged and has not been dealt with;
- (b) a receiver, or a receiver and manager, has been appointed, and is acting, in respect of the property or part of the property of the corporation;
- (c) the corporation is under official management; or
- (d) the corporation has entered into a compromise or arrangement with another person or other persons and the administration of the compromise or arrangement has not been concluded or an application has been made to a court for the approval of such a compromise or arrangement and has not been dealt with.

**(3)** The Commission shall not grant an application by a corporation under sub-section (1) for registration as a company under this Code unless—

- (a) under the law for the time being in force in the place where the corporation was incorporated or formed—
  - (i) the transfer of the incorporation of the corporation is authorized;
  - (ii) the corporation is of a class that is the same or substantially the same as one of the classes of companies referred to in sub-section (1);
  - (iii) the constituent documents of the corporation specify the name and objects of the corporation;

- (iv) where the liability of the members of the corporation is limited—the extent to which, and the manner in which, that liability is limited is defined in the constituent documents of the corporation; and
- (v) where the corporation has a share capital and the liability of its members is limited—its capital is of a fixed amount and is divided into shares of a fixed amount;
- (b) the corporation has complied with the regulations (if any) of the law of the place where it was incorporated or formed that relate to the transfer of its incorporation;
- (c) where the law of the place where the corporation was incorporated or formed does not require the members of the corporation, or a specified proportion of those members, to consent to the transfer of the incorporation of the corporation—not less than three-quarters of such members of the corporation as, being entitled to do so, vote in person or, where proxies are allowed, by proxy, consent to the transfer of the incorporation of the corporation at a meeting of which not less than 21 days' notice specifying the intention of the corporation to apply for such a transfer is given; and
- (d) the name of the corporation is reserved in the State under section 55.

**(4)** An application by a corporation under sub-section (1) shall be in the prescribed form, shall be lodged with the Commission and shall be accompanied by—

- (a) a certified copy of the certificate of incorporation or registration of the corporation in the place of its incorporation or a document having the same effect;
- (b) evidence acceptable to the Commission that the corporation is not, by reason of sub-section (2), disqualified from making the application;
- (c) evidence acceptable to the Commission that the requirements of paragraphs (3) (a), (b) and (c) have been satisfied;
- (d) a certified printed copy of the constituent document or of each of the constituent documents of the corporation;
- (e) in the case of a corporation applying to be registered as a company having a share capital, a statement specifying—
  - (i) the nominal share capital of the corporation and the number and classes of shares into which the share capital is divided;
  - (ii) the number of shares taken up and the amount paid on each share; and

- (iii) subject to sub-section (6), the full name, or the surname and at least one Christian or given name and other initials, and the address, of each of the shareholders and the number and class of shares held by each person named;
- (f) in relation to each existing charge on property of the corporation that would be a registrable charge within the meaning of Division 9 of Part IV if the corporation were a company as defined in sub-section 5 (1), the documents required to be lodged by sub-section 201 (3);
- (fa) notice in the prescribed form of the address of the proposed registered office of the corporation in the State; and
- (g) such other documents or information as the Commission requires and specifies by notice in writing to the corporation.

**(5)** Where a document required by sub-section (4) to be lodged with the Commission has previously been lodged with the Commission pursuant to Division 5 of Part XIII, the Commission may, for the purposes of this section, dispense with the requirement that the document be lodged with the Commission.

**(6)** Where a corporation—

- (a) has more than 500 members;
- (b) satisfies the Commission that it will keep its principal register at a place in the State within 25 kilometres of the office of the State Commission; and
- (c) satisfies the Commission that it will provide reasonable accommodation and facilities for persons to inspect and take copies of its list of members and its particulars of shares transferred,

the corporation is not required to comply with sub-paragraph (4) (e) (iii).

### **Registration of corporations as companies**

**86. (1)** Where a corporation applies to the Commission under section 84 to be registered as a company—

- (a) if the Commission is satisfied that the corporation—
  - (i) has complied with the requirements of that section and with any conditions to which the certificate issued to the corporation under the provision of the law of a participating State or a participating Territory that corresponds with section 83 is subject; and

- (ii) is not disqualified by reason of sub-section 84 (3) from making the application,  
the Commission shall grant the application and register the corporation as a company; or  
(b) if the Commission is not so satisfied—the Commission shall refuse the application.

**(2)** Where a corporation applies to the Commission under section 85 to be registered as a company—

- (a) if the Commission is satisfied that the corporation has complied with the requirements of that section and is not disqualified by reason of that section from making the application or from being granted registration as a company—the Commission shall grant the application and register the corporation as a company; or  
(b) if the Commission is not so satisfied—the Commission shall refuse the application.

**(3)** Where the Commission grants an application by a corporation under section 84 or 85—

- (a) if, in the case of a corporation incorporated in a participating State or participating Territory, the corporation was incorporated as a proprietary company or, in any other case, the constituent documents of the corporation comply with the requirements of sub-section 34 (1)—the Commission shall register the corporation as a proprietary company; or  
(b) if paragraph (a) does not apply—the Commission shall register the company as a public company.

**(4)** Where the Commission grants an application by a corporation under section 84 or 85, the Commission shall register the corporation as a company of one of the following classes:

- (a) a company limited by shares;  
(b) a company limited by guarantee;  
(c) a company limited both by shares and by guarantee;  
(d) an unlimited company; or  
(e) a no liability company,

being whichever of those classes is—

- (f) in the case of a corporation that was incorporated under the law of a participating State or participating Territory—equivalent to the class in which the corporation is included under the law of that State or Territory; or
- (g) in the case of any other corporation—the same or substantially the same as the class in which that corporation is included under the law of the place where the corporation was incorporated.

**(5)** Where the Commission grants an application by a corporation under this Division for registration as a company, the Commission shall cause to be issued to the corporation a certificate under the common seal of the Commission—

- (a) stating that the corporation has been registered under this Division as a company and specifying the date of commencement of the registration;
- (b) stating that that company is—
  - (i) a company limited by shares;
  - (ii) a company limited by guarantee;
  - (iii) a company limited both by shares and by guarantee;
  - (iv) an unlimited company; or
  - (v) a no liability company,as the case requires; and
- (c) stating that that company is a proprietary company or a public company, as the case requires.

**(6)** The Commission shall cause a register to be kept for the purposes of this section and, where a corporation is registered under this Division as a company—

- (a) shall cause to be entered in the register—
  - (i) the name of the corporation; and
  - (ii) the date of commencement of the registration of the corporation as a company; and
- (b) shall cause to be incorporated with the register—
  - (i) in the case of a corporation registered as a company under sub-section (1)—the application lodged by the corporation under sub-section 84 (2) and the documents that, by virtue of paragraph 84 (2) (b), accompanied that application; and

- (ii) in the case of a corporation registered as a company under sub-section (2)—the application lodged by the corporation under sub-section 85 (4) and the documents that, by virtue of paragraphs 85 (4) (a) to (g), inclusive, accompanied that application.

(7) Where a corporation is registered under this Division as a company and, immediately before the corporation was so registered, it was registered pursuant to Division 5 of Part XIII, the Commission shall, upon the registration of the corporation as a company, remove the name of the corporation from the register kept pursuant to that Division and may retain such of the documents registered pursuant to that Division that relate to the corporation as the Commission thinks fit.

#### **Effect of registration**

**87.** (1) Where, pursuant to section 86, the Commission registers a corporation as a company, then, from the commencement of the day specified in the certificate issued under sub-section 86 (5) as the date of commencement of the registration of that corporation as a company—

- (a) the corporation shall be deemed to be a company duly incorporated under this Code;
- (b) subject to the succeeding provisions of this Division, the provisions of this Code extend and apply to the corporation, and to persons and matters associated with the corporation, as if the corporation were a company duly incorporated under this Code;
- (c) the corporation—
  - (i) is capable of performing all the functions of a company duly incorporated under this Code;
  - (ii) is capable of suing and being sued;
  - (iii) has perpetual succession and shall have a common seal; and
  - (iv) has power to acquire, hold and dispose of property; and
- (d) the members of the corporation have such liability to contribute to the property of the corporation in the event of its being wound up under the provisions of this Code as is provided by the provisions of this Code as they apply to the corporation by virtue of the succeeding provisions of this Division.

**(2)** Sub-section (1) does not operate—

- (a) to create a new legal entity;
- (b) to prejudice or affect the identity of the body corporate constituted by the corporation or its continuity as a body corporate;
- (c) to affect the property of the corporation;
- (d) to affect any appointment made, resolution passed or any other act or thing done in relation to the corporation pursuant to a power conferred by any of the constituent documents of the corporation or by the law of the place where the corporation was incorporated; or
- (e) except to the extent provided by this Division, to affect any rights, powers, authorities, duties, functions, liabilities or obligations of the corporation or any other person.

**(3)** Sub-section (1) does not operate to render defective any legal proceedings by or against the corporation, and any legal proceedings that could have been continued or commenced by or against the corporation before its registration as a company may, notwithstanding the registration, be continued or commenced by or against the corporation after its registration.

**(4)** Where, pursuant to sub-section 86 (2), the Commission registers a corporation as a company—

- (a) the provisions of the constituent documents of the corporation that would, if the corporation had been incorporated under this Code, have been required by this Code to be included in its memorandum of association shall be deemed to be the registered memorandum of association of the company; and
- (b) the provisions of the constituent documents of the corporation that do not, by virtue of paragraph (a), constitute the registered memorandum of association shall be deemed to be the registered articles of association of the company,

and those provisions of the constituent documents, to the extent to which they so constitute the registered memorandum of association or the registered articles of association of the company, bind the company and its members accordingly.

**(5)** A reference in sub-section (4) to the constituent documents of a corporation shall, if any of those documents is or are in a language other than English, be construed as a reference to the translation of the document or documents concerned into the English language that was lodged with the

application for registration under this Division irrespective of the correctness of the translation, but nothing in this sub-section affects any liabilities of the corporation or its members that existed immediately before the registration of the corporation as a company.

**Alterations to constituent documents of foreign companies**

**88. (1)** A corporation that is registered under sub-section 86 (2) as a company of a particular class shall, within 90 days after the date of commencement of registration of the corporation, by special resolution, make such alterations (if any) to its constituent documents as—

- (a) are necessary to express in Australian currency any amounts of money specified in the constituent documents;
- (b) are necessary to ensure that the constituent documents comply with the requirements of this Code relating to constituent documents of companies of that class; and
- (c) are necessary or expedient to give effect to the provisions of this Division, or are incidental to giving effect to those provisions.

**(2)** Where a corporation is required by paragraph (1) (a) to alter its constituent documents to express in Australian currency amounts of money specified in those documents, the alterations shall all be made on the basis of the same rate, being a rate fixed by resolution of the corporation before the passing of the special resolution referred to in sub-section (1), and the resolution fixing that rate, when passed pursuant to this sub-section, shall, for the purposes of section 251, be deemed to be a special resolution.

**(3)** Where a corporation is required by sub-section (1) to alter its constituent documents, the corporation shall, if the Commission so directs, apply to the Court, within a time specified by the Commission, for an order approving the constituent documents of the corporation as altered in accordance with the resolution referred to in that sub-section.

**(4)** Where, pursuant to sub-section (3), a corporation applies to the Court for an order approving its constituent documents as altered in accordance with sub-section (1), the Court may, if it is satisfied that the resolutions altering the constituent documents have been duly passed and that the alterations to the constituent documents satisfy the requirements of sub-section (1), make an order approving the constituent documents of the corporation as altered in accordance with those resolutions, with such modifications (if any) to the constituent documents as it thinks fit.

**(5)** Subject to sub-section (6), section 72 applies in relation to a resolution passed by a corporation pursuant to sub-section (1) or an order of the Court made in relation to a corporation under sub-section (4) as if the references in sub-sections 72 (2), (3), (5) and (9) to the memorandum of a company were references to the constituent documents of the corporation.

**(6)** Where a corporation would, but for this sub-section, be required by sub-section (5) and section 72 to lodge with the Commission a printed copy of its constituent documents as altered by a special resolution referred to in sub-section (1) or by an order of the Court made under sub-section (4), the corporation may instead lodge with the Commission a copy of the special resolution or an office copy of the order of the Court, as the case may be, and, if the memorandum of the corporation has been altered by the resolution or the order, a printed copy of the memorandum as altered.

**(7)** Where the constituent documents of a corporation registered as a company having a share capital are altered in accordance with this section, from the time when the alterations take effect—

- (a) the amount of the nominal share capital and the nominal value of each share shall be taken to be the amount and value respectively expressed in the altered constituent documents;
- (b) each person who held shares in the corporation immediately before the alteration took effect holds the same number of shares as he held before the alterations took effect and, in the case of a corporation shares in which are divided into 2 or more classes, the same number of shares in each class as he held before the alterations took effect; and
- (c) the amount paid up on each share in the corporation shall be deemed to be an amount in Australian currency that bears to the nominal value of the share under the altered constituent documents the same proportion as, immediately before the alterations took effect, the amount paid up on the share bore to the nominal value of the share, and the amount of the share capital paid up shall be calculated accordingly.

**(8)** If a corporation fails to comply with the provisions of sub-section (1), (2) or (3), the corporation and any officer of the corporation who is in default are each guilty of an offence.

**Effect of registration of company under corresponding law****89. Where—**

- (a) a company has applied, under the provision of the law of a participating State or of a participating Territory that corresponds with section 84, for registration as a company under the law of that State or Territory; and
- (b) the Commission has registered that company as a company under the law of that State or Territory,

the company shall, from the time at which it is deemed, by virtue of the provision of a law of that State or Territory that corresponds with section 87, to be a company duly incorporated under the law of that State or Territory, cease to be incorporated under this Code.

**Application of this Code to corporations registered under this Division**

**90. (1)** Sub-section 75 (1) does not apply in relation to a corporation that has been registered under this Division as a company unless the members of the corporation, by special resolution, resolve that the sub-section should apply to the corporation.

**(2)** Section 239 does not apply in relation to a corporation that has been registered under this Division as a company.

**(3)** Section 240 applies in relation to a corporation that has been registered under this Division as a company as if—

- (a) sub-section 240 (2) were omitted; and
- (b) there were omitted from paragraph 240 (5) (a) “or the period of 18 months referred to in sub-section (2)”.

**(4)** Where a corporation that is a holding company is registered as a company under sub-section 86 (2), section 268 applies in relation to subsidiaries of the corporation that were subsidiaries of the corporation on the date of commencement of the registration of the corporation as a company under sub-section 86 (2) and, notwithstanding sub-section 268 (2), the action referred to in sub-section 268 (1) shall be taken in relation to those subsidiaries within 12 months after that date.

**(5)** Section 360 applies in relation to a corporation that has been registered under this Division as a company as if a reference to a past member of the company included a reference to a person who had been a member of the corporation but had ceased to be such a member before the corporation was registered under this Division as a company but such a person is liable to contribute to the property of the company only to an amount sufficient for—

- (a) payment of debts and liabilities contracted by the corporation before it was so registered;
  - (b) payment of the costs, charges and expenses of winding up the corporation, in so far as those costs, charges and expenses relate to the debts and liabilities referred to in paragraph (a); and
  - (c) the adjustment of the rights of the contributories among themselves, in so far as the adjustment relates to the debts and liabilities referred to in paragraph (a).
- (6)** Without prejudice to section 87, Part III of the *Companies (Application of Laws) Act*, 1981, applies to a corporation that has been registered under this Division as a company, and to persons and matters associated with that corporation, as if that corporation had been incorporated under the law of the State corresponding with this Code that was in force immediately before the commencement of the *Companies (Application of Laws) Act*, 1981, and as if that Act commenced on the date of commencement of the registration of that corporation as a company under section 86.

#### **Establishment of registers and minute books**

**91. (1)** A corporation that is registered under this Division as a company shall, within 14 days after the date of commencement of the registration of the corporation—

- (a) establish the registers required to be kept by the provisions of sections 131, 143, 147, 172, 209, 231, 238 and 256 and include in those registers such of the information required to be included in those registers as is available to the corporation at the date of commencement of the registration; and
- (b) establish books to be used for the entry of minutes of proceedings of meetings for the purpose of compliance with section 253 and comply with the requirements of sub-section 254 (1) in relation to those books.

**(2)** Where, before the expiration of the period of 14 days referred to in sub-section (1)—

- (a) pursuant to sub-section 131 (5), 143 (3), 147 (6), 172 (3), 209 (4), 231 (8), 238 (6) or 257 (3), a person requests a corporation that has been registered under this Division as a company to furnish

the person with, or make available for inspection by the person, a copy of, or of a part of, a register kept pursuant to a requirement of this Code; or

- (b) pursuant to sub-section 254 (2), a person requests a corporation that has been registered under this Division as a company to furnish the person with a copy of any minutes of a general meeting,

the period within which the corporation is obliged to comply with that request shall be deemed to commence at the expiration of that period of 14 days.

#### **Share warrants**

**92. (1)** Where a corporation that is registered under sub-section 86 (2) had, before its registration, issued any share warrant, the bearer of the share warrant is entitled, on surrendering it to the corporation for cancellation, to have his name entered as a member in the register of members of the corporation.

**(2)** A corporation that is registered under sub-section 86 (2) is liable to compensate a person for any loss incurred by him by reason of the corporation entering in the register of its members the name of the bearer of a share warrant issued before the registration of the corporation in respect of shares specified in the share warrant without the share warrant being surrendered and cancelled.

**(3)** Subject to this section, the articles of a corporation that is registered under sub-section 86 (2) may provide that the bearer of a share warrant in relation to shares in the corporation is to be deemed to be a member of the corporation either to the full extent or for any purpose defined in the articles.

#### **Certificate of registration conclusive evidence**

**93.** A certificate of registration under this Division as a company under the common seal of the Commission is conclusive evidence that all the requirements of this Division in respect of registration of the company under this Division and of matters precedent and incidental to the registration of the company under this Division have been complied with, and that the corporation referred to in the certificate is duly registered under this Division as a company and is deemed to be a company duly incorporated under this Code.

**PART IV—PROSPECTUSES, SECURITIES AND CHARGES***Division 1—Prospectuses***Interpretation**

**94. (1)** For the purposes of this Code, a statement included in a prospectus shall be deemed to be untrue if it is misleading in the form or context in which it is included.

**(2)** For the purposes of the application of section 95 or 96, if forms referred to in the section concerned that are the same or substantially the same are issued to the public or are issued to any section of the public, whether selected as clients of the person issuing the forms or in any other manner, each of the forms shall be deemed to be issued to the public notwithstanding that each form may be used only by the person to whom it is issued, but forms shall not be taken to be issued to the public by reason only that—

- (a) they are issued to persons whose ordinary business is to buy or sell shares, debentures or prescribed interests, whether as principal or agent;
- (b) they are issued to existing members or debenture holders of a corporation and relate to shares in, or debentures of, that corporation;
- (c) they are issued to holders of prescribed interests made available by a corporation pursuant to a deed that is an approved deed for the purposes of Division 6 and relate to prescribed interests made available by that corporation pursuant to the same approved deed; or
- (d) they are issued to existing members of a company in connection with a proposal referred to in section 409 and relate to shares in that company.

**(3)** A reference in this Division to a statement includes a reference to matter that is not written but, by reason of the form or context in which it appears, conveys a message.

**Prohibition of issue of certain documents in relation to proposed corporations**

**95. (1)** It is unlawful to issue—

- (a) a form of application for shares in, or debentures of, a corporation that is to be formed; or

(b) a form to accompany a deposit of money with, or a loan of money to, a corporation that is to be formed.

**(2)** Sub-section (1) does not apply if—

(a) the form is not issued to the public; and

(b) the invitation or offer to which the form relates is not issued or made to the public.

**(3)** A corporation that, or another person who, does any act or thing that is unlawful by reason of sub-section (1) and any officer of such a corporation who is in default are each guilty of an offence.

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

**Forms of application for shares or debentures to be attached to prospectus**

**96. (1)** A form of application for shares in or debentures of a corporation or a form to accompany a deposit of money with, or a loan of money to, a corporation shall not be issued by the corporation or by any other person unless the form is attached to a prospectus and a copy of the form and a copy of the prospectus have been registered by the Commission under this Code or the corresponding law of a participating State or of a participating Territory.

**(2)** Sub-section (1) does not apply if—

(a) the form is not issued to the public; and

(b) the invitation or offer to which the form relates is not issued or made to the public.

**(3)** A corporation that, or another person who, contravenes this section and any officer of such a corporation who is in default are each guilty of an offence.

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

**Invitations or offers in relation to borrowings by a corporation**

**97. (1)** An invitation to the public to subscribe for or purchase debentures of a corporation or an offer to the public of debentures of a corporation for subscription or purchase, shall not be made by the corporation or by any other person unless—

(a) a copy of a prospectus in relation to the invitation or offer has been registered by the Commission under this Code or the corresponding law of a participating State or of a participating Territory;

- (b) the prospectus contains an undertaking by the corporation that it will, within 2 months after the acceptance of any money as a deposit or loan from any person in response to the invitation or offer, issue to that person a document that acknowledges, evidences or constitutes an acknowledgement of the indebtedness of the corporation in respect of that deposit or loan; and
- (c) the document is, in accordance with this section, described or referred to in the prospectus and in any other document constituting or relating to the invitation or offer as—
  - (i) an unsecured note or an unsecured deposit note;
  - (ii) a mortgage debenture or certificate of mortgage debenture stock; or
  - (iii) a debenture or certificate of debenture stock.

**(2)** Where, pursuant to an invitation or offer referred to in sub-section (1), a corporation has accepted from any person any money as a deposit or loan, the corporation shall, within 2 months after the acceptance of the money, issue to that person a document that—

- (a) acknowledges, evidences or constitutes an acknowledgement of the indebtedness of the corporation in respect of that deposit or loan; and
- (b) complies with the other requirements of this section.

**(3)** The document shall be described or referred to in the prospectus, in any other document constituting or relating to the invitation or offer and in the document itself as an unsecured note or an unsecured deposit note, unless, pursuant to the provisions of either sub-section (4) or (5), it is, and may be, otherwise described.

**(4)** The document may be described or referred to in the prospectus, in any other document constituting or relating to the invitation or offer or in the document itself as a mortgage debenture or certificate of mortgage debenture stock if, and only if, there is included in the prospectus—

- (a) a statement to the effect that—
  - (i) the repayment of all moneys that have been or may be deposited with or lent to the corporation in response to the invitation or offer is secured by a first mortgage given to the

trustee for the holders of the debentures to be issued in relation to the deposit or loan over land vested in the corporation or in any of its guarantor corporations;

- (ii) the mortgage has been duly 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
  - (iii) the aggregate amount of those moneys and of all other liabilities (if any) secured by the mortgage of that land ranking *pari passu* with the liability to repay those moneys does not exceed 60% of the value of the corporation's interest in that land as shown in the valuation included in the prospectus; and
- (b) a copy of a written valuation of the corporation's interest in the land so mortgaged showing the nature and extent of the corporation's interest made not more than 6 months before the date of the prospectus by a person who is competent and qualified to make the valuation in the place where the land is situated and who is not an officer of the corporation, of any of its guarantor corporations or of any corporation that is related to either the first-mentioned corporation or any of its guarantor corporations.

**(5)** The document may be described or referred to in the prospectus, in any other document constituting or relating to the invitation or offer or in the document itself as a debenture or certificate of debenture stock if, and only if—

- (a) pursuant to sub-section (4) it may be, but is not, described or referred to in that prospectus or document as a mortgage debenture or certificate of mortgage debenture stock; or
- (b) there is included in the prospectus—
  - (i) a statement to the effect that—
    - (A) the repayment of all moneys that have been or may be deposited with or lent to the corporation in response to the invitation or offer has been secured by a charge in favour of the trustee for the holders of the debentures over the whole or any part of the tangible property of the corporation and of its guarantor corporations or any of them; and

- (B) having regard to the particulars in the summary made in accordance with sub-paragraph (ii), 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 moneys and all other liabilities ranking in priority to, or *pari passu* with, that liability that have been or may be incurred; and
- (ii) a summary made by the registered company auditor who has made the report required to be included in the prospectus by paragraph 98 (1) (e) showing in tabular form the aggregate values (calculated as prescribed) of the tangible property of the borrowing corporation and of its guarantor corporations that has been charged to secure the repayment of all moneys and other liabilities referred to in sub-paragraph (i), after making such adjustments as are proper to give a true and fair view of the tangible property available as security for the charge and, in particular, after making adjustments—
  - (A) to exclude from those aggregate values such part of the value of any shares in or advances to a corporation as is reflected in or depends upon the tangible property of that corporation that is otherwise included in the summary;
  - (B) to exclude from those aggregate values such part of the value of any shares in a corporation that is related to the borrowing corporation or the guarantor corporation, as the case requires, as is properly attributable to intangible property of that first-mentioned corporation; and
  - (C) to add to those aggregate values the amount to be raised under the prospectus including the maximum amount of over-subscriptions that the prospectus in accordance with section 102 specifies may be retained, being a summary that—
  - (D) shows the amounts outstanding of the aggregate amounts borrowed respectively by the borrowing corporation and by its guarantor corporations and distinguishes between the amounts that will rank for repayment in priority to the proposed issue and the amounts that will rank *pari passu* with that proposed issue;

- (E) states by way of note or otherwise the total amount of the values of intangible property excluded in making the adjustments required under this sub-paragraph;
- (F) where the corporation has given a charge over its assets to secure a liability the amount of which may vary from time to time, takes into account the actual amount of the liability as at the date at which the summary is made up but shows by way of note the further amount that may be advanced under that charge;
- (G) where necessary, explains or qualifies by way of note or otherwise any of the matters set out in the summary;
- (H) discloses by way of note or otherwise the amount of advances (distinguishing between advances that are secured and advances that are unsecured) by the borrowing corporation to any corporation that is related to the borrowing corporation other than a corporation that is a guarantor corporation in relation to that borrowing corporation that has secured the guarantee by a charge over its property in favour of the trustee for the holders of the debentures of the borrowing corporation; and
- (I) discloses by way of note or otherwise the amount of advances (distinguishing between advances that are secured and advances that are unsecured) by a corporation that is a guarantor corporation, or each corporation that is a guarantor corporation, in relation to the borrowing corporation to any corporation that is related to the borrowing corporation (other than the amount of advances to any other corporation that is also a guarantor corporation in relation to the borrowing corporation).

**(6)** Nothing in this section applies to a prescribed corporation and nothing in this Code requires a prospectus to be issued in connection with—

- (a) an invitation issued by a prescribed corporation to the public to subscribe for or purchase debentures of a prescribed corporation; or
- (b) an offer made by a prescribed corporation to the public of debentures of the prescribed corporation for subscription or purchase.

**(7)** In sub-section (6), “prescribed corporation” means—

- (a) a banking corporation;
- (b) a corporation that is declared by the Commission, by notice published in the *Gazette*, to be an authorized dealer in the short term money market; or
- (c) a corporation that—
  - (i) is a pastoral company in respect of which an exemption granted under section 11 of the *Banking Act* 1959 is in force;
  - (ii) is registered under the *Life Insurance Act* 1945 or is a corporation the whole of the issued shares in which are held beneficially by a corporation so registered; or
  - (iii) is a subsidiary of a banking corporation or of a pastoral company referred to in sub-paragraph (i), if the repayment of all existing and future deposits with and loans to the subsidiary are guaranteed by the banking corporation or pastoral company,

and is declared by the Commission by notice published in the *Gazette* to be a prescribed corporation for the purposes of this section.

**(8)** The Commission may, by notice published in the *Gazette*, vary or revoke a declaration made under paragraph (7) (b).

**(9)** The Commission may, by notice published in the *Gazette*—

- (a) specify terms and conditions subject to which sub-section (6) has effect in relation to a corporation specified in paragraph (7) (c); or
- (b) vary or revoke any declaration or specification made under paragraph (7) (c) or under this sub-section.

**(10)** A corporation that, or another person who, contravenes or fails to comply with any of the provisions of this section and any officer of such a corporation who is in default are each guilty of an offence.

**Penalty—**

- (a) in the case of a contravention or failure to comply with sub-section (1) arising out of the issuing of an invitation or the making of an offer without a copy of a prospectus in relation to the invitation or the offer having been registered by the Commission as required by paragraph (1) (a)—\$20,000 or imprisonment for 5 years, or both; or
- (b) in any other case—\$2,500 or imprisonment for 6 months, or both.

(11) The provisions of this section relating to the description of a document acknowledging or evidencing, or intended to acknowledge or evidence, the indebtedness of a corporation apply to and in relation to every such document issued after the commencement of the *Companies (Application of Laws) Act*, 1981, notwithstanding anything in any debenture or trust deed issued or executed before that commencement and in force for the time being, and any such document issued after that commencement shall be described in accordance with the requirements of this section notwithstanding anything in any such debenture or trust deed.

(12) For the purposes of this section, a document issued by a borrowing corporation certifying that a person specified in the document is, in respect of any deposit with or loan to the corporation, the registered holder of a specified number or value—

- (a) of unsecured notes or unsecured deposit notes;
- (b) of mortgage debentures or certificates of mortgage debenture stock; or
- (c) of debentures or certificates of debenture stock,

issued by the corporation upon or subject to the terms and conditions contained in a trust deed referred to or identified in the certificate shall be deemed to be a document evidencing the indebtedness of that corporation in respect of that deposit or loan.

(13) The prospectus and a document issued in connection with or in relation to the prospectus shall describe or refer to the document mentioned in sub-section (12) in the manner required or authorized by the Commission and shall so describe or refer to the document without any addition to or qualification of the description or reference other than any addition that the Commission may approve or require in order to indicate the priority of the indebtedness that the document is to evidence.

#### **Contents of prospectuses**

**98. (1)** To comply with the requirements of this Code, a prospectus—

- (a) shall be printed in type of a size not less than the type known as eight point Times unless the Commission, before the issuing or advertising of the prospectus in the State, certifies in writing that the type and size of letter are legible and satisfactory;
- (b) shall be dated;

- (c) shall, as to one copy, be lodged with the Commission as required by this Code, shall state that a copy of the prospectus has been so lodged and shall also state, immediately after the statement that a copy has been so lodged, that the Commission takes no responsibility as to the contents of the prospectus;
- (d) where the prospectus relates to shares, shall set out particulars as to—
  - (i) the minimum amount that, in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums, or, if any part of the sums is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of—
    - (A) the purchase price of any property purchased or to be purchased that is to be defrayed in whole or in part out of the proceeds of the issue;
    - (B) any preliminary expenses payable by the corporation, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the corporation;
    - (C) the repayment of any money borrowed by the corporation in respect of any of the foregoing matters; and
    - (D) working capital; and
  - (ii) the amounts to be provided in respect of the matters mentioned in sub-paragraph (i) otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided;
- (e) shall contain a report by a registered company auditor (to be headed “Investigating Accountant’s Report”) containing the prescribed matters and such other matters as the Commission requires;
- (ea) shall set out the prescribed matters and contain the prescribed reports;
- (eb) shall set out such other matters as the Commission requires and contain such other reports as the Commission requires;

- (f) in the case of a prospectus pursuant to which the public is to be invited to deposit money with or lend money to a corporation that is a subsidiary of another corporation or a prospectus pursuant to which a corporation that is a subsidiary of another corporation is to make offers to the public to accept moneys deposited with, or moneys lent to, the corporation—
  - (i) shall contain a statement as to whether or not that other corporation is under any liability to repay those moneys or to pay any interest on those moneys; and
  - (ii) where that other corporation is so stated to be under any such liability—shall also give full particulars of the nature and extent of that liability, of the circumstances under which that liability arose and of the manner in which that liability is to be discharged;
- (g) shall contain a statement that no shares or debentures, as the case requires, will be allotted or issued on the basis of the prospectus later than 6 months after the date of the issue of the prospectus;
- (h) shall, if it contains any statement that is made by an expert or is contained in what purports to be a copy of, or extract from, a report, memorandum or valuation of an expert, state the date on which the statement, report, memorandum or valuation was made and whether or not it was prepared by the expert for incorporation in the prospectus;
- (j) shall not contain the name of any person as—
  - (i) a trustee for holders of debentures of the corporation;
  - (ii) an auditor, banker, solicitor, stockbroker or share broker of the corporation or for or in relation to the issue or proposed issue of shares or debentures; or
  - (iii) a person performing any function in a professional, advisory or other capacity not mentioned in sub-paragraph (i) or (ii) for the corporation or for or in relation to the issue or proposed issue of shares or debentures,

unless that person has consented in writing before the issue of the prospectus to act in that capacity in relation to the prospectus and, in the case of a company, a copy, verified by a statement in writing, of the consent has been lodged with the Commission:

- (k) shall set out the dates of, the parties to, and the general nature of, every material contract, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the corporation or a contract entered into more than 2 years before the date of issue of the prospectus;
- (l) shall state whether or not application has been, or is proposed to be, made for permission for the shares or debentures to which the prospectus relates to be listed for quotation on the stock market of any stock exchange, and if such an application has been or is proposed to be made, shall specify the stock exchange or stock exchanges to which application has been or is proposed to be made;
- (m) shall set out full particulars of the nature and extent of the interest (if any) of every director or proposed director and of every expert in the promotion of, or in the property proposed to be acquired by, the corporation, or, where the interest of such a director or proposed director or such an expert consists of being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any persons, in the case of a director or proposed director, either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the corporation or, in the case of an expert, for services rendered by him or the firm in connection with the promotion or formation of the corporation;
- (n) shall, where the prospectus offers shares in or debentures of a foreign company, in addition contain particulars with respect to—
  - (i) the constituent documents of the foreign company;
  - (ii) the enactments or provisions having the force of an enactment by or under which the incorporation of the foreign company was effected;
  - (iii) an address in the State where the constituent documents, and the enactments or provisions, or certified copies of the constituent documents, enactments or provisions, may be inspected;
  - (iv) the date on which and the place where the foreign company was or is to be incorporated or formed; and
  - (v) the address of the registered office of the foreign company in the State; and

(o) shall specify each participating State or participating Territory **(if any)** in which it is proposed to issue the prospectus.

**(2)** The date inserted in a prospectus pursuant to paragraph (1) (b) **shall**, unless the contrary is proved, be taken to be the date of issue of **the** prospectus.

**(3)** Regulations made for the purposes of sub-section (1) may **make** different provision in relation to different classes of prospectuses or in relation to prospectuses to be issued in respect of different classes of shares **or** debentures or different classes of corporations.

**(3A)** A report contained in a prospectus in accordance with sub-section (1) or in accordance with a requirement made by the Commission under that sub-section shall either—

(a) indicate by way of note any adjustments as respects the figures of **any** profit or loss or assets and liabilities dealt with by the report **that** appear necessary to the person or persons making the report; or

(b) make those adjustments and indicate by way of note that **adjustments** have been made and the nature of those adjustments.

**(4)** Without limiting the generality of sub-section (1), the Commission **may** require that a report that is required, pursuant to sub-section (1) or pursuant to a requirement made under that sub-section, to be contained in a prospectus shall contain accounts that comply with the requirements set out in **the** regulations in force for the time being under sub-section 269 (8) or **with** such of those requirements as are specified by the Commission.

**(5)** Paragraph (1) (m) and sub-paragraphs (1) (n) (i), (ii) and (iii) do not apply in the case of a prospectus issued more than 2 years after **the** day on which—

(a) in the case of a company—it is incorporated; or

(b) in the case of a foreign company—it is registered as a foreign company in the State or in a participating State or a participating Territory under the provisions of the law of that State or Territory that **correspond** with Division 5 of Part XIII.

**(6)** A condition requiring or binding an applicant for shares in or **deben-**tures of a corporation to waive compliance with any requirement of this **sec-**tion, or purporting to affect him with notice of any contract, document **or** matter not specifically referred to in the prospectus is void.

**(7)** Where a prospectus relating to any shares in or debentures of a corporation is issued and the prospectus does not comply with the requirements of this Code, the directors of the corporation and any other persons responsible for the prospectus are each guilty of an offence.

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

**(8)** In the event of non-compliance with, or contravention of, any of the requirements set out in this section, a director or other person responsible for the prospectus does not incur any liability by reason of the non-compliance or contravention if—

- (a) as regards any matter not disclosed, he proves that he had no knowledge of that matter;
- (b) he proves that the non-compliance or contravention arose from an honest mistake on his part concerning the facts; or
- (c) the non-compliance or contravention was—
  - (i) in respect of matter that, in the opinion of the court dealing with the case, was immaterial; or
  - (ii) otherwise such as, in the opinion of that court, having regard to all the circumstances of the case, ought reasonably to be excused.

**(9)** In the event of failure to include in a prospectus a statement with respect to the matters specified in paragraph (1) (m), no director or other person shall incur any liability in respect of the failure unless it is proved that he had knowledge of the matters not disclosed.

**(10)** Nothing in this section limits or diminishes any liability that a person may incur under any rule of law or any enactment or under this Code apart from sub-section (7).

#### **Certain notices, &c., not to be published**

**99. (1)** In this section—

“notice” includes a circular and an advertisement but does not include a registered prospectus or a report, statement, notice, circular or advertisement the publication of which is permitted under section 100;

“publish” includes issue;

“registered prospectus” includes a prospectus registered under the corresponding law of a participating State or of a participating Territory.

(2) A reference in this section to the publishing of a notice is a reference to the publishing of the notice by any means, including the publishing in a newspaper or periodical, by broadcasting or televising or in a film.

(3) Subject to sub-section (4), a person shall not publish a notice that—

- (a) offers to the public for subscription or purchase shares in, or debentures of, a corporation or proposed corporation;
- (b) invites the public to subscribe for or purchase shares in, or debentures of, a corporation or proposed corporation; or
- (c) refers or calls attention, whether directly or indirectly, to—
  - (i) a prospectus;
  - (ii) an offer or intended offer to the public for subscription or purchase of shares in, or debentures of, a corporation;
  - (iii) an invitation or intended invitation to the public to subscribe for or purchase shares in, or debentures of, a corporation; or
  - (iv) another notice that refers or calls attention, whether directly or indirectly, to a prospectus or such an offer, intended offer, invitation or intended invitation, not being a notice referred to in sub-section (4).

(4) Sub-section (3) does not apply to or with respect to the publishing of a notice that refers to a registered prospectus and—

- (a) states that allotments or issues of, or contracts for the subscription for or purchase of, shares or debentures to which the prospectus relates will be made only on receipt of a form of application referred to in and attached to a copy of the prospectus but contains no other statements other than statements as to any or all of the following:
  - (i) particulars of the shares in, or debentures of, the corporation to which the prospectus relates;
  - (ii) the name of the corporation, the date of its incorporation and the amount of its paid-up capital;
  - (iii) the general nature of the main business of the corporation;
  - (iv) the names, addresses and occupations of the directors of the corporation;
  - (v) the name and address of each broker and underwriter to the issue and the name of the stock exchange of which each broker or underwriter is a member;

- (vi) where the prospectus relates to debentures, the name and address of the trustee for the debenture holders;
- (vii) the time and place at which copies of the prospectus and forms of application for the shares or debentures to which it relates may be obtained;
- (viii) the period during which the offer or invitation contained in the prospectus is open;
- (b) is published by the holder of a dealers licence or an investment advisers licence, by a recognized dealer or recognized investment adviser or by an exempt dealer within the meaning of the *Securities Industry (New South Wales) Code* but contains no other statements other than statements as to any or all of the matters referred to in paragraph (a) and a statement as to—
  - (i) whether or not the person publishing the notice recommends acceptance of the offer or invitation to which the prospectus relates; and
  - (ii) the interest (if any) that the person publishing the notice has in the success of the offer or invitation to which the prospectus relates, being an interest that the person has as underwriter or sub-underwriter to the issue of the shares or debentures to which the prospectus relates or a relevant interest, within the meaning of the *Securities Industry (New South Wales) Code*, in those shares or debentures; or
- (c) is published by the holder of a dealers licence or an investment advisers licence, by a recognized dealer or recognized investment adviser or by an exempt dealer within the meaning of the *Securities Industry (New South Wales) Code* and is accompanied by a copy of the prospectus.

**(5)** The inclusion in a notice of a statement required by this Code or any Act or law to be included in the notice does not affect the operation of subsection (4).

**(6)** A person shall not contravene, or authorize or permit an act that constitutes a contravention of, this section.

**(7)** Where a notice relating to a corporation is published in contravention of this section by or with the authority or permission of an officer of the corporation, the corporation is guilty of an offence.

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

**Certain reports referring to prospectuses not to be published**

- 100.** (1) In this section, unless the contrary intention appears—  
“publish” includes issue;  
“registered prospectus” has the same meaning as in section 99;  
“report” includes a statement, notice, circular and an advertisement,  
whether or not in writing, but does not include a notice, circular **or**  
advertisement the publication of which is permitted under section 99.
- (2) A reference in this section to the publishing of a report is a reference to the publishing of the report by any means, including the publishing **in a** newspaper or periodical, by broadcasting or televising or in a film.
- (3) Subject to sub-section (4), a person who is aware that a prospectus relating to an issue of shares or debentures—
- (a) is in course of preparation by or on behalf of a corporation **or in** respect of a proposed corporation, for registration under the law of any State or Territory; or
  - (b) has been issued by or on behalf of a corporation,  
shall not publish a report that is reasonably likely to induce persons to apply for those shares or debentures.
- (4) Sub-section (3) does not apply to or with respect to the publishing of—
- (a) a report that relates to affairs of a corporation the name of which **is** included in the official list of a stock exchange and—
    - (i) is published only to that stock exchange or an officer of that stock exchange on behalf of the corporation or by or on behalf of one or more of the directors of the corporation; or
    - (ii) has been so published;
  - (b) a report of the whole or part of the proceedings at a general meeting of a corporation the name of which is included in the official list of **a** stock exchange and which contains no other matter other **than** matters laid before that meeting;
  - (c) a report that relates to a corporation and is published by or on behalf of a corporation or by or on behalf of one or more of the directors of the corporation and—
    - (i) does not contain matter that materially affects affairs of the corporation other than matter previously made available **in a** registered prospectus, an annual report or a report referred to in paragraph (a) or (b);

- (ii) does not contain a reference, whether directly or indirectly, to an offer to the public of shares or debentures for subscription or purchase or to an invitation to the public to subscribe for or purchase shares or debentures, being an offer or invitation that, when the report is published, is open or is intended to be made or issued, not being a reference to the principal business of the corporation in a case where the principal business of the corporation is the borrowing of money and the provision of finance; and
  - (iii) is not accompanied by a registered prospectus or a notice described in sub-section 99 (3), and is a report that the corporation and its directors have taken all reasonable steps to ensure is not published in a form or manner in which it might be associated with a notice described in sub-section 99 (3);
- (d) a report published on behalf of a corporation by or on behalf of the directors of a corporation with the consent of the Commission;
- (e) a report that is a news report (whether or not with other comment), or is *bona fide* comment, published by a person in a newspaper or periodical or by broadcasting or televising relating to—
  - (i) a registered prospectus or information contained in a registered prospectus; or
  - (ii) a report referred to in paragraph (a), (b), (c) or (d), if none of the following:
    - (iii) that person;
    - (iv) an agent or employee of that person;
    - (v) where the report or comment is published in a newspaper or periodical—the publisher of the newspaper or periodical; or
    - (vi) where the report or comment is published by broadcasting or televising—the licensee of the broadcasting or television station by which it is published,receives or is entitled to receive any consideration or other benefit from a person who has an interest in the success of the issue of shares or debentures to which the report or comment relates as an inducement to publish, or as the result of the publication of, the report or comment;

- (f) a report where the report is not published—
  - (i) by or on behalf of a corporation to which the report relates or, whether directly or indirectly, at the instigation of, or by arrangement with, the corporation or the directors of the corporation;
  - (ii) by or on behalf of the directors or promoters of a proposed corporation to which the report relates; or
  - (iii) by or on behalf of a person who has an interest in the success of the issue of shares or debentures to which the report relates, and the person publishing the report does not receive and is not entitled to receive any consideration or other benefit from the corporation or any of the directors of the corporation or any of the directors or promoters of the proposed corporation, or from a person mentioned in sub-paragraph (iii), as an inducement to publish, or as the result of the publication of, the report; or
- (g) a report containing only matter that is prescribed matter for the purposes of this sub-section or relating only to a corporation that is, or is included in a class that is, prescribed for the purposes of this sub-section.

**(5)** A person shall not contravene this section or authorize or permit an act that constitutes a contravention of this section.

**(6)** Where a report relating to a corporation is published in contravention of this section by or with the authority or permission of an officer of the corporation, the corporation is guilty of an offence.

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

#### **Evidentiary provisions. &c.**

**101. (1)** In this section—

“notice” means a notice within the meaning of section 99 or a report within the meaning of section 100;

“publish” includes issue.

**(2)** A person who publishes a notice relating to a corporation or proposed corporation after he has received a certificate that—

- (a) specifies the names of 2 directors of the corporation or 2 proposed directors of the proposed corporation and is signed by those directors or proposed directors; and

(b) is to the effect that, by reason of sub-section 99 (4) or 100 (4), section 99 or 100, as the case may be, does not apply to the notice, is not guilty of an offence under section 99 or 100, as the case may be.

(3) Where a notice to which a certificate under sub-section (2) relates is published, each director or proposed director who signed that certificate shall, for the purposes of sections 99 and 100, be deemed to have published the notice.

(4) A person who publishes a notice to which a certificate under sub-section (2) relates shall, if the Commission requires him to do so, forthwith deliver the certificate to the Commission.

**Penalty:** \$1,000 or imprisonment for 3 months, or both.

(5) In proceedings for an offence under section 99 or 100, a certificate relating to a notice that purports to be a certificate under this section is *prima facie* evidence that—

- (a) when the certificate was issued, the persons named in the certificate as directors of the corporation or proposed directors of the proposed corporation, as the case may be, were the directors or proposed directors;
- (b) the signatures in the certificate purporting to be the signatures of the directors or proposed directors, as the case may be, are those signatures; and
- (c) the publication of the notice was authorized by those directors or proposed directors, as the case may be.

(6) Nothing in section 99, 100 or this section limits or diminishes the liability that a person may incur, otherwise than under section 99, 100 or this section, under any rule of law or under any other enactment.

#### **Retention of over-subscriptions in debenture issues**

**102.** (1) A corporation shall not accept or retain subscriptions to a debenture issue in excess of the amount of the issue as disclosed in the prospectus unless the corporation has specified in the prospectus—

- (a) that it expressly reserves the right to accept or retain over-subscriptions; and
- (b) a limit on the amount of over-subscriptions that may be accepted or retained.

(2) Subject to section 98 and any regulations made for the purposes of paragraph 98 (1) (ea), where a corporation specifies in a prospectus relating to a debenture issue that it reserves the right to accept or retain over-subscriptions—

- (a) the corporation shall not make, authorize or permit any statement or reference as to the asset-backing for the issue to be made or contained in any prospectus relating to the issue, other than a statement or reference to the total assets and the total liabilities of the corporation; and
- (b) the corporation shall set out in the prospectus a statement or reference as to what the total assets and total liabilities of the corporation would be if over-subscriptions to the limit specified in the prospectus were accepted or retained.

Penalty: \$2,500.

#### **Registration of prospectuses**

**103. (1)** A prospectus shall not be issued by any person unless a copy of the prospectus has first been registered by the Commission under this Code or under the corresponding law of a participating State or a participating Territory.

(2) The Commission shall not register a copy of a prospectus under this Code unless—

- (a) the prospectus relates to a company or a registered foreign company;
- (b) the copy, signed by every director and by every person who is named in the prospectus as a proposed director of the company or foreign company or by his agent authorized in writing, is lodged with the Commission on or before the date of issue of the prospectus;
- (c) the prospectus appears to comply with the requirements of this Code;
- (d) there are also lodged with the Commission copies, verified by statements in writing, of any consents required by section 106 to the issue of the prospectus and of all material contracts referred to in the prospectus or, in the case of such a contract not reduced to writing, a memorandum giving full particulars of the contract, verified by a statement in writing; and
- (e) the Commission is of the opinion that the prospectus does not contain any statement or matter that is false in a material particular or is materially misleading in the form or context in which it appears.

**(3)** If a prospectus is issued without a copy of the prospectus having been registered as required by this section, the corporation and any person who is knowingly a party to the issue of the prospectus are each guilty of an offence.

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

**(4)** A company or foreign company in respect of which a copy of a prospectus has been registered under this section shall cause a true copy of every document referred to in paragraph (2) (d) to be deposited, within 7 days after registration of the copy of the prospectus, at the registered office of the company or foreign company in the State and shall keep each such copy for a period of at least 6 months after the registration of the copy of the prospectus for the inspection of any person without charge.

#### **Document containing offer of shares for sale deemed to be prospectus**

**104. (1)** Where a corporation allots or issues or agrees to allot or issue to any person any shares in, or debentures of, the corporation with a view to all or any of them being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the corporation, and all enactments and rules of law—

- (a) relating to the contents of prospectuses and liability in respect of statements and non-disclosures in prospectuses, or otherwise relating to prospectuses; and
- (b) relating to the offering or to an intended offering to the public of shares or debentures for subscription or purchase,

apply and have effect accordingly as if the shares or debentures had been offered to the public and as if persons accepting the offer in respect of any shares or debentures were subscribers for the shares or debentures, but without prejudice to the liability (if any) of the persons by whom the offer is made in respect of statements or non-disclosures in the document or otherwise.

**(2)** For the purposes of this Code, unless the contrary is proved, it is evidence that an allotment or issue of, or an agreement to allot or issue, shares or debentures was made with a view to the shares or debentures being offered for sale to the public if it is shown—

- (a) that an offer of the shares or debentures or of any of them for sale to the public was made within 6 months after the allotment or issue or agreement to allot or issue; or

(b) that an offer of the shares or debentures or of any of them for sale to the public was made, and that, at the date when the offer was made, the corporation had not received the whole of the consideration to be received in respect of the shares or debentures.

(3) The requirements of this Division as to prospectuses have effect as though the persons making an offer to which this section relates were persons named in a prospectus as directors of a corporation.

(4) In addition to complying with the other requirements of this Division, the document making the offer shall state—

- (a) the net amount of the consideration received or to be received by the corporation in respect of shares or debentures to which the offer relates; and
- (b) the place and time at which the contract under which the shares or debentures have been or are to be allotted or issued may be inspected.

(5) Where an offer to which this section relates is made by a corporation or a firm, it is sufficient for the purposes of paragraph 103 (2) (b) if the document referred to in sub-section (1) is signed on behalf of the corporation or firm by 2 directors of the corporation or by members of the firm who constitute not less than one-half of the number of members of the firm, as the case may be, and any such director or member may sign by his agent authorized in writing.

(6) For the purposes of this section, an invitation to the public to make offers to purchase shares or debentures shall be deemed to constitute an offer of the shares or debentures for sale to the public and a person who makes an offer pursuant to such an invitation shall be deemed to be a person who accepted an offer of the shares for sale to the public that is so deemed to be constituted by the invitation.

**Allotment or issue of shares or debentures where prospectus indicates application for quotation on stock market**

**105. (1)** Subject to this section, where a prospectus in relation to shares in, or debentures of, a corporation states that application has been or will be made to a stock exchange, whether in Australia or elsewhere, for permission for the shares or debentures to be listed for quotation on the stock market of that stock exchange and—

- (a) the permission is not applied for in the form for the time being required by that stock exchange before the third day on which that stock exchange is open after the date of issue of the prospectus; or
- (b) the permission is not granted before the expiration of a period of 6 weeks from the date of issue of the prospectus or such longer period, not exceeding 12 weeks, from the date of issue as is, within that period of 6 weeks, notified to the applicant by or on behalf of the stock exchange,

any allotment or issue, whenever made, on an application pursuant to the prospectus is void and the corporation shall repay, in accordance with the succeeding provisions of this section, any money received by it from any person pursuant to the prospectus.

**(2)** Where a corporation is liable under sub-section (1) to repay money received pursuant to a prospectus—

- (a) the money shall be repaid forthwith without interest; and
- (b) if the money is not repaid—
  - (i) where the liability to repay the money arose by reason of paragraph (1) (a)—within 14 days after the third day referred to in that paragraph; or
  - (ii) where the liability to repay the money arose by reason of paragraph (1) (b), within 14 days after—
    - (A) the period of 6 weeks first referred to in that paragraph; or
    - (B) if a longer period has been notified under that paragraph—that longer period,

then, in addition to the liability of the corporation to repay the money, the directors of the corporation are jointly and severally liable to repay the money with interest at the rate of 8% per annum (or, if another rate is prescribed, that other rate) calculated from the expiration of the 14 days referred to in sub-paragraph (i) or (ii), as the case requires.

**(3)** Where, in relation to any shares in, or debentures of, a corporation—

- (a) permission is not applied for as specified in paragraph (1) (a); or
- (b) permission is not granted as specified in paragraph (1) (b),

the Commission may, by notice published in the *Gazette*, on the application of the corporation made before any share or debenture is purported to be allotted or issued, exempt the allotment of the shares or the issue of the debentures from the operation of this section.

**(4)** A director is not liable under this section if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part.

**(5)** Without limiting the application of any of the provisions of this section, this section has effect—

- (a) in relation to any shares or debentures agreed to be taken by a person underwriting an offer of, or invitation in relation to, those shares or debentures contained in a prospectus as if he had applied for those shares or debentures pursuant to the prospectus; and
- (b) in relation to a prospectus offering shares for sale or inviting offers to purchase shares, as if—
  - (i) a reference to sale or purchase, as the case may be, were substituted for a reference to allotment;
  - (ii) the persons by whom the offer is made or the invitation is issued, and not the corporation, were liable under this section to repay money received from applicants, and references to the corporation's liability under this section were construed accordingly; and
  - (iii) for the reference in sub-section (6) to the corporation and any officer of the corporation who is in default there were substituted a reference to any person by or through whom the offer is made or the invitation is issued who knowingly authorizes or permits the default.

**(6)** All money received by a corporation pursuant to a prospectus as mentioned in the preceding provisions of this section shall be kept in a separate bank account so long as the corporation may become liable to repay it under this section and, if default is made in complying with this sub-section, the corporation and any officer of the corporation who is in default are each guilty of an offence.

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

**(7)** Where a stock exchange has, within the period applicable under paragraph (1) (b), granted permission subject to compliance with any requirements specified by the stock exchange, permission shall be deemed to have been granted by the stock exchange if the directors have given to the stock exchange an undertaking in writing to comply with the requirements of the stock exchange, but if any such undertaking is not complied with, each director who is in default is guilty of an offence.

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

**(8)** A person shall not issue a prospectus inviting persons to subscribe for, or offering to accept subscriptions for, shares in, or debentures of, a corporation if the prospectus includes—

- (a) an untrue statement that permission has been granted for those shares or debentures to be dealt in or quoted or listed for quotation on a stock market of a stock exchange; or
- (b) any statement in any way referring to any such permission or to any application or intended application for any such permission, or to dealing in or quoting or listing the shares or debentures on, or on a stock market of, a stock exchange, or to any requirements of a stock exchange, unless that statement is or is to the effect that permission has been granted or that application has been or will be made to the stock exchange within 3 days of the issue of the prospectus.

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

**(9)** Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to do so, is void.

#### **Expert's consent to issue of prospectus containing statement by him**

**106. (1)** A prospectus in relation to a corporation that includes a statement purporting to be made by an expert or to be based on a statement made by an expert shall not be issued unless—

- (a) the expert has given, and has not, before delivery of a copy of the prospectus for registration, withdrawn, his written consent to the issue of the prospectus with the statement included in the form and context in which it is included; and
- (b) there appears in the prospectus a statement that the expert has given, and has not withdrawn, his consent.

**(2)** If a prospectus is issued in contravention of this section, the corporation and any person who is knowingly a party to the issue of the prospectus are each guilty of an offence.

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

**Civil liability for untrue statement or non-disclosure in prospectus**

**107. (1)** Subject to this section, where a prospectus is issued in relation to a corporation, a person who—

- (a) is a director of the corporation at the time of the issue of the prospectus;
- (b) authorized or caused himself to be named and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time;
- (c) is a promoter of the corporation; or
- (d) authorized or caused the issue of the prospectus,

is liable to pay compensation to all persons who subscribe for or purchase any shares or debentures or units of shares or debentures on the faith of the prospectus for any loss or damage sustained by reason of any untrue statement in the prospectus, or by reason of the non-disclosure in the prospectus of any matter of which he had knowledge and which he knew to be material.

**(2)** Notwithstanding anything in sub-section (1), an expert whose consent to the issue of a prospectus is required and who has given that consent is not, by reason only of having given that consent, liable under sub-section (1) as a person who has authorized or caused the issue of the prospectus except in respect of—

- (a) an untrue statement in the prospectus purporting to be made by him as an expert; and
- (b) a non-disclosure in the prospectus of any material matter for which he is responsible in his capacity or purported capacity as an expert.

**(3)** For the purposes of sub-section (1), a person who is named in a prospectus as—

- (a) a trustee for holders of debentures of the corporation;
- (b) an auditor, banker, solicitor, stockbroker or share broker of the corporation or for or in relation to the issue or proposed issue of shares or debentures; or
- (c) a person performing any function in a professional, advisory or other capacity not mentioned in paragraph (a) or (b) for the corporation or for or in relation to the issue or proposed issue of shares or debentures,

shall not, for that reason alone, be taken to have authorized the issue of the prospectus.

(4) For the purposes of sub-section (1), a statement shall be deemed to be in a prospectus if it is contained in any report or memorandum that appears on the face of, or is issued with, the prospectus, or is incorporated by reference in the prospectus, whether the reference occurs in the prospectus or in any other document.

(5) Subject to sub-section (6), a person, other than a person to whom sub-section (7) applies, is not liable under sub-section (1) if he proves—

- (a) that, having consented to become a director of the corporation, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent;
- (b) that the prospectus was issued without his knowledge or consent and—
  - (i) when he became aware of the issue of the prospectus, he forthwith gave reasonable public notice that it was issued without his knowledge; or
  - (ii) he gave reasonable public notice that the prospectus was issued without his consent forthwith after it was issued,

as the case may be;
- (c) that, after the issue of the prospectus and before any allotment, issue or sale under the prospectus, he, on becoming aware of any untrue statement in the prospectus, withdrew his consent to the issue of the prospectus and gave reasonable public notice of the withdrawal and of the reason for the withdrawal; or
- (d) that—
  - (i) as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he had reasonable grounds to believe, and did until the time of the allotment, issue or sale of the shares or debentures believe, that the statement was true;
  - (ii) as regards every untrue statement purporting to be a statement made by an expert or to be based on a statement made by an expert or contained in what purports to be a copy of, or extract from, a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of, or extract from, the report or valuation, and he had reasonable grounds to believe, and did until the time of the issue of the

prospectus believe, that the person making the statement was competent to make it and that that person had given the consent required by section 106 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration, or, to the defendant's knowledge, before any allotment, issue or sale under the prospectus; and

- (iii) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of, or extract from, a public official document, it was a correct and fair representation of the statement or a correct and fair copy of, or extract from, the document.

**(6)** Sub-section (5) does not apply in the case of a person who is liable, by reason of his having given a consent required of him by section 106, as a person who has authorized or caused the issue of the prospectus in respect of an untrue statement purporting to have been made by him as an expert.

**(7)** A person who, apart from this sub-section, would under sub-section (1) be liable, by reason of his having given a consent required of him by section 106, as a person who has authorized the issue of a prospectus, in respect of an untrue statement purporting to be made by him as an expert is not so liable if he proves—

- (a) that, having given his consent under section 106 to the issue of the prospectus, he withdrew it in writing before a copy of the prospectus was lodged with the Commission;
- (b) that, after a copy of the prospectus was lodged with the Commission and before any allotment, issue or sale under the prospectus, he, on becoming aware of the untrue statement, withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reasons for the withdrawal; or
- (c) that he was competent to make the statement and that he had reasonable grounds to believe, and did until the time of the allotment, issue or sale of the shares or debentures believe, that the statement was true.

**(8) Where—**

- (a) a prospectus in relation to a corporation contains the name of a person as a director of the corporation, or as having agreed to become a director, and that person has not consented to become a director, or

has withdrawn his consent before the issue of the prospectus, and has not authorized or consented to the issue of the prospectus; or

- (b) the consent of a person is required under section 106 to the issue of the prospectus and he either has not given that consent or has withdrawn it before the issue of the prospectus,

the directors of the corporation, except any without whose knowledge or consent the prospectus was issued, and any other person who authorized or caused the issue of the prospectus are jointly and severally liable to indemnify the person so named or whose consent was so required against all damages, costs and expenses to which he may be made liable by reason of his name having been so inserted in the prospectus or by reason of the inclusion in the prospectus of a statement purporting to be made by him as an expert, or in defending himself against any action or other legal proceeding brought against him by reason of his name having been so inserted in the prospectus or the inclusion in the prospectus of such a statement.

#### **Criminal liability for untrue statement or non-disclosure in prospectus**

**108. (1)** Where in a prospectus there is any untrue statement or non-disclosure, any person who authorized or caused the issue of the prospectus is guilty of an offence unless he proves—

- (a) that the statement or non-disclosure was immaterial;
- (b) that he had reasonable grounds to believe, and did until the time of the issue of the prospectus believe, that the statement was true or the non-disclosure was immaterial; or
- (c) where there was in the prospectus a non-disclosure—that the non-disclosure was inadvertent.

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

**(2)** For the purposes of sub-section (1), a statement shall be deemed to be in a prospectus if it is contained in any report or memorandum that appears on the face of, or is issued with, the prospectus, or is incorporated by reference in the prospectus, whether the reference occurs in the prospectus or in any other document.

**(3)** A person shall not be taken for the purposes of this section to have authorized or caused the issue of a prospectus by reason only of his having given the consent required by this Division to the inclusion in the prospectus of a statement purporting to be made by him as an expert.

**Power to exempt from compliance with Division or to declare that Division applies as if modified**

**109. (1)** The Commission 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 all or any of the requirements of this Division.

**(2)** A person who is exempted by the Commission, subject to a condition, from compliance with a requirement of this Division shall not contravene or fail to comply with the condition.

**(3)** Where a person has contravened or failed to comply with a condition to which an exemption under sub-section (1) is subject, the Court may, on the application of the Commission, order the person to comply with the condition.

**(4)** The Commission may, by instrument in writing, declare that this Division shall have effect in its application to or in relation to a particular person or persons in a particular case as if a provision or provisions of this Division specified in the instrument were omitted, modified or varied in a manner specified in the instrument, and, where such a declaration is made, this Division has effect accordingly.

**(5)** A copy of an instrument executed under this section shall be published in the *Gazette*.

*Division 2—Restrictions on Allotment and Variation of Contracts***Prohibition of allotment unless minimum subscription received**

**110. (1)** A company shall not make an allotment of shares in the company that have been offered to the public or in respect of which an invitation has been issued to the public unless—

- (a) the minimum subscription has been subscribed; and
- (b) the sum payable on application for the shares so subscribed has been received by the company.

(2) For the purposes of sub-section (1), where a company has, whether before or after the commencement of the *Companies (Application of Laws) Act*, 1981, received a cheque for the sum payable on application for an allotment of shares in the company, the sum shall be deemed not to have been received by the company until the cheque is paid by the bank on which it is drawn.

(3) In ascertaining for the purposes of sub-section (1) whether the minimum subscription has been subscribed in relation to an allotment of shares, there shall, in respect of each share for the allotment of which an application has been made, be deemed to have been subscribed an amount equal to the sum of—

- (a) the nominal value of that share; and
- (b) if the share is, or is to be, issued at a premium—the amount of the premium payable on the share,  
less any amount payable otherwise than in cash.

(4) Except in the case of a no liability company, the amount payable on application for each share that has been offered to the public or in respect of which an invitation has been issued to the public shall be not less than 5% of the nominal amount of the share.

(5) If the conditions referred to in paragraphs (1) (a) and (b) have not been satisfied on the expiration of 4 months after the issue of the prospectus, the company shall repay, in accordance with the succeeding provisions of this section, all money received from applicants for shares.

(6) Where a company is liable, under sub-section (5), to repay money received from applicants for shares—

- (a) the money shall be repaid without interest within 7 days after the company becomes so liable; and
- (b) if the money is not repaid within 7 days after the company becomes so liable—
  - (i) the directors of the company are, subject to sub-section (7), jointly and severally liable to repay the money with interest at the rate of 8% per annum (or if another rate is prescribed, that other rate) calculated from the expiration of the period of 7 days; and
  - (ii) each director of the company is guilty of an offence.

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

(7) A director of a company is not liable under sub-paragraph (6) (b) (i), and is not guilty of an offence under sub-paragraph (6) (b) (ii), if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part.

(8) An allotment made by a company to an applicant in contravention of the provisions of this section is voidable at the option of the applicant and is so voidable notwithstanding that the company is in the course of being wound up.

(9) An option referred to in sub-section (8) is exercisable by notice in writing served on the company—

- (a) in the case of an allotment made by a company that is not required to hold a statutory meeting—within one month after the date of the allotment; and
- (b) in the case of an allotment made by a company that is required to hold a statutory meeting—
  - (i) if the company holds the statutory meeting within the period specified in sub-section 239 (1)—within one month after the date of the allotment or the holding of the statutory meeting, whichever is the later; or
  - (ii) if the company fails to hold the statutory meeting within that period—within one month after the expiration of that period or the date of the allotment, whichever is the later.

(10) A director of a company who knowingly contravenes, or permits or authorizes the contravention of, any of the provisions of this section is guilty of an offence and is liable, in addition to the penalty or punishment for the offence, to compensate the company and any person to whom an allotment has been made in contravention of this section respectively for any loss, damages or costs that the company or the person has sustained or incurred by reason of the allotment, but no proceedings for the recovery of any such compensation shall be commenced after the expiration of 2 years from the date of the allotment.

(11) Any condition requiring or binding an applicant for shares to waive compliance with any requirement of this section, or purporting to do so, is void.

**(12)** A company shall not allot or issue, and an officer or promoter of a company or a proposed company shall not authorize or permit to be allotted or issued, shares or debentures on the basis of a prospectus after the expiration of 6 months from the issue of the prospectus.

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

**(13)** Where an allotment or issue of shares or debentures is made on the basis of a prospectus after the expiration of 6 months from the issue of the prospectus, the allotment is not, by reason only of that fact, voidable or void.

#### **Application moneys to be held in trust until allotment**

**111. (1)** Where, whether before or after the commencement of the *Companies (Application of Laws) Act*, 1981, shares or debentures have been offered to the public or invitations have been issued to the public in respect of shares or debentures, all application moneys and other moneys paid, whether before or after the commencement of the *Companies (Application of Laws) Act*, 1981, by an applicant on account of the shares or debentures before the allotment or issue of the shares or debentures, shall, until the allotment or issue of the shares or debentures, be held by the company on trust for the applicant in a bank account, being a bank account established and kept by the company solely for the purpose of depositing application moneys and other moneys paid by applicants for those shares or debentures, but there is no obligation or duty on any bank with whom any such moneys have been deposited to inquire into or see to the proper application of those moneys so long as the bank acts in good faith.

**(2)** If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

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

#### **Restriction on varying contracts referred to in prospectus**

**112.** A company shall not, before the statutory meeting, vary the terms of a contract referred to in the prospectus unless the variation is made subject to the approval of the statutory meeting.

*Division 3—Shares*

**Return as to allotments**

**113. (1)** Where a company makes an allotment of its shares, or shares in a company are deemed to have been allotted under sub-section (6), the company shall, within one month after the allotment is made or deemed to have been made, lodge with the Commission a return of the allotment stating—

- (a) the number and nominal amounts of the shares comprised in the allotment;
- (b) the amount (if any) paid, deemed to be paid or due and payable on the allotment of each share;
- (c) where the capital of the company is divided into shares of different classes—the class of shares to which each share comprised in the allotment belongs; and
- (d) subject to sub-section (2), the full name, or the surname and at least one Christian or given name and other initials, and the address of each of the allottees and the number and class of shares allotted to him.

**(2)** The particulars mentioned in paragraph (1) (d) need not be included in a return—

- (a) where shares have been allotted for cash by a no liability company;
- (b) where a company to which the provisions of sub-section 265 (1) apply has allotted shares for cash; or
- (c) where a company to which the provisions of that sub-section apply has allotted shares for a consideration other than cash and the number of persons to whom the shares have been allotted exceeds 500.

**(3)** Where shares in a company are allotted, or deemed to have been allotted, as fully or partly paid up otherwise than in cash and the allotment is made pursuant to a contract in writing, the company shall lodge with the return the contract evidencing the entitlement of the allottee or a certified copy of any such contract.

**(4)** If a certified copy of a contract is lodged in accordance with sub-section (3), the original contract duly stamped shall be produced at the same time to the Commission.

**(5)** Where shares in a company are allotted, or are deemed to have been allotted, as fully or partly paid up otherwise than in cash and the allotment is made—

- (a) pursuant to a contract not reduced to writing;
- (b) pursuant to a provision in the memorandum or articles of the company;
- (c) in satisfaction of a dividend declared in favour of, but not payable in cash to, the shareholders; or
- (d) pursuant to the application of moneys held by the company in an account or reserve in paying up or partly paying up unissued shares to which the shareholders have become entitled,

the company shall lodge with the return a statement containing such particulars as are prescribed.

**(6)** For the purposes of this section, any shares in a company that the subscribers to the memorandum have agreed in the memorandum to take shall be deemed to have been allotted to those subscribers on the date of the incorporation of the company.

**(7)** If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

#### **Differences in calls and payments, reserve liability, &c.**

**114. (1)** A company, if so authorized by its articles, may—

- (a) make arrangements on the issue of shares for varying the amounts and times of payment of calls as between shareholders;
- (b) accept from a member the whole or a part of the amount remaining unpaid on any shares although no part of that amount has been called up; and
- (c) except in the case of a no liability company, pay dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

**(2)** A limited company may, by special resolution, determine that any portion of its share capital that has not been already called up is not capable of being called up except in the event and for the purposes of the company

being wound up, and thereupon that portion of the company's share capital is not capable of being called up except in the event and for the purposes of the company being wound up, but no such resolution prejudices any rights acquired by a person before the passing of the resolution.

**Share warrants**

**115.** A company shall not issue any share warrant.

**Restriction on application of capital of company**

**116. (1)** Except as provided by section 117 or 118, a company shall not apply any of its shares or capital money either directly or indirectly in making a payment to a person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares are or the money is so applied by being added to the purchase price of property acquired by the company or to the contract price of work to be executed for the company or the money is paid out of the nominal purchase price or contract price or otherwise.

**(2)** Without limiting the generality of sub-section (1), except as provided by section 117 or 118, a company shall not issue shares at a discount.

**(3)** If a company contravenes this section, the company is, notwithstanding section 570, not guilty of an offence against this Code but each officer of the company who is in default is guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**(4) Where—**

- (a) a person is convicted of an offence under this section in relation to a company; and
- (b) the court by which he was convicted is satisfied that the company has suffered loss or damage as a result of the act that constituted the offence,

that court may, in addition to imposing a penalty, order the convicted person to pay compensation to the company of such amount as that court specifies, and any such order may be enforced as if it were a judgment of that court.

**(5) Where a contravention of this section takes place—**

- (a) if a person other than the company concerned, being a person who was, at the time of the contravention, aware of the matters constituting the contravention, has made a profit as a result of the contravention, the company may, whether or not that person or any other person has been convicted of an offence under sub-section (3) in relation to that contravention, recover from the person as a debt due to the company by action in any court of competent jurisdiction an amount equal to the profit; and
- (b) where the company concerned has suffered loss or damage as a result of the contravention—the company may recover an amount equal to the loss or damage from any person who is in default, whether or not that person or any other person has been convicted of an offence under sub-section (3) in relation to that contravention, as a debt due to the company by action in any court of competent jurisdiction.

**Power to make certain payments**

**117. (1)** A company may make a payment to a person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for shares in the company if—

- (a) the payment is not prohibited by the memorandum or articles;
- (b) the payment does not exceed—
  - (i) 10% of the total of the amounts payable in respect of the shares upon their allotment; or
  - (ii) such amounts (if any), or an amount calculated in accordance with such rate (if any), as is authorized by the articles, whichever is the less;
- (c) the amount or rate of the payment is disclosed in the prospectus in respect of the shares or, if there is no such prospectus, in a statement lodged with the Commission before the company becomes liable to make the payment; and
- (d) the number of shares for which persons have agreed, for a payment, to subscribe absolutely is set out in that prospectus or statement.

**(2)** For the purposes of this section, the allowance of a discount by a company shall be taken to be the making of a payment by the company.

(3) A vendor to, promoter of, or person who receives payment in money or shares from, a company may apply any part of the money or shares so received in making any payment that would, if it were made directly by the company, be lawful under this section.

**Power to issue shares at a discount**

118. (1) A no liability company may issue shares at a discount.

(2) Subject to this section, a company other than a no liability company may issue at a discount shares included in a class of shares already issued if—

- (a) the issue of the shares at a discount—
  - (i) is authorized by resolution passed in general meeting of the company; and
  - (ii) is confirmed by order of the Court;
- (b) the resolution specifies the maximum rate of discount at which the shares are to be issued;
- (c) the shares are issued within one month after the date on which the issue is confirmed by order of the Court or within such extended time as the Court allows; and
- (d) the shares are first offered to every holder of shares in the company of that class in proportion to the number of shares of that class held by him.

(3) The Court may, if having regard to all the circumstances of the case it thinks proper to do so, make an order confirming the issue on such terms and conditions as it thinks fit.

(4) A prospectus relating to the issue of the shares shall contain particulars of the discount allowed or of so much of that discount as has not been written off at the date of the issue of the prospectus.

(5) If default is made in complying with sub-section (4), the company and any officer of the company who is in default are each guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(6) An offer made for the purposes of paragraph (2) (d) shall be made by notice specifying the number of shares to which the member is entitled, and specifying a period, being not less than 21 days from the date of the notice, within which the offer may be accepted.

**(7)** If an offer in respect of shares made in accordance with sub-section (6) is not accepted within the period specified by the notice, the shares may be issued on terms not more favourable than those offered to the shareholders.

#### **Issue of shares at premium**

**119. (1)** Where a company issues shares for which a premium is received by the company, whether in cash or in the form of other valuable consideration, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account to be called the "share premium account", and the provisions of this Code relating to the reduction of the share capital of a company, other than sub-section 123 (6) apply, subject to this section, as if the share premium account were paid-up share capital of the company.

- (2)** The share premium account may be applied—
  - (a) in paying up unissued shares to be issued to members of the company as fully paid bonus shares;
  - (b) in paying up in whole or in part the balance unpaid on shares previously issued to members of the company;
  - (c) in the payment of dividends, if those dividends are satisfied by the issue of shares to members of the company;
  - (d) in the case of a company that carries on life insurance business in Australia—by appropriation or transfer to any statutory fund established and maintained pursuant to the *Life Insurance Act 1945*;
  - (e) in writing off—
    - (i) the preliminary expenses of the company; or
    - (ii) the expenses of, or the payment made in respect of or discount allowed on, any issue of shares in, or debentures of, the company; or
  - (f) in providing for the premium payable on redemption of debentures or redeemable preference shares.

#### **Redeemable preference shares**

**120. (1)** Subject to this section, a company having a share capital may, if so authorized by its articles, issue preference shares that are, or at the option of the company are to be, liable to be redeemed.

(2) The redemption shall not be taken to reduce the authorized share capital of the company.

(3) The shares shall not be redeemed—

- (a) except on such terms and in such manner as are provided by the articles;
- (b) except out of profits that would otherwise be available for dividends or out of the proceeds of a fresh issue of shares made for the purposes of the redemption; and
- (c) unless they are fully paid-up.

(4) The premium (if any) payable on redemption shall be provided for out of profits or out of the share premium account.

(5) Where redeemable preference shares are redeemed otherwise than out of the proceeds of a fresh issue of shares, there shall, out of profits that would otherwise have been available for dividends, be transferred to a reserve called the "capital redemption reserve" a sum equal to the nominal amount of the shares redeemed, and the provisions of this Code relating to the reduction of the share capital of a company, other than sub-section 123 (6), apply, except as provided by this section, as if the capital redemption reserve were paid-up share capital of the company.

(6) Where, pursuant to this section, a company has redeemed or is about to redeem any preference shares, it may issue shares up to the sum of the nominal values of the shares redeemed or to be redeemed as if those preference shares had never been issued.

(7) The capital redemption reserve may be applied in paying up unissued shares of the company to be issued to members of the company as fully-paid bonus shares.

(8) Where a company redeems any redeemable preference shares, it shall, within 14 days after so doing, lodge with the Commission a notice in the prescribed form relating to the shares redeemed.

(9) Shares shall be taken to have been redeemed notwithstanding that a cheque given in payment of the amount payable upon redemption of the shares has not been presented for payment.

(10) If a company fails to comply with this section, the company and any officer of the company who is in default are each guilty of an offence.

**Power of company to alter its share capital**

**121. (1)** A company may, if so authorized by its articles, by resolution passed in general meeting alter the provisions of its memorandum in any one or more of the following ways:

- (a) by increasing its share capital by the creation of new shares of such amount as it thinks expedient;
- (b) by consolidating and dividing all or any of its share capital into shares of larger amount than its existing shares;
- (c) by converting, or providing for the conversion of, all or any of its paid-up shares into stock or re-converting, or providing for the re-conversion of, that stock into paid-up shares of any denomination;
- (d) by subdividing its shares or any of them into shares of smaller amount than is fixed by the memorandum, but so that, in the subdivision, the proportion between the amount paid and the amount (if any) unpaid on each share of a smaller amount is the same as it was in the case of the share from which the share of a smaller amount is derived;
- (e) by cancelling shares that, at the date of the passing of the resolution to that effect, have not been taken or agreed to be taken by any person or that have been forfeited and by reducing the amount of the company's share capital by the amount of the shares so cancelled.

**(2)** A cancellation of shares under this section shall be deemed not to be a reduction of share capital within the meaning of this Code.

**(3)** An unlimited company having a share capital may, by any resolution passed for the purposes of sub-section 69 (1), do either or both of the following:

- (a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital may be called up except in the event and for the purposes of the company being wound up;
- (b) provide that a specified portion of its uncalled share capital may not be called up except in the event and for the purposes of the company being wound up.

**Validation of shares improperly issued**

**122. (1)** Where a company has purported to issue or allot shares and—

- (a) the creation, issue or allotment of those shares is invalid by reason of any provision of this Code or of any Act or of the memorandum or articles of the company or for any other reason; or

- (b) the terms of the purported issue or allotment are inconsistent with or are not authorized by any such provision,

the Court may, upon application made by the company, by a holder or mortgagee of any of those shares or by a creditor of the company and upon being satisfied that in all the circumstances it is just and equitable so to do, make an order—

- (c) validating the purported issue or allotment of those shares; or  
(d) confirming the terms of the purported issue or allotment of the shares,

or both.

**(2)** Upon an office copy of an order made under sub-section (1) being lodged with the Commission, the shares to which the order relates shall be deemed to have been validly issued or allotted upon the terms of the issue or allotment of the shares.

#### **Special resolution for reduction of share capital**

**123. (1)** Subject to confirmation by the Court, a company may, if so authorized by its articles, by special resolution reduce its share capital in any way and in particular, without limiting the generality of the foregoing, may do all or any of the following:

- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;  
(b) cancel any paid-up share capital that is lost or is not represented by available assets; or  
(c) pay off any paid-up share capital that is in excess of the needs of the company,

and may, so far as necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

**(2)** A reduction in the paid-up share capital of a company does not of itself operate to reduce the nominal share capital of the company.

**(3)** Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs—

- (a) every creditor of the company who, at the date fixed by the Court, is entitled to any debt or claim that, if that date were the date of commencement of the winding up of the company, would be admissible in proof against the company, is entitled to object to the reduction;
- (b) the Court, unless satisfied on affidavit that there are no such creditors, shall settle a list of the names of creditors entitled to object and, for that purpose, shall ascertain as far as possible, without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a final day on or before which creditors whose names are not entered on the list may claim to be so entered; and
- (c) where a creditor whose name is entered on the list, and whose debt has not been discharged or whose claim has not determined, does not consent to the reduction, the Court may dispense with the consent of that creditor on the company securing payment of his debt or claim by appropriating as the Court directs—
  - (i) if the company admits the full amount of the debt or claim or, though not admitting it, is willing to provide for it—the full amount of the debt or claim; or
  - (ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim or if the amount is contingent or not ascertained—an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

**(4)** The Court may, having regard to any special circumstances of any case, direct that all or any of the provisions of sub-section (3) shall not apply in respect of creditors included in a class of creditors.

**(5)** The Court may, if satisfied with respect to each creditor who under sub-section (3) is entitled to object, that—

- (a) his consent to the reduction has been obtained;
- (b) his debt has been discharged or secured; or
- (c) his claim has determined or has been secured,

make an order confirming the reduction on such terms and conditions as it thinks fit.

(6) An order made under sub-section (5) shall show—

- (a) the amount of the share capital of the company as altered by the order;
- (b) the number of shares into which the share capital is to be divided;
- (c) the amount of each share; and
- (d) the amount (if any) that at the date of the order is deemed to be paid up on each share.

(7) A company shall not act upon a resolution for the reduction of share capital before the date on which a certified copy of the resolution and an office copy of the order of the Court have been lodged with the Commission but such a resolution may specify a date, earlier than the first-mentioned date but not earlier than the date of the resolution, as the date from which the reduction of capital is to have retrospective effect.

(8) A certificate of the Commission stating that a certified copy of the resolution and an office copy of the order made under sub-section (5) have been registered by the Commission is conclusive evidence that all the requirements of this Code with respect to reduction of share capital have been complied with in respect of the company and that the share capital of the company is such amount as is stated in the order.

(9) Upon lodgment of a copy of an order as mentioned in sub-section (7), the particulars shown in the order pursuant to sub-section (6) shall be deemed to be substituted for the corresponding particulars in the memorandum and the substitution shall be deemed to be an alteration of the memorandum for the purposes of this Code.

(10) A member of a company, past or present, is not liable in respect of any share in the company to any call or contribution exceeding in amount the difference (if any) between the amount of the share as fixed by an order made under sub-section (5) and the amount paid, or the reduced amount (if any) that is deemed to have been paid, on the share (as the case may be) but, where the name of a creditor who is entitled under sub-section (3) to object to a reduction is, by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his claim, not entered on the list of creditors, and after the reduction the company is unable, within the meaning of the provisions of this Code with respect to winding up by the Court, to pay the amount of his debt or claim—

- (a) every person who was a member of the company at the date of the registration of the copy of the order for reduction is liable to contribute for the payment of that debt or claim an amount not exceeding

the amount that he would have been liable to contribute if the company had commenced to be wound up on the day before that date; and

- (b) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance of the proceedings for reduction or of their nature and effect with respect to his claim, may, if it thinks fit, settle accordingly a list of the names of persons liable to contribute by reason of paragraph (a) and make and enforce calls and orders on the contributors whose names are included in the list as if they were ordinary contributors in a winding up,

but nothing in this sub-section affects the rights of the contributors among themselves.

**(11)** An officer of a company who—

- (a) knowingly conceals the name of a creditor entitled to object to a reduction in the share capital of the company; or  
(b) knowingly misrepresents the nature or amount of the debt or claim of any creditor of the company,

is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(12)** This section does not apply to an unlimited company, but nothing in this Code precludes an unlimited company from reducing in any way its share capital, including any amount in its share premium account.

**(13)** The granting by a company to a member of the company of a right to occupy or use land, or a building or part of a building, owned or held under lease by the company, whether for consideration or not, shall not be regarded as being a reduction of the share capital of the company if it is made pursuant to a provision of the memorandum or articles of the company under which a member of the company may, by virtue of his being such a member, be granted such a right, whether the provision provides for consideration to be given for it or not.

**(14)** Sub-section (13) applies whether the grant is by way of lease, under-lease, licence or otherwise, and whether or not, in the case of a grant in respect of a building or part of a building, the grant also entitles the member to a right of use of a garage, outbuilding or other structure or of a passage, stairway or convenience of a building or of land appurtenant to the building or part of the building.

(15) This section does not apply in relation to a reduction of capital, or to a cancellation of shares that have been allotted, where the reduction or cancellation results from, or is necessary by reason of, the operation of the *Companies (Acquisition of Shares) (New South Wales) Code* or a corresponding law in force in a participating State or participating Territory, or of regulations applying under that Code or applying or made under such a corresponding law, and nothing in this Code operates to invalidate any such reduction of capital or cancellation of shares.

(16) Where land is comprised in a strata plan registered under the *Strata Titles Act*, 1973, and at the time of registration of the strata plan the proprietor of that land was a company, the transfer by the company of any lot on the strata plan in exchange for or in satisfaction of a right of a kind referred to in sub-section (13) shall not of itself constitute, and shall be deemed never to have constituted, a reduction of the share capital of the company.

**Commission to be informed of special rights carried by, or division or conversion of, shares**

124. (1) Where a company allots shares to which are attached rights that are not provided for in the memorandum or articles of the company or in a resolution or document to which section 251 applies, the company shall, unless the rights attached to the shares are in all respects the same as the rights attached to shares previously allotted, lodge with the Commission, within one month after the allotment of the shares, a statement in the prescribed form relating to those rights.

(2) Where—

- (a) shares in a company that were not previously divided into classes are so divided; or
- (b) shares in a company that are of one class are converted into shares of another class,

the company shall, within one month after the division or conversion, lodge with the Commission a return in the prescribed form showing particulars of the division or conversion.

(3) If a company contravenes this section, the company and any officer of the company who is in default are each guilty of an offence.

**Rights of holders of classes of shares**

**125. (1)** This section applies to a company having a share capital that is divided into classes of shares.

**(2) Where—**

- (a) rights are attached to shares included in a class of shares;
- (b) no provision is made by the memorandum or articles for the variation or abrogation of those rights; and
- (c) neither the memorandum nor the articles declares or declare those rights to be unalterable,

the company may, with the consent in writing of the holders of three-quarters of the issued shares included in that class or with the sanction of a special resolution passed at a meeting of the holders of those shares, vary or abrogate those rights or alter the memorandum or articles so as to authorize the variation or abrogation of those rights.

**(3) Where—**

- (a) rights are attached to shares included in a class of shares; and
- (b) provision is made by the memorandum or articles authorizing the variation or abrogation of those rights with the consent of a specified proportion of the holders of the issued shares included in that class or with the sanction of a resolution of a kind specified in the memorandum or articles passed at a meeting of the holders of those shares,

the memorandum or articles shall not be altered so as to vary or abrogate, or to authorize the variation or abrogation of, those rights, except with the consent of that proportion of the holders of those shares or with the sanction of such a resolution passed at a meeting of the holders of those shares.

**(4) Where rights are attached to shares included in a class of shares and—**

- (a) those rights are at any time varied or abrogated; or
- (b) the memorandum or articles is or are altered so as to authorize the variation or abrogation of those rights,

the holders of not less in the aggregate than 10% of the issued shares included in that class may apply to the Court to have the variation or abrogation of the rights, or the alteration of the memorandum or articles, as the case may be, set aside and, if such an application is made, the variation or abrogation, or the alteration, does not have effect until confirmed by the Court.

**(5)** An application under sub-section (4) shall be made within 28 days after the variation, abrogation or alteration referred to in that sub-section was made and may be made, on behalf of the shareholders entitled to make the application, by such one or more of their number as they appoint in writing.

**(6)** On the application, the Court may, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested, if it is satisfied that the variation, abrogation or alteration would unfairly prejudice the members of the class represented by the applicant, set aside the variation, abrogation or alteration, as the case may be, and shall, if not so satisfied, confirm it.

**(7)** A company shall, within 14 days after the making of an order by the Court on an application under this section, lodge an office copy of the order with the Commission and, if the company fails to comply with this provision, the company and any officer of the company who is in default are each guilty of an offence.

**(8)** For the purposes of this section, the allotment by a company of preference shares ranking equally with existing preference shares shall be deemed to be a variation of the rights attached to those existing preference shares unless the allotment of the first-mentioned shares was authorized by the terms of allotment of the existing preference shares or by the memorandum or articles in force at the time when the existing preference shares were allotted.

**(9)** Nothing in section 73 or 76 affects the operation of this section.

#### **Rights of holders of shares**

**126. (1)** This section applies to a company having a share capital that is not divided into classes of shares.

**(2) Where—**

- (a) rights are attached to shares in a company;
- (b) no provision is made by the memorandum or articles for the variation or abrogation of those rights; and
- (c) neither the memorandum nor the articles declares or declare those rights to be unalterable,

the company may, with the consent in writing of the holders of three-quarters of the issued shares in the company or with the sanction of a special resolution passed at a meeting of the holders of those shares, vary or abrogate those rights or alter the memorandum or articles so as to authorize the variation or abrogation of those rights.

**(3) Where—**

- (a) rights are attached to shares in a company; and
- (b) provision is made by the memorandum or articles authorizing the variation or abrogation of those rights with the consent of a specified proportion of the holders of the issued shares in the company or with the sanction of a resolution of a kind specified in the memorandum or articles passed at a meeting of the holders of those shares,

the memorandum or articles shall not be altered so as to vary or abrogate, or to authorize the variation or abrogation of, those rights, except with the consent of that proportion of the holders of those shares or with the sanction of such a resolution passed at a meeting of the holders of those shares.

**(4) Where rights are attached to shares in a company and—**

- (a) those rights are at any time varied or abrogated; or
- (b) the memorandum or articles is or are altered so as to authorize the variation or abrogation of those rights,

the holders of not less in the aggregate than 10% of the issued shares in the company may apply to the Court to have the variation or abrogation of the rights, or the alteration of the memorandum or articles, as the case may be, set aside and, if such an application is made, the variation or abrogation, or the alteration, does not have effect until confirmed by the Court.

**(5)** An application under sub-section (4) shall be made within 28 days after the variation, abrogation or alteration referred to in that sub-section was made and may be made, on behalf of the shareholders entitled to make the application, by such one or more of their number as they appoint in writing.

**(6)** On the application, the Court may, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested, if it is satisfied that the variation, abrogation or alteration would unfairly prejudice the shareholders of the company, set aside the variation, abrogation or alteration, as the case may be, and shall, if not so satisfied, confirm it.

(7) A company shall, within 14 days after the making of an order by the Court on an application under this section, lodge an office copy of the order with the Commission and, if the company fails to comply with this provision, the company and any officer of the company who is in default are each guilty of an offence.

(8) For the purposes of this section—

- (a) the allotment by a company of shares to which are attached rights that are not provided for in the memorandum or articles of the company or in a resolution or document to which section 251 applies shall be deemed to be a variation of the rights attached to shares previously issued unless the rights attached to the first-mentioned shares are in all respects the same as the rights attached to shares previously issued; and
- (b) the division of shares in a company into classes of shares shall be deemed to be a variation of the rights attached to those shares unless, in relation to each share in the company, the rights attached to that share are in all respects the same after the division as they were before the division.

(9) Nothing in section 73 or 76 affects the operation of this section.

#### **Rights of classes of members**

**127. (1)** This section applies to a company not having a share capital.

**(2) Where—**

- (a) members of the company included in a class of members have special rights;
- (b) no provision is made by the memorandum or articles for the variation or abrogation of those rights; and
- (c) neither the memorandum nor the articles declares or declare those rights to be unalterable,

the company may, with the consent in writing of three-quarters of the members included in that class or with the sanction of a special resolution passed at a meeting of members included in that class, vary or abrogate those rights or alter the memorandum or articles so as to authorize the variation or abrogation of those rights.

**(3) Where—**

- (a) members of the company included in a class of members have special rights; and

- (b) provision is made by the memorandum or articles authorizing the variation or abrogation of those rights with the consent of a specified proportion of the members included in that class or with the sanction of a resolution of a kind specified in the memorandum or articles passed at a meeting of the members included in that class,

the memorandum or articles shall not be altered so as to vary or abrogate, or to authorize the variation or abrogation of, those rights, except with the consent of that proportion of the members included in that class or with the sanction of such a resolution passed at a meeting of those members.

**(4)** Where members of the company included in a class of members have special rights and—

- (a) those rights are at any time varied or abrogated; or  
(b) the memorandum or articles is or are altered so as to authorize the variation or abrogation of those rights,

members included in that class who constitute not less than 10% of the members included in that class may apply to the Court to have the variation or abrogation of the rights, or the alteration of the memorandum or articles, as the case may be, set aside and, if such an application is made, the variation or abrogation, or the alteration, does not have effect until confirmed by the Court.

**(5)** An application under sub-section (4) shall be made within 28 days after the variation, abrogation or alteration referred to in that sub-section was made and may be made, on behalf of the members entitled to make the application, by such one or more of their number as they appoint in writing.

**(6)** On the application, the Court may, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested, if it is satisfied that the variation, abrogation or alteration would unfairly prejudice the members of the class represented by the applicant, set aside the variation, abrogation or alteration, as the case may be, and shall, if not so satisfied, confirm it.

**(7)** A company shall, within 14 days after the making of an order by the Court on an application under this section, lodge an office copy of the order with the Commission and, if the company fails to comply with this provision, the company and any officer of the company who is in default are each guilty of an offence.

**(8)** Nothing in section 73 or 76 affects the operation of this section.

**Rights of holders of preference shares to be set out in memorandum or articles**

**128. (1)** A company shall not allot any preference shares or convert any issued shares into preference shares unless there are set out in the memorandum or articles of the company the rights of the holders of those shares with respect to repayment of capital, participation in surplus assets and profits, cumulative or non-cumulative dividends, voting, and priority of payment of capital and dividend in relation to other shares or other classes of preference shares.

**(2)** If a company contravenes this section, the company and any officer of the company who is in default are each guilty of an offence.

**Company financing dealings in its shares, &c.**

**129. (1)** Except as otherwise expressly provided by this Code, a company shall not—

- (a) whether directly or indirectly, give any financial assistance for the purpose of, or in connection with—
  - (i) the acquisition by any person, whether before, or at the same time as, the giving of financial assistance, of—
    - (A) shares or units of shares in the company; or
    - (B) shares or units of shares in a holding company of the company; or
  - (ii) the proposed acquisition by any person of—
    - (A) shares or units of shares in the company; or
    - (B) shares or units of shares in a holding company of the company; or
- (b) whether directly or indirectly, in any way—
  - (i) acquire shares or units of shares in the company; or
  - (ii) purport to acquire shares or units of shares in a holding company of the company; or
- (c) whether directly or indirectly, in any way, lend money on the security of—
  - (i) shares or units of shares in the company; or
  - (ii) shares or units of shares in a holding company of the company.

(2) A reference in this section to the giving of financial assistance includes a reference to the giving of financial assistance by means of the making of a loan, the giving of a guarantee, the provision of security, the release of an obligation or the forgiving of a debt or otherwise.

(3) For the purposes of this section, a company shall be taken to have given financial assistance for the purpose of an acquisition or proposed acquisition referred to in paragraph (1) (a) (in this sub-section referred to as the "relevant purpose") if—

- (a) the company gave the financial assistance for purposes that included the relevant purpose; and
- (b) the relevant purpose was a substantial purpose of the giving of the financial assistance.

(4) For the purposes of this section, a company shall be taken to have given financial assistance in connection with an acquisition or proposed acquisition referred to in paragraph (1) (a) if, when the financial assistance was given to a person, the company was aware that the financial assistance would financially assist—

- (a) the acquisition by a person of shares or units of shares in the company; or
- (b) where shares in the company had already been acquired—the payment by a person of any unpaid amount of the subscription payable for the shares or of any premium payable in respect of the shares, or the payment of any calls on the shares.

(5) If a company contravenes sub-section (1), the company is, notwithstanding section 570, not guilty of an offence but each officer of the company who is in default is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(6) Where—

- (a) a person is convicted of an offence under sub-section (5) (including an offence under that sub-section that is deemed to have been committed by reason of sub-section 38 (1) of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (New South Wales) Code*); and

- (b) the court by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence,

that court may, in addition to imposing a penalty under that sub-section, order the convicted person to pay compensation to the company or other person, as the case may be, of such amount as the court specifies, and any such order may be enforced as if it were a judgment of the court.

(7) The power of a court under section 535 to relieve a person to whom that section applies, wholly or partly and on such terms as the court thinks fit, from a liability referred to in that section extends to relieving a person against whom an order may be made under sub-section (6) of this section from the liability to have such an order made against him.

- (8) Nothing in sub-section (1) prohibits—

- (a) the payment of a dividend by a company in good faith and in the ordinary course of commercial dealing;
- (b) a payment made by a company pursuant to a reduction of capital in accordance with section 123;
- (c) the discharge by a company of a liability of the company that was incurred in good faith as a result of a transaction entered into on ordinary commercial terms;
- (d) where a corporation is a borrowing corporation by reason that it is or will be under a liability to repay moneys received or to be received by it—
  - (i) the giving, in good faith and in the ordinary course of commercial dealing, by a company that is a subsidiary of the borrowing corporation, of a guarantee in relation to the repayment of those moneys, whether or not the guarantee is secured by any charge over the property of that company; or
  - (ii) the provision, in good faith and in the ordinary course of commercial dealing, by a company that is a subsidiary of the borrowing corporation, of security in relation to the repayment of those moneys;
- (e) an acquisition by a company of an interest (other than a legal interest) in fully-paid shares in the company where no consideration is provided by the company, or by any corporation that is related to the company, for the acquisition;

- (f) the purchase by a company of shares in the company pursuant to an order of a court;
- (g) the creation or acquisition, in good faith and in the ordinary course of commercial dealing, by a company of a lien on shares in the company (other than fully-paid shares) for any amount payable to the company in respect of the shares; or
- (h) the entering into, in good faith and in the ordinary course of commercial dealing, of an agreement by a company with a subscriber for shares in the company permitting the subscriber to make payments for the shares (including payments in respect of any premium) by instalments,

but nothing in this sub-section—

- (j) shall be construed as implying that a particular act of a company would, but for this sub-section, be prohibited by sub-section (1); or
- (k) shall be construed as limiting the operation of any rule of law permitting the giving of financial assistance by a company, the acquisition of shares or units of shares by a company or the lending of money by a company on the security of shares.

**(9) Nothing in sub-section (1) prohibits—**

- (a) the making of a loan, the giving of a guarantee or the provision of security by a company in the ordinary course of its ordinary business where—
  - (i) that business includes the lending of money, or the giving of guarantees or the provision of security in connection with loans made by other persons; and
  - (ii) the loan that is made by the company, or, where the guarantee is given or the security is provided in respect of a loan, that loan, is made on ordinary commercial terms as to the rate of interest, the terms of repayment of principal and payment of interest, the security to be provided and otherwise; or
- (b) the giving by a company of financial assistance for the purpose of, or in connection with, the acquisition or proposed acquisition of fully-paid shares or units of fully-paid shares in the company or in a holding company of the company to be held by or for the benefit of employees of the company or of a corporation that is related to the company, including any director holding a salaried employment or office in the company or in the corporation, as the case may be, where—
  - (i) in the case where neither sub-paragraph (ii) nor sub-paragraph (iii) applies—the company has at a general meeting;

- (ii) in a case where the company is a subsidiary of a listed corporation or listed corporations—the company and the listed corporation or listed corporations have at general meetings; or
- (iii) in the case where the company is not a subsidiary of a listed corporation but is a subsidiary whose ultimate holding company is incorporated in Australia or an external Territory—the company and the ultimate holding company have at general meetings,

approved a scheme for the provision of money for such acquisitions and the financial assistance is given in accordance with the scheme.

**(10)** Nothing in sub-section (1) prohibits the giving by a company of financial assistance for the purpose of, or in connection with, an acquisition or proposed acquisition by a person of shares or units of shares in the company or in a holding company of the company if—

- (a) the company, by special resolution, resolves to give financial assistance for the purpose of or in connection with, that acquisition;
- (b) where—
  - (i) the company is a subsidiary of a listed corporation; or
  - (ii) the company is not a subsidiary of a listed corporation but is a subsidiary whose ultimate holding company is incorporated in Australia or an external Territory,

the listed corporation or the ultimate holding company, as the case may be, has, by special resolution, approved the giving of the financial assistance;

- (c) the notice specifying the intention to propose the resolution referred to in paragraph (a) as a special resolution sets out—
  - (i) particulars of the financial assistance proposed to be given and the reasons for the proposal to give that assistance; and
  - (ii) the effect that the giving of the financial assistance would have on the financial position of the company and, where the company is included in a group of corporations consisting of a holding company and a subsidiary or subsidiaries, the effect that the giving of the financial assistance would have on the financial position of the group of corporations,

and is accompanied by a copy of a statement made in accordance with a resolution of the directors, setting out the names of any directors who voted against the resolution and the reasons why they so voted, and signed by not less than 2 directors, stating whether, in the opinion

of the directors who voted in favour of the resolution, after taking into account the financial position of the company (including future liabilities and contingent liabilities of the company), the giving of the financial assistance would be likely to prejudice materially the interests of the creditors or members of the company or any class of those creditors or members;

- (d) the notice specifying the intention to propose the resolution referred to in paragraph (b) as a special resolution is accompanied by a copy of the notice, and a copy of the statement, referred to in paragraph (c);
- (e) not later than the day next following the day when the notice referred to in paragraph (c) is dispatched to members of the company there is lodged with the Commission a copy of that notice and a copy of the statement that accompanied that notice;
- (f) the notice referred to in paragraph (c) and a copy of the statement referred to in that paragraph are given to—
  - (i) all members of the company;
  - (ii) all trustees for debenture holders of the company; and
  - (iii) if there are no trustees for, or for a particular class of, debenture holders of the company—all debenture holders, or all debenture holders of that class, as the case may be, of the company whose names are, at the time when the notice is dispatched, known to the company;
- (g) the notice referred to in paragraph (d) and the accompanying documents are given to—
  - (i) all members of the listed corporation or of the ultimate holding company;
  - (ii) all trustees for debenture holders of the listed corporation or of the ultimate holding company; and
  - (iii) if there are no trustees for, or for a particular class of, debenture holders of the listed corporation or of the ultimate holding company—all debenture holders or debenture holders of that class, as the case may be, of the listed corporation or of the ultimate holding company whose names are, at the time when the notice is dispatched, known to the listed corporation or the ultimate holding company;

- (h) within 21 days after the general meeting of the company at which the resolution referred to in paragraph (a) is passed or, in a case to which paragraph (b) applies, the general meeting of the listed corporation or ultimate holding company at which the resolution referred to in that paragraph is passed, whichever is the later, a notice—
  - (i) setting out the terms of the resolution referred to in paragraph (a); and
  - (ii) stating that any of the persons referred to in sub-section (12) may, within the period referred to in that sub-section, make an application to the Court opposing the giving of the financial assistance,

is published, in each State and Territory in which the company is carrying on business, in a daily newspaper circulating generally in that State or Territory;
- (j) no application opposing the giving of the financial assistance is made within the period referred to in sub-section (12) or, if such an application or applications has or have been made, the application or each of the applications has been withdrawn or the Court has approved the giving of the financial assistance; and
- (k) the financial assistance is given in accordance with the terms of the resolution referred to in paragraph (a) and not earlier than—
  - (i) in a case to which sub-paragraph (ii) does not apply—the expiration of the period referred to in sub-section (12); or
  - (ii) if an application or applications has or have been made to the Court within that period—
    - (A) where the application or each of the applications has been withdrawn—the withdrawal of the application or of the last of the applications to be withdrawn; or
    - (B) in any other case—the decision of the Court on the application or applications.

**(11)** Where, on application to the Court by a company, the Court is satisfied that the provisions of sub-section (10) have been substantially complied with in relation to a proposed giving by the company of financial assistance of a kind mentioned in that sub-section, the Court may, by order, declare that the provisions of that sub-section have been complied with in relation to the proposed giving by the company of financial assistance.

(12) Where a special resolution referred to in paragraph (10) (a) is passed by a company, an application to the Court opposing the giving of the financial assistance to which the special resolution relates may be made, within the period of 21 days after the publication of the notice referred to in paragraph (10) (h), by—

- (a) a member of the company;
- (b) a trustee for debenture holders of the company;
- (c) a debenture holder of the company;
- (d) a creditor of the company;
- (da) if the company is included in a group of corporations consisting of a holding company and a subsidiary or subsidiaries—
  - (i) a member of that subsidiary or of any of those subsidiaries;
  - (ii) a trustee for debenture holders of that subsidiary or of any of those subsidiaries;
  - (iii) a debenture holder of that subsidiary or of any of those subsidiaries; or
  - (iv) a creditor of that subsidiary or of any of those subsidiaries;
- (e) if paragraph (10) (b) applies—
  - (i) a member of the listed corporation or ultimate holding company that passed a special resolution referred to in that paragraph;
  - (ii) a trustee for debenture holders of that listed corporation or ultimate holding company;
  - (iii) a debenture holder of that listed corporation or ultimate holding company; or
  - (iv) a creditor of that listed corporation or ultimate holding company; or
- (f) the Commission.

(13) Where an application or applications opposing the giving of financial assistance by a company in accordance with a special resolution passed by the company is or are made to the Court under sub-section (12), the Court—

- (a) shall, in determining what order or orders to make in relation to the application or applications, have regard to the rights and interests of the members of the company or of any class of them as well as to the rights and interests of the creditors of the company or of any class of them; and

- (b) shall not make an order approving the giving of the financial assistance unless the Court is satisfied that—
- (i) the company has disclosed to the members of the company all material matters relating to the proposed financial assistance; and
  - (ii) the proposed financial assistance would not, after taking into account the financial position of the company (including any future or contingent liabilities), be likely to prejudice materially the interests of the creditors or members of the company or of any class of those creditors or members,

and may do all or any of the following:

- (c) if it thinks fit, make an order for the purchase by the company of the interests of dissentient members of the company and for the reduction accordingly of the capital of the company;
- (d) if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase (otherwise than by the company or by a subsidiary of the company) of the interests of dissentient members;
- (e) give such ancillary or consequential directions and make such ancillary or consequential orders as it thinks expedient;
- (f) make an order disapproving the giving of the financial assistance or, subject to paragraph (b), an order approving the giving of the financial assistance.

**(14)** Where the Court makes an order under this section in relation to the giving of financial assistance by a company, the company shall, within 14 days after the order is made, lodge with the Commission an office copy of the order.

**(15)** The passing of a special resolution by a company for the giving of financial assistance by the company for the purpose of, or in connection with, an acquisition or proposed acquisition of shares or units of shares in the company, and the approval by the Court of the giving of the financial assistance, do not relieve a director of the company of any duty to the company under section 229 or otherwise, and whether of a fiduciary nature or not, in connection with the giving of the financial assistance.

**(16)** A reference in this section to an acquisition or proposed acquisition of shares or units of shares is a reference to any acquisition or proposed acquisition whether by way of purchase, subscription or otherwise.

**(17)** This section does not apply in relation to the doing of any act or thing pursuant to a contract entered into before the commencement of the *Companies (Application of Laws) Act*, 1981, if the doing of that act or thing would have been lawful if that Act had not been enacted.

#### **Consequences of company financing dealings in its shares, &c.**

**130. (1)** Except as provided by this section—

- (a) the validity of a contract or transaction is not affected by a contravention of paragraph 129 (1) (a);
- (b) the validity of a contract or transaction is not affected by a contravention of paragraph 129 (1) (b) unless the contract or transaction effects the acquisition that constitutes the contravention; and
- (c) the validity of a contract or transaction is not affected by a contravention of paragraph 129 (1) (c) unless the contract or transaction effects the loan that constitutes the contravention.

**(2)** Where a company makes or performs a contract, or engages in a transaction, that would, but for sub-section (1), be invalid by reason that—

- (a) the contract was made or performed, or the transaction was engaged in, in contravention of section 129; or
- (b) the contract or transaction is related to a contract that was made or performed, or to a transaction that was engaged in, in contravention of that section,

the first-mentioned contract or transaction is, subject to the following provisions of this section, voidable at the option of the company by notice in writing given to the other party, or by notices in writing given to each of the other parties, to that contract or transaction.

**(3)** The Court may, on the application of a member of a company, a holder of debentures of a company, a trustee for the holders of debentures of a company or a director of a company, by order, authorize the member, holder of debentures, trustee or director to give a notice or notices under sub-section (2) in the name of the company.

**(4)** Where—

- (a) a company makes or performs a contract, or engages in a transaction;

- (b) the contract is made or performed, or the transaction is engaged in, in contravention of section 129 or the contract or transaction is related to a contract that was made or performed, or to a transaction that was engaged in, in contravention of that section; and
- (c) the Court is satisfied, on the application of the company or of any other person, that the company or that other person has suffered, or is likely to suffer, loss or damage as a result of—
  - (i) the making or performance of the contract or the engaging in of the transaction;
  - (ii) the making or performance of a related contract or the engaging in of a related transaction;
  - (iii) the contract or transaction being void by reason of section 129 or having become void, or becoming void, under this section; or
  - (iv) a related contract or transaction being void by reason of section 129 or having become void, or becoming void, under this section,

the Court may make such order or orders as it thinks just and equitable (including, without limiting the generality of the foregoing, all or any of the orders mentioned in sub-section (5)) against any party to the contract or transaction or to the related contract or transaction, or against the company or against any person who aided, abetted, counselled or procured, or was, by act or omission, in any way, directly or indirectly, knowingly concerned in or party to the contravention.

**(5)** The orders that may be made under sub-section (4) include—

- (a) an order directing a person to refund money or return property to the company or to another person;
- (b) an order directing a person to pay to the company or to another person a specified amount not exceeding the amount of the loss or damage suffered by the company or other person; and
- (c) an order directing a person to indemnify the company or another person against any loss or damage that the company or other person may suffer as a result of the contract or transaction or as a result of the contract or transaction being or having become void.

**(6)** If a certificate signed by not less than 2 directors, or by a director and a secretary, of a company stating that the requirements of paragraphs 129 (10) (a) to (j), inclusive, have been complied with in relation to the

proposed giving by the company of financial assistance for the purposes of an acquisition or proposed acquisition by a person of shares or units of shares in the company or in a holding company of the company is given to a person—

- (a) the person to whom the certificate is given is not under any liability to have an order made against him under sub-section (4) by reason of any contract made or performed, or any transaction engaged in, by him in reliance on the certificate; and
- (b) any such contract or transaction is not invalid, and is not voidable under sub-section (2), by reason that the contract is made or performed, or the transaction is engaged in, in contravention of section 129 or is related to a contract that was made or performed, or to a transaction that was engaged in, in contravention of that section.

**(7)** Sub-section (6) does not apply in relation to a person to whom a certificate is given under that sub-section in relation to a contract or transaction if the Court, on application by the company concerned or any other person who has suffered, or is likely to suffer, loss or damage as a result of the making or performance of the contract or the engaging in of the transaction, or the making or performance of a related contract or the engaging in of a related transaction, by order, declares that it is satisfied that the person to whom the certificate was given became aware before the contract was made or the transaction was engaged in that the requirements of sub-section 129 (10) had not been complied with in relation to the financial assistance to which the certificate related.

**(8)** For the purposes of sub-section (7), a person shall, in the absence of proof to the contrary, be deemed to have been aware at a particular time of any matter of which a servant or agent of the person having duties or acting on behalf of the person in relation to the relevant contract or transaction was aware at the time.

**(9)** In any proceeding, a document purporting to be a certificate given under sub-section (6) shall, in the absence of proof to the contrary, be deemed to be such a certificate and to have been duly given.

**(10)** A person who has possession of a certificate given under sub-section (6) shall, in the absence of proof to the contrary, be deemed to be the person to whom the certificate was given.

**(11)** If a person signs a certificate stating that the requirements of sub-section 129 (10) have been complied with in relation to the proposed giving by a company of financial assistance and any of those requirements had not been complied with in respect of the proposed giving of that assistance at the time when the certificate was signed by that person, the person is guilty of an offence.

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

**(12)** It is a defence to a prosecution for an offence against sub-section (11) if the defendant proves that at the time when he signed the certificate he believed on reasonable grounds that all the requirements of sub-section 129 (10) had been complied with in respect of the proposed giving of financial assistance to which the certificate related.

**(13)** The power of a court under section 535 to relieve a person to whom that section applies, wholly or partly and on such terms as the court thinks fit, from a liability referred to in that section extends to relieving a person against whom an order may be made under sub-section (4) of this section from the liability to have such an order made against him.

**(14)** If a company makes a contract or engages in a transaction under which it gives financial assistance as mentioned in paragraph 129 (1) (a) or lends money as mentioned in paragraph 129 (1) (c), any contract or transaction made or engaged in as a result of or by means of, or in relation to, that financial assistance or money shall be deemed for the purposes of this section to be related to the first-mentioned contract or transaction.

**(15)** Any rights or liabilities of a person under this section (including rights or liabilities under an order made by the Court under this section) are in addition to and not in derogation of any rights or liabilities of that person apart from this section but, where there would be any inconsistency between the rights and liabilities of a person under this section or under an order made by the Court under this section and the rights and liabilities of that person apart from this section, the provisions of this section or of the order made by the Court prevail.

#### **Register of options**

**131. (1)** A company shall keep a register of options granted to persons to take up unissued shares in the company.

(2) The company shall, within 14 days after the grant of an option to take up unissued shares in the company, enter in the register the following particulars:

- (a) the name and address of the holder of the option;
- (b) the date on which the option was granted;
- (c) the number and description of the shares in respect of which the option was granted;
- (d) the period during which, the time at which or the occurrence upon the happening of which the option may be exercised;
- (e) the consideration (if any) for the grant of the option;
- (f) the consideration (if any) for the exercise of the option or the manner in which that consideration is to be ascertained or determined;
- (g) such other particulars as are prescribed.

(3) The register is *prima facie* evidence of any matters inserted in the register as required or authorized by this Code.

(4) The register shall be open for inspection—

- (a) by any 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.

(5) A person may request a company to furnish him with a copy of the register or any part of the register and, where such a request is made, the company shall 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 the Commission 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 the Commission approves.

**(5A)** A company shall keep, at the place where the register referred to in sub-section (1) is kept, a copy of every instrument by which an option to take up unissued shares in the company is granted and, for the purposes of sub-sections (4) and (5), those copies shall be deemed to be part of the register referred to in sub-section (1).

**(5B)** Notwithstanding sub-section (5A), a company is not required to keep a copy of any instrument by which an option has been granted if the option has been granted official quotation by a stock exchange.

**(6)** Failure by a company to comply with any of the provisions of this section in relation to an option does not affect any rights in respect of the option.

**(7)** If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

#### **Options over unissued shares**

**132. (1)** An option granted after the commencement of the *Companies Act*, 1961, by a public company that enables any person to take up unissued shares in the company after a period of 5 years has elapsed from the date on which the option was granted is void.

**(2)** Sub-section (1) does not apply in a case where the holders of debentures of a company have an option to take up shares in the company by way of redemption of the debentures.

#### **Power of company to pay interest out of capital in certain cases**

**133.** Where any shares in a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant that cannot be made profitable for a long period, the company may pay interest on so much of that share capital as is for the time being paid up and charge the interest so paid to capital as part of the cost of the construction or provision but—

- (a) no such payment shall be made unless it is—
  - (i) authorized by the articles of the company or by special resolution; and
  - (ii) approved by the Court;

- (b) before approving any such payment, the Court may, at the expense of the company, appoint a person to inquire and report as to the circumstances of the case, and may require the company to give security for the payment of the costs of the inquiry;
- (c) the payment shall be made for such period only as is determined by the Court, but that period shall not in any case extend beyond a period of 12 months after the works or buildings have been completed or the plant has been provided;
- (d) the rate of interest shall not exceed 8% per annum or, if another rate is prescribed, that other rate; and
- (e) the payment of the interest does not operate as a reduction of the amount paid up on the shares in respect of which it is paid.

*Division 4—Substantial Shareholdings*

**Application and interpretation**

**134. (1)** This section has effect for the purposes of this Division.

**(2)** A reference to a company is a reference—

- (a) to a company that has been admitted to the official list of a stock exchange in Australia and has not been removed from that official list;
- (b) to a body corporate, being a body incorporated in the State, that is for the time being declared by the Ministerial Council, by order published in the *Gazette*, to be a company for the purposes of this Division; or
- (c) to a body, not being a body corporate, formed in the State, that is for the time being declared by the Ministerial Council, by order published in the *Gazette*, to be a company for the purposes of this Division.

**(3)** The Ministerial Council may, by order published in the *Gazette*, revoke or vary an order published under sub-section (2).

**(4)** In relation to a company the whole or a portion of the share capital of which consists of stock, a reference in this Division to a number of shares expressed as a percentage shall, in relation to an amount of stock, be construed as a reference to the amount of stock that represents that number of shares.

**(5)** A reference in the definition of “voting share” in sub-section 5 (1) to a body corporate includes a reference to a body referred to in paragraph (2) (c) of this section.

**Persons obliged to comply with Division**

**135. (1)** The obligation to comply with this Division extends to all natural persons, whether resident in the State or in Australia or not and whether Australian citizens or not, and to all bodies corporate or unincorporate, whether incorporated or carrying on business in the State or in Australia or not.

**(2)** This Division extends to acts done or omitted to be done outside the State, whether in Australia or not.

**Substantial shareholdings and substantial shareholders**

**136. (1)** For the purposes of this Division, a person has a substantial shareholding in a company if—

- (a) in the case of a company the voting shares in which are not divided into classes of shares—he is entitled to not less than the prescribed percentage of those shares; or
- (b) in the case of a company the voting shares in which are divided into 2 or more classes of shares—he is entitled to not less than the prescribed percentage of the shares in one of those classes.

**(2)** For the purposes of this Division, the voting shares in a company to which a person is entitled include—

- (a) voting shares in which that person has a relevant interest; and
- (b) except in the case of a person being a nominee corporation in respect of which a certificate by the Commission is in force under sub-section (6)—voting shares in which an associate of that person has a relevant interest,

but do not include voting shares in which an associate of that person has a relevant interest and in respect of which that associate has obtained a certificate from the Commission under sub-section (7).

(3) A reference in this Division to an associate of a person shall be construed as a reference to—

- (a) if the person is a corporation—
  - (i) a director or secretary of the corporation;
  - (ii) a corporation that is related to that person; or
  - (iii) a director or secretary of such a related corporation;
- (b) where the matter to which the reference relates is shares in a company—a person with whom the first-mentioned person has, or proposes to enter into, an agreement, arrangement, understanding or undertaking, whether formal or informal and whether express or implied—
  - (i) by reason of which he or the first-mentioned person may exercise, directly or indirectly control the exercise of, or substantially influence the exercise of, any voting power attached to shares in that company;
  - (ii) with a view to controlling or influencing the composition of the board of directors, or the conduct of affairs, of that company; or
  - (iii) under which he or the first-mentioned person may acquire from the other of them shares in that company or may be required to dispose of such shares in accordance with the directions of the other of them;
- (c) a person in concert with whom the first-mentioned person is acting, or proposes to act, in respect of the matter to which the reference relates;
- (d) a person with whom the first-mentioned person is, by virtue of the regulations, to be regarded as associated in respect of the matter to which the reference relates;
- (e) a person with whom the first-mentioned person is, or proposes to become, associated, whether formally or informally, in any other way in respect of the matter to which the reference relates; or
- (f) if the first-mentioned person has entered into, or proposes to enter into, a transaction, or has done or proposes to do, any other act or thing, with a view to becoming associated with a person as mentioned in paragraph (b), (c), (d) or (e)—that last-mentioned person.

(4) A person shall not be taken to be an associate of another person by virtue of paragraph (3) (b), (c), (d), (e) or (f) by reason only that—

- (a) one of those persons furnishes advice to, or acts on behalf of, the other person in the proper performance of the functions attaching to his professional capacity or to his business relationship with the other person;
- (b) without limiting the generality of paragraph (a), where the ordinary business of one of those persons includes dealing in securities—specific instructions are given to the person by or on behalf of the other person to acquire shares on behalf of the other person in the ordinary course of that business; or
- (c) the other person has been appointed by the first-mentioned person as a proxy or representative to exercise, at a meeting of members or of a class of members of a company, votes attached to shares of which the first-mentioned person is the holder, where the relevant interest of that other person in those shares that arises by reason of his appointment as a proxy or representative would be disregarded under subsection 8 (8) by reason of paragraph (b) of that sub-section.

(5) For the purposes of paragraph (3) (b), it is immaterial that the power of a person to exercise, control the exercise of, or influence the exercise of, voting power is in any way qualified.

(6) The Commission may, in its discretion, issue to a nominee corporation a certificate declaring the nominee corporation to be an approved nominee corporation for the purposes of this section and may at any time, in its discretion, by notice in writing to the nominee corporation, revoke the certificate.

(7) The Commission may, in its discretion, issue to any person a certificate declaring that specified shares in which that person has a relevant interest are to be disregarded for the purposes of ascertaining the voting shares to which another person specified in the certificate is entitled, and may at any time, in its discretion, by notice in writing to the first-mentioned person, revoke the certificate.

(8) For the purposes of this Division, a person who has a substantial shareholding in a company is a substantial shareholder in that company.

**(9)** A reference in this section to the prescribed percentage is a reference to 10% or, where a lesser percentage is prescribed by regulations in force for the time being for the purposes of this section, a reference to that lesser percentage.

#### **Substantial shareholder to notify company of his interests**

**137. (1)** A person who is a substantial shareholder in a company shall give to the company a notice in the prescribed form that—

- (a) states—
  - (i) his name and address;
  - (ii) the prescribed particulars of the voting shares in the company in which the person or an associate of the person has a relevant interest or relevant interests (including, unless the interest or interests cannot be related to a particular share or shares, the name of the person who is registered as the holder);
  - (iii) the prescribed particulars of each such interest; and
  - (iv) the prescribed particulars of any contract, scheme or arrangement, or any other circumstances, by reason of which the person or the associate acquired that interest or has that interest; and
- (b) is accompanied by the prescribed documents.

**(2)** A person required to give a notice under sub-section (1) shall give the notice within 2 business days after that person becomes aware of the relevant interest or interests by virtue of which he is a substantial shareholder.

**(3)** The notice shall be so given notwithstanding that the person has ceased to be a substantial shareholder before the expiration of the period referred to in sub-section (2).

#### **Substantial shareholder to notify company of change in his interests**

**138. (1)** Where there is a change (not being a prescribed change) in the relevant interest or relevant interests of a substantial shareholder in a company, or in the relevant interest or relevant interests of an associate of a

substantial shareholder in a company, in voting shares in the company, the substantial shareholder shall give to the company a notice in the prescribed form that—

(a) states—

- (i) his name;
- (ii) whether the change is a change in a relevant interest of an associate, and if so, the name of the associate;
- (iii) the date of the change and the prescribed particulars of the change; and
- (iv) the prescribed particulars of any contract, scheme or arrangement, or any other circumstances, by reason of which the change has occurred; and

(b) is accompanied by the prescribed documents.

(2) A person required to give a notice under sub-section (1) shall give the notice within 2 business days after that person becomes aware of the change.

(3) For the purposes of sub-section (1), where a person acquires or disposes of voting shares in a company, there shall be deemed to be a change in the relevant interest or relevant interests of the person in voting shares in that company.

**Person who ceases to be substantial shareholder to notify company**

**139.** (1) A person who ceases to be a substantial shareholder in a company shall give to the company a notice in the prescribed form that—

(a) states—

- (i) his name;
- (ii) the date on which he ceased to be a substantial shareholder; and
- (iii) the prescribed particulars of any contract, scheme or arrangement, or any other circumstances, by reason of which the person ceased to be a substantial shareholder; and

(b) is accompanied by the prescribed documents.

(2) A person required to give a notice under sub-section (1) shall give the notice within 2 business days after he becomes aware that he or an associate has ceased to have a relevant interest or relevant interests in a share or shares in a company to the extent necessary to make him a substantial shareholder in the company.

**References to operation of section 8**

**140.** The circumstances required to be stated in a notice under section 137, 138 or 139 include circumstances by reason of which, having regard to the provisions of section 8—

- (a) a person has a relevant interest in voting shares;
- (b) a change has occurred in a relevant interest in voting shares; or
- (c) a person has ceased to be a substantial shareholder in a company, respectively.

**Copy of notice to be served on stock exchange**

**141.** A person who gives a notice under section 137, 138 or 139 to a company referred to in paragraph 134 (2) (a), shall, on the day on which he gives that notice, serve a copy of the notice on the stock exchange that is the home exchange in relation to the company.

**Commission may extend period for giving notice under this Division**

**142. (1)** The Commission may, on the application of a person who is required to give a notice under this Division, in its discretion, extend, or further extend, the period for giving the notice.

**(2)** An application for an extension under sub-section (1) may be made, and the power of the Commission under that sub-section may be exercised, notwithstanding that the period referred to in that sub-section has expired.

**Company to keep register of substantial shareholders**

**143. (1)** A company shall keep a register in which it shall forthwith enter—

- (a) in alphabetical order the names of persons from whom it has received notices under section 137; and
- (b) against each name so entered, the information given in the notice and, where it receives a notice under section 138 or 139, the information given in that notice.

**(2)** The register shall be open for inspection—

- (a) by any 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.

**(3)** A person may request a company to furnish him with a copy of the register or any part of the register and, where such a request is made, the company shall 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 the Commission 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 the Commission approves.

**(4)** If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

**(5)** A company is not, by reason of anything done under this Division—

- (a) to be taken for any purpose to have notice of; or
- (b) put upon inquiry as to,

a right of a person to or in relation to a share in the company.

#### **Offences against certain sections**

**144.** A person who fails to comply with section 137, 138 or 139 is guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

#### **Knowledge of servant or agent imputed to master or principal**

**145.** In any proceedings under section 144 or 146, a person shall, in the absence of proof to the contrary, be presumed to have been aware at a particular time of a fact or occurrence of which a servant or agent of the

person having duties or acting in relation to a relevant interest or relevant interests of his master or principal in a share or shares in the company concerned was aware at the time.

#### **Powers of court with respect to defaulting substantial shareholder**

**146. (1)** Where a person (in this section referred to as the "substantial shareholder") is, or at any time after the commencement of the *Companies (Application of Laws) Act*, 1981, has been, a substantial shareholder in a company and has failed to comply with section 137, 138 or 139, the Court may, on the application of the Commission, whether or not that failure still continues, make one or more of the following orders:

- (a) an order restraining the substantial shareholder, or a person who is an associate of the substantial shareholder, from disposing of, or of any interest in, shares in the company, being shares to which the substantial shareholder is entitled;
- (b) an order restraining a person who is, or is entitled to be registered as, the holder of shares in the company to which the substantial shareholder is or has been entitled from disposing of, or of any interest in, those shares;
- (c) an order restraining the exercise of any voting or other rights attached to any shares in the company to which the substantial shareholder is or has been entitled;
- (d) an order directing the company not to make payment, or to defer making payment, of any sum or sums due from the company in respect of any shares to which the substantial shareholder is or has been entitled;
- (e) an order directing the disposal of, or of any interest in, shares in the company to which the substantial shareholder is or has been entitled;
- (f) an order directing the company not to register the transfer or transmission of specified shares;
- (g) an order that any exercise of the voting or other rights attached to specified shares in the company to which the substantial shareholder is or has been entitled be disregarded;
- (h) for the purposes of securing compliance with any other order made under this section, an order directing the company or any other person to do or refrain from doing a specified act.

**(1A)** 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.

**(1B)** Where the Commission makes an application to the Court for the making of an order under sub-section (1), the Court shall not require the Commission or any other person, as a condition of granting an interim order under sub-section (1A), to give any undertakings as to damages.

**(2)** Where, at the hearing of an application under this section, it is proved to the satisfaction of the Court that—

- (a) a person is entitled to shares in a company by reason that another person who is, by virtue of sub-section 136 (3), an associate of the first-mentioned person has a relevant interest in those shares; and
- (b) that other person became entitled to that relevant interest within the period of 6 months immediately preceding the filing of the application with the Court,

then, in determining for the purposes of the application whether the first-mentioned person failed to comply with section 137, 138 or 139, the proof to the satisfaction of the Court of the matters mentioned in paragraphs (a) and (b) of this sub-section constitutes *prima facie* evidence that the other person was, for the purposes of sub-section 136 (3), an associate of the first-mentioned person from the time when that other person became entitled to that relevant interest until the date of the hearing.

**(3)** Any order under this section may include such ancillary or consequential provisions as the Court thinks just.

**(4)** An order under sub-section (1) directing the disposal of, or of an interest in, a share may provide that the disposal shall be made within such time and subject to such conditions (if any) as the Court thinks fit, including, if the Court thinks fit, a condition that the disposal shall not be made to a person who is, or, as a result of the disposal, would become, a substantial shareholder in the company.

**(5)** The Court may direct that, where a share is not disposed of in accordance with an order of the Court under sub-section (1), the share shall vest in the Commission.

**(6)** The Court shall, before making an order under sub-section (1) and in determining the terms of such an order, satisfy itself, so far as it can reasonably do so, that the order would not unfairly prejudice any person.

**(7)** The Court shall not make an order under this section, other than an order restraining the exercise of voting rights, if it is satisfied—

- (a) that the failure of the substantial shareholder to comply as mentioned in sub-section (1) was due to his inadvertence or mistake or to his not being aware of a relevant fact or occurrence; and
- (b) that, in all the circumstances, the failure ought to be excused.

**(8)** The Court may, before making an order under sub-section (1), direct that notice of the application be given to such persons as it thinks fit or direct that notice of the application be published in such manner as it thinks fit, or both.

**(9)** The Court may rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.

**(10)** A person who contravenes or fails to comply with an order under this section that is applicable to him is guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**(11)** Where an offence under sub-section (10) is committed by a corporation, each officer of the corporation who is in default is guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**(12)** Section 462 applies in relation to a share that vests in the Commission under this section in like manner as it applies in relation to an estate or interest in property referred to in the first-mentioned section.

#### *Division 5—Debentures*

##### **Register of debenture holders and copies of trust deed**

**147. (1)** A company that issues debentures shall keep a register of holders of debentures.

**(2)** A foreign company formed outside Australia and the external Territories that is registered as a foreign company under Division 5 of Part XIII shall, if it issues debentures, keep a register of holders of debentures, being—

- (a) debentures issued pursuant to an application in which an address in Australia or an external Territory was specified as the address of the applicant for debentures; or

(b) debentures issued pursuant to an application made on a form of application attached to a prospectus a copy of which was registered under this Code.

(3) A registered foreign company (other than a registered foreign company to which sub-section (2) applies) shall, if it issues debentures, keep a register of holders of debentures, being—

(a) debentures issued in the State; or

(b) debentures issued pursuant to an application in which an address in the State was specified as the address of the applicant for debentures.

(4) A register kept pursuant to this section shall—

(a) contain particulars of the names and addresses of debenture holders and the respective amounts of debentures held by them; and

(b) except when duly closed, be open for inspection at the place where it is kept in accordance with section 547—

(i) by the registered holder of any debentures of, or by any holder of shares in, the company or foreign company—with-out charge; and

(ii) by any other person—on payment for each inspection of such amount, not exceeding the prescribed amount, as the company or foreign company requires or, where the company or foreign company does not require the payment of an amount, without charge.

(5) For the purposes of this section, a register shall be deemed to be duly closed if closed in accordance with provisions contained in the articles, in the debentures or debenture stock certificates, or in the trust deed or other document relating to or securing the debentures, during such periods (not exceeding in the aggregate 30 days in any calendar year) as are specified in those provisions.

(6) A registered holder of debentures of, or a holder of shares in, a company or a registered foreign company may request the company or foreign company to furnish him with a copy of its register of the holders of debentures kept pursuant to this section or any part of that register.

(7) A registered holder of debentures of a company or of a registered foreign company may request the company or foreign company to furnish him with a copy of any trust deed relating to or securing the issue of those debentures.

**(8)** Where a company or registered foreign company receives a request under sub-section (6) or (7), the company shall send the copy that was requested to the person who made the request—

- (a) if the company or registered foreign 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 registered foreign company or within such longer period as the Commission 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 the Commission approves.

**(9)** The Commission may at any time by notice in writing require a company or a registered foreign company to furnish the Commission with a copy of any trust deed relating to or securing the issue of debentures of the company or foreign company and, where a company or foreign company receives a notice under this sub-section, the company or foreign company shall furnish the copy within 21 days after the day on which it receives the notice.

**(10)** If default is made in complying with this section, the company or registered foreign company and any officer of the company or foreign company, as the case may be, who is in default are each guilty of an offence.

**(11)** In this section, “debenture” means a debenture, debenture stock, bonds, notes and any other security given by a corporation, whether constituting a charge on property of the corporation or not, but does not include—

- (a) a cheque, order for the payment of money or bill of exchange;
- (b) a promissory note having a face value of not less than \$50,000; or
- (c) an acknowledgement, issued by a banking corporation, of the receipt of money deposited with the banking corporation.

#### **Branch registers**

**148. (1)** A company, or a registered foreign company to which sub-section 147 (2) applies (in this section referred to as a “relevant foreign company”), may cause to be kept in any place outside the State a branch register of holders of debentures.

(2) Where a person who is a holder of debentures issued by a company or by a relevant foreign company and is resident in a participating State or participating Territory requests the company or relevant foreign company, as the case may be, in writing to register in a branch register of the company or relevant foreign company in that State or Territory debentures held by that person—

- (a) if the company or relevant foreign company keeps a branch register of holders of debentures in that State or Territory—the company or relevant foreign company shall register in that branch register the debentures issued by the company or relevant foreign company that are held by that person; or
- (b) if the company or relevant foreign company—
  - (i) does not keep a branch register of holders of debentures in that State or Territory; and
  - (ii) is carrying on business in that State or Territory,  
the company or relevant foreign company shall, within one month after receipt by it of the application, cause a branch register of holders of debentures to be kept in that State or Territory and shall register in that branch register the debentures issued by the company or relevant foreign company that are held by that person.

(3) A branch register kept by a company or a relevant foreign company shall be deemed to be part of the register of holders of debentures kept by that company or relevant foreign company, as the case may be.

(4) A branch register shall be kept in the same manner as that in which the principal register is by this Code required to be kept.

(5) A company or relevant foreign company shall transmit to the place at which its principal register is kept a copy of every entry in its branch register within 28 days after the entry is made, and shall cause to be kept at that place, duly entered up from time to time, a duplicate of its branch register, and the duplicate branch register shall, for the purposes of this Code, be deemed to be part of the principal register.

(6) Subject to the provisions of this section with respect to the duplicate branch register, the debentures registered in a branch register shall be distinguished from the debentures registered in the principal register, and no transaction with respect to any debentures registered in a branch register shall, during the continuance of that registration, be registered in any other register.

(7) Subject to sub-section (8), a company or a relevant foreign company may discontinue a branch register and thereupon the company or relevant foreign company shall transfer all entries in that register to some other branch register kept by the company or relevant foreign company in the same State or Territory or, if there is no other branch register kept by the company or relevant foreign company in that State or Territory, to the principal register.

(8) Where a company or relevant foreign company keeps in a participating State or participating Territory a branch register in which are registered debentures held by a person or persons resident in that State or Territory, the company or relevant foreign company is not entitled to discontinue that branch register unless—

- (a) the company or relevant foreign company keeps another branch register in that State or Territory to which the entries in the first-mentioned branch register will be transferred;
- (b) the person or persons resident in that State or Territory whose debentures are registered in the first-mentioned branch register consents or consent in writing to the discontinuance of that branch register; or
- (c) the company or relevant foreign company ceases to carry on business in that State or Territory.

(9) A branch register is *prima facie* evidence of any matters that are by this section directed or authorized to be inserted in that register.

(10) If default is made in complying with this section, the company or relevant foreign company, any officer of the company or relevant foreign company who is in default, and any person who has arranged with the company or relevant foreign company to make up a branch register on behalf of the company or relevant foreign company and is in default, are each guilty of an offence.

(11) In this section—

“branch register”, in relation to a company or relevant foreign company, means a branch register of holders of debentures issued by the company or relevant foreign company that is kept pursuant to this section;

“debenture” means a debenture, debenture stock, bonds, notes and any other security given by a corporation, whether constituting a charge on property of the corporation or not, but does not include—

- (a) a cheque, order for the payment of money or bill of exchange;

- (b) a promissory note having a face value of not less than \$50,000; or
- (c) an acknowledgement, issued by a banking corporation, of the receipt of money deposited with the banking corporation;

“principal register”, in relation to a company or relevant foreign company, means the register of holders of debentures issued by the company or relevant foreign company that is kept pursuant to section 147.

#### **Specific performance of contracts**

**149.** A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

#### **Perpetual debentures**

**150.** A condition contained in any debenture or in any deed for securing any debentures, whether the debenture or deed is issued or made before or after the commencement of the *Companies (Application of Laws) Act*, 1981, is not invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency however remote or on the expiration of a period however long, any rule of law or equity to the contrary notwithstanding.

#### **Re-issue of redeemed debentures**

**151. (1)** Where a company has redeemed any debentures, whether before or after the commencement of the *Companies (Application of Laws) Act*, 1981—

- (a) unless any provision to the contrary, whether express or implied, is contained in the articles or in any contract entered into by the company; or
- (b) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled,

the company has, and shall be deemed always to have had, power to re-issue the debentures, either by re-issuing the same debentures or by issuing other debentures in their place, but the re-issue of a debenture or the issue of one debenture in place of another under this sub-section, whether re-issue or issue

was made before or after the commencement of the *Companies (Application of Laws) Act*, 1981, shall not be regarded as the issue of a new debenture for the purpose of any provision limiting the amount or number of debentures that may be issued by the company.

(2) After the re-issue of any debentures the person entitled to the debentures has, and shall be deemed always to have had, the same priorities as if the debentures had never been redeemed.

(3) Where a company has, either before or after the commencement of the *Companies (Application of Laws) Act*, 1981, deposited any of its debentures to secure advances on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit while the debentures remain so deposited.

#### **Qualifications of trustee for debenture holders**

**152. (1)** Subject to this section, a corporation that—

- (a) in the State, invites the public to subscribe for or purchase debentures or offers debentures to the public for subscription or purchase; or
- (b) offers debentures as consideration for the acquisition, pursuant to a take-over scheme within the meaning of the *Companies (Acquisition of Shares) (New South Wales) Code*, of shares in a company,

shall make provision in a trust deed relating to those debentures for the appointment as a trustee for the holders of those debentures of a corporation (in this section referred to as a "trustee corporation"), being—

- (c) a person constituted as the Public Trustee in any State or Territory;
- (d) a corporation authorized by a law of a State or Territory to take in its own name a grant of probate of the will, or of letters of administration of the estate, of a deceased person;
- (e) a corporation registered under the *Life Insurance Act* 1945;
- (f) a banking corporation;
- (g) a corporation (in this paragraph referred to as the "subsidiary") the whole of the issued shares of which are held beneficially by a corporation or corporations of a kind referred to in paragraph (d), (e) or (f) (in this paragraph referred to as the "holding company") if—
  - (i) the holding company is liable for all liabilities incurred or to be incurred by the subsidiary as trustee for the holders of the debentures; or

- (ii) the holding company has subscribed for and beneficially holds shares in the subsidiary, being shares in respect of which there is a liability of not less than \$500,000 that has not been called up and that, by reason of a special resolution of the members of the subsidiary, is not capable of being called up except in the event, and for the purposes, of the winding up of the subsidiary; or
  - (h) a corporation approved by the Commission for the purposes of this sub-section.
- (2) The approval of a corporation by the Commission pursuant to paragraph (1) (h) shall be given by notice published in the *Gazette* and—
- (a) may be given generally or in relation to a particular borrowing corporation, a particular class of borrowing corporations or a particular trust deed;
  - (b) may be given subject to such terms and conditions (if any) as the Commission thinks fit and as are specified in the notice; and
  - (c) may be varied or revoked by the Commission by notice published in the *Gazette*.
- (3) Where the approval of a corporation has been revoked under subsection (2), the borrowing corporation shall appoint a trustee corporation qualified pursuant to this section in place of the trustee corporation that by reason of the revocation has ceased to be qualified.
- (4) Where a borrowing corporation is required by sub-section (1) to make provision in a trust deed for the appointment of a trustee corporation as trustee for the holders of debentures, the borrowing corporation shall not issue any of those debentures until the trustee corporation has consented to act as trustee and the appointment has been made.
- (5) Except by leave of the Court, a trustee corporation shall not be appointed, hold office or act as trustee for the holders of debentures of a borrowing corporation if that trustee corporation is—
- (a) a director of the borrowing corporation;
  - (b) a shareholder that beneficially holds shares in the borrowing corporation;
  - (c) beneficially entitled to moneys owed by the borrowing corporation to it;

- (d) indebted (otherwise than in its capacity as a trustee) in an amount exceeding \$5,000 to the borrowing corporation;
- (e) a corporation that has entered into a guarantee in respect of the principal debt secured by those debentures or in respect of interest on that debt; or
- (f) a corporation that is related to—
  - (i) a corporation of a kind referred to in any of the preceding paragraphs; or
  - (ii) the borrowing corporation.

(6) Sub-section (5) does not prevent a trustee corporation from being appointed, holding office or acting as trustee for the holders of debentures of a borrowing corporation by reason only that—

- (a) the borrowing corporation owes to the trustee corporation or to a corporation that is related to the trustee corporation—
  - (i) moneys that (not taking into account any moneys referred to in sub-paragraphs (ii) and (iii)) do not—
    - (A) at the time of the appointment or at any time within a period of 3 months after the debentures are first offered to the public—exceed 10% of the amount of the debentures in respect of which invitations or offers to the public are proposed to be issued or made within that period; and
    - (B) at any time after the expiration of that period—exceed 10% of the amount owed by the borrowing corporation to the holders of the debentures;
  - (ii) moneys that are secured by, and only by—
    - (A) a first mortgage over land of the borrowing corporation;
    - (B) debentures issued by the borrowing corporation to the public;
    - (C) debentures not issued to the public that are issued pursuant to the same trust deed as that creating other debentures issued at any time by the borrowing corporation to the public; or
    - (D) debentures to which the trustee corporation, or a corporation that is related to the trustee corporation, is not beneficially entitled; or

- (iii) moneys to which the trustee corporation, or a corporation that is related to the trustee corporation, is entitled as trustee for holders of any debentures of the borrowing corporation in accordance with the terms of the debentures or of the relevant trust deed; or
- (b) the trustee corporation, or a corporation that is related to the trustee corporation, is a shareholder of the borrowing corporation in respect of shares that it beneficially holds, if the voting shares in the borrowing corporation beneficially held by the trustee corporation, and by all other corporations that are related to it, do not exceed 10% of the voting shares in the borrowing corporation.

**(7) Nothing in sub-section (5)—**

- (a) affects the operation of any debentures or trust deed issued or executed before 1 July 1964; or
- (b) applies to or in relation to the trustee for the holders of any such debentures,

unless, pursuant to any such debentures or trust deed, a further offer of debentures was or is made to the public on or after that date.

**(8)** The reference in sub-section (1) to a corporation that offers debentures as consideration for the acquisition of shares in a company includes a reference to a corporation 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 make, or that the sum be applied in whole or in part in making, a payment by way of deposit with, or loan to, the corporation.

**(9)** If default is made in complying with any provision of this section, the corporation and any officer of the corporation who is in default are each guilty of an offence.

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

**Retirement of trustees**

**153. (1)** Notwithstanding anything contained in any law in force in the State or in the relevant debentures or trust deed, a trustee for the holders of debentures does not cease to be the trustee until a corporation qualified pursuant to section 152 for appointment as trustee for the holders of the debentures has been appointed to be the trustee for the holders of the debentures and has taken office as such.

(2) Where provision has been made in the relevant trust deed for the appointment of a successor to a trustee for the holders of the debentures upon retirement or otherwise, the successor may, subject to section 152, be appointed in accordance with that provision.

(3) Where no provision has been made in the relevant trust deed for the appointment of a successor to a retiring trustee, the borrowing corporation may appoint a successor that is qualified for appointment pursuant to section 152.

(4) Notwithstanding anything in this Code or in any debentures or trust deed, a borrowing corporation may, with the consent of an existing trustee for the holders of the debentures, appoint as successor to the existing trustee any corporation that is qualified for appointment pursuant to section 152 and is related to the existing trustee.

(5) Where the trustee for the holders of debentures has ceased to exist or to be qualified under section 152, a trustee for the holders of debentures has not been appointed pursuant to sub-section 152 (3) or the trustee for the holders of debentures fails or refuses to act or is disqualified under section 152, the Court may, on the application of the borrowing corporation, the trustee (if any) for the holders of the debentures, the holder of any of the debentures or the Commission, appoint a corporation qualified pursuant to section 152 to be the trustee for the holders of the debentures and, where appropriate, to be that trustee in place of the trustee that so ceased to exist or to be qualified, failed or refused to act as trustee or is disqualified.

(6) Where a successor is appointed to be a trustee in place of a trustee, the successor shall, within one month after the appointment, lodge with the Commission notice in the prescribed form of the appointment.

#### **Contents of trust deed**

**154. (1)** Where a corporation—

- (a) in the State, invites the public to subscribe for or purchase debentures or offers debentures to the public for subscription or purchase; or
- (b) offers debentures as consideration for the acquisition, pursuant to a take-over scheme within the meaning of the *Companies (Acquisition of Shares) (New South Wales) Code*, of shares in a company,

the relevant trust deed shall contain a limitation on the amount that the borrowing corporation may borrow pursuant to that deed or those debentures and shall contain covenants by the borrowing corporation or, if the trust deed does not expressly contain those covenants, the trust deed shall be deemed to contain covenants by the borrowing corporation, to the effect—

- (c) that the borrowing corporation will use its best endeavours to carry on and conduct its business in a proper and efficient manner;
  - (d) that the borrowing corporation will—
    - (i) make available for inspection by the trustee for the holders of the debentures or any registered company auditor appointed by that trustee the whole of the accounting or other records of the borrowing corporation; and
    - (ii) give to it or him such information as it or he requires with respect to all matters relating to the accounting or other records of the borrowing corporation; and
  - (e) that the borrowing corporation will, on the delivery to its registered office of an application by persons holding not less than 10% in nominal value of the issued debentures to which the covenant relates, by giving notice to each of the holders of the debentures to which the covenant relates (other than debentures payable to bearer) at his address as specified in the register of the holders of debentures, convene a meeting of the holders of those debentures to consider the accounts and balance-sheet that were laid before the last preceding annual general meeting of the borrowing corporation and to give to the trustee directions in relation to the exercise of the trustee's powers, being a meeting to be held at a time and place specified in the notice under the chairmanship of a person nominated by the trustee or, if the trustee does not nominate a person to be the chairman, under the chairmanship of such other person as is appointed for that purpose by the holders of those debentures present at the meeting.
- (2) A trust deed to which sub-section (1) applies that is executed after the commencement of the *Companies (Application of Laws) Act*, 1981, shall contain covenants by each corporation that is a guarantor corporation in relation to the borrowing corporation, or, if the trust deed does not expressly contain those covenants, the trust deed shall be deemed to contain covenants by each guarantor corporation, to the effect—
- (a) that the guarantor corporation will use its best endeavours to carry on and conduct its business in a proper and efficient manner; and

- (b) that the guarantor corporation will—
- (i) make available for inspection by the trustee for the holders of the debentures or any registered company auditor appointed by that trustee, the whole of the accounting or other records of the guarantor corporation; and
  - (ii) give to it or him such information as it or he requires with respect to all matters relating to the accounting or other records of the guarantor corporation.

(3) For the purposes of sub-section (2), each guarantor corporation shall be deemed to be a party to the trust deed.

(4) The reference in sub-section (1) to a corporation that offers debentures as consideration for the acquisition of shares in a company includes a reference to a corporation 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 make, or that the sum be applied in whole or in part in making, a payment by way of deposit with, or loan to, the corporation.

(5) Where, on or after the date of commencement of the *Companies (Application of Laws) Act*, 1981, any debenture (other than a debenture lawfully issued pursuant to a trust deed executed before 1 July 1964) is issued and the trust deed relating to the issue of the debenture does not expressly contain the limitation on the amount that the borrowing corporation may borrow and the covenants referred to in sub-section (1), the corporation that issued the debenture and any officer of the corporation who is in default are each guilty of an offence.

(6) Where, on or after the date of commencement of the *Companies (Application of Laws) Act*, 1981, any debenture (other than a debenture lawfully issued pursuant to a trust deed executed before that date) is issued and the trust deed relating to the issue of the debenture does not expressly contain the covenants referred to in sub-section (2), the corporation that issued the debenture and any officer of the corporation who is in default are each guilty of an offence.

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

#### **Power of Court in relation to certain irredeemable debentures**

**155. (1)** Notwithstanding anything in any debenture or trust deed, where, on the application of the trustee for the holders of debentures that are irredeemable or redeemable only on the happening of a contingency or, if

there is no trustee, on the application of the holder of any such debentures, the Court is satisfied that—

- (a) at the time of the issue of the debentures the property of the corporation that constituted or was intended to constitute the security for the debentures was sufficient or likely to become sufficient to discharge the principal debt and any interest on that debt;
- (b) the security, if realized under the circumstances existing at the time of the application, would be likely to bring not more than 60% of the principal sum of moneys outstanding (regard being had to all prior charges and charges ranking *pari passu*, if any); and
- (c) the property covered by the security, on a fair valuation on the basis of a going concern after allowing a reasonable amount of depreciation, is worth less than the principal sum and the borrowing corporation is not making sufficient profit to pay the interest due on the principal sum or (where no definite rate of interest is payable) interest on that sum at such rate as the Court considers would be a fair rate to expect from a similar investment,

the Court may order that the security for the debentures be enforceable forthwith or at such time as the Court directs.

(2) Sub-section (1) does not affect any power to vary rights or accept any compromise or arrangement created by the terms of the debentures or the relevant trust deed or under a compromise or arrangement between the borrowing corporation and creditors.

#### Duties of trustees

**156. (1)** A trustee for the holders of debentures—

- (a) shall exercise reasonable diligence to ascertain whether or not the property of the borrowing corporation and of each of its guarantor corporations that is or may be available, whether by way of security or otherwise, is sufficient, or is likely to be or become sufficient, to discharge the principal debt as and when it becomes due;
- (b) shall satisfy itself that each prospectus relating to the debentures does not contain any matter that is inconsistent with the terms of the debentures or with the relevant trust deed;
- (c) shall ensure that the borrowing corporation and each of its guarantor corporations comply with the provisions of Division 9 so far as they relate to the debentures and are applicable;

- (d) shall exercise reasonable diligence to ascertain whether or not the borrowing corporation and each of its guarantor corporations have committed any breach of the covenants, terms and provisions of the debentures or the trust deed;
  - (e) except where it is satisfied that the breach will not materially prejudice the security (if any) for the debentures or the interests of the holders of the debentures—shall take all steps and do all such things as it is empowered to do to cause the borrowing corporation and any of its guarantor corporations to remedy any breach of those covenants, terms and provisions;
  - (f) where the borrowing corporation or any of its guarantor corporations fails, when so required by the trustee, to remedy a breach of the covenants, terms and provisions of the debentures or the trust deed—may place the matter of the failure to remedy the breach before a meeting of holders of the debentures, submit such proposals for the protection of their investment as the trustee considers necessary or appropriate and obtain the directions of the holders in relation to the matter; and
  - (g) where the borrowing corporation submits to those holders a compromise or arrangement—shall give to them a statement explaining the effect of the compromise or arrangement and, if it thinks fit, recommend to them an appropriate course of action to be taken by them in relation to the compromise or arrangement.
- (2)** Where, after due inquiry, the trustee for the holders of the debentures at any time is of the opinion that the property of the borrowing corporation and of any of its guarantor corporations that is or should be available, whether by way of security or otherwise, is insufficient, or likely to become insufficient, to discharge the principal debt as and when it becomes due, the trustee may apply to the Commission for an order under this sub-section and the Commission may, on such an application, after giving the borrowing corporation an opportunity of making representations in relation to the application, by order in writing served on the corporation at its registered office in the State, impose such restrictions on the activities of the corporation, including restrictions on advertising for deposits or loans and on borrowing by the corporation, as the Commission thinks necessary for the protection of the interests of the holders of the debentures or the Commission may, and, if the borrowing corporation so requires, shall, direct the trustee to apply to the Court for an order under sub-section (4) and the trustee shall apply accordingly.

**(3) Where—**

- (a) after due inquiry, the trustee at any time is of the opinion that the property of the borrowing corporation and of any of its guarantor corporations that is or should be available, whether by way of security or otherwise, is insufficient or likely to become insufficient, to discharge the principal debt as and when it becomes due; or
- (b) the corporation has contravened or failed to comply with an order made by the Commission under sub-section (2),

the trustee may, and where the borrowing corporation has requested the trustee to do so, the trustee shall, apply to the Court for an order under sub-section (4).

**(4) Where** an application is made to the Court under sub-section (2) or (3), the Court may, after giving the borrowing corporation an opportunity of being heard, by order, do all or any of the following things, namely:

- (a) direct the trustee to convene a meeting of the holders of the debentures for the purpose of placing before them such information relating to their interests and such proposals for the protection of their interests as the trustee considers necessary or appropriate and of obtaining their directions in relation to the protection of their interests and give such directions in relation to the conduct of the meeting as the Court thinks fit;
- (b) stay all or any actions or other civil proceedings before any court by or against the borrowing corporation;
- (c) restrain the payment of any moneys by the borrowing corporation to the holders of debentures of the corporation or to any class of such holders;
- (d) appoint a receiver of such of the property as constitutes the security (if any) for the debentures;
- (e) give such further directions from time to time as may be necessary to protect the interests of the holders of the debentures, the members of the borrowing corporation or any of its guarantor corporations or the public,

but in making any such order the Court shall have regard to the rights of all creditors of the borrowing corporation.

**(5)** The Court may vary or rescind any order made under sub-section (4) as the Court thinks fit.

**(6)** In making an application to the Commission or to the Court, a trustee shall have regard to the nature and kind of the security given when the debentures were offered to the public and, if no security was given, shall have regard to the position of the holders of the debentures as unsecured creditors of the borrowing corporation.

**Powers of trustee to apply to the Court for directions, &c.**

**157. (1)** The trustee for the holders of debentures may apply to the Court—

- (a) for directions in relation to any matter arising in connection with the performance of the functions of the trustee; or
  - (b) to determine any question in relation to the interests of the holders of debentures,
- and the Court may—
- (c) give such directions to the trustee as the Court deems fit; and
  - (d) if satisfied that the determination of the question will be just and beneficial—accede wholly or partially to the application on such terms and conditions as the Court thinks fit or make such other order on the application as the Court thinks just.

**(2)** The Court may, on an application under this section, order a meeting of all or any of the holders of debentures to be convened to consider any matters in which they are concerned and to advise the trustee on those matters and may give such ancillary or consequential directions as the Court thinks fit.

**(3)** The meeting shall be held and conducted in such manner as the Court directs, under the chairmanship of a person nominated by the trustee or, if the trustee does not nominate a person to be the chairman, under the chairmanship of such other person as is appointed for that purpose by the holders of debentures present at the meeting.

**Obligations of borrowing corporation**

**158. (1)** Where there is a trustee for the holders of any debentures of a borrowing corporation, the trustee shall, by notice in writing to the borrowing corporation, specify for the purposes of this section a day, being not later than 6 months after the date of the relevant prospectus, and the directors of the borrowing corporation shall—

- (a) at the end of a period not exceeding 3 months ending on the day so specified; and
- (b) at the end of each succeeding period, being a period of 3 months or such shorter period as the trustee, in any special circumstances, allows,

prepare a report that relates to that period and complies with the requirements of sub-section (2) and, within one month after the end of each such period, lodge the report relating to that period with the trustee and a copy of the report with the Commission.

**(2)** The report referred to in sub-section (1) shall be signed by not less than 2 of the directors on behalf of all of them and shall set out in detail any matters adversely affecting the security or the interests of the holders of the debentures and, without affecting the generality of the foregoing, shall state—

- (a) whether or not the limitations on the amount that the corporation may borrow have been exceeded and, if they have been exceeded, particulars of borrowings exceeding those limitations;
- (b) whether or not the borrowing corporation and each of its guarantor corporations have observed and performed all the covenants and provisions binding upon them respectively by or pursuant to the debentures or any trust deed;
- (c) whether or not any event has happened that has caused or could cause the debentures or any provision of the relevant trust deed to become enforceable and, if so, particulars of that event;
- (d) whether or not any circumstances affecting the borrowing corporation, its subsidiaries or its guarantor corporations or any of them have occurred that materially affect any security or charge included in or created by the debentures or any trust deed and, if so, particulars of those circumstances;

- (e) whether or not there has been any substantial change in the nature of the business of the borrowing corporation or any of its subsidiaries or any of its guarantor corporations since the debentures were first issued to the public that has not previously been reported upon as required by this section and, if so, particulars of that change; and
- (f) where the borrowing corporation has deposited money with, lent money to, or assumed any liability of, a corporation that is related to the borrowing corporation, particulars, with respect to each corporation that is so related, of—
  - (i) the total amounts so deposited or lent and the extent of any liability so assumed during the period covered by the report; and
  - (ii) the total amounts owing to the borrowing corporation in respect of money so deposited or lent and the extent of any liability so assumed as at the end of the period covered by the report,

distinguishing between deposits, loans and assumptions of liability that are secured and those that are unsecured, but not including any deposit with, loan to, or liability assumed on behalf of, a corporation if that corporation has guaranteed the repayment of the debentures of the borrowing corporation and has secured the guarantee by a charge over its property in favour of the trustee for the holders of the debentures of the borrowing corporation.

**(3)** Where, during the period to which a report referred to in sub-section (1) relates—

- (a) a corporation has become a guarantor corporation;
- (b) a guarantor corporation has ceased to be liable for the payment of the whole or part of the moneys for which it was liable under the guarantee; or
- (c) a guarantor corporation has changed its name,

the report shall so state and shall give particulars of the matters so stated.

**(4)** Where there is a trustee for the holders of any debentures issued by a borrowing corporation and the borrowing corporation or any of its guarantor corporations that has guaranteed the repayment of the moneys raised by the

issue of those debentures creates any charge, the borrowing corporation or the guarantor corporation, as the case requires, shall, whether or not any demand for the particulars has been made—

- (a) furnish in writing to the trustee, within 21 days after the creation of the charge, particulars of the charge; and
- (b) if the total amount to be advanced on the security of the charge is indeterminate—
  - (i) furnish in writing to the trustee, within 7 days after an advance is made, particulars of the amount of the advance; or
  - (ii) where the advances are merged in a current account with bankers or trade creditors—furnish in writing to the trustee, at the end of every 3 months, particulars of the net amount outstanding in respect of the advances.

**(5)** The directors of a borrowing corporation that has issued debentures (other than debentures of a kind that could be lawfully described pursuant to section 97 as mortgage debentures or certificates of mortgage debenture stock) and of every relevant guarantor corporation that has guaranteed the repayment of the moneys raised by the issue of those debentures shall—

- (a) at a date not later than 6 months, or, in the case of a particular corporation, not later than the expiration of such other period as is for the time being fixed by the Commission with the consent of the trustee for the debenture holders of that corporation (if any), after the expiration of each financial year of the corporation, cause to be made out and lodged with the Commission and with the trustee for the holders of the debentures a profit and loss account for that financial year and a balance-sheet as at the end of that financial year; and
- (b) at a date not later than 10 months, or, in the case of a particular corporation, not later than the expiration of such other period as is for the time being fixed by the Commission with the consent of the trustee for the debenture holders of that corporation (if any), after the expiration of each financial year of the corporation, cause to be made out and lodged with the Commission and with the trustee for the holders of the debentures a profit and loss account for the period from the end of that financial year until the expiration of 6 months after the end of that financial year and a balance-sheet as at the end of the period to which the profit and loss account relates.

(6) The directors of a borrowing corporation that is a holding company shall—

- (a) at a date not later than 6 months, or, in the case of a particular borrowing corporation, not later than the expiration of such other period as is for the time being fixed by the Commission with the consent of the trustee for the debenture holders of that corporation, after the expiration of each financial year of the corporation, cause to be made out and lodged with the Commission and with the trustee for the holders of the debentures (if any) a set of consolidated accounts for the borrowing corporation and each guarantor corporation that is a subsidiary of the borrowing corporation for that financial year; and
- (b) at a date not later than 10 months, or, in the case of a particular borrowing corporation, not later than the expiration of such other period as is for the time being fixed by the Commission with the consent of the trustee for the debenture holders of that corporation, after the expiration of each financial year of the corporation, cause to be made out and lodged with the Commission and with the trustee for the holders of the debentures (if any) a set of consolidated accounts for the borrowing corporation and each guarantor corporation that is a subsidiary of that borrowing corporation for the period from the end of that financial year until the expiration of 6 months after the end of that financial year.

(7) A trustee for debenture holders of a corporation may give to the directors of a guarantor corporation that is a subsidiary of that borrowing corporation a notice requiring them to comply with sub-section (5) and, where a notice is so given—

- (a) the directors of the guarantor corporation shall comply with the requirements of sub-section (5) in relation to the next financial year of that corporation that ends after the notice is so given and in relation to each subsequent financial year of that corporation; and
- (b) where the notice is given within the period of 6 months after the end of a financial year of that guarantor corporation—the directors of the corporation shall comply with the requirements of paragraph (5) (b) in relation to the period commencing at the end of that financial year and ending at the expiration of that period of 6 months.

(8) A trustee for debenture holders shall, within 7 days after he gives a notice under sub-section (7), lodge a copy of that notice with the Commission.

**(9)** Nothing in sub-section (5), (6) or (7) applies to the directors of a prescribed corporation.

**(10)** In sub-section (9), “prescribed corporation” means a corporation that is a pastoral company in respect of which an exemption granted under section 11 of the *Banking Act 1959* is in force and is declared by the Commission by notice published in the *Gazette* to be a prescribed corporation for the purposes of this section.

**(11)** The Commission may, by notice published in the *Gazette*—

- (a) specify terms and conditions subject to which sub-section (9) has effect in relation to a prescribed corporation; or
- (b) vary or revoke any declaration made under sub-section (10) or any specification made under paragraph (a) of this sub-section.

**(12)** Sub-sections (1), (4), (5), (6) and (7) do not apply in respect of a borrowing corporation or a guarantor corporation if—

- (a) the borrowing corporation or the guarantor corporation, as the case may be, is being wound up; or
- (b) a receiver, or a receiver and manager, of property of the borrowing corporation or the guarantor corporation, as the case may be, has been appointed and has not ceased to act under that appointment.

**(13)** The provisions of section 269 (other than sub-section (6)), sub-sections 270 (1), (2) and (3), section 273, section 285 (other than sub-section (8)) and section 288 are, with such adaptations as are necessary, applicable to every profit and loss account and balance-sheet made out and lodged pursuant to sub-section (5) of this section by the directors of a borrowing corporation as if that profit and loss account and balance-sheet were a profit and loss account and balance-sheet referred to in those sections or sub-sections.

**(14)** Notwithstanding anything in the preceding provisions of this section, the directors of a borrowing corporation are not required to comply, in relation to profit and loss accounts and balance-sheets required to be made out and lodged under sub-section (5), with sub-section 269 (3) or 270 (2) or with section 285 (as it relates to group accounts) if the trustee for debenture holders consents in writing to the directors being exempt from those requirements.

**(15)** The provisions of section 269 (other than sub-section (6)), sub-sections 270 (1), (2) and (3), section 273, section 285 (other than sub-section (8)) and section 288 are, with such adaptations as are necessary, applicable to every profit and loss account and balance-sheet made out and lodged pursuant to sub-section (6) of this section by the directors of the borrowing corporation as if—

- (a) that profit and loss account and balance-sheet were a profit and loss account and balance-sheet referred to in those sections or sub-sections; and
- (b) references in those sections and sub-sections to group accounts were references to the consolidated accounts referred to in sub-section (6) of this section.

**(16)** The provisions of section 269 (other than sub-section (3)), sub-sections 270 (1) and (3), section 273, section 285 (other than the provisions of that section relating to group accounts) and section 288 are, with such adaptations as are necessary, applicable to every profit and loss account and balance-sheet made out and lodged pursuant to sub-section (5) of this section by the directors of a relevant guarantor corporation as if that profit and loss account and balance-sheet were a profit and loss account and balance-sheet referred to in those sections or sub-sections.

**(17)** Notwithstanding the provisions of sub-section (16), where a guarantor corporation, being a corporation that is incorporated in the United Kingdom or in a State or Territory in the United States of America has lodged with the Department of Trade or other appropriate Government Department in the United Kingdom or the Securities and Exchange Commission of the United States of America a profit and loss account and balance-sheet, for a period in respect of which the corporation is required to lodge a profit and loss account and balance-sheet pursuant to sub-section (5) of this section, it is sufficient compliance with the requirements of that sub-section if certified copies of the profit and loss account and balance-sheet so lodged with the Department of Trade or that other Department or the Securities and Exchange Commission are, with the consent of the trustee for the debenture holders, lodged with the Commission and the trustee for the debenture holders within the time prescribed by that sub-section.

**(18)** Where the directors of a borrowing corporation do not lodge with the trustee for the holders of debentures a report as required by sub-section (1) or where the directors of a borrowing corporation or the directors of a guarantor corporation do not lodge with the trustee the balance-sheets, profit and loss accounts and reports as required by sub-sections (5) to (16),

inclusive, within the period, or at the date, specified in the sub-section concerned, the trustee shall forthwith lodge notice of that fact with the Commission.

(19) Notwithstanding anything contained in sub-sections (13) to (16), inclusive, the audit of a profit and loss account and balance-sheet of a borrowing corporation or its guarantor corporation relating to a period of 6 months immediately following a financial year of the corporation required to be made out and lodged in accordance with sub-section (5) or (6) may be dispensed with or may be of a limited nature or extent if the trustee for the holders of the debentures of the borrowing corporation has consented in writing to the audit being dispensed with or being of a limited nature or extent, as the case may be.

(20) Where the trustee has so consented to the audit of a profit and loss account and balance-sheet of a borrowing corporation or guarantor corporation being dispensed with or being of a limited nature or extent, the directors of the corporation shall lodge with the Commission a copy of the instrument of consent at the time when the profit and loss account and balance-sheet are so lodged.

(21) Where the trustee for debenture holders for a borrowing corporation has consented to the directors of the corporation being exempt from complying with the requirements relating to profit and loss accounts and balance-sheets referred to in sub-section (14), the directors shall lodge with the Commission a copy of the instrument of consent at the time when the profit and loss account and balance-sheet are so lodged.

(22) Notwithstanding anything contained in this section, a profit and loss account and balance-sheet of a borrowing corporation or its guarantor corporation relating to a period of 6 months immediately following a financial year of the corporation required to be made out and lodged in accordance with sub-section (5) may, unless the trustee for the holders of the debentures of the borrowing corporation otherwise requires in writing, be based upon the value of the trading stock of the borrowing corporation or the guarantor corporation, as the case may be, as—

- (a) reasonably estimated by the directors of that corporation on the basis of the value of that trading stock as adopted for the purpose of the profit and loss account and balance-sheet of that corporation laid before the corporation at its last preceding annual general meeting; and
- (b) certified in writing as such by those directors.

**(23)** In this section, “relevant guarantor corporation”, in relation to a borrowing corporation, means—

- (a) a guarantor corporation that is not a subsidiary of that borrowing corporation; and
- (b) a guarantor corporation the directors of which have been given notice under sub-section (7) by the trustee for debenture holders of the borrowing corporation of which the guarantor corporation is a subsidiary.

#### **Obligation of guarantor corporation to furnish information**

**159. (1)** For the purpose of the preparation of a report that is required by this Code to be signed by or on behalf of the directors of a borrowing corporation or any of them, that corporation may, by notice in writing, require any of its guarantor corporations to furnish it with any information relating to that guarantor corporation that is required by this Code to be contained in that report, and that guarantor corporation shall furnish the borrowing corporation with that information before such date, being a date not earlier than 14 days after the notice is given, as is specified for that purpose in the notice.

**(2)** If a corporation fails to comply with a requirement contained in a notice given pursuant to sub-section (1), that corporation and any officer of that corporation who is in default are each guilty of an offence.

#### **Loans and deposits to be immediately repayable on certain events**

**160. (1)** Where, in a prospectus issued in connection with an invitation to the public to subscribe for or to purchase, or in connection with an offer to the public for subscription or purchase of, debentures of a corporation, there is a statement as to any particular purpose or project for which the moneys received by the corporation in response to the invitation or offer are to be applied, the corporation shall from time to time make reports to the trustee for the holders of those debentures as to the progress that has been made towards achieving that purpose or completing that project.

**(2)** Each such report shall be included in the report required to be furnished to the trustee for the holders of the debentures under sub-section 158 (1).

**(3)** Where it appears to the trustee for the holders of the debentures that the purpose or project has not been achieved or completed within the time stated in the prospectus within which the purpose or project is to be achieved or completed or, where no such time was stated, within a reasonable time, the trustee may, and, if in his opinion it is necessary for the protection of the interests of the holders of the debentures, shall, give notice in writing to the corporation requiring it to repay the moneys so received by the corporation and the trustee shall, within one month after such a notice is given, lodge with the Commission a copy of the notice.

**(4)** The trustee shall not give a notice pursuant to sub-section (3) if it is satisfied—

- (a) that the purpose or project has been substantially achieved or completed;
- (b) that the interests of the holders of debentures have not been materially prejudiced by the failure to achieve or complete the purpose or project within the time stated in the prospectus or within a reasonable time; or
- (c) that the failure to achieve or complete the purpose or project was due to circumstances beyond the control of the corporation that could not reasonably have been foreseen by the corporation at the time when the prospectus was issued.

**(5)** Upon receipt by the corporation of a notice referred to in sub-section (3), the corporation is liable to repay any money owing to a person (in this sub-section referred to as the “relevant person”) as the result of a loan or deposit made in response to the invitation or offer, and, on demand in writing by the relevant person, shall immediately repay the money to the relevant person unless—

- (a) before the moneys received by the corporation in response to the invitation or offer were accepted by the corporation, the corporation, by notice in writing served on the persons from whom moneys were received—
  - (i) had specified the purpose or project for which the moneys would in fact be applied by the corporation; and
  - (ii) had offered to repay the moneys to those persons,

and the relevant person had not, within 14 days after the receipt of the notice or such longer time as was specified in the notice, demanded in writing from the corporation repayment of the money owing to him; or

- (b) the corporation by notice in writing served on the holders of the debentures—
    - (i) had specified the purpose or project for which the moneys would in fact be applied by the corporation; and
    - (ii) had offered to repay the moneys to the holders of the debentures,
- and the relevant person had not, within 14 days after the receipt of the notice or such longer time as was specified in the notice, demanded in writing from the corporation repayment of the money owing to him.
- (6) Where the corporation has given a notice in writing as provided by sub-section (5) specifying the purpose or project for which the moneys received by the corporation in response to the invitation or offer will in fact be applied by the corporation, the provisions of this section apply and have effect as if the purpose or project so specified in the notice was the particular purpose or project specified in the prospectus as the purpose or project for which the moneys were to be applied.

#### **Invitations or offers by prescribed corporations**

**161. (1)** Notwithstanding any other provision of this Code, an invitation to the public by a prescribed corporation to lend money to, or to deposit money with, that corporation or an offer to the public by a prescribed corporation to accept moneys that are lent to, or deposited with, that corporation shall, for the purposes of this Division, be deemed not to be an invitation to the public to subscribe for or purchase debentures of the corporation or an offer to the public of debentures of the corporation for subscription or purchase.

**(2)** In this section, “prescribed corporation” has the same meaning as in sub-section 97 (7).

#### **Compliance with laws of another State or a Territory sufficient compliance for certain companies**

**162.** Notwithstanding anything in this Division, in the case of a borrowing corporation that is a recognized company or in the case of a guarantor corporation of such a borrowing corporation, it is sufficient compliance with this Division if the corporation has complied with the provisions of the laws of the State or Territory in which the borrowing corporation is incorporated that correspond with this Division.

**Liability of trustees for debenture holders**

**163. (1)** Subject to this section, any provision contained in a trust deed relating to or securing an issue of debentures, or in any contract with the holders of debentures secured by a trust deed, is void in so far as it would have the effect of exempting a trustee from, or indemnifying it against, liability for breach of trust where it fails to show the degree of care and diligence required of it as trustee having regard to its powers, authorities or discretions under the trust deed or contract.

**(2)** Sub-section (1) does not invalidate—

- (a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or
- (b) any provision enabling such a release to be given—
  - (i) on the agreement to the giving of the release of a majority of not less than three-quarters in nominal value of the debenture holders present and voting in person or, where proxies are permitted, by proxy at a meeting convened for the purpose; and
  - (ii) either with respect to specific acts or omissions or on the dissolution of the trustee or on its ceasing to act.

**(3)** Sub-section (1) does not operate—

- (a) to invalidate any provision in force at the commencement of the *Companies (Application of Laws) Act*, 1981, so long as any trustee then entitled to the benefit of that provision remains a trustee of the deed in question; or
- (b) to deprive any trustee of any exemption or right to be indemnified in respect of anything done or omitted to be done by the trustee while any such provision was in force.

*Division 6—Prescribed Interests*

**Interpretation**

**164. (1)** In this Division, unless the contrary intention appears—

“company” means a public company and includes—

- (a) a corporation that is a public company under the corresponding law of a participating State or of a participating Territory; and

- (b) a corporation that is a public company under the law of a declared State or a declared Territory and is registered as a foreign company in New South Wales or in a participating State or a participating Territory;

“declared State” means a State that is declared by the Commission, by order in writing published in the *Gazette*, to be a declared State for the purposes of this Division;

“declared Territory” means a Territory that is declared by the Commission, by order in writing published in the *Gazette*, to be a declared Territory for the purposes of this Division;

“financial year”, in relation to a deed, means the period of 12 months ending on 30 June or on such other date as is specified in the deed in lieu of 30 June;

“management company”, in relation to any prescribed interests issued or proposed to be issued or any deed that relates to any prescribed interests issued or proposed to be issued, means a company by or on behalf of which the prescribed interests have been or are proposed to be issued, and includes any person for the time being exercising the functions of the management company.

**(2)** A reference in this Division to a deed shall be read as including a reference to any instrument amending or affecting the deed.

**(3)** Any deed approved under a corresponding previous law of the State shall, if it does not contain the covenants concerned, be deemed to contain covenants to the effect of the covenants required to be contained in a deed under sub-section 168 (1) except the covenants required under sub-paragraphs 168 (1) (b) (i), (ii) and (iii), and sub-sections 168 (3), (4), (5) and (6) apply in relation to the deed accordingly.

#### **Approved deeds**

**165. (1)** For the purposes of this Division, a deed is an approved deed if—

- (a) an approval has been granted to the deed under this Division or under any corresponding previous law of the State; and
- (b) an approval has been granted under this Division or under any corresponding previous law of the State to the trustee or representative appointed for the purposes of the deed acting as trustee or representative and that approval has not been revoked and the trustee or representative has not ceased to hold office.

(2) In the case of a management company that is a recognized company or is a recognized foreign company, a deed is an approved deed for the purposes of this Division if the deed and the company acting as trustee or representative for the purposes of the deed have been approved under the provisions of the law of the participating State or participating Territory in which that recognized company or recognized foreign company is incorporated or registered that correspond with this Division.

**Approval of deeds**

**166. (1)** Where a deed makes provision for the appointment of a company as trustee for or representative of the holders of prescribed interests issued or proposed to be issued by a company, the Commission may, subject to this section, grant its approval to the deed.

(2) The Commission shall not grant its approval to a deed unless the deed—

- (a) complies with the requirements of this Division; and
- (b) makes provision for such other matters and things as are required by or under the regulations to be included in the deed.

(3) Within 7 days after a deed has been approved under this section, the management company shall lodge with the Commission the deed, or a copy of the deed verified by a statement in writing, and a copy so lodged shall for all purposes, in the absence of proof that it is not a true copy, be regarded as an original.

**Approval of trustees**

**167. (1)** The Commission may, subject to such terms and conditions as it thinks fit, grant its approval to a company acting as trustee or representative for the purposes of a deed.

(2) The Commission may, at any time, by reason of a breach of a term or condition subject to which the approval was granted or for any other reason, revoke an approval granted under this section or under any corresponding previous law of the State.

**Covenants to be included in deeds**

**168. (1)** Subject to sub-section (2), a deed shall, for the purposes of paragraph 166 (2) (a), contain covenants to the following effect:

- (a) a covenant binding the management company that it will use its best endeavours to carry on and conduct its business in a proper and efficient manner and to ensure that any undertaking, scheme or enterprise to which the deed relates is carried on and conducted in a proper and efficient manner;
- (b) covenants binding the management company—
  - (i) that the management company will pay to the trustee or representative, within 30 days after their receipt by the company, any moneys that, under the deed, are payable by the company to the trustee or representative;
  - (ii) that the management company will not sell or issue, or permit to be sold or issued, a prescribed interest to which the deed relates otherwise than at a price calculated in accordance with the provisions of the deed;
  - (iii) that the management company will, at the request of the holder of a prescribed interest, purchase, or cause to be purchased, that prescribed interest from the holder and that the purchase price will be a price calculated in accordance with the provisions of the deed; and
  - (iv) that the management company will not, without the approval of the trustee or representative, publish or cause to be published any advertisement, circular or other document containing any statement with respect to the sale price of prescribed interests to which the deed relates or the yield from those prescribed interests or containing any invitation to buy prescribed interests;
- (c) covenants binding the trustee or representative that it will—
  - (i) exercise all due diligence and vigilance in carrying out its functions and duties and in watching the rights and interests of the holders of the prescribed interests to which the deed relates;
  - (ii) keep or cause to be kept proper books of account in relation to those prescribed interests;
  - (iii) cause those accounts to be audited at the end of each financial year by a registered company auditor; and

- (iv) send or cause to be sent by post a statement of the accounts with the report of the auditor on those accounts within 2 months of the end of the financial year to each of the holders of those prescribed interests;
- (d) a covenant binding the management company and the trustee or representative, respectively, that no moneys available for investment under the deed will be invested in or lent to the management company, or to the trustee or representative, or to any company (other than a banking corporation or a corporation declared pursuant to paragraph 97 (7) (b) to be an authorized dealer in the short term money market) that is related to the management company or to the trustee or representative;
- (e) a covenant binding the management company that the company will—
  - (i) make available to the trustee or representative, or to any registered company auditor appointed by it, for inspection all the books of the company whether kept at the registered office or elsewhere; and
  - (ii) give to the trustee or representative or to any such auditor such oral or written information as it or he requires with respect to all matters relating to the undertaking, scheme or enterprise of the company or any property (whether acquired before or after the date of the deed) of the company or otherwise relating to the affairs of the company;
- (f) a covenant binding the management company that the management company will make available, or ensure that there is made available, to the trustee or representative such details as the trustee or representative requires with respect to all matters relating to the undertaking, scheme or enterprise to which the deed relates;
- (g) covenants binding the management company and the trustee or representative, respectively, that the management company or the trustee or representative, as the case may be, will not exercise the right to vote in respect of any shares relating to the prescribed interests to which the deed relates held by the management company, trustee or representative at any election for directors of a corporation shares in which are so held, without the consent of the majority of the holders of the prescribed interests to which the deed relates present in person and voting given at a meeting of those holders convened in the manner provided for in paragraph (h) for the purpose of authorizing the exercise of the right at the next election; and

- (h) a covenant binding the management company that the management company will, within 21 days after an application is delivered to the company at its registered office, being an application by not less than 50, or one-tenth in number, whichever is the less, of the holders of the prescribed interests to which the deed relates, by sending notice by post of the proposed meeting at least 7 days before the proposed meeting to each of the holders of the prescribed interests to which the deed relates at his last known address or, in the case of joint holders, to the joint holder whose name appears first in the company's records, convene a meeting of the holders for the purpose of laying before the meeting the accounts and balance-sheet that were laid before the last preceding annual general meeting of the management company or the last audited statement of accounts of the trustee or representative, and for the purpose of giving to the trustee or representative such directions as the meeting thinks proper.

**(2)** The Commission may, by notice published in the *Gazette*, declare that, subject to such terms and conditions as are specified in the notice, a specified deed that makes provision for the appointment of a specified company as trustee for or representative of the holders of the prescribed interests to which the deed relates is not required to contain covenants to the effect of such of the matters referred to in sub-section (1) or to contain such of the matters provided for in regulations made for the purposes of paragraph 166 (2) (b), as are specified in the notice and the Commission may, by notice so published, revoke such a notice or vary it in such manner as it thinks fit.

**(3)** A meeting convened for the purposes of a covenant contained in a deed pursuant to paragraph (1) (g) or (h) shall be held at the time and place specified in the notice, being a time not later than 2 months after the giving of the notice, under the chairmanship of—

- (a) such person as is appointed for that purpose by the holders of the prescribed interests to which the deed relates present at the meeting; or
- (b) where no such appointment is made, a nominee of the trustee or representative approved by the Commission,

and shall be conducted in accordance with the provisions of the deed or, in so far as the deed makes no provision, as directed by the chairman of the meeting.

**(4)** Notwithstanding anything to the contrary contained in an approved deed, the undertaking, scheme, enterprise, contract or arrangement to which the deed relates may be continued in operation or existence if it appears to be

in the interests of the holders of the prescribed interests to which the deed relates during such period as is, or such periods as are, agreed upon by the trustee or representative and the management company.

- (5) Where a direction is given to the trustee or representative at a meeting convened pursuant to a covenant complying with paragraph (1) (h), the trustee or representative—
- (a) shall comply with the direction unless it is inconsistent with the deed or this Code; and
  - (b) is not liable for anything done or omitted to be done by it by reason only of its following that direction.

(6) Where the trustee or representative is of the opinion that a direction so given is inconsistent with the deed or this Code or is otherwise objectionable, the trustee or representative may apply to the Court for an order confirming, setting aside or varying the direction and the Court may make such order as it thinks fit.

#### **Prescribed interests to be issued by companies only**

**169.** A person, other than a company or an agent of a company authorized for that purpose under the common or official seal of the company, shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest.

#### **Statement to be issued**

**170. (1)** A company or an agent of a company shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest unless a statement in writing in relation to that prescribed interest has been registered by the Commission under Division 1.

**(2)** For the purposes of the registration of the statement referred to in sub-section (1), and for all other purposes, the statement shall be deemed to be a prospectus issued by a company.

**(3)** Subject to sub-sections (4) and (5), all provisions of this Code and rules of law relating to—

- (a) prospectuses;

- (b) the offering or intended offering to the public of shares for subscription or purchase;
- (c) the inviting or intended inviting of the public to subscribe for or purchase shares; and
- (d) the issuing or intended issuing of forms of application for shares,

shall, with such adaptations as are necessary, apply and have effect in relation to prescribed interests as if—

- (e) the prescribed interests were shares that were offered or intended to be offered to the public for subscription or purchase or that the public were invited or intended to be invited to subscribe for or purchase;
- (f) persons accepting any offers or making offers pursuant to any invitation in respect of, or subscribing for or purchasing, any such prescribed interests were subscribers for shares;
- (g) the references in paragraph 99 (4) (a) to the corporation were references to the financial or business undertaking or scheme, the common enterprise or the investment contract to which the statement relates;
- (h) the reference in sub-paragraph 99 (4) (a) (iv) to the directors of the corporation were a reference to the management company for the prescribed interest and the directors of that company; and
- (j) the reference in sub-paragraph 99 (4) (a) (vi) to debentures were a reference to prescribed interests and the reference in that subparagraph to the trustee for the debenture holders were a reference to the trustee for, or representative of, the holders of the prescribed interests.

**(4)** Subject to sub-section (5), the statement shall set out the prescribed matters, and shall contain the prescribed reports, with such adaptations (if any) as the circumstances of each case require and the Commission approves.

**(5)** A matter or report referred to in sub-section (4) may be omitted from a statement if, having regard to the nature of the prescribed interest, the Commission is of the opinion that the matter or report is not appropriate for inclusion in the statement and has by instrument in writing approved the omission.

**(6)** Where a statement in respect of a recognized company has been registered under the provisions of the law of the participating State or participating

Territory in which the company is incorporated that correspond with Division 1, that statement shall, for the purposes of this Division, be deemed to have been registered by the Commission under Division 1 and anything required to be done before registration under that Division shall be deemed to have been done.

**No issue without approved deed**

**171. (1)** A person shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest unless, at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed.

**(2)** A person shall not, in any deed, prospectus, statement, advertisement or other document relating to a prescribed interest, make any reference to an approval of a deed or of a trustee or representative granted under—

- (a) this Division or a previous corresponding law of the State; or
- (b) the provisions of the law of a participating State or participating Territory that correspond with this Division, or a previous corresponding law of a participating State or participating Territory.

**Register of holders of prescribed interests**

**172. (1)** Subject to sub-section (6), the management company shall, in respect of each deed with which the company is concerned, keep at the registered office or principal place of business in the State of the company, or at such other place in the State as the Commission approves, a register of the holders of prescribed interests under the deed and enter in the register—

- (a) the names and addresses of the holders;
- (b) the extent of the holding of each holder and, if his prescribed interest consists of a specific interest in any property, a description of the property sufficient to identify it;
- (c) the date at which the name of each person was entered in the register as a holder; and
- (d) the date at which any person ceased to be a holder.

**(2)** A management company incorporated in a participating State, participating Territory, declared State or declared Territory that—

- (a) keeps a register of holders of prescribed interests in accordance with the provisions of the law of that State or Territory that correspond with the preceding provisions of this section; and
- (b) keeps within the State a register containing with respect to the holders of prescribed interests who are resident within the State the information prescribed by sub-section (1),

shall be deemed to comply with sub-section (1).

**(3)** A management company that is deemed by sub-section (2) to comply with sub-section (1) shall, within 14 days after receiving a written request from a holder of a prescribed interest resident in the State, make available for inspection by him a copy of the register of holders of prescribed interests kept as mentioned in paragraph (2) (a).

**(4)** The provisions of Division 4 of Part V (except section 262) shall, with such adaptations and modifications as are necessary, apply to and in relation to the registers kept under sub-section (1) and under paragraph (2) (b).

**(5)** A management company that—

- (a) keeps a register of holders of prescribed interests pursuant to sub-section (1) or paragraph (2) (b) at a place in the State within 25 kilometres of the office of the State Commission; and
- (b) provides reasonable accommodation and facilities for persons to inspect and take copies of its list of holders of prescribed interests,

need not comply with the provision of paragraph 173 (1) (c) in relation to the deed under which the prescribed interests are held unless the Commission, by order in writing published in the *Gazette*, otherwise directs.

**(6)** The Commission may, by order in writing published in the *Gazette* declare that, subject to such terms and conditions as are specified in the order, a specified management company is not required to comply with the provisions of sub-section (1) in respect of a deed specified in the order.

**Returns, information, &c., relating to prescribed interests**

**173. (1)** Where a deed is or has at any time been an approved deed under sub-section 165 (1), the management company shall lodge with the Commission—

- (a) so long as the deed, or any deed in substitution in whole or in part for the deed, remains in force—within 2 months after the end of each financial year applicable to the deed or substituted deed; or
- (b) if the deed ceases to be in force and no deed has been substituted in whole or in part for the deed, or any such substituted deed ceases to be in force—within 2 months after the deed or substituted deed, as the case may be, ceases to be in force,

a return in the prescribed form containing—

- (c) a list of all persons who, at the end of the relevant financial year, were holders of the prescribed interests to which the deed or substituted deed relates; and
  - (d) such other particulars as are prescribed,
- and accompanied by the prescribed documents.

**(2)** Any document required to be lodged with the Commission by the management company under sub-section (1) shall be signed by at least one director of the management company.

**(3)** A company to which sub-section (1) applies shall, if so requested by any holder of a prescribed interest to which the deed relates within a period of one month after the end of the relevant financial year, send by post or cause to be sent by post to the holder, within 2 months after the end of the relevant financial year, a copy of each of the documents that the company is required to lodge with the Commission by virtue of that sub-section (other than the list referred to in paragraph (1) (c)).

**(4)** Sub-section (1) does not apply to a management company that is a recognized company and has complied with the provision of the law of the participating State or participating Territory in which it was incorporated that corresponds with this section.

**(5)** A reference in this section to the relevant financial year shall be read as a reference—

- (a) in a case to which paragraph (1) (a) applies—to the financial year referred to in that paragraph in respect of which the return is lodged; or
- (b) in a case to which paragraph (1) (b) applies—
  - (i) if the deed ceases to be in force at the expiration of the last day of a financial year applicable to the deed—that financial year; or
  - (ii) in any other case—the period that commenced at the expiration of the last preceding financial year applicable to the deed and ended on the day on which the deed ceased to be in force.

#### **Penalty for breach of certain provisions or covenants**

**174. (1)** A person shall not—

- (a) contravene or fail to comply with a provision of section 169, 170 or 171; or
- (b) fail to comply with a covenant contained or deemed to be contained in any deed that is or at any time has been an approved deed.

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

**(2)** A person is not relieved from any liability to any holder of a prescribed interest by reason of any contravention of, or failure to comply with, a provision of this Division.

#### **Winding up of schemes, &c.**

**175. (1)** Where—

- (a) the management company under a deed is in the course of being wound up; or
- (b) in the opinion of the trustee or representative, the management company has ceased to carry on business or has, to the prejudice of holders of prescribed interests to which the deed relates, failed to comply with a provision of the deed,

the trustee or representative shall convene a meeting of those holders in the manner set out in sub-section (2).

Penalty: \$2,500.

(2) A meeting under sub-section (1) shall be convened by sending by post notice of the proposed meeting at least 21 days before the proposed meeting to each holder at his last known address, or, in the case of joint holders, to the joint holder whose name appears first in the company's records.

(3) The provisions of sub-section 168 (3) apply to such a meeting as if the meeting were a meeting referred to in that sub-section.

(4) If at any such meeting a resolution is passed by a majority of not less than three-quarters in value of the holders of the prescribed interests present in person and voting at the meeting that the undertaking, scheme, enterprise, contract or arrangement to which the deed relates be wound up, the trustee or representative shall, within 28 days after the day on which the meeting is held, apply to the Court for an order confirming the resolution.

Penalty: \$2,500.

(5) On an application by the trustee or representative, the Court may, if it is satisfied that it is in the interest of the holders of the prescribed interests, confirm the resolution and may make such orders as it thinks necessary or expedient for the effective winding up of the undertaking, scheme, enterprise, contract or arrangement.

#### **Power to exempt from compliance with Division and non-application of Division in certain circumstances**

**176.** (1) The Commission may, by notice published in the *Gazette*, exempt any company, subject to such terms and conditions as are specified in the notice, from complying with all or any of the provisions of this Division in relation to any prescribed interest, or class of prescribed interests, specified in the notice, and may, by notice published in the *Gazette*, revoke such a notice or vary it in such manner as it thinks fit.

(2) This Division does not apply in the case of the sale of any prescribed interest by a personal representative, liquidator, receiver or trustee in bankruptcy in the normal course of realization of property.

### **Liability of trustees**

**177. (1)** Subject to this section, a provision contained in a deed that is or has been at any time an approved deed, or in any contract with the holders of prescribed interests to which such a deed relates, is void in so far as it would have the effect of exempting a trustee or representative under the deed from, or indemnifying a trustee or representative against, liability for breach of trust where the trustee or representative fails to show the degree of care and diligence required of a trustee or representative having regard to the powers, authorities or discretions conferred on the trustee or representative by the deed.

**(2)** Sub-section (1) does not invalidate—

- (a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee or representative before the giving of the release; or
- (b) any provisions enabling such a release to be given—
  - (i) on the agreement to the giving of the release of a majority of not less than three-quarters in nominal value of holders of prescribed interests present in person and voting at a meeting convened for the purpose; and
  - (ii) either with respect to specific acts or omissions or on the trustee or representative ceasing to act.

## *Division 7—Title to and Transfer of Securities*

### **Nature of shares**

**178. (1)** A share or other interest of a member in a company—

- (a) is personal property;
- (b) is transferable or transmissible as provided by the articles; and
- (c) subject to the articles, is capable of devolution by will or by operation of law.

**(2)** Subject to sub-section (1)—

- (a) the laws applicable to ownership of and dealing with personal property apply to a share or other interest of a member in a company as they apply to other property; and

- (b) equitable interests in respect of a share or other interest of a member in a company may be created, dealt with and enforced as in the case of other personal property.

(3) For the purposes of any law, a share or other interest of a member in a company shall be taken to be situated—

- (a) in a case to which paragraph (b) does not apply—in the State or Territory in which the register of members of the company is kept; or
- (b) if the name of the member is, in respect of the share or interest concerned, entered in a branch register—in the State, Territory or country other than Australia in which that branch register is kept.

#### **Numbering of shares**

**179. (1)** Each share in a company shall be distinguished by an appropriate number.

(2) Notwithstanding sub-section (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, are fully paid up and 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; or
- (b) if all the issued shares in a company are evidenced by certificates in accordance with the provisions of section 180, each certificate is distinguished by an appropriate number and that number is recorded in the register of members, none of those shares is required to have a distinguishing number.

#### **Certificate to be evidence of title**

**180. (1)** A certificate issued in accordance with sub-section (2) specifying any shares held by a member of a company is *prima facie* evidence of the title of the member to the shares.

(2) Such a certificate shall be under the common seal of the company or, in the case of a share certificate relating to shares on a branch register, the common or official seal of the company and shall state—

- (a) the name of the company and the authority under which the company is constituted;

- (b) the class of the shares; and
- (c) the nominal value of the shares and the extent to which the shares are paid up.

**(3)** Failure to comply with this section does not affect the rights of a holder of shares.

**(4)** If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

#### **Company may have duplicate common seal**

**181.** A company may, if authorized by its articles, have a duplicate common seal, which shall be a facsimile of the common seal of the company with the addition on its face of the words "Share Seal" or "Certificate Seal" and a certificate referring to or relating to securities of the company sealed with such a duplicate seal shall, for the purposes of this Code, be deemed to be sealed with the common seal of the company.

#### **Loss or destruction of certificates**

**182.** (1) Subject to sub-section (2), where a certificate or other document of title to shares, debentures or prescribed interests is lost or destroyed, the company shall, on application by the owner of the shares, debentures or prescribed interests, issue a duplicate certificate or document to the owner—

- (a) if the company requires the payment of an amount not exceeding the prescribed amount—within 21 days after the payment is received by the company or within such longer period as the Commission 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 the Commission approves.

**(2)** The application shall be accompanied by—

- (a) a statement in writing that the certificate or document has been lost or destroyed, and has not been pledged, sold or otherwise disposed of, and, if lost, that proper searches have been made; and
- (b) an undertaking in writing that if it is found or received by the owner it will be returned to the company.

(3) The directors of a company may, before accepting an application for the issue of a duplicate certificate or document, require the applicant—

- (a) to cause an advertisement to be inserted in a daily newspaper circulating in a place specified by the directors stating that the certificate or document has been lost or destroyed and that the owner intends, after the expiration of 14 days after the publication of the advertisement, to apply to the company for a duplicate; or
- (b) to furnish a bond for an amount equal to at least the current market value of the shares or debentures indemnifying the company against loss following the production of the original certificate or document, or to do both those things.

**Instrument of transfer**

**183. (1)** Notwithstanding anything in its articles or in a deed relating to debentures or interests, a company shall not register a transfer of shares, debentures or interests unless a proper instrument of transfer has been delivered to the company.

**(2)** Sub-section (1) does not prejudice the power of the company to register as a shareholder, debenture holder or interest holder a person to whom the right to any shares in, debentures of, or interests made available by, the company has devolved by will or by operation of law.

**(3)** A transfer of shares, debentures or interests of a deceased holder made by his personal representative is, although the personal representative is not himself registered as the holder of those shares, debentures or interests, as valid as if he had been so registered at the time of the execution of the instrument of transfer.

**(4)** Where the personal representative of a deceased holder duly constituted as such under the law in force in another State or in a Territory—

- (a) executes an instrument of transfer of a share, debenture or interest of the deceased holder to himself or to another person; and
- (b) delivers the instrument to the company, together with a statement in writing made by him to the effect that, to the best of his knowledge, information and belief, no grant of representation of the estate of the deceased holder has been applied for or made in the State and no

application for such a grant will be made, being a statement made within the period of 3 months immediately preceding the date of delivery of the statement to the company,

the company shall register the transfer and pay to the personal representative any dividends or other moneys accrued in respect of the share, debenture or interest up to the time of the execution of the instrument, but this sub-section does not operate so as to require the company to do an act or thing that it would not have been required to do if the personal representative were the personal representative of the deceased holder duly constituted under the law of the State.

(5) A transfer or payment made pursuant to sub-section (4) and a receipt or acknowledgment of such a payment is, for all purposes, as valid and effectual as if the personal representative were the personal representative of the deceased holder duly constituted under the law of the State.

(6) For the purposes of this section, an application by a personal representative of a deceased person for registration as the holder of a share, debenture or interest in place of the deceased person shall be deemed to be an instrument of transfer effecting a transfer of the share, debenture or interest to the personal representative.

(7) The production to a company of a document that is, under the law of the State or under the law in force in another State or in a Territory, sufficient evidence of probate of the will, or letters of administration of the estate, of a deceased person having been granted to a person shall be accepted by the company, notwithstanding anything in its articles, or in a deed relating to debentures or interests, as sufficient evidence of the grant.

(8) In this section, "interest" includes a prescribed interest.

#### **Registration of transfer at request of transferor**

**184. (1)** On the request in writing of the transferor of a share in, debenture of, or interest made available by, a company, the company shall enter in the appropriate register the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

(2) On the request in writing of the transferor of a share in, debenture of, or interest made available by, a company, the company shall, by notice in writing, require the person having the possession, custody or control of the share certificate or debenture or any document evidencing title to the interest (as the case may be) and the instrument of transfer of the share, debenture or interest or either of them to bring it or them into the office of the company within a stated period, being not less than 7 and not more than 28 days after the date of the notice, to have the share certificate, debenture or document cancelled or rectified and the transfer registered or otherwise dealt with.

(3) If a person refuses or neglects to comply with a notice given under sub-section (2), the transferor may apply to the Court to issue 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.

(4) Upon appearance of a person so summoned, the Court may examine him upon oath or affirmation and receive other evidence or, if he does not appear after being duly served with the summons, the Court may receive evidence in his absence, and, in either case, the Court may order him to deliver up such documents to the company upon such terms or conditions as to the Court seem fit, and the costs of the summons and of proceedings on the summons are in the discretion of the Court.

(5) Lists of share certificates, debentures and other documents called in under this section and not brought in shall be exhibited in the office of the company and shall be advertised in the *Gazette* and in such newspapers and at such times as the company thinks fit.

(6) In this section, "interest" includes a prescribed interest.

**Notice of refusal to register transfer**

**185.** (1) If a company refuses to register a transfer of any shares in, debentures of, or interests made available by, the company, it shall, within 2 months after the date on which the transfer was lodged with it, send to the transferee notice of the refusal.

(2) In this section, "interest" includes a prescribed interest.

(3) If a company fails to comply with this section, the company and any officer of the company who is in default are each guilty of an offence.

**Remedy for refusal to register transfer or transmission**

**186. (1)** Where the directors of a company refuse or fail to register a transfer or transmission of any shares in, debentures of, or interest made available by, the company, the transferee or transmittee may apply to the Court for an order under this section.

**(2)** Where the Court is satisfied that the directors have refused or failed to register the transfer or transmission without just cause, the Court may—

- (a) order that the transfer or transmission be registered; or
- (b) make such other order as it thinks proper.

**(3)** Where the directors have refused or failed to register a transfer or transmission of shares, the orders that may be made by the Court under paragraph (2) (b) include an order providing for the purchase of the shares by a specified member of the company or by the company itself and, in the case of a purchase by the company itself, providing for the reduction accordingly of the capital of the company.

**(4)** In this section, “interest” includes a prescribed interest.

**Certification of transfers**

**187. (1)** The certification by a company of an instrument of transfer of shares in, debentures of, or interests made available by, the company shall be 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 shares, debentures or interests in the transferor named in the instrument of transfer but not as a representation that the transferor has any title to the shares, debentures or interests.

**(2)** Where a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to him as if the certification had been made fraudulently.

**(3)** Where a certification is expressed to be limited to 42 days or any longer period from the date of certification, the company and its officers are not, in the absence of fraud, liable in respect of the registration of any transfer of shares, debentures or interests comprised in the certification after the expiration of the period so limited or 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 shall be deemed to be certificated if it bears the words “certificate lodged” or words to the like effect;
- (b) the certification of an instrument of transfer shall be deemed to be made by a company if—
  - (i) the person issuing the instrument is a person authorized to issue certificated instruments of transfer on the company’s behalf; and
  - (ii) the certification is signed by a person authorized to certificate transfers on the company’s behalf or by an officer of the company or of a corporation so authorized; and
- (c) a certification that purports to be authenticated by a person’s signature or initials (whether handwritten or not) shall be deemed to be signed by him unless it is shown that the signature or initials was not or were not placed there by him and was not or were not placed there by any other person authorized to use the signature or initials for the purpose of certificating transfers on the company’s behalf.

(5) In this section, “interest” includes a prescribed interest.

**Duties of company with respect to issue of certificates**

**188. (1)** Within 2 months after the allotment of any shares in, the issue of debentures of, or the making available of interests by, a company, the company shall—

- (a) complete and have ready for delivery to the allottee, debenture holder or interest holder, as the case may be, (in this sub-section referred to as the “relevant person”), all the appropriate certificates, debentures or other documents in connection with the allotment of the shares, the issue of the debentures or the making available of the interests unless, in the case of shares, the conditions of the allotment otherwise provide; and
- (b) unless otherwise instructed by the relevant person, send or deliver the completed certificates, debentures or other documents to the relevant person or, where the relevant person has instructed the company in writing to send them to a nominated person, to that person.

**(2)** Within one month after the date on which a transfer of any shares, debentures or interests is lodged with a company (other than a transfer that the company is for any reason entitled to refuse to register and does not register) the company shall—

- (a) complete and have ready for delivery to the transferee all the appropriate certificates, debentures or other documents in connection with the transfer; and
- (b) unless otherwise instructed by the relevant person, send or deliver the completed certificates, debentures or other documents to the relevant person or, where the relevant person has instructed the company in writing to send them to a nominated person, to that person.

**(3)** If a company fails to comply with this section, the company and any officer of the company who is in default are each guilty of an offence.

**(4)** If a company on which a notice has been served requiring the company to make good any default in complying with the provisions of this section fails to make good the default within 10 days after the service of the notice, the Court may, on the application of the person entitled to have the certificates, debentures or other documents delivered to him, make an order directing the company and any officer of the company to make good the default within such time as is specified in the order, and the order may provide that all costs of and incidental to the application shall be borne by the company or by any officer of the company in default in such proportions as the Court thinks fit.

**(5)** In this section, “interest” includes a prescribed interest.

#### *Division 8—Transfer of Marketable Securities*

##### **Interpretation**

**189. (1)** In this Division, unless the contrary intention appears—

“beneficial owner”, in relation to a marketable security or a right to a marketable security, means a person for whom an authorized trustee corporation is (whether alone or together with another person or other persons) holding the security or right in trust in the ordinary course of its business;

“broker” means a member of a prescribed stock exchange;

“broker’s agent” means an agent or employee of a broker;

“corresponding law” means—

- (a) the provisions of a law of a participating State or of a participating Territory that correspond with this Division; or
- (b) any law of a State or Territory in respect of which a declaration under sub-section (2) is in force,

and includes regulations in force under a law referred to in paragraph (a) or (b);

“legal representative” means the executor, original or by representation, of a will, or administrator of the estate, of a deceased person;

“marketable security” means—

- (a) a share in or a debenture of a company or prescribed corporation; or
- (b) a prescribed security;

“prescribed corporation” means—

- (a) a body corporate incorporated in the State, not being a company; or
- (b) an unincorporated society, association or other body, formed or established in the State, that has been admitted to the official list of a prescribed stock exchange and has not been removed from that official list,

that is, by reason of section 16 (2) of the *Companies (Application of Laws) Act*, 1981, a prescribed corporation;

“prescribed security” means a prescribed interest that is under the regulations a prescribed security or that is one of a class of such interests that are under the regulations prescribed securities;

“prescribed stock exchange” means a stock exchange that is a member of the Australian Associated Stock Exchanges;

“right to a marketable security” means a right, whether existing or future, and whether contingent or not, of a person to have issued to him a marketable security, whether or not on payment of any money or for any other consideration;

“transfer”, in relation to a right to a marketable security, means the renunciation and transfer of that right.

(2) The Commission may, by notice published in the *Gazette*, declare a law in force in a State or Territory that is not a participating State or a participating Territory, being a law the provisions of which correspond substantially with the provisions of this Division, to be a corresponding law and may, by notice so published, revoke a declaration made under this sub-section.

(3) A reference in this Division to a form by number is a reference to the form so numbered in Schedule 4 or to a form to the like effect.

(4) A reference in a form in Schedule 4 to the full name of the transferor of marketable securities or rights to marketable securities includes a reference to the name of the person shown in the records of the company or prescribed corporation that issued those securities or rights as the holder of those securities or rights.

(5) A reference in this Division other than section 198 to the stamping of an instrument is a reference to stamping in ink, and a reference to a stamp on an instrument, or a stamp borne by an instrument, is a reference to a stamp stamped on the document in ink.

(6) A reference in section 198 to the stamping of an instrument is a reference to stamping the instrument—

- (a) in ink;
- (b) by affixing a stamp;
- (c) by impressing a stamp; or
- (d) in any other manner.

#### **Sufficient instrument of transfer**

**190.** A document that is a sufficient instrument of transfer under this Division may be used—

- (a) where it relates to a transfer of marketable securities, as a proper instrument of transfer for the purposes of section 183 and as an instrument of transfer for the purposes of any other law or instrument governing or relating to those securities; and

- (b) where it relates to a transfer of rights to marketable securities, as an instrument of transfer of those rights for the purposes of any law or instrument governing or relating to those rights or securities.

**Transfer of marketable securities**

**191. (1)** A document is a sufficient instrument of transfer of marketable securities if—

- (a) it is an instrument relating to those marketable securities duly completed in accordance with or to the effect of—  
(i) Form 1;  
(ii) Part 1 of Form 1 and Parts 1 and 2 of Form 2; or  
(iii) Part 1 of Form 1 and Parts 1 and 2 of Form 3; and
- (b) where the document relates to marketable securities on which there is an uncalled liability (not being marketable securities that are partly paid shares in a no liability company)—the transferee's acceptance of the marketable securities duly completed in accordance with or to the effect of Form 4 is included in or attached to the instrument referred to in paragraph (a).

**(2)** A document is a sufficient instrument of transfer of rights to marketable securities if—

- (a) it is an instrument relating to those rights duly completed in accordance with or to the effect of—  
(i) Form 5;  
(ii) Part 1 of Form 5 and Parts 1 and 2 of Form 6; or  
(iii) Part 1 of Form 5 and Parts 1 and 2 of Form 7; and
- (b) where the document relates to rights to marketable securities (not being marketable securities that are shares in a no liability company) for which the whole of the moneys to be subscribed is not payable in full on application being made for them—the transferee's acceptance of the marketable securities duly completed in accordance with or to the effect of Form 4 is included in or attached to the instrument referred to in paragraph (a).

**(3)** For the purposes of this section, an instrument is not duly completed in accordance with or to the effect of Form 1, 2, 3, 5, 6 or 7 or a part of one of those forms unless—

- (a) where the form or part refers to the name and address of the transferee—the instrument purports to state that name and address;
- (b) where the form or part refers to the stamp of the transferor's broker—the instrument bears a stamp that purports to be such a stamp;
- (c) where the form or part refers to the stamp of the transferee's broker—the instrument bears a stamp that purports to be such a stamp; and
- (d) where the form or part refers to a stock exchange stamp—the instrument bears a stamp that purports to be a stamp of a prescribed stock exchange or of a prescribed stock exchange under a corresponding law.

#### **Transfers by authorized trustee corporations**

**192. (1)** In respect of the transfer of marketable securities by an authorized trustee corporation, or by an authorized trustee corporation and another person or other persons, to the beneficial owner of those marketable securities, being a transfer that is not made by way of a sale, gift or exchange of the marketable securities, a document is a sufficient instrument of transfer if—

- (a) it is an instrument relating to those marketable securities duly completed in accordance with or to the effect of Form 8; and
- (b) where the document relates to marketable securities on which there is an uncalled liability (not being marketable securities that are partly paid shares in a no liability company)—the transferee's acceptance of the marketable securities duly completed in accordance with or to the effect of Form 9 is included in or attached to the instrument referred to in paragraph (a).

**(2)** In respect of the transfer of rights to marketable securities by an authorized trustee corporation, or by an authorized trustee corporation and another person or other persons, in favour of the beneficial owner of those rights, being a transfer that is not made by way of a sale, gift or exchange of the rights, a document is a sufficient instrument of transfer if—

- (a) it is an instrument relating to those rights duly completed in accordance with or to the effect of Form 10; and

- (b) where those rights are rights to marketable securities (not being marketable securities that are shares in a no liability company) for which the whole of the moneys to be subscribed is not payable in full on application being made for them—the transferee's acceptance of the marketable securities to which those rights relate duly completed in accordance with or to the effect of Form 11 is included in or attached to the instrument referred to in paragraph (a).

**Execution of transfer by transferee**

**193. (1)** Where marketable securities in a company or prescribed corporation are transferred by means of a sufficient instrument of transfer under this Division, the transferee shall be deemed to have agreed at the relevant time to accept the marketable securities subject to the several terms and conditions on which the transferor held them at that time, being the terms and conditions applicable as between the company or prescribed corporation and the holder for the time being of the marketable securities.

**(2)** Where rights to marketable securities in a company or prescribed corporation for which the whole of the moneys to be subscribed is payable in full on application being made for them are transferred by means of a sufficient instrument of transfer under this Division, the transferee shall be deemed—

- (a) to have made application at the relevant time to the company or prescribed corporation for the allotment to him of the marketable securities; and
- (b) to have agreed at the relevant time to accept the marketable securities subject to the terms and conditions upon which they are offered by the company or prescribed corporation for subscription.

**(3)** Where marketable securities that are shares in a company or prescribed corporation are transferred by means of a sufficient instrument of transfer under this Division, the transferee shall be deemed to have agreed at the relevant time—

- (a) to become a member of the company or prescribed corporation; and
- (b) to be bound by the memorandum and articles or by the constituent documents of the company or prescribed corporation.

**(4)** In this section, the “relevant time” means—

- (a) in relation to a sufficient instrument of transfer under section 191—the time of the stamping of the instrument with a stamp purporting to be that of the transferee’s broker; and
- (b) in relation to an instrument that is a sufficient instrument of transfer under section 192—the time of execution by the transferor.

#### **Effect of certain stamps on prescribed instruments**

**194. (1)** Where a duly completed instrument of transfer bears a stamp that purports to be that of the transferor’s broker or of a prescribed stock exchange and to have been stamped in the State, the broker (not being a broker’s agent) of whom or stock exchange of which that stamp purports to be the stamp and, if the stamp purports to be that of the transferor’s broker (whether or not he is a broker’s agent), any associate of that broker—

- (a) shall be deemed to have warranted the accuracy of the statements in the certificate of the broker or of the stock exchange, as the case may be, set out in the instrument;
- (b) shall be deemed to have warranted that the transferor is the registered holder of, or is entitled to be registered as the holder of, the marketable securities to which the instrument relates or is entitled to the rights to marketable securities to which the instrument relates and is legally entitled or authorized to sell or dispose of those marketable securities or rights; and
- (c) is liable to indemnify—
  - (i) the company, prescribed corporation, foreign company, or prescribed corporation under a corresponding law, that has issued or proposes to issue the marketable securities or rights to marketable securities to which the instrument relates;
  - (ii) the transferee; and
  - (iii) the transferee’s broker,against any loss or damage arising from a forged or unauthorized signature of the transferor appearing in the instrument.

**(2)** Without limiting the operation of sub-section (1), where—

- (a) a duly completed instrument of transfer bears a stamp that purports to be that of the transferor’s broker and to have been stamped in the State; and

- (b) the instrument relates to marketable securities or rights to marketable securities to which or to any of which another duly completed instrument of transfer relates, being another instrument that bears a stamp that purports to be that of a prescribed stock exchange,

the broker (not being a broker's agent) whose stamp that first-mentioned stamp purports to be and (whether or not that broker is a broker's agent) any associate of that broker are jointly and severally liable to indemnify that stock exchange against any loss or damage arising from a forged or unauthorized signature of the transferor appearing in the instrument.

**(3)** In this section—

- (a) a reference to a duly completed instrument of transfer is a reference to an instrument—

- (i) that is in accordance with or to the effect of Part 1 of Form 1, 2, 3, 5, 6 or 7 and that has been duly completed within the meaning of section 191; or
- (ii) that it is in accordance with or to the effect of a like part of a like form under a corresponding law and that has been duly completed within the meaning of the provision of that corresponding law that corresponds with section 191; and

- (b) a reference to an associate of a broker is a reference—

- (i) where the broker whose stamp on the instrument purports to be is a member of a firm of brokers and is not a broker's agent—to each other member of that firm; and
- (ii) where the broker whose stamp on the instrument purports to be is a broker's agent—to the broker for whom he is a broker's agent and, if the broker for whom he is a broker's agent is a member of a firm of brokers, to each other member of that firm.

**(4)** In this section—

“marketable security”, in relation to a duly completed instrument of transfer under a corresponding law, means a marketable security within the meaning of the corresponding law;

“right to a marketable security”, in relation to a duly completed instrument of transfer under a corresponding law, means a right to a marketable security within the meaning of the corresponding law.

**Registration of prescribed instruments**

**195. (1)** A company or prescribed corporation with which an instrument that is a sufficient instrument of transfer under section 191 is lodged for the purpose of registering a transfer of marketable securities or obtaining the allotment or issue of marketable securities is, and its officers are, in the absence of knowledge to the contrary, entitled to assume without inquiry that—

- (a) a stamp on the instrument that purports to be the stamp of the transferee's broker is the stamp of that broker;
- (b) a stamp on the instrument that purports to be the stamp of the transferor's broker is the stamp of that broker; and
- (c) a stamp on the instrument that purports to be the stamp of a prescribed stock exchange is the stamp of that stock exchange.

**(2)** A company or prescribed corporation with which an instrument that is a sufficient instrument of transfer under section 192 is lodged for the purpose of registering a transfer of marketable securities or obtaining the allotment or issue of marketable securities is, and its officers are, in the absence of knowledge to the contrary, entitled to assume without inquiry that—

- (a) at the time of the execution of the instrument, the authorized trustee corporation named in the instrument was (whether alone or together with another person or other persons) holding the marketable securities or the rights to the marketable securities in the ordinary course of its business in trust for or on behalf of the transferee; and
- (b) the transfer was not made by way of a sale, gift or exchange of the marketable securities or rights.

**Operation of Division**

**196. (1)** This Division applies and has effect in relation to the transfer of marketable securities and to the transfer of rights to marketable securities notwithstanding anything to the contrary in this Code other than this Division or in another law or instrument relating to the transfer of the securities or the transfer of the rights.

**(2)** Except as provided by this Division, this Division does not affect the terms and conditions on which marketable securities or rights to marketable securities are sold.

(3) Nothing in this Division affects any right of a company or prescribed corporation to refuse to acknowledge or register a person as the holder of marketable securities or to allot or issue marketable securities to a person on a ground other than an objection to the form of instrument lodged with the company or prescribed corporation purporting to transfer the marketable securities or rights to the marketable securities to him.

(4) The registration of a transfer of a marketable security, or the allotment or issue of a marketable security, by means of an instrument that is a sufficient instrument of transfer under this Division does not constitute a breach of any law, memorandum, articles, trust deed or other instrument relating to marketable securities.

(5) This Division does not prevent or affect the use of any other form of transfer of marketable securities or form of transfer of rights to marketable securities, or mode of execution of an instrument of transfer of marketable securities or mode of execution of an instrument of transfer of rights to marketable securities, that is otherwise permitted by law.

(6) A transfer of marketable securities or of rights to marketable securities by or to a trustee or legal representative may, notwithstanding any law or the provisions of the instrument (if any) creating or having effect in relation to the trust or will under which he is appointed trustee or legal representative, be effected by means of an instrument that is a sufficient instrument of transfer under this Division.

**Occupation need not appear in register, instrument, &c.**

**197.** (1) The omission from a register, certificate or other document relating to marketable securities of a statement of the occupation of the person who is, or is entitled to be, registered as the holder of the marketable securities does not constitute a breach of any law, memorandum, articles, trust deed or other instrument relating to the marketable securities.

(2) Notwithstanding anything contained in the memorandum or articles of a company or the constituent documents of a prescribed corporation or in the terms or conditions upon which marketable securities or rights to marketable securities in a company or prescribed corporation are created or issued, it is not necessary in an instrument of transfer of marketable securities or of rights to marketable securities to state the occupation of the transferee or transferor or to have the signature of the transferee or transferor witnessed.

**Offences**

**198. (1)** A broker shall not, in the State, stamp with a broker's stamp an instrument that may be used as a sufficient instrument of transfer under this Division or under a corresponding law unless the instrument relates to a sale or purchase made in the ordinary course of business of the broker for a consideration of not less than the unencumbered market value (at the time of the sale or purchase) of the marketable securities or rights to marketable securities to which the instrument relates.

**(2)** A prescribed stock exchange shall not, in the State, stamp with a stamp of the stock exchange an instrument that may be used as a sufficient instrument of transfer of marketable securities or of rights to marketable securities under this Division or under a corresponding law unless—

- (a) there has been lodged; or
- (b) the stock exchange holds a duly completed instrument of transfer bearing a certificate that purports to be that of the transferor's broker that there has been or will be lodged,

with the company or prescribed corporation that has issued or proposes to issue the marketable securities or rights to marketable securities a duly completed instrument of transfer relating to those marketable securities or rights.

**(3)** A person shall not, in the State, execute an instrument that may be used as a sufficient instrument of transfer under section 192 or under a like provision of a corresponding law if the instrument relates to a transfer of marketable securities or of rights to marketable securities—

- (a) made by way of a sale, gift or exchange of the marketable securities or rights; or
- (b) to or in favour of a person who is not the beneficial owner of the marketable securities or rights.

**(4)** A person other than an authorized trustee corporation shall not, in the State, knowingly cause, authorize or permit to be executed an instrument that may be used as a sufficient instrument of transfer under section 192 or under a like provision of a corresponding law if it is not a sufficient instrument of transfer within the meaning of that section or provision, as the case may be.

**(5)** A person shall not knowingly lodge or cause to be lodged with a company or prescribed corporation an instrument that has been stamped in contravention of sub-section (1) or (2), or an instrument that has been

executed in contravention of sub-section (3), for the purpose of securing the registration of the transfer of marketable securities or the allotment or issue of marketable securities to the transferee named in the instrument.

(6) An expression in this section that is used in a corresponding law has, in relation to a reference in this section to an instrument that is a sufficient instrument of transfer under that corresponding law, the same meaning as it has under that corresponding law.

(7) A reference in this section to a duly completed instrument of transfer is a reference to an instrument—

- (a) that is in accordance with or to the effect of Part 1 of Form 1, 2, 3, 5, 6 or 7 and has been duly completed within the meaning of section 191; or
- (b) that is in accordance with or to the effect of a like part of a like form under a corresponding law and has been duly completed within the meaning of the provision of that law that corresponds with section 191.

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

#### *Division 9—Registration of Charges*

##### **Interpretation and application of Division**

**199. (1)** In this Division and in Schedule 5, 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) authorizing or purporting to authorize, 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;
- (d) a warehousekeeper’s certificate;
- (e) a wharfinger’s certificate;
- (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;

“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 Register of Company Charges referred to in section 203;

“registerable charge” means a charge to and in relation to which, by virtue of section 200, the provisions of this Division mentioned in sub-section 200 (1) apply.

(2) In this Division and in Schedule 5, unless the contrary intention appears, a reference to property of a company includes a reference to property held by the company as trustee.

(3) A charge referred to in sub-section 201 (3) or (4) or section 202 shall, until the charge is registered, be treated for the purposes of this Division and Schedule 5 as if it were not a registerable charge but, when the charge is so registered, it has the priority accorded to a registered charge as from the time of registration.

(4) The registration of a charge referred to in sub-section 201 (3) or (4) or section 202 does not prejudice any priority that would have been accorded to the charge under any other law if the charge had not been registered.

(5) For the purposes of this Division and of Schedule 5, a notice or other document shall be taken to be lodged with the Commission when it is received at the office of the State Commission by an officer authorized to receive it.

(6) A reference in this Division and in Schedule 5 to a company includes a reference to a registered foreign company.

(7) A reference in this Division and in Schedule 5 to a charge on property of a company shall, in the case of a company other than a foreign company, be construed as a reference to a charge on property of the company, whether within or outside Australia.

(8) A reference in this Division and in Schedule 5 to a charge on property of a company shall, in the case of a foreign company formed within Australia, be construed as a reference to a charge on property in the State of the foreign company.

(9) A reference in this Division and in Schedule 5 to a charge on property of a company shall, in the case of a foreign company formed outside Australia, be construed as a reference to a charge on property in Australia of the foreign company.

(10) For the purposes of this section, "Australia" includes the external Territories.

**Charges required to be registered**

**200. (1)** Subject to this section, the provisions of this Division relating to the giving of notice in relation to, the registration of, and the priorities of, charges apply to and in relation to the following charges (whether legal or equitable) on property of a company and do not apply to or 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 or uncalled share premiums;
- (c) a charge on a call, whether in respect of share capital or share premiums, 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 a law in force in the State 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 him;
- (h) a lien or charge on a crop, a lien or charge on wool or a stock mortgage;
- (j) a charge on a negotiable instrument other than a marketable security.

(2) The provisions of this Division mentioned in sub-section (1) do not apply to or in relation to—

- (a) a charge, or a lien over property, arising by operation of law;
- (b) a pledge of a personal chattel or of a marketable security;
- (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;
- (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;
- (b) a chattel interest in land;
- (c) a marketable security;
- (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)** For the purposes of this section, a company shall be deemed 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 he holds the document of title on behalf of the chargee; or
- (b) a government, an authority or a corporation 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.

**(6)** For the purposes of this section, a charge shall be taken to be a charge on property of a kind to which a particular paragraph of sub-section (1) applies notwithstanding that 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 sub-section applies.

**(7)** The provisions of this Division mentioned in sub-section (1) do not apply to or in relation to a charge on land.

**(8)** The provisions of this Division mentioned in sub-section (1) do not apply to or in relation to a charge on fixtures given by a charge on the land to which they are affixed.

**(9)** The provisions of this Division mentioned in sub-section (1) do not apply to or 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.

**(10)** A charge on property of a company is not invalid by reason only of the failure to lodge with the Commission or give to the company or another person a notice or other document that is required by this Division to be so lodged or given.

#### **Lodgment of notice of charge and copy of instrument**

**201. (1)** Where a company creates a charge, the company shall ensure that there is lodged with the Commission, 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;
- (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 shall, for the purposes of sub-section (1), be deemed 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 authorizing the issue of debentures in the series, the company shall ensure that a copy of that resolution, verified by a statement in writing to be a true copy of that resolution, is lodged with the Commission within 45 days after the passing of that resolution.

(3) A foreign company that applies for registration as a company under Division 4 of Part III shall lodge with the application for registration the documents specified in sub-section (5) in relation to any charge on property of the foreign company that would be registrable under this Division if the foreign company were a company as defined in sub-section 5 (1).

(4) A foreign company that applies for registration under Division 5 of Part XIII shall lodge with the application for registration the documents specified in sub-section (5) in relation to any charge on property of the foreign company that would be registrable under this Division if the foreign company were a registered foreign company.

(5) The documents required to be lodged under sub-section (3) or (4) in relation to a charge on property of a foreign company are the following documents:

(a) a notice in the prescribed form—

- (i) setting out the name of the foreign company;
- (ii) if the charge was created by the foreign company—specifying the date of the creation of the charge;
- (iii) if the charge was a charge existing on property acquired by the foreign company—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 foreign company—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 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 foreign company—the copies referred to in sub-paragraph (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 foreign company—
      - (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 foreign company—a copy of the instrument or of each of the instruments verified by a statement in writing to be a true copy; and
  - (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 company passed a further resolution or resolutions authorizing 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.
- (6)** A notice in relation to a charge, being a charge in relation to which paragraph (1) (b) or (c) or (5) (b) or (c) applies, shall not be taken to have been lodged with the Commission under sub-section (1), (3) or (4) unless the notice is accompanied by the documents specified in that paragraph.
- (7)** Where a notice with respect to an instrument creating a charge has been lodged under sub-section (1), (3) or (4), 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, section 204 and Schedule 5 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.
- (8)** Where a payment or discount has been made or allowed, either directly or indirectly, by a company to a person in consideration of his 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 sub-section (1), (3) or (4) shall include particulars as to the amount or rate per centum of the payment or discount.

(9) Where a company issues debentures as security for a debt of the company, the company shall not thereby be regarded as having allowed a discount in respect of the debentures.

**Acquisition of property subject to charge**

**202. (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 shall, within 45 days after the acquisition of the property—

- (a) ensure that there is lodged with the Commission—
  - (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 201 (1) (a);
  - (ii) if the charge was created or evidenced as mentioned in paragraph 201 (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 201 (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.

(2) A notice in relation to a charge, being a charge in relation to which sub-paragraph (1) (a) (ii) or (iii) applies, shall not be taken to have been lodged with the Commission under sub-section (1) unless it is accompanied by the documents specified in that sub-paragraph.

**Registration of documents relating to charges**

**203. (1)** The Commission shall keep a register to be known as the Register of Company Charges.

**(2)** Where a notice in respect of a charge on property of a company that is required by section 201 or 202 to be lodged with the Commission is lodged with the Commission (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, the Commission shall forthwith cause to be entered in the Register the time and date when the notice was so lodged with the Commission 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 sub-section (9), where particulars in respect of a charge are entered in the Register in accordance with sub-section (2), the charge shall be deemed to be registered, and to have been registered from and including the time and date entered in the Register under that sub-section.

**(4)** Where a notice in respect of a charge on property of a company is lodged with the Commission under section 201 or 202 (whether during or after the period within which the notice was required to be lodged) and a document that accompanies that notice has not been duly stamped as required by any applicable law relating to stamp duty, the Commission shall 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 shall cause the word "provisional" to be entered in the Register next to the entry specifying that time and date.

**(5)** Where—

- (a) in accordance with sub-section (4), the word "provisional" is entered in the Register next 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 after the notice was lodged, or within such further period as the Commission, if it considers it to be appropriate in a particular case, allows, evidence satisfactory to the Commission that the document has been duly stamped has been produced to the Commission,

the Commission shall delete the word "provisional" from the entry in the Register relating to that charge, but if such evidence is not produced within the period, or the further period, referred to in paragraph (b), the Commission shall 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 201 or 202 is lodged with the Commission (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 sub-paragraph 201 (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) the Commission shall cause to be entered in the Register the time and date when the document was so lodged with the Commission and such of the particulars referred to in paragraphs (2) (a), (b), (c) and (d) as are ascertainable from the document, but shall cause the word "provisional" to be entered in the Register next to the entry specifying that time and date; and
- (b) the Commission shall, by notice in writing to the person who lodged the document, direct the person to ensure that there is lodged with the Commission, on or before the date specified in the notice, a notice in relation to the charge that complies with the requirements of section 201 or 202, as the case may be, but the giving by the Commission 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 201 or 202.

(7) Where the Commission 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 date specified in the notice containing the direction, the Commission shall—  
(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 sub-section (2) that have not previously been entered;
  - (b) if the direction is not complied with on or before that date—the Commission shall 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 date—the Commission shall cause to be entered in the Register in relation to the charge the time at which and date on which the direction was complied with and the particulars referred to in paragraphs (2) (a), (b), (c) and (d).
- (8)** The Commission 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 the Commission thinks fit.
- (9)** If the word “provisional” is entered in the Register next to an entry specifying a time and date in relation to a charge, the charge shall be deemed not to have been registered but—
- (a) where the word “provisional” is deleted from the Register pursuant to sub-section (5) or paragraph (7) (a)—the charge shall be deemed to be registered and to have been registered from and including the time and date specified in the Register pursuant to sub-section (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 date are subsequently entered in the Register in relation to the charge pursuant to paragraph (7) (c)—the charge shall be deemed to be registered from and including that last-mentioned time and date.
- (10)** Where, pursuant to sub-section 201 (3) or (4), a foreign company lodges with the Commission notices relating to 2 or more charges on the same property of the foreign company, the time and date that shall be entered in the Register in relation to each of those charges are the time and date when the first notice was lodged with the Commission.
- (11)** Where, in accordance with sub-section (10), the time and date that are entered in the Register are the same in relation to 2 or more charges on property of a foreign company, those charges shall, as between themselves, have the respective priorities that they would have had if they had not been registered under this Division.

(12) Where, pursuant to section 202, a company lodges with the Commission notices relating to 2 or more charges on the same property acquired by the company (being charges that are not already registered under this Division), the time and date that shall be entered in the Register in relation to each of those charges are the time and date when the first notice was lodged with the Commission.

(13) Where, in accordance with sub-section (12), the time and date that are entered in the Register are the same in relation to 2 or more charges on property acquired by a company, those charges shall, as between themselves, have the respective priorities that they would have had if they had not been registered under this Division.

(14) Where a notice is lodged with the Commission under section 206 (whether during or after the period within which it was required to be lodged), the Commission shall forthwith cause to be entered in the Register the time and date when the notice was so lodged with the Commission and the particulars set out in the notice.

#### **Priorities of charges**

**204. (1)** Subject to this section, the provisions of Schedule 5 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 Schedule 5 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 shall be deemed, for the purposes of sub-section (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 the Commission under section 201, 202 or 206 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 sub-section 200 (1) applies or apply and also relates to other property, the provisions of Schedule 5 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)**

\* \* \* \*

#### **Certain charges void against liquidator or official manager**

**205. (1) Where—**

- (a) an order is made, or a resolution is passed, for the winding up of a company; or
- (b) an official manager is appointed in respect of a company,

a registrable charge on any property of the company is void as a security on that property as against the liquidator or official manager, as the case may be, unless—

- (c) a notice in respect of the charge was lodged with the Commission under section 201 or 202, as the case requires—
- (i) within the relevant period; or
  - (ii) not later than 6 months before the commencement of the winding up or the appointment of the official manager, as the case may be;
- (d) in relation to a charge other than a charge to which sub-section 201 (3) or (4) applies—the period within which a notice in respect of the charge (other than a notice under section 206) is required to be lodged with the Commission, being the period specified in the relevant section or that period as extended by the Court under sub-section (3), has not expired at the commencement of the winding up or at the time of the appointment referred to in paragraph (b) and the notice is lodged before the expiration of that period;

- (e) in relation to a charge to which sub-section 201 (3) or (4) applies—the period of 45 days after the chargee becomes aware that the foreign company has been registered as a company under Division 4 of Part III or as a foreign company under Division 5 of Part XIII has not expired at the commencement of the winding up or at the time of the appointment referred to in paragraph (b) and the notice is lodged before the expiration of that period; or
- (f) in relation to a charge to which section 202 applies—the period of 45 days after the chargee becomes aware that the property charged has been acquired by a company has not expired at the commencement of the winding up or at the time of the appointment referred to in paragraph (b) and the notice is lodged before the expiration of that period.

**(2)** The reference in paragraph (1) (c) to the relevant period shall be construed as a reference to—

- (a) in relation to a charge to which sub-section 201 (1) applies—the period of 45 days specified in that sub-section, or that period as extended by the Court under sub-section (3) of this section;
- (b) in relation to a charge to which sub-section 201 (3) or (4) applies—the period of 45 days after the chargee becomes aware that the foreign company has been registered as a company under Division 4 of Part III or as a foreign company under Division 5 of Part XIII; or
- (c) in relation to a charge to which section 202 applies—the period of 45 days after the chargee becomes aware that the property has been acquired by a company.

(d) \* \* \* \*

**(2A)** 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 official manager is appointed in respect of the company,

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 with the Commission under section 206—
  - (i) within the period of 45 days specified in sub-section 206 (2) or that period as extended by the Court under sub-section (3) of this section; or
  - (ii) not later than 6 months before the commencement of the winding up or the appointment of the official manager, as the case may be; or
- (d) the period of 45 days specified in sub-section 206 (2), or that period as extended by the Court under sub-section (3) of this section, has not expired at the commencement of the winding up or at the time of the appointment of the official manager and the notice is lodged before the expiration of that period.

**(3)** 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 Division—

- (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, 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.

**(4) Where—**

- (a) a registrable charge (in this sub-section referred to as the “later charge”) is created before the expiration of 45 days after the creation of an unregistered registrable charge (in this sub-section referred to as the “earlier charge”);
- (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 official manager of the company, notwithstanding that a notice in respect of the later

charge was lodged with the Commission under section 201 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 Division.

(5) Nothing in sub-section (1) or (2A) 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;
- (b) the passing of a resolution for the voluntary winding up of the company; or
- (c) the passing of a resolution that the company be placed under official management.

(6) The onus of proving that a person purchased property in good faith and without notice of any of the matters referred to in paragraphs (5) (a), (b) and (c) is on the person asserting that the property was so purchased.

#### **Assignment and variation of charges**

**206. (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 shall, within 45 days after he becomes the holder of the charge—

- (a) lodge with the Commission a notice stating that he 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 shall, within 45 days after the variation occurs, ensure that there is lodged with the Commission 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 shall not be taken, for the purposes of sub-section (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.

(4) A reference in this section to the chargee in relation to a charge shall, if the charge is constituted by a debenture or debentures and there is a trustee for debenture holders, be construed as a reference to the trustee for debenture holders.

(5) Nothing in section 201 requires the lodgment of a notice under that section in relation to a charge by reason only of the fact that the terms of the charge are varied only in a manner mentioned in this section.

#### **Satisfaction of, and release of property from, charges**

**207. (1)** Where, with respect to a charge registered under this Division—

- (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 shall, 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 with the Commission and, upon the memorandum being so lodged, the Commission shall enter in the Register particulars of the matters stated in the memorandum.

(3) The reference in sub-section (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 shall, if the charge was constituted by a debenture or debentures and there was a trustee for debenture holders, be construed as a reference to the person who was, at that time, the trustee for debenture holders.

**Lodgment of notices, offences, &c.**

**208. (1)** Where a notice in respect of a charge on property of a company is required to be lodged with the Commission under section 201 or 202 or sub-section 206 (2), the notice may be lodged by the company or by any interested person.

(2) Where default is made in complying with section 201 or 202 or sub-section 206 (2) in relation to a registrable charge on property of a company, the company and any officer of the company who is in default are each guilty of an offence.

(3) Where a person who becomes the holder of a registrable charge fails to comply with sub-section 206 (1), the person and, if the person is a corporation, any officer of the corporation who is in default, are each guilty of an offence.

(4) Where a document required by this Division other than sub-section 206 (1) to be lodged with the Commission is so lodged by a person other than the company concerned, that person—

- (a) shall, 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 him on lodgment of the document.

**Company to keep documents relating to charges and register of charges**

**209. (1)** A company shall keep, at the place where the register referred to in sub-section (2) is kept, a copy of every document relating to a charge on property of the company that is lodged with the Commission under this Division or was lodged with a prescribed State authority under Division 7 of Part IV of the *Companies Act*, 1961, and a copy of every document that is given to the company under this Division.

(2) A company shall keep a register and shall, 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), forthwith 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;
- (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; 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 sub-section (2) shall 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 him with a copy of the register or any part of the register and, where such a request is made, the company shall 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 the Commission 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 the Commission 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.

**Certificates**

**210. (1)** Where particulars of a charge are entered in the Register in accordance with this Division, the Commission shall, on request by any person, issue to that person a certificate under the common seal of the Commission setting out those particulars and stating the time and date when a notice in respect of the charge containing those particulars was lodged with the Commission and, if the word "provisional" appears in the Register next to the reference to that time and date, stating that fact.

**(2)** A certificate issued under sub-section (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 Division, and the word "provisional" does not appear in the register next to the reference to the time and date when a notice in respect of the charge was lodged with the Commission, the Commission shall, on request by any person, issue to that person a certificate under the common seal of the Commission stating that particulars of the charge are entered in the Register in accordance with this Division.

**(4)** A certificate issued under sub-section (3) is conclusive evidence that the requirements of this Division 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 with the Commission) have been complied with.

**Registration under Bills of Sale Act of 1898**

**211. (1)** Where—

- (a) a company, a recognized company or a recognized foreign company transfers, assigns or gives security over a personal chattel within the meaning of the *Bills of Sale Act of 1898*; and
- (b) notice in respect of that transfer, assignment or giving of security is required to be lodged with the Commission under this Division or the corresponding provisions of the law of a participating State or participating Territory,

that transfer, assignment or giving of security is not required to be registered, under the provisions of that Act unless the transfer or assignment is made, or the security is given, jointly with another person who is not a company, a recognized company or a recognized foreign company or with other persons one or more of whom is not a company, a recognized company or a recognized foreign company.

**(2) Where—**

- (a) by reason of sub-section (1), a transfer, assignment or giving of security is not required to be registered under the provisions of the *Bills of Sale Act of 1898*; or
- (b) by reason of the provision of the law of a participating State or participating Territory that corresponds with sub-section (1), a transfer, assignment or giving of security is not required to be registered under the law of that State or Territory mentioned in that corresponding provision,

then—

- (c) no provision of the *Bills of Sale Act of 1898* relating to priorities applies to or in relation to the transfer, assignment or giving of security; and
- (d) a failure to register the transfer, assignment or giving of security under the *Bills of Sale Act of 1898* does not affect the validity, or limit the effect, of the transfer, assignment or giving of security.

**Power of Court to rectify Register, &c.**

**212. 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 mis-stated in, the Register or a memorandum referred to in section 207; and
- (b) that the omission or mis-statement—
  - (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 that on other grounds it is just and equitable to grant relief, the Court 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, order that the omission or mis-statement be rectified.

**Charges on property of recognized companies or recognized foreign companies**

**213.** The provisions of the law of a participating State or participating Territory that correspond with the provisions of this Division (other than this section) and with Schedule 5 apply in and in relation to New South Wales—

- (a) in relation to property of a recognized company incorporated in that participating State or participating Territory; and
- (b) in relation to property in Australia and the external Territories of a recognized foreign company registered in that participating State or participating Territory.

**Provisions applying when incorporation transferred**

**214. (1)** Where a recognized company is registered as a company under Division 4 of Part III and, immediately before the company is so registered, a charge or charges on property of the company was or were registered under the provisions of the law of the State or Territory from which the company transferred its incorporation that correspond with this Division and was not or were not registered under this Division—

- (a) the Commission shall forthwith enter in the Register the time and date, and the particulars, entered in the register of company charges kept under those provisions in relation to that charge or those charges; and
- (b) the time and date, and the particulars, so entered shall be deemed to have been entered in the Register in accordance with sub-section 203 (2).

**(2)** Where a foreign company that was registered as a foreign company under the law of a participating State or participating Territory is registered as a company under Division 4 of Part III and, immediately before the company is so registered, a charge or charges on property of the company was or were registered under the provisions of the law of that State or Territory that correspond with this Division and was not or were not registered under this Division—

- (a) the Commission shall forthwith enter in the Register the time and date, and the particulars, entered in the register of company charges kept under those provisions in relation to that charge or those charges; and

- (b) the time and date, and the particulars, so entered shall be deemed to have been entered in the Register in accordance with sub-section 203 (2).

**Power to exempt from compliance with certain requirements of Division**

**215. (1)** The Commission 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 201, 202 or 206 relating to—

- (a) the particulars to be contained in a notice under the relevant section;
- (b) the documents (other than the notice) to be lodged under the relevant section; or
- (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 the Commission, subject to a condition, from compliance with a requirement of section 201, 202 or 206 shall not contravene or fail to comply with 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 the Commission, order the person to comply with the condition.

**Charges created before commencement of *Companies (Application of Laws) Act, 1981***

**215A. (1)** Notwithstanding section 18 of the *Companies (Application of Laws) Act, 1981*—

- (a) Division 7 of Part IV of the *Companies Act, 1961*; and
- (b) any other provisions of that Act that are necessary for the effectual operation of that Division,

continue in force, as if that section had not been enacted, in relation to—

- (c) any charge created by a corporation before the commencement of the *Companies (Application of Laws) Act, 1981*; and

- (d) any charge to which property acquired by a corporation before the commencement of that Act was subject when the property was so acquired,

and the provisions of this Division do not apply in relation to any such charge.

(2) Sub-section (1) operates in substitution for section 30 of the *Companies (Application of Laws) Act*, 1981.

## PART V—MANAGEMENT AND ADMINISTRATION

### *Division 1—Office and Name*

#### **Registered office of company**

**216. (1)** A company shall, as from the day of its incorporation, have a registered office within the State to which all communications and notices may be addressed and which shall be open and accessible to the public—

- (a) where a notice has been lodged by the company with the Commission under sub-section 217 (2) or under a corresponding previous law of the State—for such hours (being not less than 3) between the hours of 9 a.m. and 5 p.m. of each day, Saturdays, Sundays and holidays excepted, as are specified in the later of that notice or a notice lodged by the company with the Commission under sub-section 217 (4) or under a corresponding previous law of the State; or
- (b) where a notice has not been lodged by the company with the Commission under sub-section 217 (2) or under a corresponding previous law of the State—for not less than 5 hours between 10 a.m. and 4 p.m. of each day, Saturdays, Sundays and holidays excepted.

(2) If default is made in complying with sub-section (1), the company and any officer of the company who is in default are each guilty of an offence.

**Notice of address of registered office and office hours**

**217. (1)** On the lodging of the memorandum of a proposed company for registration, there shall be lodged with the Commission notice in the prescribed form of the address of the proposed registered office of the company.

**(2)** On the lodging of the memorandum of a proposed company for registration or at any later time, notice in the prescribed form of the hours (being not less than 3) between the hours of 9 a.m. and 5 p.m. of each day, Saturdays, Sundays and holidays excepted, during which the registered office of the company is to be open and accessible to the public may be lodged with the Commission.

**(3)** Notice in the prescribed form of a change in the situation of the registered office of a company shall be lodged by the company with the Commission not later than 7 days after the day on which the change occurred.

**(4)** Where a notice has been lodged by a company under sub-section (2) or under a corresponding previous law of the State, notice in the prescribed form of a change of the hours during which the registered office of the company is open and accessible to the public shall be lodged by the company with the Commission not later than 7 days after the day on which the change occurred.

**(5)** If default is made in complying with sub-section (3) or (4), the company and any officer of the company who is in default are each guilty of an offence.

**Publication of name**

**218. (1)** The name of a company shall appear in legible characters on—

- (a) the common seal and every other seal of the company; and
- (b) every business letter, statement of account, invoice, order for goods, order for services, official notice, publication, bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, receipt and letter of credit of, or purporting to be issued or signed by or on behalf of, the company, whether or not the company is carrying on a business under a business name,

and, if default is made in complying with this sub-section, the company is guilty of an offence.

Penalty: \$1,000.

**(2)** If an officer of a company or any person on its behalf—

- (a) uses or authorizes the use of any seal that purports to be a seal of the company but on which the name of the company does not appear as required by sub-section (1);
- (b) issues or authorizes the issue of any business letter, statement of account, invoice, order for goods, order for services or official notice or publication of the company on which the name of the company does not appear as required by that sub-section; or
- (c) signs, issues or authorizes to be signed or issued on behalf of the company any bill of exchange, promissory note, cheque or other negotiable instrument, any indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, or any receipt or letter of credit, on which the name of the company does not appear as required by that sub-section,

he is guilty of an offence.

Penalty: \$1,000.

**(3)** If an officer of a company or any person on its behalf signs, issues or authorizes to be signed or issued on behalf of the company any bill of exchange, promissory note, cheque or other negotiable instrument, or any indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, or any letter of credit, on which the name of the company does not appear as required by sub-section (1), he is liable to the holder of the instrument or letter of credit for the amount due on it unless that amount is paid by the company.

**(4)** A company shall paint or affix and keep painted or affixed on the outside of every office or place in which its business is carried on, in a conspicuous position and in letters easily legible, its name, and also, in the case of the registered office, the words “Registered Office” and, if default is made in complying with this sub-section, the company is guilty of an offence.

Penalty: \$1,000.

#### *Division 2—Directors and other Officers*

##### **Directors**

**219. (1)** A public company shall have at least 3 directors and a proprietary company shall have at least 2 directors.

**(2)** A person is incapable of being appointed as a director of a company unless he is a natural person.

**(3)** In the case of a public company, at least 2 directors shall be natural persons who ordinarily reside within Australia and, in the case of a proprietary company, at least one director shall be a natural person who ordinarily so resides.

**(4)** Where the articles of a company incorporated before the date of commencement of the *Companies (Application of Laws) Act*, 1981, provide for the appointment of one director only, the articles shall on and after that date be deemed to provide for the appointment of 2 directors.

**(5)** If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

#### **Restrictions on appointment or advertisement of director**

**220. (1)** A person shall not be named as a director or proposed director in the memorandum or articles of a company, or in a prospectus, unless before the registration of the memorandum or articles or the issue of the prospectus, as the case may be, he has by himself or by his agent authorized in writing for the purpose signed and lodged with the Commission a consent in writing to act as a director and—

- (a) signed the memorandum for a number of shares not less than his qualification (if any);
- (b) signed and lodged with the Commission an undertaking in writing to take from the company and pay for his qualification shares (if any);
- (c) made and lodged with the Commission a statement in writing to the effect that a number of shares, not less than his qualification (if any), are registered in his name; or
- (d) in the case of a company formed, or intended to be formed, by way of reconstruction of another corporation or group of corporations or to acquire the shares in another corporation or group of corporations—made and lodged with the Commission a statement in writing that he was a shareholder in that other corporation or in one or more of the corporations of that group and that, as a shareholder, he will be entitled to receive and have registered in his name a number of shares not less than his qualification by virtue of the terms of an agreement relating to the reconstruction.

**(2)** Where a person has signed and lodged an undertaking to take and pay for his qualification shares, he is, as regards those shares, in the same position as if he had signed the memorandum for that number of shares.

(3) The foregoing provisions of this section (other than the provisions relating to the signing of a consent to act as director) do not apply to—

- (a) a company not having a share capital;
- (b) a proprietary company; or
- (c) a prospectus issued by or on behalf of a company or the articles adopted by a company after the expiration of one year from the date of incorporation of the company.

(4) On the lodging of the memorandum of a company for registration, the persons desiring the incorporation of the company shall also lodge with the Commission a list, certified by one of those persons to be correct, of the persons who have consented to be directors of the company, and, if the list contains the name of any person who has not so consented, the person who certified the list to be correct is guilty of an offence.

#### **Qualification of director**

**221. (1)** Without affecting the operation of any of the preceding provisions of this Division, a director who is by the articles required to hold a specified share qualification and is not already qualified shall obtain his qualification within 2 months after his appointment or such shorter period as is fixed by the articles.

**(2)** Unless otherwise provided by the articles, the qualification of any director of a company must be held by him solely and not as one of several joint holders.

#### **Vacation of office**

**222. (1)** The office of a director of a corporation is, by force of this section, vacated if—

- (a) he has not within the period referred to in sub-section 221 (1) obtained his qualification;
- (b) after so obtaining his qualification he ceases at any time to hold his qualification;
- (c) he becomes an insolvent under administration; or
- (d) he is convicted of an offence referred to in sub-section 227 (2).

(2) A person whose office is vacated by reason of paragraph (1) (a) or (b) is incapable of being re-appointed as a director until he has obtained his qualification.

(3) A person whose office is vacated by reason of paragraph (1) (c) is incapable, without the leave of the Court, of being re-appointed as a director until he ceases to be an insolvent under administration.

(4) A person whose office is vacated by reason of paragraph (1) (d) is incapable, without the leave of the Court, of being re-appointed as a director within the period of 5 years referred to in sub-section 227 (2).

(5) A person whose office is vacated by reason of paragraph (1) (a) or (b) shall not purport to act as a director of the corporation unless he is validly re-appointed as a director.

Penalty: \$1,000 or 3 months imprisonment, or both.

#### **Appointment of directors to be voted on individually**

**223. (1)** At a general meeting of a public company, a motion for the appointment of 2 or more persons as directors by a single resolution shall not be moved unless a resolution that it be moved has first been agreed to by the meeting without any vote being cast against it.

(2) A resolution passed pursuant to a motion moved in contravention of this section is void, whether or not its being so moved was objected to at the time.

(3) Where a resolution pursuant to a motion moved in contravention of this section is passed, no provision for the automatic re-appointment of retiring directors in default of another appointment applies.

(4) For the purposes of this section, a motion for approving a person's appointment or for nominating a person for appointment shall be treated as a motion for his appointment.

(5) Nothing in this section applies to a resolution altering the company's articles.

(6) Nothing in this section prevents the election of 2 or more directors by ballot or poll.

**Validity of acts of directors and secretaries**

**224. (1)** The acts of a director or secretary are valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

**(2)** Where a person whose office as director of a corporation is vacated pursuant to sub-section 222 (1) purports to do an act as director of the corporation, that act is as valid, in relation to a person dealing with the corporation in good faith and for value and without actual knowledge of the matter referred to in that sub-section by reason of which the office of the first-mentioned person was vacated, as if that office had not been vacated.

**Removal of directors**

**225. (1)** A public company may, by resolution, remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him, but, where any director so removed was appointed to represent the interests of a particular class of shareholders or debenture holders, the resolution to remove him does not take effect until his successor has been appointed.

**(2)** Special notice is required of any resolution to remove a director under this section or to appoint some person in place of a director so removed at the meeting at which he is removed and, on receipt of notice of an intended resolution to remove a director under this section, the company shall forthwith send a copy of the notice to the director concerned, and the director (whether or not he is a member of the company) is entitled to be heard on the resolution at the meeting.

**(3)** Where notice is given pursuant to sub-section (2) and the director concerned makes with respect to the notice representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so—

- (a) in any notice of the resolution given to members of the company—  
state the fact of the representations having been made; and
- (b) send a copy of the representations to every member of the company to whom notice of the meeting has been or is sent,

and, if a copy of the representations is not so sent because they were received too late or because of the company's default, the director may, without prejudice to his right to be heard orally, require that the representations be read out at the meeting.

(4) Notwithstanding the foregoing provisions of this section, copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter, and the Court may order the costs of the company or the other person on an application under this section to be paid in whole or in part by the director, notwithstanding that he is not a party to the application.

(5) A vacancy created by the removal of a director under this section, if not filled at the meeting at which he is removed, may be filled as a casual vacancy.

(6) A person appointed as director in place of a person removed under this section shall be treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become a director on the day on which the person in whose place he is appointed was last appointed a director.

(7) Nothing in the foregoing provisions of this section shall be taken as depriving a person removed under those provisions of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director or as derogating from any power to remove a director that may exist apart from this section.

(8) A director of a public company shall not be removed by, or be required to vacate his office by reason of, any resolution, request or notice of the directors or any of them notwithstanding anything in the articles or any agreement.

#### **Age of directors**

**226.** (1) Subject to this section, no person of or over the age of 72 years shall be appointed or act as a director of—

- (a) a public company; or
- (b) a company that is a subsidiary of—
  - (i) a public company; or
  - (ii) a corporation that is a public company within the meaning of the corresponding law in force in another State or in a Territory,

but nothing in this sub-section prevents a person from acting as a director of a company during the period commencing on the day on which he attains the age of 72 years and ending at the conclusion of the annual general meeting commencing next after that day.

(2) The office of a director of a public company or of a company referred to in paragraph (1) (b) becomes vacant at the conclusion of the annual general meeting of that public company or that other company, as the case may be, commencing next after the director attains the age of 72 years.

(3) An act done by a person as director is valid notwithstanding that it is afterwards discovered that he was of or over the age of 72 years at the time of his appointment or that his appointment had terminated by virtue of sub-section (2).

(4) Where the office of a director has become vacant by virtue of sub-section (2), no provision for the automatic re-appointment of retiring directors in default of another appointment applies in relation to that director.

(5) If a vacancy created by virtue of sub-section (2) is not filled at the meeting at which the office became vacant, the office may be filled as a casual vacancy.

(6) Subject to sub-section (7), a person of or over the age of 72 years may, by a resolution stating the age of that person, being a resolution—

- (a) of which not less than 14 days' written notice has been given to the members of the company entitled to vote stating that the person is a candidate for election who is of or over the age of 72 years and stating his age; and
- (b) which is passed by a majority of not less than three-quarters of such members of the company as, being entitled so to do, vote in person or where proxies are allowed, by proxy, at a general meeting of that company,

be appointed or re-appointed as a director of that company to hold office until the conclusion of the next annual general meeting of the company.

(7) Where the company is a subsidiary of a public company, or of a corporation that is a public company within the meaning of the corresponding law in force in another State or in a Territory, the appointment or re-appointment referred to in sub-section (6) does not have effect unless—

- (a) the person appointed or re-appointed is a director of the holding company; or

- (b) the appointment or re-appointment of the person as a director of the company has been approved by a resolution of the holding company—
  - (i) of which not less than 14 days' written notice was given to the members of the holding company entitled to vote stating that the person was a candidate for election as a director of the company who was of or over the age of 72 years and stating his age; and
  - (ii) which was passed by a majority of not less than three-quarters of such members of the holding company as, being entitled so to do, voted in person or, where proxies were allowed, by proxy at a general meeting of the holding company.

(8) Where the articles of a company limited by guarantee provide for the holding of postal ballots for the election of a director or directors and a postal ballot for the election of a director or directors is held, being a postal ballot in which—

- (a) the members entitled to vote have been given notice in writing by the company stating that a candidate for election is of or over the age of 72 years and stating the age of the candidate; and
  - (b) that candidate is elected by a majority of not less than three-quarters of the members who, being entitled to vote, vote in the ballot,
- that candidate may be appointed or re-appointed as a director to hold office until the conclusion of the next annual general meeting of the company.

(9) Where the articles of a company limited by guarantee provide for the election or appointment of a director or directors otherwise than by members at a general meeting or by postal ballot of members and the Commission, by instrument in writing, declares that this section does not apply to the company or its directors, then, subject to such conditions (if any) as the Commission specifies in the instrument, this section does not so apply.

(10) A vacancy in the office of a director occurring by virtue of sub-section (2) shall not be taken into account in determining when other directors are to retire.

(11) Nothing in this section limits or affects the operation of any provision of the memorandum or articles of a company preventing any person from being appointed a director or requiring any director to vacate his office at any age less than 72 years.

(12) A person is incapable of being appointed as a director of a company unless he has attained the age of 18 years.

**Certain persons not to manage corporations**

**227. (1)** A person who is an insolvent under administration shall not be a director or promoter of, or be in any way (whether directly or indirectly) concerned in or take part in the management of, a corporation without the leave of the Court.

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

**(2)** A person who has, whether before or after the commencement of the *Companies (Application of Laws) Act*, 1981, been convicted, within or outside the State—

- (a) on indictment of any offence in connection with the promotion, formation or management of a corporation;
- (b) of any offence involving fraud or dishonesty punishable on conviction by imprisonment for a period of not less than 3 months;
- (c) of any offence under section 108, 229, 554, 555, 556, 559 or 560, under section 44 of the *Companies (Acquisition of Shares) (New South Wales) Code*, under section 129 of the *Securities Industry (New South Wales) Code* or under any provision of a law in force in another State or in a Territory that corresponds with any of those provisions; or
- (d) of any offence under any provision of a previous law of the State, or of another State or of a Territory, with which any of the provisions referred to in paragraph (c) corresponds,

shall not, within a period of 5 years after his conviction or, if he was sentenced to imprisonment, after his release from prison, without the leave of the Court, be a director or promoter of, or be in any way (whether directly or indirectly) concerned in or take part in the management of, a corporation.

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

**(3)** In any proceeding for an offence against sub-section (2), a certificate by a prescribed authority stating that a person was released from prison on a specified date is *prima facie* evidence that that person was released from prison on that date.

**(4)** When granting leave under this section, the Court may impose such conditions or limitations as it thinks fit and a person who contravenes or fails to comply with any such condition or limitation that is applicable to him is guilty of an offence.

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

(5) A person intending to apply for leave of the Court under this section shall give to the Commission not less than 21 days' notice of his intention so to apply.

(6) The Court may at any time, on the application of the Commission, revoke leave granted by the Court under this section.

**Disclosure of interests in contracts, property, offices, &c.**

**228. (1)** Subject to this section, a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall, as soon as practicable after the relevant facts have come to his knowledge, declare the nature of his interest at a meeting of the directors of the company.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(2) The requirements of sub-section (1) do not apply in any case where the interest of a director of a company consists only of being a member or creditor of a corporation that is interested in a contract or proposed contract with the first-mentioned company if the interest of the director may properly be regarded as not being a material interest.

(3) A director of a company shall not be taken to be interested or to have been at any time interested in any contract or proposed contract by reason only—

- (a) in a case where the contract or proposed contract relates to any loan to the company—that he has guaranteed or joined in guaranteeing the repayment of the loan or any part of the loan; or
- (b) in a case where the contract or proposed contract has been or will be made with or for the benefit of or on behalf of a corporation that is related to the company—that he is a director of that corporation,

and this sub-section has effect not only for the purposes of this Code but also for the purposes of any rule of law, but does not affect the operation of any provision in the articles of the company.

(4) For the purposes of sub-section (1), a general notice given to the directors of a company by a director to the effect that he is an officer or member of a specified corporation or a member of a specified firm and is to be regarded as interested in any contract that may, after the date of the notice, be made with that corporation or firm shall be deemed to be a

sufficient declaration of interest in relation to any contract so made or proposed to be made if—

- (a) the notice states the nature and extent of the interest of the director in the corporation or firm;
- (b) when the question of confirming or entering into the contract is first taken into consideration, the extent of his interest in the corporation or firm is not greater than is stated in the notice; and
- (c) the notice is given at a meeting of the directors or the director takes reasonable steps to ensure that it is brought up and read at the next meeting of the directors after it is given.

**(5)** A director of a company who holds any office or possesses any property whereby, whether directly or indirectly, duties or interests might be created in conflict with his duties or interests as director shall, in accordance with sub-section (6), declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**(6)** A declaration required by sub-section (5) in relation to the holding of an office or the possession of any property shall be made by a person—

- (a) where the person holds the office or possesses the property as mentioned in sub-section (5) when he becomes a director—at the first meeting of directors held after—
  - (i) he becomes a director; or
  - (ii) the relevant facts as to the holding of the office or the possession of the property come to his knowledge,whichever is later; or
- (b) where the person commences to hold the office or comes into possession of the property as mentioned in sub-section (5) after he becomes a director—at the first meeting of directors held after the relevant facts as to the holding of the office or the possession of the property come to his knowledge.

**(7)** A secretary of a company shall record every declaration under this section in the minutes of the meeting at which it was made.

**(8)** Except as provided in sub-section (3), this section is in addition to, and not in derogation of, the operation of any rule of law or any provision in the articles restricting a director from having any interest in contracts with the company or from holding offices or possessing properties involving duties or interests in conflict with his duties or interests as a director.

**Duty and liability of officers**

**229. (1)** An officer of a corporation shall at all times act honestly in the exercise of his powers and the discharge of the duties of his office.

**Penalty—**

- (a) in a case to which paragraph (b) does not apply—\$5,000; or
- (b) where the offence was committed with intent to deceive or defraud the company, members or creditors of the company or creditors of any other person or for any other fraudulent purpose—\$20,000 or imprisonment for 5 years, or both.

**(2)** An officer of a corporation shall at all times exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties.

**Penalty:** \$5,000.

**(3)** An officer or employee of a corporation, or a former officer or employee of a corporation, shall not make improper use of information acquired by virtue of his position as such an officer or employee to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.

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

**(4)** An officer or employee of a corporation shall not make improper use of his position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.

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

**(5)** For the purposes of this section, “officer”, in relation to a corporation, means—

- (a) a director, secretary or executive officer of the corporation;
- (b) a receiver, or receiver and manager, of the property or part of the property of the corporation;
- (c) an official manager or a deputy official manager of the corporation;
- (d) a liquidator of the corporation; and
- (e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons.

**(6) Where—**

- (a) a person is convicted of an offence under this section; and
- (b) the court is satisfied that the corporation has suffered loss or damage as a result of the act or omission that constituted the offence,

the court by which he is convicted may, in addition to imposing a penalty, order the convicted person to pay compensation to the corporation of such amount as that court specifies, and any such order may be enforced as if it were a judgment of that court.

**(7) Where a person contravenes or fails to comply with a provision of this section in relation to a corporation, the corporation may, whether or not the person has been convicted of an offence under this section in relation to that contravention or failure to comply, recover from the person as a debt due to the corporation by action in any court of competent jurisdiction—**

- (a) if that person or any other person made a profit as a result of the contravention or failure—an amount equal to that profit; and
- (b) if the corporation has suffered loss or damage as a result of the contravention or failure—an amount equal to that loss or damage.

**(8) Where a person who contravenes or fails to comply with this section has been found by a court to be liable to pay to a person an amount by reason of a contravention of Part X of the *Securities Industry (New South Wales) Code* that arose out of or was constituted by the same act or transaction as the contravention of or failure to comply with this section, the amount of the liability of the person under this section shall be reduced by the first-mentioned amount.**

**(9) For the purposes of sub-section (8), the onus of proving that the liability of a person to pay an amount to another person arose from the same act or transaction as that from which another liability arose lies on the person liable to pay the amount.**

**(10) This section has effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person by reason of his office or employment in relation to a corporation and does not prevent the institution of any civil proceedings in respect of a breach of such a duty or in respect of such a liability.**

**Loans to directors**

**230. (1)** A company shall not, whether directly or indirectly—

(a) make a loan to—

- (i) a director of the company, a spouse of such a director, or a relative of such a director or spouse;
  - (ii) a director of a corporation that is related to the company, a spouse of such a director, or a relative of such a director or spouse;
  - (iii) a trustee of a trust under which a person referred to in sub-paragraph (i) or (ii) has a beneficial interest being a loan made to the trustee in his capacity as trustee; or
  - (iv) a corporation, where a person referred to in sub-paragraph (i) or (ii) has, or 2 or more such persons together have, a direct or indirect beneficial interest in shares in the corporation the nominal value of which is not less than 10% of the nominal value of the issued share capital of the corporation; or
- (b) give a guarantee or provide security in connection with a loan made or to be made by another person to a natural person or corporation referred to in paragraph (a).

**(2)** Where a company makes a loan to a corporation, or gives a guarantee or provides security in connection with a loan made to a corporation, a person or persons shall not be taken for the purposes of sub-section (1) to have a beneficial interest in shares in the corporation by reason only that the company has a relevant interest or relevant interests in shares in the corporation and the person or persons has or have a relevant interest or relevant interests in shares in the company.

**(3)** Nothing in sub-section (1) applies—

- (a) to anything done by a company that is an exempt proprietary company;
- (b) to a loan made by a company to, or a guarantee given or security provided by a company in relation to, a corporation that is related to the company if the making of the loan, the giving of the guarantee or the provision of the security has been authorized by a resolution of the directors;

- (c) subject to sub-section (4), to anything done by a company to provide a person with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company;
- (d) subject to sub-section (4), to anything done by a company to provide a person who is engaged in the full-time employment of the company or of a corporation that is related to the company with funds to meet expenditure incurred or to be incurred by him in purchasing or otherwise acquiring premises to be used by him as his principal place of residence;
- (e) to a loan made by a company to a person who is engaged in the full-time employment of the company or of a corporation that is related to the company, where—
  - (i) in the case where neither sub-paragraph (ii) nor (iii) applies—the company has at a general meeting;
  - (ii) in the case where the company is a subsidiary of a listed corporation or listed corporations—the company and the listed corporation or listed corporations have at general meetings; or
  - (iii) in the case where the company is not a subsidiary of a listed corporation but is a subsidiary whose ultimate holding company is incorporated in Australia or an external Territory—the company and the ultimate holding company have at general meetings,approved a scheme for the making of such loans and the loan is made in accordance with the scheme;
- (f) to a loan made, guarantee given or security provided by a company in the ordinary course of its ordinary business where—
  - (i) that business includes the lending of money or the giving of guarantees or the provision of security in connection with loans made by other persons; and
  - (ii) the loan that is made by the company or in respect of which the company gives the guarantee or provides the security is made on ordinary commercial terms as to the rate of interest, the terms of repayment of principal and payment of interest, the security to be provided and otherwise.

(4) Paragraph (3) (c) or (d) does not authorize the making of any loan, the entering into any guarantee or the provision of any security except—

(a) with the prior approval of—

- (i) in the case where neither sub-paragraph (ii) nor (iii) applies—the company;
- (ii) in the case where the company is a subsidiary of a listed corporation or listed corporations—the company and the listed corporation or listed corporations; or
- (iii) in the case where the company is not a subsidiary of a listed corporation but is a subsidiary whose ultimate holding company is incorporated in Australia or an external Territory—the company and the ultimate holding company,

given at a general meeting of the company or at general meetings of the company and the listed corporation or listed corporations or of the company and the ultimate holding company, as the case may be, at which the purposes of the expenditure and the amount of the loan or the extent of the guarantee or security, as the case may be, are disclosed; or

(b) on condition that if the making of the loan, the giving of the guarantee or the provision of the security is not approved—

- (i) in the case where neither sub-paragraph (i) nor (ii) applies—by the company at or before the next annual general meeting of the company;
- (ii) in the case where the company is a subsidiary of a listed corporation or listed corporations—by the company at or before the next annual general meeting of the company or by the listed corporation or by each listed corporation at or before the next annual general meeting of the listed corporation concerned; or
- (iii) in the case where the company is not a subsidiary of a listed corporation but is a subsidiary whose ultimate holding company is incorporated in Australia or an external Territory—by the company at or before the next annual general meeting of the company or by the ultimate holding company at or before the next annual general meeting of the ultimate holding company,

the loan be repaid or the liability under the guarantee or security be discharged, as the case may be, within 6 months after the conclusion of that meeting.

(5) Where a company makes a loan, gives a guarantee or provides security in contravention of this section, the company is, notwithstanding section 570, not guilty of an offence but—

- (a) in the case of a loan made to, or a guarantee given or security provided in relation to a loan made to, a director of the company or of a corporation that is related to the company or a spouse of such a director, or a relative of such a director or spouse—the director and any officers of the company who are in default are each guilty of an offence and, in addition, are jointly and severally liable to indemnify the company against any loss arising from the making of the loan, the giving of the guarantee or the providing of the security, as the case may be; or
- (b) in the case of a loan made to, or a guarantee given or security provided in relation to a loan made to, a trustee of a trust referred to in sub-paragraph (1) (a) (iii)—any director of the company, or of a corporation that is related to the company, by virtue of whose beneficial interest under the trust the making of the loan, the giving of the guarantee or the provision of the security contravened this section, and any other officers of that company who are in default, are each guilty of an offence and, in addition, are jointly and severally liable to indemnify the company against any loss arising from the making of the loan, the giving of the guarantee or the providing of the security, as the case may be; or
- (c) in the case of a loan made to, or a guarantee given or security provided in relation to a loan made to, a corporation referred to in sub-paragraph (1) (a) (iv) (in this paragraph referred to as the “relevant corporation”—any director of the company, or of a corporation that is related to the company, by virtue of whose beneficial interest in shares in the relevant corporation the making of the loan, the giving of the guarantee or the provision of the security contravened this section, and any other officers of that company or of the relevant corporation who are in default, are each guilty of an offence and, in addition, are jointly and severally liable to indemnify the company against any loss arising from the making of the loan, the giving of the guarantee or the providing of the security, as the case may be.

**Penalty—**

- (d) in a case to which paragraph (e) does not apply—\$5,000; or

(e) where the offence was committed with intent to deceive or defraud the company, members or creditors of the company or creditors of any other person or for any other fraudulent purpose—\$20,000 or imprisonment for 5 years, or both.

(6) It is a defence to a prosecution for an offence against sub-section (5) or to a proceeding instituted in respect of a liability under that sub-section if the defendant proves that he had no knowledge of the making of the loan, the giving of the guarantee or the provision of the security.

(7) Nothing in this section operates to prevent the company from recovering the amount of, or of any interest on, any loan made, or any amount for which it becomes liable under any guarantee given or in respect of any security provided, contrary to the provisions of this section.

(8) If a person has made a loan in relation to which a company has given a guarantee or provided security in contravention of this section, the person may enforce the guarantee or security against the company if, and only if—

(a) in a case where the company is a proprietary company—a certificate signed by a director and a secretary of the company certifying that the company was an exempt proprietary company was furnished to the person before the loan was made; or

(b) in any case—a certificate signed by a director and a secretary of the company certifying that the company was not prohibited by this section from giving the guarantee or providing the security was furnished to the person before the loan was made and the person did not know, and had no reason to believe, that the certificate was incorrect.

(9) A director or secretary of a company who furnishes a person with a certificate referred to in sub-section (8) that is false is guilty of an offence.

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

(10) This section has effect in addition to, and not in derogation of, any other law in force in the State.

#### **Register of directors' shareholdings, &c.**

**231. (1)** A company shall keep a register showing with respect to each director of the company particulars of—

(a) shares in the company or in a corporation that is related to the company, being shares in which the director has a relevant interest, and the nature and extent of that interest;

- (b) debentures of, or prescribed interests made available by, the company or a corporation that is related to the company being debentures or prescribed interests in which the director has a relevant interest, and the nature and extent of that interest;
- (c) rights or options of the director or of the director and another person or other persons in respect of the acquisition or disposal of shares in, debentures of, or prescribed interests made available by, the company or a corporation that is related to the company; and
- (d) contracts to which the director is a party or under which he is entitled to a benefit, being contracts under which a person has a right to call for or to make delivery of shares in, debentures of, or prescribed interests made available by, the company or a corporation that is related to the company.

**(2)** A company need not show in its register with respect to a director particulars of shares in a corporation that is related to the company and is a wholly-owned subsidiary of the company or of another corporation.

**(3)** A company that is a wholly-owned subsidiary of another company shall be deemed to have complied with this section in relation to a director who is a director of that other company if the particulars required by this section to be shown in the register of the first-mentioned company with respect to the director are shown in the register of the second-mentioned company.

**(4)** A company shall, within 7 days after receiving notice from a director under paragraph 232 (1) (a), enter in its register in relation to the director the particulars referred to in sub-section (1) including the number and description of shares, debentures, prescribed interests, rights, options and contracts to which the notice relates and, in respect of shares, debentures, prescribed interests, rights or options acquired or contracts entered into after he became a director—

- (a) the price or other consideration for the transaction (if any) by reason of which an entry is required to be made under this section; and
- (b) the date of—
  - (i) the agreement for the transaction or, if it is later, the completion of the transaction; or
  - (ii) where there was no transaction, the occurrence of the event by reason of which an entry is required to be made under this section.

(5) A company shall, within 3 days after receiving a notice from a director under paragraph 232 (1) (b), enter in its register the particulars of the change referred to in the notice.

(6) A company is not, by reason of anything done under this section, to be taken for any purpose to have notice of, or to be upon inquiry as to, the right of a person to or in relation to a share in, debenture of, or prescribed interest made available by, the company.

(7) A register kept by a company pursuant to this section shall be open for inspection—

- (a) by any 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.

(8) A person may request a company to furnish him with a copy of the register or any part of the register and, where such a request is made, the company shall 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 the Commission 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 the Commission approves.

(9) A company shall produce its register at the commencement of each annual general meeting of the company and keep it open and accessible during the meeting to all persons attending the meeting.

(10) It is a defence to a prosecution for failing to comply with sub-section (1) or (4) in respect of particulars relating to a director if the defendant proves that the failure was due to the failure of the director to comply with section 232 with respect to those particulars.

(11) In determining for the purposes of this section whether a person has a relevant interest in a debenture or prescribed interest, the provisions of section 8 that apply for the purposes of this section have effect as if a reference in those provisions to a share were a reference to a debenture or prescribed interest.

**(12)** If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

**General duty to make disclosure**

**232. (1)** A director of a company shall give notice in writing to the company—

- (a) of such particulars relating to shares, debentures, prescribed interests, rights, options and contracts as are necessary for the purposes of compliance by the company with the provisions of section 231;
- (b) of particulars of any change in respect of the particulars referred to in paragraph (a), including the consideration (if any) received as a result of the event giving rise to the change;
- (c) of such matters and events affecting or relating to himself as are necessary for the purposes of compliance by the company with any of the provisions of section 238 that are applicable in relation to him;
- (d) of such matters and events affecting or relating to himself as are necessary for the purposes of compliance by the company with any of the provisions of the *Companies (Acquisition of Shares) (New South Wales) Code* that are applicable in relation to him; and
- (e) if he is a director of a public company or of a subsidiary of a public company, of the date of his birth.

**(2)** A director required to give a notice under sub-section (1) shall give the notice—

- (a) in the case of a notice under paragraph (1) (a), within 14 days after—
  - (i) the date on which he became a director; or
  - (ii) as the case may require, the date on which the director became aware that he had a relevant interest in the shares, debentures or prescribed interests or the date on which the director became aware that he had acquired the rights or options or the date on which the director entered into the contracts, whichever last occurs;
- (b) in the case of a notice under paragraph (1) (b), within 14 days after he becomes aware of the occurrence of the event giving rise to the change referred to in that paragraph;

- (c) in the case of a notice under paragraph (1) (c), within 14 days after he becomes aware of the matter or the occurrence of the event;
- (d) in the case of a notice under paragraph (1) (d), forthwith upon becoming aware that the company requires or will require the information for the purposes of compliance with any of the provisions of the *Companies (Acquisition of Shares) (New South Wales) Code*; and
- (e) in the case of a notice under paragraph (1) (e), within 14 days after the date on which he became a director.

**(3)** Nothing in this section requires a director of a company to give notice to the company of any matter or event of which he has given notice to the company before the commencement of the *Companies (Application of Laws) Act*, 1981, for the purposes of a corresponding provision of a previous law of the State.

**(4)** A company shall, within 7 days after the receipt by it of a notice given under sub-section (1), send a copy of the notice to each of the other directors of the company.

**(5)** In any proceedings under this section, a person shall, in the absence of proof to the contrary, be presumed to have been aware at a particular time of a fact or occurrence of which a servant or agent of the person, being a servant or agent having duties or acting in relation to his master's or principal's interest or interests in a share in, a debenture of, or a prescribed interest made available by, the company concerned, was aware at that time.

**(6)** In determining for the purposes of this section whether a person has a relevant interest in a debenture or prescribed interest, the provisions of section 8 that apply for the purposes of this section have effect as if a reference in those provisions to a share were a reference to a debenture or prescribed interest.

Penalty: \$1,000 or imprisonment for 3 months, or both.

#### **Payments for loss of, or retirement from, office**

**233. (1)** It is unlawful—

- (a) for a company to make or give to a prescribed person, or for a prescribed person to receive from a company, a payment or other valuable consideration or any other benefit by way of compensation for the loss by that person or any other person of, or for or in connection with retirement of that person or any other person from, a prescribed office in relation to the company; or

- (b) for a person to make or give to a prescribed person, or for a prescribed person to receive from a person, a payment or any other valuable consideration or any other benefit in connection with the transfer of the whole or any part of the undertaking or property of a company, unless—
- (c) particulars with respect to the proposed payment or consideration (including the amount of the proposed payment or the money value of the proposed consideration) or the proposed other benefit; and
  - (d) in a case to which paragraph (a) applies—particulars of all other relevant benefits proposed to be given,

have been disclosed to the members of the company and the making of the proposed payment referred to in paragraph (c), or the giving of the proposed consideration or proposed other benefit referred to in paragraph (c), has been approved by the company in general meeting.

**(2)** Paragraph (1) (a) does not apply in relation to the making or giving by a company, or to the receipt by a person, of a payment or other valuable consideration or other benefit if that payment or other valuable consideration or other benefit is an exempt benefit.

**(3)** A company which, or person who, does an act that is unlawful by reason of sub-section (1) is guilty of an offence.

**(4)** Where an amount is paid or other valuable consideration or any other benefit is given to a person and the making or receipt of the payment or the giving or receipt of the consideration or other benefit is unlawful by reason of sub-section (1), the amount or the money value of the consideration or other benefit shall be deemed to be received by the person in trust for the company.

**(5)** This section is in addition to, and not in derogation of, any rule of law requiring disclosure to be made with respect to the making of any payment or the giving of any other valuable consideration or any other benefit.

**(6) In this section—**

- (a) a reference to a prescribed office, in relation to a company, is a reference to—
  - (i) an office of director of the company or of a related corporation;
  - (ii) an office of principal executive officer of the company or of a related corporation; and

- (iii) any other office in connection with the management of affairs of the company or of a related corporation that is held by a person who also holds, or who has, at any time within the period of 12 months immediately preceding the loss of, or retirement from, that office, held, an office mentioned in sub-paragraph (i) or (ii);
- (b) a reference to a prescribed person, in relation to a company, is a reference to—
  - (i) a person who holds, or has at any previous time held, a prescribed office in relation to the company;
  - (ii) the spouse of a person referred to in sub-paragraph (i);
  - (iii) a person who is a relative of a person referred to in sub-paragraph (i) or of the spouse of such a person; or
  - (iv) a person associated with a person referred to in sub-paragraph (i) or the spouse of a person associated with a person referred to in sub-paragraph (i);
- (c) a reference to the making of a payment or the giving of any other valuable consideration or any other benefit by a company or person includes a reference to the making of a payment or the giving of any other valuable consideration or any other benefit that the company or person is obliged under a contract to make or give; and
- (d) a reference to a payment includes a reference to a payment by way of damages for breach of contract.

**(7) In this section—**

“emoluments” in relation to a person who is a director or other officer of a corporation, means the amount or value of any money, consideration or benefit given, directly or indirectly, to that person in connection with the management of affairs of the corporation or of any holding company or subsidiary of the corporation, whether as a director or officer or otherwise, but does not include amounts in payment or reimbursement of out-of-pocket expenses incurred for the benefit of the corporation;

“exempt benefit” means a payment or other valuable consideration or any other benefit made or given by a company by way of compensation for the loss by a person of, or for or in connection with the retirement of a person from, a prescribed office in relation to the company—

- (a) made or given under an agreement entered into before 1 July 1962;

- (b) made or given under an agreement entered into on or after 1 July 1962 and before the commencement of the *Companies (Application of Laws) Act*, 1981, where the making of the payment or the giving of the consideration or benefit would have been lawful if the *Companies (Application of Laws) Act*, 1981, had not been enacted;
- (c) made or given under an agreement if particulars of the terms of that agreement have been disclosed to the members of the company and approved by the company in general meeting;
- (d) being a *bona fide* payment by way of damages for breach of contract;
- (e) being a *bona fide* payment by way of pension or lump sum payment in respect of past services, including any superannuation, retiring allowance, superannuation gratuity or similar payment the value of which (excluding any part of the pension or payment that is attributable to contributions made by the person) does not exceed the total emoluments of that person in the period of 3 years immediately preceding the loss of that prescribed office by that person or the retirement of that person from that prescribed office or, where the prescribed office is an office referred to in sub-paragraph (6) (a) (ii), does not exceed an amount ascertained in accordance with the formula  
$$\frac{7x}{3}$$
—, where  $x$  is the total emoluments of that person in the period of 3 years immediately preceding the loss of that prescribed office by that person or the retirement of that person from that prescribed office;
- (f) made or given to the person pursuant to an agreement made between the company and the person before the person became the holder of the prescribed office as the consideration or part of the consideration for the person agreeing to hold the prescribed office; or
- (g) being a payment made in respect of leave of absence to which the person is entitled by virtue of an industrial instrument;

“relevant benefit”, in relation to a proposal to make or give to a person a payment or other valuable consideration or any other benefit, being a payment, consideration or other benefit to which paragraph (1) (a)

would apply (in this definition referred to as the “proposed benefit”), means any other payment, valuable consideration or other benefit (including any exempt benefit) that is proposed to be made or given by way of compensation for the loss of, or in connection with the retirement from, the prescribed office in relation to which the proposed benefit is proposed to be made or given.

**(8)** The giving of approval by a company for the making of a payment referred to in paragraph (1) (b) or for the giving of consideration or another benefit referred to in paragraph (1) (b) does not relieve a director of the company of any duty to the company under section 229 or otherwise, and whether of a fiduciary nature or not, in connection with the making of the payment or the giving of the consideration or other benefit.

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

#### **Provisions as to assignment of office**

**234. (1)** If, in the case of a public company, provision is made by the articles or by an agreement entered into between any person and the company for empowering a director of the company to assign his office as such to another person, any such assignment of office is, notwithstanding anything in the provision of the articles or agreement, of no effect until approved by a special resolution of the company.

**(2)** This section shall not be construed so as to prevent the appointment by a director (if authorized by the articles and subject to the articles) of an alternate or substitute director to act for or on behalf of the director during his inability for any time to act as director.

#### **Powers to require disclosure of directors' emoluments**

**235. (1)** If a company is served with a notice sent by or on behalf of—

- (a) at least 10% of the total number of members of the company; or
- (b) the holders in aggregate of not less than 5% in nominal value of the company's issued share capital,

requiring the emoluments and other benefits received by the directors of the company or of a subsidiary to be disclosed, the company shall—

- (c) forthwith prepare or cause to be prepared and cause to be audited a statement showing the total amount of emoluments and other benefits paid to or received by each of the directors of the company and each director of a subsidiary, including any amount paid by way of salary, for the financial year immediately preceding the service of the notice;
- (d) when the statement referred to in paragraph (c) has been audited, forthwith send a copy of the statement to all persons entitled to receive notice of general meetings of the company; and
- (e) lay the statement before the next general meeting of the company held after the statement is audited.

**(2)** If a company fails to comply with any provision of this section, the company and the directors of the company are each guilty of an offence.

**Secretary**

**236. (1)** A company shall have at least one secretary.

**(2)** A secretary of a company shall be appointed by the directors.

**(3)** A person is not capable of being a secretary of a company unless the person is a natural person who has attained the age of 18 years.

**(4)** The secretary, or one of the secretaries, shall be a person who ordinarily resides in the State.

**(5)** A secretary who ordinarily resides in the State shall be present at the registered office of the company in person or by his agent on the days and during the hours when the registered office is required to be open and accessible to the public.

**(6)** If there is no secretary of a company, or no secretary of the company is capable of acting, any act or thing required or authorized to be done by or in relation to the secretary may be done by or in relation to any assistant or deputy secretary or, if there is no assistant or deputy secretary or no assistant or deputy secretary is capable of acting, by or in relation to an officer of the company authorized by the directors to act as secretary, either generally or in relation to the doing of that act or thing.

**(7)** A provision of this Code or of the memorandum or articles requiring or authorizing any act or thing to be done by or in relation to a director and a secretary is not satisfied by its being done by or in relation to the same person acting both as director and as, or in place of, a secretary.

**(8)** 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.

#### **Provisions indemnifying officers or auditors**

**237. (1)** Any provision, whether contained in the articles or in a contract with a company or otherwise, for exempting any officer or auditor of the company from, or indemnifying him against, any liability that by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company is void.

**(2)** Notwithstanding anything in this section, a company may, pursuant to its articles or otherwise, indemnify an officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application in relation to any such proceedings in which relief is under this Code granted to him by the Court.

**(3)** Sub-section (1) does not apply in relation to a contract of insurance, not being a contract of insurance the premiums in respect of which are paid by the company or by a related corporation.

**(4)** For the purposes of this section, “officer”, in relation to a company, means—

- (a) a director, secretary, executive officer or employee of the company;
- (b) a receiver, or receiver and manager, of the property or part of the property of the company;
- (c) an official manager or deputy official manager of the company;
- (d) a liquidator of the company; and
- (e) a trustee or other person administering a compromise or arrangement made between the company and another person or other persons.

#### **Register of directors, principal executive officers and secretaries**

**238. (1)** A company shall keep a register of its directors, principal executive officers and secretaries.

(2) The register shall contain with respect to each director his consent in writing to appointment as such and shall specify—

- (a) his present Christian or given name and surname, any former Christian or given name or surname, his usual residential address, and his business occupation (if any); and
- (b) particulars of directorships held by the director in other corporations that under the law of the State, of another State or of a Territory are public companies or subsidiaries of public companies,

but it is not necessary for the register to contain particulars of directorships held by a director of a corporation in a related corporation.

(3) Where a person is a director in one or more subsidiaries of the same holding company, it is sufficient compliance with the provisions of sub-section (2) if it is disclosed that the person is the holder of one or more directorships in that group of companies and the group may be described by the name of the holding company with the addition of the word "Group".

(4) The register shall specify with respect to each principal executive officer and secretary his full name and address and other occupation (if any) and shall contain his consent in writing to his appointment as principal executive officer or secretary, as the case may be.

(5) The register shall be open for inspection—

- (a) by any 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.

(6) A person may request a company to furnish him with a copy of the register or any part of the register and, where such a request is made, the company shall 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 the Commission 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 the Commission approves.

(7) The company shall lodge with the Commission—

- (a) within one month after incorporation—a return in the prescribed form containing the particulars required to be specified in the register;
- (b) within one month after a person ceases to be, or becomes, a director of the company—a return in the prescribed form notifying the Commission of the change and containing, with respect to each person who is, at the time of lodgment of the return, a director of the company, the particulars required to be specified in the register;
- (c) within one month after a person becomes a principal executive officer or secretary of the company—a return in the prescribed form notifying the Commission of that fact and specifying the full name, address and other occupation (if any) of that person; and
- (d) within one month after a person ceases to be a principal executive officer or secretary of the company—a return in the prescribed form notifying the Commission of that fact.

(8) If default is made in complying with any of the preceding provisions of this section, the company and any officer of the company who is in default are each guilty of an offence.

(9) The Commission may at any time, by notice in writing to a person who appears to the Commission from returns lodged with the Commission under this section to be a director, principal executive officer or secretary of a company, require the person to lodge with the Commission, within a period specified in the notice, a notice in the prescribed form stating whether the person is such a director, principal executive officer or secretary and, if the person has ceased to be such a director, principal executive officer or secretary, specifying the date on which he so ceased, and, where a person receives such a notice, the person shall comply with the notice.

(10) A certificate of the Commission stating that, from any return or notice lodged with the Commission pursuant to this section or lodged with a prescribed State authority pursuant to a corresponding provision of a previous law of the State, it appears that at any time specified in the certificate, or throughout a period specified in the certificate, a person was a director, principal executive officer or secretary of a specified company shall, in all courts and by all persons having power to take evidence for the purposes of

this Code, be received as *prima facie* evidence of the facts stated in the certificate and, for the purposes of this sub-section, a person who appears from any return or notice so lodged to be a director, principal executive officer or secretary of a company shall be deemed to continue as such until, from a return or notice subsequently so lodged with the Commission, it appears that he has ceased to be such a director, principal executive officer or secretary.

### *Division 3—Meetings and Proceedings*

#### **Statutory meeting and statutory report**

**239. (1)** Where a public company that is a limited company and has a share capital or a no liability company—

- (a) issues a prospectus inviting applications or offers from the public to subscribe for, or offering to the public for subscription, shares in the company; and
- (b) the company has not previously issued such a prospectus,

the company shall, within a period of not less than one month and not more than 3 months after the date on which the company allots shares pursuant to the prospectus, hold a general meeting of the members of the company, to be called the “statutory meeting”.

**(2)** The directors shall at least 7 days before the day on which the meeting is to be held send a copy of a report, to be called the “statutory report”, to every member of the company.

**(3)** The statutory report shall be certified by not less than 2 directors of the company and shall state, as at the date of the report—

- (a) the total number of shares allotted, distinguishing—
  - (i) shares allotted as fully paid up in cash;
  - (ii) shares allotted as partly paid up in cash;
  - (iii) shares allotted as fully paid up otherwise than in cash; and

- (iv) shares allotted as partly paid up otherwise than in cash, and stating—
- (v) in the case of shares partly paid up—the extent to which they are so paid up; and
  - (vi) in the case of shares allotted as fully or partly paid up otherwise than in cash—the consideration for which they have been allotted;
- (b) the total amount of cash received by the company in respect of all the shares allotted and so distinguished;
- (c) an abstract of the receipts of the company and of the payments made out of those receipts up to a date within 7 days of the date of the report exhibiting under distinctive headings the receipts from shares and debentures and other sources, the payments made out of those receipts and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses;
- (d) the names and addresses and descriptions of the directors, trustees for holders of debentures (if any), auditors (if any), principal executive officers and secretaries of the company; and
- (e) the particulars of any contract the modification of which is to be submitted to the meeting for its approval together with the particulars of the modification or proposed modification.
- (4) The statutory report shall, so far as it relates to the shares allotted and to the cash received in respect of such shares and to the receipts and payments on capital account, be examined and reported upon by the auditors (if any).
- (5) The directors shall cause a copy of the statutory report and the auditor's report (if any) to be lodged with the Commission at least 7 days before the date of the statutory meeting.
- (6) The directors shall cause a list showing the names and addresses of the members, and the numbers of shares held by them respectively, to be produced at the commencement of the meeting and to remain open and accessible to any member during the continuance of the meeting.

(7) The members present at the meeting are at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8) The meeting may adjourn from time to time and, at any adjourned meeting, any resolution of which notice has been given in accordance with the articles either before or after the former meeting may be passed and the adjourned meeting has the same powers as an original meeting.

(9) The meeting may by resolution appoint a committee or committees of inquiry, and at any adjourned meeting a special resolution may be passed that the company be wound up if, notwithstanding any other provision of this Code, at least 7 days notice of intention to propose the resolution has been given to every member of the company.

(10) In the event of any default in complying with the provisions of this section, any officer of the company who is in default and any director of the company who fails to take all reasonable steps to secure compliance with the provisions of this section are each guilty of an offence.

#### **Annual general meeting**

**240. (1)** Subject to sub-section (2), a company shall, in addition to any other meeting held by the company, hold a general meeting, to be called the "annual general meeting", at least once in every calendar year and, in relation to a financial year of the company that ends after the commencement of the *Companies (Application of Laws) Act*, 1981, within the period of 5 months (or, in the case of an exempt proprietary company, the period of 6 months) after the end of that financial year.

(2) A company may hold its first annual general meeting at any time within the period of 18 months after its incorporation but, where the first financial year of the company ends after the commencement of the *Companies (Application of Laws) Act*, 1981, the company shall hold the meeting not more than 5 months (or, in the case of an exempt proprietary company, more than 6 months) after the end of that financial year.

(3) A company shall be deemed to have held an annual general meeting if that company has held a general meeting at which resolutions have been passed dealing with all matters required to be dealt with at an annual general meeting, but nothing in this sub-section affects an obligation imposed by this Code to hold an annual general meeting at a particular time or within a particular period.

(4) An exempt proprietary company shall be deemed to have held an annual general meeting if that company is deemed by section 250 to have held a general meeting and the resolution that is deemed to have been passed at that general meeting deals with all matters that are required to be dealt with at an annual general meeting.

(5) The Commission may, on application made by a company in accordance with a resolution of the directors and signed by a director or secretary, subject to such conditions as the Commission thinks fit—

- (a) extend the period of 5 months or the period of 6 months referred to in sub-section (1) or the period of 18 months referred to in sub-section (2); or
- (b) permit an annual general meeting to be held in a calendar year other than the calendar year in which it would otherwise be required by sub-section (1) to be held.

(6) A company is not in default in holding an annual general meeting under sub-section (1) or (2) if, pursuant to an extension or permission under sub-section (5), an annual general meeting is not held within the period or in the calendar year in which it would otherwise be required by sub-section (1) or (2) as the case may be, to be held, but is held within the extended period or in the calendar year in which under sub-section (5) it is permitted to be held.

(7) An application by a company for an extension of a period or for permission under sub-section (5) shall be made before the expiration of that period or of the calendar year in which the annual general meeting would otherwise be required by sub-section (1) or (2), as the case may be, to be held.

(8) Subject to notice being given to all persons entitled to receive notice of the meeting, a general meeting may be held at any time and the company may resolve that any meeting held or convened to be held shall be the annual general meeting of the company.

**(9)** If default is made in holding an annual meeting under this section or in complying with any conditions imposed by the Commission under sub-section (5)—

- (a) the company and any officer of the company who is in default are each guilty of an offence; and
- (b) the Court may, on the application of any member, order a general meeting to be convened.

Penalty: \$1,000 or imprisonment for 3 months, or both.

#### **Convening of general meeting on requisition**

**241. (1)** The directors of a company, notwithstanding anything in its articles, shall, on the requisition—

- (a) of members holding at the date of the deposit of the requisition not less than 5% of such of the paid-up capital as at that date carries the right of voting at general meetings; or
- (b) in the case of a company not having a share capital, of members who are together entitled to not less than 5% of the total voting rights of all members having at that date a right to vote at general meetings,

or, in either case, of not less than 200 members, forthwith convene a general meeting of the company to be held as soon as practicable but, in any case, not later than 2 months after the receipt by the company of the requisition.

**(2)** The requisition shall state the objects of the meeting and shall be signed by the requisitioning members and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more of the requisitioning members.

**(3)** If the directors do not, within 21 days after the date of the deposit of the requisition, proceed to convene a meeting, the requisitioning members, or any of them representing more than 50% of the total voting rights of all of them, may themselves, in the same manner as nearly as possible as that in which meetings are to be convened by directors, convene a meeting, but any meeting so convened shall not be held after the expiration of 3 months from the date of the deposit of the requisition.

(4) Any reasonable expenses incurred by the requisitioning members by reason of the failure of the directors to convene a meeting shall be paid to those members by the company, and any sum so paid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default.

(5) A meeting at which a special resolution is to be proposed shall be deemed not to be duly convened by the directors if they do not give such notice of the meeting as is required by this Code in the case of special resolutions.

#### **Convening of meetings**

**242. (1)** So far as the articles do not make other provision, 2 or more members holding not less than 5% of the issued share capital, or, if the company does not have a share capital, not less than 5% in number of the members of the company, may convene a meeting of the company.

(2) A meeting of a company or of a class of members, other than a meeting for the passing of a special resolution, shall be convened by notice in writing of not less than 14 days or such longer period as is provided in the articles.

(3) A meeting shall, notwithstanding that it is convened by notice shorter than is required by sub-section (2), be deemed to be duly convened if it is so agreed—

- (a) in the case of a meeting convened as the annual general meeting—by all the members entitled to attend and vote at the meeting; or
- (b) in the case of any other meeting—by a majority in number of the members having a right to attend and vote at the meeting, being a majority that together hold not less than 95% in nominal value of the shares giving a right to attend and vote or, in the case of a company not having a share capital, are together entitled to not less than 95% of the total voting rights of all the members having the right to attend and vote at the meeting.

(4) So far as the articles do not make other provision, notice of every meeting shall be served on every member having a right to attend and vote at the meeting in the manner in which notices are required to be served by Table A.

**Articles as to right to demand a poll**

**243. (1)** Any provision contained in a company's articles is void in so far as it would have the effect—

- (a) of excluding the right to demand a poll at a general meeting on any question or matter other than the election of the chairman of the meeting or the adjournment of the meeting;
- (b) of making ineffective a demand for a poll on any question or matter, other than the election of the chairman of the meeting or the adjournment of the meeting, that is made—
  - (i) by not less than 5 members having the right to vote at the meeting;
  - (ii) by a member or members who are together entitled to not less than 10% of the total voting rights of all the members having the right to vote at the meeting; or
  - (iii) by a member or members holding shares in the company conferring a right to vote at the meeting, being shares on which an aggregate sum has been paid up equal to not less than 10% of the total sum paid up on all the shares conferring that right; or
- (c) of requiring the instrument appointing a proxy, or any other document necessary to show the validity of or otherwise relating to the appointment of a proxy, to be received by the company or any other person more than 48 hours before a meeting or adjourned meeting in order that the appointment may be effective at the meeting.

**(2)** The instrument appointing a proxy to vote at a meeting of a company shall be deemed to confer authority to demand or join in demanding a poll, and, for the purposes of sub-section (1), a demand by a person as proxy for a member of the company shall be deemed to be the same as a demand by the member.

**Quorum, chairman, voting, &c., at meetings**

**244. (1)** So far as the articles do not make other provision—

- (a) in the case of a proprietary company, 2 members of the company, and in the case of any other company, 3 members, personally present constitute a quorum;

- (b) any member elected by the members present at a meeting may be chairman of the meeting; and
- (c) in the case of a company having a share capital, every member has one vote in respect of each share or each \$20 of stock held by him, and, in any other case, every member has one vote.

(2) On a poll taken at a meeting, a person (including a proxy) entitled to more than one vote need not, if he votes, use all his votes or cast all the votes he uses in the same way.

(3) A body corporate may, by resolution of its directors or other governing body—

- (a) if it is a member of a company, authorize such person as it thinks fit to act as its representative either at a particular meeting or at all meetings of the company or of any class of members; or
- (b) if it is a creditor (including a holder of debentures) of a company, authorize such person as it thinks fit to act as its representative either at a particular meeting or at all meetings of any creditors of the company,

and a person so authorized is, in accordance with his authority and until his authority is revoked by the body corporate, entitled to exercise the same powers on behalf of the body corporate as the body corporate could exercise if it were a natural person who was a member, creditor or holder of debentures of the company.

(4) Where—

- (a) a person present at a meeting is authorized to act as the representative of a body corporate at the meeting by virtue of an authority given by the body corporate under sub-section (3); and
- (b) the person is not otherwise entitled to be present at the meeting,

the body corporate shall, for the purposes of sub-section (1), be deemed to be personally present at the meeting.

(5) A certificate under the seal of the body corporate is *prima facie* evidence of the appointment or of the revocation of the appointment, as the case may be, of a representative pursuant to the provisions of sub-section (3).

**(6)** Where a holding company holds the whole of the issued shares in a subsidiary and a minute is signed by a representative of the holding company authorized pursuant to sub-section (3) stating that any act, matter or thing, or any ordinary or special resolution, required by this Code or by the memorandum or articles of the subsidiary to be made, performed, or passed by or at a general meeting of the subsidiary has been made, performed, or passed, that act, matter, thing or resolution shall, for all purposes, be deemed to have been duly made, performed or passed by or at a general meeting of the subsidiary.

**(7) Where—**

- (a) by or under any provision of this Code any notice, copy of a resolution or other document relating to any matter is required to be lodged by the company with the Commission;
- (b) a minute referred to in sub-section (6) is signed by the representative pursuant to that sub-section; and
- (c) the minute relates to such a matter,

the company shall, within one month after the signing of the minute, lodge a copy of the minute with the Commission.

### **Proxies**

**245. (1)** Subject to sub-sections (2), (3) and (4), a member of a company who is entitled to attend and vote at a meeting of the company, or at a meeting of any class of members of the company, is entitled to appoint—

- (a) in the case of a company not having a share capital—another member or, where the articles so provide, another person (whether a member or not); or
- (b) in any other case—not more than 2 other persons (whether members or not),

as his proxy or proxies to attend and vote instead of the member at the meeting.

**(2)** A proxy appointed to attend and vote instead of a member has the same right as the member to speak at the meeting but, unless the articles otherwise provide, a proxy is not entitled to vote except on a poll.

**(3)** Where a member appoints 2 proxies, the appointment is of no effect unless each proxy is appointed to represent a specified proportion of the member's voting rights.

(4) A member of a proprietary company is not entitled to appoint another person as his proxy under sub-section (1) except—

- (a) in accordance with the articles of the company; or
- (b) with the leave of the Court.

(5) In every notice convening a meeting of a public company or of any class of members of a public company, there shall appear with reasonable prominence—

- (a) in the case of a public company having a share capital, a statement—
  - (i) that a member entitled to attend and vote is entitled to appoint not more than 2 proxies;
  - (ii) that where more than one proxy is appointed, each proxy must be appointed to represent a specified proportion of the member's voting rights; and
  - (iii) that a proxy need not be a member; or
- (b) in the case of a public company not having a share capital, a statement—
  - (i) that a member entitled to attend and vote is entitled to appoint a proxy to attend and vote instead of the member; and
  - (ii) that a proxy must, or need not, be a member (as the case requires),

and, if default is made in complying with this sub-section as respects any meeting, every officer of the company who is in default is guilty of an offence.

(6) A person who authorizes or permits an invitation to appoint as proxy a person or one of a number of persons specified in the invitation to be issued at the company's expense to some only of the members entitled to be sent a notice of the meeting and to vote at the meeting by proxy is guilty of an offence.

(7) A person is not guilty of an offence under sub-section (6) by reason only of the issue to a member at his request of a form of appointment naming the proxy or a list of persons willing to act as proxies if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy.

**Power of Court to order meeting**

**246. (1)** If for any reason it is impracticable to convene a meeting in any manner in which meetings may be convened or to conduct the meeting in the manner prescribed by the articles or this Code, the Court may, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting, order a meeting to be convened, held and conducted in such manner as the Court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting.

**(2)** Any meeting convened, held and conducted in accordance with any order made pursuant to this section shall, for all purposes, be deemed to be a meeting duly convened, held and conducted.

**(3)** For the purposes of an application to the Court or of a meeting held by order of the Court under this section, the personal representative of a deceased member of a company shall be deemed to be a member of the company and, notwithstanding anything to the contrary in this Code or the memorandum or articles of the company, to have the same voting rights as the deceased member had immediately before his death by reason of his holding shares that on his death were transmitted to his personal representative by operation of law.

**Circulation of members' resolutions, &c.**

**247. (1)** Subject to this section, a company shall, on the requisition in writing of such number of members of the company as is specified in subsection (2) and (unless the company otherwise resolves) at the expense of those members—

- (a) give to members of the company entitled to receive notice of the next annual general meeting notice of any resolution that may properly be moved and is intended to be moved at that meeting; and
- (b) circulate to members entitled to have notice of any general meeting sent to them any statement of not more than 1,000 words with respect to the matter referred to in any proposed resolution or the business to be dealt with at that meeting.

(2) The number of members necessary for a requisition under sub-section (1) is—

- (a) a number of members who are together entitled to not less than 5% of the total voting rights of all the members having at the date of the requisition a right to vote at the meeting to which the requisition relates; or
- (b) not less than 100 members holding shares in the company on which there has been paid up an average sum, per member, of not less than \$200.

(3) Notice of a resolution referred to in sub-section (1) shall be given, and any statement so referred to shall be circulated, to members of the company entitled to have notice of the meeting sent to them by serving a copy of the resolution or statement on each member in any manner permitted for service of notice of the meeting, and notice of the resolution shall be given to any other member of the company by giving notice of the general effect of the resolution in any manner permitted for giving him notice of meetings of the company, and the copy shall be served, or notice of the effect of the resolution shall be given, as the case may be, in the same manner and, so far as practicable, at the same time as notice of the meeting and, where it is not practicable for it to be served or given at that time, it shall be served or given as soon as practicable after that time.

(4) A company is not bound under this section to give notice of any resolution or to circulate any statement unless—

- (a) a copy of the requisition signed by the requisitioning members (or 2 or more copies that between them contain the signatures of all the requisitioning members) is deposited at the registered office of the company—
  - (i) in the case of a requisition requiring notice of a resolution—not less than 6 weeks before the meeting; and
  - (ii) in the case of any other requisition, not less than one week before the meeting; and
- (b) there is deposited or tendered with the requisition a sum reasonably sufficient to meet the company's expenses in giving effect to the requisition,

but if, after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called for a date 6 weeks or less after the copy has been deposited, the copy though not deposited within the time required by this sub-section shall be deemed to have been properly deposited for the purposes of this section.

(5) A company is not bound under this section to circulate any statement if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter, and the Court may order the costs of the company or of the other person on an application under this section to be paid in whole or in part by the requisitioning members, notwithstanding that they are not parties to the application.

(6) Notwithstanding anything in the company's articles, the business that may be dealt with at an annual general meeting includes any resolution of which notice is given in accordance with this section, and, for the purposes of this sub-section, notice shall be deemed to have been so given notwithstanding the accidental omission to give notice to a member or members.

(7) If default is made in complying with the provisions of this section, the company and any officer of the company who is in default are each guilty of an offence.

### **Special resolutions**

**248. (1)** A resolution is a special resolution of a company if—

- (a) it is passed at a meeting of the company, being a meeting of which not less than 21 days' written notice specifying the intention to propose the resolution as a special resolution has been duly given; and
- (b) it is passed at a meeting referred to in paragraph (a) by a majority of not less than three-quarters of such members of the company as, being entitled to do so, vote in person or, where proxies are allowed, by proxy, at that meeting.

**(2)** A resolution is a special resolution of the holders of shares in a company included in a class of shares if—

- (a) it is passed at a meeting of the holders of shares included in that class of shares, being a meeting of which not less than 21 days' written notice specifying the intention to propose the resolution as a special resolution has been duly given; and
- (b) it is passed at a meeting referred to in paragraph (a) by a majority of not less than three-quarters of such holders of shares included in that class of shares as, being entitled to do so, vote in person or, where proxies are allowed, by proxy, at that meeting.

**(3)** A resolution is a special resolution of the members of a company included in a class of members if—

- (a) it is passed at a meeting of members included in that class of members, being a meeting of which not less than 21 days' written notice specifying the intention to propose the resolution as a special resolution has been duly given; and
- (b) it is passed at a meeting referred to in paragraph (a) by a majority of not less than three-quarters of such members included in that class of members as, being entitled to do so, vote in person or, where proxies are allowed, by proxy, at that meeting.

**(4)** Notwithstanding the provisions of sub-section (1), (2) or (3), if it is so agreed by a majority in number of the members having the right to attend and vote at the meeting, being a majority that together hold not less than 95% in nominal value of the shares giving that right or, in the case of a company not having a share capital, together represent not less than 95% of the total voting rights of all members having the right to attend and vote at the meeting, a resolution may be proposed and passed as a special resolution at a meeting of which less than 21 days' notice has been given.

**(5)** At a meeting at which a special resolution is submitted, a declaration of the chairman that the resolution is carried is, unless a poll is demanded, conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

**(6)** At any meeting at which a special resolution is submitted, a poll shall be deemed to be effectively demanded if demanded—

- (a) if the articles make provision permitting a specified number of members for the time being entitled under the articles to vote at the meeting to demand a poll—
  - (i) where the number specified does not exceed 5—by that number of members so entitled; or
  - (ii) in any other case—by 5 members so entitled; or
- (b) if no such provision is made by the articles, by 3 members entitled to vote at the meeting, or by one member or 2 members so entitled if that member holds or those 2 members together hold not less than 10% in nominal value of the shares giving the right to attend and vote at the meeting or, where the company does not have a share capital, if that member is entitled, or those 2 members together are entitled, to not less than 10% of the total voting rights of all members having the right to attend and vote at the meeting.

(7) In computing the majority on a poll demanded on the question that a special resolution be passed, reference shall be had to the number of votes cast for and against the resolution and to the number of votes to which each member is entitled by this Code or the articles of the company.

(8) For the purposes of this section, notice of a meeting shall be deemed to be duly given and the meeting shall be deemed to be duly held when the notice is given and the meeting held in the manner provided by this Code or by the articles.

(9) Where, in the case of a company incorporated before the commencement of the *Companies (Application of Laws) Act*, 1981, any matter is required or permitted to be done by extraordinary resolution, that matter may be done by special resolution.

#### **Resolution requiring special notice**

**249.** (1) Where by this Code special notice is required of a resolution to be put at a meeting of a company, the resolution is not effective unless notice of the intention to move the resolution has been given to the company not less than 28 days before the meeting at which it is moved, but if, after notice of the intention to move such a resolution has been given to the company, a meeting is convened for a date 28 days or less after the notice has been given, the notice, although not given to the company within the time required by this section, shall be deemed to be properly given.

(2) The company shall give persons entitled to be given notice of a meeting of the company notice of any such resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, shall give them notice of the resolution in any manner allowed by the articles not less than 14 days before the meeting.

#### **Resolutions of exempt proprietary companies**

**250.** (1) If all the members of an exempt proprietary company have signed a document containing a statement that they are in favour of a prescribed resolution in terms set out in the document, a resolution in those terms shall be deemed to have been passed at a general meeting of the company held on the day on which the document was signed and at the time at which the document was last signed by a member or, if the members

signed the document on different days, on the day on which, and at the time at which, the document was last signed by a member and, where a document is so signed—

- (a) the company shall be deemed to have held a general meeting at that time on that day; and
- (b) the document shall be deemed to constitute a minute of that meeting.

(2) Sub-section (1) does not apply in relation to a document unless the document has been signed by each person who was a member of the company at the time when the document was last signed.

(3) For the purposes of this section—

- (a) 2 or more separate documents containing statements in identical terms each of which is signed by one or more members shall together be deemed to constitute one document containing a statement in those terms signed by those members on the respective days on which they signed the separate documents; and
- (b) a prescribed resolution is a resolution that is required or permitted by this Code or the memorandum or articles to be passed at a general meeting of a company and includes a resolution appointing an officer or auditor or approving of or agreeing to any act, matter or thing but does not include a resolution of which special notice is required or that is required to be passed by a majority other than a simple majority.

(4) Any document that is attached to a document signed as mentioned in sub-section (1) and is signed by the member or members who signed the last-mentioned document shall, for the purposes of this Code, be deemed to have been laid before the company at the general meeting referred to in that sub-section.

(5) Nothing in this section affects or limits any rule of law relating to the effectiveness of the assent of members of a company given to a document, or to any act, matter or thing, otherwise than at a general meeting of the company.

**Lodgment with the Commission, &c., of copies of certain resolutions and agreements**

- 251.** (1) A printed copy of—  
(a) each special resolution;

- (b) each resolution or agreement that binds a class of shareholders, whether or not agreed to by all the members of that class; and
- (c) each document or resolution that attaches rights to shares (whether or not in substitution for other rights) and is not otherwise required to be lodged with the Commission under this Code,

shall, except where otherwise expressly provided by this Code, within one month after the passing of the resolution or the making of the agreement or document, be lodged by the company with the Commission.

**(2)** Where articles have not been registered, a member may request the company to furnish him with a printed copy of any resolution, document or agreement to which this section applies and, where such a request is made, the company shall 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 the Commission 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 the Commission approves.

**(3)** If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

#### **Resolutions at adjourned meetings**

**252.** Where a resolution is passed at an adjourned meeting of a company or of holders of any class of shares or of directors, the resolution shall for all purposes be treated as having been passed on the date on which it was in fact passed and not on any earlier date.

#### **Minutes of proceedings**

**253. (1)** A company shall—

- (a) cause minutes of all proceedings of general meetings and of meetings of its directors to be entered, within one month after the relevant meeting is held, in books kept for that purpose; and
- (b) except in the case of documents that are deemed to constitute minutes by virtue of section 250, cause those minutes to be signed by the chairman of the meeting at which the proceedings took place or by the chairman of the next succeeding meeting.

**(2)** Any minute that is so entered and, in a case to which paragraph (1) (b) applies, purports to be signed as provided by that paragraph is *prima facie* evidence of the proceedings to which it relates.

**(3)** Where minutes have been so entered and, in a case to which paragraph (1) (b) applies, signed, then, unless the contrary is proved—

- (a) the meeting shall be deemed to have been duly held and convened;
- (b) all proceedings that are recorded in the minutes as having taken place at the meeting shall be deemed to have duly taken place; and
- (c) all appointments of officers or auditors that are recorded in the minutes as having been made at the meeting shall be deemed to have been validly made.

**(4)** If a company fails to comply with this section, the company and any officer of the company who is in default are each guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

#### **Inspection of minute books**

**254. (1)** The books containing the minutes of proceedings of any general meeting or of a meeting of the directors of the company shall be kept by the company at the registered office or the principal place of business in the State of the company or at such other place in Australia as is approved by the Commission and, in the case of the books containing the minutes of proceedings of general meetings, shall be open for inspection by any member without charge.

**(2)** A member of a company may request the company in writing to furnish him with a copy of any minutes of a general meeting and, where such a request is made, the company shall 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 the Commission 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 the Commission approves.

**(3)** If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

*Division 4—Register of Members*

**Non-application of the Division to mutual life assurance companies**

**255.** Nothing in this Division (other than sub-section 257 (5)) applies to a company to which section 140 of the *Life Insurance Act* 1945 applies so long as the company complies with the provisions of that section.

**Register and index of members**

**256. (1)** A company shall keep a register of its members and enter in that register—

- (a) the names and addresses of the members and, in the case of a company having a share capital, a statement of the shares held by each member (distinguishing each share by its number (if any) or by the number (if any) of the certificate evidencing the member's holding) and of the amount paid or agreed to be considered as paid on the shares of each member;
- (b) the date at which the name of each person was entered in the register as a member;
- (c) the date at which any person who ceased to be a member during the previous 7 years so ceased to be a member; and
- (d) in the case of a company having a share capital, the date of every allotment of shares to members and the number of shares comprised in each allotment.

**(2)** Notwithstanding anything in sub-section (1), where the company has converted any of its shares into stock and given notice of the conversion to the Commission, the company shall alter the register to show the amount of stock or number of stock units held by each member instead of the number of shares and the particulars relating to shares specified in paragraph (1) (a).

**(3)** Notwithstanding anything in sub-section (1), a company may keep the names and particulars relating to persons who have ceased to be members of the company separately, and the names and particulars relating to former members need not be supplied to a person who applies for a copy of the register unless he specifically requests the names and particulars of former members.

**(4)** The register of members is *prima facie* evidence of any matters inserted in that register as required or authorized by this Code.

(5) A company having more than 50 members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index in convenient form of the names of the members and shall, within 14 days after the date on which any alteration is made in the register of members, make any necessary alteration in the index.

(6) The index shall, in respect of each member, contain a sufficient indication to enable the account of that member in the register to be found readily.

(7) If default is made in complying with this section, the company and any officer of the company who is in default are each guilty of an offence.

#### **Inspection and closing of register**

**257.** (1) A company may close the register of members or part of that register for any time or times, but so that no part of the register shall be closed for more than 30 days in the aggregate in any calendar year.

(2) The register and index shall be open for inspection—

(a) by any 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.

(3) A person may request a company to furnish him with a copy of the register or any part of the register (but only so far as it relates to names, addresses, number of shares held and amounts paid on shares) and, where such a request is made, the company shall 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 the Commission 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 the Commission approves.

(4) If default is made in complying with sub-section (2) or (3), the company and any officer of the company who is in default are each guilty of an offence.

(5) Any member of a company to which section 140 of the *Life Insurance Act* 1945 applies is entitled to inspect any register, index, or other record of the company that relates to the members of the company, but may make copies of or take extracts from such a register, index or record only in relation to names, addresses and voting entitlements of the members of the company.

(6) This section has effect subject to section 261.

#### **Consequences of default by agent**

**258.** Where, by virtue of paragraph 547 (1) (b), the register of members is kept at the office of a person other than the company, and by reason of any default of that other person, the company fails to comply with section 257 or sub-section 547 (1) or (4) or with any requirements of this Code as to the production of the register, that other person is liable to the same penalties as if he were an officer of the company who was in default, and the power of the Court under section 551 extends to the making of orders against that other person and his officers and servants.

#### **Power of Court to rectify register**

**259. (1)** If—

- (a) an entry is omitted from the register;
- (b) an entry is made in the register without sufficient cause;
- (c) an entry wrongly exists in the register;
- (d) there is an error or defect in an entry in the register; or
- (e) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person aggrieved, any member or the company may apply to the Court for rectification of the register, and the Court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.

**(2)** On any application under sub-section (1), the Court may decide—

- (a) any question relating to the right of a person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between—
  - (i) a member or alleged member on the one hand and another member or alleged member on the other hand; or
  - (ii) a member or alleged member on the one hand and the company on the other hand; and
- (b) generally any question necessary or expedient to be decided with respect to the rectification of the register.

**(3)** Where a company is required by this Code to lodge a return containing a list of its members with the Commission, the Court, when making an order for rectification of the register, shall by its order direct a notice of the rectification to be so lodged.

**Trustee, &c., may be registered as owner of shares**

**260. (1)** A trustee, executor or administrator of the estate of a deceased person who was registered in a register or branch register kept in the State as the holder of a share in any corporation may be registered as the holder of that share as the trustee, executor or administrator of that estate and is, in respect of that share, subject to the same liabilities as those to which he would have been subject if the share had remained registered in the name of the deceased person and is not subject to any other liabilities in respect of that share.

**(2)** A trustee, executor or administrator of the estate of a deceased person who was entitled in equity to a share in any corporation, being a share registered in a register or branch register kept in the State, may, with the consent of the corporation and of the registered holder of that share, be registered as the holder of the share as trustee, executor or administrator of that estate and is, in respect of that share, subject to the same liabilities as those to which he would have been subject if that share had been registered in the name of the deceased person and is not subject to any other liabilities in respect of that share.

**(3) Where—**

- (a) a person 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 (in this sub-section referred to as the “incapable person”); and
- (b) the incapable person is registered in a register or branch register kept in the State as the holder of a share in any corporation,

the first-mentioned person may be registered as the holder of that share as administrator of that estate and is, in respect of that share, subject to the same liabilities as those to which he would have been subject if that share had remained registered in the name of the incapable person and is not subject to any other liabilities in respect of that share.

**(4) Where—**

- (a) a person 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 (in this sub-section referred to as the “incapable person”); and
- (b) the incapable person is entitled in equity to a share in any corporation, being a share registered in a register or branch register kept in the State,

the first-mentioned person 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 and is, in respect of that share, subject to the same liabilities as those to which he would have been subject if that share had been registered in the name of the incapable person and is not subject to any other liabilities in respect of that share.

**(5) Where—**

- (a) by reason of the operation of the *Bankruptcy Act 1966*, a share in a corporation, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy; and
- (b) the bankrupt is registered in a register or branch register kept in the State as the holder of that share,

the Official Trustee in Bankruptcy may be registered as the holder of that share as Official Trustee in Bankruptcy and is, in respect of that share, subject to the same liabilities as those to which he would have been subject if that share had remained registered in the name of the bankrupt and is not subject to any other liabilities in respect of that share.

**(6) Where—**

- (a) by reason of the operation of the *Bankruptcy Act* 1966, a share in a corporation, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy;
- (b) the share is registered in a register or branch register kept in the State; and
- (c) the bankrupt is entitled in equity to that share,

the Official Trustee in Bankruptcy may, with the consent of the corporation and of the registered holder of that share, be registered as the holder of that share as Official Trustee in Bankruptcy and is, in respect of that share, subject to the same liabilities as those to which he would have been subject if that share had been registered in the name of the bankrupt and is not subject to any other liabilities in respect of that share.

**(7)** Shares in a corporation registered in a register or branch register kept in the State and held by a trustee in respect of a particular trust may, with the consent of the corporation, be marked in the register or branch register in such a way as to identify them as being held in respect of the trust.

**(8)** Except as provided in this section and section 261, no notice of any trust, whether express, implied or constructive, shall be entered on the register or branch register kept in the State or be receivable by the Commission and no liabilities are affected by anything done pursuant to sub-section (1), (2), (3), (4), (5), (6) or (7) or section 261 and the corporation concerned is not affected with notice of any trust by anything so done.

**(9)** A person who commences to hold shares in a proprietary company as trustee for, or otherwise on behalf of or on account of, a corporation shall, within one month after commencing so to hold the shares, serve on the company notice in writing that he so holds the shares.

**Power of company to obtain information as to beneficial ownership of its shares**

**261. (1)** In this section, “company” has the same meaning as in section 134.

(2) A company may, by notice in writing given to a person who holds voting shares in the company, require the person, within 14 days after receiving the notice, to furnish to the company a statement in writing setting out, so far as it lies within his knowledge, full particulars of the name and address of every other person (if any) who has a relevant interest in any of the voting shares in the company held by him and full particulars of each such interest and of the circumstances by reason of which the other person has that interest.

(3) Where a company receives, pursuant to a notice given to a person under sub-section (2) or under this sub-section, information that another person has a relevant interest in any of the voting shares in the company held by the first-mentioned person, the company may, by notice in writing given to that other person, require that other person, within 14 days after receiving the notice, to furnish to the company a statement in writing setting out full particulars of that interest and of the circumstances by reason of which he has that interest.

(4) Where a company receives, pursuant to a notice given to a person under sub-section (2) or (3), information that a person other than the holder of voting shares in the company has a relevant interest in voting shares in the company, the company shall enter in a separate part of the register of its members, in relation to the holder of those shares, the name and address of each other person who the company has been informed has a relevant interest in those shares and particulars of the interest and of the circumstances by reason of which the person has the interest.

(5) The separate part of the register of members of a company kept pursuant to sub-section (4) is not open to inspection by a person not being a member of the company or a person authorized by the Commission, and the company is not liable to furnish a copy of that part of the register to a person other than a member of the company, the Commission or a person authorized by the Commission.

(6) A person who fails to comply with a notice given to him under sub-section (2) or (3) is guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(7) If default is made in complying with sub-section (4), the company and any officer of the company who is in default are each guilty of an offence.

(8) A person is not guilty of an offence against sub-section (6) if he proves that the information required by the notice was already in the possession of the company or that the giving of the notice was for any reason frivolous or vexatious.

**(9)** Where the Commission is satisfied that, having regard to any undertaking given by a person in respect of any shares held or to be held by him in a company, there are special reasons why that person should be exempted from the operation of this section, the Commission may, by order in writing published in the *Gazette*, exempt that person from the operation of this section in relation to those shares.

### **Branch registers**

**262. (1)** A company having a share capital may cause to be kept in any place outside the State a branch register of members.

**(2)** Where a member of a company having a share capital who is resident in a participating State or participating Territory requests the company in writing to register in a branch register of the company in that State or Territory shares held by the member—

(a) if the company keeps a branch register of members in that State or Territory—the company shall register in that branch register the shares held by that member; or

(b) if the company—

(i) does not keep a branch register of members in that State or Territory; and

(ii) is carrying on business in that State or Territory,

the company shall, within one month after receipt by it of the application, cause a branch register of members to be kept in that State or Territory and shall register in that branch register the shares held by that member.

**(3)** A branch register kept by a company shall be deemed to be part of the company's register of members.

**(4)** A branch register shall be kept in the same manner as that in which the principal register is by this Code required to be kept.

**(5)** A company shall transmit to the place at which its principal register is kept a copy of every entry in its branch register within 28 days after the entry is made, and shall cause to be kept at that place, duly entered up from time to time, a duplicate of its branch register, and the duplicate branch register shall, for the purposes of this Code, be deemed to be part of the principal register.

(6) Subject to the provisions of this section with respect to the duplicate branch register, the shares registered in a branch register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a branch register shall, during the continuance of that registration, be registered in any other register.

(7) Subject to sub-section (8), a company may discontinue a branch register and thereupon the company shall transfer all entries in that register to some other branch register kept by the company in the same State or Territory or, if there is no other branch register kept by the company in that State or Territory, to the principal register.

(8) Where a company keeps in a participating State or participating Territory a branch register in which are registered shares held by a member or members resident in that State or Territory, the company is not entitled to discontinue that branch register unless—

- (a) the company keeps another branch register in that State or Territory to which the entries in the first-mentioned branch register will be transferred;
- (b) the member or members resident in that State or Territory whose shares are registered in the first-mentioned branch register consents or consent in writing to the discontinuance of that branch register; or
- (c) the company ceases to carry on business in that State or Territory.

(9) If default is made in complying with this section, the company, any officer of the company who is in default, and any person who has arranged with the company to make up a branch register on behalf of the company and is in default, are each guilty of an offence.

#### *Division 5—Annual Return*

##### **Annual return**

**263. (1)** A company shall—

- (a) in a case to which paragraph (b) does not apply—within one month after the date of the annual general meeting of the company or, if the annual general meeting is not held within the period within which it is required by section 240 to be held, within one month after the last day of that period; or
- (b) in the case of a company keeping pursuant to its articles a branch register in a place outside Australia—within 2 months after the date of the annual general meeting or, if the annual general meeting is not held within the period within which it is required by section 240 to be held, within 2 months after the last day of that period,

lodge with the Commission an annual return in the prescribed form, containing a list of members and such other particulars as are prescribed and accompanied by the prescribed documents.

(2) The regulations may prescribe different forms of return for companies having a share capital and companies not having a share capital.

(3) If a company fails to comply with this section, the company and any officer of the company who is in default are each guilty of an offence.

#### **Auditor's statement**

**264. (1)** A company that is not required by this Code to lodge accounts with the Commission shall include in or attach to its annual return under section 263 a statement relating to the accounts of the company required to be laid before the company at its annual general meeting held on the date to which the return is made up or, if an annual general meeting is not held on that date, the annual general meeting last preceding that date, signed by the auditor of the company—

- (a) stating whether the company has in his opinion kept proper accounting records and other books during the period covered by those accounts;
- (b) stating whether the accounts have been audited in accordance with this Code; and
- (c) stating whether the auditor's report on the accounts was made subject to any qualification, or included any comment made under sub-section 285 (4), and, if so, particulars of the qualification or comment.

(2) This section does not apply to an exempt proprietary company that is an unlimited company that, pursuant to section 278, did not appoint an auditor to audit the accounts referred to in sub-section (1).

(3) If a company fails to comply with this section, the company and any officer of the company who is in default are each guilty of an offence.

#### **Exemption of certain companies**

**265. (1)** A public company that—

- (a) has more than 500 members;
- (b) keeps its principal register at a place in the State within 25 kilometres of the office of the State Commission; and

(c) provides reasonable accommodation and facilities for persons to inspect and take copies of its list of members and its particulars of shares transferred,

need not comply with such of the provisions of this Division and of the regulations made for the purposes of this Division as relate to the inclusion in the annual return of a list of members if there is included in the annual return a certificate by the secretary that the company is of a kind to which this sub-section applies.

(2) The Commission may, by order in writing published in the *Gazette*, require any company to which sub-section (1) applies to comply with all or any of the provisions of this Division or of the regulations made for the purposes of this Division referred to in that sub-section.

(3) If default is made in complying with an order made under sub-section (2), the company and any officer of the company who is in default are each guilty of an offence.

## PART VI—ACCOUNTS AND AUDIT

### *Division 1—Preliminary*

#### **Interpretation**

**266.** In this Part, unless the contrary intention appears—

“accounts” means profit and loss accounts and balance-sheets and includes statements, reports and notes, other than auditors’ reports or directors’ reports, attached to or intended to be read with any of those profit and loss accounts or balance-sheets;

“current liability”, in relation to accounts or group accounts, means a liability that would in the ordinary course of events be payable within 12 months after the end of the financial year to which the accounts or group accounts relate;

“group accounts”, in relation to a holding company, means—

- (a) a set of consolidated accounts for the group of companies of that holding company;
- (b) 2 or more sets of consolidated accounts together covering that group;
- (c) separate accounts for each corporation in that group; or

- (d) a combination of one or more sets of consolidated accounts and one or more separate accounts together covering that group;

“group of companies”, in relation to a holding company, means the holding company and the corporations that are subsidiaries of the holding company;

“holding company” means a company that is the holding company of a corporation;

“non-current liability” means a liability that is not a current liability;

“the profit or loss” means—

- (a) in relation to a corporation that is not a holding company—the profit or loss resulting from operations of that corporation;
- (b) in relation to a corporation that is a holding company of a group of companies for which group accounts are required—the profit or loss resulting from operations of that corporation;
- (c) in relation to a corporation referred to in paragraph (b) and its subsidiaries—the profit or loss resulting from operations of the group of companies of which the corporation is the holding company; and
- (d) in relation to a corporation that is a holding company of a group of companies for which group accounts are not required—the profit or loss resulting from operations of that corporation.

#### *Division 2—Accounts*

##### **Accounts to be kept**

**267. (1)** A company shall—

- (a) keep such accounting records as correctly record and explain the transactions of the company (including any transactions as trustee) and the financial position of the company; and
- (b) keep its accounting records in such a manner as will enable—
  - (i) the preparation from time to time of true and fair accounts of the company; and
  - (ii) the accounts of the company to be conveniently and properly audited in accordance with this Code.

(2) Subject to section 9 of the *Evidence (Reproductions) Act, 1967*, a company shall retain the accounting records kept under this section or under a corresponding provision of a previous law of the State for a period of 7 years after the completion of the transactions to which they relate.

(3) The company shall keep the accounting records at such place or places as its directors think fit.

(4) If any accounting records of a company are kept at a place outside the State, the company shall, if required by the Commission to produce those records at a place in the State, comply with the requirement not later than 14 days after the requirement is made.

(5) If any accounting records of a company are kept at a place outside Australia the company shall keep at a place within Australia determined by the directors such statements and records with respect to the matters dealt with in the records kept outside Australia as would enable true and fair accounts and any documents required by this Code to be attached to the accounts to be prepared.

(6) A company shall lodge with the Commission notice in writing of the place in Australia where any statements and records kept pursuant to sub-section (5) are kept unless the statements and records are kept at the registered office of the company.

(7) The accounting records of the company shall be kept in writing in the English language or so as to enable the accounting records to be readily accessible and readily convertible into writing in the English language.

(8) The Court may, on application by a director of a company, make an order authorizing a registered company auditor acting for the director to inspect the accounting records of the company.

(9) A company shall make its accounting records available in writing in the English language at all reasonable times for inspection without charge by any director of the company and by any other person authorized or permitted by or under this Code to inspect the accounting records of the company.

(10) Where a registered company auditor inspects the accounting records pursuant to an order of the Court under sub-section (8), he shall not disclose to a person other than the director on whose application the order was made any information acquired by him in the course of his inspection.

(11) If default is made in complying with a provision of this section other than sub-section (10), the company, a director of the company who failed to take all reasonable steps to secure compliance by the company with the provision and any officer of the company who is in default are each guilty of an offence.

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

(12) In any proceedings against a person for failure to take all reasonable steps to secure compliance by a company with a provision of this section, it is a defence if the person proves that he had reasonable grounds to believe and did believe that a competent and reliable person was charged with the duty of seeing that that provision was complied with and was in a position to discharge that duty.

#### **Financial years of grouped companies**

**268. (1)** Subject to this section, the directors of a holding company shall take such action (if any) as is necessary to ensure that the financial year of each subsidiary of the holding company coincides with the financial year of the holding company.

**(2)** The action referred to in sub-section (1) shall be taken in relation to a particular subsidiary not later than 12 months after the date on which the subsidiary became a subsidiary of the holding company.

**(3)** Subject to any order by the Commission under this section, where the financial year of a holding company and the financial year of each of its subsidiaries coincide, the directors of the holding company shall at all times take such action as is necessary to ensure that the financial year of the holding company or any of its subsidiaries is not altered in such a way that all of those financial years no longer coincide.

**(4)** Where the directors of a holding company are of the opinion that there is good reason why the financial year of any of its subsidiaries should not coincide with the financial year of the holding company, they may apply in writing to the Commission for an order authorizing the subsidiary to continue to have or to adopt (as the case requires) a financial year that does not coincide with that of the holding company.

**(5)** The application shall be supported by a statement in writing made in accordance with a resolution of the directors of the holding company, signed by not less than 2 directors and stating the reasons for seeking the order.

**(6)** The Commission may require the directors making the application to supply such information relating to the operations of the holding company, and of any related corporation, as the Commission thinks necessary for the purpose of determining the application.

**(7)** The Commission may engage a registered company auditor to investigate and report to it on the application.

**(8)** The costs of an investigation and report under sub-section (7) are payable by the holding company of which the applicants are directors.

(9) The Commission may make an order granting or refusing the application or granting the application subject to such limitations, terms or conditions as it thinks fit, and shall serve a copy of the order on the holding company.

(10) Where the applicants are aggrieved by an order made by the Commission, the applicants may, within 2 months after the service of the order upon the holding company, appeal against the order to the Court.

(11) The Court shall determine the appeal and, in determining the appeal, may make any order that the Commission had power to make on the original application and may exercise any of the powers that the Commission might have exercised in relation to the original application.

(12) Where the directors of a holding company have applied to the Commission for an order under this section, sub-section (1) shall be deemed not to apply to or in relation to the subsidiary to which the application relates until the determination of the application and of any appeal arising out of the application.

(13) Where an order is made authorizing a subsidiary to have or to adopt a financial year that does not coincide with that of its holding company, compliance with the terms of the order of the Commission (including any limitations or conditions set out in the order), or, where there has been an appeal, compliance with the terms of any order made on the determination of the appeal, shall be deemed to be compliance with the provisions of sub-section (1) in relation to the subsidiary.

(14) Where an application for an order by the Commission under this section has been refused and there is no appeal, or where there has been an appeal and the appeal has been withdrawn or dismissed, the time within which the directors of the holding company are required to comply with the provisions of sub-section (1) in relation to the subsidiary shall be deemed to be the period of 12 months after the date upon which the order of the Commission is served on the holding company, or, where there has been an appeal that has been dismissed, the period of 12 months after the determination of the appeal.

(15) Where the directors of a holding company have applied to the Commission for an order under this section, and the application has been refused and the appeal (if any) arising out of the refusal has been dismissed, the directors of the holding company are not entitled to make an application under this section with respect to the subsidiary within 3 years after the refusal of the first-mentioned application or, where there was an appeal, after the dismissal of the appeal, unless the Commission is satisfied that there

has been a substantial change in the relevant facts or circumstances since the refusal of the former application or the determination of the appeal, as the case may be.

#### **Profit and loss account, balance-sheet and group accounts**

**269. (1)** The directors of a company shall, not less than 14 days before an annual general meeting of the company or, if no annual general meeting of the company is held within the period within which it is required by section 240 to be held, not less than 14 days before the end of that period, cause to be made out a profit and loss account for the last financial year of the company, being a profit and loss account that gives a true and fair view of the profit or loss of the company for that financial year.

**(2)** The directors of a company shall, not less than 14 days before an annual general meeting of the company or, if no annual general meeting of the company is held within the period within which it is required by section 240 to be held, not less than 14 days before the end of that period, cause to be made out a balance-sheet as at the end of the last financial year of the company, being a balance-sheet that gives a true and fair view of the state of affairs of the company as at the end of that financial year.

**(3)** Where, at the end of a financial year of a company, the company is a holding company, the directors of the company shall, not less than 14 days before the next annual general meeting of the company or, if no annual general meeting of the company is held within the period after the end of that financial year within which it is required by section 240 to be held, not less than 14 days before the end of that period, cause to be made out group accounts dealing with—

- (a) the profit or loss of the company and its subsidiaries for their respective last financial years; and
- (b) the state of affairs of the company and its subsidiaries as at the end of their respective last financial years,

and giving a true and fair view of the profit or loss and state of affairs so far as they concern members of the holding company.

**(4)** The directors of a company, other than a company that pursuant to section 278 or 279 did not appoint an auditor to audit the accounts concerned, shall take reasonable steps to ensure that the accounts of the company and, if it is a holding company for which group accounts are required, the group accounts are audited as required by this Part not less than 14 days before the annual general meeting of the company or, if no annual general

meeting of the company is held within the period within which it is required by section 240 to be held, not less than 14 days before the end of that period.

(5) The directors of a company shall cause to be attached to, or endorsed upon, the accounts or group accounts in relation to the company the auditor's report relating to those accounts or group accounts, as the case may be, that is furnished to the directors in accordance with sub-section 285 (2).

(6) Group accounts are not required to be made out by the directors of a company in accordance with sub-section (3) where the company is, at the end of its financial year, a wholly-owned subsidiary of another corporation incorporated in the State or in a participating State or participating Territory.

(7) The directors shall, before the profit and loss account and balance-sheet referred to in sub-sections (1) and (2) are made out, take reasonable steps—

- (a) to ascertain what action has been taken in relation to the writing off of bad debts and the making of provisions for doubtful debts and to cause all known bad debts to be written off and adequate provision to be made for doubtful debts;
- (b) to ascertain whether any current assets, other than current assets to which paragraph (a) applies, are unlikely to realize in the ordinary course of business their value as shown in the accounting records of the company and, if so, to cause—
  - (i) those assets to be written down to an amount that they might be expected so to realize; or
  - (ii) adequate provision to be made for the difference between the amount of the value as so shown and the amount that they might be expected so to realize; and
- (c) to ascertain whether any non-current asset is shown in the books of the company at an amount that, having regard to its value to the company as a going concern, exceeds the amount that it would have been reasonable for the company to expend to acquire that asset as at the end of the financial year and, unless adequate provision for writing down that asset is made, to cause to be included in the accounts such information and explanations as will prevent the accounts from being misleading by reason of the overstatement of the amount of that asset.

(8) Without affecting the generality of the preceding provisions of this section, the directors of a company shall ensure that the accounts of the company and, if it is a holding company for which group accounts are required, the group accounts comply with such of the prescribed require-

ments as are relevant to those accounts or group accounts, as the case may be, but where accounts or group accounts prepared in accordance with those requirements would not otherwise give a true and fair view of the matters required by this section to be dealt with in the accounts or group accounts, the directors of the company shall add such information and explanations as will give a true and fair view of those matters.

(9) The directors of a company shall cause to be attached to any accounts required by section 275 to be laid before a company at its annual general meeting, before the auditor reports on the accounts under this Part, a statement made in accordance with a resolution of the directors and signed by not less than 2 directors stating whether, in the opinion of the directors—

- (a) the profit and loss account is drawn up so as to give a true and fair view of the profit or loss of the company for the financial year;
- (b) the balance-sheet is drawn up so as to give a true and fair view of the state of affairs of the company as at the end of the financial year; and
- (c) there are reasonable grounds to believe that the company will be able to pay its debts as and when they fall due.

(10) The directors of a company that is a holding company shall cause to be attached to group accounts of the company required by section 275 to be laid before the company at its annual general meeting, before the auditor reports on the group accounts under this Part, a statement made in accordance with a resolution of the directors of the company and signed by not less than 2 directors stating whether, in the opinion of the directors, the group accounts are drawn up so as to give a true and fair view of—

- (a) the profit or loss of the company and its subsidiaries for their respective last financial years; and
- (b) the state of affairs of the company and its subsidiaries as at the end of their respective last financial years,

so far as they concern members of the company.

#### **Directors' reports**

270. (1) The directors of a company, other than a company to which subsection (2) applies, shall, not less than 14 days before the annual general meeting of the company or, if no annual general meeting of the company is held within the period within which it is required by section 240 to be held, not less than 14 days before the end of that period, cause to be made out in

respect of the last financial year of the company a report, made in accordance with a resolution of the directors and signed by not less than 2 of the directors with respect to the profit or loss of the company for that financial year and the state of the company's affairs as at the end of that financial year, stating—

- (a) the names of the directors in office at the date of the report;
- (b) the principal activities of the company in the course of the financial year and any significant change in the nature of those activities during that period;
- (c) the net amount of the profit or loss of the company for the financial year after provision for income tax;
- (d) where, at any time during the financial year, the company was a holding company—the names of any subsidiaries acquired or disposed of during the financial year, the consideration for each such acquisition or disposal and the amount in each case of the net tangible assets of the subsidiary acquired or disposed of and, in the case of a subsidiary not being a wholly-owned subsidiary, the extent of the company's interest in the subsidiary;
- (e) the amounts and particulars of any material transfers to or from reserves or provisions during the financial year;
- (f) where, during the financial year, the company has issued any shares or debentures—the purposes of the issue, the classes of shares or debentures issued, the number of shares of each class and the amount, term and rate of debentures of each class, and the terms of issue of each class of the shares;
- (g) the amount (if any) that the directors recommend should be paid by way of dividend, and any amounts that have been paid or declared by way of dividend since the end of the previous financial year, indicating which of those amounts (if any) have been shown in a previous report under this sub-section or sub-section (2) or under a corresponding previous law of the State;
- (h) whether the directors, before the profit and loss account and balance-sheet were made out, took reasonable steps to ascertain what action had been taken in relation to the writing off of bad debts and the making of provisions for doubtful debts, and to cause all known bad debts to be written off and adequate provision to be made for doubtful debts;

- (j) whether, at the date of the report, the directors are aware of any circumstances that would render the amount written off for bad debts or the amount of the provision for doubtful debts inadequate to any substantial extent and, if so, giving particulars of the circumstances;
- (k) whether the directors, before the profit and loss account and balance-sheet were made out, took reasonable steps to ascertain whether any current assets, other than current assets to which paragraph (h) applies, were unlikely to realize in the ordinary course of business their value as shown in the accounting records of the company and, if so, to cause—
  - (i) those assets to be written down to an amount that they might be expected so to realize; or
  - (ii) adequate provision to be made for the difference between the amount of the value as so shown and the amount that they might be expected so to realize;
- (l) whether, at the date of the report, the directors are aware of any circumstances that would render the values attributed to current assets in the accounts misleading and, if so, giving particulars of the circumstances;
- (m) whether there exists at the date of the report—
  - (i) any charge on the assets of the company that has arisen since the end of the financial year and secures the liabilities of any other person and, if so, giving particulars of the charge and, so far as practicable, of the amount secured; and
  - (ii) any contingent liability that has arisen since the end of the financial year and, if so, stating the general nature of the liability and, so far as practicable, the maximum amount, or an estimate of the maximum amount, for which the company could become liable in respect of the liability;
- (n) whether any contingent or other liability has become enforceable, or is likely to become enforceable, within the period of 12 months after the end of the financial year, being a liability that, in the opinion of the directors, will or may substantially affect the ability of the company to meet its obligations when they fall due and, if so, giving particulars of that liability;
- (o) whether at the date of the report the directors are aware of any circumstances not otherwise dealt with in the report or accounts that would render any amount stated in the accounts misleading and, if so, giving particulars of the circumstances;

- (p) whether the results of the company's operations during the financial year were, in the opinion of the directors, substantially affected by any item, transaction or event of a material and unusual nature and, if so, giving particulars of that item, transaction or event and the amount or the effect of that item, transaction or event, if known or reasonably ascertainable; and
- (q) whether there has arisen in the interval between the end of the financial year and the date of the report any item, transaction or event of a material and unusual nature likely, in the opinion of the directors, to affect substantially the results of the company's operations for the next succeeding financial year and, if so, giving particulars of the item, transaction or event.

**(2)** The directors of a company that, at the end of its last financial year, was a holding company (other than a holding company that was a wholly-owned subsidiary of another corporation incorporated in the State or in a participating State or participating Territory) shall, not less than 14 days before the annual general meeting of the company or, if no annual general meeting of the company is held within the period within which it is required by section 240 to be held, not less than 14 days before the end of that period, cause to be made out a report, made in accordance with a resolution of the directors, and signed by not less than 2 of them, with respect to the profit or loss and the state of affairs of the group of companies of the holding company as at the end of that financial year of the holding company, stating—

- (a) the names of the directors of the company in office at the date of the report;
- (b) the principal activities of the corporations in the group in the course of the financial year and any significant change in the nature of those activities during that period;
- (c) the names of any subsidiaries acquired or disposed of during the financial year, the consideration for each such acquisition or disposal and the amount in each case of the net tangible assets of the subsidiary acquired or disposed of and, in the case of a subsidiary not being a wholly-owned subsidiary, the extent of the company's interest in the subsidiary;
- (d) the amounts and particulars of any material transfers to or from reserves or provisions of a corporation in the group during the financial year;

- (e) where, during the financial year, any corporation in the group has issued any shares or debentures—the purposes of the issue, the classes of shares or debentures issued, the number of shares of each class and the amount, term and rate of debentures of each class, and the terms of issue of each class of the shares;
- (f) the amount (if any) that the directors of the company recommend should be paid by way of dividend, and any amounts that have been paid or declared by way of dividend since the end of the previous financial year of the company, indicating which of those amounts (if any) have been shown in a previous report under this sub-section or sub-section (1) or under a corresponding previous law of the State;
- (g) the amount (if any) of dividends paid to or declared in favour of the company by each of the subsidiaries since the end of the previous financial year and up to the date of the report, except so far as those dividends are shown in the group accounts in accordance with the regulations in force for the time being under sub-section 269 (8);
- (h) whether, so far as debts owing to the company are concerned, the directors of the company, before the profit and loss account and balance-sheet were made out, took reasonable steps to ascertain what action had been taken in relation to the writing off of bad debts and the making of provisions for doubtful debts, and to cause all known bad debts to be written off and adequate provision to be made for doubtful debts;
- (j) whether, at the date of the report, the directors of the company are aware of any circumstances that would render the amount written off for bad debts, or the amount of the provision for doubtful debts, in the group of companies inadequate to any substantial extent and, if so, giving particulars of the circumstances;
- (k) whether the directors of the company, before the profit and loss account and balance-sheet were made out, took reasonable steps to ascertain whether any current assets of the company, other than current assets to which paragraph (h) applies, were unlikely to realize in the ordinary course of business their value as shown in the accounting records of the company and, if so, to cause—
  - (i) those assets to be written down to an amount that they might be expected so to realize; or
  - (ii) adequate provision to be made for the difference between the amount of the value as so shown and the amount that they might be expected so to realize;

- (l) whether, at the date of the report, the directors of the company are aware of any circumstances that would render the values attributed to current assets in the group accounts misleading and, if so, giving particulars of the circumstances;
- (m) whether there exists at the date of the report—
  - (i) any charge on the assets of any corporation in the group that has arisen since the end of the financial year and secures the liabilities of any other person and, if so, giving particulars of any such charge and, so far as practicable, of the amount secured; and
  - (ii) any contingent liability of any corporation in the group that has arisen since the end of that financial year and, if so, stating the general nature of the liability and, so far as practicable, the maximum amount, or an estimate of the maximum amount, for which the corporation could become liable in respect of the liability;
- (n) whether any contingent or other liability of any corporation in the group has become enforceable, or is likely to become enforceable, within the period of 12 months after the end of the financial year, being a liability that, in the opinion of the directors of the company, will or may substantially affect the ability of the corporation to meet its obligations as and when they fall due and, if so, giving particulars of that liability;
- (o) whether, at the date of the report, the directors of the company are aware of any circumstances, not otherwise dealt with in the report or group accounts, that would render any amount stated in the group accounts misleading and, if so, giving particulars of the circumstances;
- (p) whether the results of the operations of the group or of a corporation in the group during the financial year were, in the opinion of the directors of the company, substantially affected by any item, transaction or event of a material and unusual nature and, if so, giving particulars of that item, transaction or event and the amount or the effect of that item, transaction or event, if known or reasonably ascertainable; and
- (q) whether there has arisen in the interval between the end of the financial year and the date of the report any item, transaction or event of a material and unusual nature likely, in the opinion of the directors of the company, to affect substantially the results of the operations of any corporation in the group for the next succeeding financial year and, if so, giving particulars of the item, transaction or event.

(3) In sub-sections (1) and (2) the expression "any item, transaction or event of a material and unusual nature" includes but is not limited to—

- (a) any change in accounting principles adopted since the last report;
- (b) any material change in the method of valuation of the whole or any part of the trading stock;
- (c) any material item appearing in the accounts or group accounts for the first time or not usually included in the accounts or group accounts; and
- (d) any absence from the accounts or group accounts of any material item usually included in the accounts or group accounts.

(4) Where a company, other than a holding company for which group accounts are required, has at any time granted to a person an option to have issued to him shares in the company, the directors shall state in the report made under this section—

- (a) in the case of an option so granted during the financial year or since the end of the financial year—
  - (i) the name of the person to whom the option was granted or, where it was granted generally to all the holders of shares or debentures or of a class of shares or debentures of that company or of another corporation, that the option was so granted;
  - (ii) the number and classes of shares in respect of which the option was granted;
  - (iii) the date of expiration of the option;
  - (iv) the basis upon which the option is or was to be exercised; and
  - (v) whether any person entitled to exercise the option had or has any right, by virtue of the option, to participate in any share issue of any other corporation;
- (b) particulars of shares issued, during the financial year or since the end of the financial year, by virtue of the exercise of an option; and
- (c) the number and classes of unissued shares under option as at the date of the report, the prices, or the method of fixing the prices, of issue of those shares, the dates of expiration of the options and particulars of the rights (if any) of the holders of the options to participate by virtue of the options in any share issue of any other corporation.

(5) Where any of the particulars required by sub-section (4) have been stated in a previous report, they may be stated by reference to that report.

(6) Where a holding company or any of its subsidiaries has at any time granted to a person an option to have issued to him shares in the company or subsidiary, the directors of the company shall state in the report made under this section the name of the corporation in respect of shares in which the option was granted and the other particulars referred to in sub-section (4).

(7) The directors of a company shall state in the report whether, since the end of the previous financial year, a director of the company has received or become entitled to receive a benefit, other than—

- (a) a benefit included in the aggregate amount of emoluments received or due and receivable by directors shown in the accounts or, if the company is a holding company, the group accounts, in accordance with the regulations made for the purposes of sub-section 269 (8); or
- (b) the fixed salary of a full-time employee of the company or of a related corporation,

by reason of a contract made by the company or a related corporation with the director or with a firm of which he is a member, or with a company in which he has a substantial financial interest, and, if so, the general nature of the benefit.

(8) Where there is attached to or included with a report of the directors laid before a company at its annual general meeting or sent to the members under section 274 a statement, report or other document relating to affairs of the company or any of its subsidiaries, not being a statement, report or document required by this Code to be laid before the company in general meeting, the statement, report or other document shall, for the purposes of section 563, be deemed to be part of that first-mentioned report.

#### **Rounding off of amounts in accounts and reports**

**271. (1)** The regulations may make provision permitting every company, or every company included in a class of companies specified in the regulations, subject to such conditions, exceptions or qualifications (if any) as are specified in the regulations, to insert in any accounts or report under this Code, in substitution for an amount that the company would, but for this section, be required or permitted to set out in the accounts or report, an amount ascertained in accordance with the regulations but not being an amount that is more than \$500 greater or less than the first-mentioned amount.

**(2)** For the purposes of sub-section (1), the insertion of zero shall be deemed to be the insertion of an amount.

**Group accounts not to be issued, &c., until receipt of subsidiaries' accounts, &c.**

**272. (1)** Subject to sub-section (6), the directors of a holding company shall not cause to be made out the group accounts referred to in sub-section 269 (3) or make the report referred to in sub-section 270 (2) unless they have received from each subsidiary its accounts, the statements required under section 269 and the directors' report in accordance with section 270.

**(2)** The directors of a holding company shall take all reasonable steps to ensure that, when they make their report under section 270, they will have available to them a report that—

- (a) has been made by the directors of each subsidiary and, if necessary, revised or added to by the directors of the subsidiary; and
- (b) represents the state of affairs of the subsidiary not more than one month earlier than the date on which the report of the directors of the holding company is made.

**(3)** Where a subsidiary of a holding company is incorporated outside the State, it is sufficient compliance with this section if the directors of the holding company receive from the subsidiary accounts and reports corresponding with those required under this section and in accordance with the law of the place of incorporation of the subsidiary.

**(4)** The directors of a subsidiary shall, at the request of the directors of the holding company, supply all such information as is required for the preparation of group accounts of the holding company and its subsidiaries, and of the report of the directors of the holding company.

**(5)** The directors of a holding company are, unless they know or have reason to suspect that any matter in any accounts, report or information furnished by the directors of a subsidiary is false or misleading, entitled to rely on the accounts, report or information for the purpose of the preparation of the group accounts and their report so far as they relate to the affairs of the subsidiary.

**(6)** Where the directors of a holding company, having taken all such steps as are reasonably available to them, are unable to obtain from the directors of a subsidiary any accounts, report or other information required for the

preparation of the group accounts and the directors' report of the group, they may cause to be made out the group accounts and make the directors' report without incorporating in, or including with, those group accounts, or incorporating in, or including with, that directors' report, the first-mentioned accounts, report or other information relating to the subsidiary but with such qualifications and explanations as are necessary to prevent the group accounts and report from being misleading.

(7) Where the directors of a holding company have caused to be made out the group accounts and have made the directors' report in accordance with sub-section (6), they shall send to the shareholders of the holding company, within one month after receiving the accounts, report or other information from the directors of the subsidiary, a copy of the accounts and report or a statement embodying the other information, as the case may be, together with a statement by the directors of the holding company containing such qualifications and explanations of the group accounts and of their report as are necessary having regard to the accounts, report or information received from the subsidiary.

#### **Relief from requirements as to accounts and reports**

**273. (1)** The directors of a company may apply to the Commission in writing for an order relieving them from compliance with any specified requirements of this Code relating to, or to the audit of, accounts or group accounts or to the report required by sub-section 270 (1) or (2) and the Commission may make an order relieving the directors from compliance with all or any of those requirements either unconditionally or on condition that the directors comply with such other requirements relating to, or to the audit of, the accounts or group accounts or to the report as the Commission imposes.

**(2)** The application shall be supported by a statement in writing made in accordance with a resolution of the directors of the company, signed by not less than 2 directors and stating the reasons for seeking an order.

**(3)** The Commission may require the directors making the application to supply such information relating to the operations of the company and of any related corporation, as the Commission thinks necessary for the purpose of determining the application.

**(4)** Notice of an order under sub-section (1) shall be served on the company to which it relates.

**(5)** The Commission may, where it considers it appropriate, make an order in respect of a specified class of companies relieving the directors of a company in that class from compliance with any specified requirements of this Code relating to, or to the audit of, accounts or group accounts or to the report required by sub-section 270 (1) or (2) and the order may be made either unconditionally or on condition that the directors of the company comply with such other requirements relating to, or to the audit of, accounts or group accounts or to the report as the Commission imposes.

**(6)** Notice of an order under sub-section (5) shall be published in the *Gazette*.

**(7)** The Commission shall not make an order under sub-section (1) or (5) unless—

- (a) in the case of an order relating to the form or content of accounts or group accounts or of a report required by sub-section 270 (1) or (2)—the Commission is of the opinion that compliance with the requirements of this Code would render the accounts or group accounts or the report, as the case may be, misleading or inappropriate to the circumstances of the company or would impose unreasonable burdens on the company or on an officer of the company; or
- (b) the company—
  - (i) is not carried on for the purposes of profit or gain to its individual members;
  - (ii) is, by the terms of its memorandum or articles, prohibited from making any distribution, whether in money, property or otherwise, to its members; and
  - (iii) is required by or under any law of the Commonwealth, of a State or of a Territory to prepare annually a statement of its income and expenditure or a statement as to its financial position, or both.

**(8)** The Commission may make an order under sub-section (1) or (5) that is limited to a specific period and—

- (a) in the case of an order under sub-section (1)—may from time to time either on application by the directors, or without any such application, revoke or suspend the operation of the order; or
- (b) in the case of an order under sub-section (5)—may from time to time revoke or suspend the operation of the order.

**(9)** The revocation or suspension under sub-section (8) of an order does not take effect until—

- (a) in the case of an order under sub-section (1)—notice of the revocation or suspension is served on the company to which the order relates; and
- (b) in the case of an order under sub-section (5)—notice of the revocation or suspension is published in the *Gazette*.

**(10)** A person aggrieved by—

- (a) an order under sub-section (1) or (5);
- (b) the revocation or suspension of the operation of such an order; or
- (c) the refusal of an application for an order or for revocation or suspension of the operation of an order,

may, within 2 months after the service or publication, as the case may be, of notice of the order or notice of the revocation or suspension or after the refusal, as the case may be, appeal to the Court, and the Court may confirm, set aside or modify the order, or confirm or set aside the revocation, suspension or refusal, and may make such further order as it thinks just.

#### **Members of company entitled to balance-sheet, &c.**

**274. (1)** A company shall, not less than 14 days before each annual general meeting, send a copy of all accounts and, if it is a holding company, group accounts that are to be laid before the company at the meeting, accompanied by a copy of the statements required under section 269, a copy of the directors' report required under section 270 and a copy of the auditor's report or reports required by section 285, to all persons entitled to receive notice of general meetings of the company.

**(2)** A company shall furnish to a member of a company, whether or not he is entitled to have sent to him copies of the accounts or group accounts, to whom copies have not been sent, or a holder of debentures, on request in writing being made by him to the company, as soon as practicable and without charge, a copy of the last accounts and group accounts (if any) laid or to be laid before the company at its annual general meeting, together with copies of the other documents required under sub-section (1) to accompany those accounts and group accounts (if any).

**(3)** It is a defence to a prosecution for a failure to comply with sub-section (1) or (2) if the defendant proves that the person in relation to whom the failure occurred had, before the failure occurred, been furnished with a copy of the accounts or group accounts and all documents referred to in sub-sections (1) and (2).

**(4)** This section does not apply to or in relation to a mutual life assurance company limited by guarantee registered under the *Life Insurance Act* 1945.

**(5)** Sub-sections (1) and (2) do not apply to a company in relation to an annual general meeting that is deemed by section 250 to have been held.

Penalty: \$1,000.

#### **Accounts and reports to be laid before annual general meeting**

**275.** The directors of a company shall cause to be laid before each annual general meeting of the company held in accordance with section 240—

- (a) a copy of the profit and loss account made out in accordance with sub-section 269 (1) for the last financial year of the company;
- (b) a copy of the balance-sheet made out in accordance with sub-section 269 (2) as at the end of the last financial year of the company;
- (c) in the case of a company that, at the end of its last financial year before the relevant annual general meeting, was not a holding company—a copy of the directors' report made out in accordance with sub-section 270 (1) in respect of that financial year;
- (d) in the case of a company that, at the end of its last financial year before the relevant annual general meeting, was a holding company—a copy of the group accounts made out in accordance with sub-section 269 (3) in relation to that financial year and a copy of the directors' report made out in accordance with sub-section 270 (2) in respect of the profit or loss and the state of affairs of the group of companies of the holding company as at the end of that financial year;
- (e) a copy of any auditor's report required by sub-section 269 (5) to be attached to the accounts or group accounts of the company; and
- (f) a copy of the statement by the directors required by sub-section 269 (9) or (10) to be attached to the accounts or group accounts of the company.

**Failure to Comply with this Division**

**276. (1)** Subject to the succeeding provisions of this section, if a director of a company fails to take all reasonable steps to comply with, or to secure compliance with, or has knowingly been the cause of any default under, any of the preceding provisions of this Division (including any of those provisions as applying by virtue of section 158) other than section 267, he is guilty of an offence.

**Penalty—**

- (a) in a case to which paragraph (b) does not apply—\$5,000; or
- (b) if the offence was committed with intent to deceive or defraud members or creditors of the company or creditors of any other person or for any other fraudulent purpose—\$20,000 or imprisonment for 5 years, or both.

**(2)** In any proceedings against a person for failure to take all reasonable steps to comply with, or to secure compliance with, the preceding provisions of this Division relating to the form and content of the accounts of a company or group accounts of a holding company by reason of an omission from the accounts or group accounts (including any of those provisions as applying by virtue of section 158), it is a defence to prove that the information omitted was immaterial and did not affect the giving of a true and fair view of the matters required by section 269 to be dealt with in the accounts or group accounts, as the case may be.

**(3)** If, after the expiration of the period within which any accounts of a company or any report of the directors of a company is or are required by section 269 or 270 to be made out, the Commission, by notice in writing to each of the directors, requires the directors to produce the accounts or report to a person specified in the notice on a date and at a place so specified, and the directors fail to produce the accounts or report as required by the notice, then, in any proceeding for a failure to comply with section 269 or 270, proof of the failure to produce the accounts or report as required by the notice is *prima facie* evidence that the accounts or report were not made out within that period.

***Division 3—Audit*****Qualifications of auditors**

**277. (1)** Subject to this section, a person shall not—

- (a) consent to be appointed as auditor of a company;
- (b) act as auditor of a company; or

- (c) prepare a report required by this Code to be prepared by a registered company auditor or by an auditor of a company,

if—

- (d) the person is not a registered company auditor;
- (e) the person, or a corporation in which the person is a substantial shareholder for the purposes of Division 4 of Part IV or the provisions of the law of a participating State or of a participating Territory that correspond with that Division, is indebted in an amount exceeding \$5,000 to the company or to a related corporation; or
- (f) except where the company is an exempt proprietary company, the person—
- (i) is an officer of the company;
  - (ii) is a partner, employer or employee of an officer of the company; or
  - (iii) is a partner or employee of an employee of an officer of the company.

**(2)** Subject to this section, a firm shall not—

- (a) consent to be appointed as auditor of a company;
- (b) act as auditor of a company; or
- (c) prepare a report required by this Code to be prepared by a registered company auditor or by an auditor of a company,

unless—

- (d) at least one member of the firm is a registered company auditor who is ordinarily resident in a State or Territory;
- (e) where the business name under which the firm is carrying on business is not registered under the *Business Names Act*, 1962—there has been lodged with the Commission a return in the prescribed form showing, in relation to each member of the firm, his full name and his address as at the time when the firm so consents, acts or prepares a report;
- (f) no member of the firm, and no corporation in which any member of the firm is a substantial shareholder within the meaning of Division 4 of Part IV, or the provisions of the law of a participating State or of a participating Territory that correspond with that Division, is indebted in an amount exceeding \$5,000 to the company or to a related corporation;

- (g) except where the company is an exempt proprietary company, no member of the firm is—
  - (i) an officer of the company;
  - (ii) a partner, employer or employee of an officer of the company; or
  - (iii) a partner or employee of an employee of an officer of the company; and
- (h) except where the company is an exempt proprietary company, no officer of the company receives any remuneration from the firm for acting as a consultant to it on accounting or auditing matters.

**(3)** A reference in sub-section (1) or (2) to indebtedness to a corporation does not, in relation to indebtedness of a natural person, include a reference to indebtedness of that person to a corporation that is a prescribed corporation for the purposes of Division 4 where—

- (a) the indebtedness arose as a result of a loan made to that person by the corporation in the ordinary course of its ordinary business; and
- (b) the amount of that loan was used by that person to pay the whole or part of the purchase price of premises that are used by that person as his principal place of residence.

**(4)** For the purposes of sub-sections (1) and (2), a person shall be deemed to be an officer of a company if—

- (a) he is an officer of a related corporation; or
- (b) except where the Commission, if it thinks fit in the circumstances of the case, directs that this paragraph shall not apply in relation to him—he has, at any time within the immediately preceding period of 12 months, been an officer or promoter of the company or of a related corporation.

**(5)** For the purposes of this section, a person shall not be taken to be an officer of a company by reason only of his being or having been the liquidator of that company or of a related corporation.

**(6)** For the purposes of this section, a person shall not be taken to be an officer of a company by reason only of his having been appointed as auditor of that company or of a related corporation or, for any purpose relating to taxation, a public officer of a corporation or by reason only of his being or having been authorized to accept on behalf of the company or a related corporation service of process or any notices required to be served on the company or related corporation.

(7) The appointment of a firm as auditor of a company shall be deemed to be an appointment of all persons who are members of the firm and are registered company auditors, whether resident in a State or Territory or not, at the date of the appointment.

(8) Where a firm that has been appointed as auditor of a company is reconstituted by reason of the death, retirement or withdrawal of a member or members or by reason of the admission of a new member or new members, or both—

- (a) a person who was deemed under sub-section (7) to be an auditor of the company and who has so retired or withdrawn from the firm as previously constituted shall be deemed to have resigned as auditor of the company as from the day of his retirement or withdrawal but, unless that person was the only member of the firm who was a registered company auditor and, after the retirement or withdrawal of that person, there is no member of the firm who is a registered company auditor, section 282 does not apply to that resignation;
- (b) a person who is a registered company auditor and who is so admitted to the firm shall be deemed to have been appointed as an auditor of the company as from the date of his admission; and
- (c) 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,

but nothing in this sub-section affects the operation of sub-section (2).

(9) Except as provided by sub-section (8), the appointment of the members of a firm as auditors of a company that is deemed by sub-section (7) to have been made by reason of the appointment of the firm as auditor of the company is not affected by the dissolution of the firm.

(10) A report or notice that purports to be made or given by a firm appointed as auditor of a company shall not be taken to be duly made or given unless it is signed in the firm name and in his own name by a member of the firm who is a registered company auditor.

(11) Without limiting the generality of section 570, if, in contravention of this section, a firm consents to be appointed, or acts as, auditor of a company or prepares a report required by this Code to be prepared by an auditor of a company, each member of the firm is guilty of an offence.

**(12)** Where it is, in the opinion of the Commission, impracticable for an exempt proprietary company to obtain the services of a registered company auditor as auditor of the company by reason of the place where the company carries on business, a person who is, in the opinion of the Commission, suitably qualified or experienced and is approved by the Commission for the purposes of this Code in relation to the audit of the company's accounts may be appointed as auditor of the company, subject to such terms and conditions as are specified in the approval.

**(13)** A person appointed in accordance with sub-section (12) shall, in relation to the auditing of the company's accounts and, if it is a holding company for which group accounts are required, group accounts but subject to the terms and conditions of the approval under that sub-section, be deemed to be a registered company auditor and the provisions of this Code shall, with the necessary modifications, apply to and in relation to him accordingly.

**(14)** Where a person approved by the Commission under sub-section (12) is acting as auditor of a company, the Commission 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 person as auditor of the company.

**(15)** A notice under sub-section (14) terminating the appointment of a person 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 person notice of his resignation as auditor taking effect from that date.

**(16)** A person shall not—

- (a) if he has been appointed auditor of a company—knowingly disqualify himself while the appointment continues from acting as auditor of the company; or
- (b) if he is a member of a firm that has been appointed auditor of a company—knowingly disqualify the firm while the appointment continues from acting as auditor of the company.

**Unlimited exempt proprietary company need not appoint auditor in certain circumstances**

**278. (1)** Notwithstanding the provisions of this Part, an exempt proprietary company that is an unlimited company is not required to appoint an auditor at an annual general meeting, whether that meeting is the first annual general meeting held after the company is incorporated as, or converts to, such a company or is a subsequent annual general meeting, if—

- (a) at the date of the annual general meeting no member of the company is a person other than a natural person, an exempt proprietary company that is an unlimited company or a corporation that, under the law in force in another State or in a Territory, is an exempt proprietary company that is an unlimited company; and
- (b) not more than one month before the annual general meeting, all the members of the company have agreed that it is not necessary for the company to appoint an auditor.

**(2)** The directors of an exempt proprietary company that is an unlimited company are not required to comply with sub-section 280 (1) if—

- (a) all the members of the company have agreed, on a date not later than 14 days after the incorporation of the company, that it is not necessary for the company to appoint an auditor; and
- (b) between the date of the incorporation of the company and the date referred to in paragraph (a), no member of the company is a person other than a natural person, an exempt proprietary company that is an unlimited company or a corporation that under the law in force in another State or in a Territory is an exempt proprietary company that is an unlimited company.

**(3)** Where a company, by reason of the circumstances referred to in sub-section (1) or (2), does not have an auditor, a secretary of the company shall record a minute to that effect in the book containing the minutes of proceedings of general meetings of the company.

**(4)** An exempt proprietary company that is an unlimited company and that at an annual general meeting did not appoint an auditor shall at the next annual general meeting of the company appoint an auditor unless the conditions referred to in sub-section (1) are satisfied.

**(5) Within one month after—**

- (a) a company that by reason of the circumstances referred to in sub-section (1) or (2) does not have an auditor ceases to be an exempt proprietary company or ceases to be an unlimited company; or
- (b) a body corporate other than—
  - (i) an exempt proprietary company that is an unlimited company; or
  - (ii) a corporation that under the law in force in another State or in a Territory is an exempt proprietary company that is an unlimited company,

becomes a member of an exempt proprietary company that, by reason of the circumstances referred to in sub-section (1) or (2), does not have an auditor,

the directors of the company shall appoint, unless the company at a general meeting has appointed, a person or persons, a firm or firms, or a person or persons and a firm or firms, as auditor or auditors of the company.

**(6)** A person or firm appointed as auditor of a company under sub-section (5) holds office, subject to this Division, until the next annual general meeting of the company.

**Exempt proprietary company need not appoint auditor in certain circumstances**

**279. (1)** Notwithstanding the provisions of this Part, an exempt proprietary company that is not an unlimited company is not required to appoint an auditor at an annual general meeting, whether that meeting is the first annual general meeting held after the company is incorporated as, or becomes, such a company or is a subsequent annual general meeting, if not more than one month before the annual general meeting all the members of the company have agreed that it is not necessary for the company to appoint an auditor.

**(2)** The directors of an exempt proprietary company that is not an unlimited company are not required to comply with sub-section 280 (1) if all the members of the company have agreed, on a date not later than 14 days after the incorporation of the company, that it is not necessary for the company to appoint an auditor.

**(3)** Where a company, by reason of the circumstances referred to in sub-section (1) or (2), does not have an auditor, a secretary of the company shall record a minute to that effect in the book containing the minutes of proceedings of general meetings of the company.

**(4)** An exempt proprietary company that is not an unlimited company and that at an annual general meeting did not appoint an auditor shall at the next annual general meeting of the company appoint an auditor unless the conditions referred to in sub-section (1) are satisfied.

**(5)** Where, by reason of the circumstances referred to in sub-section (1) or (2), accounts or group accounts of a company required to be laid before the company at its annual general meeting are not audited, there shall be included in, or attached to, the annual return of the company for the financial year to which the accounts or group accounts relate a certificate signed by not less than 2 directors of the company stating whether—

- (a) the company has, in respect of the financial year—
  - (i) kept such accounting records as correctly record and explain the transactions and financial position of the company;
  - (ii) kept its accounting records in such a manner as would enable true and fair accounts of the company to be prepared from time to time; and
  - (iii) kept its accounting records in such a manner as would enable the accounts of the company to be conveniently and properly audited in accordance with this Code; and
- (b) the accounts and group accounts (if any) have been properly prepared by a competent person.

**(6)** Where—

- (a) directors of a company state in a certificate in respect of a financial year of the company that—
  - (i) the company did not keep such accounting records as are required by this Code to be kept;
  - (ii) the accounting records of the company were not kept in the manner required by this Code; or
  - (iii) the accounts of the company have not been properly prepared by a competent person; or

- (b) a director of a company has been convicted under sub-section 563 (2) of an offence in relation to a certificate under sub-section (5) of this section,

there shall be deemed to be a vacancy in the office of auditor of the company and sub-section 280 (5) applies to that vacancy.

(7) Where a company, by reason of circumstances referred to in sub-section (1) or (2), does not have an auditor and all the members of the company have agreed that the company should appoint an auditor, an auditor may be appointed as if a vacancy had occurred in the office of auditor.

(8) Within one month after a company that, by reason of the circumstances referred to in sub-section (1) or (2), does not have an auditor ceases to be an exempt proprietary company, the directors of the company shall appoint, unless the company at a general meeting has appointed, a person or persons, a firm or firms, or a person or persons and a firm or firms, as auditor or auditors of the company.

(9) If, within 14 days after a company that has an auditor becomes an exempt proprietary company, all the members of the company agree, this Code does not prevent the company from terminating the appointment of the auditor and, where the appointment is so terminated, a vacancy in the office of auditor of the company shall be deemed not to have occurred.

(10) A person or firm appointed as auditor of a company under sub-section (6) or (8) holds office, subject to this Division, until the next annual general meeting of the company and sub-section (1) does not apply to or in relation to that company.

### **Appointment of auditors**

**280.** (1) Within one month after the date on which a company is incorporated, the directors of the company shall appoint, unless the company at a general meeting has appointed, a person or persons, a firm or firms, or a person or persons and a firm or firms, as auditor or auditors of the company.

(2) A person or firm appointed as auditor of a company under sub-section (1) holds office, subject to this Division, until the first annual general meeting of the company.

**(3) A company shall—**

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

**(4) A person or firm appointed as auditor under sub-section (3) holds office until death or removal or resignation from office in accordance with section 282 or until ceasing to be capable of acting as auditor by reason of sub-section 277 (1) or (2).**

**(5) Within one month after a vacancy, other than a vacancy caused by the removal of an auditor from office, occurs in the office of auditor of the company, if there is no surviving or continuing auditor of the company, the directors shall, unless—**

- (a) the company at a general meeting has appointed a person or persons, a firm or firms, or a person or persons and a firm or firms, to fill the vacancy; or
  - (b) where the company is an exempt proprietary company, all the members of the company have within one month after the vacancy occurs agreed that it is not necessary for the vacancy to be filled,
- appoint a person or persons, a firm or firms, or a person or persons and a firm or firms, to fill the vacancy.

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

**(7) A company or the directors of a company shall not appoint a person or firm as auditor of the company unless that person or firm has, before the appointment, consented by notice in writing given to the company or to the directors to act as auditor and has not withdrawn his or its consent by notice in writing given to the company or to the directors.**

**(8) A notice under sub-section (7) given by a firm shall be signed in the firm name and in his own name by a member of the firm who is a registered company auditor.**

**(9)** If a company appoints a person or firm as auditor of a company in contravention of sub-section (7), the purported appointment does not have any effect and the company and any officer of the company who is in default are each guilty of an offence.

**(10)** Where an auditor of a company is removed from office at a general meeting in accordance with section 282—

- (a) the company may at that meeting (without adjournment), by a resolution passed by a majority of not less than three-quarters of such members of the company as, being entitled so to do, vote in person or, where proxies are allowed, by proxy, forthwith appoint as auditor or auditors a person or persons, a firm or firms, or a person or persons and a firm or firms, to whom or which has been sent a copy of the notice of nomination in accordance with sub-section 281 (3); or
- (b) if such a resolution is not passed or, by reason only that such a copy of the notice of nomination has not been sent to a person, could not be passed, the meeting may be adjourned to a date not earlier than 20 days and not later than 30 days after the day of the meeting and the company may, at the adjourned meeting, by ordinary resolution appoint as auditor or auditors a person or persons, a firm or firms, or a person or persons and a firm or firms, notice of whose nomination for appointment as auditor has been received by the company from a member of the company at least 14 clear days before the date to which the meeting is adjourned.

**(11)** If after the removal from office of an auditor of a company the company fails to appoint another auditor under sub-section (10), the company shall, within 7 days after the failure, notify the Commission accordingly, whereupon the Commission shall, unless—

- (a) there is another auditor of the company whom the Commission believes to be able to carry out the responsibilities of auditor alone and who agrees to continue as auditor; or
- (b) where the company is an exempt proprietary company, all the members of the company have agreed that it is not necessary for another auditor to be appointed and the company notifies the Commission of that agreement when it notifies the Commission that it has failed to appoint another auditor,

appoint as auditor or auditors of the company a person or persons, a firm or firms, or a person or persons and a firm or firms, who or which consents or consent to be so appointed.

**(12)** Subject to sub-section (11), if a company does not appoint an auditor when required by this Code to do so, the Commission may, on the application in writing of a member of the company, appoint as auditor or auditors of the company a person or persons, or a firm or firms, or a person or persons and a firm or firms, who or which consents or consent to be so appointed.

**(13)** A person or firm appointed as auditor of a company under sub-section (5), (10), (11) or (12) holds office, subject to this Division, until the next annual general meeting of the company.

**(14)** Notwithstanding sub-section (4), an auditor of a company that becomes a subsidiary of a corporation shall, unless he sooner vacates his office, retire at the annual general meeting of that subsidiary next held after it becomes such a subsidiary but, subject to this Division, is eligible for re-appointment.

**(15)** If a director of a company fails to take all reasonable steps to comply with, or to secure compliance with, sub-section (1) or (5), he is guilty of an offence.

#### **Nomination of auditors**

**281. (1)** Subject to this section, a company is not entitled to appoint a person or a firm as auditor of the company at its annual general meeting, not being a meeting at which an auditor is removed from office, unless notice in writing of his or its nomination as auditor was given to the company by a member of the company—

- (a) before the meeting was convened; or
- (b) not less than 21 days before the meeting.

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

**(3)** Where notice of nomination of a person or firm for appointment as auditor of a company is received by the company, whether for appointment at a meeting or an adjourned meeting referred to in sub-section 280 (10) or at an annual general meeting, the company shall—

- (a) not less than 7 days before the meeting; or

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

**Removal and resignation of auditors**

**282. (1)** An auditor of a company may be removed from office by resolution of the company at a general meeting of which special notice has been given, but not otherwise.

**(2)** Where special notice of a resolution to remove an auditor is received by a company, it shall forthwith send a copy of the notice to the auditor and lodge a copy of the notice with the Commission.

**(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 the Commission on the application of the company otherwise orders, the company shall send a copy of the representations in accordance with the auditor's request, and the auditor may, without prejudice to his 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)** Upon the removal from office of an auditor of a company, the company shall forthwith give to the Commission notice in writing of the removal.

**(6)** An auditor of a company may, by notice in writing given to the company, resign as auditor of the company if—

(a) he has, by notice in writing given to the Commission, applied for consent to his resignation and stated the reasons for his application and, at or about the same time as he gave the notice to the Commission, notified the company in writing of his application to the Commission; and

(b) he has received the consent of the Commission.

(7) The Commission shall, as soon as practicable after receiving a notice from an auditor under sub-section (6), notify the auditor and the company whether it consents to the resignation of the auditor.

(8) A statement made by an auditor in an application to the Commission under sub-section (6) or in answer to an inquiry by the Commission 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 the Commission that the statement was made in the application or in the answer to the inquiry by the Commission is conclusive evidence that the statement was so made.

(9) A person aggrieved by the refusal of consent by the Commission to the resignation of an auditor of a company may, within one month after the date of the refusal, appeal to the Court from the refusal, and thereupon the Court, after giving the company an opportunity to be heard, may confirm or reverse the refusal and may make such further order as it thinks just.

(10) Subject to any order of the Court under sub-section (9) and to sub-section (11), the resignation of an auditor takes effect—

- (a) on the date (if any) specified for the purpose in the notice of resignation;
- (b) on the date on which the Commission gives its consent to the resignation; or
- (c) on the date (if any) fixed by the Commission for the purpose, whichever last occurs.

(11) The resignation of an auditor of an exempt proprietary company does not require the consent of the Commission under sub-section (6), and takes effect—

- (a) on the date (if any) specified for the purpose in the notice of resignation; or
- (b) on the date on which the notice is received by the company, whichever is the later.

(12) 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 paragraph 277 (2) (d) of acting as auditor of a company, the member so retiring or withdrawing shall (if not disqualified from acting as auditor of the company) be deemed to be the auditor of the company until he obtains the consent of the Commission to his retirement or withdrawal.

(13) Within 14 days after the receipt of a notice of resignation from an auditor of a company or, where an auditor of a company is removed from office, within 14 days after the removal, the company shall lodge a notice of the resignation or removal in the prescribed form with the Commission and, in the case of the resignation or removal from office of an auditor of a borrowing corporation, give a copy of the notice lodged with the Commission to the trustee for the holders of debentures of the borrowing corporation.

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

**283.** 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.

**Fees and expenses of auditors**

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

**Powers and duties of auditors as to reports on accounts**

**285. (1)** An auditor of a company shall report to the members on the accounts required to be laid before the company at the annual general meeting and on the company's accounting records and other records relating to those accounts and, if it is a holding company for which group accounts are required, shall also report to the members on the group accounts.

**(2)** A report by an auditor of a company under sub-section (1) shall be furnished by the auditor to the directors of the company in sufficient time to enable the company to comply with the requirements of sub-section 274 (1) in relation to that report.

- (3) An auditor shall, in a report under this section, state—
- (a) whether the accounts and, if the company is a holding company for which group accounts are required, the group accounts are in his opinion properly drawn up—
    - (i) so as to give a true and fair view of the matters required by section 269 (or, in the case of a prescribed corporation within the meaning of section 288, by this Part), to be dealt with in the accounts and, if there are group accounts, in the group accounts; and
    - (ii) in accordance with the provisions of this Code;
  - (b) whether the accounting records and other records and the registers required by this Code to be kept by the company and, if it is a holding company, by the subsidiaries other than those of which he has not acted as auditor have been, in his opinion, properly kept in accordance with the provisions of this Code or, in the case of a subsidiary incorporated in another State or in a Territory, in accordance with the provisions of the corresponding law of that State or Territory;
  - (c) in the case of group accounts—
    - (i) the names of the subsidiaries (if any) of which he has not acted as auditor;
    - (ii) whether he has examined the accounts and auditors' reports of all subsidiaries of which he has not acted as auditor, being accounts that are included (whether separately or consolidated with other accounts) in the group accounts;
    - (iii) whether he is satisfied that the accounts of the subsidiaries that are to be consolidated with other accounts are in form and content appropriate and proper for the purposes of the preparation of the consolidated accounts, and whether he has received satisfactory information and explanations as required by him for that purpose; and
    - (iv) whether the auditor's report on the accounts of any subsidiary was made subject to any qualification, or included any comment made under sub-section (4), and, if so, particulars of the qualification or comment;
  - (d) any defect or irregularity in the accounts or group accounts and any matter not set out in the accounts or group accounts without regard to which a true and fair view of the matters dealt with by the accounts or group accounts would not be obtained; and

- (e) if he is not satisfied as to any matter referred to in paragraph (a), (b) or (c), his reasons for not being so satisfied.

(4) It is the duty of an auditor of a company to form an opinion as to each of the following matters:

- (a) whether he has obtained all the information and explanations that he required;
- (b) whether proper accounting records and other records, including registers, have been kept by the company as required by this Code;
- (c) whether the returns received from branch offices of the company are adequate;
- (d) where the company is a holding company—whether the procedures and methods used by the company and by each of its subsidiaries in arriving at the amounts taken into any consolidated accounts were appropriate to the circumstances of the consolidation; and
- (e) where group accounts are prepared otherwise than as one set of consolidated accounts for the group—whether he agrees with the reasons for preparing them in the form in which they are prepared as given by the directors in the accounts,

and he shall state in his report particulars of any deficiency, failure or shortcoming in respect of any matter referred to in this sub-section.

(5) An auditor of a company has a right of access at all reasonable times to the accounting records and other records, including registers, of the company, and is entitled to require from any officer of the company such information and explanations as he desires for the purposes of audit.

(6) An auditor of a holding company for which group accounts are required has a right of access at all reasonable times to the accounting records and other records, including registers, of any subsidiary and is entitled to require from any officer or auditor of any subsidiary, at the expense of the holding company, such information and explanations in relation to the affairs of the subsidiary as he requires for the purpose of reporting on the group accounts.

(7) The auditor's report shall be attached to or endorsed on the accounts or group accounts and shall, if a member so requires, be read before the company at the annual general meeting, and is open to inspection by a member at any reasonable time.

(8) An auditor of a company or his agent authorized by him in writing for the purpose is entitled to attend any general meeting of the company and to receive all notices of, and other communications relating to, any general meeting that a member is entitled to receive, and to be heard at any general

meeting that he attends on any part of the business of the meeting that concerns the auditor in his capacity as auditor, and is entitled so to be heard notwithstanding that he retires at that meeting or a resolution to remove him from office is passed at that meeting.

(9) If an auditor of a company becomes aware that the company or the directors has or have made default in complying with section 240 or the provisions of section 275 relating to the laying of accounts or group accounts before the annual general meeting of the company, the auditor shall immediately inform the Commission by notice in writing and, if accounts or group accounts have been prepared and audited, send to the Commission a copy of the accounts or group accounts and of his report on the accounts or group accounts.

(10) Except in a case to which sub-section (9) applies, if an auditor, in the course of the performance of his duties as auditor of a company, is satisfied that—

- (a) there has been a contravention of, or failure to comply with, any of the provisions of this Code; and
- (b) the circumstances are such that in his opinion the matter has not been or will not be adequately dealt with by comment in his report on the accounts or group accounts or by bringing the matter to the notice of the directors of the company or, if the company is a subsidiary, of the directors of any corporation of which the company is a subsidiary.

he shall forthwith report the matter to the Commission by notice in writing.

#### **Obstruction of auditor**

**286. (1)** An officer of a corporation who refuses or fails without lawful excuse to allow an auditor of the corporation or of its holding company access, in accordance with the provisions of this Code, to any accounting records and other records, including registers, of the corporation in his custody or control, or to give any information or explanation as and when required under those provisions or otherwise hinders, obstructs or delays an auditor in the performance of his duties or the exercise of his powers, is guilty of an offence.

**(2)** An auditor of a corporation who refuses or fails without lawful excuse to allow an auditor of a holding company of the corporation access, in accordance with the provisions of this Code, to any accounting records and other records, including registers, of the corporation in his custody or control, or to give any information or explanation as and when required under those provisions, or otherwise hinders, obstructs or delays an auditor in the performance of his duties or the exercise of his powers, is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**Special provisions relating to borrowing and guarantor corporations**

**287. (1)** The auditor of a borrowing corporation shall, within 7 days after furnishing the corporation or its members with any report, certificate or other document that he is required by this Code or by the debentures or trust deed to give to the corporation or its members, send to every trustee for the holders of debentures of the borrowing corporation a copy of the report, certificate or document, together with a copy of each document accompanying the report, certificate or document so furnished.

**(2)** Where, in the performance of his duties as auditor of a borrowing corporation or a guarantor corporation, the auditor becomes aware of any matter that, in his opinion, is or is likely to be prejudicial to the interests of the holders of debentures of the borrowing corporation and is relevant to the exercise and performance of the powers and duties imposed by this Code or by any trust deed upon any trustee for the holders of the debentures, the auditor shall, within 7 days after becoming aware of the matter, send a report in writing on the matter to the corporation of which he is auditor and a copy of the report to the trustee.

*Division 4—Special Provisions Relating to Banking and Life Insurance Corporations***Banking and life insurance corporations**

**288. (1)** In this section “prescribed corporation” means—

- (a) a banking corporation; or
- (b) a corporation that is registered under the *Life Insurance Act, 1945*.

**(2)** Subject to this section, this Part applies to and in relation to a prescribed corporation that is a company or is a corporation that is a subsidiary of the holding company of a group of companies.

**(3)** Where, under a law of the Commonwealth relating to banking, a prescribed corporation is required to prepare accounts annually, accounts of the corporation that comply with the provisions of that law shall be deemed to comply with the provisions of this Code relating to accounts.

**(4)** Sub-section 270 (1) does not apply to or in relation to a prescribed corporation or its directors.

(5) Where, under a law of the Commonwealth relating to life insurance, a prescribed corporation is required to prepare accounts annually, the prescribed corporation and the directors and auditors of the corporation shall not be taken to have failed to comply with such of the provisions of this Part as are applicable to it or them by reason only—

- (a) that no accounts are laid before the annual general meeting of the corporation other than accounts that—
  - (i) comply with the provisions of that law; or
  - (ii) comply with such conditions as are specified by the Commission; or
- (b) that, where accounts that comply with such conditions as are specified by the Commission are laid before the annual general meeting of the corporation, an auditor's report to the members on those accounts is not laid before that meeting.

(6) Sub-section 285 (3) does not apply to or in relation to the accounts of a prescribed corporation that is registered under the *Life Insurance Act 1945* where those accounts comply with that law.

(7) Where a company is a holding company of another corporation and is, under section 269, required to cause group accounts to be made out, the company and the directors and auditors of the company—

- (a) shall not be taken to have failed to comply with the provisions of this Code relating to group accounts by reason only that the group accounts do not contain, whether separately or consolidated with other accounts, accounts of a prescribed corporation that is a corporation in the group of companies other than accounts that—
  - (i) comply with a law of the Commonwealth relating to the preparation of annual accounts of the prescribed corporation; or
  - (ii) in the case of a prescribed corporation registered under the *Life Insurance Act 1945*, comply with such conditions as are specified by the Commission;
- (b) shall not be taken to have failed to comply with the provisions of sub-section 270 (2) by reason only that a directors' report made under that sub-section relates only to corporations in the group of companies other than prescribed corporations; and

(c) shall not be taken to have failed to comply with the provisions of sub-section 269 (4) or (5) or of section 285 by reason only that those provisions are not complied with in relation to prescribed corporations in the group of companies that are registered under the *Life Insurance Act* 1945.

(8) A prescribed corporation shall not be taken to have failed to comply with section 274 in relation to an annual general meeting by reason only that it does not send to a person entitled to receive notice of general meetings of the company accounts or documents referred to in that section other than accounts and documents so referred to that, in compliance with the provisions of this Part, whether by the operation of this section or otherwise, are to be laid before that annual general meeting.

(9) Where a prescribed corporation registered under the *Life Insurance Act* 1945, does not lay before its annual general meeting accounts and an auditor's report that comply with the provisions of that Act, it shall lodge a copy of those accounts and a copy of that report with the Commission on or before a day that is not later than 9 months after the end of the period to which they relate.

## PART VII—SPECIAL INVESTIGATIONS

### Interpretation and application

**289. (1)** In this Part, unless the contrary intention appears—

“company” means—

- (a) a company as defined in sub-section 5 (1); and
- (b) a foreign company that—
  - (i) has been or is registered under Division 5 of Part XIII; or
  - (ii) has carried on or is carrying on business in the State;

“corporation” includes a corporation that is in the course of being wound up or has been dissolved;

“direction” means a direction given to the Commission pursuant to sub-section 290 (4) or in the exercise of a power under sub-section 291 (1), (2) or (3) in relation to the carrying out of an investigation into affairs of a corporation;

“inspector” means an inspector appointed under this Part;

“officer”, in relation to a corporation, means an officer as defined in sub-section 5 (1) and includes—

- (a) a person who acts, or has at any time acted, as banker, solicitor or auditor, or in any other capacity, for the corporation;
- (b) a person who is, or has at any time been, a provisional liquidator of the corporation;
- (c) a person who—
  - (i) has, or has at any time had, in his possession any property of the corporation;
  - (ii) is indebted to the corporation; or
  - (iii) is capable of giving information concerning affairs of the corporation; and
- (d) where an inspector has reasonable grounds for suspecting or believing that a person is a person referred to in paragraph (c)—that person;

“prescribed direction” means a direction given—

- (a) pursuant to sub-section 290 (4); or
- (b) in the exercise of a power under sub-section 291 (1) or (2) otherwise than in response to a request made by the Commission under sub-section 291 (4),

not being a direction that has been approved by the Ministerial Council under sub-section 291 (6);

“relevant authority”, in relation to a direction or in relation to an investigation that is carried out, or is to be carried out, pursuant to a direction, means—

- (a) in the case of a direction given by the Commonwealth Minister other than a direction that has been approved by the Ministerial Council under sub-section 291 (6)—the Commonwealth Minister;
- (aa) in the case of a direction given by the Minister other than a direction that has been approved by the Ministerial Council under sub-section 291 (6)—the Minister; or
- (b) in the case of a direction given by the Ministerial Council or approved by the Ministerial Council under sub-section 291 (6)—the Ministerial Council.

(2) This Part does not authorize an investigation into affairs of a corporation in relation to business of the corporation that is life insurance business for the purposes of the *Life Insurance Act* 1945.

(3) Where 2 or more inspectors have been appointed under this Part to investigate affairs of a corporation, each of those inspectors may exercise his powers or perform his functions under this Part independently of the other inspector or inspectors.

(4) In relation to an investigation into affairs of a corporation carried out by the Commission—

- (a) a reference in section 295, 296, 297, 298, 308, 311 or 312 to an inspector shall be read as a reference to a member of the Commission or to an authorized agent of the Commission; and
- (b) the reference in section 310 to an inspector shall be read as a reference to the Commission.

(5) The reference in sub-section (4) to an authorized agent of the Commission shall be read as a reference to—

- (a) an employee of the Commission;
- (b) a person whose services are available to the Commission by virtue of arrangements made under sub-section 24 (1) or (2) of the *National Companies and Securities Commission Act* 1979; or
- (c) a person engaged under sub-section 25 (1) of that Act,

who is authorized by the Commission to act on behalf of the Commission in connection with the investigation concerned.

(6) In relation to an investigation into affairs of a corporation carried out pursuant to a prescribed direction, a reference in section 298, 306 (other than sub-section (6), (12) or (13)), 311 or 312 to the Commission shall be read as a reference to the relevant authority.

(7) An investigation under this Part shall, for the purposes of Part IV of the *Evidence Act*, 1898, be deemed to be a legal proceeding.

#### **Application for carrying out of investigation**

**290. (1)** An application for an investigation to be carried out into—

- (a) affairs of a corporation; or

(b) such of the affairs of a corporation as are specified in the application, may be made in writing to the Minister or the Ministerial Council.

**(2)** The application may be made—

- (a) where the corporation, not being a banking corporation, has a share capital—
  - (i) by not less than 100 members of the corporation;
  - (ii) by members holding not less than one-twentieth of the issued shares in the corporation; or
  - (iii) by members holding not less than one-twentieth of the paid-up capital of the corporation;
- (b) where the corporation is a banking corporation that has a share capital—by members holding not less than one-third of the issued shares in the corporation;
- (c) where the corporation does not have a share capital—by not less than one-twentieth of the members of the corporation;
- (d) where the corporation, not being a banking corporation, has issued debentures—by the trustee for the holders of the debentures or by the holders of not less than one-twentieth in nominal value of the debentures;
- (e) where the corporation has made available prescribed interests in relation to a financial or business undertaking, scheme, common enterprise or investment contract—by the trustee for or representative of the holders of those interests or by the holders of not less than one-twentieth of those interests; or
- (f) by the corporation pursuant to a special resolution.

**(3)** Where an application is made under this section, the applicants shall—

- (a) furnish such information in connection with the application as the Minister or the Ministerial Council, as the case may be, requires to enable the Minister or Ministerial Council to determine whether it is in the public interest in respect of the State that an investigation should be carried out into affairs of the corporation to which the application relates; and
- (b) where the Minister or the Ministerial Council, as the case may be, so requires—give to the Commission security of such amount and in such manner as the Minister or Ministerial Council determines for payment of the expenses of and incidental to the investigation.

(4) Where an application is made under this section to the Minister or the Ministerial Council and the Minister or the Ministerial Council, as the case may be, is satisfied that it is in the public interest in respect of the State that an investigation should be carried out into the affairs of the corporation to which the application relates, or into particular affairs of the corporation, and the applicants have complied with the provisions of this section, the Minister or the Ministerial Council, as the case may be, shall, by instrument in writing, direct the Commission to arrange for an investigation into the affairs, or into those particular affairs, of the corporation to which the application relates.

### **Investigations**

**291.** (1) Where it appears to the Minister that it is in the public interest in respect of the State that an investigation be carried out into the affairs, or into particular affairs, of a corporation, the Minister may, by instrument in writing, direct the Commission to arrange for the investigation into the affairs, or into those particular affairs, of that corporation.

(2) Where it appears to the Commonwealth Minister that it is in the national interest that an investigation be carried out into the affairs, or into particular affairs, of a company, the Commonwealth Minister may, by instrument in writing, direct the Commission to arrange for an investigation into the affairs, or into those particular affairs, of that company.

(3) The Ministerial Council may, by instrument in writing, direct the Commission to arrange for an investigation into the affairs, or into particular affairs, of a company.

(4) The Commission may request the Minister or the Commonwealth Minister in writing to exercise his powers under sub-section (1) or (2) to direct the Commission to arrange for an investigation into affairs of a corporation.

(5) The Commission may request the Ministerial Council in writing to exercise its power under sub-section (3) to direct the Commission to arrange for an investigation into affairs of a company.

(6) Where a direction is given by the Minister under sub-section 290 (4) or under sub-section (1) of this section or by the Commonwealth Minister under sub-section (2) of this section, the Ministerial Council may, if it thinks fit, approve the direction.

**Conduct of investigations**

- 292.** (1) An instrument containing a prescribed direction—
- (a) shall specify the matters that are to be investigated;
  - (b) may require the investigation to be carried out by the Commission or require it to be carried out by an inspector to be appointed by the Commission; and
  - (c) in the case of an investigation that is to be carried out by an inspector appointed by the Commission—may require a specified person to be appointed as the inspector and may require him to be appointed on specified terms and conditions.
- (2) An instrument containing a direction other than a prescribed direction—
- (a) shall specify the matters that are to be investigated; and
  - (b) may be accompanied by a statement in writing setting out the views of the relevant authority as to—
    - (i) whether the investigation should be carried out by the Commission or by an inspector appointed by the Commission; and
    - (ii) if the Commission decides to appoint an inspector to carry out the investigation—the person who should be appointed and the terms and conditions of his appointment.
- (3) Where the Commission receives a direction, the Commission shall—
- (a) in the case of a prescribed direction—comply with any requirements specified in the direction; and
  - (b) in the case of any other direction—
    - (i) take into account any views expressed by the relevant authority in a statement accompanying the direction;
    - (ii) if the Commission decides to arrange for the investigation to which the direction relates to be carried out contrary to the wishes of the relevant authority—notify the relevant authority accordingly; and

- (iii) if, after the Commission so notifies the relevant authority, the Ministerial Council gives any instructions to the Commission in relation to the investigation—comply with those instructions.

- (4)** Where the Commission receives a direction, the Commission shall—
- (a) arrange for an investigation to be carried out into the matters specified in the instrument containing the direction; and
  - (b) subject to sub-section (3)—
    - (i) decide whether the investigation is to be carried out by the Commission or by an inspector to be appointed by the Commission; and
    - (ii) if it decides that the investigation should be carried out by an inspector—appoint the inspector on such terms and conditions as the Commission determines.

- (5)** Where, pursuant to a direction, an investigation is being carried out by the Commission or by an inspector appointed by the Commission, the Commission shall, if, and only if, it is so directed by the relevant authority—

- (a) arrange for the investigation to be extended to additional matters;
- (b) terminate the investigation, or terminate the investigation in so far as it relates to particular matters; or
- (c) in the case of an investigation that is being carried out by an inspector—terminate, or vary the terms and conditions of, the appointment of the inspector,

before the completion of the investigation.

- (6)** Where the Commission is directed under sub-section 290 (4) or 291 (1), (2) or (3) to arrange for an investigation into affairs of a corporation, the Commission shall cause to be published in the *Gazette* a notice stating that the direction has been given and specifying the affairs concerned.

- (7)** A notice referred to in sub-section (6) shall—
- (a) if the investigation is being or is to be carried out by the Commission—state that fact; or
  - (b) if the investigation is being or is to be carried out by an inspector—state that fact and specify the name of the inspector.

**(8)** Where the Commission ceases to carry out an investigation or the appointment of an inspector to carry out an investigation is terminated, the Commission shall cause notice of the cessation or termination to be published in the *Gazette*.

**(9)** A certificate by the Commission stating that—

- (a) an investigation into a matter specified in the certificate, being a matter relating to affairs of a corporation, is being or is to be carried out by the Commission; or
- (b) an investigation into a matter specified in the certificate, being a matter relating to affairs of a corporation, is being or is to be carried out by an inspector named in the certificate,

is *prima facie* evidence of the matters stated in the certificate and, in the case of an investigation by an inspector, that the inspector has been duly appointed.

#### **Investigation of affairs of related corporation**

**293. (1)** Where the Commission thinks it necessary, for the purposes of an investigation being carried out by the Commission into affairs of a corporation, to investigate affairs of a corporation that is or has at any relevant time been related to the first-mentioned corporation, the Commission may, with the consent in writing of the relevant authority, investigate the affairs of that related corporation or such of the affairs of that related corporation as are specified by the relevant authority.

**(2)** Where an inspector appointed under this Division to investigate the affairs of a corporation thinks it necessary, for the purposes of that investigation, to investigate affairs of a corporation that is or has at any relevant time been related to that corporation, he may, with the consent in writing of the relevant authority, investigate the affairs of that related corporation or such of the affairs of that related corporation as are specified by the relevant authority.

**(3)** Where—

- (a) an investigation is carried out under this Part into affairs of a corporation pursuant to a direction; and
- (b) an investigation under this section is carried out into affairs of a corporation that is related to the first-mentioned corporation,

the last-mentioned investigation shall be deemed, for the purposes of this Part, to be carried out pursuant to that direction.

**Powers of Commission and inspectors appointed under corresponding law**

**294. (1)** Where, pursuant to a direction given to the Commission under the provisions of a law of a participating State or of a participating Territory that correspond with this Part—

- (a) the Commission is carrying out an investigation into affairs of a corporation; or
- (b) in relation to an investigation being carried out by the Commission under that law into affairs of a corporation, any necessary consent has been given for the investigation, by the Commission, of affairs of a corporation that is or has been related to that corporation,

the Commission may exercise, in relation to the corporation referred to in paragraph (a) or the related corporation referred to in paragraph (b), as the case may be, the powers that it would have if it were carrying out an investigation under this Part into—

- (c) in a case to which paragraph (a) applies—the matters specified in the direction in accordance with the provision of a law of that State or Territory that corresponds with sub-section 292 (1) or (2); or
- (d) in a case to which paragraph (b) applies—the matters specified pursuant to the provision of a law of that State or Territory that corresponds with sub-section 293 (1).

**(2)** Where, pursuant to a direction given to the Commission under the provisions of a law of a participating State or of a participating Territory that correspond with this Part—

- (a) a person has been appointed as an inspector to carry out an investigation into affairs of a corporation; or
- (b) in relation to an investigation being carried out by a person appointed as an inspector under that law into affairs of a corporation, any necessary consent has been given for the investigation, by that person, of affairs of a corporation that is or has been related to that corporation,

that person may exercise, in relation to the corporation referred to in paragraph (a) or the related corporation referred to in paragraph (b), as the case may be, the powers of an inspector under this Part that he would have if he had been appointed as an inspector under this Part to investigate—

- (c) in a case to which paragraph (a) applies—the matters specified in the direction in accordance with the provision of a law of that State or Territory that corresponds with sub-section 292 (1) or (2); or
- (d) in a case to which paragraph (b) applies—the matters specified pursuant to the provision of a law of that State or Territory that corresponds with sub-section 293 (2).

#### **Powers of inspectors**

**295. (1)** An inspector may, by notice in writing containing the prescribed matters given in the prescribed manner, require an officer of a corporation affairs of which are being investigated under this Part—

- (a) to produce to the inspector such books of the corporation and other books relating to affairs of the corporation as are in the custody or under the control of the officer;
- (b) to give to the inspector all reasonable assistance in connection with the investigation; and
- (c) to appear before the inspector for examination on oath or affirmation and to answer questions put to him,

and may administer an oath or affirmation to that officer.

**(2)** A notice given pursuant to paragraph (1) (c) shall set out the provisions of sub-sections 296 (6) and (7).

**(3)** Where an inspector has reasonable grounds for believing that books in the custody or under the control of a person may be relevant to any of the matters relating to affairs of a corporation that are being investigated under this Part, the inspector may, by notice in writing containing the prescribed matters given in the prescribed manner, require that person to produce those books to the inspector.

**(4)** \* \* \* \*

**(5)** An inspector shall not exercise his powers under sub-section (1) in respect of an officer of a corporation affairs of which he is investigating under section 293 unless he has furnished to the officer a certificate in the prescribed form stating that he is investigating affairs of the corporation under that section and that the officer is an officer of the corporation.

**(6)** Where books are produced to an inspector under this Part, the inspector may take possession of the books for such period as he considers necessary for the purposes of the investigation, and during that period he shall permit a person who would be entitled to inspect any one or more of those books if they were not in the possession of the inspector to inspect at all reasonable times such of those books as that person would be so entitled to inspect.

**Examination of officers**

**296. (1)** Where affairs of a corporation are being investigated under this Part, the following provisions of this section have effect.

**(2)** An officer of the corporation shall not, without reasonable excuse, refuse or fail to comply with a requirement made under section 295.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(3)** An officer of the corporation shall not, in purported compliance with a requirement made under section 295, furnish information that is false or misleading in a material particular.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(4)** An officer of the corporation shall not, when appearing before an inspector for examination pursuant to paragraph 295 (1) (c), make a statement that is false or misleading in a material particular.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(5)** An officer of the corporation shall not, when appearing before an inspector for examination pursuant to paragraph 295 (1) (c), refuse or fail to take an oath or make an affirmation.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**(6)** A duly qualified legal practitioner acting for an officer—

(a) may attend an examination of that officer; and

(b) may, at such times during the examination as the inspector determines—

(i) address the inspector; and

(ii) examine the officer,

in relation to matters in respect of which the inspector has questioned the officer.

(7) An officer is not excused from answering a question put to him by an inspector on the ground that the answer might tend to incriminate him but, where the officer claims, before answering the question, that the answer might tend to incriminate him, the answer is not admissible in evidence against him in criminal proceedings other than proceedings under sub-section (2), (3) or (4) or other proceedings in respect of the falsity of the answer.

(8) A claim referred to in sub-section (7) may be made in any form of words agreed between the officer and the inspector.

(9) A person who complies with a requirement of an inspector under section 295 does not incur a liability to any person by reason only of that compliance and, for the purposes of this sub-section, a certificate under sub-section 295 (5) is conclusive evidence of the matters stated in that certificate.

(10) A person who is required to attend for examination pursuant to paragraph 295 (1) (c) is entitled to such allowances and expenses as are prescribed.

(11) The Commission may, in its discretion, pay, on account of the costs and expenses incurred by a person in complying with a requirement under paragraph 295 (1) (a) or (b), such amount as it thinks reasonable.

(12) Where, in the opinion of an inspector, a legal practitioner acting for an officer is attempting to obstruct the examination of the officer by the exercise of the rights conferred on him under sub-section (6) to address the inspector or to examine the officer, the inspector may require the legal practitioner to cease to address him or to cease to examine the officer, as the case may be.

(13) Where an inspector makes a requirement of a legal practitioner under sub-section (12), the legal practitioner shall not refuse or fail to comply with that requirement.

#### **Officer or other person failing to comply with requirement of this Part**

**297. (1)** Where an inspector appointed to investigate affairs of a corporation is satisfied that an officer of a corporation or another person has, without reasonable excuse, failed to comply with a requirement of the inspector made under section 295, the inspector may, by writing signed by him, certify the failure to the Court.

(2) Where an inspector gives a certificate under sub-section (1) in relation to an officer of a corporation or another person, the Court may inquire into the case and—

- (a) order the officer or the other person, as the case may be, to comply with the requirement of the inspector within such period as is fixed by the Court; or
- (b) if the Court is satisfied that the officer or the other person, as the case may be, failed, without reasonable excuse, to comply with the requirement of the inspector, punish him in like manner as if he had been guilty of contempt of the Court and, if it sees fit, also make an order pursuant to paragraph (a).

(3) The powers of the Court under this section may be exercised in relation to an officer or another person notwithstanding that the officer or other person has been convicted of an offence in relation to the matters in respect of which the powers are to be exercised.

#### **Record of examination**

**298. (1)** An inspector may cause to be made a record of the questions asked and the answers given at an examination under this Part.

(2) Where a record of the questions asked and the answers given at an examination under this Part is in writing or is reduced to writing—

- (a) the inspector may require the person to read the written record or have the written record read to him and may require him to sign the written record; and
- (b) if the person requests the inspector in writing to furnish him with a copy of the written record, the inspector shall furnish the copy to the person without charge but subject to such conditions (if any) as the inspector imposes.

(3) A written record of the examination of a person under this Part that is signed by the person as mentioned in sub-section (2) or is authenticated in any other prescribed manner is *prima facie* evidence of the questions asked and the answers given at the examination.

(4) A person to whom a copy of a written record of an examination is given under paragraph (2) (b) and any person who comes into possession of the copy or a copy of the copy shall comply with any conditions imposed by the inspector under that paragraph.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(5) Nothing in this section affects or limits the admissibility in any criminal or civil proceedings of other evidence of the questions asked and answers given at an examination under this Part.

(6) The Commission may give a copy of a written record made of an examination under this Part and a copy of any related book to a duly qualified legal practitioner who satisfies the Commission that he is acting for a person who is conducting, or is, in good faith, contemplating, criminal or civil proceedings in respect of any matters into which an investigation has been or is being made by an inspector under this Part.

(7) A duly qualified legal practitioner to whom a copy of a written record of an examination or of a related book is given under sub-section (6) or any other person who comes into possession of the copy, or a copy of the copy, shall not use the copy otherwise than in connection with the institution or preparation of, or in the course of, criminal or civil proceedings and shall not publish or communicate for any other purpose the copy or any part of the contents of the copy to any other person.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(8) The Commission may if it thinks fit give a copy of a written record made of an examination under this Part and of any related book to any other person subject to such conditions as the Commission imposes.

(9) A person to whom a copy of a written record of an examination or of a related book is given under sub-section (8) and any person who comes into possession of the copy or a copy of the copy shall comply with any conditions imposed by the Commission under that sub-section.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(10) When a final report is made in respect of an investigation under this Part, any record made of questions asked and answers given at an examination relating to the investigation shall be furnished with the report.

#### **Admissibility of record of examination in evidence in proceedings against person examined**

**299. (1)** Except as provided by sub-section (2), any questions asked and answers given at an examination of a person under this Part are admissible in evidence in any criminal or civil proceedings against the person.

(2) Evidence of an answer given by a person at an examination under this Part shall not be admitted in evidence in criminal or civil proceedings against the person if—

- (a) the proceedings are criminal proceedings (other than proceedings for an offence against sub-section 296 (2), (3) or (4) or other proceedings in respect of the falsity of the answer) and, before answering the question, the person claimed that the answer might tend to incriminate him;
- (b) the question and answer are not relevant to the proceedings and the person objects to the admission of the evidence;
- (c) the answer is qualified or explained by some other answer given at the examination, evidence of the other answer is not tendered in the proceedings and the person objects to the admission of the evidence of the first-mentioned answer; or
- (d) the answer disclosed matter in respect of which a claim of legal professional privilege could be made by the person in the proceedings if the provisions of this Division did not apply in relation to that evidence, and the person objects to the admission of the evidence.

(3) This section applies whether the proceedings against the person examined are heard alone or together with proceedings against another person.

**Admissibility in other proceedings of questions and answers at an examination**

**300.** Where, in any criminal or civil proceedings, direct evidence by a person of a matter would be admissible, a question asked of, and answer given by, the person at an examination under this Part that tends to establish that matter are admissible in those proceedings as evidence of that matter—

- (a) if it appears to the court in which the proceedings are instituted—
  - (i) that the person examined is dead or is unfit, by reason of any physical or mental incapacity, to attend as a witness;
  - (ii) that the person is outside the State and it is not reasonably practicable to secure his attendance; or
  - (iii) that all reasonable steps have been taken to find the person and he cannot be found; or

- (b) in a case to which paragraph (a) does not apply—unless a party to the proceedings, other than the party tendering evidence of the question and answer, requires the tendering party to call the person as a witness in the proceedings and the tendering party does not call the person as a witness in the proceedings.

#### **Weight of evidence**

**301.** In ascertaining the weight (if any) to be attached to evidence of questions and answers admitted under section 300 in any proceedings, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the evidence, including—

- (a) the recency or otherwise at the time when the examination concerned took place of any relevant matter dealt with at the examination; and
- (b) the presence and nature, or the absence, of any incentive for the person examined to conceal or misrepresent any relevant matter in his answers.

#### **Credibility of person who answered questions**

**302. (1)** Where evidence of questions and answers is admitted under section 300 in any proceedings and the person examined is not called as a witness in the proceedings, evidence is admissible where, if the person examined had been called as a witness, the evidence would have been admissible for the purpose of destroying or supporting his credibility.

**(2)** Evidence is admissible to show that a statement made by a person referred to in sub-section (1) is inconsistent with another statement made by him at any time.

**(3)** Notwithstanding sub-sections (1) and (2), evidence is not admissible of any matter of which, if the person referred to in sub-section (1) had been called as a witness and denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.

#### **Determination of objection to admissibility of question and answer**

**303. (1)** A party to any criminal or civil proceedings may, not later than 14 days before the commencement of the hearing of the proceedings, serve upon another party notice that the first-mentioned party proposes to tender as evidence in the proceedings the written record of an examination under this Part or a specified part of the written record of such an examination.

(2) Where a notice is served under sub-section (1), the other party may, within 14 days after the service of the notice or within such longer period as is agreed by the parties or allowed by the court or tribunal in which the proceedings are brought, give notice to the tendering party stating that he objects to the admission in evidence of all or any of the questions and answers contained in the written record or the part of the written record proposed to be tendered and, if he objects to the admission of some only of the questions and answers, specifying the questions and answers concerned.

(3) A notice under sub-section (2) shall, in relation to each question and answer objected to, specify the grounds upon which the objection is taken.

(4) Upon receipt of a notice under sub-section (2), the tendering party shall send a copy of the notice to the court or tribunal in which the proceedings are brought.

(5) Upon receipt of a copy of the notice, the court or tribunal in which the proceedings are brought may, in its discretion, either determine the objections specified in the notice as a preliminary point of law before the commencement of the hearing of the proceedings or defer the determination of the objections until the hearing of the proceedings.

(6) At the hearing of the proceedings, a party is not entitled, without the leave of the court or tribunal hearing the proceedings, to take any objection to the admission in evidence of the written record, or a part of the written record, of an examination under this Part in respect of which a notice was given to him under sub-section (1) if he could have objected to the tender of the written record or of that part of the written record by a notice under sub-section (2) but did not so object.

(7) Nothing in this section renders inadmissible in any criminal or civil proceedings any evidence that would have been admissible if this section had not been enacted.

#### **Delegation by inspector**

**304. (1)** An inspector may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to a person any of his powers or functions under this Part other than this power of delegation.

(2) The power of delegation conferred on an inspector under sub-section (1) does not, except in the case of an inspector being a body corporate that is an authority of a State or Territory, extend to delegating the power to administer oaths or affirmations or the power to examine on oath or affirmation.

(3) Any act or thing done in the exercise of a power or the performance of a function by a person to whom that power or function has been delegated by an inspector under sub-section (1) has the same force and effect as if it had been done by the inspector.

(4) A delegate shall, at the request of an officer of a corporation, produce the instrument of delegation for inspection.

(5) A delegation under this section by an inspector does not prevent the exercise or performance of a power or function by the inspector.

### **Reports of investigations**

**305.** (1) Where an investigation is being carried out by an inspector appointed pursuant to a direction other than a prescribed direction, the inspector may, and if so directed by the Commission shall, make interim reports to the Commission, and, on the completion or termination of the investigation, the inspector shall report to the Commission his opinion on or in relation to the affairs of the corporation or corporations that he has investigated, together with the facts on which his opinion is based.

(2) Where an investigation is being carried out by an inspector appointed pursuant to a prescribed direction, the inspector may, and if so directed by the relevant authority shall, make interim reports to the relevant authority and, on the completion or termination of the investigation, the inspector shall report to the relevant authority his opinion on or in relation to the affairs of the corporation or corporations that he has investigated, together with the facts on which his opinion is based.

(3) Where an investigation is being carried out by the Commission, the Commission may, and if so directed by the relevant authority shall, make interim reports to the relevant authority and, on the completion or termination of the investigation, the Commission shall report to the relevant authority its opinion on or in relation to the affairs of the corporation or corporations that it has investigated, together with the facts upon which its opinion is based.

**Provisions relating to reports**

**306.** (1) Subject to sub-section (3), a copy of a final report prepared pursuant to section 305 shall, and a copy of the whole or any part of an interim report may if the Commission thinks fit, be sent by the Commission to the registered office of the corporation to which the report relates, being the registered office in the place where the corporation was formed, and a copy of a report so sent shall, at the request of an applicant under section 290, be furnished to him by the Commission.

(2) Subject to sub-sections (3) and (4), the Commission shall give a copy of a report made under this Part to each other person to whom, in the opinion of the Commission, the report ought to be given by reason that it relates to affairs of that person to a material extent.

(3) The Commission is not bound to furnish a corporation or any other person with a copy of any part of a report made under this Part or with a complete copy of such a report if the Commission is of the opinion that there is good reason for not divulging the contents of the report or of parts of the report.

(4) Subject to sub-section (5), the Commission shall not give a copy of a report under this Part to a person under sub-section (2) if the Commission believes that legal proceedings that have been, or that in its opinion might be, instituted might be unduly prejudiced by giving the report to that person.

(5) A court before which legal proceedings are brought against a person for or in respect of matters dealt with in a report under this Part may order that a copy of the report or of a part of the report be given to that person.

(6) Subject to sub-section (7)—

- (a) the Ministerial Council may cause to be printed and published the whole or any part of a report under this Part that relates to an investigation the expenses of which are, under the Agreement, to be borne by the Commission;
- (b) the Minister may cause to be printed and published the whole or any part of a report under this Part that relates to an investigation the expenses of which are, under the Agreement, to be borne by the State; and
- (c) the Commonwealth Minister may cause to be printed and published the whole or any part of a report under this Part that relates to an investigation the expenses of which are, under the Agreement, to be borne by the Commonwealth.

**(7) Where—**

- (a) the Ministerial Council, the Minister or the Commonwealth Minister would, but for this sub-section, have power to publish a report;
- (b) the Ministerial Council, the Minister or the Commonwealth Minister, as the case may be, receives—
  - (i) a certificate of the Attorney-General of a State stating that the publication of the report would be prejudicial to the administration of justice in that State;
  - (ii) a certificate of the Attorney-General of the Commonwealth stating that the publication of the report would be prejudicial to the administration of justice in a Territory (not being the Northern Territory) specified in the certificate; or
  - (iii) a certificate of the Attorney-General of the Northern Territory stating that the publication of the report would be prejudicial to the administration of justice in that Territory; and
- (c) the Ministerial Council, the Minister or the Commonwealth Minister, as the case may be, has not received a further certificate of that Attorney-General stating that the publication of the report would no longer be prejudicial to the administration of justice in the relevant State or Territory,

the Ministerial Council, the Minister or the Commonwealth Minister, as the case may be, shall not cause or permit that report to be published in whole or in part.

**(8)** If from a report under this Part or from the record of an examination under this Part, it appears to the Commission that an offence may have been committed by a person and that a prosecution ought to be instituted, the Commission shall cause a prosecution to be instituted and prosecuted.

**(9)** Where it appears to the Commission that a prosecution ought to be instituted, it may, by notice in writing given before or after the institution of a prosecution in accordance with sub-section (8), require a person whom it suspects or believes on reasonable grounds to be capable of giving information concerning any matter to which the prosecution relates (not being a person who is or, in the opinion of the Commission, is likely to be a defendant in the proceedings or is or has been a duly qualified legal practitioner acting for such a person) to give all assistance in connection with the prosecution or proposed prosecution that he is reasonably able to give.

(10) Where a person to whom a notice has been given under sub-section (9) fails to comply with a requirement specified in the notice, the Court may, on the application of the Commission, direct that person to comply with the requirement.

(11) If, from a report under this Part, or from the record of an examination under this Part, the Commission is of the opinion that proceedings ought in the public interest to be brought by a corporation for the recovery of damages in respect of fraud, negligence, default, breach of trust, breach of duty or other misconduct in connection with affairs of, or for the recovery of property of, the corporation to which the report or record relates, the Commission may cause proceedings to be brought accordingly in the name of the corporation.

(12) A copy of a report of an inspector under this Part purporting to be certified as such a report by the Commission is admissible in civil proceedings as evidence of—

- (a) the inspector's report of his opinion for the purposes of paragraph 364 (1) (g) or sub-paragraph 470 (1) (c) (iv); and
- (b) any facts or matters stated in the report to have been found to exist by the inspector.

(13) A copy of a report of the Commission under this Part purporting to be certified as such a report by the Commission is admissible in civil proceedings as evidence of—

- (a) the Commission's report of its opinion for the purposes of paragraph 364 (1) (g) or sub-paragraph 470 (1) (c) (iv); and
- (b) any facts or matters stated in the report to have been found to exist by the Commission.

(14) Nothing in this section operates to diminish the protection afforded to witnesses by the *Evidence Act, 1898*.

#### **Commission's powers in respect of books**

**307. (1)** An inspector may, when making a report under this Part, give to the Commission books of which he has taken possession under sub-section 295 (6) and the Commission—

- (a) may retain the books for such period as it considers to be necessary to enable a decision to be made as to whether or not legal proceedings ought to be instituted as a result of the investigation;

- (b) may retain the books for such further period as it considers to be necessary to enable any such proceedings to be instituted and prosecuted;
- (c) may permit other persons to inspect the books while they are in its possession;
- (d) may permit the use of the books for the purposes of legal proceedings instituted as a result of the investigation; and
- (e) shall permit a person who would be entitled to inspect any one or more of the books if they were not in the possession of the Commission to inspect at all reasonable times such of the books as that person would be so entitled to inspect.

**(2)** Where the Commission takes possession of books under sub-section 295 (6), the Commission has such powers and obligations with respect to those books as it would have if it had been given those books by an inspector pursuant to sub-section (1) of this section.

#### **Privileged communications**

**308.** Where in the exercise of his powers under section 295 an inspector requires a duly qualified legal practitioner to disclose a privileged communication made by or on behalf of or to that legal practitioner in his capacity as a legal practitioner, the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by or on behalf of whom the communication was made or, if the person is a body corporate that is under official management or in the course of being wound up, the official manager or the liquidator, as the case may be, agrees to the legal practitioner complying with the requirement but, where the legal practitioner so refuses to comply with a requirement, he shall, if he knows the name and address of the person to whom or by or on behalf of whom the communication was made, forthwith furnish that name and address in writing to the inspector.

Penalty: \$1,000 or imprisonment for 3 months, or both.

#### **Expenses of investigation**

**309. (1)** Subject to this section and to clause 18 of the Agreement, the expenses of and incidental to an investigation shall be paid by the Commission.

(2) For the purposes of this section, the expenses of and incidental to an investigation under this Part include—

- (a) the expenses incurred in any proceedings brought in the name of a corporation under sub-section 306 (11); and
- (b) in the case of an investigation carried out pursuant to a direction that is approved by the Ministerial Council pursuant to sub-section 291 (6)—the expenses (if any) incurred before the direction is so approved.

(3) Where an investigation has been carried out under this Part and proceedings are instituted under sub-section 306 (11) or otherwise as a result of that investigation, the Commission may make one or more of the following orders, namely:

- (a) that a specified person pay, within the time and in the manner specified in the order, the whole, or a specified part, of the expenses of and incidental to the investigation;
- (b) where expenses have been paid by the Commission, that a specified person reimburse the Commission, within the time and in the manner specified in the order, to the extent of the payment;
- (c) that a specified person, within the time and in the manner specified in the order, pay, or reimburse the Commission in respect of, the whole, or a specified part, of the cost to the Commission of carrying out the investigation, including the remuneration of any employee of the Commission concerned with the investigation.

(4) Where the Commission is of the opinion that the whole or any part of the expenses of and incidental to an investigation into affairs of a corporation under this Part should be paid by the corporation, the Commission may by order in writing direct the corporation to pay a specified amount, being the whole or part of those expenses, within the time and in the manner specified.

(5) Where a person or corporation has failed to comply with an order of the Commission under sub-section (3) or (4), proceedings may be taken in a court of competent jurisdiction to recover the amount in question as a debt due to the Commission.

(6) An inspector may include in his report a recommendation whether an order under sub-section (3) or (4) should be made or whether orders under both those sub-sections should be made.

**(7) Where—**

- (a) pursuant to a direction given as a result of an application under sub-section 290 (1), the Commission carried out an investigation, or an inspector was appointed to carry out an investigation, into affairs of a corporation;
- (b) the applicants have given security in accordance with sub-section 290 (3); and
- (c) the corporation fails to comply with an order under sub-section (4), the security may, in the discretion of the Commission, be forfeited to the Commission or, if the amount that the corporation has failed to pay pursuant to an order is less than the amount of the security, a part of the security equal to the amount remaining unpaid may, in the discretion of the Commission, be forfeited to the Commission.

**(8) Where**, in a case where the expenses of and incidental to an investigation or part of those expenses have been or are to be borne by a party to the Agreement, the expenses or part of the expenses borne or to be borne by that party are recovered by the Commission pursuant to this section, the Commission shall, to the extent of the amount recovered, reimburse or credit that party.

**Concealing, &c., of books of corporation****310. (1) A person who—**

- (a) conceals, destroys, mutilates or alters a book of or relating to a corporation affairs of which are the subject of investigation by an inspector under this Part;
- (b) where such a book is in the State—sends the book out of the State; or
- (c) where such a book is outside the State but is within Australia—sends the book out of Australia,

is guilty of an offence.

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

**(2)** It is a defence to a prosecution for an offence against sub-section (1) if the defendant proves that he did not act with intent to defeat the purposes of this Part or to delay or obstruct the carrying out of an investigation under this Part.

**Power of Commission to make certain orders**

**311. (1)** Where an investigation into affairs of a corporation is being made under this Part and it appears to the Commission that facts concerning affairs of the corporation cannot be ascertained because an officer of the corporation has failed or refused to comply with a requirement of an inspector under section 295, the Commission may, by instrument in writing published in the *Gazette*, make one or more of the following orders:

- (a) an order restraining a specified person from disposing of any interest in specified securities of the corporation;
- (b) an order restraining a specified person from acquiring any interest in specified securities of the corporation;
- (c) an order restraining the exercise of any voting or other rights attached to specified securities of the corporation;
- (d) an order directing a person who is registered as the holder of securities in respect of which an order under this section is in force to give notice in writing of that order to any person whom he knows to be entitled to exercise a right to vote attached to those securities;
- (e) an order directing the corporation not to make payment, except in the course of winding up, of any sum due from the corporation in respect of specified securities of the corporation;
- (f) an order directing the corporation not to register the transfer or transmission of specified securities of the corporation;
- (g) an order directing the corporation not to issue shares to a person who holds shares in the corporation, being shares that were proposed to be issued to the person by reason of his holding shares in the corporation or pursuant to an offer or invitation made or issued to him by reason of his holding shares in the corporation.

**(2)** A copy of an order under sub-section (1) and of any order by which it is varied or revoked shall be served—

- (a) on any person affected by the order; and
- (b) on the corporation.

**(3)** Where an order made under sub-section (1) is in force, a person aggrieved by the order may apply to the Court for variation or revocation of the order and the Court may, if it is satisfied that it is reasonable to do so, vary the order or revoke the order and any order by which it has been varied.

(4) A person who contravenes or fails to comply with an order under sub-section (1) is guilty of an offence and, where that person is a corporation, each officer (as defined in sub-section 5 (1)) of the corporation who is in default is guilty of an offence.

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

#### **Application for winding up**

**312. (1)** Where a report of an investigation under this Part has been made by an inspector, application may be made to the Court by the Commission—

- (a) if the corporation the subject of the report was incorporated or deemed to be incorporated under this Code or any corresponding previous law of the State—for the winding up of the corporation; or
- (b) if the corporation the subject of the report is a body to which Division 6 of Part XII applies—for the winding up of the corporation in accordance with that Division.

**(2)** Upon the making of the application, the provisions of this Code, with such adaptations as are necessary, apply as if—

- (a) in the case of a corporation to which paragraph (1) (a) applies—a winding up application had been filed with the Court by the corporation; and
- (b) in the case of a corporation to which paragraph (1) (b) applies—a winding up application had been filed with the Court by a creditor or contributory of the corporation upon the dissolution of the corporation in the place in which it was formed.

**(3)** Where, in the case of a corporation to which paragraph (1) (b) applies, on an application under sub-section (1) an order is made for the winding up of the corporation, the corporation shall not carry on business or establish or keep a place of business in the State.

**(4)** A copy of an application by the Commission under sub-section (1) shall be served on the corporation to which it refers.

#### **Certain powers not to be delegated**

**313.** The Commission shall not delegate to any person its power under this Part to appoint an inspector to carry out an investigation, to determine the terms and conditions of such an appointment or to terminate such an appointment or the power to make orders under section 311.

## **PART VIII—ARRANGEMENTS AND RECONSTRUCTIONS**

### **Crown to be bound**

**314.** This Part binds the Crown in right of New South Wales and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

### **Power to compromise with creditors and members**

**315. (1)** Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting or meetings of the creditors or class of creditors or of the members of the company or class of members to be convened in such manner, and to be held in such place or places within or outside the State, as the Court directs and, where the Court makes such an order, the Court may approve the explanatory statement required by paragraph 316 (1) (a) to accompany notices of the meeting or meetings.

**(2)** The Court shall not make an order pursuant to an application under sub-section (1) unless 14 days notice of the hearing, or such lesser period of notice as the Court or the Commission permits, has been given to the Commission.

**(3)** The Court shall not make an order under sub-section (1) that a meeting be held in another State or in a Territory unless it appears to the Court that—

- (a) in the case of a meeting in respect of a proposed compromise or arrangement between the company and its creditors or any class of them—some or all of those creditors, or of the creditors included in that class, as the case may be, reside in that State or Territory; or
- (b) in the case of a meeting in respect of a proposed compromise or arrangement between the company and its members or any class of them—some or all of those members, or of the members included in that class, as the case may be, reside in that State or Territory.

(4) A compromise or arrangement is binding on the creditors, or on a class of creditors, or on the members, or on a class of members, as the case may be, of the company and on the company or, if the company is in the course of being wound up, on the liquidator and contributories of the company, if, and only if—

- (a) at a meeting convened in accordance with an order of the Court under sub-section (1)—
  - (i) in the case of a compromise or arrangement between a company 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 not less than 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 company and its members or a class of members—the compromise or arrangement is agreed to by a majority in number of the members, or of the members included in that class of members, present and voting, either in person or by proxy, being, in the case of a company having a share capital, a majority whose shares have nominal values that amount, in the aggregate, to not less than 75% of the total of the nominal values of all the shares of the members present and voting in person or by proxy, or of the members included in that class present and voting in person or by proxy, as the case may be; 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 shall, for the purposes of sub-section (4), be deemed together to constitute a single meeting and the votes in favour of the proposed compromise or arrangement cast at each of the meetings shall be aggregated, and the votes against the proposed compromise or arrangement cast at each of the meetings shall be aggregated, accordingly; or

- (b) in the case of meetings of members—the meetings shall, for the purposes of sub-section (4), be deemed together to constitute a single meeting and the votes in favour of the proposed compromise or arrangement cast at each of the meetings shall be aggregated, and the votes against the proposed compromise or arrangement cast at each of the meetings shall 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.

**(7)** Except with the leave of the Court, a person shall not be appointed to administer, and shall not administer, a compromise or arrangement approved under this Code between a company and its creditors or any class of them or between a company 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 is—

- (a) a mortgagee of any property of the company;
- (b) an auditor or an officer of the company;
- (c) an officer of any corporation that is a mortgagee of property of the company; or
- (d) a person who is not a registered liquidator.

**(8)** For the purposes of sub-section (7), a person shall be deemed to be an officer of the company if—

- (a) he is an officer of a related corporation; or
- (b) except where the Commission, if it thinks fit in the circumstances of the case, directs that this paragraph shall not apply in relation to him—he has, at any time within the immediately preceding period of 12 months, been an officer or promoter of the company or of a related corporation.

**(9)** Nothing in paragraph (7) (d) prohibits the appointment to administer a compromise or arrangement of a corporation authorized by any Act or any law of the State to administer a compromise or arrangement to which a company is a party.

**(10)** Nothing in sub-section (7) disqualifies a person from administering a compromise or arrangement pursuant to an appointment validly made before the commencement of the *Companies (Application of Laws) Act, 1981*.

**(11)** Where a person is or persons are appointed, whether by the terms of a compromise or arrangement or pursuant to a power given by the terms of a compromise or arrangement, to administer the compromise or arrangement—

- (a) section 325, sub-sections 326 (1A) and (2) and sections 327, 330 and 332 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 the property of the company; and
  - (ii) a reference in any of those sections or sub-sections to a receiver, or to a receiver of the property, of a company were a reference to that person or to those persons; and
- (b) section 420 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 company; and
  - (ii) a reference in that section to a liquidator were a reference to that person or to those persons.

**(12)** 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 the Commission, and upon being so lodged, notwithstanding sub-section 72 (5), the order takes effect, or shall be deemed to have taken effect, on and from the date of lodgment or such earlier date as the Court determines and specifies in the order.

**(13)** Subject to sub-section (14), a copy of every order of the Court made for the purposes of paragraph (4) (b) shall be annexed to every copy of the memorandum of the company issued after the order has been made or, in the case of a company not having a memorandum, to every copy so issued of the constituent documents of the company.

**(14)** The Court may, by order, exempt a company from compliance with the requirements of sub-section (13) or determine the period during which the company shall comply with those requirements.

**(15)** Where a compromise or arrangement referred to in sub-section (1) (whether or not for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any 2 or more companies) has been proposed, the directors of the company shall—

- (a) if a meeting of the members of the company 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 company for inspection by the shareholders and creditors of the company at least 7 days before the date of any meeting ordered by the Court to be convened as provided in sub-section (1).

**(16)** A company that makes default in complying with sub-section (13) and any officer of the company who is in default are each guilty of an offence.

**(17)** If default is made in complying with sub-section (15), each director of the company is guilty of an offence.

**(18)** Where no order has been made or resolution passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of them, the Court may, in addition to exercising any of its other powers, on the application in a summary way of the company or of any member or creditor of the company, restrain further proceedings in any action or other civil proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.

**(19)** Where an order is made by the Supreme Court of a participating State or of a participating Territory under the provision of the law of that State or Territory that corresponds with sub-section (1) and an office copy of the order is filed in the office of the Prothonotary of the Supreme Court of New South Wales, the order has effect and may be enforced in all respects in New South Wales as if it were an order of that last-mentioned Court made under that sub-section in relation to a company incorporated pursuant to this Code.

**(20)** Where, by virtue of the provision of the law of a participating State or of a participating Territory that corresponds with sub-section (4), a compromise or arrangement is binding on the creditors, or on the creditors included in a class of creditors, of a recognized company, or of a foreign

company registered in that State or Territory, the compromise or arrangement is, by force of this sub-section, binding on the creditors, or the creditors included in that class of creditors, as the case may be, of that company whose debts are recoverable by action in a court of New South Wales.

**(21)** The Court shall 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 the *Companies (Acquisition of Shares) (New South Wales) Code*; or
- (b) there is produced to the Court a statement in writing by the Commission stating that the Commission has no objection to the compromise or arrangement,

but the Court is not required to approve a compromise or arrangement by reason only that a statement by the Commission stating that the Commission has no objection to the compromise or arrangement has been produced to the Court as mentioned in paragraph (b).

**(22)** In this section and section 316—

“arrangement” includes a reorganization of the share capital of a body corporate by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods;

“company” means a company incorporated pursuant to this Code or a corresponding previous law of the State and includes a foreign company registered in the State.

#### **Information as to compromise with creditors or members**

**316. (1)** Where a meeting is convened under section 315, the company shall—

- (a) with every notice convening the meeting that is sent to a creditor or member, send a statement (in this section referred to as 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 company

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 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 shall 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 company shall forthwith comply with the request.

**(3)** Where the compromise or arrangement affects the rights of debenture holders, the explanatory statement shall specify any material interests of the trustees for the debenture holders, whether as such trustees, as members or creditors of the company 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 shall, on making application in that manner, be furnished by the company free of charge with a copy of the explanatory statement.

**(5)** Each director and each trustee for debenture holders shall give notice to the company of such matters relating to himself 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 company and its creditors or any class of them, the company shall not send out an explanatory statement pursuant to sub-section (1) unless a copy of that statement has been registered by the Commission.

**(7)** Where an explanatory statement sent out pursuant to sub-section (1) is not required by sub-section (6) to be registered by the Commission, the Court shall not make an order approving the compromise or arrangement unless it is satisfied that the Commission has had a reasonable opportunity to examine the explanatory statement and to make submissions to the Court in relation to that statement.

**(8)** Where a copy of an explanatory statement is lodged with the Commission for registration under sub-section (6), the Commission shall not register the copy of the statement unless the statement appears to comply with the requirements of this Code and the Commission 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)** Subject to sub-section (11), where a company contravenes or fails to comply with a requirement of this section, the company and any officer of the company who is in default are each guilty of an offence.

**(10)** For the purposes of sub-section (9), the liquidator of a company and any trustee for debenture holders shall be deemed to be officers of the company.

**(11)** It is a defence to a prosecution for an offence against sub-section (9) if the defendant proves that the default in complying with a requirement of this section was due to the refusal of any other person, being a director or trustee for debenture holders, to supply particulars of his interests for the purposes of the explanatory statement.

#### **Provisions for facilitating reconstruction and amalgamation of corporations**

**317. (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 any corporation or corporations or the amalgamation of any 2 or more corporations and that, under the scheme, the whole or any part of the undertaking or of the property of any corporation concerned in the scheme (in this section referred to as the "transferor corporation") is to be transferred to a company (in this section referred to as the "transferee company"), the Court may, either by the order approving the compromise or arrangement or by any subsequent order, provide for all or any of the following matters:

- (a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of the transferor corporation;

- (b) the allotting or appropriation by the transferee company of any 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 corporation;
- (d) if the transferor corporation is a company—the dissolution, without winding up, of the transferor corporation;
- (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 shall be transferred to and vest in, and those liabilities shall be 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 corporation to which the order relates shall, within 14 days after the making of the order, lodge with the Commission an office copy of the order.

**(4)** Where an order is made by the Supreme Court of a participating State or of a participating Territory under the provision of the law of that State or Territory that corresponds with sub-section (1) and an office copy of the order is filed in the office of the Prothonotary of the Supreme Court of New South Wales, the order has effect and may be enforced in all respects in New South Wales as if it were an order of the last-mentioned Court made under that sub-section.

**(6) 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.

**(7) Notwithstanding the provisions of sub-section 315 (22), in this section “company” does not include any company other than a company as defined in sub-section 5 (1).**

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

**318. (1)** Where a scheme or contract (not being a scheme or contract arising out of the making of take-over offers or a take-over announcement under the *Companies (Acquisition of Shares) (New South Wales) Code*) involving a transfer of the shares included in a class of shares in a company (in this section referred to as the “transferor company”) to a person (in this section referred to as the “transferee”) has, within 4 months after the making of the offer relating to the scheme or contract by the transferee, been approved by the holders of not less than nine-tenths in nominal value of the shares included in that class of shares (other than the prescribed shares), the transferee may at any time within 2 months after the offer has been so approved give notice as prescribed to a dissenting shareholder that he desires to acquire the shares of that shareholder.

**(2)** Where such a notice is given, the transferee is, unless on an application made by a dissenting shareholder within one month after the date on which the notice was given or within 14 days after a statement is supplied to a dissenting shareholder pursuant to sub-section (6) (whichever is the later) the Court thinks fit to order otherwise, 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.

**(3)** Where the shares in a company are not divided into 2 or more classes, those shares shall be deemed to constitute a class.

**(4)** Where alternative terms were offered to the approving shareholders, the dissenting shareholder is entitled to elect not later than the expiration of one month after the date on which the notice is given under sub-section (1) or 14 days after the date on which a statement is supplied pursuant to sub-section (6) (whichever is the later) which of those terms he prefers and, if the dissenting shareholder fails to make the election within the time allowed by this sub-section, 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)** Notwithstanding anything in sub-section (2) or (4), where the nominal value of the prescribed shares exceeds one-tenth of the aggregate nominal value of the prescribed shares and the shares (other than prescribed shares) to be transferred under the scheme or contract, the provisions of sub-sections (2) and (4) do not apply unless—

- (a) the transferee offers the same terms to all holders of the shares (other than prescribed shares) to be transferred under the scheme or contract; and
- (b) the holders who approve the scheme or contract, besides holding not less than nine-tenths in nominal value of the shares (other than prescribed shares) to be transferred under the scheme or contract, are not less than three-quarters in number of the holders of those shares.

**(6)** Where the transferee has given notice to a dissenting shareholder that he desires to acquire that shareholder's shares, that shareholder is entitled to require the transferee, by a demand in writing served on the transferee within one month after the date on which the notice was given, to furnish to him a statement in writing of the names and addresses of all other dissenting shareholders as shown in the register of members.

**(7)** Where, pursuant to a scheme or contract referred to in sub-section (1), 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 company, any corporation that is related to the transferee is beneficially entitled, comprise or include nine-tenths in nominal value of the shares included in the class of shares concerned, then—

- (a) the transferee shall, within one month after the date on which he becomes beneficially entitled to those shares (unless in relation to the scheme or contract he 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 sub-section (1); and

- (b) such a holder may, within 3 months after the giving of the notice to him, by notice to the transferee, require the transferee to acquire his shares and, where alternative terms were offered to the approving shareholders, elect which of those terms he will accept.

**(8)** Where a shareholder gives notice under paragraph (7) (b) with respect to his 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 and, where alternative terms were offered to those shareholders, on the terms for which the shareholder has elected, or where he 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.

**(9)** Where a notice has been given by the transferee under sub-section (1) and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee shall, within 14 days after—

- (a) the expiration of 1 month after the date on which the notice is given;
- (b) the expiration of 14 days after a statement under sub-section (6) is supplied; or
- (c) where an application has been made to the Court by a dissenting shareholder, the application is disposed of,

whichever last happens, send a copy of the notice to the transferor company together with an instrument of transfer executed, on behalf of the shareholder, by a person appointed by the transferee and, on his own behalf, by the transferee, and pay, allot or transfer to the transferor company the consideration representing the price payable by the transferee for the shares that, by virtue of this section, the transferee is entitled to acquire and the transferor company shall thereupon register the transferee as the holder of those shares.

**(10)** All sums received by the transferor company under this section shall be paid into a separate bank account and those sums, and any other consideration so received, shall be held by that company in trust for the several persons entitled to the shares in respect of which they were respectively received.

(11) Where a sum or other property is held in trust by a company for a person under this section or under any corresponding previous law of the State and has been so held for not less than 2 years, the company shall, before the expiration of 10 years after the date 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 the Minister administering the *Unclaimed Moneys Act*, 1917.

(12) The Minister administering the *Unclaimed Moneys Act*, 1917, shall sell or dispose of any property transferred to him under this section or any corresponding provision of a previous law of the State and any property that becomes substituted for it that he comes to hold in right of any property other than cash received under sub-section (11) as he thinks fit and shall deal with the proceeds of the sale or disposal and any cash so received and any dividends paid to him in respect of shares in a corporation in accordance with the *Unclaimed Moneys Act*, 1917.

(13) Where any property transferred to the Minister administering the *Unclaimed Moneys Act*, 1917, under this section or any corresponding provision of a previous law of the State includes shares in a corporation, that Minister is not subject to any obligation—

- (a) to pay any calls;
- (b) to make any contribution to the debts and liabilities of the corporation;
- (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 date of the transfer, but this sub-section does not affect the right of a corporation to forfeit a share.

(14) Where, under the provision of the law in force in another State or in a Territory that corresponds with this section, shares in a company are transferred to an authority specified in that law, that authority is not subject to any obligation as specified in sub-section (13) in respect of those shares, but this sub-section does not affect a right of the company to forfeit the share.

(15) Neither the State nor the Minister administering the *Unclaimed Moneys Act*, 1917, 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 that Minister under this section or which that Minister has in relation to property transferred to him under this section or property that becomes substituted for the whole or any part of that property.

**(16)** In this section—

“dissenting shareholder” means a shareholder who has not assented to the scheme or contract and a shareholder who has failed or refused to transfer his shares to the transferee in accordance with the scheme or contract;

“prescribed shares”, in relation to a scheme or contract involving a transfer of the shares included in a class of shares in a company, means shares included in that class of shares that, at the time of the making of the offer relating to the scheme or contract, are held by the transferee, a nominee of the transferee or, where the transferee is a company, a subsidiary of the company.

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

**319. (1)** Where a person is appointed to administer a compromise or arrangement that has been approved under this Part, he shall, within 14 days after he is appointed, lodge with the Commission a notice in writing of his 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 the Commission 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 corporation or corporations concerned and any other matters that, in the opinion of the Commission 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 IX—CONDUCT OF AFFAIRS OF COMPANY IN OPPRESSIVE OR UNJUST MANNER**

**Remedy in cases of oppression or injustice**

**320. (1)** An application to the Court for an order under this section may be made by—

- (a) a member of a company who believes—
  - (i) that affairs of the company are being conducted in a manner oppressive to one or more of the members (including that member); or
  - (ii) that directors of the company have acted in affairs of the company in their own interests and not in the interests of the members as a whole or in any other manner whatsoever that is unfair or unjust to one or more of the members (including that member) other than the directors; or
- (b) in a case where the Commission has received a report by an inspector under this Code or where the Commission has made a report under Part VII to the relevant authority within the meaning of that Part—the Commission.

**(2)** If the Court is of opinion—

- (a) that affairs of a company are being conducted in a manner oppressive to one or more of the members; or
- (b) that directors of a company 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 is unfair or unjust to other members,

the Court may, subject to sub-section (3), make such order or orders as it thinks fit, including, but without limiting the generality of the foregoing, one or more of the following orders:

- (c) an order that the company be wound up;
- (d) an order for regulating the conduct of the company's affairs in the future;
- (e) an order for the purchase of the shares of any member by other members;
- (f) an order for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital.

(3) The Court shall not make an order under sub-section (2) for the winding up of the company if it is of the opinion that the winding up of the company would unfairly prejudice the member or members referred to in paragraph (2) (a) or the other members referred to in paragraph (2) (b).

(4) Where an order that the company be wound up is made pursuant to sub-section (2), the provisions of this Code relating to winding up of a company apply, with such adaptations as are necessary, as if the order had been made upon an application duly filed in the Court by the company.

(5) Where an order under this section makes any alteration in or addition to the memorandum or articles of a company, then, notwithstanding anything in any other provision of this Code but subject to the provisions of the order, the company does not have power, without the leave of the Court, to make any further alteration in or addition to the memorandum and articles inconsistent with the provisions of the order but, subject to the foregoing provisions of this sub-section, the alteration or addition has effect as if it had been duly made by resolution of the company.

(6) An office copy of any order made under this section pursuant to an application by a member of the company shall be lodged by the applicant with the Commission within 14 days after the making of the order.

(7) If default is made in complying with sub-section (6), the applicant is guilty of an offence.

## PART X—RECEIVERS AND MANAGERS

### Interpretation

**321.** In this Part, unless the contrary intention appears, a reference to a receiver, in relation to property of a corporation, includes a reference to a receiver and manager of property of a corporation.

### Crown to be bound

**322.** This Part binds the Crown in right of New South Wales and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

**Disqualification for appointment as receiver**

**323. (1)** None of the following persons is qualified to be appointed, or shall act, as receiver of the property or part of the property of a company:

- (a) a mortgagee of any property of the company;
- (b) an auditor or an officer of the company;
- (c) an officer of any corporation that is a mortgagee of the property of the company;
- (d) a person who is not a registered liquidator.

**(2)** For the purposes of sub-section (1), a person shall be deemed to be an officer of the company if—

- (a) he is an officer of a related corporation; or
- (b) except where the commission, if it thinks fit in the circumstances of the case, directs that this paragraph shall not apply in relation to him—he has, at any time within the immediately preceding period of 12 months, been an officer or promoter of the company or of a related corporation.

**(3)** A reference in this section to an officer of a company or to an officer of a corporation does not include a reference to a person who is a receiver, appointed under an instrument, of the property, or part of the property, of the company or corporation.

**(4)** Nothing in paragraph (1) (d) applies to any corporation authorized by any Act or any law of the State to act as receiver of the property of a company.

**(5)** Nothing in this section disqualifies a person from acting as receiver of the property or part of the property of a company under an appointment validly made before the commencement of the *Companies (Application of Laws) Act*, 1981.

**Liability of receiver**

**324. (1)** A receiver, or any other authorized person, who, whether as agent for the company concerned or not, enters into possession or assumes control of any property of a company for the purpose of enforcing any charge is, notwithstanding any agreement to the contrary, but without prejudice to his rights against the company or any other person, liable for debts incurred

by him in the course of the receivership, possession or control for services rendered, goods purchased or property hired, leased, used or occupied.

**(2)** Sub-section (1) shall not be construed so as to constitute the person entitled to the charge a mortgagee in possession.

**(3)** In any civil proceeding arising out of any act alleged to have been done by a person who enters into possession or assumes control of property of a company, being a person who purports to be properly appointed as a receiver in respect of that property under powers contained in a charge but who has not been properly appointed as receiver in respect of that property, the court concerned may, if it is satisfied that the person entering into possession or assuming control believed on reasonable grounds that he had been properly appointed as receiver, order that—

- (a) the person who entered into possession or assumed control be relieved in whole or in part of any liability incurred by him that he would not have incurred if he had been properly appointed; and
- (b) a person who purported to appoint as receiver the person entering into possession or assuming control be liable for any act done by the person entering into possession or assuming control to the extent that the person entering into possession or assuming control has been relieved of liability as mentioned in paragraph (a).

**(4)** A receiver of the property or part of the property of a company appointed under the powers contained in any instrument may apply to the Court for directions in relation to any matter arising in connection with the performance of his functions.

#### **Power of Court to fix remuneration of receivers**

**325. (1)** The Court may, on application by the liquidator or the official manager of a company, or by the Commission, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver of the property or part of the property of the company.

**(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;

- (b) is exercisable notwithstanding that the receiver has died or ceased to act before the making of the order or the application for the order; and
- (c) where the receiver has been paid or has retained for his remuneration for any period before the making of the order any amount in excess of that fixed for that period—extends to requiring him or his 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) shall 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, on an application made by the liquidator, the official manager, the receiver or the Commission, vary or amend an order made under this section.

#### **Notification of appointment of receiver**

**326. (1)** If any person obtains an order for the appointment of a receiver of the property or part of the property of a company, or of the property or part of the property within the State of a registered foreign company, or appoint such a receiver under any powers contained in an instrument, he shall, within 14 days after he has obtained the order or made the appointment, lodge notice of the fact with the Commission.

**(1A)** A person who has been appointed as a receiver of the property or part of the property of a company or registered foreign company shall, within 14 days after the date of his appointment, lodge with the Commission notice in the prescribed form of the address of his office and, in the event of a change in the situation of his office, shall, within 14 days after the change, lodge with the Commission notice in the prescribed form of the change.

**(2)** Where a person appointed as receiver of the property or part of the property of a company or registered foreign company ceases to act as such, he shall, within 14 days thereafter, lodge with the Commission notice that he has so ceased.

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**Statement that receiver appointed**

**327. (1)** Where a receiver of the property or part of the property of a corporation has been appointed, in every business letter, statement of account, invoice, order for goods, order for services, official notice, publication, bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, receipt and letter of credit of, or purporting to be issued or signed by or on behalf of, the corporation, there shall be set out after the name of the corporation where it first appears a statement that a receiver, or a receiver and manager, as the case may be, has been appointed.

**(2)** If default is made in complying with this section, the corporation, any officer or liquidator of the corporation who is in default and any receiver who is in default, are each guilty of an offence.

Penalty: \$1,000.

**Provisions as to information where receiver appointed**

**328. (1)** Where a receiver of the property or part of the property of a company is appointed—

- (a) the receiver shall forthwith serve on the company notice of his appointment;
- (b) the persons who were, at the date of the receiver's appointment, the directors and the secretary of the company shall, within 14 days after the company receives the notice referred to in paragraph (a), make out and submit to the receiver a report in the prescribed form as to the affairs of the company as at the date of the receiver's appointment; and
- (c) the receiver shall, within one month after receipt of the report—
  - (i) lodge with the Commission a copy of the report and of any comments he sees fit to make relating to the report;
  - (ii) send to the company a copy of any such comments, or if he does not see fit to make any comment, a notice to that effect; and

- (iii) where the receiver is appointed by or on behalf of the holders of debentures of the company, send to the trustees (if any) for those holders, a copy of the report and the comments (if any) lodged with the Commission under sub-paragraph (i).

(2) Where notice has been served on a company under paragraph (1) (a), the persons who were, at the date of the receiver's appointment, the directors and the secretary of the company may, whether before or after the expiration of the period specified in paragraph (1) (b) for the submission of the report, apply to the receiver or to the Court for an extension of the period within which the report is to be submitted and—

- (a) where application is made to the receiver—if the receiver believes that there are special reasons for so doing, he may, by notice in writing to those persons, extend that period until a specified date; and
- (b) where 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 date.

(3) Where, under sub-section (2), the persons who were, at the date of the receiver's appointment, the directors and the secretary of a company are granted an extension of the period within which a report as to the affairs of the company is to be submitted—

- (a) where the extension is granted by the receiver—the receiver shall forthwith lodge with the Commission a copy of the notice given by him to those persons; or
- (b) where the extension is granted by the Court—the persons to whom an extension is granted shall forthwith lodge with the Commission a copy of the order of the Court.

(4) Sub-section (1) does not apply in relation to the appointment of a receiver to act with an existing receiver or in place of a receiver who has died or ceased to act, except that, where that sub-section applies to a receiver who dies or ceases to act before that sub-section has been fully complied with, the references in paragraphs (1) (b) and (c) to the receiver shall (subject to sub-section (5)) be read as including references to his successor and to any continuing receiver.

(5) Where the company is being wound up, this section and section 329 apply notwithstanding that the receiver and the liquidator are the same person, but with any necessary modifications arising from that fact.

**Receiver may require reports**

**329. (1)** A receiver of the property or part of the property of a company may, by notice 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, 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 receiver's appointment—persons who have taken part in the formation of the company;
- (c) persons who are in the employment of the company or have been in the employment of the company within one year before the date of the receiver's appointment and are, in the opinion of the receiver, capable of giving the information required;
- (d) persons who are, or have been within one year before the date of the receiver's appointment, officers of, or in the employment of, a corporation that is, or within that year was, an officer of the company to the affairs of which the report relates.

**(2)** The receiver may, in a notice under sub-section (1), specify the information that he requires as to affairs of a company by reference to information required by this Code or the regulations to be included in any other report, statement or notice under this Code.

**(3)** A person making a report and verifying it as required by sub-section (1) shall, subject to the regulations, be allowed, and shall be paid by the receiver (or his successor) out of his receipts, such costs and expenses incurred in and about the preparation and making of the report and the verification of the report as the receiver (or his successor) considers reasonable.

**(4)** A person who fails to comply with a requirement made under sub-section (1) is guilty of an offence.

**(5)** A reference in this section to the receiver's successor shall be read as including a reference to a continuing receiver.

**Lodging of accounts of receivers**

**330. (1)** A receiver of the property or part of the property of a company, or of the property or part of the property within the State of a registered foreign company, shall within one month after the expiration of the period of 6 months or such lesser period as the receiver determines from the date of his appointment and of every subsequent period of 6 months during which he acts as receiver and within one month after he ceases to act as receiver, lodge with the Commission an account in the prescribed form showing—

- (a) his receipts and his payments during each such period or, where he ceases to act as receiver, during the period from the end of the period to which the last preceding account related or from the date of his appointment, as the case requires, up to the date of his so ceasing to act;
- (b) in the case of the second account lodged under this sub-section and all subsequent accounts—the aggregate amount of receipts and payments during all preceding periods since his appointment; and
- (c) where he has been appointed pursuant to the powers contained in any instrument—the amount (if any) owing under that instrument
  - (i) in the case of the first account—at the time of his appointment and at the expiration of the period to which the account relates; and
  - (ii) in the case of any other account—at the expiration of the period to which the account relates,

and his estimate of the total value, at the expiration of the period to which the account relates, of the property of the company or registered foreign company that is subject to the instrument.

**(2)** \* \* \* \* \*

**(3)** The Commission may, of its own motion or on the application of the company or registered foreign company or a creditor of the company or registered foreign company, cause the accounts lodged in accordance with sub-section (1) to be audited by a registered company auditor appointed by the Commission and, for the purpose of the audit, the receiver shall furnish the auditor with such books and information as the auditor requires.

**(4)** Where the Commission causes the accounts to be audited upon the request of the company or registered foreign company or a creditor, the Commission may require the company, registered foreign company or creditor, as the case may be, to give security for the payment of the cost of the audit.

**(5)** The costs of an audit under sub-section (3) shall be fixed by the Commission and the Commission may if it thinks fit make an order declaring that, for the purposes of sub-section 324 (1), those costs shall be deemed to be a debt incurred by the receiver in the course of the receivership for services rendered and, where such an order is made, the receiver is liable for those costs in accordance with section 324 as if they were such a debt.

**(6)** A receiver who fails to comply with a requirement made under this section is guilty of an offence.

**Payments of certain debts out of property subject to floating charge in priority to claims under charge**

**331. (1) Where—**

- (a) a receiver is appointed on behalf of the holders of any debentures of a company 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, 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 referred to as the “relevant date”)—
  - (i) the company has not commenced to be wound up voluntarily; and
  - (ii) the company has not been ordered to be wound up by the Court,

the following provisions of this section have effect.

**(2)** The following debts or amounts shall be paid out of the property coming to the hands of the receiver or other person taking possession or assuming control 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 447;
- (b) second, if an auditor of the company had applied to the Commission under sub-section 282 (6) for consent to his or its resignation as auditor and the Commission had refused that consent before the relevant date—the reasonable fees and expenses of the auditor incurred during the period commencing on the date of the refusal of consent by the Commission and ending on the relevant date;

(c) subject to sub-sections (4) and (5), third, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 441 (e) or (g) or section 445.

(3) Debts or amounts payable pursuant to paragraph (2) (c) shall be paid in the same order of priority as is prescribed by Subdivision C of Division 4 of Part XII in respect of those debts and amounts.

(4) If an auditor of a company had applied to the Commission under sub-section 282 (6) for consent to his or its resignation as auditor and the Commission had, before the relevant date, refused that consent, a receiver shall, when property comes to his hands, before paying any debt or amount referred to in paragraph (2) (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 to the hands of the receiver, being fees and expenses in respect of which provision has not already been made pursuant to this sub-section.

(5) If an auditor of the company applies to the Commission under sub-section 282 (6) for consent to his or its resignation as auditor and, after the relevant date, the Commission refuses that consent, the receiver shall, in relation to property that comes to his hands after the refusal of consent by the Commission, before paying any debt or amount referred to in paragraph (2) (c), make provision out of that property for the reasonable fees and expenses of the auditor incurred after the refusal of consent by the Commission but before the date on which the property comes to the hands of the receiver, being fees and expenses in respect of which provision has not already been made pursuant to this sub-section.

(6) A receiver shall make provision in respect of reasonable fees and expenses of an auditor in respect of a particular period as required by sub-section (4) or (5) 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 that estimate.

(7) For the purposes of this section the references in Subdivision C of Division 4 of Part XII to the relevant date shall 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 requires.

**Enforcement of duty of receiver to make returns**

**332. (1)** If a receiver of the property or part of the property of a company—

- (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 him, by any member or creditor of the company or trustee for debenture holders, of a notice requiring him to do so; or
- (b) who has been appointed under the powers contained in any instrument has, after being required at any time by the liquidator of the company so to do, failed to render proper accounts of, and to vouch, his receipts and payments and to pay over to the liquidator the amount properly payable to him,

the Court may, on an application made for the purposes of this sub-section, make an order directing the receiver to make good the default within such time as is specified in the order.

**(2)** An application for the purposes of sub-section (1) may be made—

- (a) in a case to which paragraph (a) of that sub-section applies—by a member or creditor of the company or by a trustee for debenture holders; and
- (b) in a case to which paragraph (b) of that sub-section applies—by the liquidator of the company.

**PART XI—OFFICIAL MANAGEMENT**

**Interpretation**

**333. (1)** In this Part—

- (a) “special notice”, in relation to a meeting of creditors of a company, means notice of the meeting sent by post to each of the creditors and posted not less than 14 days and not more than 21 days before the date of the meeting; and
- (b) a special resolution shall be deemed to have been passed at a meeting of creditors of a company if the resolution is agreed to by a majority in number of the creditors present and voting, either in

person or by proxy, being a majority whose debts against the company amount in the aggregate to not less than 75% of the total amount of the debts of the creditors of the company present and voting, either in person or by proxy, at the meeting.

(2) A creditor of a company, being a corporation that is related to the company, is not entitled to vote as a creditor on a special resolution moved at a meeting of creditors of the company convened under this Part.

(3) Subject to sub-section (2), nothing in this Part affects the rights of a secured creditor of the company.

**Crown to be bound**

**334.** This Part binds the Crown in right of New South Wales and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

**Power of company to call meeting of creditors to appoint official manager**

**335. (1)** Where it is resolved by the majority of the directors of a company present at a meeting of the directors specially convened for the purpose that the company is unable to pay its debts as and when they become due and payable, the company may, or, where the company is requested in writing to do so by a creditor of the company who has a judgment against the company unsatisfied to the extent of not less than \$1,000, the company shall, convene a meeting of its creditors in accordance with this section for the purpose of placing the company under official management and appointing an official manager of the company.

(2) A meeting of creditors of a company for the purposes of this section shall be convened by giving notice of the meeting in accordance with this section to the creditors of the company.

(3) The notice referred to in sub-section (2) shall be given by the company within—

- (a) 35 days after the passing of the resolution, or the receipt by the company of the request, referred to in sub-section (1); or
- (b) such further period as the Commission allows where, in the opinion of the Commission, the company would not be able to give the notice within the time specified in paragraph (a).

(4) The company shall, not less than 7 days before the expiration of the period within which the notice referred to in sub-section (2) is required to be given, prepare a report in the prescribed form as to the affairs of the company made up to a date not earlier than the date of the passing of the resolution, or the receipt by the company of the request, referred to in sub-section (1).

(5) Each director of the company shall furnish to the company a certificate under his hand certifying whether the report prepared in accordance with sub-section (4) does or does not, to the best of his knowledge, information and belief, give a true and fair view of the state of affairs of the company as at the date to which it is made up and, subject to sub-section (8), a company shall be deemed to have failed to comply with sub-section (4) unless each director has furnished to the company such a certificate.

(6) Where a director certifies that to the best of his knowledge, information and belief the report does not give a true and fair view of the state of affairs of the company, he shall also state in the certificate the grounds on which he formed that opinion.

(7) A director of a company shall not furnish a certificate under sub-section (5) concerning a report prepared in accordance with sub-section (4) unless he has made such enquiries as are reasonably necessary to determine whether the report does or does not give a true and fair view of the state of affairs of the company as at the date to which it is made up.

(8) Where the Commission is satisfied that it is impracticable for a company to obtain the certificate referred to in sub-section (5) from a director of the company, the Commission may exempt the company from the obligation to obtain the certificate from that director.

(9) For the purposes of sub-section (2), notice of a meeting of creditors of a company shall be given by—

- (a) sending by post to each of the creditors a notice, in the prescribed form; and
- (b) publishing a copy of that notice in the State, and in each other State and each Territory in which the company carries on business or has carried on business at any time during the 2 years immediately preceding the passing of the resolution, or the receipt by the company of the request, referred to in sub-section (1), in a daily newspaper circulating generally in the State, or in that other State or in that Territory, as the case may be,

not less than 7 days, nor more than 14 days, before the day fixed for the holding of the meeting.

**(10)** Subject to sub-section (11), the company shall attach to every notice posted in accordance with sub-section (9)—

- (a) a summary of the affairs of the company, in the prescribed form;
- (b) a notice that the report that the company is required by sub-section (4) to prepare is available for inspection at the registered office of the company and that a copy of the report will be sent by post to any creditor who makes a request in writing for a copy of the report or will be delivered to any creditor who attends at the registered office of the company and requests a copy; and
- (c) a copy of each certificate furnished by a director of the company in accordance with sub-section (5).

**(11)** The company may attach to a notice posted in accordance with sub-section (9) a copy of the report prepared in accordance with sub-section (4) and, where it so attaches a copy of that report, the company is not required to attach the summary and notice referred to in paragraphs (10) (a) and (b).

**(12)** A meeting of creditors convened under this section shall be convened for a date, time and place convenient to the majority in value of the creditors.

**(13)** The creditors of the company present at the meeting who are entitled to vote on a special resolution moved at the meeting shall appoint a chairman of the meeting.

**(14)** The chairman so appointed shall at the meeting determine whether the date, time and place of the meeting are convenient to the majority in value of the creditors, and his decision is final.

**(15)** Within 7 days after the first notice convening the meeting is posted to any creditor, the company shall lodge with the Commission a copy of that notice and shall attach to the copy a certified copy of the report required to be prepared by the company under sub-section (4) and a certified copy of each of the certificates furnished by the directors under sub-section (5).

**(16)** If a company fails to comply with sub-section (1), (4), (10) or (15), or a request referred to in paragraph (10) (b), the company is, notwithstanding section 570, not guilty of an offence against this Code but any officer of the company who is in default is guilty of an offence.

**(17)** Any director of a company who fails to take all reasonable steps to secure compliance by the company with sub-section (4) is guilty of an offence.

**(18)** A director who contravenes, or fails to comply with, sub-section (5), (6) or (7) is guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**Report as to affairs of company to be submitted to meeting of creditors of company**

**336. (1)** The directors of a company that has convened a meeting of creditors under section 335 shall appoint one of their number to attend the meeting.

**(2)** The director so appointed shall attend the meeting and shall—

(a) submit to the meeting the report prepared in accordance with sub-section 335 (4); and

(b) disclose to the meeting the company's affairs and the circumstances leading up to the convening of the meeting.

**(3)** If default is made in complying with this section, any director of the company who is in default is guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**Power to adjourn meeting**

**337. (1)** A meeting convened under section 335 may by resolution be adjourned from time to time to a time and date specified in the resolution but shall not be adjourned to a date later than 21 days after the date for which the meeting was originally convened.

**(2)** Where a meeting is adjourned, the adjourned meeting shall, 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 date later than 8 days after the passing of the resolution by which it is adjourned, the company shall cause notice of the time, date and place of the resumption of the meeting to be published in a daily newspaper circulating generally in the State at least 7 days before the date of the resumption of the meeting.

**Power of creditors to place company under official management**

**338. (1)** At a meeting of creditors of a company convened under section 335, the creditors may, by special resolution—

- (a) resolve that the company be placed under official management for a period, commencing on the date of the passing of the resolution and ending not more than 3 years from that date, specified in the resolution;
- (b) appoint a person named in the resolution who—
  - (i) has consented in writing to act as official manager of the company;
  - (ii) is not the auditor of the company;
  - (iii) is not an officer of a corporation that is a mortgagee of property of the company; and
  - (iv) has furnished to the company a certificate under his hand stating that he is not an insolvent under administration, to be the official manager of the company during the period of the official management; and
- (c) fix the amount of the salary or other remuneration of the official manager or delegate the fixing of the amount to a committee of management appointed under this Part.

**(2)** The company shall—

- (a) within 7 days after the passing of the special resolution referred to in sub-section (1)—
  - (i) cause a notice in the prescribed form of the passing of the resolution to be lodged with the Commission; and
  - (ii) send by post to each of the creditors and members of the company a notice in the prescribed form of the passing of the special resolution and the provisions of section 353; and
- (b) within 21 days after the passing of the special resolution, cause notice that the company has been placed under official management and of the full name of the official manager to be published in the *Gazette*.

**(3)** If the company fails to comply with sub-section (2), the company is, notwithstanding section 570, not guilty of an offence but any officer of the company who is in default is guilty of an offence.

**(4)** A creditor to whom the company owes, or a representative of a group of creditors to whom the company owes in the aggregate, more than 5% of the total unsecured debts of the company may, within 14 days after the appointment of a person as official manager of the company under sub-section (1) of this section or sub-section 355 (3), apply to the Court for an order terminating that appointment and, if in the opinion of the Court the person so appointed is not suitable to be the official manager of the company, the Court may make an order terminating his appointment and appointing as official manager a registered company auditor (other than the auditor of the company) who has consented in writing to act as official manager.

**(5)** Where under sub-section (4) the Court has made an order appointing a person to be the official manager of a company, the provisions of this Part apply to that person as if he had been appointed official manager of the company at a meeting of creditors under sub-section (1) on the date of the order.

**(6)** Where the Court makes an order under sub-section (4), the person obtaining the order shall—

- (a) within 7 days after the making of the order, lodge with the Commission notice in the prescribed form of the making of the order and its date; and
- (b) within 7 days after the passing and entering of the order, lodge with the Commission an office copy of the order.

**(7)** A person who fails to comply with sub-section (6) is guilty of an offence.

#### **Appointment of committee of management**

**339. (1)** At a meeting of the creditors of a company held under this Part, the creditors may resolve that a committee of management be appointed for the purposes of this Part.

**(2)** A committee of management of a company shall consist of 5 natural persons, of whom 3 shall be appointed by the creditors of the company by special resolution and 2 shall be appointed by the members of the company at a general meeting of the company.

(3) A person is not eligible to be appointed a member of a committee of management of a company unless he is—

- (a) in the case of an appointment by the creditors of the company—
  - (i) a creditor of the company;
  - (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 authorized in writing by a creditor of the company to be a member of the committee of management; or
- (b) in the case of an appointment by the members of the company—
  - (i) a member of the company;
  - (ii) the attorney of a member of the company by virtue of a general power of attorney given by the member; or
  - (iii) a person authorized in writing by a member of the company to be a member of the committee of management.

**Notice of appointment and address of official manager**

340. (1) A person who has been appointed official manager of a company shall, within 14 days after the date of his appointment, lodge with the Commission notice in the prescribed form of his appointment as official manager and of the address of his office and, in the event of a change in the situation of his office, shall, within 14 days after the change, lodge with the Commission notice in the prescribed form of the change.

(2) A person shall, within 14 days after his resignation or removal from office as official manager of a company, lodge with the Commission notice in the prescribed form of his resignation or removal.

(3) A person who fails to comply with any of the provisions of this section is guilty of an offence.

**Effect of resolution**

341. (1) Subject to section 353, where a special resolution placing a company under official management has been duly passed by the creditors of the company under sub-section 338 (1)—

- (a) the company is under official management for the period specified in the special resolution unless the official management is extended or earlier terminated under this Part;

- (b) the directors of the company cease to hold office;
  - (c) the person appointed official manager of the company shall assume, and is responsible for, the management of the company and shall perform the duties, and may perform any of the functions and exercise any of the powers, of the directors of the company; and
  - (d) the affairs of the company shall be conducted subject to the provisions of this Part.
- (2)** The official manager shall be chairman of any meeting of the company, of its creditors or of the company and its creditors that is held or resumed while he holds office as official manager.

#### **Six-monthly meetings of creditors and members**

**342. (1)** Subject to sub-section (2), within 2 months after the expiration of the period of 6 months commencing on the date of his appointment as official manager and of each subsequent period of 6 months, or, if the Commission, at any time before the expiration of any such period, requires or permits him to do so in respect of a lesser period specified by the Commission, within 2 months after the expiration of the period so specified, the official manager of a company shall—

- (a) prepare a statement showing the assets and liabilities of the company as at the last day of the period and a report containing such other information as he thinks necessary to enable the creditors and members of the company to assess the financial position of the company as at the last day of the period;
- (b) convene a meeting of the creditors and members of the company to consider the statement and report; and
- (c) cause the statement and report to be laid before the creditors and members at that meeting.

**(2)** Where under sub-section (1) the Commission has required or permitted the preparation of a statement and report in respect of a period of less than 6 months, the next period of 6 months shall commence at the expiration of that lesser period.

**(3)** The official manager of a company shall attach to each statement referred to in sub-section (1)—

- (a) a statement signed by him; and

(b) in the case of a company that is required by this Code to appoint a person to be its auditor—a statement signed by the auditor,

stating in each case whether or not, in the opinion of the person by whom the statement is signed, the statement referred to in sub-section (1) is drawn up so as to give a true and fair view of the affairs of the company.

(4) The official manager of the company shall cause copies of the statement and report referred to in this section to be kept and to be available for inspection by any creditor or member of the company at the registered office of the company.

(5) The official manager shall—

- (a) give written notice to every creditor and member of the company that the statement referred to in sub-section (1) has been made up when next sending to the creditors or members any report, notice of meeting, notice of call or dividend relating to the company; and
- (b) in the notice inform creditors and members of the company at what address, and between what hours, the statement may be inspected.

(6) Within 7 days after a meeting is held under sub-section (1), the official manager shall lodge with the Commission a notice in the prescribed form of the holding of the meeting and of the date on which it was held, together with a copy of each statement and report laid before the creditors and members at that meeting.

(7) Where the statement referred to in sub-section (1) is not accompanied by a statement signed by a registered company auditor, the Commission may cause the statement referred to in sub-section (1) to be audited by a registered company auditor appointed by the Commission, and, for the purposes of the audit, the official manager shall furnish to the auditor such books and information as the auditor requires.

(8) The costs of an audit under sub-section (7) shall be fixed by the Commission and are part of the costs of the official management.

(9) An official manager who fails to comply with any provision of this section is guilty of an offence.

(10) An auditor of a company who fails to supply to the official manager at his request a statement required by the official manager for the purposes of compliance with sub-section (3) is guilty of an offence.

**Stay of proceedings**

**343. (1)** Where a company is under official management, no action or other civil proceedings against the company in any court of the State shall, except with the leave of the Court and in accordance with such terms and conditions (if any) as the Court imposes, be commenced or proceeded with until the company ceases to be under official management.

**(2)** Where a recognized company is under official management in the State or Territory in which it is incorporated, no action or other civil proceeding against the recognized company in any court of the State shall, except with the leave of the Court and in accordance with such terms and conditions (if any) as the Court imposes, be commenced or proceeded with until the company ceases to be under official management in the State or Territory in which it is incorporated.

**(3)** At any time after a company has, in accordance with section 335, convened a meeting of its creditors for the purpose of placing the company under official management and before the passing of a special resolution by the creditors under sub-section 338 (1) resolving that the company be placed under official management, the company or any creditor of the company may, if 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 and conditions as it thinks fit.

**Power to extend period of official management**

**344. (1)** The official manager of a company shall convene a meeting of creditors of the company for a day not earlier than 7 months, and not later than one month, before the day on which the period of official management is due to expire for the purpose of considering whether or not the period of official management should be extended and, if the creditors think fit, passing a special resolution extending the period of official management for such further period not exceeding 12 months as is specified in the resolution.

**(2)** If, at a meeting held under section 342 not earlier than 7 months and not later than one month before the day on which the period of official management is due to expire, the creditors of the company consider whether or not the period of official management should be extended, the official manager shall be taken to have complied with sub-section (1).

(3) The meeting referred to in sub-section (1) shall be convened by the official manager by sending by post to each of the creditors, not less than 7 days, nor more than 14 days, before the day fixed for the holding of the meeting, a notice specifying the date, time, place and purpose of the meeting.

(4) The official manager shall, within 7 days after the passing of a special resolution under sub-section (1), lodge with the Commission a copy of that resolution.

**Extension of period of official management**

**345.** Where a special resolution extending the period of official management of a company is passed at a meeting convened in accordance with section 344, the company continues under official management during the period specified in the resolution unless the official management is further extended or is earlier terminated under this Part.

**Appointment of official manager not to affect appointment and duties of auditor**

**346.** Notwithstanding the appointment of an official manager of a company and while the company is under official management, the provisions of this Code relating to the appointment and re-appointment of auditors and the rights and duties of auditors continue to apply to and in relation to the company and, in the application of those provisions to and in relation to the company, a reference to the directors of a company shall be read as a reference to the official manager of the company.

**Duties of official manager**

**347. (1)** Subject to the provisions of this Code, the official manager of a company shall—

- (a) as soon after his appointment as is reasonably practicable, take into his custody or under his control all the property to which the company is or appears to be entitled;
- (b) subject to any direction given pursuant to paragraph (c), conduct the business and management of the company in such manner as he thinks most economical and most beneficial to the interests of the members and creditors of the company;

- (c) comply with any directions of the creditors of the company that are agreed to by special resolution at any meeting of creditors of which special notice has been given;
- (d) comply with all requirements of this Code applicable to the company or the directors of the company relating to the keeping of accounts and the lodging of annual returns and perform all such other duties as are so applicable and are imposed on the company or on the directors of the company by or under this Code;
- (e) if so directed by the committee of management of the company acting under sub-section 357 (6) or by a creditor or creditors of the company to whom the company owes not less than 10% in value of the total unsecured debts of the company, by notice sent by post to each of the creditors, convene a meeting of creditors of the company; and
- (f) if a meeting of creditors held under sub-section 344 (1) does not resolve to extend the period of the official management—within 7 days after the conclusion of the meeting, by notice sent by post to each of the members of the company, convene a meeting of the members to be held on a date not later than 21 days after the conclusion of the meeting of creditors under sub-section 344 (1) for the purpose of—
  - (i) reporting to the members accordingly; and
  - (ii) enabling the members, if they think fit, to elect directors of the company to take office upon the termination of the period of official management.

**(2)** A meeting convened under paragraph (1) (f) shall be deemed to have been properly convened and to be empowered under the memorandum and articles of the company to appoint or elect directors, and directors so appointed or elected shall take office on the termination of the period of official management of the company.

**(3)** If at any time the official manager is of the opinion that the continuance of the official management of the company will not enable the company to pay its debts, he shall convene a meeting of the members of the company for the purpose of considering and, if the members think fit, passing a special resolution that the company be wound up voluntarily.

**(4)** Where the official manager convenes a meeting of members of the company under subsection (3), the official manager shall—

- (a) convene a meeting of the creditors of the company for the day, or the day next following the day, on which the meeting of members is proposed to be held;

- (b) cause the notices of the meeting of creditors to be sent by post to the creditors on the same day as the sending of the notices of the meeting of the members; and
- (c) convene the meeting of creditors for a date, time and place convenient to the majority in value of the creditors and give the creditors at least 14 days' notice by post of the meeting.

**(5)** The official manager shall lay before the meeting of creditors convened in accordance with sub-section (4) a report in the prescribed form as to the affairs of the company made up to a date that is not more than 30 days before the day for which the meeting is convened.

**(6)** Where, at a meeting of members of a company convened under sub-section (3), the members pass a special resolution to the effect that the company be wound up voluntarily—

- (a) the members shall, at that meeting, nominate a person to be liquidator for the purpose of winding up the affairs, and distributing the property, of the company; and
- (b) the creditors may, at the meeting of creditors of the company convened under sub-section (4), nominate a person to be liquidator for that purpose.

**(7)** A person nominated by the members of a company pursuant to sub-section (6) shall, subject to sub-sections (8) and (9), be the liquidator of the company.

**(8)** Where the members and creditors of a company nominate different persons to be the liquidator of the company, the person nominated by the creditors shall, subject to sub-section (9), be the liquidator of the company.

**(9)** Where the members and creditors of a company nominate different persons to be the liquidator of the company, the Court may, on the application of a member or creditor of the company made within 7 days after the date on which the nomination was made by the creditors, by order, direct that the person nominated by the members be the liquidator of the company or that the persons nominated by the members and creditors, respectively, be jointly the liquidators of the company.

**(10)** On the appointment of a liquidator the company ceases to be under official management.

**(11)** The person who, immediately before the appointment of the liquidator, was the official manager of the company shall, within 7 days after the holding of the later of the meetings referred to in sub-sections (3) and (4), lodge with the Commission a notice in the prescribed form of the holding of the meetings and the dates of the meetings, being a notice that has attached to it a copy of the report referred to in sub-section (5).

**(12)** A person who fails to comply with sub-section (1), (3), (4), (5) or (11) is guilty of an offence.

#### **Undue preferences in the case of official management**

**348. (1)** A settlement, a conveyance or transfer of property, a charge on property, a payment made, or an obligation incurred, by a company which, if it had been made or incurred by a natural person, would, in the event of his becoming a bankrupt, be void as against the trustee in the bankruptcy, is, in the event of the company being placed under official management, void as against the official manager.

**(2) Where—**

- (a) a creditor of a company has issued execution against the property of the company or has instituted proceedings to attach a debt due to the company or to enforce a charge, or a charging order, against property of the company; and
- (b) the creditor would, if the execution or proceedings had been issued or instituted in relation to a debt due by a natural person who subsequently became a bankrupt, be required to pay the amount (if any) received by the creditor as a result of the execution or proceedings to the trustee in the bankruptcy,

the creditor shall, in the event of the company being placed under official management, pay the amount (if any) received as a result of the execution or proceedings, less the taxed costs of the execution or proceedings, to the official manager.

**(3)** Where a creditor has paid to the official manager of a company an amount in accordance with sub-section (2), that creditor shall be taken to be an unsecured creditor of the company for the amount owed to him by the company as if the execution or proceedings had not been issued or instituted.

**(4)** For the purposes of this section, the date that corresponds with the date of presentation of the petition in bankruptcy in the case of a natural person and the date on which a person becomes a bankrupt is the date on which the company commences to be under official management.

**Application and disposal of property during official management**

**349. (1)** The official manager of a company may sell or otherwise dispose of any property of the company in the ordinary course of the business of the company.

**(2)** The official manager of a company may sell or otherwise dispose of any property of the company otherwise than in the ordinary course of the business of the company if the aggregate of the value of that property and the price or prices received for any other property previously sold or disposed of otherwise than in the ordinary course of the business of the company during the period of official management does not exceed \$5,000.

**(3)** The official manager of a company may, with the consent of the committee of management, sell or otherwise dispose of any property of the company otherwise than in the ordinary course of the business of the company if the aggregate of the value of that property and the price or prices received for any other property previously sold or disposed of otherwise than in the ordinary course of the business of the company during the period of official management does not exceed \$20,000.

**(4)** The official manager of a company may—

- (a) with the leave of the Court; or
- (b) with the consent of the creditors given by a special resolution passed at a meeting of the creditors of which special notice has been given, being a notice that set out the intention to propose, as a special resolution, a resolution for the sale or disposal, or the mortgage or charge, of that property,

sell or otherwise dispose of, or mortgage or charge, any property of the company.

**(5)** The moneys of the company that become available to the official manager of the company during the period of the official management shall be applied by him in the following order:

- (a) first, in the payment of the costs of the official management, including the remuneration of the official manager, the deputy official manager (if any) and the auditor of the company (if any) appointed in accordance with the provisions of Division 3 of Part VI;
- (b) second, in discharge of the liabilities of the company incurred in the course of the official management; and
- (c) third, in discharge of any other liabilities of the company.

**(6)** Subject to sub-section (5), the liabilities of the company referred to in paragraph (5) (c) shall be discharged as if those liabilities were liabilities of a company being wound up, and the provisions of Part XII apply, as far as possible, to, and in relation to, the discharge of those liabilities.

#### **Official manager may apply to Court for directions**

**350. (1)** The official manager may apply to the Court for directions in relation to any matter arising out of the exercise of his powers or functions as official manager.

**(2)** An act done in accordance with a direction given by the Court on application made under sub-section (1) shall be deemed to have been properly done for the purposes of this Code.

#### **Certain provisions applicable to official management**

**351. (1)** Where a company is under official management, the following provisions of this section have effect.

**(2)** A sum due to a member in his capacity as a member by way of dividends, profits or otherwise shall not be treated as a debt of the company payable to that member in the case of competition between himself and any other creditor who is not a member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the members among themselves.

**(3)** The Court may make such order for inspection of the books of the company by creditors and members as the Court thinks just, and any books in the possession, or in the custody or under the control, of the company may be inspected by creditors or members accordingly, but not further or otherwise.

**(4)** The provisions of sections 418, 419, 420 and 457 apply to and in relation to the company as if—

- (a) the company were being wound up;
- (b) a reference in any of those provisions to the liquidator of the company were a reference to the official manager of the company;
- (c) a reference in any of those provisions to contributors were a reference to members of the company; and
- (d) the reference in sub-section 457 (1) to a report made under section 418 were a reference to a report made under that section as applied by virtue of this sub-section.

**Power of Court to terminate official management and give directions**

**352.** (1) If at any time, on the application of the official manager or of any creditor or member of a company or of the Commission, it appears to the Court that the purpose for which the company was placed under official management has been fulfilled or that, for any reason, it is undesirable that the company should continue to be under official management, the Court may by order terminate the official management on the date specified in the order and, upon that date, the official manager ceases to be the official manager of the company.

(2) The Court shall not make an order under sub-section (1) on an application by a person other than the Commission unless at least 7 days' notice in writing of the application has been given to the Commission.

(3) The Court may, on an application under sub-section (1), if the applicant or, where the Commission is not the applicant, the Commission so requests, grant leave to the person making the request to file an application for the winding up of the company.

(4) On making an order under sub-section (1), the Court may also give such directions as it considers 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 to take office upon the termination of the official management.

(5) The costs and expenses of any proceeding before the Court under this section and the costs and expenses incurred in convening a meeting of members of the company pursuant to an order of the Court under this section shall, if the Court so directs, form part of the costs of the official management of the company.

**Resolution to place company under official management effective, subject to appeal**

**353.** (1) Where a resolution has been passed under sub-section 338 (1) determining that a company be placed under official management—

- (a) a creditor to whom the company owes, or a representative of a group of creditors to whom the company owes in the aggregate, an amount that exceeds 5% of the total unsecured debts of the company;

- (b) a member holding, or any representative of a group of members holding collectively, not less than 10% of the paid-up capital of the company; or
- (c) in the case of a company not having a share capital, any member holding, or any representative of a group of members holding collectively, not less than 10% of the total voting rights of members having a right to vote at all general meetings,

may apply to the Court for the variation or cancellation of the resolution at any time within a period of 14 days after the passing of the resolution and the Court may, if it is of the opinion that there is no reasonable prospect of the company being rehabilitated or that the resolution is not in the interests of the creditors and the members of the company, vary or cancel the resolution.

**(2)** Where the Court makes an order cancelling a resolution, the Court may give such directions as it considers necessary for the resumption of the management and control of the company by the persons who were officers of the company immediately before it was placed under official management.

**(3)** Upon the cancellation of a resolution by the Court under this section, the company ceases to be under official management and the person appointed official manager of the company ceases to hold office.

**(4)** Where the Court makes an order under this section varying a resolution, the resolution has effect, on and from the date of the order, as varied by the order.

**(5)** Where an order is made under this section, the acts of the official manager before the making of the order are as valid and binding on the company, and on the members and creditors of the company, as they would have been if the order had not been made.

#### **Lodgment of office copy of Court order**

**354. (1)** Where the Court makes an order under section 352 (otherwise than on the application of the Commission) or an order under section 353, the person on whose application the order is made shall lodge with the Commission—

- (a) within 7 days after the order is made—notice in the prescribed form of the making of the order and the date of the order; and

(b) within 7 days of the passing and entering of the order—an office copy of the order.

(2) A person who fails to comply with sub-section (1) is guilty of an offence.

(3) Where the Commission is an applicant for an order under section 352, the Commission shall enter in its records particulars of the application and, after the passing and entering of the order, an office copy of the order, and sub-section 31 (2) applies in relation to the document containing those particulars and to the office copy as if they were documents lodged with the Commission.

#### **Termination of appointment and release of official manager**

**355. (1)** The appointment of a person as official manager of a company terminates where—

- (a) that person tenders his resignation in writing to either—
  - (i) the committee of management appointed pursuant to this Part; or
  - (ii) a meeting of creditors of the company;
- (b) a special resolution that the appointment of the person be terminated is passed at a meeting of creditors of the company of which special notice stating that the meeting is convened for the purpose of considering such a resolution has been given; or
- (c) the Court makes an order that the appointment of the person be terminated.

**(2)** The appointment of a person as official manager of a company shall be terminated by the committee of management or, if there is no committee of management, by the Court on the application of any creditor or member of the company if—

- (a) the official manager becomes an insolvent under administration;
- (b) the official manager becomes incapable, by reason of mental infirmity, of managing his affairs;
- (c) having been appointed by an order of the Court under sub-section 338 (4), the official manager ceases to be a registered company auditor; or
- (d) the official manager becomes the auditor of the company.

(3) Where a vacancy occurs in the office of official manager of a company, the committee of management may appoint, or if there is no committee of management, a meeting of creditors of the company convened for that purpose by any 2 of their number may by special resolution appoint, as official manager, a person who is qualified for appointment.

(4) A person is qualified for appointment under sub-section (3) if—

- (a) he has consented in writing to act as official manager of the company;
- (b) he is not the auditor of the company;
- (c) he is not an officer of a corporation that is a mortgagee of property of the company; and
- (d) he has furnished to the committee of management or the chairman of the meeting of creditors, as the case may be, a certificate under his hand stating that he is not an insolvent under administration.

(5) A person appointed official manager under sub-section (3) shall assume, and is responsible for, the management of the company and shall perform the duties, and may perform any of the functions and exercise any of the powers, of the directors of the company.

(6) Where the appointment of an official manager terminates or is terminated, until a person is appointed official manager under sub-section (3), the powers and functions of the official manager vest in, and the duties of the official manager shall be performed by—

- (a) the deputy official manager;
- (b) if there is no deputy official manager—the committee of management; or
- (c) if there is no deputy official manager and no committee of management—a person appointed by the Court, on the application of a creditor of the company, to act as official manager until a person is appointed official manager under sub-section (3).

(7) A person who convenes a meeting of creditors of a company for the purpose of considering a resolution that the appointment of a person as official manager of the company be terminated shall give to the person who is the official manager not less than 14 days' written notice of the meeting and of the purpose for which it is being convened.

(8) Where a person who is an official manager of a company receives a notice given under sub-section (7), he shall—

- (a) before the date on which the meeting is to be held, prepare a report showing how the official management of the company has been conducted by him;
- (b) present the report to the meeting and give such explanations of that report as are reasonably requested by any creditor; and
- (c) within 7 days after the holding of the meeting, lodge with the Commission a notice of the holding of the meeting—
  - (i) setting out the date on which the meeting was held; and
  - (ii) stating whether the resolution for the termination of the appointment of the person as official manager was passed, together with a copy of the report prepared in accordance with paragraph (a).

(9) Where a person (other than a person who has been given notice of a meeting under sub-section (7)) ceases to be an official manager of a company (including a person who ceases to be an official manager by reason that his appointment is terminated by the Court under sub-section 338 (4))—

- (a) he shall, notwithstanding that he has ceased to be the official manager, within 14 days after the day on which he ceased to be the official manager, prepare a report showing how the official management was conducted by him and, for this purpose, he has a right of access to the books of the company; and
- (b) he shall, within 28 days after the day on which he ceased to be the official manager, convene a meeting of all persons who were creditors of the company at the commencement of the official management and all persons who, on the day on which the person ceased to be the official manager, were creditors of the company.

(10) Notice of the meeting referred to in paragraph (9) (b) shall be given to the creditors of the company by sending by post to each of the creditors, not less than 7 days, nor more than 14 days, before the date fixed for the holding of the meeting, a notice specifying the date, time, place and purpose of the meeting and a copy of the report prepared in accordance with paragraph (9) (a).

(11) At the meeting of creditors convened under paragraph (9) (b), the person who was the official manager of the company shall present his report to the meeting and shall give such explanations of that report as are reasonably requested by any creditor.

(12) Within 7 days after the holding of the meeting referred to in paragraph (9) (b), the person who was the official manager shall lodge with the Commission notice of the holding of the meeting and of the date on which it was held, together with a copy of the report prepared in accordance with paragraph (9) (a).

(13) At a meeting of creditors convened under paragraph (9) (b), 2 creditors constitute a quorum and, if a quorum is not present at the meeting, the person who was the official manager shall, within 7 days after the day for which the meeting was convened, lodge with the Commission—

- (a) a notice stating that the meeting was duly convened and that no quorum was present; and
- (b) a copy of the report prepared in accordance with paragraph (9) (a).

(14) If the meeting is not held on the day for which it is convened under paragraph (9) (b), the person who was official manager shall, within 7 days after that day, lodge with the Commission—

- (a) a notice stating that the meeting was not held on that day; and
- (b) a copy of the report prepared in accordance with paragraph (9) (a).

(15) The expenses incurred by a person who was an official manager of a company in connection with the preparation of a report in accordance with paragraph (8) (a) form part of the costs of the official management.

(16) The expenses incurred by a person who was official manager of a company in connection with the preparation of a report in accordance with paragraph (9) (a) and in relation to the convening and holding of the meeting in accordance with paragraph (9) (b) form part of the costs of the official management and shall be deemed to have been incurred during the period of the official management.

(17) Subject to sub-section (18), where a person ceases to be the official manager of a company (including a person who ceases to be an official manager by reason that his appointment is terminated by the Court under sub-section 338 (4)), the adoption by a meeting of creditors of the company of the report prepared by him under paragraph (8) (a) or paragraph (9) (a), as the case requires, and of his explanations, discharges him from all liability in respect of any act or omission by him in the management of the company or otherwise in relation to his conduct as official manager.

**(18)** The adoption by a meeting of creditors of a company of a report prepared in accordance with paragraph (8) (a) or (9) (a) by a person who has ceased to be the official manager of the company and of any explanations of the person in relation to the report does not—

- (a) discharge the person from the liabilities referred to in sub-section (17) if the adoption was obtained by fraud or by suppression or concealment of a material fact; or
- (b) discharge the person from a liability to which, by virtue of any law in force in the State other than this Code, he would be subject in respect of any negligence, default, breach of trust or breach of duty committed by him in relation to the company.

**(19)** If the report prepared by a person in accordance with paragraph (8) (a) or (9) (a) and the explanations of the report are not adopted by a meeting of creditors within 2 months after—

- (a) in the case of a report prepared in accordance with paragraph (8) (a)—the date of the meeting to which the report was presented; or
- (b) in the case of a report prepared in accordance with paragraph (9) (a)—the date on which notice of the meeting convened in accordance with paragraph (9) (b) was given to the creditors of the company,

the person may apply to the Court for an order of release.

**(20)** If a person who was official manager of the company complies with sub-section (13), he may apply to the Court for an order of release.

**(21)** On an application under sub-section (19) or (20), the Court may, if it thinks fit, make an order releasing the applicant from liability for acts or omissions by him in the management of the company and such an order has the same effect as the adoption of a report and explanations has under sub-section (17).

**(22)** Where the Court makes an order under sub-section (21), it may by order direct that any costs or expenses incurred by the applicant in connection with the application shall form part of the costs of the official management and shall be deemed to have been incurred during the period of the official management.

**(23)** Where the Court makes an order under sub-section (21), the person who was the official manager shall lodge with the Commission an office copy of the order within 7 days after the passing and entering of the order.

**Notification that corporation is under official management**

**356.** (1) Where a company is under official management or a corporation is under official management under the law in force in another State or in a Territory, in every business letter, statement of account, invoice, order for goods, order for services, official notice, publication, bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, receipt and letter of credit of, or purporting to be issued or signed by or on behalf of, the company or corporation, there shall be set out after the name of the company or corporation where it first appears the words "under official management".

(2) If default is made in complying with sub-section (1), the company or corporation and any officer of the company or corporation who is in default are each guilty of an offence.

Penalty: \$1,000.

**Functions of committee of management and appointment of deputy official manager**

**357.** (1) The functions of the committee of management of a company appointed pursuant to this Part are to assist and advise the official manager of the company in relation to any matters concerning the management of the company on which he requests the advice and assistance of the committee.

(2) Either the committee of management of a company or a meeting of creditors of a company convened by the official manager—

(a) may appoint a person who—

- (i) has consented in writing to act as deputy official manager of the company;
- (ii) is not the auditor of the company;
- (iii) is not an officer of a corporation that is a mortgagee of property of the company; and
- (iv) has furnished to the official manager a certificate under his hand stating that he is not an insolvent under administration, to be a deputy official manager of the company;

- (b) may remove the deputy official manager from office and may, if the committee of management or the meeting of creditors, as the case may be, considers it is necessary, appoint another person to be deputy official manager in his place; and
- (c) may determine the amount of the salary or other remuneration of the deputy official manager.

**(3)** In the absence of the official manager of a company, a deputy official manager shall, subject to any written directions given to him by the official manager, act as the official manager and, while so acting, has the powers, duties and functions of the official manager.

**(4)** A person who is appointed deputy official manager of a company shall, within 14 days after his appointment, lodge with the Commission a notice in the prescribed form of his appointment as deputy official manager and of the address of his office and, in the event of any change in the situation of his office, he shall, within 14 days after the change, lodge with the Commission notice in the prescribed form of the change.

**(5)** A person who ceases to be deputy official manager shall, within 14 days after ceasing to be deputy official manager, lodge with the Commission notice in the prescribed form of his ceasing to be deputy official manager.

**(6)** The committee of management of a company may, at any time and from time to time, direct the official manager of the company to convene a meeting of the creditors of the company or a meeting of the members of the company or a meeting of both creditors and members of the company, and the official manager shall give effect to the direction.

**(7)** Subject to this section and the regulations, the provisions of sections 433 and 434 apply to and with respect to a committee of management of a company, the proceedings of and vacancies in a committee of management of a company, and the removal of members of the committee of management of a company, and so apply as if—

- (a) a reference in any of those provisions to the committee of inspection or to the committee were a reference to the committee of management;
- (aa) a reference in any of those provisions to a member of the committee were a reference to a member of the committee of management;
- (b) a reference in any of those provisions to the liquidator were a reference to the official manager of the company; and
- (c) a reference in any of those provisions to a contributory were a reference to a member of the company.

**PART XII—WINDING UP***Division 1—Preliminary***Crown to be bound**

**358.** This Part binds the Crown in right of New South Wales and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

**Modes of winding up**

**359. (1)** The winding up of a company may be either—

- (a) by the Court; or
- (b) voluntary.

**(2)** Unless the contrary intention appears, the provisions of this Code with respect to winding up apply to the winding up of a company in either of those modes.

**Liability as contributories of present and past members**

**360. (1)** On a company being wound up, every present and past member is liable to contribute to the property of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up and for the adjustment of the rights of the contributories among themselves, subject to the following qualifications:

- (a) subject to paragraph (b), a past member is not liable to contribute if he has ceased to be a member for one year or more before the commencement of the winding up;
- (b) where the company is a limited company and became a limited company within the period of 3 years immediately preceding the commencement of the winding up by virtue of a change of status pursuant to paragraph 69 (1) (a) or the corresponding provision of a previous law of the State, a past member of the company who was a member of the company at the time of the change of status—
  - (i) is liable notwithstanding paragraph (a) to contribute in respect of debts and liabilities contracted before the change of status; and

- (ii) if no person who was a member of the company at the time of the change of status is a member at the commencement of the winding up, is so liable to contribute notwithstanding paragraph (d) and whether or not the existing members have satisfied the contributions required to be made by them pursuant to this Code;
- (c) a past member is not liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;
- (d) subject to paragraph (b), a past member is not liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them pursuant to this Code;
- (e) in the case of a company limited by shares, no contribution is required from a member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member;
- (f) in the case of a company limited by guarantee, no contribution is, subject to sub-section (2), required from a member exceeding the amount undertaken to be contributed by him to the property of the company in the event of its being wound up;
- (g) notwithstanding paragraphs (e) and (f), where the company is a limited company and became a limited company by virtue of a change of status pursuant to paragraph 69 (1) (a) or the corresponding provision of a previous law of the State, the amount that a member of the company at the time of the change of status, or a person who at that time was a past member of the company, is liable to contribute in respect of the debts and liabilities of the company contracted before that time is unlimited;
- (h) where a company has changed its status pursuant to paragraph 69 (1) (c) or the corresponding provision of a previous law of the State, a person who, at the time the company applied for the change of status, was a past member of the company and did not thereafter again become a member of the company is not, if the company is wound up, liable to contribute to the property of the company more than he would have been liable to contribute if the company had not changed its status;
- (j) nothing in this Code invalidates any provision contained 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;

- (k) a sum due to a member in his capacity as a member by way of dividends, profits or otherwise shall not be treated as a debt of the company payable to that member in a case of competition between himself and any other creditor who is not a member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.
- (2) On the winding up of a company limited both by shares and by guarantee, every member is liable, in addition to the amount undertaken to be contributed by him to the property of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him.

#### **Nature of liability of contributory**

**361.** The liability of a contributory is of the nature of a specialty debt according to the law of the State accruing due from him at the time when his liability commenced but payable at the times when calls are made for enforcing the liability.

#### **Contributories in case of death or bankruptcy of member**

**362. (1)** If a contributory dies, either before or after he has been placed on the list of contributories, his personal representatives are liable in due course of administration to contribute to the property of the company in discharge of his liability and are contributories accordingly, and, if they make default in paying any money ordered to be paid by them, proceedings may be taken for administering the estate of the deceased contributory and for compelling payment, out of the assets of that estate, of the money due.

**(2)** If a contributory becomes an insolvent under administration or assigns his estate for the benefit of his creditors, either before or after he has been placed on the list of contributories—

- (a) his trustee shall represent him for all the purposes of the winding up and shall be a contributory accordingly; and
- (b) there may be proved against his estate the estimated value of his liability to future calls as well as calls already made.

*Division 2—Winding Up by the Court*

*Subdivision A—General*

**Application for winding up**

**363. (1)** A company (whether or not it is being wound up voluntarily) may be wound up under an order of the Court on the application of—

- (a) the company;
- (b) a creditor, including a contingent or prospective creditor, of the company;
- (c) a contributory;
- (d) the liquidator;
- (e) the Commission pursuant to section 312 or 352;
- (f) the official manager of the company appointed pursuant to Part XI;
- (g) a person (other than the Commission) who has been granted leave under section 352; or
- (h) the Insurance Commissioner appointed under the *Insurance Act* 1973,

or of any 2 or more of those persons.

**(2)** An application under sub-section (1) in relation to a company may be made by the Insurance Commissioner if and only if—

- (a) an inspector has been appointed to make an investigation in respect of the company under section 52 of the *Insurance Act* 1973; and
- (b) the liabilities of the company within the meaning of Part III of the *Insurance Act* 1973 exceed the assets of the company within the meaning of that Part of that Act.

**(3)** Notwithstanding anything in sub-section (1), the Court shall not hear the application if it is made by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and a *prima facie* case for winding up has been established to the satisfaction of the Court.

**Circumstances in which company may be wound up by Court**

- 364. (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;
  - (b) default is made by the company in lodging the statutory report or in holding the statutory meeting;
  - (c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;
  - (d) except in the case of a company that is the wholly-owned subsidiary of a company within the meaning of this Code or of the corresponding law of a participating State or a participating Territory, the number of members is reduced, in the case of a proprietary company, below 2 or, in the case of any other company, below 5;
  - (e) the company is unable to pay its debts;
  - (f) 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;
  - (g) the Commission has reported under Part VII that it is of the opinion, or an inspector appointed under Part VII has reported that he is of the opinion—
    - (i) that the company cannot pay its debts and should be wound up; or
    - (ii) that it is in the interests of the public, of the shareholders or of the creditors that the company should be wound up;
  - (h) where an application for the winding up of the company was made under paragraph 363 (1) (h)—the Court is of opinion that it is in the interests of the public, of the shareholders or of the creditors that the company should be wound up; or
  - (j) the Court is of opinion that it is just and equitable that the company be wound up.
- (2)** For the purposes of sub-section (1), if—
- (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding \$1,000 then due has served on the company a demand, signed by or on behalf of the creditor, requiring

the company to pay the sum so due and the company has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

- (b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) the Court, after taking into account any contingent and prospective liabilities of the company, is satisfied that the company is unable to pay its debts,

the company shall be deemed to be unable to pay its debts.

#### **Commencement of winding up by the Court**

**365. (1)** Where, before the filing of the application, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution and, unless the Court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

**(2)** In any other case the winding up shall be deemed to have commenced at the time of the filing of the application for the winding up.

#### **As to payment of preliminary costs, &c.**

**366. (1)** The persons, other than the company itself or the liquidator of the company, on whose application any winding up order is made shall, at their own cost, prosecute all proceedings in the winding up until a liquidator has been appointed under this Part.

**(2)** The liquidator shall, 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 the Commission, a fraud has been committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation, the taxed costs or so much of them as is not reimbursed under sub-section (2) may be reimbursed by the Commission 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 shall, 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.

#### **Powers of Court on hearing application**

**367. (1)** On hearing a winding up application the Court may dismiss the application with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit, but the Court shall not refuse to make a winding up order on the ground only that the property of the company has been mortgaged to an amount equal to or in excess of the value or amount of that property or that the company has no property.

**(2)** 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 that he intends 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;
- (b) dispense with any notices being given or steps being taken that are required by this Code, or by the rules, or by any prior order of the Court;
- (c) direct that oral evidence be taken on the application or any matter relating to the application;
- (d) direct a speedy hearing or trial of the application or of any issue or matter;
- (e) allow the application to be amended or withdrawn; and
- (f) give such directions as to the proceedings as the Court thinks fit.

**(3)** 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 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,

shall 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.

(4) Notwithstanding any rule of law to the contrary, the Court shall not refuse to make an order for winding up on the application of a person referred to in paragraph 363 (1) (c) on the ground that, if the order were made, no property of the company would be available for distribution among the contributories.

(5) Where the application is made on the ground of default in lodging the statutory report or in holding the statutory meeting, the Court may, instead of making a winding up order, direct that the statutory report be lodged or that a meeting be called, and may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

(6) 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.

**Avoidance of dispositions of property, attachments, &c.**

**368. (1)** Any disposition of property of the company, other than a disposition made by the liquidator pursuant to a power conferred on him by this Code or by an order of the Court, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void.

(2) Notwithstanding sub-section (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.

(3) 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.

**Application to be lis pendens**

**369.** Any 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.

**Certain notices to be lodged with Commission**

**370. (1)** An applicant (other than the Commission) for the winding up of a company shall—

- (a) lodge with the Commission, not later than 10.30 a.m. 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;
- (b) after an order for winding up is made—lodge with the Commission, 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 with the Commission, 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 shall, within 7 days after the passing and entering of a winding up order—

- (a) except where the applicant is the Commission—lodge an office copy of the order with the Commission;
- (b) serve an office copy of the order on the company or such other person as the Court directs; and
- (c) deliver to the liquidator an office copy of the order together with a statement that the order has been served as mentioned in paragraph (b).

**(3)** An applicant (other than the Commission) who fails to comply with sub-section (1) or (2) is guilty of an offence.

**(4)** Where the Commission is an applicant for the winding up of a company, the Commission shall 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 sub-section 31 (2) applies in relation to the document containing those particulars and to the office copy as if they were documents lodged with the Commission.

**Effect of winding up order**

**371. (1)** 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.

**(2)** Where an order has been made for the winding up of a company, or a provisional liquidator has been appointed in respect of a company, no action or other civil proceeding may be commenced or proceeded with against the company except—

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

*Subdivision B—Liquidators*

**Power of Court to appoint official liquidator**

**372. (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, where there is an appeal against a winding up order, before a decision in the appeal is made, and that liquidator has and may exercise such functions, powers and duties as are conferred on him by this Code or prescribed by the rules or as the Court specifies in the order appointing him.

**General provisions as to liquidators**

**373. (1)** A liquidator appointed by the Court may resign or, on cause shown, be removed by the Court.

**(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 a resolution passed at a meeting of creditors by a majority of the creditors present and voting, either in person or by proxy, being a majority whose debts against the company that have been admitted to proof amount in the aggregate to not less than 75% of the total amount of the debts of the creditors of the company present and voting, either in person or by proxy, that have been admitted to proof; or
  - (ii) if no such resolution is passed—by the Court.

**(4)** A meeting of creditors for the purposes of sub-section (3) shall be convened by the liquidator by sending to each creditor a notice to which is attached a statement of all receipts and expenditure by the liquidator and of the amount of remuneration sought by him.

**(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 not less than 10% of the issued capital of the company;
- (b) a creditor or creditors whose debts against the company that have been admitted to proof amount in the aggregate to not less than 10% of the total amount of the debts of the creditors of the company that have been admitted to proof; or
- (c) the Commission,

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 sub-paragraph (3) (b) (i) the Court may, on the application of the liquidator or of a member or members referred to in sub-section (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 shall be filled by the Court.

(8) If more than one liquidator is appointed by the Court, the Court shall declare whether anything that is required or authorized by this Code 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 Code, the acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

**Custody and vesting of company's property**

**374.** (1) Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his 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 shall 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 shall vest in the liquidator and thereupon the property to which the order relates shall vest 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 shall, within 14 days after the making of the order, lodge with the Commission an office copy of the order.

**Report as to company's affairs to be submitted to liquidator**

**375.** (1) There shall be made out and verified by a statement in writing in the prescribed form, and submitted to the liquidator, by the persons who were, at the date of the winding up order or, if the liquidator specifies an earlier date, that earlier date, the directors and secretary of the company a report in the prescribed form as to the affairs of the company as at the date concerned.

**(2)** The liquidator may, by notice in writing served personally or by post addressed to the last known address of the person, require one or more persons included in one or more of the following classes of persons to make out as required by the notice, verify by a statement in writing in the prescribed form, and submit to him, 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 is 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 in the employment of the company or have been in the employment of 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 in the employment of, a corporation 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 sub-section (2), specify the information that he requires as to affairs of the company by reference to information required by this Code or the regulations to be included in any other report, statement or notice under this Code.

**(4)** A report referred to in sub-section (1) shall, subject to sub-section (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 sub-section (2) shall, subject to sub-section (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 may, on an application in writing made to him before the expiration of the time limited by sub-section (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) shall, 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 with the Commission; and
- (b) shall, where he gives a notice under sub-section (6), forthwith lodge a copy of the notice with the Commission.

**(8) A person making or concurring in making a report required by this section and verifying it as required by this section shall, subject to the rules, be allowed, and shall 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 who, without reasonable excuse, fails to comply with a provision of this section other than sub-section (7) is guilty of an offence.**

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

**(10) A person who, without reasonable excuse, fails to comply with sub-section (7) is guilty of an offence.**

**(11) In this section a reference to a liquidator includes a reference to a provisional liquidator.**

**Preliminary report by liquidator**

**376.** A liquidator of a company shall, within 2 months, or such longer period (if any) as the Commission allows, after receiving a report referred to in sub-section 375 (1) or (2), lodge with the Commission 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;
- (b) as to the estimated amounts of assets and liabilities of the company;
- (c) if the company has failed—as to the causes of the failure; and
- (d) as to whether, in his 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.

**Powers of liquidator**

**377. (1)** The liquidator may, with the authority of the Court, of the committee of inspection or of a resolution of the creditors—

- (a) carry on the business of the company so far as is necessary for the beneficial disposal or winding up of that business;
- (b) subject to the provisions of section 441, pay any class of creditors in full;
- (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to 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)** The liquidator may—

- (a) bring or defend any legal proceeding in the name and on behalf of the company;
- (b) appoint a solicitor to assist him in his duties;
- (c) sell or otherwise dispose of, in any manner, all or any part of the property of the company;
- (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 the company's common or official seal;
- (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;
- (f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company;

- (g) obtain credit, whether on the security of the property of the company or otherwise;
- (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 estate, that cannot be conveniently done in the name of the company;
- (j) compromise any debt due to the company other than calls and liabilities for calls and other than a debt where the amount claimed by the company to be due to it exceeds \$20,000;
- (k) appoint an agent to do any business that the liquidator is unable to do himself; and
- (l) do all such other things as are necessary for winding up the affairs of the company and distributing its property.

**(3)** The authority of the Court or committee of inspection or a resolution of the creditors is not required for the carrying on of the business of the company by the liquidator in accordance with paragraph (1) (a) during the 4 weeks next after the date of the winding up order.

**(4)** 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 shall be deemed to be due to the liquidator himself.

**(5)** 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 may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

#### **Settlement of list of contributories and application of property**

**378. (1)** As soon as practicable after making a winding up order, the liquidator—

- (a) shall settle a list of contributories;
- (b) may rectify the register of members in all cases where rectification is required pursuant to this Part; and
- (c) shall cause the property of the company to be collected and applied in discharge of its liabilities.

**(2)** Notwithstanding the provisions of sub-section (1), where it appears to the liquidator that it will not be necessary to make calls on or adjust the rights of contributories, the liquidator may dispense with the settlement of a list of contributories.

(3) In settling the list of contributories the liquidator shall 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.

#### **Exercise and control of liquidator's powers**

**379.** (1) Subject to this Part, the liquidator shall, 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 shall convene meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than 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 shall use his own discretion in the management of affairs and property of the company and the distribution of its property.

#### **Payment by liquidator into bank**

**380.** (1) A liquidator shall, in the manner and at the times prescribed by the rules, pay the money received by him into such bank and account as are prescribed by the rules or specified by the Court.

(2) If a liquidator retains for more than 10 days a sum exceeding \$500, or such other amount as the Court in any particular case authorizes him to retain, then, unless he explains the retention to the satisfaction of the Court,

he shall pay interest at the rate of 20% per annum on the amount so retained in excess computed from the expiration of the 10 days until he has complied with the provisions of sub-section (1), and is liable—

- (a) to disallowance of all or such part of his remuneration as the Court thinks just;
- (b) to be removed from his office by the Court; and
- (c) to pay any expenses occasioned by reason of his default.

(3) A liquidator who pays any sums received by him as liquidator into a bank or account other than the bank or account prescribed or specified under sub-section (1) is guilty of an offence.

#### **Release of liquidators and dissolution of company**

**381.** When the liquidator—

- (a) has realized all the property of the company or so much of that property as can in his opinion be realized without needlessly protracting the winding up, and has distributed a final dividend (if any) to the creditors and adjusted the rights of the contributories among themselves and made a final return (if any) to the contributories; or
- (b) has resigned or has been removed from his office,  
he may apply to the Court—
  - (c) for an order that he be released; or
  - (d) for an order that he be released and that the company be dissolved.

#### **As to orders for release or dissolution**

**382. (1)** The Court—

- (a) may cause a report on the accounts of the liquidator to be prepared by the auditor appointed by the Commission under section 422 or by some other registered company auditor appointed by the Court;
- (b) on the liquidator complying with all the requirements of the Court—shall 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) shall 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 from all liability in respect of any act done or default made by him in the administration of the affairs of the company or otherwise in relation to his 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 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 the company be dissolved,

the liquidator shall, within 14 days after the making of the order, lodge an office copy of the order with the Commission.

**(6)** Where an order is made that the company be dissolved, the company is, from the date of the order, dissolved accordingly.

#### *Subdivision C—General Powers of Court*

##### **Power to stay or terminate winding up**

**383. (1)** At any time during the winding up of a company, the Court may, on the application of the liquidator or of a creditor or contributory, make an order staying the winding up either indefinitely or for a limited time or terminating the winding up on a date specified in the order.

**(2)** On such an application, the Court may, before making an order, direct the liquidator to furnish a report with respect to a relevant fact or matter.

**(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 shall, if the Court so directs, form part of the costs, charges and expenses of the winding up.

(5) Where an order is made under this section, the company shall lodge an office copy of the order with the Commission within 14 days after the making of the order.

#### **Delivery of property to liquidator**

**384. (1)** The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator forthwith or within such time as the Court directs any money, property or books in his 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 him or from the estate of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call pursuant to this Code, and may—

- (a) in the case of an unlimited company—allow to the contributory by way of set-off any money due to him or to the estate that he represents from the company on any independent dealing or contract but not any money due to him 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 his 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 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 so made,
- 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.

**(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 moneys and securities paid or delivered into any bank pursuant to 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 shall be taken to be truly stated as against all persons and in all proceedings.

#### **Appointment of special manager**

**385. (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, 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 by the Court.

**(2)** The special manager—

- (a) shall give such security and account in such manner as the Court directs;
- (b) shall 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.

**Claims of creditors and distribution of property**

**386. (1)** The Court may fix a date 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 shall 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.

**Inspection of books by creditors and contributories**

**387.** The Court may make such order for inspection of the books of the company by creditors and contributories as the Court thinks just, and any books in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

**Power to arrest absconding contributory**

**388.** 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 the State or otherwise to abscond or to remove or conceal any of his 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 his books and movable personal property to be seized and safely kept until such time as the Court orders.

**Delegation to liquidator of certain powers of Court**

**389. (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;
- (b) the paying, delivery, conveyance, surrender or transfer of money, property or books to the liquidator;

- (c) the making of calls and 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)** Notwithstanding anything contained in rules or regulations made for the purposes of sub-section (1), a liquidator shall not—
- (a) make any call without either the special leave of the Court or the sanction of the committee of inspection; or
  - (b) distribute any surplus among the persons entitled to it without the special leave of the Court.

#### **Powers of Court cumulative**

**390.** Any powers conferred on the Court by this Code 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.

### *Division 3—Voluntary Winding Up*

#### *Subdivision A—Introductory*

##### **Limitation on right to wind up voluntarily**

**391.** Where an application has been filed with the Court for the winding up of a company on the ground that it is unable to pay its debts, the company is not, without the leave of the Court, entitled to resolve that it be wound up voluntarily.

##### **Circumstances in which company may be wound up voluntarily**

**392. (1)** Subject to section 391, a company may be wound up voluntarily if the company so resolves by special resolution.

**(2)** A company shall—

- (a) within 7 days after the passing of a resolution for voluntary winding up, lodge a printed copy of the resolution with the Commission; and

- (b) within 21 days after the passing of the resolution, cause notice of the resolution to be published in the *Gazette*.
- (3) If the company fails to comply with the provisions of sub-section (2), the company and any officer of the company who is in default are each guilty of an offence.

**Commencement of winding up**

**393.** A voluntary winding up commences at the time of the passing of the resolution for voluntary winding up.

**Effect of voluntary winding up**

**394. (1)** The company shall, from the commencement of the winding up, 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 articles, continue until it is dissolved.

**(2)** Any transfer of shares, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members, made after the commencement of the winding up are void.

**Declaration of solvency**

**395. (1)** Where it is proposed to wind up a company voluntarily, the directors of the company, or, in the case of a company having more than 2 directors, 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 shall 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 realized from that property;
- (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 Code unless—

- (a) the declaration is made at the meeting of directors referred to in sub-section (1);
- (b) the declaration is lodged with the Commission 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 the Commission, whether before, on or after the first-mentioned date, allows; and
- (c) the resolution for voluntary winding up is passed within the period of 5 weeks after the making of the declaration or within such further period after the making of that declaration as the Commission, whether before or after the expiration 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 Code by reason of sub-section (3)) without having reasonable grounds for his 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.

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

**(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) the Commission has allowed a further period after the expiration 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 shall be presumed, unless the contrary is shown, that the director who made the declaration did not have reasonable grounds for his opinion.

*Subdivision B—Provisions applicable only to Members' Voluntary Winding Up*

**Liquidators**

**396. (1)** The company in general meeting shall 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 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, 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 shall be held in the manner provided by this Code or by the articles or in such manner as is, on application by any contributory or by the continuing liquidators, determined by the Court.

**Duty of liquidator to call creditors' meeting in case of insolvency**

**397. (1)** Where a declaration has been made under section 395 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 shall forthwith convene a meeting of the creditors.

**(2)** The liquidator shall 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.

**(3)** Unless the Court otherwise orders, nothing in sub-section (2) requires the liquidator to send, to a creditor whose debt does not exceed \$200, a list of creditors referred to in that sub-section, but the notice convening the meeting that is sent to a creditor to whom the liquidator is not required to send such a list shall specify a place at which copies of the list referred to in that sub-section can be obtained on request made orally or in writing and, where such a creditor so requests, the liquidator shall forthwith comply with the request.

**(4)** The liquidator shall lay before the meeting a statement of the assets and liabilities of the company and the notice convening the meeting shall draw the attention of the creditors to the right conferred upon them by sub-section (5).

**(5)** The creditors may, at the meeting convened under sub-section (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 sub-section (5), the winding up shall 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 shall, within 7 days after a meeting has been held pursuant to the provisions of sub-section (1), lodge with the Commission a notice in the prescribed form.

**(8)** Where the liquidator has convened a meeting under sub-section (1) and the creditors do not appoint a liquidator instead of the liquidator appointed by the company, the winding up shall 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 sub-section (1) was held less than 3 months before the end of that year.

*Subdivision C—Provisions applicable only to Creditors' Voluntary Winding Up*

**Meeting of creditors**

**398. (1)** The company shall cause a meeting of the creditors of the company to be convened for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company.

**(2)** The company shall convene a meeting at a date, time and place convenient to the majority in value of the creditors and shall—

- (a) give to the creditors at least 7 days' notice by post of the meeting;
- (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 with the Commission, not less than 7 days before the date 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 the State, and in each other State and each 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 the State, or in that other State or in that Territory, as the case may be.

(3) Unless the Court otherwise orders, nothing in sub-section (2) requires the company to send, to a creditor whose debt does not exceed \$200, a list of creditors referred to in sub-paragraph (2) (b) (ii), but the notice convening the meeting that is sent to a creditor to whom the company is not required to send such a list shall specify a place at which copies of the list referred to in that sub-paragraph can be obtained on request made orally or in writing and, where such a creditor so requests, the company shall forthwith comply with the request.

(4) If the company fails to comply with sub-section (1) or (2), the company is, notwithstanding section 570, not guilty of an offence against this Code, but any officer of the company who is in default is guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(5) The directors of the company shall—

(a) cause to be laid before the meeting of creditors a report in the prescribed form, and verified by all the directors, as to the affairs of the company, made up to the latest practicable date before the notices of the meeting were sent; and

(b) appoint one of their number to attend the meeting.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(6) The director so appointed and a secretary shall attend the meeting and disclose to the meeting the affairs of the company and the circumstances leading up to the proposed winding up.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(6A) The directors of the company shall, not later than 7 days after the report referred to in paragraph (5) (a) is laid before the meeting of creditors as mentioned in that paragraph, lodge a copy of the report with the Commission.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(7) The creditors may appoint one of their number or the director appointed under sub-section (5) to preside at the meeting.

**(8)** The chairman shall, 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 decision is final.

**(9)** At a meeting of creditors held under this section the creditors may determine the matters referred to in paragraphs 432 (1) (a) and (b) and, where the creditors so determine those matters, a meeting of the creditors for the purposes of section 432 shall be deemed to have been held and the determinations shall be deemed to have been made under that section.

#### **Power to adjourn meeting**

**399. (1)** A meeting convened under section 398 may by resolution be adjourned from time to time to a time and date specified in the resolution but shall not be adjourned to a date later than 21 days after the date for which the meeting was originally convened.

**(2)** Where a meeting is adjourned, the adjourned meeting shall, 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 date later than 8 days after the passing of the resolution by which it is adjourned, the company shall cause notice of the date, time and place of the resumption of the meeting to be published, in a daily newspaper circulating generally in the State, at least 7 days before the date of the resumption of the meeting.

**(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.

#### **Liquidators**

**400. (1)** The company shall, and the creditors may, at their respective meetings nominate a person to be liquidator for the purpose of winding up the affairs and distributing the property of the company and, if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator but, if no person is nominated by the creditors, the person nominated by the company shall be liquidator.

(2) Notwithstanding the provisions of sub-section (1), where different persons are nominated, any director or member may, within 7 days after the date on which the nomination was made by the creditors, apply to the Court for an order directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors.

(3) The committee of inspection, or, if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator.

(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 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.

#### **Execution and civil proceedings**

**401.** (1) Any attachment, sequestration, distress or execution put in force against the property of the company after the commencement of a creditors' voluntary winding up is void.

(2) After the commencement of the winding up, no action or other civil proceeding shall 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 or officer 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 hands to which the company is *prima facie* entitled.

#### **Execution and civil proceedings against recognized companies**

**402.** (1) Any attachment, sequestration, distress or execution put in force against the property of a recognized company after the commencement of a creditors' voluntary winding up under the corresponding law of the State or Territory in which the company is incorporated is void.

(2) After the commencement of that winding up, no action or other civil proceeding shall be proceeded with or commenced against the recognized company except by leave of the Supreme Court of that State or Territory and subject to such terms as that Court imposes.

*Subdivision D—Provisions applicable to every Voluntary Winding Up***Distribution of property of company**

**403.** Subject to the provisions of this Code as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities equally and, subject to that application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

**Appointment of liquidator**

**404.** If from any cause there is no liquidator acting, the Court may appoint a liquidator.

**Removal of liquidator**

**405.** The Court may, on cause shown, remove a liquidator and appoint another liquidator.

**Review of liquidator's remuneration**

**406.** Any member or creditor, or the liquidator, may at any time before the dissolution 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.

**Acts of liquidator valid, &c.**

**407. (1)** The acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his 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 shall 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.

**(4)** For the purposes of this section, a disposition of property shall be taken as including a payment of money.

**Powers and duties of liquidator**

**408. (1)** The liquidator may—

- (a) in the case of a members' voluntary winding up, with the approval of a special resolution of the company or, in the case of a creditors' voluntary winding up, with the approval of the Court or the committee of inspection or, if there is no such committee, a meeting of creditors, exercise any of the powers given by paragraphs 377 (1) (b), (c) and (d) to a liquidator in a winding up by the Court;
- (b) exercise any of the other powers by this Code given to the liquidator in a winding up by the Court;
- (c) exercise the power under section 378 of a liquidator appointed by the Court to settle a list of contributories;
- (d) exercise the power of the Court of making calls;
- (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 thinks fit.

**(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 shall pay the debts of the company and adjust the rights of the contributories among themselves.

**(4)** When several liquidators are appointed, any power given by this Code may be exercised by such one or more of them as is determined at the time of their appointment, or in default of such determination, by any number not less than 2.

**Power of liquidator to accept shares, &c., as consideration for sale of property of company**

**409. (1)** Where it is proposed that the whole or part of the business or property of a company (in this section referred to as the "company") be transferred or sold to another corporation (in this section referred to as the "corporation"), the liquidator of the company, may, with the sanction of a

special resolution of the company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, debentures, policies or other like interests in the corporation for distribution among the members of the company or may enter into any other arrangement whereby the members of the company may, in lieu of or in addition to receiving cash, shares, debentures, policies or other like interests, participate in the profits of or receive any other benefit from the corporation, and any such transfer, sale or arrangement is binding on the members of the company.

(2) If a member of the company who did not vote in favour of the special resolution expresses his 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, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in the manner provided by this section.

(3) If the liquidator elects to purchase the member's interest, the purchase money shall be paid before the company is dissolved and be raised by the liquidator in such manner as is determined by special resolution.

(4) A special resolution is not invalid for the purposes of this section by reason that 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 a year after the passing of the resolution, the resolution is not valid unless sanctioned by the Court.

(5) For the purposes of an arbitration under this section, the law relating to commercial arbitration applies as if there were a submission for reference to 2 arbitrators, one to be appointed by each party, and the appointment of an arbitrator may be made under the hand of the liquidator or, if there is more than one liquidator, under the hands of any 2 or more of the liquidators, and the Court may give any directions necessary for the initiation and conduct of the arbitration and any such direction is binding on the parties.

(6) In the case of a creditors' voluntary winding up, the powers of the liquidator under this section shall not be exercised except with the approval of the Court or the committee of inspection.

#### **Annual meeting of creditors**

**410. (1)** If the winding up continues for more than one year, the liquidator shall—

(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—convene a general meeting of the company and a meeting of the creditors,

within 3 months after the end of the first year from the commencement of the winding up and the end of each succeeding year, and shall lay before the meeting or each meeting an account of his acts and dealings and of the conduct of the winding up during that first year or that succeeding year, as the case may be.

(2) The liquidator shall cause the notices of the meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company.

#### **Final meeting and dissolution**

**411. (1)** As soon as the affairs of the company are fully wound up, the liquidator shall 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 shall convene a general meeting of the company, or, in the case of a creditors' voluntary winding up, a meeting of the company and the creditors, for the purpose of laying before it the account and giving any explanation of the account.

(2) The meeting shall be convened by an advertisement published in the *Gazette* at least one month before the meeting specifying the date, time, place and purpose of the meeting.

(3) The liquidator shall, within 7 days after the meeting, lodge with the Commission 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 company and of the creditors, 2 members and 2 creditors constitute a quorum and, if a quorum is not present at the meeting, the liquidator shall, in lieu of the return mentioned in sub-section (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 provisions of that sub-section as to the lodging of the return shall be deemed to have been complied with.

(5) Subject to sub-section (6), on the expiration of the period of 3 months after the lodging of the return with the Commission the company is dissolved.

**(6)** On the application of the liquidator or of any other party who appears to the Court to be interested, the Court may, before the expiration of the period of 3 months referred to in sub-section (5), by order, declare that sub-section (5) is not to apply in relation to the company and specify the date on which the company is to be dissolved and, where the Court makes such an order, the company is dissolved on the date specified in the order.

**(7)** The person on whose application an order of the Court under this section is made shall, within 14 days after the making of the order, lodge with the Commission an office copy of the order and, if he fails so to do, he is guilty of an offence.

#### **Arrangement, when binding on creditors**

**412. (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 sub-section (4)—

- (a) binding on the company if sanctioned by a special resolution; and
- (b) binding on the creditors if a resolution in favour of the arrangement is passed at a meeting of creditors by a majority of the creditors present and voting, either in person or by proxy, being a majority whose debts against the company amount in the aggregate to not less than 75% of the total amount of the debts of the creditors of the company present and voting, either in person or by proxy.

**(2)** A creditor shall 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 him and the amount of any debt or set-off owing by him to the company, appears to be the balance due to him.

**(3)** A dispute with regard to 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.

**Application to Court to have questions determined or powers exercised**

**413.** (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.

(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.

**Costs**

**414.** All proper costs, charges and expenses of and incidental to the winding up (including the remuneration of the liquidator) are payable out of the property of the company in priority to all other claims.

*Division 4—Provisions applicable to every Mode of Winding Up**Subdivision A—General***Interpretation**

**415.** In sections 416, 417 and 419 to 423 (inclusive), unless the contrary intention appears, “liquidator” includes a provisional liquidator.

**Books to be kept by liquidator**

**416.** A liquidator shall keep proper books in which he shall 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 his agent inspect them.

**Disqualification of liquidators**

**417.** (1) Subject to this section, a person shall not consent to be appointed, and shall not act, as liquidator of a company unless he is—

- (a) a registered liquidator; or
- (b) registered as a liquidator of that company under sub-section 20 (3).

**(2)** Subject to this section, a person shall 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 corporation in which the person is a substantial shareholder for the purposes of Division 4 of Part IV or the provisions of the law of a participating State or participating Territory that correspond with that Division, is indebted in an amount exceeding \$5,000 to the company or to a related corporation;
- (b) if he is, otherwise than in his capacity as liquidator, a creditor of the company or of a related corporation in an amount exceeding \$5,000; or
- (c) if—
  - (i) he is an officer of the company (otherwise than by reason of being a liquidator of the company or of a related corporation);
  - (ia) he is an officer of any corporation that is a mortgagee of property of the company;
  - (ii) he is an auditor of the company;
  - (iii) he is a partner or employee of an auditor of the company;
  - (iv) he is a partner, employer or employee of an officer of the company; or
  - (v) he is a partner or employee of an employee of an officer of the company.

**(3)** The reference in paragraph (2) (a) to indebtedness to a corporation does not, in relation to indebtedness of a natural person, include a reference to indebtedness of that person to a corporation that is a prescribed corporation for the purposes of Division 4 of Part VI where—

- (a) the indebtedness arose as a result of a loan made to that person by the corporation in the ordinary course of its ordinary business; and
- (b) the amount of that loan was used by that person to pay the whole or part of the purchase price of premises that are used by that person as his principal place of residence.

**(4)** Sub-section (1) and paragraph (2) (c) do not apply to a members' voluntary winding up of a proprietary company that is an exempt proprietary company or is a subsidiary of a public company.

(5) Paragraph (2) (c) does not apply to a creditors' voluntary winding up if, by a resolution carried by a majority of the creditors in number and value present and voting, either in person or by proxy, at a meeting of which 7 days' notice has been given to every creditor stating the purpose of the meeting, it is determined that that paragraph shall not so apply.

(6) For the purposes of sub-section (2), a person shall be deemed to be an officer or auditor of a company if—

- (a) he is an officer or auditor of a related corporation; or
- (b) except where the Commission, if it thinks fit in the circumstances of the case, directs that this paragraph shall not apply in relation to him—he has, at any time within the immediately preceding period of 2 years, been an officer, auditor or promoter of the company or of a related corporation.

(7) A person shall not consent to be appointed, and shall not act, as liquidator of a company if he is an insolvent under administration.

(8) A person shall not consent to be appointed, and shall not act, as liquidator of a company that is being wound up by order of the Court unless he is an official liquidator.

(9) A person shall not be appointed as liquidator of a company unless he has, before his appointment, consented in writing to act as liquidator of the company.

Penalty: \$1,000 or imprisonment for 3 months, or both.

#### **Reports by liquidator**

**418. (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 a member or contributory, of the company may have been guilty of an offence under any law of the Commonwealth or of a State or Territory in relation to the company;
- (b) a person who has taken part in the formation, promotion, administration, management or winding up of the company—
  - (i) may have misappropriated 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 shall—

(d) forthwith report the matter to the Commission and state in the report whether he proposes to make an application for an examination or order under section 541; and

(e) furnish the Commission with such information, and give to it such access to and facilities for inspecting and taking copies of any documents, as the Commission requires.

**(2)** The liquidator may also, if he thinks fit, lodge with the Commission further reports specifying any other matter that, in his opinion, it is desirable to bring to the notice of the Commission.

**(3)** If it appears to the Court, in the course of a winding up of a company, that a past or present officer, or a contributory or member, of the company or a person who has taken part in the formation, promotion, administration, management or winding up of the company, has been guilty of an offence in relation to the company and that the liquidator has not made a report to the Commission with respect to the matter, the Court may, on the application of a person interested in the winding up or of its own motion, direct the liquidator to make such a report.

#### **Liquidators to enjoy qualified privilege in certain circumstances**

**419. (1)** A liquidator has qualified privilege in proceedings for defamation in respect of any statement that he makes in the course of his duties as liquidator, whether the statement is made orally or in writing.

**(2)** This section does not limit or affect any other right, privilege or immunity that a liquidator or other person has as defendant in proceedings for defamation.

#### **Supervision of liquidators**

**420. (1)** If—

(a) it appears to the Court or to the Commission that a liquidator has not faithfully performed or is not faithfully performing his duties or has not observed or is not observing any of the prescribed requirements or the requirements of the Court; or

- (b) a complaint is made to the Court or to the Commission by any person with respect to the conduct of a liquidator in connection with the performance of his duties,

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

(2) The Commission 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 him or any other person on oath or affirmation concerning the winding up and may direct an investigation to be made of the books of the liquidator.

#### **Notice of appointment and address of liquidator**

**421. (1)** A liquidator shall, within 14 days after his appointment, lodge with the Commission notice in the prescribed form of his appointment and of the address of his office and, in the event of any change in the situation of his office, shall, within 14 days after the change, lodge with the Commission notice in the prescribed form of the change.

(2) A liquidator shall, within 14 days after his resignation or removal from office, lodge with the Commission notice of the resignation or removal in the prescribed form.

#### **Liquidator's accounts**

**422. (1)** A liquidator shall, within one month after the expiration of the period of 6 months from the date of his appointment and of every subsequent period of 6 months during which he acts as liquidator and within one month after he ceases to act as liquidator, lodge with the Commission—

- (a) an account in the prescribed form and verified by a statement in writing showing—  
(i) his receipts and his payments during each such period or, where he 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 appointment, as the case requires, up to the date of his so ceasing to act; and

(ii) in the case of the second account lodged under this sub-section and all subsequent accounts—the aggregate amount of receipts and payments during all preceding periods since his 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)** The Commission 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 shall prepare a report on the account and the statement (if any).

**(3)** For the purposes of the audit under sub-section (2) the liquidator shall furnish the auditor with such books and information as the auditor requires.

**(4)** Where the Commission causes an account, or an account and a statement, to be audited under sub-section (2)—

- (a) the Commission shall furnish to the liquidator a copy of the report prepared by the auditor; and
- (b) sub-section 30 (2) applies in relation to the report prepared by the auditor as if it were a document required to be lodged with the Commission.

**(5)** The liquidator shall 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.

**(6)** The costs of an audit under this section shall be fixed by the Commission and form part of the expenses of winding up.

#### **Liquidator to make good defaults**

**423. (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 is by law required to lodge, make or give, fails to make good the default within 14 days after the service on him of a notice requiring him to do so, the Court may, on the application of any contributory or creditor of the company or the Commission, make an order directing the liquidator to make good the default within such time as is specified in the order.

(2) Any order made under sub-section (1) may provide that all costs of and incidental to the application shall be borne by the liquidator.

(3) Nothing in sub-section (1) prejudices the operation of any law imposing penalties on a liquidator in respect of any such default.

#### **Notification that a corporation is in liquidation**

**424. (1)** Where a corporation is being wound up, in every business letter, statement of account, invoice, order for goods, order for services, official notice, publication, bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, receipt and letter of credit of, or purporting to be issued or signed by or on behalf of, the corporation, there shall be set out after the name of the corporation where it first appears the words "in liquidation".

(2) If default is made in complying with this section, the corporation and any officer of the corporation or liquidator who is in default are each guilty of an offence.

Penalty: \$1,000.

#### **Books of company**

**425. (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 contributors 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 shall retain the books referred to in sub-section (1) for a period of 5 years from the date of dissolution of the company and, subject to section 262A of the *Income Tax Assessment Act* 1936 of the Commonwealth as amended and in force for the time being, may, at the expiration of that period, destroy them.

(3) Notwithstanding sub-section (2) but subject to sub-section (4), when a company has been wound up, the books referred to in sub-section (1) may be destroyed within a period of 5 years after the dissolution 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 not less than 14 days notice has been given to the Commission;

- (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 direct.
- (4)** The liquidator is not entitled to destroy books as mentioned in paragraph (3) (b) or (c) unless the Commission consents to the destruction of those books.

#### **Investment of surplus funds on general account**

**426. (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 no committee of inspection, the liquidator himself, 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 authorized by law to invest trust funds;
- (b) on deposit with a corporation that is declared, pursuant to paragraph 97 (7) (b), to be an authorized dealer in the short term money market; 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 realization of such part of the securities as is necessary.

**Unclaimed property to be paid to Treasurer of New South Wales**

**427. (1)** Where a liquidator of a company has in his hands or under his control—

- (a) any amount being a dividend that has or other moneys that have remained unclaimed for more than 6 months after the date when the dividend or other moneys became payable; or
- (b) after making a final distribution, any unclaimed or undistributed amount of moneys arising from the property of the company,

he shall forthwith pay those moneys to the Treasurer of New South Wales.

**(2)** The Court may at any time on the application of the Commission—

- (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 moneys in his hands or under his control;
- (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 moneys referred to in paragraph (a) to the Treasurer of New South Wales.

**(3)** Where a liquidator of a company pays moneys to the Treasurer of New South Wales pursuant to sub-section (1) or to an order of the Court made under paragraph (2) (c), the liquidator is entitled to a receipt for the moneys so paid and the giving of that receipt discharges the liquidator from any liability in respect of those moneys.

**(4)** For the purposes of this section the Court may exercise all the powers conferred by this Code with respect to the discovery and realization of the property of a company and the provisions of this Code 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 Code, deprive a person of any other right or remedy to which he is entitled against the liquidator or another person.

**(6)** Where, at the expiration of a period of 2 years after the date on which unclaimed moneys were paid to the credit of the Companies Liquidation Account, those moneys have not been paid out of the Account in accordance with this section, those moneys shall be paid to the Consolidated Revenue Fund.

**(7)** Where a person claims to be entitled to any moneys paid to the credit of the Companies Liquidation Account, the Treasurer of New South Wales shall, if he is satisfied that the person is entitled to that money, direct payment of that money to be made to him out of the Companies Liquidation Account or, if the money has been paid to the Consolidated Revenue Fund in accordance with sub-section (6), direct payment to the person of an equivalent amount, which shall be paid out of moneys appropriated by the Parliament for the purpose.

**(8)** A person who is dissatisfied with the decision of the Treasurer of New South Wales in respect of a claim made by the person in accordance with sub-section (7) may appeal to the Court and the Court may confirm, disallow or vary the decision of the Treasurer of New South Wales.

**(9)** Where a person claims to be entitled to moneys that have been paid to another person in accordance with this section, the Treasurer of New South Wales is not under any liability to that first-mentioned person in respect of those moneys, but, if the first-mentioned person is entitled to those moneys, he may recover those moneys from the other person.

**(10)** Where a person claims to be entitled to moneys, being moneys an amount equivalent to which has been paid to another person in accordance with sub-section (7) out of moneys appropriated by the Parliament for the purpose, the Treasurer of New South Wales is not under any liability to that first-mentioned person in respect of those moneys, but, if the first-mentioned person is entitled to those moneys, he may recover that equivalent amount from the other person.

#### **Companies Liquidation Account**

**428. (1)** There shall be established in the Treasury in the Special Deposits Account an account to be called the "Companies Liquidation Account".

**(2)** Moneys deposited with the Treasurer of New South Wales under section 427 shall be paid to the credit of the Companies Liquidation Account.

**(3)** Moneys standing to the credit of the Companies Liquidation Account may be expended for the purpose of making payments in accordance with section 427.

**Expenses of winding up where property insufficient**

**429. (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 the Commission 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 the Commission so directs, gives such security to secure the amount of the indemnity as the Court or the Commission thinks reasonable.

**(3)** Nothing in this section shall be taken to relieve a liquidator of any obligation to make a report under section 418 or to lodge a document with the Commission under any provision of this Code by reason only that he would be required to incur expense in order to perform that obligation.

**Resolutions passed at adjourned meetings of creditors and contributories**

**430.** Subject to sub-section 399 (4), where a resolution is passed at an adjourned meeting of any creditors or contributories of a company, the resolution shall for all purposes be treated as having been passed on the date on which it was in fact passed and not on any earlier date.

**Meetings to ascertain wishes of creditors or contributories**

**431. (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 chairman of any such meeting and to report the result of the meeting to the Court.

**(2)** In the case of creditors, regard shall be had to the value of each creditor's debt.

**(3)** In the case of contributories, regard shall be had to the number of votes conferred on each contributory by this Code or the articles.

*Subdivision B—Committees of Inspection***Convening of meetings by liquidator for appointment of committee of inspection**

**432. (1)** The liquidator of a company shall, 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 unless he is—

- (a) in the case of an appointment by creditors of the company—
  - (i) a creditor of the company;
  - (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 authorized 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;
  - (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 authorized in writing by a contributory of the company to be a member of the committee of inspection.

**Proceedings of committee of inspection**

**433. (1)** A committee of inspection shall meet at such times and places as its members from time to time appoint.

**(2)** The liquidator or 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 shall not act unless a majority of its members are present.

**Vacancies on committee of inspection**

**434. (1)** A member of a committee may resign by notice in writing signed by him 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 represent the creditors or contributories, as the case may be,

his 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.

**(4)** A meeting referred to in sub-section (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 sub-section (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.

**Member of committee not to accept extra benefit**

**435. (1)** A member of a committee of inspection shall not, while acting as such a member, except as provided by this Code 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;
- (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 sub-section (1) may be set aside by the Court on the application of a creditor or member of the company.

**Powers of Court where no committee of inspection**

**436.** 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 authorized or required to be done or given by the committee.

*Subdivision C—Proof and Ranking of Claims***Interpretation**

**437.** In this Subdivision, “relevant date” means—

- (a) in the case of a company ordered to be wound up by the Court that has not previously commenced to be wound up voluntarily—the date of the winding up order; and
- (b) in any other case—the date of the commencement of the winding up.

**Proofs of debts**

**438. (1)** In every winding up, subject in the case of insolvent companies to the application in accordance with the provisions of this Code of the *Bankruptcy Act* 1966, all debts payable on a contingency and all claims against the company (present or future, certain or contingent, ascertained or sounding only in damages) are admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.

**(2)** Subject to sections 204 and 441, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the *Bankruptcy Act* 1966, in relation to the estates of bankrupt persons 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 by virtue of this section.

**Computation of debts**

**439. (1)** The amount of a debt of a company (including a debt that is for or includes interest) is to be computed for the purposes of the winding up as at the relevant date.

**(2)** Sub-section (1) does not apply to an amount required to be paid under sub-section 442 (1).

**Debts proved to rank equally except as otherwise provided**

**440.** Except as otherwise provided by this Code, all debts proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they shall be paid proportionately.

**Priority payments**

**441.** Subject to the following provisions of this Subdivision, in the winding up of a company the following debts shall be paid in priority to all other unsecured debts:

- (a) first, the costs, charges and expenses of the winding up, including the taxed costs of an applicant payable under section 366, the remuneration of the liquidator and the costs of any audit carried out under section 422;

- (b) if the winding up was preceded by the appointment of a provisional liquidator—second, the costs, charges and expenses properly and reasonably incurred by the provisional liquidator during the period of his appointment and the remuneration of the provisional liquidator;
- (c) where the winding up commences within 2 months after the end of a period of official management of the company—third, the costs, charges and expenses of and incidental to the official management properly and reasonably incurred by the official manager during the period of official management, including the remuneration of the official manager, of any deputy official manager and of any auditor appointed in accordance with Division 3 of Part VI;
- (d) where the winding up commences within 2 months after the end of a period of official management of the company—fourth, debts of the company properly and reasonably incurred by the official manager in the conduct by him of the business of the company during the period of official management;
- (e) fifth, wages in respect of services rendered to the company by employees before the relevant date, but not exceeding \$2,000 in respect of any one employee;
- (f) sixth, all amounts due in respect of injury compensation, being compensation the liability for which arose before the relevant date;
- (g) seventh, all amounts due on or before the relevant date to or in respect of an employee of the company (whether remunerated by salary, wages, commission or otherwise), in respect of leave of absence, being amounts due by virtue of an industrial instrument;
- (h) eighth—
  - (i) all amounts of rates, being rates that are, or are in the nature of, municipal or other local rates (other than rates imposed by an Act of the Commonwealth or a law of the Australian Capital Territory) that were due and payable at the relevant date and the liability for which accrued within the 12 months that next preceded that date;
  - (ii) all amounts of income tax that were assessed under any Act or Act of any other State or law of a Territory other than the Australian Capital Territory before the relevant date, not exceeding in the whole one year's assessment;

- (iii) all amounts of land tax that were assessed under any Act or Act of any other State or law of a Territory other than the Australian Capital Territory before the relevant date, not exceeding in the whole one year's assessment;
- (iv) all amounts of pay-roll tax (other than pay-roll tax imposed by an Act of the Commonwealth) that were due and payable at the relevant date; or
- (v) all amounts that were due and payable, at the relevant date—
  - (A) by way of repayment of any advance made to the company; or
  - (B) in respect of goods supplied or services rendered to the company,under any Act or Act of any other State or law of a Territory other than the Australian Capital Territory relating to or providing for the improvement, development or settlement of land for the aid, development or encouragement of mining; and
- (j) ninth, any amount that, pursuant to an order under section 309 of this Code or under section 33 of the *Securities Industry (New South Wales) Code*, the company was at the relevant date under an obligation to pay.

**Orders under section 309 or under section 33 of the Securities Industry (New South Wales) Code**

**442. (1)** Where, after the relevant date, an order is made under section 309 of this Code or under section 33 of the *Securities Industry (New South Wales) Code* against a company that is being wound up, the amount that, pursuant to the order, the company is liable to pay is admissible to proof against the company and—

- (a) where all the debts that, under section 441, have priority over all unsecured debts have not been paid at the time when the amount is admitted to proof—shall be paid in priority to all other unsecured debts except those having priority under section 441; and
- (b) where all the debts that, under section 441, have priority over all other unsecured debts have been paid at the time when the amount is admitted to proof—shall be paid in priority to all other unsecured debts that, at that time, have not been paid.

**(2)** Where a copy of an order referred to in sub-section (1) against a company is served on the liquidator of the company and the liquidator has not admitted to proof the amount that, pursuant to the order, the company is liable to pay, the liquidator—

- (a) shall serve notice on the Commission that he has not admitted that amount to proof; and
- (b) shall not make a payment or further payment out of the property of the company (other than payments of debts that, under section 441, have priority over all other unsecured debts) until the expiration of 7 days after service of that notice.

#### **Debts due to employees**

**443. (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 is a person referred to in sub-section (2), entitled to payment under section 441 as if his 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 shall, for the purpose of calculating any entitlement to payment for leave of absence, be deemed, while the liquidator employs him for those purposes, to be employed by the company.

**(3)** Subject to sub-section (4), where, after the relevant date, an amount in respect of long service leave or extended leave become due to a person referred to in sub-section (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 to any amount in respect of long service leave or extended leave but, by the operation of sub-section (2) he 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 qualifying service after that relevant date bears to the total length of his qualifying service; and
- (b) shall, to the extent of the balance of that amount be deemed to be an amount referred to in paragraph 441 (g).

**Debts of a class to rank equally**

**444.** After provision is made for the costs, charges and expenses referred to in paragraph 441 (a), the debts of a class referred to in each of the remaining paragraphs of section 441 rank equally between themselves and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall be paid proportionately.

**Advances in respect of wages and leave of absence**

**445.** Where a payment has been made by a company on account of wages, or in respect of leave of absence under an industrial instrument, being a payment made out of money advanced by a person for the purpose of making the payment, 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, but not exceeding 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, as the person who received the payment would have had if the payment had not been made.

**Priority of employees' claims over floating charges**

**446.** 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 paragraphs 441 (e) and (g);
- (b) any amount that pursuant to sub-section 443 (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 441 (e) or (g); and
- (c) any amount in respect of which a right of priority is given by section 445,

payment of that debt or amount shall 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.

### **Insurance against liabilities to third parties**

**447. (1)** Where a company is, under a contract of insurance 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 shall, 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 441.

**(2)** If the liability of the insurer to the company is less than the liability of the company to the third party, sub-section (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.

### **Provisions relating to injury compensation**

**448. (1)** Notwithstanding anything in section 441, paragraph 441 (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 shall, for the purposes of paragraph 441 (f), be taken to be the lump sum for which those periodical payments could, if redeemable, be redeemed under the law under which the periodical payments are made.

### **Priority where security given for payment of taxes**

**449.** Where a company has given security for the payment or repayment of any amount to which paragraph 441 (h) relates, that paragraph applies only in relation to the balance of any such amount remaining due after deducting from the first-mentioned amount the net amount realized from the security.

**Power of Court to make orders in favour of certain creditors**

**450.** 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 moneys 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.

*Subdivision D—Effect on other Transactions***Undue preference**

**451. (1)** A settlement, a conveyance or transfer of property, a charge on property, a payment made, or an obligation incurred, by a company that, if it had been made or incurred by a natural person, would, in the event of his 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 sub-section (1), the date that corresponds with the date of presentation of the petition in bankruptcy in the case of a natural person is—

- (a) in the case of a winding up by the Court—

- (i) where, before the filing of the application for the winding up, a resolution has been passed by the company for winding up the company voluntarily—the date upon which the resolution to wind up the company voluntarily is passed;

- (ii) where the company is under official management at the time of the filing of the application for the winding up or had been under official management at any time within the period of 6 months before the filing of the application—the date of the commencement of the official management; or

- (iii) in any other case—the date of the filing of the application for the winding up; and

- (b) in the case of a voluntary winding up—
  - (i) where the company is under official management at the time when the resolution to wind up the company voluntarily is passed or had been under official management at any time within the period of 6 months before the passing of that resolution—the date of the commencement of the official management; or
  - (ii) in any other case—the date upon which the resolution to wind up the company voluntarily is passed.
- (3) For the purposes of this section, the date that corresponds with the date on which a person becomes a bankrupt is the date on which the winding up of the company commences or is deemed to have commenced.
- (4) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors is void.

#### **Effect of floating charge**

**452.** A floating charge on the undertaking or property of the company created within 6 months before the commencement of the winding up is, unless it is proved that the company immediately after the creation of the charge was solvent, invalid except to the amount of any moneys 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.

#### **Liquidator's right to recover in respect of certain transactions**

- 453. (1)** Where any property, business or undertaking has been acquired by a company for a cash consideration within a period of 4 years before the commencement of the winding up of the company—
- (a) from a promoter of the company or a spouse of such a promoter, or from a relative of such a promoter or spouse;
  - (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;
  - (c) from a corporation 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 corporation 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 corporation 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 within a period of 4 years before the commencement of the 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;
- (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;
- (c) to a corporation 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 corporation 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 corporation 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 within the period of 6 months before the commencement of the winding up of the company;
- (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 sub-paragraph (i) and the amount of the value of any property recovered as mentioned in sub-paragraph (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 sub-section (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.

**Disclaimer of onerous property**

**454. (1)** Subject to this section, where part of the property of a company consists of—

- (a) land burdened with onerous covenants;
- (b) shares in corporations;
- (c) property that is unsaleable or is not readily saleable; or
- (d) unprofitable contracts,

the liquidator of the company may, on behalf of the company, subject to sub-section (2), notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised an act of ownership in relation to it, by writing signed by him, disclaim the property.

(2) The power of the liquidator under sub-section (1) may only be exercised within 12 months after the commencement of the winding up or such further period as is allowed by the Court but, where the property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power may be exercised at any time within 12 months after the property has come to his knowledge or such further period as is allowed by the Court.

(3) The disclaimer operates to terminate, as from the date of the disclaimer, the rights, interests and liabilities of the company and the property of the company in or in respect of the property disclaimed but does not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(4) The Court may, before or on granting leave to disclaim, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, as the Court thinks just and may make such other order in the matter as the Court thinks just.

(5) Where a disclaimer in respect of property is made, the liquidator shall, as soon as practicable, give notice of the disclaimer—

- (a) to every person who, to the knowledge of the liquidator, has an interest in the property; and
- (b) in the case of property the transfer or transmission of which is required by a law to be registered—to the registrar or other person who has the function under that law of registering the transfer or transmission of that property.

(6) A liquidator is not entitled to disclaim a lease without the leave of the Court unless—

- (a) he has, in accordance with the regulations, given to the lessor and, if the company has sub-let the whole or part of the leased property or has charged the lease, to each sub-lessee or chargee 28 days' notice in writing of his intention to disclaim the lease; and
- (b) no person to whom the liquidator has given such a notice has, within 28 days after it was given to him, required the liquidator, in accordance with the regulations, to apply to the Court for leave to disclaim the lease.

(7) The Court may, in relation to an application for leave to disclaim a lease under this section, make such orders with respect to fixtures, improvements and other matters arising out of the lease, as the Court thinks proper.

(8) Where—

- (a) an application in writing has been made to the liquidator by a person interested in property requiring him to decide whether he will disclaim the property; and
- (b) the liquidator has, for a 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 shall be deemed 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 sub-section (9) may be proved as a debt in the winding up.

(11) The Court may, on application by a person either claiming an interest in, or being under a liability not discharged by this Code in respect of, disclaimed property, and after hearing such persons as it thinks proper, make an order for the vesting of the property in, or delivery of the property to, a person entitled to it or a person in whom, or to whom, it seems to the Court to be proper that it should be vested or delivered, or a trustee for that person.

(12) A person aggrieved by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the extent of any loss he has suffered by reason of the disclaimer and may prove the loss as a debt in the winding up.

(13) For the purpose of determining whether property of a company is of a kind to which sub-section (1) applies, the liquidator may, by notice served on a person claiming to have an interest in the property, require the person to furnish 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 him and the person shall comply with the requirement.

**Executions, attachments, &c., before winding up****455. (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 shall 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 costs of that execution, attachment or enforcement.

(2) Where the creditor has paid to the liquidator an amount in accordance with sub-section (1), he may prove in the winding up for his 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 sub-sections (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)** Sub-section (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)** Sub-section (3) does not prevent a creditor from performing a binding contract for the sale of property entered into before he received a notice referred to in that sub-section.

**(6)** Notwithstanding anything contained in this Subdivision, 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 or 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.

#### **Duties of sheriff after receiving notice of application**

**456. (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

(d) pay to the creditor by whom or on whose behalf the process of execution was issued or to any person on his behalf the proceeds of the sale of property of the company that has been sold pursuant to such a process or any moneys seized, or paid to avoid seizure or sale of property of the company, under such a process.

**(2)** Sub-section (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 moneys have 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 moneys not paid out of court shall not be paid to the creditor or to any person on behalf of the creditor.

**(4)** Sub-section (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 shall deliver or pay to the liquidator—
  - (i) any property of the company in his 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 moneys in his 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 moneys 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 shall pay to the liquidator any proceeds of the sale of property of the company or other moneys in court, being proceeds of sale or other moneys 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 moneys are, required by sub-section (6) to be delivered or paid to a liquidator; or
- (b) a sheriff has, pursuant to sub-section (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 sub-section,

the costs of the execution are a first charge on that property or on those proceeds of sale or other moneys.

**(8)** For the purpose of giving effect to the charge referred to in sub-section (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 moneys referred to in that sub-section as he 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 sub-section (1), otherwise validly take; or
- (b) permit the making of a payment the making of which would, by reason of sub-section (3), otherwise be prohibited.

*Subdivision E—Offences*

**Prosecution of delinquent officers and members**

**457.** (1) Where a report is made under section 418, the Commission may, if it thinks fit, investigate the matter but, if it appears to the Commission that the case is not one in which it ought to institute a prosecution, it shall inform the liquidator accordingly, and thereupon the liquidator may himself institute a prosecution in relation to any offence referred to in the report.

(2) Where the Commission decides to institute a prosecution against a person following a report to the Commission under section 418, the Commission may, by notice in writing given before or after the institution of the prosecution, require an officer of the company to which the matter reported to the Commission relates (not being an officer who is, or, in the opinion of the Commission, is likely to be, a defendant in the proceedings or is or has been a duly qualified legal practitioner acting for such a person) to give all assistance in connection with the prosecution or proposed prosecution that he is reasonably able to give.

(3) Where a person is required pursuant to sub-section (2) to give assistance in connection with a prosecution or proposed prosecution, the person shall not—

- (a) without reasonable excuse, refuse or fail to comply with the requirement; or
- (b) in purported compliance with the requirement, furnish information or make a statement that is false or misleading in a material particular.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(4) A person is not excused from furnishing information or producing a document pursuant to a requirement made of him under sub-section (2) on the ground that the information or document might tend to incriminate him but, where the person claims before furnishing information that the information might tend to incriminate him, the information is not admissible in evidence against him in criminal proceedings other than proceedings under this section.

(5) For the purposes of sub-section (2), “officer”, in relation to a company, means an officer as defined in sub-section 5 (1) and includes—

- (a) a person who has at any time been an officer as so defined; and
- (b) a person who acts, or has at any time acted, as banker, solicitor, auditor or in any other capacity for the company.

(6) The Commission may direct that the whole or any part of any costs and expenses properly incurred by the liquidator in proceedings brought by him under this section shall be defrayed out of moneys of the Commission.

(7) Subject to any direction given under sub-section (6) and to any charges on the property of the company and any debts to which priority is given by this Code, all such costs and expenses shall be payable out of that property as part of the costs of winding up.

#### *Subdivision F—Dissolution*

##### **Power of Court to declare dissolution of company void**

**458. (1)** Where a company has been dissolved pursuant to sub-section 382 (6) or 411 (5), the Court may at any time, on application of the liquidator of the company or of any other person who appears to the Court to be interested, make an order declaring the dissolution to have been void, and the Court may by the order give such directions and make such provisions (including directions and provisions relating to the re-transmission of property vested in the Commission under section 461) as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been dissolved.

(2) The person on whose application the order was made shall, within 14 days after the making of the order or such further time as the Court allows, lodge with the Commission an office copy of the order.

##### **Power of Commission to deregister defunct company**

**459. (1)** Where the Commission has reasonable cause to believe that a company is not carrying on business or is not in operation, it may send to the company by post a letter to that effect and stating that, if an answer showing cause to the contrary is not received within one month from the date of the letter, a notice will be published in the *Gazette* with a view to cancelling the registration of the company.

(2) Unless the Commission receives an answer within one month from the date of the letter to the effect that the company is carrying on business or is in operation, it may publish in the *Gazette* and send to the company in the

prescribed manner a notice that, at the expiration of 3 months from the date of that notice, the registration of the company mentioned in the notice will, unless cause is shown to the contrary, be cancelled and the company will be dissolved.

(3) If in any case where a company is being wound up the Commission has reasonable cause to believe that—

- (a) no liquidator is acting;
- (b) the affairs of the company are fully wound up and for a period of 6 months the liquidator has been in default in lodging any return required to be made by him; or
- (c) the affairs of the company have been fully wound up under Division 2 and there is no property or the property available is not sufficient to pay the costs of obtaining an order of the Court dissolving the company,

it may publish in the *Gazette* and send to the company or the liquidator (if any) a notice to the same effect as that referred to in sub-section (2).

(4) At the expiration of the time mentioned in a notice sent by the Commission under sub-section (2) or (3), the Commission may, unless cause to the contrary is previously shown, by notice in writing published in the *Gazette*, cancel the registration of the company and, on the publication in the *Gazette* of the last-mentioned notice, the company is dissolved, but—

- (a) the liability (if any) of every officer and member of the company continues and may be enforced as if the company had not been dissolved; and
- (b) nothing in this sub-section affects the power of the Court to wind up a company the registration of which has been cancelled.

(5) If the Commission is satisfied that the registration of a company was cancelled as the result of an error on the part of the Commission, the Commission may reinstate the registration of the company, and thereupon the company shall be deemed to have continued in existence as if its registration had not been cancelled.

(6) If a person is aggrieved by the cancellation of the registration of a company, the Court, on an application made by the person at any time within 15 years after the cancellation, may, if satisfied that the company was, at the time of the cancellation, carrying on business or in operation or otherwise satisfied that it is just that the registration of the company be reinstated, order

the reinstatement of the registration of the company and, upon an office copy of the order being lodged with the Commission, the company shall be deemed to have continued in existence as if its registration had not been cancelled, and the Court may by the order give such directions and make such provisions (including directions and provisions relating to the re-transfer of property vested in the Commission under section 461) as seem just for placing the company and all other persons in the same position as nearly as may be as if the registration of the company had not been cancelled.

(7) Where the registration of a company is reinstated pursuant to subsection (5) or (6), the Commission shall cause notice of that fact to be published in the *Gazette*.

(8) A notice to be sent under this section to a liquidator may be addressed to the liquidator at his last-known place of business, and a letter or notice to be sent under this section to a company may be addressed to the company at its registered office or, if no office has been registered, to the care of some officer of the company, or, if there is no officer of the company whose name and address are known to the Commission, may be sent to each of the persons who subscribed the memorandum of the company addressed to him at the address mentioned in the memorandum.

#### **Commission to act as representative of defunct company in certain events**

**460. (1)** Where, after a company has been dissolved (whether before or after the commencement of the *Companies (Application of Laws) Act*, 1981, it is proved to the satisfaction of the Commission—

- (a) that the company, if it still existed, would be legally or equitably bound to carry out, complete or give effect to some dealing, transaction or matter; and
- (b) that, in order to carry out, complete or give effect to that dealing, transaction or matter, some purely administrative act, not being of a discretionary kind, should have been done by or on behalf of the company, or should be done by or on behalf of the company if the company still existed,

the Commission may, as representing the company or its liquidator under the provisions of this section, do that act or cause that act to be done.

**(2)** The Commission may execute or sign any relevant instrument or document adding a memorandum stating that it has done so pursuant to this section, and any such execution or signature has the same force, validity and effect as if the company, if it still existed, had duly executed the instrument or document.

**Outstanding property of defunct company to vest in Commission**

**461.** (1) Where, after a company has been dissolved, there remains any outstanding property, whether within or outside the State but not including unpaid capital, whether called or uncalled, which was vested in the company, to which the company was entitled, or over which the company had a disposing power, at the time when it was dissolved, but which was not got in, realized upon or otherwise disposed of or dealt with by the company or its liquidator, the estate and interest in the property, at law or in equity, of the company or its liquidator at the time when the company was dissolved, together with all claims, rights and remedies that the company or its liquidator then had in respect of the property vests by force of this section in the Commission.

(2) Where any claim, right or remedy of the liquidator may under this Code be made, exercised or availed of only with the approval or concurrence of the Court or some other person, the Commission may, for the purposes of this section, make, exercise or avail itself of that claim, right or remedy without such approval or concurrence.

(3) Where a company is dissolved, then, notwithstanding that the books of the company vest in the Commission by reason of sub-section (1), the person who was the last director of the company or the persons who were the last directors of the company before the company was dissolved shall retain the books of the company (other than any books of the company that any liquidator of the company is required to retain under sub-section 425 (2)) for a period of 3 years after the date on which the company was dissolved.

**Outstanding interests in property, how disposed of**

**462.** (1) Upon proof to the satisfaction of the Commission that there is vested in it by force of section 461 any estate or interest in property, whether solely or together with any other person, of a beneficial nature and not merely held in trust, the Commission may get in, sell or otherwise dispose of, or deal with, that estate or interest or any part of that estate or interest as it sees fit.

(2) The power of the Commission under sub-section (1) to sell or otherwise dispose of, or deal with, any such estate or interest may be exercised either solely or together with any other person, by public auction, public tender or private contract and in such manner, for such consideration and upon such terms and conditions as the Commission thinks fit, and includes power to rescind any contract and resell or otherwise dispose of, or deal with, that property as the Commission thinks expedient, and power to make, execute, sign and give such contracts, instruments and documents as the Commission thinks necessary.

(3) There is payable to the Treasurer of New South Wales, in respect of the exercise of the powers conferred upon the Commission by sub-sections (1) and (2), out of any income derived from, or the proceeds of sale or other disposition of, the estate or interest concerned, such commission as is prescribed.

(4) The Commission shall apply any moneys received by it in the exercise of any power conferred on it by this Subdivision in defraying the costs and expenses of and incidental to the exercise of that power and in making payments authorized by this Subdivision, and shall pay the remainder (if any) of the moneys to the Treasurer of New South Wales.

(5) The Treasurer of New South Wales shall pay all moneys paid to him under this section into the Consolidated Revenue Fund.

(6) A person making a claim in respect of any money paid to the Treasurer of New South Wales under sub-section (4) may apply to the Court for an order for payment of an amount to him and the Court, if satisfied that an amount should be paid to him, shall make an order for the payment accordingly.

(7) Upon the making of an order under sub-section (6) for payment of an amount to a person, or, where the Treasurer of New South Wales is otherwise of the opinion that an amount should be paid to a person out of money paid to the Treasurer of New South Wales under this section, the Treasurer of New South Wales shall pay that amount to that person out of moneys lawfully available for the purpose.

(8) The provisions of this section do not deprive a person of another right or remedy to which he is entitled against the liquidator or another person.

#### **Liability of Commission and Crown as to property vested in Commission**

**463.** Property vested in the Commission by operation of this Subdivision is liable and subject to all charges, claims and liabilities imposed on or affecting that property by reason of any law as to rates, taxes, charges or any other matter or thing to which the property would have been liable or subject had the property continued in the possession, ownership or occupation of the company, but there shall not be imposed, on the Commission or the Crown any duty, obligation or liability whatsoever to do or suffer any act or thing required by any such law to be done or suffered by the owner or occupier other than the satisfaction or payment of any such charges, claims or liabilities out of the property of the company so far as it is, in the opinion of the Commission, properly available for and applicable to such a payment.

**Accounts**

**464.** The Commission shall—

- (a) keep a record of any property coming to its possession or under its control or to its knowledge vested in it by force of this Subdivision and of its dealings with that property;
- (b) keep accounts of all moneys arising from those dealings and of how they have been disposed of; and
- (c) keep all accounts, vouchers, receipts and papers relating to that property and those moneys.

*Division 5—Reciprocity with Participating States and Participating Territories*

**Recognition and enforcement in the State of order made in a participating State or participating Territory in relation to a recognized company or recognized foreign company**

**465.** If an office copy of an order made by the Supreme Court of a participating State or of a participating Territory under the corresponding law of that State or Territory for or in connection with the winding up of a recognized company or a recognized foreign company is filed by the liquidator in the office of the Prothonotary of the Supreme Court of the State, the order has effect and may be enforced in all respects in the State as if it were an order of the Court made under this Code in relation to a company incorporated under this Code.

**Exercise by the Court of powers or functions in relation to a recognized company or recognized foreign company**

**466.** Where—

- (a) the proper officer of the Supreme Court of a participating State or of a participating Territory furnishes to the Prothonotary of the Supreme Court of the State a request in writing for that last-mentioned Court to exercise or perform a power or function under this Part in relation to a recognized company or recognized foreign company that is being wound up under the corresponding law of that participating State or participating Territory, being a power or function of a kind that that last-mentioned Court may exercise or perform under this Part in relation to a company incorporated under this Code; or

- (b) a liquidator of a recognized company or recognized foreign company that is being wound up under the corresponding law of a participating State or participating Territory makes an application to the Supreme Court of the State for the Court to exercise or perform a power or function under this Part in relation to that company, being a power or function of a kind that that Court may exercise or perform on the application of the liquidator of a company that is being wound up under this Part,

the Supreme Court of the State may exercise or perform the power or function accordingly.

**Power of Prothonotary to request Supreme Court of a participating State or participating Territory to exercise or perform powers or functions**

**467.** The Prothonotary of the Court may furnish to the proper officer of the Supreme Court of a participating State or of a participating Territory a request in writing for that last-mentioned Court to exercise or perform in that State or Territory a power or function under the corresponding law of that State or Territory in relation to a company or a registered foreign company that is being wound up under this Part and, where such a request is given effect to, any act or thing done by the Supreme Court of the participating State or participating Territory pursuant to the request has effect for the purposes of this Code as if it had been done by the Court under this Code.

**Powers and functions in the State of liquidators of recognized companies or recognized foreign companies**

**468.** The liquidator of a recognized company, or of a recognized foreign company, that is being wound up under the law of a participating State or participating Territory may, for the purposes of the winding up of affairs of the company in the State, exercise any power or perform any function under this Part of a kind that may be exercised or performed under this Part by a liquidator of a company incorporated under this Code.

*Division 6—Winding Up of Bodies other than Companies*

**Application**

**469. (1)** This Division applies to the following bodies:

- (a) a foreign company that is, or is required to be, registered as a foreign company under Division 5 of Part XIII; and

(b) a partnership, association or other body (whether corporate or unincorporate) that consists of more than 5 members.

(2) The provisions of this Division have effect in addition to, and not in derogation of, sub-sections 518 (10), (12) and (13) and any provisions contained in this Code or any other law with respect to the winding up of bodies, and the Court or liquidator may exercise any powers or do any act in the case of bodies to which this Division applies that might be exercised or done by it or him in the winding up of companies.

### **Winding up of bodies to which this Division applies**

**470. (1)** Subject to this Division, a body to which this Division applies may be wound up under this Part, and this Part applies accordingly to such a body with such adaptations as are necessary, including the following adaptations:

- (a) the principal place of business of such a body in the State shall, for all the purposes of the winding up, be deemed to be the registered office of the body;
- (b) no such body shall be wound up voluntarily under this Part;
- (c) the circumstances in which the body may be wound up are as follows:
  - (i) if the body has been dissolved, has ceased to have a place of business in the State, has a place of business in the State only for the purpose of winding up its affairs or has ceased to carry on business in the State;
  - (ii) if the body is unable to pay its debts;
  - (iii) if the Court is of opinion that it is just and equitable that the body should be wound up; or
  - (iv) in the case of a foreign company, if the Commission has reported under Part VII that it is of opinion or an inspector appointed under that Part has reported that he is of opinion—
    - (A) that the foreign company cannot pay its debts and should be wound up; or
    - (B) that it is in the interests of the public, or of the shareholders or of the creditors of the foreign company, that the foreign company should be wound up.

**(2)** For the purposes of sub-paragraph (1) (c) (ii), a body shall be deemed to be unable to pay its debts if—

- (a) a creditor, by assignment or otherwise, to whom the body is indebted in a sum exceeding \$1000 then due has served on the body, by leaving at its principal place of business in the State or by delivering to the secretary or a director or executive officer of the 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;
- (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 body or from him in his capacity as a member 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 the State or by delivering it to the secretary or a director or executive officer of the body or by otherwise serving it in such manner as the Court approves or directs, the 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 reasonable satisfaction against the action or proceeding and against all costs, damages and expenses to be incurred by him by reason of the action or proceeding;
- (c) execution or other process issued on a judgment, decree or order obtained in any court in favour of a creditor against the body or any member of the body as such, or any person authorized to be sued as nominal defendant on behalf of the body, is returned unsatisfied; or
- (d) it is otherwise proved to the satisfaction of the Court that the body is unable to pay its debts.

**(3)** A body incorporated outside the State may be wound up under this Division notwithstanding that it is being wound up or has been dissolved 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.

**(4)** For the purposes of this section, a body to which this Division applies shall be regarded as carrying on business in the State in circumstances in which a foreign company would be regarded for the purposes of section 510 as carrying on business within the State and shall not be regarded as carrying

on business within the State in circumstances in which a foreign company would not be regarded for the purposes of section 510 as carrying on business within the State and the question whether a body to which this Division applies has ceased to carry on business shall be determined accordingly.

**Contributories in winding up of a body to which this Division applies**

**471. (1)** On a body to which this Division applies being wound up, every person—

- (a) who is liable to pay or contribute to the payment of—
  - (i) any debt or liability of the body;
  - (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) where the body has been dissolved in the place in which it was formed or incorporated—who immediately before the dissolution was so liable,

is a contributory and every contributory is liable to contribute to the property of the body all sums due from him in respect of any such liability.

**(2)** On the death or bankruptcy of any contributory, the provisions of this Code with respect to the personal representatives of deceased contributories and the assignees and trustees of bankrupt contributories, respectively, apply.

**Power of Court to stay or restrain proceedings**

**472. (1)** The provisions of this Code 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 body to which this Division applies where the application to stay or restrain is by a creditor, to actions and other civil proceedings against any contributory of the body.

**(2)** Where an order has been made for winding up a body to which this Division applies, no action or other civil proceeding shall be proceeded with or commenced against any contributory of the body in respect of any debt of the body except by leave of the Court and subject to such terms as the Court imposes.

*Division 7—Miscellaneous***Outstanding property of defunct body formed within Australia**

**473. (1)** This section applies to a body that is—

- (a) a recognized company;
- (b) a foreign company incorporated or formed in Australia or an external Territory; or
- (c) a body referred to in paragraph 469 (1) (b) incorporated or formed in Australia or an external Territory.

**(2)** Where, after a body to which this section applies has been dissolved, there remains in the State any outstanding property, not including unpaid capital, whether called or uncalled, which was vested in the body, to which the body was entitled, or over which the body had a disposing power at the time when it was dissolved, but which was not got in, realized upon or otherwise disposed of or dealt with by the body or its liquidator, the estate and interest in the property, at law or in equity, of the body or its liquidator at the time when the body was dissolved, 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 such person as is entitled to the property according to the law of the place of incorporation or formation of the body.

**Outstanding property of defunct body formed outside Australia**

**474. (1)** This section applies to a body that is—

- (a) a foreign company incorporated or formed outside Australia and the external Territories; or
- (b) a body referred to in paragraph 469 (1) (b) incorporated or formed outside Australia and the external Territories.

**(2)** Where, after a body to which this section applies has been dissolved, there remains in the State any outstanding property, not including unpaid capital, whether called or uncalled, which was vested in the body, to which the body was entitled, or over which the body had a disposing power, at the time when it was dissolved, but which was not got in, realized upon or otherwise disposed of or dealt with by the body or its liquidator, the estate and interest in the property, at law or in equity, of the body, or its liquidator at the time when the body was dissolved, 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 the Commission.

(3) Where any claim, right or remedy of a liquidator may under this Code be made, exercised or availed of only with the approval or concurrence of the Court or some other person, the Commission 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 462 applies in relation to property that vests in the Commission under this section in like manner as it applies in relation to an estate or interest in property referred to in section 462.

(5) Sections 463 and 464 apply in relation to property that vests in the Commission under this section in like manner as they apply in relation to property referred to in sections 463 and 464.

### **PART XIII—VARIOUS TYPES OF COMPANIES**

#### *Division 1—No Liability Companies*

##### **Application of Code to no liability companies**

**475.** Subject to this Division and except as otherwise expressly provided in this Code, the provisions of this Code relating to public companies, other than sections 360, 361 and 362, section 377 (so far as it relates to calls), paragraphs 378 (1) (a) and (b), sub-sections 378 (2), (3) and (4) and sub-section 384 (3), apply to no liability companies.

##### **Shareholder not liable to calls or contributions**

**476.** The acceptance of a share in a no liability company, whether by original allotment or by transfer, does not constitute a contract on the part of the person accepting it to pay any calls in respect of the share or any contribution to the debts and liabilities of the company and such a person is not liable to be sued for any calls or contributions but he is not entitled to a dividend upon any such share upon which a call is due and unpaid.

##### **Dividends payable on shares held irrespective of amount paid up on shares**

**477.** Subject to any provisions of the articles relating to preferred, deferred or other special classes of shares, dividends that are payable to the shareholders in a no liability company are payable to the persons entitled to those dividends in proportion to the shares held by them respectively, irrespective of the amount paid up or credited as paid up on the shares.

**Calls, when due**

**478.** (1) The calls upon shares in a no liability company shall be so made that they are payable not less than 14 days from the day on which the call is made, and no subsequent call shall be made until after the expiration of 7 days from the day upon which the call made immediately before it is payable.

(2) When a call is made, notice of the amount of the call, of the day when it is payable and of the place for payment shall, not less than 7 days before that day, be sent by post to the holder of shares on which the call is made.

**Forfeiture of shares**

**479.** (1) Any share in a no liability company upon which a call is unpaid at the expiration of 14 days after the day for its payment is thereupon forfeited without any resolution of directors or other proceedings and shall, subject to this Division, be offered for sale by public auction not more than 6 weeks after the date on which the call is payable.

(2) The sale shall be advertised not less than 14 and not more than 21 days before the day appointed for the sale in a daily newspaper circulating generally throughout the State.

(3) Where a sale is not held owing to error or inadvertence, the sale, if it is held in due course as soon as practicable after the discovery of the error or inadvertence, is not invalid.

(4) If there is any failure to comply with the provisions of this section, the company and any officer of the company who is in default are each guilty of an offence.

(5) At any such sale, a share forfeited for non-payment of any call may, if the company in accordance with its articles or by ordinary resolution so determines, be offered for sale and sold credited as paid up to the sum of the amount paid up on the share at the time of forfeiture and the amount of the call and the amount of any other calls becoming payable on or before the date of the sale.

(6) The proceeds of the sale shall be applied in payment of—

- (a) first, the expenses of the sale;
- (b) second, any expenses necessarily incurred in respect of the forfeiture; and

(c) third, the calls then due and unpaid,

and the balance (if any) shall be paid to the member whose share has been so sold on his delivering to the company the share certificate that relates to the forfeited share.

**Provisions as to sale of forfeited shares**

**480. (1)** The directors may, in the case of a share advertised for sale as forfeited for non-payment of a call, fix a reserve price not exceeding the sum of the amount of the call due and unpaid on the share at the time of forfeiture and the amount of any other calls becoming payable on or before the date of the sale.

**(2)** If a bid at least equal to the reserve price so fixed is not made for the share, the share may be withdrawn from sale.

**(3)** A share so withdrawn from sale or a share for which no bid is received at the sale shall be held by the directors in trust for the company and shall be disposed of in such manner as the company, in accordance with its articles or by resolution, determines, but, at any meeting of the company, no person is entitled to any vote in respect of the shares so held by the directors in trust.

**(4)** Unless otherwise specifically provided by resolution, the shares to be so disposed of shall first be offered to shareholders for a period of 14 days before being disposed of in any other manner.

**As to shares held by or in trust for company**

**481.** A call does not have any effect upon any forfeited share that is held by or in trust for the company pursuant to this Division, but such a share, when it is re-issued or sold by the company, may be credited as paid up to such amount as the company, in accordance with its articles or by resolution, determines.

**Sale of shares on non-payment of calls valid although specific numbers not advertised**

**482. (1)** When forfeited shares are sold for non-payment of any call, the sale is valid although the specific numbers of the shares are not advertised.

**(2)** In every advertisement, it is sufficient to give notice of the intended sale of forfeited shares by advertising to the effect that all shares on which a call remains unpaid will be sold.

**Postponement of sale**

**483. (1)** 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 or from any date to which the sale has duly been postponed, but so that no such intended sale shall be postponed to a date more than 90 days from the first date fixed for the intended sale.

**(2)** The date to which the sale is postponed shall, in respect of every postponement, be advertised in a daily newspaper circulating generally in the State.

**Redemption of forfeited shares**

**484. (1)** Notwithstanding anything in this Division, if a share belonging to a person has been forfeited, he may, at any time up to or on the day immediately before the day upon which it is intended to sell the share, redeem the share by payment to the company of—

- (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.

**(2)** Upon such a payment, the person is entitled to the share as if the forfeiture had not been incurred.

**Office to be open the day before sale**

**485.** On the day immediately before the day appointed for the sale of a forfeited share, the registered office of the company shall be open during the hours for which it is by this Code required to be open and accessible to the public.

**Distribution of surplus where cessation of business upon winding up**

**486. (1)** If, on the winding up of a no liability company, there remains any surplus, the surplus shall be distributed amongst the parties entitled to it in proportion to the shares held by them respectively irrespective of the amounts paid up or credited as paid up on the shares.

**(2)** A member who is in arrears in payment of any call, but whose shares have not been actually forfeited, is not entitled to share in such a distribution until the amount owing in respect of the call has been fully paid and satisfied.

**Distribution of surplus where cessation of business within 12 months**

**487. (1)** If a no liability company ceases to carry on business within 12 months of its incorporation, shares issued for cash rank on a winding up, to the extent of the capital contributed by subscribing shareholders, in priority to those issued to vendors or promoters or both for consideration other than cash.

**(2)** In sub-section (1), “no liability company” includes a company that, having been incorporated as a no liability company, changes its status under section 69.

**As to rights attaching to preference shares issued to promoters**

**488. (1)** Notwithstanding anything in the memorandum or articles of a no liability company, the holders of any shares issued to vendors or promoters are not entitled to any preference on the winding up of the company.

**(2)** In sub-section (1), “no liability company” includes a company that, having been incorporated as a no liability company, changes its status under section 69.

**Restrictions on tribute arrangements**

**489. (1)** Without the sanction of a special resolution of the company, the directors of a no liability company shall not—

- (a) let the whole or portion of a mine or claim on tribute; or
- (b) make any contract for working any land on tribute.

**(2)** Sub-section (1) does not preclude the directors of a no liability company from letting the whole or portion of a mine or claim on tribute, or making any contract for working any land on tribute, for any period not exceeding 3 months, without the sanction of such a resolution, if no such letting or contract has been made within the period of 2 years immediately preceding the proposed letting or contract.

*Division 2—Investment Companies***Interpretation**

**490. (1)** In this Division, unless the contrary intention appears—

“investment company” means a corporation for the time being declared by order of the Commission pursuant to sub-section (3) to be an investment company;

“net tangible assets”, in relation to a corporation, means tangible property at book values, less total liabilities at book values and less any aggregate amount by which the book values of the marketable securities held by the corporation exceed their market values;

“relevant provision of this Division” means any of the provisions of sections 491 to 498 (inclusive).

**(2)** A reference in a relevant provision of this Division to an investment company shall be construed as a reference to an investment company to which that provision applies.

**(3)** The Commission may, by order in writing published in the *Gazette*, declare to be an investment company any corporation (being a company or a foreign company, that is, or is required to be, registered as a foreign company under Division 5) that is engaged primarily in the business of investment in marketable securities for the purpose of revenue and for profit and not for the purpose of exercising control.

**(4)** Where the Commission makes an order declaring a corporation to be an investment company, the Commission may, if it thinks fit, specify in the order the relevant provisions of this Division that are to apply to that investment company.

**(5)** If, in an order declaring a corporation to be an investment company, the Commission specifies relevant provisions of this Division that are to apply to that corporation, any relevant provisions of this Division that are not so specified do not apply to the corporation.

**(6)** If the Commission does not, in an order declaring a corporation to be an investment company, specify relevant provisions of this Division that are to apply to the corporation, every provision of this Division applies to the corporation.

**Restriction on borrowing by investment companies**

**491. (1)** An investment company shall not borrow an amount if that amount, or the sum of that amount and amounts previously borrowed by it and not repaid, exceeds an amount equivalent to 50% of its net tangible assets.

**(2)** An investment company shall not borrow an amount otherwise than by the issue of debentures if that amount, or the sum of that amount and amounts previously borrowed by it otherwise than by the issue of debentures and not repaid, exceeds an amount equivalent to 25% of its net tangible assets.

**(3)** In sub-section (2), "debentures" does not include a debenture—

- (a) that is redeemable, except at the option of the borrower exercised not earlier than 2½ years after the date of issue of the debenture, within less than 5 years after that date; or
- (b) that is issued to a bank as security for an overdraft.

**Restriction on investments of investment companies**

**492. (1)** An investment company shall not invest an amount in a corporation if that amount, or the sum of that amount and amounts previously invested by it in that corporation and still so invested, exceeds an amount equivalent to 10% of the net tangible assets of the investment company.

**(2)** An investment company shall not hold more than 5% of the subscribed ordinary share capital of a corporation.

**Restriction on underwriting by investment companies**

**493. (1)** An investment company shall not underwrite any issue of authorized securities to an amount that, when added to the amount or amounts (if any) to which it has previously underwritten a current issue or issues of other authorized securities (not being an amount or amounts in respect of which the underwriting obligation has been discharged), exceeds an amount equivalent to 40% of its net tangible assets.

**(2)** An investment company shall not underwrite any issue of non-authorized securities to an amount that, when added to the amount or amounts (if any) to which it has previously underwritten a current issue or issues of other non-authorized securities (not being an amount or amounts in respect of which the underwriting obligation has been discharged), exceeds an amount equivalent to 20% of its net tangible assets.

**(3) Where—**

- (a) an investment company has underwritten any issue of securities and, in relation to the underwriting, has not contravened sub-section (1) or (2); and
  - (b) the investment company, as a result of the underwriting, invests in a corporation contrary to section 492,
- the investment company shall be deemed not to have contravened a provision of that section by reason of so investing in the corporation if, at the expiration of 12 months after so investing—
- (c) the amount invested by it in the corporation does not exceed an amount equivalent to 10% of the net tangible assets of the investment company; and
  - (d) it does not hold more than 5% of the subscribed ordinary share capital of the corporation.

**(4)** This section extends to and in relation to sub-underwriting as if the sub-underwriting were underwriting.

**(5) In this section—**

“authorized securities” means securities in which, by any Act, Act of the Commonwealth or of another State, law of a Territory or Act of New Zealand, trustees are authorized to invest trust funds in their hands;

“non-authorized securities” means securities other than authorized securities.

**Special requirements as to articles and prospectus**

**494. (1)** An investment company shall not issue a prospectus or permit a prospectus to be issued on its behalf unless the prospectus specifies—

- (a) the type of security in which, in accordance with the objects of the company, the company may invest; and
- (b) whether it is among the objects of the company to invest within Australia or outside Australia or both.

**(2)** After the expiration of 3 months after an investment company has been declared to be an investment company, the investment company shall not borrow or invest any moneys, or underwrite or sub-underwrite any issue of securities, unless the articles of the company specify the matters referred to in paragraphs (1) (a) and (b).

**Investment company not to hold shares in other investment companies**

**495. (1)** An investment company shall not purchase, or (after the expiration of 3 years after it is declared to be an investment company) hold, any shares in or debentures of—

- (a) any other investment company; or
- (b) any corporation incorporated in any other State or in a Territory, or in New Zealand, that is for the time being declared by order of the Commission pursuant to sub-section (2) to be a corporation to which this paragraph applies.

**(2)** The Commission may, by order published in the *Gazette*, declare a corporation that is engaged primarily in the business of investment in marketable securities for the purpose of revenue and for profit and not for the purpose of exercising control to be a corporation to which paragraph (1) (b) applies.

**Investment company not to speculate in commodities**

**496. (1)** An investment company shall not, for the purpose of profit, buy or sell, or deal in, any raw materials or manufactured goods, whether in existence or not, otherwise than by investing in companies trading in such materials or goods.

**(2)** Sub-section (1) does not apply to or in relation to—

- (a) any buying, selling or dealing by an investment company pursuant to a contract entered into by the investment company before it was declared to be an investment company; or
- (b) the selling of or the dealing in raw materials or manufactured goods acquired by the investment company—
  - (i) before it was so declared; or
  - (ii) pursuant to a contract entered into before it was so declared.

**Balance-sheets and accounts**

**497. (1)** An investment company shall state under separate headings in every balance-sheet of the company, in addition to any other matters required to be stated in that balance-sheet—

- (a) the investments of the company in any securities other than relevant securities; and

(b) the manner in which the investments of the company have been valued.

**(2)** In sub-section (1), “relevant securities”, means—

- (a) government, municipal and other public debentures, stocks and bonds;
- (b) shares in a corporation;
- (c) options in respect of shares in a corporation; and
- (d) debentures of a corporation.

**(3)** An investment company shall attach to every such balance-sheet—

- (a) a complete list of all purchases and sales of securities by the company during the period to which the accounts relate together with a statement of the total amount of brokerage paid or charged by the company during that period and the proportion of that brokerage paid to any stock or share broker, or any employee or nominee of any stock or share broker, who is an officer of the company; and
- (b) a complete list of all the investments of the company as at the date of the balance-sheet showing the descriptions and quantities of those investments.

**(4)** An investment company shall show separately in the profit and loss account, in addition to any other matters required to be shown in that profit and loss account, income from underwriting (including sub-underwriting).

#### **Investment fluctuation reserve**

**498. (1)** The net profits and losses of an investment company from the purchase and sale of securities shall be respectively credited and debited by the company to a reserve account to be kept by it and to be called the “investment fluctuation reserve”.

**(2)** The investment fluctuation reserve is not available for the payment of dividends.

**(3)** The investment fluctuation reserve is available for the payment of income tax payable in respect of profits made on the sale of securities.

**Penalties**

**499. (1)** If default is made by an investment company in complying with any of the provisions of this Division, the investment company and any officer of the investment company who is in default are each guilty of an offence.

**(2)** A transaction entered into by the company is not invalid by reason only of such a default.

Penalty: \$5,000.

*Division 3—Companies Carrying on Business Outside the State*

**Interpretation**

**500. (1)** In this Division, “company” means—

- (a) a company incorporated pursuant to this Code or pursuant to a corresponding previous law of the State; or
- (b) a foreign company that is formed outside Australia and the external Territories and is registered under Division 5.

**(2)** A reference in this Division to a company carrying on business within a State or a Territory includes a reference to a company establishing or using a share transfer office or share registration office in the State or Territory or administering, managing or otherwise dealing with property situated in the State or Territory as an agent, legal personal representative or trustee, whether by servants or agents or otherwise.

**(3)** Notwithstanding sub-section (2), a company shall not be regarded as carrying on business within a State or Territory for the reason only that, within that State or Territory, it—

- (a) is or becomes a party to an action or suit or an administrative or arbitration proceeding or effects settlement of an action, suit or other proceeding or of a claim or dispute;
- (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
- (c) maintains a bank account;

- (d) effects a sale through an independent contractor;
- (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside the State or Territory;
- (f) creates evidence of a debt, or creates a charge on property;
- (g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts;
- (h) conducts an isolated transaction that is completed within a period of 31 days, but 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.

**Notification of principal office in participating State or Territory**

**501. (1)** A company that has established a place of business or commenced to carry on a business within a participating State or participating Territory shall—

- (a) within one month after doing so; or
- (b) in the case of a foreign company—within one month after doing so or becoming registered as a foreign company, whichever is the later,

lodge with the Commission notice in the prescribed form of the situation of its principal office in that State or Territory.

**(2)** A company that has established a place of business or commenced to carry on business within a participating State or participating Territory may lodge with the Commission notice in the prescribed form of the hours (being not less than 3) between 9 a.m. and 5 p.m. each day (Saturdays, Sundays and holidays excepted) during which the principal office of the company in that State or Territory is open and accessible to the public.

**(3)** Where a company has lodged with the Commission a notice in writing of the situation of its principal office in a participating State or participating Territory, the Commission shall, on being requested to do so, issue a certificate in the prescribed form under its common seal stating that the company has a principal office in that State or Territory and specifying the address of that office.

**(4)** A certificate issued under sub-section (3) is *prima facie* evidence in all courts of the particulars stated in the certificate.

**Notice to be given of change or alteration in principal office in participating State or Territory**

**502.** (1) Notice in the prescribed form of any change or alteration in the situation of the principal office of a company in a participating State or participating Territory shall be lodged by the company with the Commission not later than 7 days after the day on which the change or alteration occurs.

(2) Where a notice has been lodged by a company under sub-section 501 (2) in relation to a participating State or participating Territory, notice in the prescribed form of any change of the hours during which the principal office of the company in that State or Territory is open and accessible to the public shall be lodged by the company with the Commission not later than 7 days after the day on which the change occurs.

**Notice to be lodged of cessation of business in participating State or Territory**

**503.** If a company ceases to have a place of business or to carry on business in a participating State or a participating Territory, it shall, within 7 days after so ceasing, lodge with the Commission notice of that fact.

**Offences**

**504.** If a company fails to comply with a provision of this Division, the company and any officer of the company who is in default are each guilty of an offence.

*Division 4—Recognized Companies and Recognized Foreign Companies***Interpretation**

**505.** (1) A reference in this Division to a recognized company or a recognized foreign company carrying on business within the State includes a reference to such a company establishing or using a share transfer office or share registration office in the State or administering, managing or otherwise dealing with property situated in the State as an agent, legal personal representative or trustee, whether by servants or agents or otherwise.

**(2)** Notwithstanding sub-section (1), a recognized company or a recognized foreign company shall not be regarded as carrying on business within the State for the reason only that, within the State, it—

- (a) is or becomes a party to an action or suit or an administrative or arbitration proceeding or effects settlement of an action, suit or other proceeding or of a claim or dispute;
- (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
- (c) maintains a bank account;
- (d) effects a sale through an independent contractor;
- (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside the State;
- (f) creates evidence of a debt or creates a charge on property;
- (g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts;
- (h) conducts an isolated transaction that is completed within a period of 31 days, but 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.

#### **Power to hold land**

**506.** A recognized company or a recognized foreign company has power to hold land in the State.

#### **Recognized company or recognized foreign company to have a principal office**

**507. (1)** A recognized company or a recognized foreign company that has established a place of business or commenced to carry on business within the State shall have a principal office within the State to which all communications and notices may be addressed, which shall be open and accessible to the public—

- (a) where a notice in relation to the State has been lodged by the company with the Commission under the provision of the law of the State or Territory in which the company is incorporated or registered as a foreign company that corresponds with sub-section 501 (2)—

for the hours specified in the later of that notice or a notice lodged with the Commission under the provision of the law of that State or Territory that corresponds with sub-section 502 (2); or

- (b) in any other case—for not less than 5 hours between 10 a.m. and 4 p.m. each day (Saturdays, Sundays and holidays excepted),

and at which a representative of the company is present at all times when the office is open to the public.

(2) A certificate issued under the provision of the law of a participating State or participating Territory that corresponds with sub-section 501 (3) is *prima facie* evidence in all courts of the particulars stated in the certificate.

**Name of recognized company or recognized foreign company to be reserved or registered**

**508. (1)** A recognized company or a recognized foreign company shall not establish a place of business or carry on business within the State unless the name of the company is reserved or registered under Division 2 of Part III.

(2) A recognized company or a recognized foreign company shall not use in the State any name other than the name reserved or registered in respect of that company under Division 2 of Part III or a name registered under any other law of the State.

(3) If a recognized company or a recognized foreign company contravenes this section, the recognized company or recognized foreign company and any officer of the recognized company or recognized foreign company who is in default are each guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**Publication of name, &c., of recognized company or recognized foreign company**

**509. (1)** There shall appear in legible characters on every relevant document of a recognized company or recognized foreign company (other than a banking corporation) that is issued, signed or published in the State—

- (a) the name of the recognized company or recognized foreign company and the State or Territory where it is incorporated or registered as a foreign company; and

- (b) in the case of a recognized foreign company the liability of the members of which is limited (unless the last word of its name is the word "Limited" or the abbreviation "Ltd.")—notice of the fact that the liability of its members is limited,

and, if default is made in complying with this sub-section, the recognized company or recognized foreign company is guilty of an offence.

**Penalty:** \$1,000.

**(2)** If an officer of a recognized company or recognized foreign company, or any person on behalf of a recognized company or recognized foreign company—

- (a) issues or publishes in the State, or authorizes the issue or publication in the State, of any business letter, statement of account, order for goods, order for services, official notice or publication of the recognized company or recognized foreign company that does not comply with the requirements of sub-section (1); or
- (b) signs or issues in the State, or authorizes to be signed or issued in the State, on behalf of the recognized company or recognized foreign company, any bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, or any receipt or letter of credit, that does not comply with the requirements of sub-section (1),

he is guilty of an offence.

**Penalty:** \$1,000.

**(3)** If an officer of a recognized company or a recognized foreign company or any person on behalf of a recognized company or a recognized foreign company signs or issues in the State, or authorizes to be signed or issued in the State, on behalf of the recognized company or recognized foreign company, any bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, or any letter of credit, that does not comply with the requirements of sub-section (1), he is liable to the holder of the instrument or letter of credit for the amount due on it unless that amount is paid by the recognized company or recognized foreign company, as the case may be.

(4) A recognized company or recognized foreign company (other than a banking corporation) shall paint or affix and keep painted or affixed on the outside of every office or place in the State in which its business is carried on, in a conspicuous position and in letters easily legible—

- (a) its name and the State or Territory where it is incorporated, or registered as a foreign company;
- (b) in the case of a recognized foreign company the liability of the members of which is limited (unless the last word of its name is the word "Limited" or the abbreviation "Ltd.")—notice of the fact that the liability of its members is limited; and
- (c) in the case of the office or place that is the principal office in the State—the words "Principal Office",

and, if default is made in complying with this sub-section, the recognized company or recognized foreign company is guilty of an offence.

Penalty: \$1,000.

(5) In this section, "relevant document", in relation to a recognized company or a recognized foreign company, means a business letter, statement of account, invoice, order for goods, order for services, official notice, publication, bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, receipt and letter of credit of or purporting to be issued or signed by or on behalf of the recognized company or recognized foreign company.

#### *Division 5—Foreign Companies other than Recognized Foreign Companies*

##### **Interpretation**

**510. (1)** In this Division, unless the contrary intention appears—

"agent", in relation to a foreign company, means a person named in a memorandum of appointment or power of attorney lodged in relation to the company under paragraph 512 (2) (e) or sub-section 514 (5);

"foreign company" means a foreign company other than a recognized foreign company.

**(2)** A reference in this Division to a foreign company carrying on business within the State includes a reference to such a company establishing or using a share transfer office or share registration office in the State or administering, managing or otherwise dealing with property situated in the State as an agent, legal personal representative or trustee, whether by servants or agents or otherwise.

**(3)** Notwithstanding sub-section (2), a foreign company shall not be regarded as carrying on business within the State for the reason only that, within the State, it—

- (a) is or becomes a party to an action or suit or an administrative or arbitration proceeding or effects settlement of an action, suit or proceeding or of a claim or dispute;
- (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
- (c) maintains a bank account;
- (d) effects a sale through an independent contractor;
- (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside the State;
- (f) creates evidence of a debt, or creates a charge on property;
- (g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts;
- (h) conducts an isolated transaction that is completed within a period of 31 days, but 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.

#### **Power of foreign companies to hold land**

**511.** A foreign company registered under this Division has power to hold land in the State.

#### **Unregistered foreign company not to establish place of business or carry on business in the State**

**512. (1)** A foreign company shall not establish a place of business, or commence to carry on business, within the State unless it is registered under this Division.

(2) Subject to this Division, if a foreign company lodges with the Commission for registration under this Division—

- (a) a certified copy of the certificate of its incorporation or registration in its place of incorporation or formation or a document of similar effect;
- (b) a certified copy of its constituent documents;
- (c) a list of its directors or the members of its committee of management, council or other governing body by whatever name called, containing particulars with respect to those directors or members that are equivalent to the particulars that are required by this Code to be contained in the register of the directors, principal executive officers and secretaries of a company incorporated under this Code;
- (d) where the list referred to in paragraph (c) includes directors, or members of a committee of management, council or other governing body, who are—
  - (i) resident in the State; and
  - (ii) members of a local board of directors, committee of management, council or other governing body,a memorandum duly executed by or on behalf of the foreign company stating the powers of those local directors or members;
- (e) a memorandum of appointment or power of attorney under the seal of the foreign company or executed on its behalf in such manner as to be binding on the company stating the name and address, or names and addresses, of one or more persons resident in the State, not including a foreign company, a recognized foreign company or a recognized company, authorized to accept on its behalf service of process and any notices required to be served on the company;
- (f) in relation to each existing charge on property of the foreign company that would be a registrable charge within the meaning of Division 9 of Part IV if the foreign company were a registered foreign company, the documents required to be lodged by sub-section 201 (4);
- (fa) notice of the address of its registered office or, if there is no registered office, of its principal place of business, in its place of incorporation or formation;
- (g) notice of the address of its registered office in the State; and

- (h) a statement in writing in the prescribed form made by the agent of the company,

the Commission shall register the company under this Division by entering the name of the company in a register to be kept by the Commission for the purposes of this Division.

#### **Registered office of registered foreign company**

**513. (1)** A registered foreign company shall have a registered office within the State to which all communications and notices may be addressed and which shall be open and accessible to the public—

- (a) where a notice has been lodged by the foreign company with the Commission under sub-section (2)—for such hours (being not less than 3) between 9 a.m. and 5 p.m. each day (Saturdays, Sundays and holidays excepted) as are specified in the later of that notice or a notice lodged by the foreign company with the Commission under sub-section 515 (3); or
- (b) in any other case—for not less than 5 hours between 10 a.m. and 4 p.m. each day (Saturdays, Sundays and holidays excepted),

and at which a representative of the company is present at all times when the office is open to the public.

**(2)** A registered foreign company may lodge with the Commission notice in writing of the hours (being not less than 3) between 9 a.m. and 5 p.m. each day (Saturdays, Sundays and holidays excepted) during which the registered office of the foreign company in the State is open and accessible to the public.

#### **Agents**

**514. (1)** Where a memorandum of appointment or power of attorney lodged with the Commission pursuant to paragraph 512 (2) (e) is executed by a person on behalf of the foreign company concerned, a copy of the deed or document by which that person is authorized to execute the memorandum of appointment or power of attorney, verified, by a statement in writing in the prescribed form, to be a true copy, shall be lodged with the Commission and the copy shall for all purposes be regarded as an original.

**(2)** An agent of a registered foreign company, until he ceases to be such in accordance with sub-section (4)—

- (a) continues to be the agent of the company;

- (b) is answerable for the doing of all such acts, matters and things as are required to be done by the company by or under this Code or the corresponding law of a participating State or participating Territory; and
- (c) is personally liable to all penalties imposed on the company for any contravention of any of the provisions of this Code or of such a corresponding law unless he satisfies the court hearing the matter that he should not be so liable.

**(3)** A registered foreign company or its agent may lodge with the Commission notice in writing stating that the agent has ceased to be the agent or will cease to be the agent on a date specified in the notice.

**(4)** An agent in respect of whom a notice has been lodged under sub-section (3) ceases to be an agent on the expiration of a period of 21 days after the date of lodgment of the notice or on the date of the appointment of another agent the memorandum of whose appointment has been lodged in accordance with sub-section (5), whichever is the earlier, but, if the notice states a date on which he is to so cease and the date is later than the expiration of that period, on that date.

**(5)** Where—

- (a) an agent of a registered foreign company ceases to be the agent and the company is then without an agent in the State; and
- (b) the company is carrying on business or has a place of business in the State or in a participating State or participating Territory,

the company shall, within 21 days after the agent ceases to be such, appoint an agent and lodge a memorandum of his appointment in accordance with paragraph 512 (2) (e) and a statement in writing in accordance with paragraph 512 (2) (h) and, if not already lodged pursuant to sub-section (1) of this section, a copy of the deed, document or power of attorney referred to in that sub-section verified in accordance with that sub-section.

**(6)** On the registration of a foreign company under this Division or the lodging with the Commission of particulars of a change or alteration in a matter referred to in paragraph 515 (2) (e), the Commission shall issue, under its common seal, a certificate of the registration of the company in the prescribed form, and a certificate so issued is *prima facie* evidence in all courts of the particulars mentioned in the certificate.

**Notice to be filed where documents, &c., altered**

**515. (1)** Notice of any change or alteration in the situation of the registered office of a registered foreign company in the State shall be lodged by the registered foreign company with the Commission not later than 7 days after the day on which the change occurred.

**(2)** Where any change or alteration is made in—

- (a) any of the constituent documents of a registered foreign company or any other instrument lodged with the Commission in relation to such a company;
- (b) the directors of a registered foreign company;
- (c) the agent or agents of a registered foreign company or the name or address of any agent;
- (d) the situation of the registered office of a registered foreign company in its place of incorporation or formation;
- (e) the name of a registered foreign company; or
- (f) the powers of any directors resident in the State who are members of a local board of directors of the foreign company,

the foreign company shall, within one month, or within such further period as the Commission in special circumstances allows, after the change or alteration, lodge with the Commission notice in writing giving particulars of the change or alteration and such documents as the regulations require.

**(3)** Where a notice has been lodged by a registered foreign company under sub-section 513 (2), notice in the prescribed form of any change of the hours during which the registered office of the foreign company in the State is open and accessible to the public shall be lodged by the registered foreign company with the Commission not later than 7 days after the day on which the change occurs.

**Balance-sheets and other documents**

**516. (1)** Subject to this section, a registered foreign company shall, at least once in every calendar year and at intervals of not more than 15 months, lodge with the Commission a copy of its balance-sheet made up to the end of its last financial year, and a copy of its profit and loss account 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 the place of its incorporation or formation, together with a statement in writing in the prescribed form verifying that the copies are true copies of the documents so required.

(2) The Commission may, whether before or after the expiration of the period within which a registered foreign company is required by sub-section (1) to lodge a copy of a balance-sheet and a copy of a profit and loss account and other documents, extend the period within which the balance-sheet and the profit and loss account and the other documents are required to be lodged.

(3) The Commission may, if it is of the opinion that the balance-sheet, the profit and loss account and the other documents referred to in sub-section (1) do not sufficiently disclose the company's financial position—

- (a) require the company to lodge a balance-sheet;
- (b) require the company to lodge an audited balance-sheet;
- (c) require the company to lodge a profit and loss account; or
- (d) require the company to lodge an audited profit and loss account,

within such period, in such form, containing such particulars and including such documents as the Commission by notice in writing to the company requires, but this sub-section does not authorize the Commission to require a balance-sheet or a profit and loss account to contain any particulars or include any documents that would not be required to be furnished if the company were a public company within the meaning of this Code.

(4) The registered foreign company shall 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 shall prepare and lodge with the Commission a balance-sheet, or, if the Commission 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 Code.

(6) Where a registered foreign company is not required by the law of the place of its incorporation or formation to prepare a profit and loss account, the company shall prepare and lodge with the Commission a profit and loss account or, if the Commission so requires, an audited profit and loss account, 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 Code

(7) Except as provided in sub-sections (8) and (9), this section does not apply to or in relation to a registered foreign company—

- (a) that is an unlimited private company under the law of the United Kingdom relating to companies and is exempt under that law from lodging accounts with the Registrar of Companies or other appropriate authority under that law;
- (b) that is included in a class of companies incorporated under the law of another State, of a Territory, or of a country other than Australia and the external Territories, being a class of companies that the Commission has declared, by order in writing published in the *Gazette*, to be a class of companies of a kind the same or substantially the same as exempt proprietary companies under this Code;
- (c) that is included in a class of companies incorporated under the law of another State, of a Territory, or of a country other than Australia and the external Territories, being a class of companies that the Commission has declared, by order in writing published in the *Gazette*, to be a class of companies of a kind the same or substantially the same as proprietary companies under this Code, where no beneficial interest in any share in the company is held, directly or indirectly, otherwise than by a natural person;
- (d) that is a corporation incorporated in the United Kingdom or in another State or a Territory, that has, by the law of the place of its incorporation, exemptions and privileges similar to those that are provided for in section 66 and that is not required by that law to lodge its accounts with a public authority so that they are available for public inspection; or
- (e) that is an association incorporated in another State or a Territory under a law of that other State or of the Territory that makes special provision for the incorporation of associations that—
  - (i) are formed for the purpose of providing recreation or amusement or promoting commerce, industry, art, science, religion, charity, pension or superannuation schemes or any other object useful to the community;
  - (ii) are by their constituent documents prohibited from the payment of dividends to their members; and
  - (iii) are not required by that law to lodge accounts with a public authority so that they are available for public inspection.

(8) A registered foreign company referred to in paragraph (7) (a), (b) or (c) shall, at least once in every calendar year, lodge with the Commission a return in the prescribed form made up to the date of its annual general meeting.

(9) The return shall be lodged within a period of one month after the date to which it is made up or within such further period as the Commission, in special circumstances, allows.

**Publication of name, &c., of foreign company**

**517. (1)** There shall appear in legible characters on every relevant document of a foreign company (other than a banking corporation) that is issued, signed or published in the State—

- (a) the name of the foreign company and the place where it is formed or incorporated; and
- (b) in the case of a foreign company the liability of the members of which is limited (unless the last word of its name is the word "Limited" or the abbreviation "Ltd.")—notice of the fact that the liability of its members is limited,

and, if default is made in complying with this sub-section, the foreign company is guilty of an offence.

Penalty: \$1,000.

**(2)** If an officer of a foreign company, or any person on behalf of the foreign company—

- (a) issues or publishes in the State, or authorizes the issue or publication in the State, of any business letter, statement of account, order for goods, order for services, official notice or publication of the foreign company that does not comply with the requirements of sub-section (1); or
- (b) signs or issues in the State, or authorizes to be signed or issued in the State, on behalf of the foreign company any bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, or any receipt or letter of credit, that does not comply with the requirements of sub-section (1),

he is guilty of an offence.

Penalty: \$1,000.

**(3)** If an officer of a foreign company or any person on behalf of a foreign company signs or issues in the State, or authorizes to be signed or issued in the State, on behalf of the foreign company, any bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument or any letter of credit that does not comply with the requirements of sub-section (1), he is liable to the holder of the instrument or letter of credit for the amount due on it, unless that amount is paid by the foreign company.

**(4)** A foreign company (other than a banking corporation) shall paint or affix and keep painted or affixed on the outside of every office or place in the State in which its business is carried on, in a conspicuous position and in letters easily legible—

- (a) its name and the place where it is formed or incorporated;
- (b) in the case of a foreign company the liability of the members of which is limited (unless the last word of its name is the word "Limited" or the abbreviation "Ltd.")—notice of the fact that the liability of its members is limited; and
- (c) in the case of the office that is its registered office in the State—the words "Registered Office",

and, if default is made in complying with this sub-section, the foreign company is guilty of an offence.

Penalty: \$1,000.

**(5)** In this section, "relevant document", in relation to a foreign company, means a business letter, statement of account, invoice, order for goods, order for services, official notice, publication, bill of exchange, promissory note, cheque or other negotiable instrument, indorsement on or order in, a bill of exchange, promissory note, cheque or other negotiable instrument, receipt and letter of credit of or purporting to be issued or signed by or on behalf of the foreign company.

#### **Cessation of business, &c.**

**518. (1)** If a registered foreign company—

- (a) ceases to have a place of business, or to carry on business, in the State (whether or not it continues to have a place of business, or to carry on business, in a participating State or participating Territory); or

- (b) ceases to have a place of business, or to carry on business, in a participating State or participating Territory (whether or not it continues to have a place of business, or to carry on business, in the State or in another participating State or participating Territory),

it shall, within 7 days after so ceasing, lodge with the Commission notice in writing of that fact.

**(2)** If the Commission receives notice from an agent of a registered foreign company that the company has been dissolved, the Commission shall remove the name of the company from the register.

**(3)** Where the Commission has reasonable cause to believe that a registered foreign company does not have a place of business, and does not carry on business, in the State and, in the case of a foreign company formed outside Australia and the external Territories, does not have a place of business, and does not carry on business, in any participating State or participating Territory, the Commission may send to the company in the prescribed manner a letter to that effect and stating that, if an answer showing cause to the contrary is not received within one month from the date of the letter, a notice will be published in the *Gazette* with a view to striking the name of the company off the register.

**(4)** Unless the Commission receives an answer within one month from the date of the letter to the effect that the foreign company has a place of business, or is carrying on business, it may publish in the *Gazette* and send to the company in the prescribed manner a notice that, at the expiration of 3 months from the date of that notice, the name of the company mentioned in the notice will, unless cause is shown to the contrary, be struck off the register.

**(5)** At the expiration of the time mentioned in a notice sent by the Commission under sub-section (4), the Commission may, unless cause to the contrary is previously shown, strike the name of the foreign company off the register, and shall publish notice of the name having been so struck off the register in the *Gazette*, but nothing in this sub-section affects the power of the Court to wind up a foreign company the name of which has been struck off the register.

**(6)** Where the name of a foreign company is struck off the register pursuant to sub-section (5), the company ceases to be registered as a foreign company under this Division.

(7) If the Commission is satisfied that the name of a registered foreign company was struck off the register as the result of an error on the part of the Commission, the Commission may restore the name of the company to the register, and thereupon the name of the company shall be deemed never to have been struck off and the company shall be deemed never to have ceased to be registered as a foreign company.

(8) If a person is aggrieved by the name of a registered foreign company having been struck off the register, the Court, on an application made by the person at any time within 15 years after the name of the company has been so struck off, may, if satisfied that, at the time of the striking off, the company had a place of business or was carrying on business in the State or, in the case of a foreign company formed outside Australia and the external Territories, in a participating State or participating Territory or otherwise that it is just that the name of the company be restored to the register, order the name of the company to be restored to the register, and, upon an office copy of the order being lodged with the Commission, the name of the company shall be deemed never to have been struck off, and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(9) Where the name of a foreign company is restored to the register pursuant to sub-section (7) or (8), the Commission shall cause notice of that fact to be published in the *Gazette*.

(10) If a registered foreign company ceases to be registered under this Division, any obligation to lodge a document with the Commission imposed on the company by this Code by virtue of the doing of any act or thing, or the occurrence of any event, at or before the time of the company so ceasing, being an obligation not discharged by the company at or before that time, continues to apply to the company notwithstanding that the period specified by this Code for the lodging of the document has not expired at or before that time.

(11) If a registered foreign company commences to be wound up or is dissolved in its place of incorporation or formation—

- (a) each person who, immediately before the commencement of the winding up proceedings, was an agent of the company, shall, within one month after the commencement of the winding up or the dissolution or within such further time as the Commission in special circumstances allows, lodge or cause to be lodged with the Commission notice of that fact and, when a liquidator is appointed, notice of the appointment; and

- (b) the Court shall, on application by the person who is the liquidator for the place of incorporation or formation of the company or by the Commission, appoint a liquidator of the company.

**(12)** If a registered foreign company incorporated under the law in force in another State or in a Territory is placed under official management in its place of incorporation under the provisions of the law of that State or Territory that correspond with Part XI or if the period of official management is terminated, the company shall, within one month after the commencement or termination or within such further time as the Commission in special circumstances allows, lodge with the Commission notice in the prescribed form of that fact.

**(13)** A liquidator of a registered foreign company who is appointed by the Court—

- (a) shall, before any distribution of the foreign company's property is made, by advertisement in a newspaper circulating generally in the State and, in the case of a foreign company formed outside Australia and the external Territories, in each participating State or participating Territory where the foreign company had been carrying on business at any time during the 6 years immediately preceding the liquidation, invite all creditors to make their claims against the foreign company within a reasonable time before the distribution;
- (b) shall not, without obtaining an order of the Court, pay out any creditor of the foreign company to the exclusion of any other creditor of the foreign company; and
- (c) shall, unless the Court otherwise orders, recover and realize the property of the foreign company in the State and, in the case of a foreign company formed outside Australia and the external Territories, in any participating State or participating Territory and shall pay the net amount so recovered and realized to the liquidator of that foreign company for the place where it was formed or incorporated.

**(14)** Where a registered foreign company has been wound up so far as its property in the State and, in the case of a foreign company formed outside Australia and the external Territories, in any participating State or participating Territory is concerned and there is no liquidator for the place of its incorporation or formation, the liquidator may apply to the Court for directions as to the disposal of the net amount recovered pursuant to subsection (13).

**Name of foreign company to be struck off register**

**519.** (1) Where a registered foreign company formed outside Australia and the external Territories is registered as a foreign company under the provisions of the law of a participating State or participating Territory that correspond with this Division, the Commission shall strike the name of that foreign company off the register, and the foreign company thereupon ceases to be registered as a foreign company under this Division.

(2) Where a registered foreign company formed outside Australia and the external Territories is registered as a company under the provisions of the law of a participating State or participating Territory that correspond with Division 4 of Part III, the Commission shall strike the name of that foreign company off the register, and the foreign company thereupon ceases to be registered as a foreign company under this Division.

**Restriction on use of certain names**

**520.** (1) A foreign company shall not be registered under this Division unless the name of the foreign company is reserved under Division 2 of Part III in respect of the foreign company.

(2) A change in the name of a foreign company shall not be registered under sub-section (3) unless the name to which the foreign company proposes to change its name is reserved under Division 2 of Part III in respect of the foreign company.

(3) If a registered foreign company lodges with the Commission notice in writing giving particulars of a change in the name of the foreign company, the Commission shall, subject to sub-sections (1) and (2), alter the register kept by the Commission for the purposes of this Division by substituting the new name of the company for the name by which the company was previously registered.

(4) A registered foreign company shall not use in the State any name other than that under which it is registered under this Division or under any other law of the State.

(5) If a registered foreign company contravenes or fails to comply with sub-section (4), the foreign company, and any officer of the foreign company and any agent of the foreign company who are in default, are each guilty of an offence.

**Branch register of shares in foreign company**

**521.** (1) Subject to this section, a registered foreign company that has a share capital and has any member who is resident in the State shall keep at its registered office in the State or at some other place in the State a branch register for the purpose of registering shares of members resident in the State who apply to have the shares registered in that register.

(2) Subject to this section, a registered foreign company incorporated outside Australia and the external Territories that has a share capital and has any member who is resident in a participating State or a participating Territory shall keep at its principal office in that State or Territory or at some other place in that State or Territory a branch register for the purpose of registering shares of members resident in that State or Territory who apply to have the shares registered in that branch register.

(3) A registered foreign company is not obliged to keep a branch register pursuant to sub-section (1) until after the expiration of one month from the receipt by it of an application in writing by a member resident in the State for registration in its branch register in the State of the shares held by the member.

(4) A registered foreign company is not obliged to keep a branch register in a participating State or participating Territory pursuant to sub-section (2), unless—

- (a) the registered foreign company is carrying on business in that State or Territory; and
- (b) a period of 2 months has expired since the registered foreign company received an application in writing by a member resident in that State or Territory for registration, in a branch register in that State or Territory, of the shares held by the member.

(5) \* \* \* \* \*

(6) This section does not apply to a foreign company that by its constituent documents prohibits any invitation to the public to subscribe for, and any offer to the public to accept subscriptions for, shares in the foreign company.

(7) Every branch register kept pursuant to this section shall be kept in the manner provided by Division 4 of Part V as though the branch register were a register of a company incorporated under this Code.

(8) Transfers shall be effected on a branch register kept pursuant to this section in the same manner and at the same charges as on the register of members of the foreign company concerned kept in its place of incorporation

or formation and transfers lodged at its registered office in the State or, in the case of a foreign company formed outside Australia and the external Territories, at its principal office in a participating State or participating Territory are binding on the foreign company.

(9) The Court has the same powers in relation to rectification of a branch register kept pursuant to this section as it has in respect of the register of a company incorporated under this Code.

(10) Where a registered foreign company opens a branch register in the State or, in the case of a foreign company formed outside Australia and the external Territories, in any participating State or participating Territory, it shall, within 14 days after the opening of the register, lodge with the Commission notice of that fact specifying the address where the register is kept.

(11) Where any change is made in the place where a branch register is kept by a registered foreign company or where a branch register kept by a registered foreign company is discontinued, the company shall, within 14 days after the change or discontinuance, lodge notice of the change or discontinuance with the Commission.

(11A) If a registered foreign company fails to comply with sub-section (1), (2) or (11), the foreign company, any officer of the foreign company who is in default and any agent of the foreign company who is in default are each guilty of an offence.

(12) Where a corporation is entitled pursuant to a law of the place of incorporation or formation of a foreign company that corresponds with section 42 of the *Companies (Acquisition of Shares) (New South Wales) Code* or corresponds with section 318 of this Code to give notice to a dissenting offeree or to a dissenting shareholder in that foreign company or the holder of shares in that foreign company that are not voting shares that it desires to acquire any of his shares registered on a branch register kept under this section, this section ceases to apply to that foreign company until—

- (a) the shares have been acquired; or
- (b) that corporation has ceased to be entitled to acquire the shares.

#### **Registration of shares in branch register**

**522. (1)** Subject to this Code, on application for that purpose made by a member of a registered foreign company, being a member who is resident in the State, the foreign company shall register in a branch register of the company kept in the State the shares held by the member that are registered in any other register kept by the company.

**(2)** Subject to this Code, on application for that purpose made by a member of a registered foreign company formed outside Australia and the external Territories, being a member who is resident in a participating State or a participating Territory, the foreign company shall register in a branch register of the company kept in that State or Territory the shares held by the member that are registered in any other register kept by the company.

**Removal of shares from branch register**

**523.** Subject to this Code, on application for that purpose made by a member of a registered foreign company holding shares registered in a branch register, the foreign company shall remove the shares from the branch register and register them in such other register as is specified in the application.

**Index of members and inspection and closing of branch registers**

**524.** The provisions of section 256 relating to the keeping of an index of the names of members of a company apply, with such adaptations as are necessary, in relation to persons holding shares in a branch register kept in the State and section 257 applies, with such adaptations as are necessary, to the inspection and closing of a branch register and of an index kept in relation to a branch register kept in the State.

**Branch register to be *prima facie* evidence**

**525.** A branch register is *prima facie* evidence of any matters that are by this Division required or authorized to be inserted in that register.

**Certificate as to shareholding**

**526.** A certificate under the seal of a foreign company specifying any shares held by any member of that company and registered in the branch register is *prima facie* evidence of the title of the member to the shares and of the fact that the shares are registered in the branch register.

**Penalties**

**527.** If default is made by a foreign company in complying with any provision of this Division other than a provision in which a penalty or punishment is expressly mentioned, the company, and any officer or agent of the company who is in default, are each guilty of an offence.

**PART XIV—MISCELLANEOUS***Division 1—General***Service of documents on company**

**528. (1)** A document may be served on a company by leaving it at, or by sending it by post to, the registered office of the company.

**(2)** For the purposes of sub-section (1), the situation of the registered office of a company—

- (a) in a case to which neither paragraph (b) nor paragraph (c) applies— shall be deemed to be the place notice of the address of which has been lodged with the Commission under sub-section 84 (2), 85 (4) or 217 (1);
- (b) if only one notice of a change of address has been lodged with the Commission under sub-section 217 (3), shall, on and from—
  - (i) the date that is 7 days after the date on which the notice was lodged; or
  - (ii) the date that is specified in the notice as the date from which the change of address is to take effect,
 whichever is later, be deemed to be the place the address of which is specified in the notice; or
- (c) if 2 or more notices of a change of address have been lodged with the Commission under sub-section 217 (3), shall, on and from—
  - (i) the date that is 7 days after the date on which the later or latest of those notices was lodged; or
  - (ii) the date that is specified in the later or latest of those notices as the date from which the change of address is to take effect,
 whichever is later, be deemed to be the place the address of which is specified in the relevant notice,

and shall be so deemed to be that place irrespective of whether the address of a different place is shown as the address of the registered office of the company in a return or other document (not being a notice under sub-section 217 (3)) lodged with the Commission after the notice referred to in paragraph (a) or (b), or the later or latest of the notices referred to in paragraph (c), was lodged.

(3) For the purposes of sub-section (1), the situation of the registered office of a company incorporated under a corresponding previous law of the State shall, unless and until a notice is lodged with the Commission in relation to that company under sub-section 217 (3), be deemed to be the place that was, immediately before the commencement of the *Companies (Application of Laws) Act*, 1981, deemed to be the situation of the registered office of the company for the purposes of the *Companies Act*, 1961.

(4) Without limiting the operation of sub-section (1), a document may be served on a company by delivering a copy of the document personally to each of 2 directors of the company who reside in Australia or an external Territory.

(5) Where a liquidator of a company has been appointed, a document may be served on the company 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 with the Commission.

(6) Where an official manager of a company has been appointed, a document may be served on the company by leaving it at, or by sending it by post to, the last address of the office of the official manager notice of which has been lodged with the Commission.

(7) Nothing in this section affects—

- (a) the power of the Court to authorize a document to be served on a company in a manner not provided for by this section; or
- (b) the operation of any provision of a law in force in the State or of the rules authorizing a document to be served on a company in a manner not provided for by this section.

#### **Service of documents on recognized company or recognized foreign company**

**529. (1)** A document may be served on a recognized company or on a recognized foreign company by leaving it at, or by sending it by post to, the principal office of the company in the State.

(2) For the purposes of sub-section (1), the situation of the principal office of a recognized company or of a recognized foreign company—

- (a) in a case to which neither paragraph (b) nor paragraph (c) applies —shall be deemed to be the place notice of the address of which has been lodged with the Commission under the provision of the law of the participating State or participating Territory in which the company is incorporated or registered that corresponds with sub-section 501 (1);

- (b) if only one notice of a change of address has been lodged with the Commission under the provision of that law that corresponds with sub-section 502 (1), shall, on and from—
- (i) the date that is 7 days after the date on which the notice was lodged; or
  - (ii) the date that is specified in the notice as the date from which the change of address is to take effect,
- whichever is later, be deemed to be the place the address of which is specified in the notice; or
- (c) if 2 or more notices of a change of address have been lodged with the Commission under the provision of that law that corresponds with sub-section 502 (1), shall, on and from—
- (i) the date that is 7 days after the date on which the later or latest of those notices was lodged; or
  - (ii) the date that is specified in the later or latest of those notices as the date from which the change of address is to take effect,
- whichever is later, be deemed to be the place the address of which is specified in the relevant notice,

and shall be so deemed to be that place irrespective of whether the address of a different place is shown as the address of the principal office of the recognized company or recognized foreign company in a return or other document (not being a notice lodged under the provision referred to in paragraph (b)) lodged with the Commission after the notice referred to in paragraph (a) or (b), or the later or latest of the notices referred to in paragraph (c), was lodged.

**(3)** Without limiting the operation of sub-section (1), a document may be served on a recognized company or recognized foreign company by delivering a copy of the document personally to each of 2 directors of the recognized company or recognized foreign company who reside in Australia or in an external Territory.

**(4)** Where a liquidator of a recognized company or of a recognized foreign company has been appointed, a document may be served on the recognized company or recognized foreign company 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 with the Commission under the law of a participating State or participating Territory.

(5) Where an official manager of a recognized company or of a recognized foreign company has been appointed, a document may be served on the recognized company or recognized foreign company by leaving it at, or by sending it by post to, the last address of the office of the official manager notice of which has been lodged with the Commission under the law of a participating State or participating Territory.

(6) Nothing in this section affects the power of the Court to authorize a document to be served on a recognized foreign company in a manner not provided for by this section.

**Service of documents on registered foreign company**

**530. (1)** A document may be served on a registered foreign company—

- (a) by leaving it at, or by sending it by post to, the registered office of the foreign company in the State; or
- (b) by leaving it at, or by sending it by post to, the address of a person who is an agent of the foreign company for the purposes of Division 5 of Part XIII, being—
  - (i) in a case to which sub-paragraph (ii) does not apply—an address notice of which has been lodged with the Commission under sub-section 512 (2) or 514 (5); or
  - (ii) if a notice or notices of a change or alteration in that address has or have been lodged with the Commission under sub-section 515 (2)—the address shown in that last-mentioned notice or the later or latest of those last-mentioned notices.

**(2)** For the purposes of sub-section (1), the situation of the registered office of a registered foreign company—

- (a) in a case to which neither paragraph (b) nor paragraph (c) applies—shall be deemed to be the place notice of the address of which has been lodged with the Commission under paragraph 512 (2) (g);
- (b) if only one notice of a change of address has been lodged with the Commission under sub-section 515 (1), shall, on and from—
  - (i) the date that is 7 days after the date on which the notice was lodged; or
  - (ii) the date that is specified in the notice as the date from which the change of address is to take effect,whichever is later, be deemed to be the place the address of which is specified in the notice; or

- (c) if 2 or more notices of a change of address have been lodged with the Commission under sub-section 515 (1), shall, on and from—
  - (i) the date that is 7 days after the date on which the later or latest of those notices was lodged; or
  - (ii) the date that is specified in the later or latest of those notices as the date from which the change of address is to take effect, whichever is later, be deemed to be the place the address of which is specified in the relevant notice,

and shall be so deemed 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 foreign company in a return or other document (not being a notice under sub-section 515 (1)) lodged with the Commission after the notice referred to in paragraph (a) or (b), or the later or latest of the notices referred to in paragraph (c), was lodged.

**(3)** Without limiting the operation of sub-section (1), if 2 or more directors of a registered foreign company reside in Australia or an external Territory, a document may be served on the foreign company by delivering a copy of the document personally to each of 2 of those directors.

**(4)** Where a liquidator of a registered foreign company has been appointed, a document may be served on the company 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 with the Commission.

**(5)** Nothing in this section affects the power of the Court to authorize a document to be served on a registered foreign company in a manner not provided for by this section.

#### **Address of registered office, principal office, &c.**

**530A.** Where a provision of this Code requires a notice to be lodged with the Commission of—

- (a) the address of an office, or of a proposed office, of a corporation or a person; or
- (b) a change in the situation of an office of a corporation or a person, the notice—
- (c) shall 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 relates to the address or situation of an office of a corporation and the address specified in accordance with paragraph (a) is the address of premises that are not to be occupied by the corporation—shall be accompanied by the consent, given in the prescribed form, by the person who is the occupier of those premises to the specification of that address in that notice.

**Vesting of property**

**531. (1)** Where an order is made by a court under this Code vesting property in a person—

- (a) subject to sub-section (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 shall, 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 sub-section (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)**

\* \* \* \*

**Parts of dollar to be disregarded in determining majority in value of creditors, &c.**

**532.** In determining for the purposes of this Code 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 shall be disregarded.

**Costs**

**533. (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 defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

**(2)** The costs of any proceeding before a court under this Code shall be borne by such party to the proceeding as the court, in its discretion, directs.

**Disposal of securities if whereabouts of holder unknown**

**534. (1)** Where a person has been shown in an appropriate register of a company as the holder of a security of the company for a period of not less than 6 years and the company has, for a period of not less than 6 years—

- (a) had reasonable grounds for believing that that person was not residing at the address shown in the register as his address; and
- (b) on each occasion during that last-mentioned period when, whether or not in accordance with a provision of this Code, it sought to communicate with that person, been unable after the exercise of reasonable diligence so to do,

the company may cause an advertisement to be published in a daily newspaper circulating in the State, Territory or country shown in that register in relation to the address of the person concerned stating that the company intends, after the expiration of one month from the date of the advertisement, to apply to the Minister administering the *Unclaimed Moneys Act*, 1917, for permission to transfer to that Minister the securities held by the person and any rights in respect of the securities.

**(2)** If, after the expiration of one month from the date of the advertisement, the whereabouts of the person remain unknown, the company may apply to the Minister administering the *Unclaimed Moneys Act*, 1917, for permission to transfer to that Minister the securities held by the person and any rights in respect of the securities.

**(3)** The application shall be accompanied by a statement in writing by a director, principal executive officer or secretary of the company in the prescribed form and a copy of the advertisement referred to in sub-section (1).

(4) Where the Minister administering the *Unclaimed Moneys Act*, 1917, grants permission for the securities and rights (if any) to be transferred, the company may transfer the securities and rights (if any) to that Minister and for that purpose may execute for and on behalf of the holder a transfer of the securities and rights (if any) to that Minister.

(5) The Minister administering the *Unclaimed Moneys Act*, 1917, shall sell or dispose of any securities or rights transferred to him under subsection (4) or under any corresponding provision of a previous law of the State or any securities or other property received by him that became substituted for any securities or rights so transferred as he thinks fit and shall deal with the proceeds of the sale or disposal, and any income derived, in accordance with that Act.

(6) Neither New South Wales nor the Minister administering the *Unclaimed Moneys Act*, 1917, 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 that are conferred on that Minister under this section or that that Minister has in relation to the property transferred to him under this section or property that became substituted for the whole or any part of that property.

(7) The Minister administering the *Unclaimed Moneys Act*, 1917, is not subject to any obligation—

- (a) to pay any calls;
- (b) to make any contribution to the debts and liabilities of the company;
- (c) to discharge any other liability; or
- (d) to do any other act or thing,

in respect of a security transferred to him under this section or under any corresponding provision of a previous law of the State, whether the obligation arose before, or arises after, the date of the transfer, but this sub-section does not affect the right of the company to forfeit a share.

(8) A reference in this section to a period of not less than 6 years is a reference to a period that commenced before or after the commencement of the *Companies (Application of Laws) Act*, 1981.

#### **Power to grant relief**

**535. (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 by virtue of which he is 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 he has acted honestly and that, having

regard to all circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach, the court may relieve him either wholly or partly from his 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 him in respect of any negligence, default, breach of trust or breach of duty in a capacity by virtue of which he is such a person, he may apply to the Court for relief, and the Court has the same power to relieve him as it would have had under sub-section (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 sub-section (1) applies is being tried by a judge with a jury, the judge after hearing the evidence may, if he is satisfied that the defendant ought pursuant to that sub-section to be relieved either wholly or partly from the liability sought to be enforced against him, 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 of a corporation;
- (b) an auditor of a corporation, whether or not he is an officer of the corporation;
- (c) an expert in relation to a matter 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 Code in relation to a corporation.

(5) For the purposes of this section, “officer” in relation to a corporation, means—

- (a) a director, secretary, executive officer or employee of the corporation;
- (b) a receiver, or receiver and manager, of the property or part of the property of the corporation;
- (c) an official manager or deputy official manager of the corporation;
- (d) a liquidator of the corporation; and
- (e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons.

**Power of Court to give directions with respect to meetings ordered by the Court**

**536.** Where, under this Code, the Court orders a meeting to be convened, the Court may, subject to this Code, 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.

**Appeals from decisions of Commission**

**537.** A person aggrieved by the refusal of the Commission to register a corporation or other person or to register or receive a document, or by any other act, omission or decision of the Commission, may, within such period (if any) as is prescribed, appeal to the Court, which may confirm, reverse or modify the refusal, act or decision, or remedy the omission, as the case may be, and make such orders and give such directions in the matter as it thinks fit, but this section does not apply to—

- (a) any act, omission or decision of the Commission in respect of which any provision in the nature of an appeal or review is expressly provided by this Code; or
- (b) any act or decision of the Commission that is declared by this Code to be conclusive or final or is embodied in any document declared by this Code to be conclusive evidence of any act, matter or thing.

**Appeals from decisions of receivers, liquidators, &c.**

**538.** A person aggrieved by any act, omission or decision of—

- (a) a person administering a compromise, arrangement or scheme referred to in Part VIII;
- (b) a receiver, or a receiver and manager, of the property or part of the property of a corporation;
- (c) an official manager or a deputy official manager; 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.

**Irregularities**

**539. (1)** In this section, unless the contrary intention appears—

- (a) a reference to a proceeding under this Code 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 or at a joint meeting of creditors and members of a corporation; and
  - (ii) a defect, irregularity or deficiency of notice or time.

**(2)** A proceeding under this Code is not invalidated by reason 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 Code, or a meeting notice of which is required to be given in accordance with the provisions of this Code, or any proceeding at such a meeting, is not invalidated by reason only 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 the Commission, declares proceedings at the meeting to be void.

**(4)** Subject to the following provisions of this section and without limiting the generality of any other provision of this Code, 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 Code or in relation to a corporation is not invalid by reason of any contravention of, or failure to comply with, a provision of this Code or a provision of any of the constituent documents of a corporation;
- (b) an order directing the rectification of any register kept by the Commission under this Code;
- (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 Code or in relation to a corporation (including an order extending a period where the period concerned expired before the 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 shall 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 in the public interest that the order be made;
- (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.

#### **Power of Commission to intervene in proceedings**

**540. (1)** The Commission may intervene in any legal proceeding relating to a matter arising under this Code.

**(2)** Where the Commission intervenes in any proceeding referred to in sub-section (1), the Commission shall be deemed to be a party to the proceeding with all the rights, duties and liabilities of such a party.

**(3)** Without limiting the generality of sub-section (2), the Commission may appear and be represented in any proceeding in which it wishes to intervene pursuant to sub-section (1)—

- (a) by an employee of the Commission;

- (b) by a natural person to whom, or by an officer or employee of a person to whom or to which, the Commission has delegated its functions and powers under this Code or such of those functions and powers as relate to a matter to which the proceeding relates; or
- (c) by solicitor or counsel.

**Examination of persons concerned with corporations**

**541. (1)** In this section, a reference, in relation to a corporation, to a prescribed person, shall be construed as a reference to an official manager, liquidator or provisional liquidator of the corporation or to any other person authorized by the Commission to make applications under this section or to make an application under this section in relation to that corporation.

- (2)** Where it appears to the Commission or to a prescribed person that—
  - (a) a person who has taken part or been concerned in the promotion, formation, management, administration or winding up of, or has otherwise taken part or been concerned in affairs of, a corporation has been, or may have been, guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to that corporation; or
  - (b) a person may be capable of giving information in relation to the promotion, formation, management, administration or winding up of, or otherwise in relation to affairs of, a corporation,

the Commission or prescribed person may apply to the Court for an order under this section in relation to the person.

**(3)** Where an application is made under sub-section (2) in relation to a person, the Court may, if it thinks fit, order that the person attend before the Court on a day and at a time to be fixed by the Court to be examined on oath or affirmation on any matters relating to the promotion, formation, management, administration or winding up of, or otherwise relating to affairs of, the corporation concerned.

**(4)** An examination under this section shall 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.

**(5)** The Court, on making an order for an examination, or at any later time, on the application of any person concerned, may give such directions as to the matters to be inquired into, and, subject to sub-section (4), as to the procedure to be followed (including, in the case of an examination in private, directions as to the persons who may be present), as it thinks fit.

**(6)** A person who is ordered under sub-section (3) to attend before the Court shall not, without reasonable excuse—

- (a) fail to attend as required by the order; or
- (b) fail to attend from day to day until the conclusion of the examination.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(7)** A person attending before the Court for examination pursuant to an order made under sub-section (3) shall not refuse or fail to take an oath or make an affirmation.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(8)** A person attending before the Court for examination pursuant to an order made under sub-section (3) shall not refuse or fail to answer a question that he is directed by the Court to answer.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(9)** A person attending before the Court for examination pursuant to an order made under sub-section (3), if directed by the Court to produce any books in his possession or under his control relevant to the matters on which he is to be, or is being, examined, shall not refuse or fail to comply with the direction.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(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.

**(11)** A person attending before the Court for examination pursuant to an order made under sub-section (3) shall not make a statement that is false or misleading in a material particular.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(12)** A person is not excused from answering a question put to him at an examination held pursuant to an order made under sub-section (3) on the ground that the answer might tend to incriminate him but, where the person claims, before answering the question, that the answer might tend to incriminate him, the answer is not admissible in evidence against him in criminal proceedings other than proceedings under this section or other proceedings 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 at an examination under this section to be recorded in writing and may require him to sign that written record.

**(14)** Subject to sub-section (12), 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.

**(15)** An examination under this section 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 section may be exercised by that other court.

**(16)** A person ordered to attend before the Court or another court for examination under this section may, at his own expense, employ a solicitor, or a solicitor and counsel, and the solicitor or counsel, as the case may be, may put to him such questions as the Court, or the other court, as the case may be, considers just for the purpose of enabling him to explain or qualify any answers or evidence given by him.

**(17)** The Court or another court before which an examination under this section takes place may, if it thinks fit, adjourn the examination from time to time.

**(18)** Where the Court that made the order under sub-section (3) for an examination is satisfied that the order for the examination was obtained without reasonable cause, the Court may order the whole or any part of the costs incurred by the person ordered to be examined to be paid by the applicant or by any other person who, with the consent of the Court, took part in the examination.

#### **Orders against persons concerned with corporations**

**542. (1)** In this section, a reference to a prescribed person, in relation to a corporation, shall be construed as a reference to an official manager, liquidator or provisional liquidator of the corporation or to any other person authorized by the Commission to make applications under this section or to make an application under this section in relation to that corporation.

**(2)** Subject to sub-section (3), where, on application by the Commission or a prescribed person, 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 sub-section (4)) and may so make an order against or in relation to a person notwithstanding that the person may have committed an offence in respect of the matter to which the order relates.

**(3)** The Court shall not make an order against a person under sub-section (2) unless the Court has given the person the opportunity—

- (a) to give evidence himself;
- (b) to call witnesses to give evidence;
- (c) to adduce other evidence in relation to the matters to which the application relates; and
- (d) to employ, at his own expense, a solicitor, or a solicitor and counsel, to put to him, or to any other witness, such questions as the Court considers just for the purpose of enabling him to explain or qualify any answers or evidence given by him.

**(4)** The orders that may be made under sub-section (2) against a person include—

- (a) an order directing the person to pay money or transfer property to the corporation; and
- (b) an order directing the person to pay to the corporation the amount of the loss or damage.

**(5)** Nothing in this section prevents any person from instituting any other proceedings in relation to matters in respect of which an application may be made under this section.

#### **Civil proceedings not to be stayed**

**543.** No civil proceedings under this Code shall be stayed by reason only that the proceeding discloses, or arises out of, the commission of an offence.

**Form and evidentiary value of books**

**544. (1)** A book that is required by this Code to be kept or prepared may be kept or prepared—

- (a) by making entries in a bound or looseleaf book;
- (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 the Commission.

**(2)** Sub-section (1) does not authorize 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 the Commission.

**(3)** A corporation shall 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 Code 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 Code to make a book containing those matters available for inspection or to provide copies of the whole or part of a book containing those matters shall 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.

**(5)** Where—

- (a) by virtue of a provision of this Code a book that is required by this Code to be kept or prepared is *prima facie* evidence of any matters; and
- (b) the book is kept or prepared by recording or storing the matters concerned by means of a mechanical, electronic or other device,  
any writing that reproduces matters so recorded or stored is *prima facie* evidence of those matters.

**(6)** A writing that purports to reproduce matters recorded or stored by means of a mechanical, electronic or other device shall, unless the contrary is established, be deemed to be a reproduction of those matters.

**Inspection of books**

**545. (1)** A book that is by this Code required to be available for inspection shall, subject to and in accordance with this Code, be available for inspection at the place where, in accordance with this Code, it is kept and at all times when the registered office in the State of the corporation concerned is required to be open and accessible to the public.

**(2)** If any register kept by a company or a foreign company for the purposes of this Code is kept at a place other than the registered office of the company or foreign company, that place shall 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.

**(3)** A person permitted by this Code 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.

**Location of books kept on computers, &c.**

**546. (1)** This section has effect where a corporation records otherwise than in written form the matters required to be contained in a book and means are provided by which those matters are made available for inspection in written form at a place (in this section referred to as the "place of inspection") other than the place (in this section referred to as the "place of storage") where the material constituting the record is kept.

**(2)** If the place of inspection in respect of a book is at a place where, apart from this section, the book would be required to be kept, the corporation shall be deemed to have complied with the requirements of this Code as to the location of the book.

**(3)** Sub-section (2) applies only if the corporation—

- (a) has lodged with the Commission a notice stating that it desires to avail itself of this section in respect of a specified book and specifying the situation of the place of inspection and the place of storage in respect of that book; and
- (b) where such a situation is changed, has within 14 days after the change lodged notice of the change with the Commission.

**Location of registers**

**547. (1)** A register that is required by section 131, 143, 147, 209, 231 238 or 256 to be kept by a company shall be kept at the registered office or the principal place of business in the State of the company but—

- (a) if the work of making up the register is done at another office of the company within the State, it may be kept at that other office;
- (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 within the State, it may be kept at that office; or
- (c) if the Commission approves, it may be kept at another place in Australia.

**(2)** A branch register that is required by section 148 or 262 to be kept in a particular State or Territory by a company shall be kept at the principal office, or the principal place of business, in that State or Territory of the company but—

- (a) if the work of making up the branch register is done at another office of the company within that State or Territory, it may be kept at that other office;
- (b) if the company arranges with some other person to make up the branch register on its behalf and the office of that other person at which the work is done is within that State or Territory, it may be kept at that office; or
- (c) if the Commission approves, it may be kept at another place in Australia.

**(3)** If default is made in complying with sub-section (1) or (2) in its application to any register or branch register of a company, the company, any officer of the company who is in default, and any person who has arranged with the company to make up the register or branch register on its behalf and is in default, are each guilty of an offence.

**(4)** A company shall, within 7 days after any register or branch register of the company to which sub-section (1) or (2) applies is first kept at a place other than the registered office or the principal office, as the case may be, lodge with the Commission notice of the place where the register or branch register is kept and shall, within 7 days after any change in the place at which the register or branch register is kept, lodge with the Commission notice of the change.

(5) If default is made in complying with sub-section (4) in its application to any register or branch register of a company, the company and any officer of the company who is in default are each guilty of an offence.

(6) For the purposes of this section, a reference in sub-section (1) to a register required to be kept by a company under section 256 includes, if an index is required to be kept under sub-section (5) of that section, a reference to the register and index.

(7) In this section, unless the contrary intention appears, "company" includes a registered foreign company.

#### **Translations of instruments**

**548. (1)** Where under this Code a corporation is required to lodge with the Commission any instrument or a certified copy of any instrument and the instrument is not written in the English language, the corporation shall lodge at the same time with the Commission a certified translation of the instrument into the English language.

**(2)** Where under this Code a corporation is required to make an instrument available for inspection and the instrument is not written in the English language, the corporation shall keep at its registered office in the State or, if it does not have a registered office in the State, at its principal office in the State, a certified translation of the instrument into the English language.

**(3)** In this section, "instrument" includes any certificate, contract or other document.

#### **Certificate of incorporation conclusive evidence**

**549.** A certificate of incorporation of a company given under section 35 or 72 or under the corresponding provision of a previous law of the State, or a certificate of the incorporation of a company given under section 31 or under the corresponding provision of a previous law of the State, is conclusive evidence that all the requirements of this Code or of that previous law, as the case may be, in respect of registration and all matters precedent and incidental to registration have been complied with and that the company referred to in the certificate is duly incorporated under this Code or is a company within the meaning of this Code, as the case may be.

**Admissibility of books in evidence**

**550.** (1) Any book kept by a corporation pursuant to a requirement of this Code, or of any previous corresponding law of the State, or a requirement of the corresponding law in force in another State or in a Territory or of a previous corresponding law in force in another State or in a Territory, 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 corporation shall, unless the contrary is proved, be deemed to be such a book and to be kept pursuant to a requirement mentioned in sub-section (1).

**Court may compel compliance**

**551.** If any person in contravention of this Code 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.

*Division 2—Offences***Restriction on offering shares, debentures, &c., for subscription or purchase**

**552.** (1) A person shall not, whether by appointment or otherwise, go from place to place offering shares for subscription or purchase to the public or any member of the public.

(2) Sub-section (1) does not apply in the case of the shares of a corporation where the Commission has, on the application of the corporation, exempted the corporation from the provision of that sub-section by instrument in writing published in the *Gazette*.

(3) A person shall not make an offer in writing to any member of the public (not being a person whose ordinary business it is to purchase or sell shares, whether as principal or agent) of any shares for purchase unless the offer is accompanied by—

- (a) a statement in writing (signed by the person making the offer and dated) containing such particulars as are required by this section to be included in the statement and otherwise complying with the requirements of this section; or
- (b) in the case of shares in a corporation formed or incorporated outside the State, by such a statement or by a prospectus that complies with this Code.

**(4)** Sub-section (3) does not apply—

- (a) where the shares to which the offer relates are shares of a class that are listed for quotation on the stock market of a stock exchange in a State or Territory and the offer so states, specifying the stock exchange;
- (b) where the shares to which the offer relates are shares that a corporation has allotted or agreed to allot with a view to their being offered for sale to the public and the offer is made by a document that complies with all applicable enactments and rules of law as to prospectuses;
- (c) where the provisions of Division 1 or Division 5 of Part IV apply in relation to the offer and have been complied with;
- (d) where the offer relates to a prescribed interest and is made by means of a statement in writing as required by Division 6 of Part IV; or
- (e) where the offer relates to debentures of a corporation of the kind referred to in sub-section 97 (6).

**(5)** The statement referred to in sub-section (3) shall not contain any matter other than the particulars required by this section to be included in the statement, and shall not be in characters smaller or less legible than any characters used in the offer or in any document sent with the offer.

**(6)** The statement referred to in sub-section (3) shall contain particulars as to—

- (a) whether the person making the offer is acting as principal or agent and, if as agent—
  - (i) the name of his principal;
  - (ii) an address in the State where that principal can be served with process; and
  - (iii) particulars as to the remuneration payable by the principal to the agent;
- (b) the date on which and the place where the corporation was incorporated and address of its registered or principal office in its place of incorporation and in the State;
- (c) the authorized share capital of the corporation, its issued share capital, its paid-up share capital and the classes into which its share capital is divided and the rights of each class of shareholders in respect of capital, dividends and voting;

- (d) the dividends (if any) paid by the corporation in respect of each class of shares during each of the 5 financial years immediately preceding the offer and, if no dividend has been paid in respect of shares of any particular class during any of those years, a statement to that effect;
- (e) the total amount of any debentures issued by the corporation and outstanding at the date of the statement, together with the rate of interest payable on those debentures;
- (f) the names and addresses of the directors;
- (g) whether or not the shares offered are fully paid up and, if not, to what extent they are paid up;
- (h) whether or not the shares are listed for quotation on the stock market of, or permission to deal in the shares on a stock market has been granted by, any stock exchange and, if so, the name of each such stock exchange;
- (j) where the offer relates to units—the names and addresses of the persons in whom the shares represented by the units are vested, the date of, and the parties to, any document defining the terms on which those shares are held, and an address in the State where that document or a copy of that document can be inspected; and
- (k) the last audited balance-sheet of the corporation.

(7) In sub-section (6), “corporation” means the corporation by which the shares to which the statement relates were or are to be issued.

(8) A person shall not, whether by appointment or otherwise, go from place to place making offers to the public or any member of the public, being offers of shares in a corporation that has not been formed for subscription or purchase.

(9) A person shall not make an offer to any member of the public, being an offer of any shares in a corporation that has not been formed for subscription or purchase.

(10) A person who acts in contravention of this section is guilty of an offence.

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

(11) Where a person convicted of an offence under this section is a corporation, each officer concerned in the management of the corporation is guilty of the like offence unless he proves that the act constituting the offence took place without his knowledge or consent.

**(12)** Where a person is convicted of having made an offer in contravention of this section, the Court or, if he was convicted by another court, that other court, may order that any contract made as a result of the offer is void and may give such consequential directions as it thinks proper for the repayment of any money or the re-transfer of any shares.

**(13)** A person aggrieved by an order made or direction given under sub-section (12) by a court other than the Court may appeal to the Court against the order or direction, and the Court may confirm, reverse or modify the order or direction and make such further order or give such further directions as it thinks just.

**(14)** In this section, "shares" means shares in a corporation and includes—

- (a) debentures and units and (without affecting the generality of the expression "debentures") all such documents (including those referred to as "bonds") as confer or purport to confer on the holder of the documents any claim against a corporation, whether the claim is present or future, certain or contingent, or ascertained or sounding only in damages; and
- (b) prescribed interests.

**(15)** In this section, a reference to an offer or offering of shares for subscription or purchase shall be construed as including an offer of shares by way of barter or exchange and a reference to an offer in writing of shares shall be construed as including an offer by means of broadcasting, television or cinematograph, but, where an offer is made by means of broadcasting, television or cinematograph, the statement or prospectus by which the offer is required to be accompanied by virtue of sub-section (3) shall be deemed to accompany the offer if—

- (a) the statement or prospectus is prepared by the person on whose behalf the offer is made;
- (b) the public are informed at the same time and by the same means as that by which the offer is made that a copy of the statement or prospectus will be supplied on request being made at a specified address; and
- (c) where a request for a copy of a statement or prospectus is made at that address within one month after the offer was made—the person making the request is supplied with a copy within 7 days after the request was made.

(16) For the purposes of this section, a person shall not, in relation to a corporation, be regarded as not being a member of the public by reason only that he is a holder of shares in the corporation or a purchaser of goods from the corporation.

(17) The provisions of this section do not apply to offers of shares in a society, association or union registered under the *Co-operation Act*, 1923, or the *Permanent Building Societies Act*, 1967, or a credit union, association of credit unions or union of associations of credit unions registered under the *Credit Union Act*, 1969.

### **Interpretation**

**553. (1)** Sections 554 to 557 (inclusive) apply to a company—

- (a) that has been wound up or is in the course of being wound up;
- (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 383;
- (c) that has at any time been, or is, under official management;
- (d) affairs of which have been or are under investigation pursuant to Part VII or the provisions of a previous law of the State with which that Part corresponds;
- (e) in respect of the property or part of the property of which a receiver, or a receiver and manager, has at any time been appointed, whether by the Court or pursuant to the powers contained in any instrument, whether or not the appointment has been terminated;
- (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 section, a company—

- (a) shall be deemed to have ceased to carry on business if, and only if, the Commission has—
  - (i) sent to the company by post a letter pursuant to the provisions of sub-section 459 (1) and has not, within the next succeeding period of one month from the date of the letter, received an answer to the effect that the company is carrying on business; or
  - (ii) published in the *Gazette* a notice pursuant to the provisions of sub-section 459 (3); and

- (b) shall be deemed to be unable to pay its debts if, and only if, execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part.

**(3)** In this section and in sections 554 to 557 (inclusive)—

“appropriate officer” means—

- (a) in relation to a company that has been, has been being or is being wound up—the liquidator;
- (b) in relation to a company that has been or is under official management—the official manager;
- (c) in relation to a company affairs of which have been or are under investigation—the Commission;
- (d) in relation to a company in respect of the property or any part of the property of which a receiver, or a receiver and manager, has been appointed—the receiver or the receiver and manager;
- (e) in relation to a company that has ceased to carry on business or is unable to pay its debts—the Commission; 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;

“company” includes any body to which Division 6 of Part XII applies;

“relevant day” means—

- (a) in relation to a company that has been, has been being or is being wound up—the day upon which under the provisions of this Code or of a corresponding previous law of the State the winding up commenced or is deemed to have commenced;
- (b) in relation to a company that has been or is under official management—the day upon which it was determined that the company should be placed under official management;
- (c) in relation to a company affairs of which have been or are under investigation—the day upon which a direction was given to the Commission to arrange for the investigation of those affairs;
- (d) in relation to a company in respect of the property or any part of the property of which a receiver, or a receiver and manager, has been appointed—the day upon which the receiver, or the receiver and manager, was appointed;

- (e) in relation to a company that is unable to pay its debts—the day upon which 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 —the day on which a letter was first sent to the company, or a notice was first published in the *Gazette* in relation to the company, as the case may be, under section 459 or the corresponding provision of a previous law of the State; or
- (g) in relation to a company that has entered into a compromise or arrangement with its creditors—the day upon which the compromise or arrangement was approved by the Court.

#### **Offences by officers of certain companies**

**554. (1)** A person who, being a past or present officer of a company to which this section applies—

- (a) does not, so far as he is capable of doing so, 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 5 years next before the relevant day, except such part as has been disposed of in the ordinary course of the business of the company;
- (b) does not deliver up to, or in accordance with the directions of, the appropriate officer—
  - (i) all the property of the company in his custody or under his control; or
  - (ii) all books in his custody or under his control belonging to the company;
- (c) has, within 5 years next before the relevant day or at a time on or after that day—
  - (i) concealed or removed any part of the property of the company to the value of \$100 or upwards;
  - (ii) concealed any debt due to or by the company;
  - (iii) fraudulently parted with, altered or made any omission in, or been privy to fraudulent parting with, altering or making any omission in, any book affecting or relating to affairs of the company;

- (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) pawned, pledged or disposed 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) makes any material omission in any statement or report relating to affairs of the company;
- (e) 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 knowledge or belief;
- (f) prevents the production to the appropriate officer of any book affecting or relating to affairs of the company;
- (g) has, within 5 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 5 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,

is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(2)** It is a defence to a charge arising under sub-paragraph (1) (c) (i) in relation to the removal of property of a company, or under sub-paragraph (1) (c) (v) in relation to a property of a company, if the defendant proves that he had no intent to defraud.

**(3)** It is a defence to a charge arising under paragraph (1) (d) if the defendant proves that he had no intent to defraud.

**(4)** It is a defence to a charge arising under paragraph (1) (f) if the defendant proves that he had no intent to conceal the state of affairs of the company.

**(5)** Where a person pawns, pledges or disposes of any property in circumstances that amount to an offence under sub-paragraph (1) (c) (v), any person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in those circumstances is guilty of an offence.

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

**(6)** A person who takes in pawn or pledge or otherwise receives property in circumstances mentioned in sub-section (5) and with the knowledge mentioned in that sub-section shall be deemed to hold the property as trustee for the company concerned and is liable to account to the company for the property.

#### **Liability where proper accounts not kept**

**555. (1)** If—

- (a) a provision of section 267 was not complied with, in respect of a company to which this section applies, during the whole or any part of the period of 2 years immediately preceding the relevant day or the period between the incorporation of the company and the relevant day, whichever is the shorter; and
- (b) the company was at any time during that period, or became at a later time, a company to which this section applies,

a director of the company who failed to take all reasonable steps to secure compliance by the company with the provision throughout that period and any officer of the company who is in default are each guilty of an offence.

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

**(2)** In any proceedings against a person for failure to take all reasonable steps to secure compliance by a company with a provision of section 267, it is a defence if the person proves that he had reasonable grounds to believe and did believe that a competent and reliable person was charged with the duty of seeing that that provision was complied with and was in a position to discharge that duty.

#### **Offences relating to incurring of debts or fraudulent conduct**

**556. (1)** If—

- (a) a company incurs a debt, whether within or outside the State;

- (b) immediately before the time when the debt is incurred—
- (i) there are 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 are 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 is, at the time when the debt is 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 is guilty of an offence 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.

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

**(2)** In any proceedings against a person under sub-section (1), it is a defence if the defendant proves—

- (a) that the debt was incurred without his express or implied authority or consent; or
- (b) that at the time when the debt was incurred, he 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.

**(3)** Proceedings may be brought under sub-section (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 sub-section (1) in respect of the incurring of that debt.

**(4)** Where sub-section (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.

**(5) If—**

- (a) a company does any 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 is 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 is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(6) A certificate issued by the proper officer of a court stating that a person specified in the certificate—**

- (a) was convicted of an offence under sub-section (1) in relation to a debt specified in the certificate incurred by a company so specified; or
- (b) was convicted of an offence under sub-section (5) in relation to a company specified in the certificate,

is, in any proceedings, *prima facie* evidence of the matters stated in the certificate.

**(7) A document purporting to be a certificate issued under sub-section (6) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly issued.****Powers of Court**

**557. (1)** Where a person has been convicted of an offence under sub-section 556 (1) in respect of the incurring of a debt, the Court, on the application of the Commission or the person to whom the debt is payable, may, if it thinks it proper to do so, declare that the first-mentioned person shall be 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 sub-section 556 (5), the Court, on the application of the Commission or of a prescribed person, may, if it thinks it proper to do so, declare that the first-mentioned person shall be 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 sub-section (2) relates—

- (a) the appropriate officer;
- (b) a creditor or contributory of the company authorized by the Commission to make an application under that sub-section; and
- (c) if the company was a company to which section 556 applied by reason of paragraph 553 (1) (c)—a member of the company,

are prescribed persons for the purposes of that sub-section.

(4) Where the Court makes a declaration under sub-section (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 shall be a charge—

- (a) on a debt or obligation due from the company to him; or
- (b) on a right or interest under a charge on any property of the company held by or vested in him or a person on his behalf, or a person claiming as assignee from or through the person liable or a person acting on his 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 sub-section (5).

(7) For the purpose of sub-section (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 sub-section (1) or (2), the appropriate officer or other applicant may himself give evidence or call witnesses.

(9) A reference in this section to a provision of this Code, other than a provision of this section, shall be construed as including a reference to a provision of a previous law of the State with which the first-mentioned provision corresponds.

**Certain rights not affected**

**558.** Except as provided by sub-section 556 (4), nothing in sub-section 556 (1) or 557 (1) or (2) affects any rights of a person to indemnity, subrogation or contribution.

**Inducement to be appointed liquidator or official manager**

**559.** A person who gives, or agrees or offers to give, to a member or creditor of a company any valuable consideration with a view to securing his own appointment or nomination, or to securing or preventing the appointment or nomination of some person other than himself, as the liquidator, provisional liquidator or official manager of the company, as receiver, or receiver and manager, of the property or any part of the property of the company or as a trustee or other person administering a compromise or arrangement in relation to the company is guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**Falsification of books**

**560. (1)** An officer, former officer, member or former member of a company who conceals, destroys, mutilates or falsifies any securities of or belonging to the company or any books affecting or relating to affairs of the company is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(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 he knows to be false or misleading in a material particular;
- (b) destroys, removes or falsifies 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) fails 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,

is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(3) It is a defence to a charge arising under sub-section (1) or (2) if the defendant proves that he acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

(4) In this section, "officer", in relation to a company, includes a receiver of the property or any part of the property of the company who is not also a manager.

**Frauds by officers**

**561.** A person who, while an officer 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 corporation;
- (b) with intent to defraud the company or a related corporation or members or creditors of the company or of a related corporation, 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, the property of the company or related corporation; or
- (c) with intent to defraud the company or a related corporation or members or creditors of the company or of a related corporation, conceals or removes any part of the property of the company or related corporation after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or related corporation,

is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**Court may disqualify person from acting as director, &c., in certain circumstances**

**562. (1)** This section applies to a company—

- (a) that has been wound up, or is in the course of being wound up, because of inability to pay its debts as and when they became due;
- (b) that has been in the course of being wound up because of inability to pay its debts as and when they became due, where the winding up has been stayed or terminated by an order under section 383;

- (c) that has been or is under official management;
- (d) that has ceased to carry on business because it was unable to pay its debts as and when they became due;
- (e) in respect of which a levy of execution was not satisfied;
- (f) in respect of the property or part of the property of which a receiver, or a receiver and manager, has been appointed, whether by a court or pursuant to the powers contained in an instrument, whether or not the appointment has been terminated; or
- (g) that has entered into a compromise or arrangement with its creditors.

**(2)** Unless cause to the contrary is shown, the Court may, on an application by the Commission and on being satisfied as to the matters referred to in sub-section (3), make an order prohibiting a person specified in the order from acting as a director of, or from being concerned or taking part in the management of, a company during such period not exceeding 5 years after the date of the order as is specified in the order.

**(3)** The Court shall not make an order under sub-section (2) unless it is satisfied—

- (a) that the person to whom the application for an order relates was given notice of the application;
- (b) that, within the period of 7 years before notice of the application was given to the person referred to in paragraph (a), whether that period commenced before or after the commencement of the *Companies (Application of Laws) Act*, 1981, that person was a director of, or was concerned or took part in the management of, 2 or more companies to which this section applies; and
- (c) that—
  - (i) in the case of each of those 2 companies; or
  - (ii) where the person was a director of, or was concerned or took part in the management of, more than 2 companies to which this section applies—in the case of each of 2 or more of those companies,

the manner in which affairs of the company had been managed was wholly or partly responsible for the company being wound up, being under official management, ceasing to carry on business, being unable to satisfy a levy of execution, being subject to the appointment of a receiver, or a receiver and manager, or entering into a compromise or arrangement with its creditors.

**(4)** A person shall not contravene or fail to comply with an order under this section that is applicable to him.

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

**(5)** In this section, “company” means—

- (a) a corporation; or
- (b) a body referred to in paragraph 469 (1) (b).

**False or misleading statements**

**563. (1)** A corporation that advertises, issues or publishes any statement of the amount of its capital that is misleading or in which the amount of nominal or authorized capital is stated without the words “nominal” or “authorized”, or in which the amount of capital or authorized or subscribed capital is stated but the amount of paid up capital or the amount of any charge on uncalled capital is not stated, and any officer of the corporation who knowingly authorizes, directs or consents to the advertising, issue or publication, are each guilty of an offence.

**(2)** A person who, in a document required by or for the purposes of this Code or lodged with or submitted to the Commission, makes or authorizes the making of a statement that to his knowledge is false or misleading in a material particular, or omits or authorizes the omission of any matter or thing without which the document is to his knowledge misleading in a material respect, is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(3)** A person who, in a document required by or for the purposes of this Code or lodged with or submitted to the Commission—

- (a) makes or authorizes the making of a statement that is false or misleading in a material particular; or
- (b) omits or authorizes 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.

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

- (4) For the purposes of sub-sections (2) and (3), 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 Code or required to be lodged with or submitted to the Commission; 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 shall be deemed to have authorized the making of the statement or the omission of the matter or thing.

#### **False reports**

**564. (1)** An officer of a corporation who makes or furnishes, or authorizes or permits the making or furnishing of, a statement or report relating to affairs of the corporation, knowing the statement or report to be false or misleading in a material particular, to—

- (a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation;
  - (b) in the case of a corporation that is a subsidiary, an auditor of the holding company; or
  - (c) a stock exchange in Australia or elsewhere or an officer of such a stock exchange,
- is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(2)** An officer of a corporation who makes or furnishes, or authorizes or permits the making or furnishing of, a statement or report relating to affairs of the corporation that is false or misleading in a material particular to—

- (a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation;
- (b) in the case of a corporation that is a subsidiary, an auditor of the holding company; or
- (c) a stock exchange in Australia or elsewhere or an officer of such a stock exchange,

without having taken reasonable steps to ensure that the statement or report was not false or misleading is guilty of an offence.

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

**(3)** The references in sub-sections (1) and (2) to making or furnishing, or authorizing or permitting the making or furnishing of, a false or misleading statement or report relating to affairs of a corporation includes a reference to making or furnishing, or authorizing or permitting the making or furnishing of, a false or misleading statement or report as to the state of knowledge with respect to those affairs of the person making or furnishing, or authorizing or permitting the making or furnishing of, the statement or report.

**(4)** Where a statement or report is made or furnished 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 statement or report, shall be considered together in determining whether the statement or report was false or misleading.

**Dividends payable from profits only**

**565. (1)** No dividend shall be payable to the shareholder of any company except out of profits or pursuant to section 119.

**(2)** Every director or executive officer of a company who wilfully pays or permits to be paid any dividend out of what he knows is not profits except pursuant to section 119—

- (a) is, without prejudice to any other liability, guilty of an offence; and
- (b) is also liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits,

and the amount for which a director or executive officer is so liable may be recovered by the creditors or the liquidator suing on behalf of the creditors.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**(3)** If the whole amount is recovered from one director or executive officer, he may recover contribution against any other person liable who has directed or consented to the payment.

**(4)** A liability imposed by this section on a person does not, on the death of the person, extend or pass to his executors or administrators nor is the estate of any such person liable under this section.

**(5)** In this section, “dividend” includes bonus and payment by way of bonus.

**Restriction on use of words “Limited” and “No Liability”**

**566.** If a person carries on business under any name or title of which “Limited” or “No Liability” or any abbreviation of these words is the final word or abbreviation, the person is, unless duly incorporated with limited liability or no liability, as the case may be, guilty of an offence.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**Restriction on use of word “Proprietary”**

**567.** If a company uses the word “Proprietary” or any abbreviation of that word as part of its name and the company does not fulfil the requirements required by this Code to be fulfilled by proprietary companies, the company and each officer of the company who is in default are each guilty of an offence.

**Reciprocity in relation to offences**

**568.** If a person does or omits to do an act or thing in the State and that person, if he had done or had omitted to do that act or thing in another State or in a Territory, would have been guilty of an offence against a provision of a law of that State or Territory that corresponds with a provision of this Code, that person is guilty of an offence against that provision of this Code.

**Offences committed partly in and partly out of the State**

**569.** If a person does or omits to do an act or thing outside the State and that person, if he had done or omitted to do that act or thing in the State, would, by reason of his also having done or omitted to do an act or thing in the State, have been guilty of an offence against this Code, that person is guilty of that offence.

**General penalty provisions**

**570. (1)** A person who—

- (a) does an act or thing that he is forbidden to do by or under a provision of this Code;

- (b) does not do an act or thing that he is required or directed to do by or under a provision of this Code; or
- (c) otherwise contravenes or fails to comply with a provision of this Code, is, unless that provision or another provision of this Code provides that he is guilty of an offence, guilty of an offence by virtue of this sub-section.

**(2)** A person who is guilty of an offence against this Code, whether by virtue of sub-section (1) or otherwise, is punishable, upon conviction, by a penalty not exceeding the penalty applicable to the offence.

**(3)** Where—

- (a) a section that does not consist of 2 or more sub-sections provides that a person is in circumstances referred to in the section guilty of an offence; or
- (b) sub-section (1) operates in relation to a provision of this Code that is contained in a section that does not consist of 2 or more sub-sections so as to make a person guilty of an offence,

and a penalty, pecuniary or otherwise, is set out at the foot of the section, the penalty applicable to the offence is the penalty so set out.

**(4)** Where—

- (a) a sub-section of a section that consists of 2 or more sub-sections provides that a person is in circumstances referred to in the sub-section guilty of an offence; or
- (b) sub-section (1) operates in relation to a provision of this Code that is contained in a sub-section of a section that consists of 2 or more sub-sections so as to make a person guilty of an offence,

then—

- (c) if a penalty, pecuniary or otherwise, is set out at the foot of the sub-section—the penalty applicable to the offence is the penalty set out at the foot of the sub-section; or
- (d) if a penalty, pecuniary or otherwise, is set out at the foot of the section and no penalty is set out at the foot of the sub-section—the penalty applicable to the offence is the penalty set out at the foot of the section.

**(5)** Where each of 2 or more sub-sections of a section contains one of the following provisions:

- (a) a provision that a person is in circumstances referred to in the sub-section guilty of an offence; or
- (b) a provision in relation to which sub-section (1) operates so as to make a person guilty of an offence,

and a penalty, pecuniary or otherwise, is set out at the foot of each of those sub-sections, the penalty applicable in relation to an offence created by either or any of those sub-sections, or in relation to an offence created by sub-section (1) in relation to a provision contained in either or any of those sub-sections, is the penalty set out at the foot of the sub-section concerned.

**(6)** Except as provided by sub-sections (3), (4) and (5), the penalty applicable in relation to an offence against this Code is a fine of \$500.

### **Continuing offences**

**571. (1)** Where—

- (a) by or under a section, or a sub-section of a section, of this Code an act or thing is required or directed to be done within a particular period or before a particular time;
- (b) failure to do that act or thing within the period or before the time referred to in paragraph (a) constitutes an offence; and
- (c) that act or thing is not done within the period or before the time referred to in paragraph (a),

the following provisions of this sub-section have effect:

- (d) the obligation to do that act or thing continues, notwithstanding that that period has expired or that time has passed, until that act or thing is done;
- (e) where a person is convicted of an offence that, by virtue of paragraph (d), is constituted by failure to do that act or thing after the expiration of that period or after that time, as the case may be, that person is guilty of a separate and further offence in respect of each day after the day of the conviction during which the failure to do that act or thing continues; and
- (f) the penalty applicable to each such separate and further offence is \$50.

**(2) Where—**

- (a) by or under a section, or a sub-section of a section, of this Code an act or thing is required or directed to be done but no period within which or time by which that act or thing is to be done is specified;
- (b) failure to do that act or thing constitutes an offence; and
- (c) a person is convicted of an offence in respect of a failure to do that act or thing,

that person is guilty of a separate and further offence in respect of each day after the day of the conviction during which the failure to do that act or thing continues and the penalty applicable to each such separate and further offence is \$50.

**(3) Charges against the same person for any number of offences under paragraph (1) (e) or sub-section (2) may be joined in the same information or complaint if those offences relate to a failure to do the same act or thing.**

**(4) If a person is convicted of more than one offence under paragraph (1) (e) or more than one offence under sub-section (2), the court may impose one penalty in respect of all the offences of which the person is so convicted under that paragraph or sub-section, as the case may be, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a penalty were imposed in respect of each offence separately.**

**Officers and other persons in default**

**572. (1)** Where a provision of this Code provides that an officer of a corporation or other person who is in default is guilty of an offence, the reference to the officer or other person who is in default shall, in relation to a contravention of, or failure to comply with, the provision, be construed as a reference to any officer of the corporation (including a person who subsequently ceased to be an officer of the corporation) or any person, as the case may be, who is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention or failure.

**(2)** For the purposes of sub-section (1), a secretary of a corporation shall, unless the contrary is proved, be deemed to be knowingly concerned in and party to any contravention by the corporation of, or any failure by the corporation to comply with—

- (a) a provision of section 216; or
- (b) a provision of section 238 or 263 requiring the lodgment of a document with the Commission.

**Power of Court to prohibit payment or transfer of moneys, securities or other property****573. (1) Where—**

- (a) an investigation is being carried out under this Code in relation to any act or omission by a person, being an act or omission that constitutes or may constitute an offence against this Code;
- (b) a prosecution has been instituted against a person for an offence against this Code; or
- (c) a civil proceeding has been instituted against a person under this Code,

and the Court considers it necessary or desirable to do so for the purpose of protecting the interests of any persons to whom the person referred to in paragraph (a), (b) or (c), as the case may be (in this section referred to as the “relevant person”), is liable or may be or become liable to pay any moneys, whether in respect of a debt, by way of damages or compensation or otherwise, or to account for any securities or other property, the Court may, on application by the Commission, make one or more of the following orders:

- (d) an order prohibiting, either absolutely or subject to conditions, a person who is indebted to the relevant person or to any person associated with 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, either absolutely or subject to conditions, a person holding money, or securities or other property, on behalf of the relevant person or on behalf of any person associated with the relevant person from paying all or any of the money, or transferring, or otherwise parting with possession of, the securities or other property, to, or to another person at the direction or request of, the person on whose behalf the money, or the securities or other property, is or are held;
- (f) an order prohibiting, either absolutely or subject to conditions, the taking or sending by any person out of the State, or out of Australia, of moneys of the relevant person or of any person associated with the relevant person;
- (g) an order prohibiting, either absolutely or subject to conditions, the taking, sending or transfer by any person of securities or other property of the relevant person or of any person associated with the relevant person from a place in the State to a place outside the State

(including the transfer of securities from a register in the State to a register outside the State) or from a place in Australia to a place outside Australia (including the transfer of securities from a register in Australia to a register outside Australia);

- (h) an order appointing—
  - (i) where 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) where 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;
- (j) where the relevant person is a natural person—an order requiring that person to deliver up to the Court his passport and such other documents as the Court thinks fit;
- (k) where the relevant person is a natural person—an order prohibiting that person from leaving Australia without the consent of the Court.

(1A) Where an application is made to the Court for an order under sub-section (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.

(1B) Where the Commission makes an application to the Court for the making of an order under sub-section (1), the Court shall not require the Commission or any other person, as a condition of granting an interim order under sub-section (1A), to give any undertakings as to damages.

(2) Where the Court has made an order under this section, the Court may, on application by the Commission or by any person affected by the order, make a further order rescinding or varying the first-mentioned order.

(3) An order made under sub-section (1) or (2) may be expressed to operate for a period specified in the order or until the order is rescinded by a further order under this section.

(4) A person shall not contravene or fail to comply with an order by the Court under this section that is applicable to him.

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

**Injunctions**

**574. (1)** Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute an offence against this Code, the Court may, on the application of—

- (a) the Commission; or
- (b) any person whose interests have been, are or would be affected by the conduct,

grant an injunction 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.

**(2) Where—**

(a) a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and

(b) that refusal or failure is, or would be, an offence against this Code, the Court may, on the application of—

- (c) the Commission; or
- (d) 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 requiring the first-mentioned person to do that act or thing.

**(3)** Where an application is made to the Court for an injunction under sub-section (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim injunction restraining a person from engaging in conduct of the kind referred to in sub-section (1) pending the determination of the application.

**(4)** The Court may rescind or vary an injunction granted under sub-section (1), (2) or (3).

**(5)** Where an application is made to the Court for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the power of the Court to grant the injunction may be exercised—

- (a) if the Court is satisfied that the person has engaged in conduct of that kind—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; or

- (b) if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will engage in conduct of that kind—whether or not the person has previously engaged in conduct of that kind and 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.
- (6) Where an application is made to the Court for a grant of an injunction requiring a person to do a particular act or thing, the power of the Court to grant the injunction may be exercised—
- if the Court is satisfied that the person has refused or failed to do that act or thing—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; or
  - if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will refuse or fail to do that act or thing—whether or not the person has previously refused or failed to do that act or thing and 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) Where the Commission makes an application to the Court for the grant of an injunction under this section, the Court shall not require the Commission or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.
- (8) 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.

**Power of Court to punish for contempt of Court**

- 575.** Nothing in a provision of this Code that provides—
- that a person shall not contravene or fail to comply with an order of the Court; or
  - that a person who contravenes or fails to comply with an order of the Court is guilty of an offence,

affects the powers of the Court in relation to the punishment of contempts of the Court.

*Division 3—Rules***Rules**

**576.** (1) Rules of court, not inconsistent with this Code, may be made under the *Supreme Court Act*, 1970—

- (a) with respect to proceedings, and the practice and procedure, of the Court under this Code;
- (b) with respect to any matter or thing that is required or permitted by this Code to be prescribed by rules or is necessary or convenient to be prescribed by rules for carrying out or giving effect to this Code; and
- (c) without limiting the generality of the foregoing, with respect to costs and with respect to rules as to meetings ordered by the Court.

(2) Sub-section (1) does not limit the rule-making powers conferred by the *Supreme Court Act*, 1970.

577.

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*Division 4—Miscellaneous***Non-application of rule against perpetuities to certain schemes**

**578.** (1) The rule of law relating to perpetuities does not apply, and shall be deemed 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 the *Companies (Application of Laws) Act*, 1981.

(2) In this section—

- (a) a reference to a corporation includes a reference to a body corporate or society incorporated or formed, whether before or after the commencement of the *Companies (Application of Laws) Act*, 1981, in pursuance of any Act, Imperial Act, Act of another State or Ordinance of a Territory or of letters patent or royal charter, or otherwise duly constituted according to law;

- (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 wife, child, grandchild, parent or any dependant of an employee or of a director of the corporation.

**Code not to apply to trade unions**

**579.** This Code does not apply to any trade union and the registration of any trade union under this Code is void.

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**SCHEDULE 1**

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**SCHEDULE 2**

Section 67

**POWERS**

1. To carry on any other business that may seem to the company capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights.
2. To acquire the whole or any part of the business and property, and undertake the whole or any part of the liabilities, of any person or corporation carrying on any business that the company is authorized to carry on, or possessed of property suitable for the purposes of the company.
3. To apply for, purchase or otherwise acquire any patents, patent rights, copyrights, trade marks, formulas, licences, concessions and the like conferring any exclusive or non-exclusive or limited right to use, or any secret or other information as to, any invention that seems capable of being used for any of the purposes of the company, or the acquisition of which seems calculated directly or indirectly to benefit the company, and to use, exercise, develop or grant licences in respect of, or otherwise turn to account, the property, rights, or information so acquired.
4. To amalgamate, or enter into partnership or into any arrangement for sharing of profits, union of interest, co-operation, joint venture, reciprocal concession or otherwise, with any person or corporation carrying on or engaged in, or about to carry on or engage in, any business or transaction that the company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit the company.
5. To take, or otherwise acquire, and hold, securities of any other corporation.
6. To enter into any arrangements with any Government or authority, supreme, municipal, local or otherwise, that may seem conducive to the company's objects, or any of them, to obtain from any such Government or authority any rights, privileges and concessions that the company thinks it desirable to obtain and to carry out, exercise, and comply with, any such arrangements, rights, privileges and concessions.
7. To establish and support, or aid in the establishment and support of, associations, institutions, funds, trusts and conveniences calculated to benefit employees or directors or past employees or directors of the company or of its predecessors in business, or the dependants or connections of any such persons, to grant pensions and allowances, to make payments towards insurance and to subscribe or guarantee money for charitable or benevolent objects, for any exhibition or for any public, general or useful object.
8. To promote any other corporation or corporations for the purpose of acquiring or taking over all or any of the property, rights and liabilities of the company, or for any other purpose that may seem directly or indirectly calculated to benefit the company.
9. To purchase, take on lease or in exchange, hire or otherwise acquire any real or personal property or any rights or privileges that the company thinks necessary or convenient for the purposes of its business and, in particular, any land, buildings, easements, machinery, plant or stock in trade.
10. To construct, improve, maintain, develop, work, manage, carry out, or control any buildings, works, factories, mills, roads, ways, tramways, railways, branches or sidings, bridges, reservoirs, water-courses, wharves, warehouses, electric works, shops, stores or other works and conveniences that seem calculated directly or indirectly to advance the company's interests and to contribute to, subsidize or otherwise assist or take part in the construction, improvement, maintenance, development, working, management, carrying out or control of the works or conveniences.
11. To invest and deal with the money of the company not immediately required in such manner as is from time to time thought fit.

12. To lend and advance money or give credit to any person or corporation, to guarantee and give guarantees or indemnities for the payment of money or the performance of contracts or obligations by any person or corporation, to secure or undertake in any way the repayment of moneys lent or advanced to, or the liabilities incurred by, any person or corporation and otherwise to assist any person or corporation.
  13. To borrow or raise or secure the payment of money in such manner as the company thinks fit and to secure any such borrowing, raising or payment of money or the repayment or performance of any debt, liability, contract, guarantee or other engagement incurred or to be entered into by the company in any way and, in particular, by the issue of debentures, perpetual or otherwise, charged upon all or any of the company's property (both present and future), including its uncalled capital and to purchase, redeem or pay off any such securities.
  14. To remunerate any person or corporation for services rendered, or to be rendered, in placing or assisting to place or guaranteeing the placing of any of the shares in the company's capital or any debentures or other securities of the company, or in or about the organization, formation or promotion of the company or the conduct of its business.
  15. To draw, make, accept, indorse, discount, execute and issue promissory notes, bills of exchange, bills of lading and other negotiable or transferable instruments.
  16. To sell or dispose of the undertaking of the company or any part of that undertaking for such consideration as the company thinks fit and, in particular, for shares, debentures or securities of any other corporation having objects altogether or in part similar to those of the company.
  17. To adopt such means of making known and advertising the business and products of the company as seem expedient.
  18. To apply for, secure or acquire by grant, legislative enactment, assignment, transfer, purchase or otherwise, to exercise, carry out and enjoy, and to pay for, aid in and contribute towards carrying into effect, any charter, licence, power, authority, franchise, concession, right or privilege that any Government or authority or any corporation or other public body is empowered to grant and to appropriate any of the company's securities and property to defray the necessary costs, charges and expenses.
  19. To apply for, promote and obtain any statute, order, regulation or other authorization or enactment that seems calculated directly or indirectly to benefit the company and to oppose any bills, proceedings or applications that seem calculated directly or indirectly to prejudice the company's interests.
  20. To procure the company to be registered or recognized in any country or place outside the State.
  21. To sell, improve, manage, develop, exchange, lease, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the company.
  22. To issue and allot fully or partly paid shares in the capital of the company in payment or part payment for any real or personal property purchased or otherwise acquired by the company or any services rendered to the company.
  23. To distribute any of the property of the company among the members in kind or otherwise but so that no distribution amounting to a reduction of capital is made without the sanction required by law.
  24. To take or hold mortgages, liens and charges to secure payment of the purchase price, or any unpaid balance of the purchase price, of any part of the company's property of whatsoever kind sold by the company, or any money due to the company from purchasers and others.
  25. To carry out all or any of the objects of the company and do all or any of the abovementioned things in any part of the world and whether as principal, agent, contractor or trustee or otherwise, and by or through trustees or agents or otherwise, and either alone or in conjunction with others.
  26. To do all such other things as are incidental or conducive to the attainment of the objects and the exercise of the powers of the company.
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**SCHEDULE 3**

Sections 5 and 75

**TABLE A****REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES***Interpretation*

## 1. (1) In these regulations—

“Code” means the *Companies (New South Wales) Code*;

“seal” means the common seal of the company and includes any official seal of the company;

“secretary” means any person appointed to perform the duties of a secretary of the company.

(2) Section 40 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (New South Wales) Code* applies in relation to these regulations as if they were an instrument made by an authority under a power conferred by the *Companies (New South Wales) Code* as in force on the date on which these regulations became binding on the company.

(3) An expression used in a particular Part or Division of the Code that is given by that Part or Division a special meaning for the purposes of that Part or Division has, in any of these regulations that deals with a matter dealt with by that Part or Division, unless the contrary intention appears, the same meaning as in that Part or Division.

*Share Capital and Variation of Rights*

2. Without prejudice to any special rights previously conferred on the holders of any existing shares or class of shares but subject to the Code, shares in the company may be issued by the directors and any such share may be issued with such preferred, deferred or other special rights or such restrictions, whether with regard to dividend, voting, return of capital or otherwise, as the directors, subject to any resolution, determine.

3. Subject to the Code, any preference shares may, with the sanction of a resolution, be issued on the terms that they are, or at the option of the company are liable, to be redeemed.

4. (1) If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may, whether or not the company is being wound up, be varied with the consent in writing of the holders of three-quarters of the issued shares of that class, or with the sanction of a special resolution passed at a separate meeting of the holders of the shares of the class.

(2) The provisions of these regulations relating to general meetings apply so far as they are capable of application and *mutatis mutandis* to every such separate meeting except that—

(a) a quorum is constituted by 2 persons who, between them, hold or represent by proxy one-third of the issued shares of the class; and

(b) any holder of shares of the class, present in person or by proxy, may demand a poll.

(3) The rights conferred upon the holders of the shares of any class issued with preferred or other rights shall, unless otherwise expressly provided by the terms of issue of the shares of that class, be deemed to be varied by the creation or issue of further shares ranking equally with the first-mentioned shares.

5. (1) The company may exercise the power to pay commissions conferred by the Code if—

(a) the rate or the amount of the commission paid or agreed to be paid is disclosed in the manner required by the Code; and

(b) the commission does not exceed 10% of the price at which the shares in respect of which the commission is paid are issued.

(2) The commission may be satisfied by the payment of cash or by the allotment of fully or partly paid shares or partly by the payment of cash and partly by the allotment of fully or partly paid shares.

(3) The company may, on any issue of shares, also pay such brokerage as is lawful.

6. (1) Except as required by law, the company shall not recognize a person as holding a share upon any trust.

(2) The company is not bound by or compelled in any way to recognize (whether or not it has notice of the interest or rights concerned) any equitable, contingent, future or partial interest in any share or unit of a share or (except as otherwise provided by these regulations or by law) any other right in respect of a share except an absolute right of ownership in the registered holder.

7. (1) A person whose name is entered as a member in the register of members is entitled without payment to receive a certificate in respect of the share under the seal of the company in accordance with the Code but, in respect of a share or shares held jointly by several persons, the company is not bound to issue more than one certificate.

(2) Delivery of a certificate for a share to one of several joint holders is sufficient delivery to all such holders.

*Lien*

8. (1) The company has a first and paramount lien on every share (not being a fully paid share) for all money (whether presently payable or not) called or payable at a fixed time in respect of that share.

(2) The company also has a first and paramount lien on all shares (other than fully paid shares) registered in the name of a sole holder for all money presently payable by him or his estate to the company.

(3) The directors may at any time exempt a share wholly or in part from the provisions of this regulation.

(4) The company's lien (if any) on a share extends to all dividends payable in respect of the share.

9. (1) Subject to sub-regulation (2), the company may sell, in such manner as the directors think fit, any shares on which the company has a lien.

(2) A share on which the company has a lien shall not be sold unless—

(a) a sum in respect of which the lien exists is presently payable; and

(b) the company has, not less than 14 days before the date of the sale, given to the registered holder for the time being of the share or the person entitled to the share by reason of the death or bankruptcy of the registered holder a notice in writing setting out, and demanding payment of, such part of the amount in respect of which the lien exists as is presently payable.

10. (1) For the purpose of giving effect to a sale mentioned in regulation 9, the directors may authorize a person to transfer the shares sold to the purchaser of the shares.

(2) The company shall register the purchaser as the holder of the shares comprised in any such transfer and he is not bound to see to the application of the purchase money.

(3) The title of the purchaser to the shares is not affected by any irregularity or invalidity in connection with the sale.

11. The proceeds of a sale mentioned in regulation 9 shall be applied by the company in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue (if any) shall (subject to any like lien for sums not presently payable that existed upon the shares before the sale) be paid to the person entitled to the shares at the date of the sale.

*Calls on Shares*

12. (1) The directors may make calls upon the members in respect of any money unpaid on the shares of the members (whether on account of the nominal value of the shares or by way of premium) and not by the terms of issue of those shares made payable at fixed times, except that no call shall exceed one-quarter of the sum of nominal values of the shares or be payable earlier than one month from the date fixed for the payment of the last preceding call.

(2) Each member shall, upon receiving at least 14 days' notice specifying the time or times and place of payment, pay to the company at the time or times and place so specified the amount called on his shares.

(3) The directors may revoke or postpone a call.

13. A call shall be deemed to have been made at the time when the resolution of the directors authorizing the call was passed and may be required to be paid by instalments.

14. The joint holders of a share are jointly and severally liable to pay all calls in respect of the share.

15. If a sum called in respect of a share is not paid before or on the day appointed for payment of the sum, the person from whom the sum is due shall pay interest on the sum from the day appointed for payment of the sum to the time of actual payment at such rate not exceeding 8% per annum as the directors determine, but the directors may waive payment of that interest wholly or in part.

16. Any sum that, by the terms of issue of a share, becomes payable on allotment or at a fixed date, whether on account of the nominal value of the share or by way of premium, shall for the purposes of these regulations be deemed to be a call duly made and payable on the date on which by the terms of issue the sum becomes payable, and, in case of non-payment, all the relevant provisions of these regulations as to payment of interest and expenses, forfeiture or otherwise apply as if the sum had become payable by virtue of a call duly made and notified.

17. The directors may, on the issue of shares, differentiate between the holders as to the amount of calls to be paid and the times of payment.

18. (1) The directors may accept from a member the whole or a part of the amount unpaid on a share although no part of that amount has been called up.

(2) The directors may authorize payment by the company of interest upon the whole or any part of an amount so accepted, until the amount becomes payable, at such rate, not exceeding the prescribed rate, as is agreed upon between the directors and the member paying the sum.

(3) for the purposes of sub-regulation (2), the prescribed rate of interest is—

- (a) if the company has, by resolution, fixed a rate—the rate so fixed; and
- (b) in any other case—8% per annum.

*Transfer of Shares*

19. (1) Subject to these regulations, a member may transfer all or any of his shares by instrument in writing in any usual or common form or in any other form that the directors approve.

(2) An instrument of transfer referred to in sub-regulation (1) shall be executed by or on behalf of both the transferor and the transferee.

(3) A transferor of shares remains the holder of the shares transferred until the transfer is registered and the name of the transferee is entered in the register of members in respect of the shares.

20. The instrument of transfer must be left for registration at the registered office of the company, together with such fee (if any) not exceeding \$1.00 as the directors require, accompanied by the certificate of the shares to which it relates and such other information as the directors properly require to show the right of the transferor to make the transfer, and thereupon the company shall, subject to the powers vested in the directors by these regulations, register the transferee as a shareholder.

21. The directors may decline to register a transfer of shares, not being fully paid shares, to a person of whom they do not approve and may also decline to register any transfer of shares on which the company has a lien.

22. The registration of transfers may be suspended at such times and for such periods as the directors from time to time determine not exceeding in the whole 30 days in any year.

#### *Transmission of Shares*

23. In the case of the death of a member, the survivor or survivors where the deceased was a joint holder, and the legal personal representatives of the deceased where he was a sole holder, shall be the only persons recognized by the company as having any title to his interest in the shares, but this regulation does not release the estate of a deceased joint holder from any liability in respect of a share that had been jointly held by him with other persons.

24. (1) Subject to the *Bankruptcy Act* 1966, a person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such information being produced as is properly required by the directors, elect either to be registered himself as holder of the share or to have some other person nominated by him registered as the transferee of the share.

(2) If the person becoming entitled elects to be registered himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects.

(3) If he elects to have another person registered, he shall execute a transfer of the share to that other person.

(4) All the limitations, restrictions and provisions of these rules relating to the right to transfer, and the registration of transfer of, shares are applicable to any such notice or transfer as if the death or bankruptcy of the member had not occurred and the notice or transfer were a transfer signed by that member.

25. (1) Where the registered holder of a share dies or becomes bankrupt, his personal representative or the trustee of his estate, as the case may be, is, upon the production of such information as is properly required by the directors, entitled to the same dividends and other advantages, and to the same rights (whether in relation to meetings of the company, or to voting or otherwise), as the registered holder would have been entitled to if he had not died or become bankrupt.

(2) Where 2 or more persons are jointly entitled to any share in consequence of the death of the registered holder, they shall, for the purpose of these regulations, be deemed to be joint holders of the share.

#### *Forfeiture of Shares*

26. (1) If a member fails to pay a call or instalment of a call on the day appointed for payment of the call or instalment, the directors may, at any time thereafter during such time as any part of the call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest that has accrued.

(2) The notice shall name a further day (not earlier than the expiration of 14 days from the date of service of the notice) on or before which the payment required by the notice is to be made and shall state that, in the event of non-payment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited.

27. (1) If the requirements of a notice served under regulation 26 are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

(2) Such a forfeiture shall include all dividends declared in respect of the forfeited shares and not actually paid before the forfeiture.

28. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and, at any time before a sale or disposition, the forfeiture may be cancelled on such terms as the directors think fit.

29. A person whose shares have been forfeited ceases to be a member in respect of the forfeited shares, but remains liable to pay to the company all money that, at the date of forfeiture, was payable by him to the company in respect of the shares (including interest at the rate of 8% per annum from the date of forfeiture on the money for the time being unpaid if the directors think fit to enforce payment of the interest), but his liability ceases if and when the company receives payment in full of all the money (including interest) so payable in respect of the shares.

30. A statement in writing declaring that the person making the statement is a director or a secretary of the company, and that a share in the company has been duly forfeited on a date stated in the statement, is *prima facie* evidence of the facts stated in the statement as against all persons claiming to be entitled to the share.

31. (1) The company may receive the consideration (if any) given for a forfeited share on any sale or disposition of the share and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of.

(2) Upon the execution of the transfer, the transferee shall be registered as the holder of the share and is not bound to see to the application of any money paid as consideration.

(3) The title of the transferee to the share is not affected by any irregularity or invalidity in connection with the forfeiture, sale or disposal of the share.

32. The provisions of these regulations as to forfeiture apply in the case of non-payment of any sum that, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the nominal value of the share or by way of premium, as if that sum had been payable by virtue of a call duly made and notified.

#### *Conversion of Shares into Stock*

33. The company may, by resolution, convert all or any of its paid up shares into stock and reconvert any stock into paid up shares of any nominal value.

34. (1) Subject to sub-regulation (2), where shares have been converted into stock, the provisions of these rules relating to the transfer of shares apply, so far as they are capable of application, to the transfer of the stock or of any part of the stock.

(2) The directors may fix the minimum amount of stock transferable and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the aggregate of the nominal values of the shares from which the stock arose.

35. (1) The holders of stock have, according to the amount of the stock held by them, the same rights, privileges and advantages as regards dividends, voting at meetings of the company and other matters as they would have if they held the shares from which the stock arose.

(2) No such privilege or advantage (except participation in the dividends and profits of the company and in the property of the company on winding up) shall be conferred by any amount of stock that would not, if existing in shares, have conferred that privilege or advantage.

36. The provisions of these regulations that are applicable to paid up shares apply to stock, and references in those provisions to share and shareholder shall be read as including references to stock and stockholder, respectively.

*Alteration of Capital*

37. The company may by resolution—

- (a) increase its authorized share capital by the creation of new shares of such amount as is specified in the resolution;
- (b) consolidate and divide all or any of its authorized share capital into shares of larger amount than its existing shares;
- (c) subdivide all or any of its shares into shares of smaller amount than is fixed by the memorandum but so that in the subdivision the proportion between the amount paid and the amount (if any) unpaid on each such share of a smaller amount is the same as it was in the case of the share from which the share of a smaller amount is derived; and
- (d) cancel shares that, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person or have been forfeited and reduce its authorized share capital by the amount of the shares so cancelled.

38. (1) Subject to any direction to the contrary that may be given by the company in general meeting, all unissued shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances allow, to the sum of the nominal values of the shares already held by them.

(2) The offer shall be made by notice specifying the number of shares offered and limiting a time within which the offer, if not accepted, will be deemed to be declined.

(3) After the expiration of that time or on being notified by the person to whom the offer is made that he declines to accept the shares offered, the directors may issue those shares in such manner as they think most beneficial to the company.

(4) Where, by reason of the proportion that shares proposed to be issued bear to shares already held, some of the first-mentioned shares cannot be offered in accordance with sub-regulation (1), the directors may issue the shares that cannot be so offered in such manner as they think most beneficial to the company.

39. Subject to the Code, the company may, by special resolution, reduce its share capital, any capital redemption reserve fund or any share premium account.

*General Meetings*

40. Any director may whenever he thinks fit convene a general meeting.

41. (1) A notice of a general meeting shall specify the place, the day and the hour of meeting and, except as provided by sub-regulation (2), shall state the general nature of the business to be transacted at the meeting.

(2) It is not necessary for a notice of an annual general meeting to state that the business to be transacted at the meeting includes the declaring of a dividend, the consideration of accounts and the reports of the directors and auditors, the election of directors in the place of those retiring or the appointment and fixing of the remuneration of the auditors.

*Proceedings at General Meetings*

42. (1) No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business.

(2) For the purpose of determining whether a quorum is present, a person attending as a proxy, or as representing a corporation that is a member, shall be deemed to be a member.

43. If a quorum is not present within half an hour from the time appointed for the meeting—

- (a) where the meeting was convened upon the requisition of members—the meeting shall be dissolved; or
- (b) in any other case—
  - (i) the meeting stands adjourned to such day, and at such time and place, as the directors determine or, if no determination is made by the directors, to the same day in the next week at the same time and place; and
  - (ii) if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting—
    - (A) 2 members constitute a quorum; or
    - (B) where 2 members are not present—the meeting shall be dissolved.

44. (1) If the directors have elected one of their number as chairman of their meetings, he shall preside as chairman at every general meeting.

(2) Where a general meeting is held and—

- (a) a chairman has not been elected as provided by sub-regulation (1); or
  - (b) the chairman is not present within 15 minutes after the time appointed for the holding of the meeting or is unwilling to act,
- the members present shall elect one of their number to be chairman of the meeting.

45. (1) The chairman may with the consent of any meeting at which a quorum is present, and shall if so directed by the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(2) When a meeting is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting.

(3) Except as provided by sub-regulation (2), it is not necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

46. (1) At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded—

- (a) by the chairman;
- (b) by at least 3 members present in person or by proxy;
- (c) by a member or members present in person or by proxy and representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting; or
- (d) by a member or members holding shares in the company conferring a right to vote at the meeting being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right.

(2) Unless a poll is so demanded, a declaration by the chairman that a resolution has on a show of hands been carried or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book containing the minutes of the proceedings of the company, is conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(3) The demand for a poll may be withdrawn.

47. (1) If a poll is duly demanded, it shall be taken in such manner and (subject to sub-regulation (2)) either at once or after an interval or adjournment or otherwise as the chairman directs, and the result of the poll shall be the resolution of the meeting at which the poll was demanded.

(2) A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith.

48. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, in addition to his deliberative vote (if any), has a casting vote.

49. Subject to any rights or restrictions for the time being attached to any class or classes of shares—

- (a) at meetings of members or classes of members each member entitled to vote may vote in person or by proxy or attorney; and
- (b) on a show of hands every person present who is a member or a representative of a member has one vote, and on a poll every person present in person or by proxy or attorney has one vote for each share he holds.

50. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy or by attorney, shall be accepted to the exclusion of the votes of the other joint holders and, for this purpose, seniority shall be determined by the order in which the names stand in the register of members.

51. If a member is of unsound mind or is a person whose person or estate is liable to be dealt with in any way under the law relating to mental health, his committee or trustee or such other person as properly has the management of his estate may exercise any rights of the member in relation to a general meeting as if the committee, trustee or other person were the member.

52. A member is not entitled to vote at a general meeting unless all calls and other sums presently payable by him in respect of shares in the company have been paid.

53. (1) An objection may be raised to the qualification of a voter only at the meeting or adjourned meeting at which the vote objected to is given or tendered.

(2) Any such objection shall be referred to the chairman of the meeting, whose decision is final.

(3) A vote not disallowed pursuant to such an objection is valid for all purposes.

54. (1) An instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorized in writing or, if the appointor is a corporation, either under seal or under the hand of an officer or attorney duly authorized.

(2) An instrument appointing a proxy may specify the manner in which the proxy is to vote in respect of a particular resolution and, where an instrument of proxy so provides, the proxy is not entitled to vote on the resolution except as specified in the instrument.

(3) An instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.

(4) An instrument appointing a proxy shall be in the following form or in a form that is as similar to the following form as the circumstances allow:

[*Name of company*]

I/we, , of , being a member/members of the abovenamed company,  
hereby appoint of , or, in his absence,  
of as my/our proxy to vote for me/us on my/our behalf at the \* annual general  
meeting of the company to be held on the day of 19 and at any adjournment  
of that meeting.

†This form is to be used \*in favour of      the resolution.  
\*against

Signed this day of 19 .

\* Strike out whichever is not desired.

† To be inserted if desired.

55. An instrument appointing a proxy shall not be treated as valid unless the instrument, and the power of attorney or other authority (if any) under which the instrument is signed or a notarially certified copy of that power or authority, is or are deposited, not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote, or, in the case of a poll, not less than 24 hours before the time appointed for the taking of the poll, at the registered office, of the company or at such other place within the State as is specified for that purpose in the notice convening the meeting.

56. A vote given in accordance with the terms of an instrument of proxy or of a power of attorney is valid notwithstanding the previous death or unsoundness of mind of the principal, the revocation of the instrument (or of the authority under which the instrument was executed) or of the power, or the transfer of the share in respect of which the instrument or power is given, if no intimation in writing of the death, unsoundness of mind, revocation or transfer has been received by the company at the registered office before the commencement of the meeting or adjourned meeting at which the instrument is used or the power is exercised.

#### *Appointment, Removal and Remuneration of Directors*

57. (1) The number of the directors and the names of the first directors shall be determined in writing by the subscribers to the memorandum of association or a majority of them.

(2) The company may, by resolution, increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

58. (1) At the first annual general meeting of the company all the directors shall retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not 3 or a multiple of 3, then the number nearest one-third, shall retire from office.

(2) A retiring director is eligible for re-election.

59. The directors to retire at an annual general meeting other than the first annual general meeting are those who have been longest in office since their last election, but, as between persons who became directors on the same day, those to retire shall (unless they otherwise agree among themselves) be determined by lot.

60. (1) The company may, at the meeting at which a director so retires, by resolution fill the vacated office by electing a person to that office.

(2) If the vacated office is not so filled, the retiring director shall, if offering himself for re-election and not being disqualified under the Code from holding office as a director, be deemed to have been re-elected unless at that meeting—

- (a) it is expressly resolved not to fill the vacated office; or
- (b) a resolution for the re-election of that director is put and lost.

61. (1) The directors may at any time appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors does not at any time exceed the number determined in accordance with these regulations.

(2) Any director so appointed holds office only until the next following annual general meeting and is then eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at that meeting.

62. (1) The company may by resolution remove any director before the expiration of his period of office, and may by resolution appoint another person in his stead.

(2) The person so appointed is subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

63. (1) The directors shall be paid such remuneration as is from time to time determined by the company in general meeting.

(2) That remuneration shall be deemed to accrue from day to day.

(3) The directors may also be paid all travelling and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or otherwise in connection with the business of the company.

64. The share qualification for directors may be fixed by the company in general meeting and, unless and until so fixed, is one share.

65. In addition to the circumstances in which the office of a director becomes vacant by virtue of the Code, the office of a director becomes vacant if the director—

- (a) becomes an insolvent under administration;
- (b) becomes prohibited from being a director by reason of an order made under the Code;
- (c) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental health;
- (d) resigns his office by notice in writing to the company;
- (e) is absent without the consent of the directors from meetings of the directors held during a period of 6 months;
- (f) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or principal executive officer; or
- (g) is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest as required by the Code.

#### *Powers and Duties of Directors*

66. (1) Subject to the Code and to any other provision of these regulations, the business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and forming the company, and may exercise all such powers of the company as are not, by the Code or by these regulations, required to be exercised by the company in general meeting.

(2) Without limiting the generality of sub-regulation (1), the directors may exercise all the powers of the company to borrow money, to charge any property or business of the company or all or any of its uncalled capital and to issue debentures or give any other security for a debt, liability or obligation of the company or of any other person.

67. (1) The directors may, by power of attorney, appoint any person or persons to be the attorney or attorneys of the company for such purposes, with such powers, authorities and discretions (being powers, authorities and discretions vested in or exercisable by the directors), for such period and subject to such conditions as they think fit.

(2) Any such power of attorney may contain such provisions for the protection and convenience of persons dealing with the attorney as the directors think fit and may also authorize the attorney to delegate all or any of the powers, authorities and discretions vested in him.

68. All cheques, promissory notes, bankers drafts, bills of exchange and other negotiable instruments, and all receipts for money paid to the company, shall be signed, drawn, accepted, endorsed or otherwise executed, as the case may be, by any 2 directors or in such other manner as the directors determine.

*Proceedings of Directors*

69. (1) The directors may meet together for the despatch of business and adjourn and otherwise regulate their meetings as they think fit.

(2) A director may at any time, and a secretary shall on the requisition of a director, convene a meeting of the directors.

70. (1) Subject to these regulations, questions arising at a meeting of directors shall be decided by a majority of votes of directors present and voting and any such decision shall for all purposes be deemed a decision of the directors.

(2) In case of an equality of votes, the chairman of the meeting, in addition to his deliberative vote (if any), has a casting vote.

71. A director shall not vote in respect of any contract or proposed contract with the company in which he is in any way, whether directly or indirectly, interested or in respect of any matter arising out of such a contract or proposed contract and, if he votes in contravention of this sub-regulation, his vote shall not be counted.

72. (1) A director may, with the approval of the other directors, appoint a person (whether a member of the company or not) to be an alternate director in his place during such period as he thinks fit.

(2) An alternate director is entitled to notice of meetings of the directors and, if the appointor is not present at such a meeting, is entitled to attend and vote in his stead.

(3) An alternate director may exercise any powers that the appointor may exercise and the exercise of any such power by the alternate director shall be deemed to be the exercise of the power by the appointor.

(4) An alternate director is not required to have any share qualifications.

(5) The appointment of an alternate director may be terminated at any time by the appointor notwithstanding that the period of the appointment of the alternate director has not expired, and terminates in any event if the appointor vacates office as a director.

(6) An appointment, or the termination of an appointment, of an alternate director shall be effected by a notice in writing signed by the director who makes or made the appointment and served on the company.

73. At a meeting of directors, the number of directors whose presence is necessary to constitute a quorum is such number as is determined by the directors and, unless so determined, is 2.

74. In the event of a vacancy or vacancies in the office of a director or offices of directors, the remaining directors may act but, if the number of remaining directors is not sufficient to constitute a quorum at a meeting of directors, they may act only for the purpose of increasing the number of directors to a number sufficient to constitute such a quorum or of convening a general meeting of the company.

75. (1) The directors shall elect one of their number as chairman of their meetings and may determine the period for which he is to hold office.

(2) Where such a meeting is held and—

(a) a chairman has not been elected as provided by sub-regulation (1); or

(b) the chairman is not present within 10 minutes after the time appointed for the holding of the meeting or is unwilling to act,

the directors present shall elect one of their number to be a chairman of the meeting.

76. (1) The directors may delegate any of their powers to a committee or committees consisting of such of their number as they think fit.

(2) A committee to which any powers have been so delegated shall exercise the powers delegated in accordance with any directions of the directors and a power so exercised shall be deemed to have been exercised by the directors.

(3) The members of such a committee may elect one of their number as chairman of their meetings.

(4) Where such a meeting is held and—

- (a) a chairman has not been elected as provided by sub-regulation (3); or
- (b) the chairman is not present within 10 minutes after the time appointed for the holding of the meeting or is unwilling to act,

the members present may elect one of their number to be chairman of the meeting.

(5) A committee may meet and adjourn as it thinks proper.

(6) Questions arising at a meeting of a committee shall be determined by a majority of votes of the members present and voting.

(7) In the case of an equality of votes, the chairman, in addition to his deliberative vote (if any), has a casting vote.

77. (1) If all the directors have signed a document containing a statement that they are in favour of a resolution of the directors in terms set out in the document, a resolution in those terms shall be deemed to have been passed at a meeting of the directors held on the day on which the document was signed and at the time at which the document was last signed by a director or, if the directors signed the document on different days, on the day on which, and at the time at which, the document was last signed by a director.

(2) For the purposes of sub-regulation (1), 2 or more separate documents containing statements in identical terms each of which is signed by one or more directors shall together be deemed to constitute one document containing a statement in those terms signed by those directors on the respective days on which they signed the separate documents.

(3) A reference in sub-regulation (1) to all the directors does not include a reference to a director who, at a meeting of directors, would not be entitled to vote on the resolution.

78. All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director are, notwithstanding that it is afterwards discovered that there was some defect in the appointment of a person to be a director or a member of the committee, or to act as, a director, or that a person so appointed was disqualified, as valid as if the person had been duly appointed and was qualified to be a director or to be a member of the committee.

#### *Managing Director*

79. (1) The directors may from time to time appoint one or more of their number to the office of managing director for such period and on such terms as they think fit, and, subject to the terms of any agreement entered into in a particular case, may revoke any such appointment.

(2) A director so appointed shall not, while holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors, but his appointment automatically terminates if he ceases from any cause to be a director.

80. A managing director shall, subject to the terms of any agreement entered into in a particular case, receive such remuneration (whether by way of salary, commission or participation in profits, or partly in one way and partly in another) as the directors determine.

81. (1) The directors may, upon such terms and conditions and with such restrictions as they think fit, confer upon a managing director any of the powers exercisable by them.

(2) Any powers so conferred may be concurrent with, or be to the exclusion of, the powers of the directors.

(3) The directors may at any time withdraw or vary any of the powers so conferred on a managing director.

*Associate Directors*

82. (1) The directors may from time to time appoint any person to be an associate director and may from time to time terminate any such appointment.

(2) The directors may from time to time determine the powers, duties and remuneration of any person so appointed.

(3) A person so appointed is not required to hold any shares to qualify him for appointment but, except by the invitation and with the consent of the directors, does not have any right to attend or vote at any meeting of directors.

*Secretary*

83. A secretary of the company holds office on such terms and conditions, as to remuneration and otherwise, as the directors determine.

*Seal*

84. (1) The directors shall provide for the safe custody of the seal.

(2) The seal shall be used only by the authority of the directors, or of a committee of the directors authorized by the directors to authorize the use of the seal, and every document to which the seal is affixed shall be signed by a director and be countersigned by another director, a secretary or another person appointed by the directors to countersign that document or a class of documents in which that document is included.

*Inspection of Records*

85. The directors shall determine whether and to what extent, and at what time and places and under what conditions, the accounting records and other documents of the company or any of them will be open to the inspection of members other than directors, and a member other than a director does not have the right to inspect any document of the company except as provided by law or authorized by the directors or by the company in general meeting.

*Dividends and Reserves*

86. (1) The company in general meeting may declare a dividend if, and only if the directors have recommended a dividend.

(2) A dividend shall not exceed the amount recommended by the directors.

87. The directors may authorize the payment by the company to the members of such interim dividends as appear to the directors to be justified by the profits of the company.

88. Interest is not payable by the company in respect of any dividend.

89. (1) The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as reserves, to be applied, at the discretion of the directors, for any purpose for which the profits of the company may be properly applied.

(2) Pending any such application, the reserves may, at the discretion of the directors, be used in the business of the company or be invested in such investments as the directors think fit.

(3) The directors may carry forward so much of the profits remaining as they consider ought not to be distributed as dividends without transferring those profits to a reserve.

90. (1) Subject to the rights of persons (if any) entitled to shares with special rights as to dividend, all dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect of which the dividend is paid.

(2) All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid, but, if any share is issued on terms providing that it will rank for dividend as from a particular date, that share ranks for dividend accordingly.

(3) An amount paid or credited as paid on a share in advance of a call shall not be taken for the purposes of this regulation to be paid or credited as paid on the share.

91. The directors may deduct from any dividend payable to a member all sums of money (if any) presently payable by him to the company on account of calls or otherwise in relation to shares in the company.

92. (1) Any general meeting declaring a dividend may, by resolution, direct payment of the dividend wholly or partly by the distribution of specific assets, including paid up shares in, or debentures of, any other corporation, and the directors shall give effect to such a resolution.

(2) Where a difficulty arises in regard to such a distribution, the directors may settle the matter as they consider expedient and fix the value for distribution of the specific assets or any part of those assets and may determine that cash payments will be made to any members on the basis of the value so fixed in order to adjust the rights of all parties, and may vest any such specific assets in trustees as the directors consider expedient.

93. (1) Any dividend, interest or other money payable in cash in respect of shares may be paid by cheque sent through the post directed to—

(a) the address of the holder as shown in the register of members, or in the case of joint holders, to the address shown in the register of members as the address of the joint holder first named in that register; or

(b) to such other address as the holder or joint holders in writing directs or direct.

(2) Any one of 2 or more joint holders may give effectual receipts for any dividends, interest or other money payable in respect of the shares held by them as joint holders.

#### *Capitalization of Profits*

94. (1) Subject to sub-regulation (2), the company in general meeting may resolve that it is desirable to capitalize any sum, being the whole or a part of the amount for the time being standing to the credit of any reserve account or the profit and loss account or otherwise available for distribution to members, and that that sum be applied, in any of the ways mentioned in sub-regulation (3), for the benefit of members in the proportions to which those members would have been entitled in a distribution of that sum by way of dividend.

(2) The company shall not pass a resolution as mentioned in sub-regulation (1) unless the resolution has been recommended by the directors.

(3) The ways in which a sum may be applied for the benefit of members under sub-regulation (1) are—

(a) in paying up any amounts unpaid on shares held by members;

(b) in paying up in full unissued shares or debentures to be issued to members as fully paid; or

(c) partly as mentioned in paragraph (a) and partly as mentioned in paragraph (b).

(4) The directors shall do all things necessary to give effect to the resolution and, in particular, to the extent necessary to adjust the rights of the members among themselves, may—

(a) issue fractional certificates or make cash payments in cases where shares or debentures become issuable in fractions; and

(b) authorize any person to make, on behalf of all the members entitled to any further shares or debentures upon the capitalization, an agreement with the company providing for the issue to them, credited as fully paid up, of any such further shares or debentures or for the payment up by the company on their behalf of the amounts or any part of the amounts remaining unpaid on their existing shares by the application of their respective proportions of the sum resolved to be capitalized.

and any agreement made under an authority referred to in paragraph (b) is effective and binding on all the members concerned.

#### *Notices*

95. (1) A notice may be given by the company to any member either by serving it on him personally or by sending it by post to him at his address as shown in the register of members or the address supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and to have been effected, in the case of a notice of a meeting, on the day after the date of its posting and, in any other case, at the time at which the letter would be delivered in the ordinary course of post.

(3) A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder first named in the register of members in respect of the share.

(4) A notice may be given by the company to a person entitled to a share in consequence of the death or bankruptcy of a member by serving it on him personally or by sending it to him by post addressed to him by name, or by the title of representative of the deceased or assignee of the bankrupt, or by any like description, at the address (if any) within the State supplied for the purpose by the person or, if such an address has not been supplied, at the address to which the notice might have been sent if the death or bankruptcy had not occurred.

96. (1) Notice of every general meeting shall be given in the manner authorized by regulation 95 to—

- (a) every member;
- (b) every person entitled to a share in consequence of the death or bankruptcy of a member who, but for his death or bankruptcy, would be entitled to receive notice of the meeting; and
- (c) the auditor for the time being of the company.

(2) No other person is entitled to receive notices of general meetings.

#### *Winding up*

97. (1) If the company is wound up, the liquidator may, with the sanction of a special resolution, divide among the members in kind the whole or any part of the property of the company and may for that purpose set such value as he considers fair upon any property to be so divided and may determine how the division is to be carried out as between the members or different classes of members.

(2) The liquidator may, with the sanction of a special resolution, vest the whole or any part of any such property in trustees upon such trusts for the benefit of the contributors as the liquidator thinks fit, but so that no member is compelled to accept any shares or other securities in respect of which there is any liability.

#### *Indemnity*

98. Every officer, auditor or agent of the company shall be indemnified out of the property of the company against any liability incurred by him in his capacity as officer, auditor or agent in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application in relation to any such proceedings in which relief is under the Code granted to him by the Court.

## TABLE B

## REGULATIONS FOR MANAGEMENT OF A NO LIABILITY COMPANY

*Interpretation*

## 1. (1) In these regulations—

“Code” means the *Companies (New South Wales) Code*;

“seal” means the common seal of the company and includes any official seal of the company; “secretary” means any person appointed to perform the duties of a secretary of the company.

(2) Section 40 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (New South Wales) Code* applies in relation to these regulations as if they were an instrument made by an authority under a power conferred by the *Companies (New South Wales) Code* as in force on the date on which these regulations became binding on the company.

(3) An expression used in a particular Part or Division of the Code that is given by that Part or Division a special meaning for the purposes of that Part or Division has, in any of these regulations that deals with a matter dealt with by that Part or Division, unless the contrary intention appears, the same meaning as in that Part or Division.

*Share Capital and Variation of Rights*

2. Without prejudice to any special rights previously conferred on the holders of any existing shares or class of shares but subject to the Code, shares in the company may be issued by the directors and any such share may be issued with such preferred, deferred or other special rights or such restrictions, whether with regard to dividend, voting, return of capital or otherwise, as the directors, subject to any resolution, determine.

3. Subject to the Code, any preference shares may, with the sanction of a resolution, be issued on the terms that they are, or at the option of the company are liable, to be redeemed.

4. (1) If any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may, whether or not the company is being wound up, be varied with the consent in writing of the holders of three-quarters of the issued shares of that class, or with the sanction of a special resolution passed at a separate meeting of the holders of the shares of the class.

(2) The provisions of these regulations relating to general meetings apply so far as they are capable of application and *mutatis mutandis* to every such separate meeting except that—

(a) a quorum is constituted by 2 persons who, between them, hold or represent by proxy one-third of the issued shares of the class; and

(b) any holder of shares of the class, present in person or by proxy, may demand a poll.

(3) The rights conferred upon the holders of the shares of any class issued with preferred or other rights shall, unless otherwise expressly provided by the terms of issue of the shares of that class, be deemed to be varied by the creation or issue of further shares ranking equally with the first-mentioned shares.

5. (1) The company may exercise the power to pay commissions conferred by the Code if—

(a) the rate or the amount of the commission paid or agreed to be paid is disclosed in the manner required by the Code; and

(b) the commission does not exceed 10% of the price at which the shares in respect of which the commission is paid are issued.

(2) The commission may be satisfied by the payment of cash or by the allotment of fully or partly paid shares or partly by the payment of cash and partly by the allotment of fully or partly paid shares.

(3) The company may, on any issue of shares, also pay such brokerage as is lawful.

6. (1) Except as required by law, the company shall not recognize a person as holding a share upon any trust.

(2) The company is not bound by or compelled in any way to recognize (whether or not it has notice of the interest or rights concerned) any equitable, contingent, future or partial interest in any share or unit of a share or (except as otherwise provided by these regulations or by law) any other right in respect of a share except an absolute right of ownership in the registered holder.

7. (1) A person whose name is entered as a member in the register of members is entitled without payment to receive a certificate in respect of the share under the seal of the company in accordance with the Code but, in respect of a share or shares held jointly by several persons, the company is not bound to issue more than one certificate.

(2) Delivery of a certificate for a share to one of several joint holders is sufficient delivery to all such holders.

#### *Calls on Shares*

8. (1) The directors may, subject to section 478 of the Code, make calls upon the members in respect of any money unpaid on the shares of the members (whether on account of the nominal value of the shares or by way of premium) and not by the terms of issue of those shares made payable at fixed times.

(2) The directors may revoke or postpone a call.

9. A call shall be deemed to have been made at the time when the resolution of the directors authorizing the call was passed and may be required to be paid by instalments.

10. At any sale by auction under section 479 of the Code, a share forfeited for non-payment of any call may, if the directors so determine, be offered for sale and sold credited as paid up to the sum of—

- (a) the amount paid up at the time of forfeiture;
- (b) the amount of the call; and
- (c) the amount of any other call or calls becoming payable on or before the date of sale.

#### *Transfer of Shares*

11. (1) Subject to these regulations, a member may transfer all or any of his shares by instrument in writing in any usual or common form or in any other form that the directors approve.

(2) An instrument of transfer referred to in sub-regulation (1) shall be executed by or on behalf of both the transferor and the transferee.

(3) A transferor of shares remains the holder of the shares transferred until the transfer is registered and the name of the transferee is entered in the register of members in respect of the shares.

12. The instrument of transfer must be left for registration at the registered office of the company together with such fee (if any) not exceeding \$1.00 as the directors require, accompanied by the certificate of the shares to which it relates and such other information as the directors properly require to show the right of the transferor to make the transfer, and thereupon the company shall, subject to the powers vested in the directors by these regulations, register the transferee as a shareholder.

13. The registration of transfer may be suspended at such times and for such periods as the directors from time to time determine not exceeding in the whole 30 days in any year.

*Transmission of Shares*

14. In the case of the death of a member, the survivor or survivors where the deceased was a joint holder, and the legal personal representatives of the deceased where he was a sole holder, shall be the only persons recognized by the company as having any title to his interest in the shares.

15. (1) Subject to the *Bankruptcy Act* 1966, a person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such information being produced as is properly required by the directors, elect either to be registered himself as holder of the share or to have some other person nominated by him registered as the transferee of the share.

(2) If the person becoming entitled elects to be registered himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects.

(3) If he elects to have another person registered, he shall execute a transfer of the share to that other person.

(4) All the limitations, restrictions and provisions of these rules relating to the right to transfer, and the registration of transfer of, shares are applicable to any such notice or transfer as if the death or bankruptcy of the member had not occurred and the notice or transfer were a transfer signed by that member.

16. (1) Where the registered holder of a share dies or becomes bankrupt, his personal representative or the trustee of his estate, as the case may be, is, upon the production of such information as is properly required by the directors, entitled to the same dividends and other advantages, and to the same rights (whether in relation to meetings of the company, or to voting or otherwise), as the registered holder would have been entitled to if he had not died or become bankrupt.

(2) Where 2 or more persons are jointly entitled to any share in consequence of the death of the registered holder, they shall, for the purpose of these regulations, be deemed to be joint holders of the share.

*Conversion of Shares into Stock*

17. The company may, by resolution, convert all or any of its paid up shares into stock and reconvert any stock into paid up shares of any nominal value.

18. (1) Subject to sub-regulation (2), where shares have been converted into stock, the provisions of these rules relating to the transfer of shares apply, so far as they are capable of application, to the transfer of the stock or of any part of the stock.

(2) The directors may fix the minimum amount of stock transferable and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the aggregate of the nominal values of the shares from which the stock arose.

19. (1) The holders of stock have, accordingly to the amount of the stock held by them, the same rights, privileges and advantages as regards dividends, voting at meetings of the company and other matters as they would have if they held the shares from which the stock arose.

(2) No such privilege or advantage (except participation in the dividends and profits of the company and in the property of the company on winding up) shall be conferred by any amount of stock that would not, if existing in shares, have conferred that privilege or advantage.

20. The provisions of these regulations that are applicable to paid up shares apply to stock, and references in those provisions to share and shareholder shall be read as including references to stock and stockholder, respectively.

*Alteration of Capital*

21. The company may, by resolution—

- (a) increase its authorized share capital by the creation of new shares of such amount as is specified in the resolution;
- (b) consolidate and divide all or any of its authorized share capital into shares of a larger amount than its existing shares;
- (c) subdivide all or any of its shares into shares of a smaller amount than is fixed by the memorandum but so that in the subdivision the proportion between the amount paid and the amount (if any) unpaid on each such share of a smaller amount is the same as it was in the case of the share from which the share of a smaller amount is derived; and
- (d) cancel shares that, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person or have been forfeited and reduce its authorized share capital by the amount of the shares so cancelled.

22. (1) Subject to any direction to the contrary that may be given by the company in general meeting, all unissued shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances allow, to the sum of the nominal values of the shares already held by them.

(2) The offer shall be made by notice specifying the number of shares offered and limiting a time within which the offer, if not accepted, will be deemed to be declined.

(3) After the expiration of that time or on being notified by the person to whom the offer is made that he declines to accept the shares offered, the directors may issue those shares in such manner as they think most beneficial to the company.

(4) Where, by reason of the proportion that shares proposed to be issued bear to shares already held, some of the first-mentioned shares cannot be offered in accordance with sub-regulation (1), the directors may issue the shares that cannot be so offered in such manner as they think most beneficial to the company.

23. Subject to the Code, the company may, by special resolution, reduce its share capital, any capital redemption reserve fund or any share premium account.

*General Meetings*

24. Any director may whenever he thinks fit convene a general meeting.

25. (1) A notice of a general meeting shall specify the place, the day and the hour of meeting and, except as provided by sub-regulation (2), shall state the general nature of the business to be transacted at the meeting.

(2) It is not necessary for a notice of an annual general meeting to state that the business to be transacted at the meeting includes the declaring of a dividend, the consideration of accounts and the reports of the directors and auditors, the election of directors in the place of those retiring or the appointment and fixing of the remuneration of the auditors.

*Proceedings at General Meetings*

26. (1) No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business.

(2) For the purpose of determining whether a quorum is present, a person attending as a proxy, or as representing a corporation that is a member, shall be deemed to be a member.

27. If a quorum is not present within half an hour from the time appointed for the meeting—

- (a) where the meeting was convened upon the requisition of members—the meeting shall be dissolved; or

(b) in any other case—

- (i) the meeting stands adjourned to such day, and at such time and place, as the directors determine or, if no determination is made by the directors, to the same day in the next week at the same time and place; and
- (ii) if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting—
  - (A) 2 members constitute a quorum; or
  - (B) where 2 members are not present—the meeting shall be dissolved.

28. (1) If the directors have elected one of their number as chairman of their meetings, he shall preside as chairman at every general meeting.

(2) Where a general meeting is held and—

- (a) a chairman has not been elected as provided by sub-regulation (1); or
  - (b) the chairman is not present within 15 minutes after the time appointed for the holding of the meeting or is unwilling to act,
- the members present shall elect one of their number to be chairman of the meeting.

29. (1) The chairman may with the consent of any meeting at which a quorum is present, and shall if so directed by the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(2) When a meeting is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting.

(3) Except as provided by sub-regulation (2), it is not necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

30. (1) At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded—

- (a) by the chairman;
- (b) by at least 3 members present in person or by proxy;
- (c) by a member or members present in person or by proxy and representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting; or
- (d) by a member or members holding shares in the company conferring a right to vote at the meeting being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right.

(2) Unless a poll is so demanded, a declaration by the chairman that a resolution has on a show of hands been carried or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book containing the minutes of the proceedings of the company, is conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(3) The demand for a poll may be withdrawn.

31. (1) If a poll is duly demanded, it shall be taken in such manner and (subject to sub-regulation (2)) either at once or after an interval or adjournment or otherwise as the chairman directs, and the result of the poll shall be the resolution of the meeting at which the poll was demanded.

(2) A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith.

32. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, in addition to his deliberative vote (if any), has a casting vote.

33. Subject to any rights or restrictions for the time being attached to any class or classes of shares—

- (a) at meetings of members or classes of members each member entitled to vote may vote in person or by proxy or attorney; and
- (b) on a show of hands every person present who is a member or a representative of a member has one vote, and on a poll every person present in person or by proxy or attorney has one vote for each share he holds.

34. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy or by attorney, shall be accepted to the exclusion of the votes of the other joint holders and, for this purpose, seniority shall be determined by the order in which the names stand in the register of members.

35. If a member is of unsound mind or is a person whose person or estate is liable to be dealt with in any way under the law relating to mental health, his committee or trustee or such other person as properly has the management of his estate may exercise any rights of the member in relation to a general meeting as if the committee, trustee or other person were the member.

36. A member is not entitled to vote at a general meeting unless all calls and other sums presently payable by him in respect of shares in the company have been paid.

37. (1) An objection may be raised to the qualification of a voter only at the meeting or adjourned meeting at which the vote objected to is given or tendered.

(2) Any such objection shall be referred to the chairman of the meeting, whose decision is final.

(3) A vote not disallowed pursuant to such an objection is valid for all purposes.

38. (1) An instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorized in writing or, if the appointor is a corporation, either under seal or under the hand of an officer or attorney duly authorized.

(2) An instrument appointing a proxy may specify the manner in which the proxy is to vote in respect of a particular resolution and, where an instrument of proxy so provides, the proxy is not entitled to vote on the resolution except as specified in the instrument.

(3) An instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.

(4) An instrument appointing a proxy shall be in the following form or in a form that is as similar to the following form as the circumstances allow:

[*Name of company*]

I/we , of , being a member/members of the abovenamed company,  
hereby appoint of or, in his absence,  
of as my/our proxy to vote for me/us on my/our behalf at the \*annual general  
meeting of the company to be held on the day of 19 and at any adjournment  
of that meeting.

<sup>f</sup>This form is to be used \*in favour of \*against the resolution.

Signed this day of 19 .

\* Strike out whichever is not desired.

<sup>t</sup>To be inserted if desired.

39. An instrument appointing a proxy shall not be treated as valid unless the instrument, and the power of attorney or other authority (if any) under which the instrument is signed or a notarially certified copy of that power or authority, is or are deposited, not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote, or, in the case of a poll, not less than 24 hours before the time appointed for the taking of the poll, at the registered office of the company or at such other place within the State as is specified for that purpose in the notice convening the meeting.

40. A vote given in accordance with the terms of an instrument of proxy or of a power of attorney is valid notwithstanding the previous death or unsoundness of mind, of the principal, the revocation of the instrument (or of the authority under which the instrument was executed) or of the power, or the transfer of the share in respect of which the instrument or power is given, if no intimation in writing of the death, unsoundness of mind, revocation or transfer has been received by the company at the registered office before the commencement of the meeting or adjourned meeting at which the instrument is used or the power is exercised.

*Appointment, Removal and Remuneration of Directors*

41. (1) The number of the directors and the names of the first directors shall be determined in writing by the subscribers to the memorandum of association or a majority of them.

(2) The company may, by resolution, increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

42. (1) At the first annual meeting of the company all the directors shall retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not 3 or a multiple of 3, then the number nearest one-third, shall retire from office.

(2) A retiring director is eligible for re-election.

43. The directors to retire at an annual general meeting other than the first annual general meeting are those who have been longest in office since their last election, but, as between persons who became directors on the same day, those to retire shall (unless they otherwise agree among themselves) be determined by lot.

44. (1) The company may, at the meeting at which a director so retires, by resolution fill the vacated office by electing a person to that office.

(2) If the vacated office is not so filled, the retiring director shall, if offering himself for re-election and not being disqualified under the Code from holding office as a director, be deemed to have been re-elected unless at that meeting—

- (a) it is expressly resolved not to fill the vacated office; or
- (b) a resolution for the re-election of that director is put and lost.

45. (1) The directors may at any time appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors does not at any time exceed the number determined in accordance with these regulations.

(2) Any director so appointed holds office only until the next following annual general meeting and is then eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at that meeting.

46. (1) The company may by resolution remove any director before the expiration of his period of office, and may by resolution appoint another person in his stead.

(2) The person so appointed is subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

47. (1) The directors shall be paid such remuneration as is from time to time determined by the company in general meeting.

(2) That remuneration shall be deemed to accrue from day to day.

(3) The directors may also be paid all travelling and other expenses properly incurred by them in attending and returning from meetings of the directors, or any committee of the directors or general meetings of the company or otherwise in connection with the business of the company.

48. The share qualifications for directors may be fixed by the company in general meeting and, unless and until so fixed, is one share.

49. In addition to the circumstances in which the office of a director becomes vacant by virtue of the Code, the office of a director becomes vacant if the director—

- (a) becomes an insolvent under administration;
- (b) becomes prohibited from being a director by reason of an order made under the Code;
- (c) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental health;
- (d) resigns his office by notice in writing to the company;
- (e) is absent without the consent of the directors from meetings of the directors held during a period of 6 months;
- (f) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or principal executive officer; or
- (g) is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest as required by the Code.

#### *Powers and Duties of Directors*

50. (1) Subject to the Code and to any other provision of these regulations, the business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and forming the company, and may exercise all such powers of the company as are not, by the Code or by these regulations, required to be exercised by the company in general meeting.

(2) Without limiting the generality of sub-section (1), the directors may exercise all the powers of the company to borrow money, to charge, any property or business of the company or all or any of its uncalled capital and to issue debentures or give any other security for a debt, liability or obligation of the company or of any other person.

51. (1) The directors may, by power of attorney, appoint any person or persons to be the attorney or attorneys of the company for such purposes, with such powers, authorities and discretions (being powers, authorities and discretions vested in or exercisable by the directors), for such period and subject to such conditions as they think fit.

(2) Any such power of attorney may contain such provisions for the protection and convenience of persons dealing with the attorney as the directors think fit and may also authorize the attorney to delegate all or any of the powers, authorities and discretions vested in him.

52. All cheques, promissory notes, bankers drafts, bills of exchange and other negotiable instruments, and all receipts for money paid to the company, shall be signed, drawn, accepted, indorsed or otherwise executed, as the case may be, by any 2 directors or in such other manner as the directors determine.

*Proceedings of Directors*

53. (1) The directors may meet together for the despatch of business and adjourn and otherwise regulate their meetings as they think fit.

(2) A director may at any time, and a secretary shall on the requisition of a director, convene a meeting of the directors.

54. (1) Subject to these regulations, questions arising at a meeting of directors shall be decided by a majority of votes of directors present and voting and any such decision shall for all purposes be deemed a decision of the directors.

(2) In case of an equality of votes, the chairman of the meeting, in addition to his deliberative vote (if any), has a casting vote.

55. A director shall not vote in respect of any contract or proposed contract with the company in which he is in any way, whether directly or indirectly, interested or in respect of any matter arising out of such a contract or proposed contract and, if he votes in contravention of this sub-regulation, his vote shall not be counted.

56. (1) A director may, with the approval of the other directors, appoint a person (whether a member of the company or not) to be an alternate director in his place during such period as he thinks fit.

(2) An alternate director is entitled to notice of meetings of the directors and, if the appointor is not present at such a meeting, is entitled to attend and vote in his stead.

(3) An alternate director may exercise any powers that the appointor may exercise and the exercise of any such power by the alternate director shall be deemed to be the exercise of the power by the appointor.

(4) An alternate director is not required to have any share qualifications.

(5) The appointment of an alternate director may be terminated at any time by the appointor notwithstanding that the period of the appointment of the alternate director has not expired, and terminates in any event if the appointor vacates office as a director.

(6) An appointment, or the termination of an appointment, of an alternate director shall be effected by a notice in writing signed by the director who makes or made the appointment and served on the company.

57. At a meeting of directors, the number of directors whose presence is necessary to constitute a quorum is such number as is determined by the directors and, unless so determined, is 2.

58. In the event of a vacancy or vacancies in the office of a director or offices of directors, the remaining directors may act but, if the number of remaining directors is not sufficient to constitute a quorum at a meeting of directors, they may act only for the purpose of increasing the number of directors to a number sufficient to constitute such a quorum or of convening a general meeting of the company.

59. (1) The directors may elect one of their number as chairman of their meetings and may determine the period for which he is to hold office.

(2) Where such a meeting is held and—

(a) a chairman has not been elected as provided by sub-regulation (1); or

(b) the chairman is not present within 10 minutes after the time appointed for the holding of the meeting or is unwilling to act,

the directors present shall elect one of their number to be chairman of the meeting.

60. (1) The directors may delegate any of their powers to a committee or committees consisting of such of their number as they think fit.

(2) A committee to which any powers have been so delegated shall exercise the powers delegated in accordance with any directions of the directors and a power so exercised shall be deemed to have been exercised by the directors.

(3) The members of such a committee may elect one of their number as chairman of their meetings.

(4) Where such a meeting is held and—

(a) a chairman has not been elected as provided by sub-regulation (3); or

(b) the chairman is not present within 10 minutes after the time appointed for the holding of the meeting or is unwilling to act,  
the members present may elect one of their number to be chairman of the meeting.

(5) A committee may meet and adjourn as it thinks proper.

(6) Questions arising at a meeting of a committee shall be determined by a majority of votes of the members present and voting.

(7) In the case of an equality of votes, the chairman, in addition to his deliberative vote (if any), has a casting vote.

61. (1) If all the directors have signed a document containing a statement that they are in favour of a resolution of the directors in terms set out in the document, a resolution in those terms shall be deemed to have been passed at a meeting of the directors held on the day on which the document was signed and at the time at which the document was last signed by a director or, if the directors signed the document on different days, on the day on which, and at the time at which, the document was last signed by a director.

(2) For the purposes of sub-regulation (1), 2 or more separate documents containing statements in identical terms each of which is signed by one or more directors shall together be deemed to constitute one document containing a statement in those terms signed by those directors on the respective days on which they signed the separate documents.

(3) A reference in sub-regulation (1) to all the directors does not include a reference to a director who, at a meeting of directors, would not be entitled to vote on the resolution.

62. All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director are, notwithstanding that it is afterwards discovered that there was some defect in the appointment of a person to be, or to act as, a director, or that a person so appointed was disqualified, as valid as if the person had been duly appointed and was qualified to be a director.

#### *Managing Directors*

63. (1) The directors may from time to time appoint one or more of their number to the office of managing director for such period and on such terms as they think fit, and, subject to the terms of any agreement entered into in a particular case, may revoke any such appointment.

(2) A director so appointed shall not, while holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors but his appointment automatically terminates if he ceases from any cause to be a director.

64. A managing director shall, subject to the terms of any agreement entered into in a particular case, receive such remuneration (whether by way of salary, commission or participation in profits, or partly in one way and partly in another) as the directors determine.

65. (1) The directors may, upon such terms and conditions and with such restrictions as they think fit, confer upon a managing director any of the powers exercisable by them.

(2) Any powers so conferred may be concurrent with, or be to the exclusion of, the powers of the directors.

(3) The directors may at any time withdraw or vary any of the powers so conferred on a managing director.

*Associate Directors*

66. (1) The directors may from time to time appoint any person to be an associate director and may from time to time terminate any such appointment.

(2) The directors may from time to time determine the powers, duties and remuneration of any person so appointed.

(3) A person so appointed is not required to hold any shares to qualify him for appointment but, except by the invitation and with the consent of the directors, does not have any right to attend or vote at any meeting of directors.

*Secretary*

67. A secretary of the company holds office on such terms and conditions, as to remuneration and otherwise, as the directors determine.

*Seal*

68. (1) The directors shall provide for the safe custody of the seal.

(2) The seal shall be used only by the authority of the directors, or of a committee of the directors authorized by the directors to authorize the use of the seal, and every document to which the seal is affixed shall be signed by a director and be countersigned by another director, a secretary or another person appointed by the directors to countersign that document or a class of documents in which that document is included.

*Inspection of Records*

69. The directors shall determine whether and to what extent, and at what time and places and under what conditions, the accounting records and other documents of the company or any of them will be open for the inspection of members other than directors, and a member other than a director does not have the right to inspect any document of the company except as provided by law or authorized by the directors or by the company in general meeting.

*Dividends and Reserves*

70. (1) The company in general meeting may declare a dividend if, and only if, the directors have recommended a dividend.

(2) A dividend shall not exceed the amount recommended by the directors.

71. The directors may authorize the payment by the company to the members of such interim dividends as appear to the directors to be justified by the profits of the company.

72. Interest is not payable by the company in respect of any dividend.

73. (1) The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as reserves, to be applied, at the discretion of the directors, for any purpose for which the profits of the company may be properly applied.

(2) Pending any such application, the reserves may, at the discretion of the directors, be used in the business of the company or be invested in such investments as the directors think fit.

(3) The directors may carry forward so much of the profits remaining as they consider ought not to be distributed as dividends without transferring those profits to a reserve.

74. (1) Subject to the rights of persons (if any) entitled to shares with special rights as to dividend, all dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect of which the dividend is paid.

(2) All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid, but, if any share is issued on terms providing that it will rank for dividend as from a particular date, that share ranks for dividend accordingly.

(3) An amount paid or credited as paid on a share in advance of a call shall not be taken for the purposes of this regulation to be paid or credited as paid on the share.

75. (1) Any general meeting declaring a dividend may, by resolution, direct payment of the dividend wholly or partly by the distribution of specific assets, including paid up shares in, or debentures of, any other corporation, and the directors shall give effect to such a resolution.

(2) Where a difficulty arises in regard to such a distribution, the directors may settle the matter as they consider expedient and fix the value for distribution of the specific assets or any part of those assets and may determine that cash payments will be made to any members on the basis of the value so fixed in order to adjust the rights of all parties, and may vest any such specific assets in trustees as the directors consider expedient.

76. (1) Any dividend, interest or other money payable in cash in respect of shares may be paid by cheque sent through the post directed to—

- (a) the address of the holder as shown in the register of members, or in the case of joint holders, to the address shown in the register of members as the address of the joint holder first named in that register; or
- (b) to such other address as the holder or joint holders in writing directs or direct.

(2) Any one of 2 or more joint holders may give effectual receipts for any dividends, interest or other money payable in respect of the shares held by them as joint holders.

#### *Capitalization of Profits*

77. (1) Subject to sub-regulation (2), the company in general meeting may resolve that it is desirable to capitalize any sum, being the whole or part of the amount for the time being standing to the credit of any reserve account or the profit and loss account or otherwise available for distribution to members, and that that sum be applied, in any of the ways mentioned in sub-regulation (3), for the benefit of members in the proportions to which those members would have been entitled in a distribution of that sum by way of dividend.

(2) The company shall not pass a resolution as mentioned in sub-regulation (1) unless the resolution has been recommended by the directors.

(3) The ways in which a sum may be applied for the benefit of members under sub-regulation (1) are—

- (a) in paying up any amounts unpaid on shares held by members;
- (b) in paying up in full unissued shares or debentures to be issued to members as fully paid; or
- (c) partly as mentioned in paragraph (a) and partly as mentioned in paragraph (b).

(4) The directors shall do all things necessary to give effect to the resolution and, in particular, to the extent necessary to adjust the rights of the members among themselves, may—

- (a) issue fractional certificates or make cash payments in cases where shares or debentures become issuable in fractions; and
- (b) authorize any person to make, on behalf of all the members entitled to any further shares or debentures upon the capitalization, an agreement with the company providing for the issue to them, credited as fully paid up, of any such further shares or debentures or for the payment up by the company on their behalf of the amounts or any part of the amounts remaining unpaid on their existing shares by the application of their respective proportions of the sum resolved to be capitalized,

and any agreement made under an authority referred to in paragraph (b) is effective and binding on all the members concerned.

#### *Notices*

78. (1) A notice may be given by the company to any member either by serving it on him personally or by sending it by post to him at his address as shown in the register of members or the address supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and to have been effected, in the case of a notice of a meeting, on the day after the date of its posting and, in any other case, at the time at which the letter would be delivered in the ordinary course of post.

(3) A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder first named in the register of members in respect of the share.

(4) A notice may be given by the company to a person entitled to a share in consequence of the death or bankruptcy of a member by serving it on him personally or by sending it to him by post addressed to him by name, or by the title of representative of the deceased or assignee of the bankrupt, or by any like description, at the address (if any) within the State supplied for the purpose by the person or, if such an address has not been supplied, at the address to which the notice might have been sent if the death or bankruptcy had not occurred.

79. (1) Notice of every general meeting shall be given in the manner authorized by regulation 78 to—

- (a) every member;
  - (b) every person entitled to a share in consequence of the death or bankruptcy of a member who, but for his death or bankruptcy, would be entitled to receive notice of the meeting; and
  - (c) the auditor for the time being of the company.
- (2) No other person is entitled to receive notices of general meetings.

#### *Winding Up*

80. (1) If the company is wound up, the liquidator may, with the sanction of a special resolution, divide among the members in kind the whole or any part of the property of the company and may for that purpose set such value as he considers fair upon any property to be so divided and may determine how the division is to be carried out as between the members or different classes of members.

(2) The liquidator may, with the sanction of a special resolution, vest the whole or any part of any such property in trustees upon such trust for the benefit of the contributories as the liquidator thinks fit, but so that no member is compelled to accept any shares or other securities in respect of which there is any liability.

81. (1) Subject to the rights of persons (if any) entitled to shares with special rights in a winding up, to the provisions of sub-section 486 (2) of the Code and to sub-regulation (2) of this regulation, all moneys and property that are to be distributed among members on a winding up shall be so distributed in proportion to the shares held by them respectively irrespective of the amount paid up or credited as paid up on the shares.

(2) If a company ceases to carry on business within 12 months of its incorporation, shares issued for cash shall, in the distribution, to the extent of the capital contributed by subscribing shareholders, rank in priority to shares issued to vendors or promoters or both for consideration other than cash.

#### *Indemnity*

82. Every officer, auditor or agent of the company shall be indemnified out of the property of the company against any liability incurred by him in his capacity as officer, auditor or agent in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application in relation to any such proceedings in which relief is under the Code granted to him by the Court.

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**SCHEDULE 4**

## FORMS OF TRANSFER OF MARKETABLE SECURITIES

FORM 1

Section 191

SECURITY TRANSFER FORM	MARKING STAMP
PART 1	
Full name of company or prescribed corporation:	
Description of securities:	Class: If not fully paid, paid to: Register
Quantity: _____ [Words] _____	[Figures] _____
Transfer identification number: _____	
Full name(s) of transferor(s): _____	
Transferor's broker hereby certifies: (a) as to the validity of documents; and (b) that stamp duty, if payable, has been or will be paid. [Transferor's broker's stamp]	
Affixed at _____ on _____ (place and date of affixing stamp)	

I (*or We*) hereby transfer the above securities to the transferee(s) named in Part 2 hereof or to the several transferees named in Part 2 of the Broker's Transfer Form(s) or Split Transfer Form(s) relating to the above securities.

\*I (*or We*) have no notice of revocation of the power of attorney under which this transfer is signed.

Signature(s) of transferor(s): \_\_\_\_\_

Date(s) signed: \_\_\_\_\_

## PART 2

Full name(s) and address(es) of transferee(s): _____	Transferee's broker hereby certifies: (a) that the securities set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid, and hereby requests that such entries be made in the register as are necessary to give effect to this transfer. [Transferee's broker's stamp]
Date of affixing stamp: _____	

\* Delete if not applicable

## FORM 2

Section 191

BROKER'S TRANSFER FORM	MARKING STAMP
PART 1	
Full name of company or prescribed corporation:	
Description of securities:	Class: If not fully paid, paid to: Register:
Quantity:	[Words] [Figures]
Transfer identification number:	Transferor's broker hereby certifies: (a) that the Security Transfer Form relating to the securities set out above has been or will be lodged at the company's or corporation's office; and (b) that stamp duty, if payable, has been or will be paid. [Transferor's broker's stamp]
Full name(s) of transferor(s):	Affixed at _____ on _____ (place and date of affixing stamp)
PART 2	
Full name(s) and address(es) of transferee(s):	Transferee's broker hereby certifies: (a) that the securities set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid, and hereby requests that such entries be made in the register as are necessary to give effect to this transfer. [Transferee's broker's stamp] Date of affixing stamp:

## FORM 3

## Section 191

SPLIT TRANSFER FORM

MARKING STAMP

## PART 1

Full name of company or prescribed corporation:

Description of securities:	Class:	If not fully paid, paid to:	Register:
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Quantity: [Words] [Figures]

Transfer identification number:

The [name of prescribed stock exchange] hereby certifies that the Security Transfer Form or the Broker's Transfer Form relating to the securities set out above has been or will be lodged at the company's or corporation's office.

[Stock Exchange stamp]

Affixed at .....

on .....  
(place and date of affixing stamp)

## PART 2

Full name(s) and address(es) of transferee(s):

Transferee's broker hereby certifies:

- (a) that the securities set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in this Part; and
  - (b) that stamp duty, if payable, has been or will be paid,
- and hereby requests that such entries be made in the register as are necessary to give effect to this transfer.

[Transferee's broker's stamp]

Date of affixing stamp:

## FORM 4

Section 191

## TRANSFeree's ACCEPTANCE

*For completion—*

- (a) by transferee(s) of marketable securities with an uncalled liability, not being partly paid shares in a no liability company; or
- (b) by transferee(s) of rights to marketable securities, where the whole of the moneys to be subscribed for the marketable securities to which the rights relate is not payable in full on application and the securities are not shares in a no liability company.

**To**

[Name of company or prescribed corporation whose securities are involved]

**I (or We)****of**

, being

**the transferee(s) of**

[Quantity and description of securities or rights]

**in the abovenamed company or corporation, comprised in the**

[Number]

**instrument(s) of transfer (or renunciation and transfer) attached, in respect of which there is an uncalled liability of \_\_\_\_\_ per unit after payment of application moneys, if any, and being the person(s) named as transferee(s) in the Security Transfer Form, Broker's Transfer Form or Split Transfer Form (or Security Renunciation and Transfer Form, Broker's Renunciation and Transfer Form or Renunciation and Split Transfer Form) relating to those securities (or rights), and having attained the age of 18 years,**  
**HEREBY AGREE—**

- (a) to accept the securities (or securities to which those rights relate) subject to the several terms and conditions upon which the transferor(s) held them at the time of the transfer of the securities by the transferor(s) to me (or us) (or upon which the securities were offered by the company or corporation for subscription); and
- (b) to become a member (or members) of the company or corporation and to be bound by the memorandum and articles or by the constitution of the company or corporation upon being registered as the holder(s) of the securities.

\* I (or We) have no notice of revocation of the power of attorney under which this instrument is signed.

Signature(s) of transferee(s)

Dated the

day of

, 19 .

\* Delete if not applicable

## FORM 5

## Section 191

SECURITY RENUNCIATION AND TRANSFER FORM		MARKING STAMP
PART 1		
Full name of company or prescribed corporation:		
Description of rights:		Register:
Quantity:	[Words]	[Figures]
Transfer identification number: Full name(s) of transferor(s):		<p>Transferor's broker hereby certifies:</p> <p>(a) as to the validity of documents; and  (b) that stamp duty, if payable, has been or will be paid.</p> <p>[Transferor's broker's stamp]</p>
<p>Affixed at _____</p> <p>on _____ (place and date of affixing stamp)</p>		

I (or We) hereby renounce and transfer the above rights in favour of the transferee(s) named in Part 2 hereof or to the several transferee(s) named in Part 2 of the Broker's Renunciation and Transfer Form(s) or Renunciation and Split Transfer Form(s) relating to the above rights.

\* I (or We) have no notice of revocation of the power of attorney under which this renunciation and transfer is signed.

Signature(s) of transferor(s):

Date(s) signed:

## PART 2

Full name(s) and address(es) of transferee(s):	<p>Transferee's broker hereby certifies:</p> <p>(a) that, the rights set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in this Part; and  (b) that stamp duty, if payable, has been or will be paid,  and hereby requests that the marketable securities be allotted by the company or corporation to the transferee(s) and such such entries be made in the register as are necessary to give effect to this renunciation and transfer.</p> <p>[Transferee's broker's stamp]</p>
Date of affixing stamp:	

\* Delete if not applicable

## FORM 6

Section 191

BROKER'S RENUNCIATION AND TRANSFER FORM	MARKING STAMP
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## PART 1

Full name of company or prescribed corporation:

Description of rights:	Register:
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Quantity:	[Words]	[Figures]
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Transfer identification number:	Transferor's broker hereby certifies: (a) that the Security Renunciation and Transfer Form relating to the rights set out above has been or will be lodged at the company's or corporation's office; and (b) that stamp duty, if payable, has been or will be paid. <u>[Transferor's broker's stamp]</u>
Full name(s) of transferor(s):	Affixed at _____ on _____ (place and date of affixing stamp)

## PART 2

Full name(s) and address(es) of transferee(s):	Transferee's broker hereby certifies: (a) that, the rights set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid, and hereby requests that the marketable securities be allotted by the company or corporation to the transferee(s) and such entries be made in the register as are necessary to give effect to this renunciation and transfer. <u>[Transferee's broker's stamp]</u>
	Date of affixing stamp:

## FORM 7

Section 191

## RENUNCIATION AND SPLIT TRANSFER FORM

## MARKING STAMP

## PART 1

Full name of company or prescribed corporation:

Description of rights:	Register:
Quantity:	[Words] [Figures]
Transfer identification number:	The [name of prescribed stock exchange] hereby certifies that the Security Renunciation and Transfer Form or the Broker's Renunciation and Transfer Form relating to the rights set out above has been or will be lodged at the company's or corporation's office.
Full name(s) of transferor(s):	[Stock Exchange stamp]
	Affixed at ..... on ..... (place and date of affixing stamp)

## PART 2

Full name(s) and address(es) of transferee(s):

Transferee's broker hereby certifies:

(a) that, the rights set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in this Part; and

(b) that stamp duty, if payable, has been or will be paid,

and hereby requests that the marketable securities be allotted by the company or corporation to the transferee(s) and such entries be made in the register as are necessary to give effect to this renunciation and transfer.

[Transferee's broker's stamp]

Date of affixing stamp:

## FORM 8

Section 192

TRUSTEE TRANSFER FORM	MARKING STAMP
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## PART 1

Full name of company or prescribed corporation:

Description of securities:	Class:	If not fully paid, paid to:	Register:
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Quantity: [Words] [Figures]

Transfer identification number, where appropriate:

Full name(s) of transferor(s):

## PART 2

Full name(s) and address(es) of transferee(s):	Transferor hereby certifies that the securities set out in Part 1 above are to be registered in the name(s) of the transferee(s) named in this Part, being the person(s) for or on whose behalf the transferor held them, either alone or together with another person or other persons, in the ordinary course of business immediately before the execution of this transfer, and hereby requests that such entries be made in the register as are necessary to give effect to this transfer.
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I (or We) hereby transfer the above securities to the transferee(s) named in Part 2 hereof.

Execution by the transferor(s):

Date of execution:

FORM 9  
TRANSFeree's ACCEPTANCE

Section 192

*For completion—*

by transferee(s) of marketable securities with an uncalled liability, not being partly paid shares in a no liability company, where the securities are transferred by an authorized trustee corporation, either alone or together with another person or other persons, to the person(s) for or on behalf of whom the corporation held them, either alone or together with that other person or those other persons, in the ordinary course of its business immediately before the execution of this transfer.

To:

[Name of company or prescribed corporation whose securities are involved]

I (*or We*)

of

the transferee(s) of

[Quantity and description of securities]

comprised in the

instrument(s) of transfer attached

[Number]

each paid to                                  in the abovenamed company or corporation and being the person(s) named as the transferee(s) in the Trustee Transfer Form relating to those securities and having attained the age of 18 years, HEREBY AGREE to accept the securities subject to the several terms and conditions on which the transferor held them at the time of the transfer of the securities by the transferor to me (*or us*) and further agree to become a member (*or members*) of the company or corporation and to be bound by the memorandum and articles or by the constitution of the company or corporation upon being registered as the holder(s) of the securities.

Signature(s) of transferee(s):

Dated the                                  day of                                  , 19    .

## FORM 10

Section 192

## TRUSTEE RENUNCIATION AND TRANSFER FORM

## PART 1

Full name of company or prescribed corporation:

Description of rights:	Register:
------------------------	-----------

Quantity:	[Words]	[Figures]
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Transfer identification number, where appropriate:

Full name(s) of transferor(s):

## PART 2

Full name(s) and address(es) of transferee(s):	Transferor hereby certifies that, the rights set out in Part 1 above having been transferred to the person(s) for or on whose behalf the transferor held them, either alone or together with another person or other persons, in the ordinary course of business immediately before the transfer, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in this Part, and hereby requests that the marketable securities be allotted by the company or corporation to the transferee(s) and that such entries be made in the register as are necessary to give effect to this renunciation and transfer.
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I (*or We*) hereby renounce and transfer the above rights in favour of the transferee(s) named in Part 2 hereof.

Execution by the transferor(s):

Date of execution:

**FORM 11  
TRANSFeree's ACCEPTANCE**

**Section 192**

*For completion—*

by persons to whom rights to marketable securities are transferred by an authorized trustee corporation, either alone or together with another person or other persons, where the whole of moneys to be subscribed for marketable securities to which the rights relate is not payable in full on application, the securities are not shares in a no liability company and the rights were held for or on behalf of the person(s) by the transferor(s).

To:

[Name of company or prescribed corporation whose securities are involved]

I (or We)

of

the transferee(s) of

[Quantity and description of rights]

comprised in the

instrument(s) of renunciation and transfer attached,

[Number]

to securities in respect of which there is an uncalled liability of per unit after the payment of application moneys, if any, and being the person(s) named as transferee(s) in the Trustee Renunciation and Transfer Form and having attained the age of 18 years, HEREBY AGREE to accept the securities to which the rights relate subject to the several terms and conditions upon which the securities were offered by the company or corporation for subscription and I (or we) hereby agree to become a member (or members) of the company or corporation and to be bound by the memorandum and articles or by the constitution of the company or corporation upon being registered as the holder(s) of the securities.

Signature(s) of transferee(s):

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_.

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**SCHEDE 5**

Section 204

**ORDER OF PRIORITY OF REGISTRABLE CHARGES**

1. (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;
  - (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 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.
  
2. An unregistered charge on the 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 clause 1; and
  - (b) another unregistered charge on the property created after the first-mentioned unregistered charge.
  
3. (1) Except as provided by the succeeding sub-clauses of this clause, any priority accorded by this Schedule 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 Schedule 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 with the Commission under section 201 or 202 in relation to the charge sets out the nature of the prospective liability and the amount so specified, then any priority accorded by this Schedule 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 with the Commission under section 201 or 202 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 provisions of this sub-clause have effect:

- (c) any priority accorded by this Schedule 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; and

- (d) any priority accorded by this Schedule 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.

4. A reference in this Schedule to a person having notice of a charge includes a reference to the person having constructive notice of the charge.

## 5. In this Schedule—

- (a) a reference to a prior registered charge in relation to another registered charge is a reference to a charge the priority time of which is earlier than the priority time of the other charge; and
- (b) a reference to a subsequent registered charge in relation to another registered charge is a reference to a charge the priority time of which is later than the priority time of the other registered charge.

## 6. In this Schedule—

“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 date entered in the Register pursuant to section 203;
- (b) where a notice has been lodged under section 202 in relation to a charge on property, being a charge that, at the time when the notice was lodged, was already registered under Division 9 of Part IV—the earlier or earliest time and date appearing in the Register in relation to the charge, being a time and date entered in the Register pursuant to section 203; and
- (c) to the extent that the charge has effect as varied by a variation notice of which was required to be lodged with the Commission under sub-section 206 (2)—the time and date entered in the Register in relation to the charge pursuant to sub-section 203 (14);

“registered charge”, means a charge that is registered under Division 9 of Part IV;

“unregistered charge”, means a charge that is not registered under Division 9 of Part IV but does not include a charge that is not registrable.

## NOTE.

1. The Companies Act 1981 of the Commonwealth (No. 89, 1981) is amended by—
    - (a) the Companies and Securities Legislation (Miscellaneous Amendments) Act 1981 (No. 153, 1981);
    - (b) the Statute Law (Miscellaneous Amendments) Act (No. 1) 1982 (No. 26, 1982).
  2. Schedule 1 to the Companies (Application of Laws) Act, 1981, of New South Wales (No. 122, 1981) is amended by the Companies (Application of Laws) Regulations, 1982.
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