

# Corporations Law Simplification Program

## First Corporate Law Simplification Bill

### Exposure Draft

Task Force

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Corporations Law Simplification Task Force  
Attorney-General's Department  
BARTON ACT 2600

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## **HIGHLIGHTS**

### **Share buy-backs**

- Unnecessary procedures and hurdles removed
- Essential safeguards provided for shareholders and creditors
- Number of words cut from about 15 000 to 2 000 (by about 85%)
- One-stop table to apply all provisions relevant to a particular buy-back

### **Proprietary companies**

- Single director companies allowed
- Single member companies allowed Annual general meeting scrapped
- Reduced accounting and financial reporting
- Comprehensive guide to the day-to-day rules that matter for small business

### **Company registers**

- 5 company registers abolished
- Uniform rules in one place for registers of members, option holders and debenture holders
- No unauthorised use of registers for junk mail
- Less red tape

### **Plain English writing**

- Easier to understand provisions
- Provisions organised the way users want them
- Signposts to related areas of the Law
- Clearer and more open layout of pages Comprehensive index

## **SIMPLIFICATION IN ACTION**

This is the first Bill produced by the Corporations Law Simplification Task Force. It covers 3 of the 7 priorities identified by the Task Force in its December 1993 Plan of Action:

- Share buy-backs
- Proprietary companies
- Company registers.

Proposals for change in these 3 areas were published in March and April.

Work on the remaining priorities is now progressing and they will be covered, along with new matters, in the second Bill.

In simplifying these 3 areas of the Corporations Law, the Bill prepared by the Task Force will streamline the Law, achieve greater consistency and remove unnecessary complexities. This follows extensive consultation and testing with users of the Law.

The Task Force was established by the Attorney-General in October 1993. It comprises an experienced commercial lawyer from the private sector, an expert in plain language, a senior legislative drafter and a senior policy adviser from the Attorney-General's Department.

The Task Force is assisted in its work by a Consultative Group of 13 private sector representatives of the investor and business communities, including officers from large companies, representatives of small business organisations and senior legal and accounting professionals. The Task Force meets with the Consultative Group about once a month to discuss the program and to seek the reaction of Group members to draft proposals, before they are released to the public for comment.

### **A law that works**

A constant complaint about the current Corporations Law is that companies cannot use the Law efficiently because of its unnecessarily complicated rules.

Sometimes, parts of the Law which were intended to offer a facility to companies are seldom used.

The current rules on share buy-backs are a good example. The new approach to them in this exposure draft graphically demonstrates what simplification can achieve.

A much higher degree of uniformity will be achieved in the new buy-back rules. They are set out in the chronological order that a company must follow, so that the Law can be used almost as a procedural manual.

The 89 sections in the current Law have come down to 11 in the simplified version.

### **A more accessible law**

The Law needs, in particular, to be more accessible to those who are not professionally qualified in law or accountancy. They are entitled to have a grasp of the general principles of the Law and some appreciation of their rights and responsibilities.

One notable step towards making the Law more accessible is the Small business guide that forms part of the proprietary companies amendments. It offers directors and shareholders an overview of the central rules that affect them in a way that is more immediately understandable. It is an introduction rather than a statement of the law and it points readers to the sections where they can find more detail.

Those who have been asked to comment on the guide have responded favourably. The current version reflects many of their useful suggestions to improve its scope and clarity. Professional advisers involved in this process have suggested that the guide could be used as a bridge between client and adviser, especially if it were also published separately.

### **Lightening the regulatory burden**

As well as making the Law more accessible, it is important to ensure that its content is as easy as possible to comply with.

Company registers have been one area where the regulatory burden has been too heavy. The new rules will strip away duplication and abandon the need either to collect or supply information that is out-of-date or without real value. Rules on registers will be brought together and made more uniform.

The concentration on essential matters will make it easier for companies to comply with the remaining requirements.

### **Catering for small business**

Numerous requests to consider the needs of small business led the Task Force to place small business structures high in its first priorities. The new provisions respond to the requests in positive and significant ways.

- Financial reporting requirements under the Corporations Law will be reduced for most proprietary companies, but strengthened for companies that have a significant economic impact.
- Proprietary companies will now be able to have only one director, so avoiding family members or friends being asked to assume the role and responsibilities of a director without any real involvement in the company's operations.
- The requirement for annual general meetings will be abandoned for proprietary companies.

### **Elimination of irrelevant requirements**

The Task Force considered 8 company registers which companies are currently required to keep. In future, companies will be required to keep registers of:

- members
- option holders
- debenture holders.

The other 5 registers can be safely abandoned without affecting the rights of shareholders, creditors or others because of the information to be available from the ASC (Australian Securities Commission) and in some cases the ASX (Australian Stock Exchange Limited). The ASC records will contain the essential information in these registers, but are easier to consult and offer more immediate access.

### **Plain drafting and improved layout**

A vital factor in making the Law accessible is the approach to drafting and layout. The text in the exposure draft has been written in line with the principles of plain English. The material has been arranged in the way that readers would look for information. Long, convoluted sentences and unfamiliar structures have been avoided.

At the same time, the material is not broken up too much. Disjointed or fractured provisions can be almost as difficult to use as a cumbersome block of unbroken text. In the Bill, greater use has also been made of the technique of including more than one sentence in a subsection where that makes the section easier to follow as a whole.

Removing verbiage and unnecessary procedures has allowed the text to be trimmed significantly. Only about 2 000 words are used to cover the buy-back provisions (as against about 15 000 at present). The Task Force has sought to make the Law more comprehensible, without sacrificing precision.

At the same time, the Task Force has not been obsessed with length. Sometimes, extra text can be useful for readers. The Small business guide, which summarises and provides signposts to provisions scattered all over the Law, is a good example of extra pages easing the reader's task.

The design of the pages proposed for the Bill departs from that used traditionally for Commonwealth legislation in a number of respects.

Laws are essentially reference books: users are continually dipping into them. Consequently, they need to be able to find sections quickly. When they are referring to a particular section they often need instant indicators of the Chapter, Part and Division in which they are reading. The new page layout seeks to provide these aids through more informative running heads.

As a further aid, many subsections have been given headings to provide readers with an indication of what is to come.

The pages have also been given a more open appearance to improve readability. This avoids cramped and cluttered pages and makes the text easier to use.

### **Consultation and testing**

There has been extensive consultation and testing with users. The proposals prepared by the Task Force in March and April were distributed widely for public comment. The press reported on each publication. Major representative bodies and associations concerned with the Law were contacted as well as many individuals. Close consultation on proposals has also occurred with the ASC in view of its practical experience and crucial role as regulator. Submissions have enabled the Task Force to refine the proposals and on occasions to rework items.

Equally important has been the close testing of the text at its various stages of development with people drawn from the wide spectrum of users of the Law. In all, 19 testing sessions were held. The tests were initially conducted before any writing began - to uncover points of difficulty, confusion, or misinterpretation in the current Law.

Various ways of organising the new material were shown to groups of users to select the one that would most nearly match the approach they would take when consulting the Law.

Finally, the text itself has been exposed to critical comment. In some cases alternative versions of particular sections were tested to see which one test groups found easier to understand. Several groups were also asked to solve practical problems, to see how quickly they could find the answers in the new text and whether reading it led them to find the right answers. This has been invaluable in achieving a text that is readable, comprehensible and, most importantly, useable.

The Task Force has adopted many of the perceptive suggestions that have come from the consultation and testing. As might be expected, audiences with different perspectives and interests have on occasions made varying proposals for particular sections. Most often the differences have been in emphasis rather than a matter of conflict. In these circumstances, the Task Force has usually

adopted the preferred approach of the majority of users, for example in the organisation of material and the shape of the table in the share buy-backs Division.

### **Numbering of sections**

So that the community might have the benefit of its work early, the Task Force is tackling the simplification of the current Law in stages. This has enabled this exposure draft of the first Bill to be released within 9 months of commencing work. The business community has endorsed this approach for much the same reason.

It raises a difficulty, however, over the numbering of sections. If the new provisions are given a completely new numbering system, then users of the Law would have to cope with both the old system for sections not yet simplified and with the new one.

Consequently, the current numbering system has been retained for the present. For example, the new buy-back provisions are given the numbers of the old provisions they are replacing and will be slotted into their place for the time being.

### **REQUEST FOR COMMENTS**

The Task Force believes that the consultations and testing that have taken place have contributed greatly to the development of the Bill. However, the segments of the Corporations Law covered by the Bill are complex, have caused difficulty in the past and have been the subject of considerable complaint. The Task Force is eager to have wide ranging community discussion on the exposure draft.

Comments would be welcomed on any aspect of the exposure draft:

- policy
- organisation of the material
- language
- layout.

Submissions may be formal submissions or very short informal reactions either to whole parts or to single sections. The Task Force wants to be alerted to provisions that are creating difficulties or need more explanation so that they can be refined and reshaped to improve the Law and make it easier to understand.

### **Simplification seminars**

As part of the consultation with users of the Corporations Law, the Task Force is planning a series of seminars on the Bill.

The seminars will be held in a central location in each city. They will start late in the afternoon and will run for 2 to 3 hours. The seminars will commence with short presentations which will explain each of the main elements of the Bill. People attending the seminars will be able to comment on the Bill and to ask questions about it.

The schedule for the seminars is:

- Brisbane            Wednesday, 7 September
- Sydney            Thursday, 8 September
- Perth            Tuesday, 13 September
- Melbourne            Thursday, 15 September

- Adelaide Tuesday, 20 September

**Closing date for comments**

Friday 28 October 1994

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## SHARE BUY-BACKS

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## COMMENTARY ON SHARE BUY-BACKS

1. Since 1989 Australian companies have been able to buy back their own shares. However, few companies have done so because the existing provisions are complicated, include expensive and unnecessary procedural steps, and duplicate regulation elsewhere in the Law.

### The new rules

2. The Bill will replace the existing provisions with a new Division. The new Division:

- makes the rules much more uniform
- makes innovative use of a table to apply the various procedural sections to the different types of buy-backs (section 206C) - in addition to its operative purpose, reference to the table enables easy access to the applicable rules
- removes mandatory procedures involving auditors, experts, advertisements and declarations, which are not required in most overseas jurisdictions
- applies to all shares other than redeemable preference shares (which are dealt with in section 192 of the Law).

3. The new Division will continue to operate as an exception to the existing prohibition in section 205 of the Corporations Law against a company acquiring an interest in its own shares. A buy-back not carried out as required by the new Division will constitute a breach of section 205.

### Equal access scheme

4. A buy-back made as part of a scheme which allows equal access to all ordinary shareholders (an 'equal access scheme') is subject to less stringent rules than a 'selective buy-back'. Under the current rules, an equal access scheme is known as a buy-back scheme. A selective buy-back is one that favours some shareholders over others or relates to shares of a class other than ordinary shares. An equal access scheme may include some marginal differences between offers (subsections 206C(2) and (3)).

5. All ordinary shareholders must have a reasonable opportunity to accept the offers made to them under an equal access scheme (paragraph 206C(2)(b)). This approach allows companies to devise their own timetable to suit their particular circumstances, provided no shareholders are unfairly disadvantaged. It is not necessary that all shareholders have an equal opportunity to consider the offer - only that they all have at least a reasonable opportunity. If, for example, the offers might reach different shareholders at different times, the shortest time available for consideration by any shareholder must be reasonable.

6. A company might not be able to bring a buy-back proposal within the rules for an equal access scheme because, for example, some of its shareholders live in a country which prohibits buy-back offers. The ASC will be able to exempt the company from the more stringent requirements for selective buy-backs. The exemption may be subject to conditions (paragraph 206E(4)(c)). An example of a possible condition would be that the company complies with the less stringent, but still significant, rules for an equal access scheme.

## **Selective buy-backs**

7. Selective buy-backs can only proceed if they are approved by all shareholders, or by a special resolution of the company on which no vote is cast by selling shareholders or their associates (subsection 206E(1)).

8. Selling shareholders and their associates are excluded from voting on a special resolution to approve a selective buy-back (paragraph 206E(1)(a)). However, this might lead to unfair results if, for example, some of the associates wished to vote against the proposal. In such a case, the ASC would be able to exempt the company from the normal voting exclusion rules (subsection 206E(4)).

## **On-market, odd lot and employee buy-backs**

9. A listed company may buy back shares in the ordinary course of trading on the stock exchange (an 'on-market buy-back') or buy back unmarketable parcels of shares (an 'odd lot buy-back'). A company may also buy back shares held by or for the benefit of employees or executive directors of the company or a related body corporate undertaken as part of a scheme that has been approved by the company in general meeting (an 'employee share scheme').

## **Solvency**

10. Directors will need to ensure that a share buy-back does not cause their company to become insolvent. If it does, directors may be personally liable under the Bill for any loss to the company, in the same way that they can already be liable for allowing the company to trade while it is insolvent (subsection 588G(1A)).

11. If a buy-back does cause a company to become insolvent, the liquidator may be able to recover compensation from the selling shareholder (section 588FF).

12. Where the company is placed into liquidation before the company has discharged its obligations under the buy-back agreement, selling shareholders will be able to claim in a winding up (section 553AA). However, their claim against the company will rank after claims made by other creditors (section 563AA).

## **Changes in control**

13. To avoid duplication of regulation, the main takeover rules in Chapter 6 of the Law will not apply to a buy-back (subsection 42A(1) and section 632A). However, if the result of the buy-back would be unreasonable, the Corporations and Securities Panel will be able to declare (upon a reference from the ASC) that the buy-back is unacceptable (section 732).

14. If an equal access scheme, employee share scheme or on-market buy-back would result in the company having bought back more than 10 percent of its shares in the last 12 months (the '10/12 limit'), the buy-back must be approved by an ordinary resolution of the company (subsection 206D(1)). This is to allow members to consider the potential implications for control over the company in the case of substantial buy-backs. Because a selective buy-back must be approved by all shareholders or by special resolution, there is no need for a separate resolution when the buy-back exceeds the 10/12 limit.

15. Shares which are bought back must be cancelled (subsection 206I(3)).

16. Substantial shareholders will not be required to update their substantial shareholder notices as shares are bought back (subsection 42A(2)). However, once the buy-back is complete and the shares have been cancelled, the usual notification requirements will revive.

## **Disclosure**

17. The ASC must be given at least 5 business days notice of any significant buy-back (section 206G). This will enable creditors and shareholders to become aware of the proposed buy-back, giving them an opportunity to try to stop it if, for example, it might lead to the company's insolvency (subsection 1324(1A)).

18. Whenever a shareholder meeting is required to approve a buy-back proposal, the company will have to give each shareholder a statement setting out all the information known to the company that is material to the decision whether to approve the proposal (subsections 206D(2) and 206E(2)). All documents sent to shareholders for the meeting will have to be lodged with the ASC (subsections 206D(3) and 206E(3)).

19. When the company makes an offer for a selective buy-back or an offer under an equal access scheme, the company will have to give the shareholder all information known to the company that is material to the decision whether to accept the offer (section 206H). The company will also have to lodge with the ASC a document setting out the terms of the offer (section 206F).

## **NEW PROVISIONS**

### **Division 4B - Share buy-backs**

- 206A Purpose
- 206B The company's power to buy back its own shares
- 206C Buy-back procedure - general
- 206D Buy-back procedure - ordinary shareholder approval if the 10% in 12 months limit exceeded
- 206E Buy-back procedure - special shareholder approval for selective buy-back
- 206F Buy-back procedure - lodgment of offer documents with the ASC
- 206G ASC to have at least 5 business days notice before buy-back agreement entered into
- 206H Buy-back procedure - disclosure of relevant information when offer made
- 206I Acceptance of offer and transfer of shares to the company
- 206J Buy-back procedure - notice to ASC of cancellation of shares
- 206K Signposts to other relevant provisions

## Division 4B - Share buy-backs

### 206A Purpose

This Division states the rules to be followed by a company when buying back its own shares. These rules are designed to protect the interests of shareholders and creditors by:

- addressing the risk of buy-back activity leading to the company's insolvency
- seeking to ensure fairness between the company's shareholders
- requiring the company to disclose all material information.

### 206B The company's power to buy back its own shares

A company may buy back its own shares (other than redeemable preference shares) if it follows the procedures laid down in this Division.

Note 1: A company may include provisions in its articles that preclude the company buying back its own shares or impose restrictions on the exercise of the company's power to buy back its own shares.

Note 2: For the redemption of redeemable preference shares see section 192.

### 206C Buy-back procedure - general

(1) The following table specifies the steps required for, and the sections that apply to, the different types of buy-back.

Procedures [and sections applied]	odd lot	employee share scheme		on-market		equal access scheme		Selective buy-back
		within 10/12 limit	over 10/12 limit	within 10/12 limit	over 10/12 limit	within 10/12 limit	over 10/12 limit	
ordinary resolution [206D]	-	-	yes	-	yes	-	yes	-
special/unanimous resolution [206E]	-	-	-	-	-	-	-	yes
lodge offer documents with ASC [206F]	-	-	-	-	-	yes	yes	yes
5 business days notice to ASC [206G]	-	yes	yes	yes	yes	yes	yes	yes
disclose relevant information when offer made [206H]	-	-	-	-	-	yes	yes	yes
cancel shares [206I]	yes	yes	yes	yes	yes	yes	yes	yes
notify ASC of cancellation [206J]	yes	yes	yes	yes	yes	yes	yes	yes

Note: The 10/12 limit is the 10% in 12 months limit laid down in subsections 206D(4) and (5). Subsections (2) and (3) of this section explain what an equal access scheme is. See section 9 for the definitions of "odd lot buy-back", "employee share scheme buy-back", "on-market buy-back" and "selective buy-back".

(2) Equal access scheme

An equal access buy-back scheme is a scheme that satisfies all the following conditions:

- (a) offers are to be made to all ordinary shareholders to buy back the same percentage of their ordinary shares;
- (b) the offers relate only to ordinary shares;
- (c) all ordinary shareholders have a reasonable opportunity to accept the offers made to them;
- (d) buy-back agreements are not entered into until a specified time for acceptances of offers has closed;
- (e) the terms of all the offers are the same.

(3) In applying subsection (2), disregard:

- (a) any differences in consideration that are attributable to the fact that the offers relate to shares having different accrued dividend entitlements; and
- (b) any differences in consideration that are attributable to the fact that the offers relate to shares on which different amounts are paid up; and
- (c) any differences in the offers introduced solely for the purpose of avoiding shareholders being left with odd lots; and
- (d) any differences in the exact percentage of shares bought back that are introduced solely for the purpose of ensuring that only whole numbers of shares are bought back.

*206D Buy-back procedure - ordinary shareholder approval if the 10% in 12 months limit exceeded*

(1) Ordinary resolution required

If section 206C applies this section to a buy-back, the terms of the buyk agreement must be approved by a resolution passed at a general -Veeting of the company before the agreement is entered into.

(2) Information to accompany the notice of meeting

The company must include with the notice of the meeting a statement out all information known to the company that:

- (a) is material to a shareholder's decision whether to vote in favour of the resolution; and
- (b) the company has not previously disclosed to shareholders.

(3) Documents to be lodged with the ASC

Before the notice of the meeting is sent to shareholders, the company must lodge copies of the following documents with the Commission:

- (a) the notice of the meeting

(b) any document relating to the buy-back that will accompany the notice of the meeting sent to shareholders.

(4) 10/12 limit

The 10/12 limit for a company proposing to make a buy-back is 10% of the number of votes attaching to the smallest number of voting shares of the company on issue during the last 12 months.

(5) Exceeding the 10/12 limit

A proposed buy-back would exceed the 10/12 limit if the number of votes attaching to:

(a) all the voting shares in the company that have been bought back during the last 12 months; and

(b) the voting shares that will be bought back if the proposed buyback is made;

would exceed the 10/12 limit.

*206E Buy-back procedure - special shareholder approval for selective buyback*

(1) Selective buy-back requires special or unanimous resolution

If section 206C applies this section to a buy-back, the terms of the buyback agreement must be approved before it is entered into by either:

(a) a special resolution passed at a general meeting of the company with no votes being cast by any person whose shares are proposed to be bought back or their associates; or

(b) a resolution agreed to by all ordinary shareholders.

(2) Information to accompany the notice of meeting

The company must include with the notice of the meeting a statement setting out all information known to the company that:

(a) is material to a shareholder's decision whether to vote in favour of the resolution; and

(b) the company has not previously disclosed to shareholders.

(3) Documents to be lodged with the ASC

Before the notice of the meeting is sent to shareholders, the company must lodge copies of the following documents with the Commission:

(a) the notice of the meeting

(b) any document relating to the buy-back that will accompany the notice of the meeting sent to shareholders.

(4) The Commission may exempt a company from the operation of this section. The exemption:

(a) must be in writing; and

(b) must be granted before the buy-back agreement is entered into; and

(c) may be granted subject to conditions.

**206F** *Buy-back procedure - lodgment of offer documents with the ASC*

If section 206C applies this section to a buy-back, the company must lodge the following with the Commission before the buy-back agreement is entered into:

- (a) a copy of a document setting out the terms of the offer
- (b) a copy of any document that is to accompany the offer.

**206G** *ASC to have at least 5 business days notice before buy-back agreement entered into*

If section 206C applies this section to a buy-back, the company must not enter into the buy-back agreement until 5 business days have elapsed since the company lodged:

- (a) documents under subsection 206D(3) or 206E(3) about the buyback; or
- (b) documents under section 206F about the buy-back; or
- (c) a notice that the company intends to carry out the buy-back.

Note 1: A company that has to lodge documents under section 206D, 206E or 206F needs to lodge a notice under paragraph (c) only if it wants for some reason to have less than 5 business days between lodging the section 206D, 206E or 206F documents and entering into the buy-back agreement.

Note 2: The company may specify a buy-back under paragraph (c) in any way. It may, for instance, choose to lodge a notice covering buy-backs to be carried out:

- under a particular scheme; or
- as part of particular on-market buy-back activity.

**206H** *Buy-back procedure - disclosure of relevant information when offer made*

If section 206C applies this section to a buy-back, the company must include with the offer to buy back shares a statement setting out all information known to the company that is material to a shareholder's decision whether to accept the offer.

**206I** *Acceptance of offer and transfer of shares to the company*

(1) Effect of acceptance of the buy-back offer on share rights

Once a company has entered into an agreement to buy back shares, all rights attaching to the shares are suspended. The suspension is lifted if the agreement is terminated.

(2) Shares transferred to the company and cancelled

A company must not deal in shares it buys back. An agreement entered into in contravention of this subsection is void.

Immediately after the registration of the transfer to the company of the shares bought back, the shares are cancelled. This cancellation does not reduce the company's nominal share capital.

**206J** *Buy-back procedure - notice to ASC of cancellation of shares*

Within 30 days after registering the transfer, the company must lodge with the Commission a notice that states:

- (a) the number of shares transferred; and

- (b) the class of shares transferred; and
- (c) the consideration paid for the shares.

*206K Signposts to other relevant provisions*

The following table sets out other provisions of the Law that are relevant to buy-backs:

Section 588G Section 1317HA	<b>liability of directors on insolvency</b> Under the combined operation of these sections, the directors may have to compensate the company if the company is, or becomes, insolvent when the company enters into the buy-back agreement.
Section 733	<b>ASC intervention (reference to the Panel)</b> Under this section, the Commission has power to refer to the Corporations and Securities Panel any circumstances related to a buy-back that the Commission considers to be unacceptable circumstances for the purposes of Part 6.9. If the Panel declares the circumstances to be unacceptable, it may exercise a range of powers under section 734.
Section 42A Section 632A	<b>application of takeover provisions</b> These sections deal with the application of Chapter 6 to buy-backs.
Section 205	<b>consequences of failure to follow procedures - the company and the officers</b> If a company fails to follow the buy-back procedures in this Division, the company contravenes this section and the officers who are involved in the contravention commit an offence (see subsection 205(5)).
Subsection 206(1A)	<b>consequences of failure to follow procedures - the transaction</b> This subsection provides that a failure to follow the procedures does not affect the validity of the buy-back transaction itself.
Section 162	<b>provisions in articles</b> This section deals with the way in which a company's articles may restrict the exercise of the company's powers and the consequences of a failure to observe these restrictions.
Section 197	<b>variation of class rights</b> This section deals with the variation of rights attached to a class of shares. This variation may be governed by the provisions of the company's memorandum and articles.

## **OTHER AMENDMENTS**

### **1. Section 9**

Insert the following definitions:

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

"buy-back agreement" by a company means an agreement by the company to buy back its own shares;

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

(a) as its purpose the acquisition of shares in the company by or on behalf of participating employees; and

(b) as been approved by the company in general meeting;

Note: "Participating employee" is defined below in this section.

"marketable parcel" of shares in a listed body means a marketable parcel of shares in the body within the meaning of the rules of the relevant securities exchange;

"odd lot buy-back" means a buy-back of shares in a listed body if the parcel of shares bought back is smaller than a marketable parcel;

"on-market buy-back" means a buy-back by a listed body at an official meeting of a securities exchange in the ordinary course of trading on a stock market of the exchange;

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

(a) a buy-back under an equal access scheme within the meaning of section 206C;

(b) an odd lot buy-back;

(c) an on-market buy-back;

(d) an employee share scheme buy-back;

### **2. After section 42**

Insert:

#### *42A (1) Shares covered by buy-back agreements*

(1) In working out the shares or voting shares that the company has a relevant interest in for the purposes of Chapter 6, shares bought back under Division 4B of Part 2.4 (share buy-backs) are to be disregarded for the period during which the rights attaching to them are suspended under subsection 206I(1).

(2) Subsection 206I(1) is to be disregarded in working out whether or not a person has a relevant interest in shares for the purposes of Part 6.7 (substantial shareholdings).

### **3. Paragraph 191(2)(ea)**

Omit substitute:

(ea) in providing for consideration payable by the company on a buy-back of its shares;  
or

**4. After subsection 205(1)**

Insert:

(1A) A buy-back authorised by section 206B does not contravene subparagraph (1)(b)(i).

**5. Subsection 206(1)**

(1) Except as provided by this section, the validity of a contract or transaction not affected by a contravention of:

(a) paragraph 205(1)(a); or

(b) paragraph 205(1)(b) - unless the contract or transaction effects the acquisition that constitutes the contravention; or

(c) paragraph 205(1)(c) - unless the contract or transaction effects . the loan that constitutes the contravention.

(1A) If the contract or transaction is constituted by:

(a) a buy-back of shares by a company; or

(b) the transfer of shares to a company under a buy-back;

paragraph (1)(b) does not apply and the validity of a contract or transaction is not affected by a contravention of paragraph 205(1)(b) (even if the contract or transaction is the one that effects the acquisition that constitutes the contravention).

**6. After section 553A**

Insert:

*553AA Selling shareholder cannot prove debt unless documents given*

The selling shareholder in a share buy-back may claim in a winding up of the company but is not entitled to a distribution of money or property unless the shareholder has discharged the shareholder's obligations to give documents in connection with the buy-back.

Note: The shareholder's claim ranks after those of non-member creditors and before those of other member creditors (see section 563AA).

**7. Section 553E**

Omit "sections 206RD and 279", substitute "section 279".

**8. After section 563**

Insert:

*563AA Seller under a buy-back agreement*

(1) The selling shareholder's claim under a buy-back agreement is postponed until all debts owed to people otherwise than as members of the company have been satisfied.

(2) The shareholder's claim is not a debt owed by the company to the seller in the shareholder's capacity as a member of the company for the purposes of section 563A.

**9. After subsection 568(1)**

Insert:

(1AA) This section does not apply to an agreement by the company to buy back its own shares.

**10. After subsection 588G(1)**

For the purposes of this section, a company that buys back shares incurs a debt (even if the consideration is not a sum certain in money). The debt is incurred at the time when the buy-back agreement is entered into.

**11. After section 632**

Insert:

*632A Acquisition by way of buy-back*

Section 615 does not apply to a buy-back authorised by section 206B.

**12. At the end of subsection 732(1)**

Add:

; (e) a company carries out, or proposes to carry out, a buy-back that is unreasonable having regard to:

the effect of the buy-back on the control of the company; and

the fact that because of section 632A the disclosure and other procedural safeguards of this Chapter do not apply to the buyback.

**13. After subsection 1324(1)**

(1A) purposes of subsection (1), a creditor or member of a company is whose interests are affected by a contravention of the Law arising from the insolvency of the company. This subsection is not intended to limit subsection (1) in any way.

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## COMMENTARY ON PROPRIETARY COMPANIES

1. Many of the obligations that the Corporations Law currently imposes on all companies are not relevant for closely held small business enterprises. While the Law does distinguish between public, proprietary and exempt proprietary companies, these distinctions do not go far enough in recognising that companies and their shareholders have very different needs, depending on the type and size of the company.

### The new rules

2. The Bill replaces the distinction between exempt and non-exempt proprietary companies with a distinction between small and large proprietary companies (section 45A). The new distinction is based on gross operating revenue (\$10m a year), assets (\$5m) and number of employees (50). Under the new rules small proprietary companies will face a regulatory burden that is no greater, and in significant respects less, than the burden currently faced by exempt proprietary companies.

3. The Bill will streamline the regulation of all proprietary companies:

- the minimum number of members and directors for a proprietary company will be reduced from 2 to 1 (sections 114 and 221)
- proprietary companies will no longer have to hold an annual general meeting (subsection 245(2A))
- small proprietary companies will not have to prepare annual financial statements, unless required to do so by 5% of members or the ASC (subsections 283(5) and (6)).

4. Previous proposals to ease the burden on small business (the Close Corporations Act 1989 and the private company structure proposed by the Parliamentary Joint Committee on Corporations and Securities) have involved creating a new company structure additional to those already in the Corporations Law. These proposals were criticised as adding complexity and offering an alternative corporate structure of only limited benefit. The Bill seeks to achieve the deregulatory aspects of those earlier proposals, without the complexity and expense involved in conversion. In these circumstances the close corporations legislation (which was never brought into force because of constitutional difficulties) will be repealed by the Bill (item 76).

### Small business guide

5. A major initiative in the draft legislation is the Small business guide (Part 1.4).

6. The guide is designed for the people who operate small businesses and aims to help them understand their rights and responsibilities if they choose to incorporate their businesses as companies. The guide's introduction, expression and cross references to substantive provisions make it clear that it is a description of the Law and does not replace it. It gives an overview and provides short answers to simple questions about the Law, and then directs the reader to the relevant part of the Law if more detail is required.

7. The guide is included as a part of the Law in response to calls that small business should receive special attention within the text of the Law. The Task Force believes that it should also be available as a separate publication, so that small business can have access to it without having to purchase the entire Law. The Task Force would particularly welcome comments on the guide.

### **Better focus for financial information**

8. The Law currently requires companies to prepare financial statements in a specified format, regardless of the needs and interests of members and creditors of the company. About 400,000 proprietary companies in Australia do not trade and an automatic rule for the preparation of accounts for all proprietary companies is open to criticism.

9. The quality of financial information in ASC records can vary considerably because:

- it might be unaudited
- accounting standards might not have been applied.

10. The user might not distinguish the more accurate information from the less reliable material. In fact, there is a widely held view that key financial data is generally so unreliable as to verge on misleading, especially having regard to the 7 month delay which may occur between the end of the financial year and the lodgment of the data. For this reason, key financial data about proprietary companies will be eliminated from the annual return.

11. It is better to focus on the financial affairs of proprietary companies which have a significant economic influence. These are the companies in which the community has a genuine interest and which the Law will require to prepare, audit and make available annual accounts.

12. This approach is consistent with the 'reporting entity' concept adopted by the accounting profession, which looks at whether it is reasonable to expect the existence of users dependent on general purpose financial reports for information about the company. The use of objective criteria in the Bill (based on assets, revenue and number of employees) will be easier for preparers, users and regulators to apply with certainty (section 45A).

13. Under the Bill, audited annual accounts will be lodged with the ASC by proprietary companies which are large under the new rules. Clear information will be available about what accounting standards have been applied in their preparation. To avoid disrupting established commercial arrangements, those existing exempt proprietary companies which have their annual accounts audited, which are large and which elect to continue operating under the existing rules will not need to lodge their accounts with the ASC (subsection 317B(2)).

14. The Law currently allows proprietary companies up to 5½ months to prepare their annual accounts. Up to 7 months can elapse before any financial information is lodged with the ASC. These time periods are allowed because the Law requires every company to compile accounts and allowance must be made for the workload for the accounting profession involved in this.

15. Focusing account preparation obligations on larger proprietary companies provides scope to make those companies prepare their accounts on a more timely basis. The Bill accordingly requires accounts to be prepared, audited and lodged with the ASC within 4 months of the end of the financial year (section 283A).

### **Keeping accounts for other reasons**

16. The Bill does not seek to discourage directors from having accounts prepared to monitor their company's ongoing financial situation, particularly given the obligation in the Law to prevent the company trading while insolvent. But there is no need for the Corporations Law to impose an inflexible and prescriptive regime on when and how those accounts are to be prepared. It will be up

to those who manage companies to decide what information is needed to run their companies effectively and in what form.

17. Companies may also be required to prepare accounts for taxation purposes or by major creditors.

#### **Streamlined rules for proprietary company status**

18. Proprietary companies will be able to choose whether to have restrictions on the right to transfer shares in their articles.

19. The difficult 'offer to the public' test will be eliminated. The prohibition on proprietary companies making offers of securities to the public will be replaced by a prohibition on them doing anything that would require the lodgment of a prospectus. Exceptions will be allowed for rights issues and employee share schemes, so that the new rules will not alter the present position for proprietary companies in this respect. Proprietary companies will also have the benefit of the current exemptions to the prospectus provisions (section 116).

20. Currently there are complex rules which can lead to a court retrospectively deeming a company which has breached the proprietary company provisions to have been a public company since a particular date. The Bill provides a simpler procedure if a proprietary company breaches the new rules, by giving the ASC the power to order it to convert to a public company (section 170).

## **SMALL BUSINESS GUIDE**

### **Part 1.4 - Small business guide**

- 1 What incorporation means
- 2 The company structure for small business
- 3 Setting up a new company
- 4 Continuing obligations after the company is set up
- 5 Company directors and company secretaries
- 6 Shares and shareholders
- 7 Funding the company's operations
- 8 Returns to shareholders
- 9 Accounts and audits for small proprietary companies
- 10 Disagreements within the company
- 11 Companies in trouble

## 1.4 - SMALL BUSINESS GUIDE

### Introduction

This guide describes the main rules in the Corporations Law that apply to proprietary companies - the most common type of company used by small business.

The notes in square brackets at the end of paragraphs in the guide indicate provisions of the Corporations Law, the Regulations made under the Law, and Australian Securities Commission Practice Notes that are relevant to the information in the paragraphs.

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

### 1 What incorporation means

#### 1.1 *separate legal entity that has its own powers*

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

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

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

Once a company is incorporated, its separate legal status, property, rights and liabilities continue until the ASC (Australian Securities Commission) cancels the company's registration.

[sections 123, 161, 162, 574]

#### 1.2 *limited liability of shareholders*

Shareholders of a company are not liable (in their capacity as shareholders) for the company's debts. As shareholders, their only obligation is to pay the company any amount unpaid on their shares if they are called upon to do so. This limitation may be affected by the commercial practices discussed below.

[sections 124, 516, regulation 12 of Table A Schedule 1]

#### 1.3 *personal liability of director for company's debts*

A director of a company may be liable for debts incurred by the company at time when the company itself is unable to pay those debts as they fall due.

A director of a company may be liable to compensate the company for any losses the company suffers from a breach of certain of the director's duties the company (see 5.3 of the guide).

In addition to having liability for the company's debts or to pay compensation to the company, a director may also be subject to a civil penalty.

A director of a company that is a trustee may be liable in some circumstances for liabilities incurred by the company.

[sections 232, 233, 318, 588G, 588J, 588M, 1317HA, 1317HD]

#### *1.4 director's personal liability as guarantor/security over personal assets*

As a matter of commercial practice, a bank, trade creditor or anyone else providing finance or credit to a company may ask a director of the company:

- for a personal guarantee of the company's liabilities; and
- for some form of security over their house or personal assets to secure the performance by the company of its obligations.

The director of a company may, for example, be asked by a bank to give a mortgage over their house to secure the company's repayment of a loan. If the company does not repay the loan as agreed with the bank, the director may lose the house.

#### *1.5 continuous existence*

A company continues to exist even if one or more of its shareholders or directors sells their shares, dies or leaves the company. If a company has only one shareholder who is also the only director of the company and that person dies, their personal representative is able to ensure that the company continues to operate.

[sections 123, 224A]

#### *1.6 how a company acts*

A company does not have a physical existence. It must act through other people.

The directors of a company are responsible for managing the company's business but the company's articles of association (see 3.2 of the guide) may allow individual directors, the company secretary, company employees or to enter into contracts that bind the company.

The shareholders of a company own the company.

Shareholders can make decisions about the company by passing a resolution at a meeting. They may pass an ordinary resolution without holding a meeting if all shareholders sign a minute (a written record) setting out the terms of the resolution.

An ordinary resolution must be passed by a majority of the shareholders present and voting. A special resolution must be passed by at least 75% of the shareholders entitled to vote in person or by proxy.

[sections 253, 255, 255A, regulation 66 of Table A Schedule 1]

#### *1.7 what others can assume about the company*

Anyone who does any business with the company is entitled to assume that the company has a legal right to conduct that business unless the person knows, or ought to know, otherwise. For example, an outsider dealing with the company is entitled to assume:

- that a person who is shown in a notice lodged with the ASC as being the director or company secretary of a company has been properly appointed and is authorised to act for the company; and
- that a person who is held out by the company to be a director, company secretary or agent of the company has been properly appointed and is authorised to act for the company.

[section 164]

## **2 The company structure for small business**

### *2.1 proprietary company for small business*

Generally, a proprietary company is the most suitable company for use by small business. Such a proprietary company must have at least one shareholder but no more than 50 shareholders (not counting employee shareholders).

[sections 116, 168, 995]

## **3 Setting up a new company**

The operator of a small business can either set up a new company themselves or buy a "shelf" company.

### *3.1 incorporation and registration*

To set up a new company, the operator must apply to the ASC for registration of the company.

A proprietary company limited by shares must have at least one initial shareholder. That person (or if there are 2 or more initial shareholders - all of them) must comply with a number of formalities before the company is registered as an Australian company. The formalities include preparing a memorandum of association and preparing or adopting articles of association.

To obtain registration, the initial shareholders must lodge an application form (Form 201) with the ASC.

The company is incorporated when the ASC registers the application.

#### *memorandum*

The memorandum sets out:

- the name of the company; and
- the names and addresses of the initial shareholders; and
- the amount of the company's share capital; and
- a statement that the share capital is divided into shares of a fixed amount; and
- a statement that the liability of shareholders is limited.

#### *articles*

The articles govern the relationships between the company, its shareholders and its directors. They deal, for example, with the transfer of shares, the appointment of directors and procedures at meetings.

Instead of preparing the articles themselves, the initial shareholders may adopt the standard articles set out in Table A of Schedule 1 to the Corporations Law.

A shareholder of a company can ask the company for a copy of articles prepared by the company.

[sections 117, 118, 120, 175, 176, 180, 181, Table A Schedule 1]

### *3.2 "shelf" companies*

The operator of a small business may find it more convenient to buy a "shelf" company (a company that has already been incorporated but has not traded) from businesses which set up companies for this purpose or from some legal or accounting firms.

### 3.3 *ACN, name and common seal*

When a company is registered, the ASC allocates to it a unique 9 digit number called the Australian Company Number (ACN). (For use of the ACN see 4.1 of the guide).

A company must have a name that is different from the name of a company that is already registered. A proprietary company must have the words "Proprietary Limited" as part of its name. Those words can be abbreviated to "Pty. Ltd."

A proprietary company may use its ACN and the words "Proprietary Limited" (or "Pty. Ltd.") as its name.

A company has a common seal. It shows the company's name and its ACN. It is used on important company documents such as share certificates and mortgages. Its use must be witnessed by:

- a director of the company and its company secretary; or
- 2 directors of the company; or
- if the company has only one director who is also the only company secretary - that person.

[sections 99A, 123, 219, 240, Division 1 of Part 4.2]

### 3.4 *contracts entered into before the company is incorporated*

If someone enters a contract on behalf of a company before it is incorporated, the company can ratify the contract within a reasonable period after the company is formed. If the company does not ratify the contract, the person who entered the contract may be personally liable to carry it out.

[[section 183](#)]

### 3.5 *issuing shares*

After the company is set up, it may issue other shares. The company's memorandum sets out a limit on the number of shares that may be issued.

[section 117, regulation 2 of Table A Schedule 1]

### 3.6 *who appoints the first directors?*

The initial shareholders usually appoint the company's first director or directors. See 5.1 and 5.2 of the guide for the removal of directors and the appointment of later directors.

A director must consent in writing to holding the position of director.

[sections 221, 222A, regulation 57, 58, 59 of Table A Schedule 1]

### 3.7 *who appoints the first company secretary?*

The directors appoint the first company secretary. See 5.4 of the guide for the removal of secretaries and the appointment of later secretaries.

A company secretary must consent in writing to holding the position of company secretary.

A company secretary may also be a director of the company.

### 3.8 *registered office*

A company must have a registered office in Australia and must inform the ASC of the location of the office. A post office box cannot be the registered office of a company. The purpose of the registered office is to have a place where official forms and notices can be sent to the company.

If the company does not occupy the premises where its registered office is located, the occupier of the premises must agree in writing to having the company's registered office located there.

The company's name and the words "Registered Office" must be shown outside the office.

A company can notify the ASC of the opening hours of its registered office. The company can choose any 3 or more hours between 9am and 5pm each business day as the opening hours of its registered office. If the company does not notify the ASC of the opening hours of its registered office, the office must be open for at least 5 hours between 10am and 4pm each business day.

[sections 100, 217, 219, Form 203]

### **3.9 registers kept by the company**

A company must keep registers, including a register of shareholders and a register of charges. Generally, a company's registers must be kept at the company's registered office.

A register may be kept either in a bound or looseleaf book or on computer.

If a register is kept on computer, its contents must be capable of being printed out in hard copy.

[sections 1302, 1306]

#### *register of shareholders*

A company must keep a register of its shareholders which contains such information as:

- the names and addresses of shareholders; and
- shares held by individual shareholders.

[sections 216A, 216B]

#### *register of charges*

A company must keep a register of charges if the company gives a bank, trade creditor or anybody else a charge over company assets.

[section 271]

## **4 Continuing obligations after the company is set up**

The Corporations Law and other laws impose obligations on companies themselves and on their directors and company secretaries. Some of the more important obligations imposed under the Corporations Law are discussed below.

### **4.1 use of company name, ACN and common seal**

The name of a company must be shown outside all the company's business premises (including its registered office) that are open to the public.

The company's name and its ACN must appear on its seal, some of its public documents, its cheques and on all documents lodged with the ASC.

[section 219, Australian Securities Commission practice note 47]

### **4.2 notice of changes in directors and company secretaries**

A company must notify the ASC of changes in its directors and company secretary. A company must also notify the ASC of changes in the address of its directors and company secretary.

[section 242]

#### 4.3 *annual return*

A company must lodge with the ASC an annual return which contains such information as:

- names and addresses of each director and company secretary; and
- issued shares; and
- details of shareholders; and
- address of registered office.

For convenience, the ASC sends a partially completed annual return to each company for the company to check, amend if necessary, verify and send back to the ASC.

[section 335, regulations 3.8.01, 3.8.02, Form 316]

#### 4.4 *notice of changes in registered office*

A company must notify the ASC of changes in:

- the address of its registered office; and
- the opening hours of its registered office (if the company has lodged notice of opening hours with the ASC).

[section 218, Form 203]

#### 4.5 *notice of allotment of shares*

A company must notify the ASC of details of any shares allotted by the company.

[section 187, Form 207]

#### 4.6 *notice of charges*

A company must keep a register of charges it creates over its assets. The company must notify the ASC if it creates certain kinds of charges.

[sections 262, 263, 271]

#### 4.7 *notice of changes in locations of registers*

A company must notify the ASC of changes in the locations of registers.

[sections 216E, 1302, Form 909]

#### 4.8 *annual fee*

A company must pay an annual fee to the ASC.

[Corporations (Fees) Regulations]

### **5 Company directors and company secretaries**

#### 5.1 *who can be a director*

Only an individual who is at least 18 years old can be a director. If a proprietary company has only one director, they must ordinarily reside in Australia. If a proprietary company has more than one director, at least one of the directors must ordinarily reside in Australia.

A director must consent in writing to holding the position of director.

The Court or the ASC may prohibit a person from being a director or from otherwise being involved in the management of a company if, for example, the person has breached the Corporations Law.

A person needs the Court's permission to be a director if the person is unable to pay their debts as they fall due or has been convicted of certain offences.

Generally, a director may resign by giving written notice of the resignation to the company. The company must notify the ASC of a director's resignation. A director who resigns may also notify the ASC of the resignation.

The articles may give the directors the power to remove directors.

[sections 221, 222A; 224, 228, 230, 242, 242C, 599, 600]

## 5.2 *appointment of new directors*

A company's articles usually allow existing directors of a company to appoint a new director if a casual vacancy occurs. Shareholders in general meeting may also have the power to appoint new directors.

[regulations 60, 61 of Table A Schedule 1]

## 5.3 *duties and liabilities of directors*

In managing the business of a company, each of its directors is subject to a wide range of duties under the Corporations Law and other laws. Some of the more important duties are:

- to act in good faith
- to act in the best interests of the company
- to avoid conflicts between the interests of the company and the directors' interests
- to act honestly
- to exercise care and diligence
- to prevent the company trading while it is unable to pay its debts
- if the company is being wound up - to report to the liquidator on the affairs of the company up to the date of the winding up order, or earlier if required
- if the company is being wound up - to help the liquidator (by, for example, giving to the liquidator any records of the company that the director has).

A director who fails to perform their duties may be guilty of an offence and may be personally liable to compensate the company or others for any loss or damage they suffer.

A director's obligations may continue even after the company has been dissolved.

[sections 232, 475, 530A, 574, 588G, 596, 1317HA, 1317HB, 1317HD]

## 5.4 *company secretaries*

A company must have a company secretary. If a company has only one secretary, they must ordinarily reside in Australia. If a company has more than one company secretary, at least one of them must ordinarily reside in Australia. The directors appoint the company secretary.

A company secretary must consent in writing to holding the position of company secretary.

A company secretary may also be a director of the company.

Generally, a company secretary may resign by giving written notice of the resignation to the company. The company must notify the ASC of a company secretary's resignation. A company secretary who resigns may also notify the ASC of the resignation.

The company secretary is an officer of the company and may be subject to the requirements imposed by the Corporations Law on company officers. The company secretary also has specific responsibilities under the Corporations Law, including responsibility for ensuring that:

- the company keeps its registered office open during its opening hours
- the company lodges its annual return.

A company secretary's obligations may continue even after the company has been dissolved.

[sections 83, 217, 222A, 240, 242, 242C, 335, 574]

## **6 Shares and shareholders**

A proprietary company limited by shares has a share capital and must have at least one shareholder.

### *6.1 becoming a shareholder and ceasing to be a shareholder*

A person may become a shareholder of a company in several ways, including the following:

- the person being an initial shareholder of the company ; or
- the company allotting shares to the person; or
- the person buying shares in the company from an existing shareholder and the company registering the transfer.

A person ceases to be a shareholder of a company if:

- the person sells all of their shares in the company and the company registers the transfer of the shares; or
- the company buys back all the person's shares; or
- the ASC cancels the company's registration.

[sections 206I, 574, regulation 19 of Table A Schedule 1]

### *6.2 classes of shares*

A proprietary company must have at least one share. It may have different classes of shares. Usually the articles set out the rights that attach to each class of shares. Those rights distinguish the classes of shares from each other.

[sections 116, 118, regulation 2 of Table A Schedule 1]

### *6.3 Meetings of shareholders*

Shareholders may hold meetings of all shareholders or meetings of only those shareholders who hold a particular class of share. Directors have the power to call meetings but shareholders who hold at least 5% of the issued share capital can insist that a meeting be called.

Meetings may be held regularly or to resolve specific questions about the management or business of the company.

The Corporations Law and the company's articles set out rules about meetings including minimum notice periods and who can attend and vote.

A company must keep a written record of each meeting. The record usually includes information such as where and when the meeting was held and the of any voting.

[sections 246, 247, 253, 258, regulations 40 to 56 of Table A Schedule 1]

#### **6.4**     *voting rights*

Different rights to vote at meetings of shareholders may attach to different classes of shares. The entitlement to vote is usually set out in the company's articles.

[regulation 2 of Table A Schedule 1]

#### **6.5**     *buying and selling shares*

A shareholder may sell their shares but only if the sale would not breach the company's articles. A company's articles may give the company's directors the discretion to refuse to register the transfer of the shares between the seller and the buyer.

[sections 2061, 574, regulation 19 of Table A Schedule 1]

### **7**       **Funding the company's operations**

The initial shareholders may fund the company's operations by lending money to the company or by taking up other shares in the company.

The company may also borrow money from banks and other financial organisations.

Anyone who has lent money, or provided credit, to the company may require a mortgage or charge over the company's assets to secure the performance by the company of its obligations.

[sections 116, 161, regulation 66 of Table A Schedule 1]

### **8**       **Returns to shareholders**

Shareholders can take money out of the company in a number of ways but only the company complies with its articles, the Corporations Law and all other relevant laws. A director of a company that pays out money causing the compa to be unable to pay its debts as they fall due may be liable:

- to pay compensation; and
- for criminal penalties.

[sections 588G, 1317HA, 1317HB, 1317HD]

#### **8.1**     *dividends*

Dividends are payments to shareholders out of the company's after tax profits. The directors of the company decide whether the payment of dividends is appropriate.

[section 201, regulation 86 of Table A Schedule 1]

#### **8.2**     *buy-back of shares*

A company can buy back shares from shareholders.

[Division 4B of Part 2.4]

#### **8.3**     *distribution of surplus assets on winding up*

If a company is wound up and there are any assets left over after all the company's debts have been paid, the surplus is distributed to shareholders ; accordance with the company's articles.

[section 563A, regulation 97 of Table A Schedule 1]

## **9 Accounts and audit for small proprietary companies**

### *9.1 the small/large distinction*

The accounting requirements imposed on a proprietary company under the Corporations Law depend on whether the company is classified as small or large. A company's classification can change from one financial year to another as its circumstances change.

A company is classified as small if it satisfies at least 2 of the following tests:

- gross operating revenue of less than \$10 million;
- gross assets of less than \$5 million;
- fewer than 50 employees.

A company that does not satisfy at least 2 of these tests is classified as large.

[section 45A]

As the great majority of proprietary companies are small under these tests, discussion below deals mainly with the accounting requirements for small proprietary companies. If a company becomes large, the accounting requirements imposed on it are more extensive.

[section 315]

### *9.2 accounting records*

Under the Corporations Law, all proprietary companies must keep sufficient accounting records to allow annual accounts to be prepared and audited. "Accounting record" here means some kind of systematic record of the company's financial transactions - not merely a collection of receipts, invoices, bank statements and cheque stubs. Bookkeeping software may provide a convenient way to fulfil this obligation.

[sections 283, 289]

### *9.3 preparing accounts etc.*

The Corporations Law does not require a small proprietary company to prepare accounts (an annual profit and loss account and a balance sheet) unless the company is asked to do so by:

- shareholders holding at least 5% of the voting shares in the company; or
- the ASC.

Although the Corporations Law itself may not require a small proprietary company to prepare accounts except in the circumstances mentioned, the company may need to prepare the accounts for the purposes of other laws (for example, income tax laws). Moreover, good business practice may also make it advisable for the company to prepare the accounts so that it can monitor and better manage its financial position.

Generally, large proprietary companies must prepare accounts, have them audited, send them to shareholders and lodge them with the ASC.

[sections 283, 292 to 294, 317, 317B]

## **10 Disagreements within the company**

### *10.1 special problems faced by minority shareholders*

There are remedies available to a shareholder of a company if:

- the affairs of the company are being conducted in a way that is unfair to that shareholder or to other shareholders of the company; or

- the affairs of the company are being conducted in a way that is against the interests of the company as a whole.

[section 260]

### 10.2 *buy-back of shares*

A company may buy back the shares of a shareholder who wants to sever their relationship with the company.

[Division 4B of Part 2.4]

### 10.3 *selling shares*

A shareholder may not be able to sell their shares readily - particularly they want to sell their shares to someone who is not an existing shareho: Some of the difficulties they may face in that case are:

- restrictions in the company's articles on transferring shares;
- the limitations in the Law on offering shares to the public.

Even if an existing shareholder wants to buy the shares, the buyer and the seller may not be able to agree on a price for them.

## 11 **Companies in trouble**

### 11.1 *voluntary administration*

If a company experiences financial problems, the directors may appoint an administrator to take over the operations of the company to see if the company's creditors and the company can work out a solution to the company's problems.

If the company's creditors and the company cannot agree, the company will wound up (see 11.3 of the guide).

[Part 5.3A]

### 11.2 *receivers*

A receiver, or receiver and manager, may be appointed to take over some or all of the assets of a company. Generally this would occur if the company is in financial difficulty. A receiver may be appointed for example because an amount owed to a secured creditor is overdue.

[Part 5.2]

### 11.3 *winding up and distribution*

A company may be wound up by order of a Court, or voluntarily if the shareholders of the company pass a special resolution to do so.

A liquidator is appointed:

- when a Court orders a company to be wound up; or
- the shareholders of a company pass a resolution to wind up a company.

[Part 5.2, section 495]

### 11.4 *liquidators*

A liquidator is appointed to administer the winding up of a company. A liquidator's main functions are:

- to take possession of the company's assets; and
- to determine debts owed by the company and pay the company's creditors; and
- to distribute to shareholders any assets of the company left over after paying creditors (any distribution to shareholders is made according to the rights attaching to their shares); and
- finally, to dissolve the company.

[Parts 5.413, 5.5]

#### *11.5 order of payment of debts*

Generally, creditors who hold security over company assets are paid first.

[Division 6 of Part 5.6]

#### *11.6 cancellation of registration*

If a company has ceased trading or has been wound up, it remains on the register until the ASC cancels the company's registration.

[sections 573, 574]

## OTHER AMENDMENTS

### 1. Section 9 (definitions of "exempt proprietary company" and "proprietary company provisions")

Omit.

### 2. Section 9

Insert the following definitions:

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

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

### 3. Section 9 (definition of "proprietary company")

Omit, substitute:

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

### 4. After Division 5 of Part 1.2

Insert:

#### *Division 5A - Types of company*

45A Proprietary companies

(1) Proprietary company

A proprietary company is a company that:

(a) is registered as a proprietary company under section 120, 129, 137 or 145; or

(b) converts to a proprietary company under section 168.

Note: A proprietary company must:

- be limited by shares
- have 50 or fewer non-employee shareholders
- not do anything that would require lodgment of a prospectus under Part 7.12 (except in limited circumstances). (see section 116)

(2) Small proprietary companies

A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:

(a) the consolidated gross operating revenue for the financial year of the company and the entities it controls is less than \$10 million;

(b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls is less than \$5 million;

(c) the company and the entities it controls have fewer than 50 employees at the end of the financial year.

Note: A small proprietary company generally has reduced financial reporting requirements (see subsections 283(4), (5) and (6)).

(3) Large proprietary companies

A proprietary company is a large proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:

(a) the consolidated gross operating revenue for the financial year of the company and the entities it controls is \$10 million or more;

(b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls is \$5 million or more;

(c) the company and the entities it controls have 50 or more employees at the end of the financial year.

(4) Entities and controlled entities

In this section, "entity" has the meaning given by section 294A. Apply section 243E to decide whether a proprietary company controls another entity.

(5) Counting employees

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

(6) Accounting standards

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

**5. At the end of subsection 58C(1)**

Add:

Note: See also section 283A.

**6. Section 69**

Repeal.

**7. Section 114**

Repeal, substitute:

*114 Formation of companies*

(1) Proprietary companies

One or more persons may form a proprietary company by:

(a) subscribing their name to a memorandum; and

(b) complying with the registration requirements for proprietary companies set out in this Division.

(2) Public companies

Five or more persons may form a public company by:

- (a) subscribing their names to a memorandum; and
- (b) complying with the registration requirements for public companies set out in this Division.

**8. Section 116**

Repeal, substitute:

**116** *Proprietary companies*

(1) To be incorporated as a proprietary company and once incorporated as a proprietary company, a company must comply with this section.

(2) A proprietary company:

- (a) must be limited by shares; and
- (b) must have 50 or fewer non-employee shareholders;
- (c) and subject to subsection (4), must not engage in any activity that would require the lodgment of a prospectus under Part 7.12.

Note : If a proprietary company contravenes this subsection, one consequence is that may be required to convert to a public company (see section 170).

(3) In applying paragraph (2)(b):

- (a) count joint holders of a particular parcel of shares as one person; and
- (b) an employee shareholder is:
  - (i) a shareholder who is an employee of the company of a subsidiary of the company; or

(ii) a shareholder who was an employee of the company or of a subsidiary of the company, when they became a shareholder.

(4) Paragraph (2)(c) does not apply to an offer of shares to:

- (a) existing shareholders of the company; or
- (b) employees of the company or a subsidiary of the company.

(5) Effect of breaching prospectus limitations on transactions

An act or transaction is not invalid merely because of a contravention paragraph (2)(c).

**9. Subsection 118(3)**

Omit, substitute:

(3) If:

(a) the proposed company's memorandum states the matters that are required to be stated under paragraphs 117(1)(a), (b), (c) and (g); and

(b) the company is to be incorporated as a proprietary company

the application must set out the matters stated in the memorandum under those paragraphs.

**10. Subsection 120(2)**

Omit, substitute:

(2) The Commission must not register a company under this Division by a particular name unless that name is available within the meaning of section 367.

**11. Paragraphs 135(a) and (b)**

Add at the end "and".

**12. Paragraph 135(c)**

"transfer; and", substitute "transfer".

**13. Paragraph 135(d)**

Omit.

**14. At the end of section 136**

Add:

(4) The application may ask for registration as a proprietary company.

**15. Subsection 137(4)**

Omit, substitute:

(4) The Commission must register the applicant as a proprietary company if:

(a) it is limited by shares; and

(b) it has 50 or fewer non-employee shareholders; and

(c) its application asks for registration as a proprietary company.

(4A) In applying paragraph (4)(b):

(a) count joint holders of a particular parcel of shares as one person; and

(b) an employee shareholder is:

(i) a shareholder who is an employee of the company or of a subsidiary of the company; or

(ii) a shareholder who was an employee of the company, or of a subsidiary of the company, when they became a shareholder.

**16. Paragraph 164(3)(e)**

Omit the paragraph, substitute:

- (e) that a document has been duly sealed by the company if it bears what s to be an impression of the company's seal and either:
  - (i) the sealing of the document appears to be witnessed by 2 people, one of whom may be assumed to be a director of the company because of paragraph (b) or (c) and the other of whom may be assumed to be a director or a secretary of the company because of those paragraphs; or
  - (ii) the sealing of the document appears to be witnessed by one person who may be assumed to be a director and a secretary the company because of paragraph (b) or (c) but only if it is stated next to the signature that they witnessed the sealing in their capacity as the sole director and sole secretary of the company; and

**17. Subsections 168(1) and (2)**

Omit, substitute:

- (1) A public company limited by shares may convert to a proprietary company lodging a copy of a special resolution determining to convert to a proprietary company and specifying an appropriate alteration to its name.
- (2) Subject to its constitution, a proprietary company may convert to a public company by lodging:
  - (a) a copy of a special resolution determining to convert to a public company and specifying an appropriate alteration to its name; and
  - (b) in the case of a Table A proprietary company - a copy of its memorandum and its articles (if any).

**18. Section 170**

Repeal, substitute:

*170 Commission may order a proprietary company to convert to a public, company in certain circumstances*

- (1) The Commission may order a proprietary company to convert to a public' company under section 168 if it is satisfied that the company has contravened subsection 116(2).
- (2) The order:
  - (a) must be in writing; and
  - (b) must be given to the company.
- (3) A company must comply with an order given to it under subsection (1).

**19. Subsection 171(3)**

Omit ", share capital, or status as a proprietary company", substitute "or share capital" .

**20. Sections 177 and 178**

Repeal.

**21. Subsection 180(4)**

Omit.

**22. Section 186**

Repeal, substitute:

*186 Consequences for members of public company if the company carries on business with fewer than 5 members*

(1) This section applies to a person who is a member of a public company (except a company all of whose shares are held by a holding company that is a company or a recognised company).

(2) If the conditions set out in this section are satisfied, the person:

- (a) is severally liable for debts of the company; and
- (b) may be severally sued for payment of those debts; and
- (c) contravenes this subsection.

(3) The conditions are:

- (a) the number of members of the company falls below 5; and
- (b) the company carries on business for a continuous period of more than 6 months while the number of members is below 5; and
- (c) during the period and after those 6 months, the company contracts a debt; and
- (d) the person:
  - (i) is a member of the company at that time; and
  - (ii) is aware that the company is carrying on business with fewer than 5 members.

(4) In counting the members of a company for the purposes of subsection (3), count joint holders of a particular parcel of shares as one person.

**23. After subsection 205(10)**

Insert:

(10A) If a company is a proprietary company and has only one director, the signature requirement in paragraph (10)(c) is satisfied if the director signs the statement referred to in that paragraph.

**24. After subsection 220(4)**

Insert:

(4A) Without limiting the operation of subsection (1), a document may be served on a proprietary company that has only one director by delivering: a copy personally to that director.

## **25. Section 221**

Repeal, substitute:

### *221 Directors*

(1) Proprietary companies

A proprietary company must have at least one director. At least one director must ordinarily reside in Australia.

(2) Public companies

A public company must have at least 3 directors. At least 2 of them must ordinarily reside in Australia.

(3) Body corporate cannot be director

A body corporate cannot be appointed as a director.

## **26. After section 224**

Insert:

*224A Appointment of new director on death, mental incapacity or bankruptcy of single director/shareholder of proprietary company*

(1) Death or mental incapacity

If a person who is the only director and the only shareholder of a proprietary company:

- (a) dies; or
- (b) cannot manage the company because of the person's mental incapacity;

and a personal representative or trustee is appointed to administer the person's estate or property, the personal representative or trustee may appoint a person as the director of the company.

(2) Bankruptcy

If:

- (a) the office of the director of a proprietary company is vacated under paragraph 224(1)(c) because of the bankruptcy of the director; and
- (b) the person is the only director and also the only shareholder of the company; and
- (c) a trustee in bankruptcy is appointed to the person's property;

the trustee may appoint a person as the director of the company.

(3) A person who has a power of appointment under this section may appoint themselves as director.

(4) A person appointed as a director of a company under this section holds that office as if they had been properly appointed in accordance with the company's articles of association.

**27. After subsection 228(3)**

Insert:

(3A) If a proprietary company is a subsidiary of a public company:

- (a) subsection (3) does not apply to it; and
- (b) a person can continue to act as a director of the proprietary company until the next annual general meeting of the public company after the person turns 72; and
- (c) the person's office of director becomes vacant at the end of meeting.

Note: Proprietary companies do not need to hold annual general meetings (see subsection 245(2A)).

**28. Subsections 228(4), (5), (6) and (11)**

Insert "or (3A)" after "(3)".

**29. Subsection 228(7)**

Omit "subsection (8)", substitute "subsections (8) and (8A)".

**30. After subsection 228(8)**

Insert:

(8A) If the subsidiary is a proprietary company:

- (a) the person may be appointed or re-appointed as a director of the subsidiary until the end of the next annual general meeting of the holding company; and
- (b) the appointment does not need a resolution under subsection (7); and
- (c) the appointment must satisfy either paragraph (8)(a) or paragraph (8)(b).

**31. At the end of section 231**

Add:

(10) This section does not apply to a director who is the only director of a proprietary company and the only shareholder of that company.

**32. After subsection 240(7)**

Insert:

(7A) Subsection (7) does not apply if both the following conditions are satisfied:

- (a) the only director of a proprietary company is also the only secretary of the company;
- (b) whenever that person witnesses the use of the company seal - it is stated next to the signature that they witnessed the sealing in their capacity as the sole director and sole secretary of the company.

**33. Subsection 245(1)**

Omit ", or, in the case of an exempt proprietary company, within 6 months,".

**34. Subsection 245(2)**

Omit "(or, in the case of an exempt proprietary company, not more than 6 vnths)".

**35. After subsection 245(2)**

Insert:

(2A) Subsections (1) and (2) do not apply to a proprietary company.

**36. Subsection 245(4)**

Omit.

**37. Paragraph 249(1)(a)**

Omit, substitute:

- (a) a quorum is constituted by:
  - (i) in the case of a proprietary company with a single member - that member;  
and
  - (ii) in the case of a proprietary company with 2 or more members - 2 members personally present; and
  - (iii) in the case of a public company - 3 members personally present; and

**38. Subsection 255(1):**

Omit "an exempt proprietary company", substitute "a proprietary company".

**39. After section 255**

Insert:

*255A Decisions of single shareholder/single director proprietary companies*

- (1) If a proprietary company has only one shareholder and the shareholder <sup>4</sup>, records the shareholder's decision to a particular effect, the recording of? the decision counts as the passing by the shareholder of a resolution to that effect.
- (2) If a proprietary company has only one director and the director records the director's decision to a particular effect, the recording of the decisio counts as the passing by the director of a resolution to that effect.
- (3) A record made for the purposes of subsection (1) or (2) must be made in writing.
- (4) A record made for the purposes of subsection (1) or (2) also has effect minutes of the passing of the resolution.

#### **40. Before Division 1 of Part 3.6**

Insert:

##### *Division 1A - Application of Part*

##### **283 Application of Part**

(1) Disclosing entity

This Part applies to a disclosing entity for all its accounting periods.

(2) Public company or large proprietary company

This Part applies to a public company or a large proprietary company for all its accounting periods.

(3) Small proprietary company - keeping accounting records etc.

Sections 289, 317, 319 and 320 apply to a small proprietary company for all its accounting periods.

(4) Small proprietary company - foreign control and not covered by consolidated accounts

The other provisions of this Part apply to a small proprietary company for an accounting period if:

(a) the company is controlled by a foreign company for the whole or a part of the period; and

(b) the company's profit or loss for the period is not covered by accounts lodged with the Commission by the foreign company.

Note 1: For the concept of one company controlling another see section 243E.

Note 2: For "foreign company" see section 9.

(5) Small proprietary company - shareholder request If:

(a) subsections (1) and (4) do not apply to a small proprietary company; and

(b) shareholders make a request under section 283B for a financial year;

the provisions of this Part apply to the company for that year in accordance with the request.

(6) Small proprietary company - ASC request

If:

(a) subsections (1) and (4) do not apply to a small proprietary company; and

(b) the Commission makes a request under subsection 317(1) to the company for a financial year;

the provisions of this Part apply to the company for that year in accordance with the request.

##### **283A Time for preparing accounts etc.**

(1) This section applies for the purposes of working out the deadlines that apply to the various kinds of company for the purposes of this Part.

- (2) The deadline for an accounting period for a disclosing entity or a public company that is not a disclosing entity is the deadline for the period as defined in section 58C.
- (3) The deadline for a financial year for a large proprietary company that is not a disclosing entity is 4 months after the end of the year.
- (4) The deadline for a financial year for a small proprietary company referred to in subsection 283(4) is 4 months after the end of the year.
- (5) The deadline for a financial year for a small proprietary company that has been given a request under section 283B is worked out using subsections (6) and (7).
- (6) If the request is made before the end of the financial year, the deadline 4 months after the end of the financial year.
- (7) If the request is made after the end of the financial year, the deadline is:
  - (a) 6 weeks after the date on which the request is made; or
  - (b) 4 months after the end of the financial year;

whichever ends later.

- (8) The deadline for a financial year for a small proprietary company that has been given a request under subsection 317(1) is the date specified in the request.

#### **283B Small proprietary company - shareholder request**

- (1) Shareholders holding 5% or more of the voting shares in a small proprietary company may ask the company to comply with the provisio of this Part for a financial year.

Note: For "voting share" see section 9.

- (2) The request may be general or may specify the particular requirements this Part that the company is to comply with.
- (3) The request must be:
  - (a) served on the company; and
  - (b) signed by the shareholders making the request; and
  - (c) made no later than 12 months after the end of the financial year.

#### **41. Subsection 290(5)**

Omit all the words after "company,", substitute:

signed by:

- (a) in the case of a proprietary company that has only one director - that director; or
- (b) in any other case - at least 2 directors.

The notice must state the reasons for seeking the order.

**42. Subsection 296(1)**

Omit ", other than a company that pursuant to section 325 or 326 did not appoint auditor to audit the financial statements concerned,".

**43. Subsection 301(9) and (10)**

Omit.

**44. Subsection 302(8)**

Omit.

**45. Subsection 303(1)**

Omit, substitute:

(1) Subject to subsection (IA), a company's directors must comply with section 301, or sections 301 and 302, as the case requires, in relation to an accounting period before the auditor reports under this Part on the financial statements.

(1A) If:

(a) a company is a small proprietary company; and

(b) either:

(i) the Commission has asked the company under section 317 to prepare accounts; or

(ii) the shareholders have asked the company under section 283B to prepare accounts but have not asked the company to have the accounts audited;

the company's directors must comply with section 301, or sections 301 and 302, as the case requires, in relation to a financial year before the deadline after the financial year.

**46. At the end of section 303**

Add:

(3) If a company is a proprietary company and has only one director, the signature requirement in paragraph (2)(d) is satisfied if the director signs a report referred to in subsection (2).

**47. Paragraph 304(1A)(b)**

Omit "an exempt proprietary company", substitute "a proprietary company".

**48. Paragraph 305(1A)(b)**

Omit "an exempt proprietary company", substitute "a proprietary company".

**49. At the end of section 310**

Add:

(3) If a company is a proprietary company and has only one director, the signature requirement in paragraph (2)(d) is satisfied if the director sig a statement referred to in subsection (2).

**50. Subsection 313(3)**

Omit all the words after "company,", substitute:

signed by:

- (a) in the case of a proprietary company that has only one director - that director; or
- (b) in any other case - at least 2 directors.

The notice must state the reasons for seeking the order.

**51. Subsection 315(2)**

Omit "A company", substitute "A public company".

**52. After subsection 315(3) Insert:**

(3A) If a company is:

- (a) a large proprietary company for a financial year; or
- (b) a small proprietary company to which subsection 283(4) applies for a financial year;  
or
- (c) a small proprietary company that receives a request under section 283B for a financial year;

the company must send to each eligible person by the deadline for that year a copy of:

- (d) the company's financial statements for that year; and
- (e) each Division 5 statement for that year; and
- (f) the Division 6 report for that year; and
- (g) the auditor's report (if any) about the financial statements for that year under section 331A.

**53. Subsection 315(4)**

Omit "or (3)", substitute ", (3) or (3A)".

**54. Subsection 315(6)**

Omit.

**55. Subsection 316(1)**

Omit "A company", substitute "A public company".

**56. Section 317**

Repeal, substitute:

*317 ASC may require company to prepare or lodge accounts etc.*

- (1) The Commission may ask a small proprietary company to comply with the provisions of this Part for a financial year.
- (2) The request may be general or may specify the particular requirements of this Part that the company is to comply with.
- (3) A request under subsection (1) must specify the date by which the documents have to be prepared, sent or lodged. The date must be a reasonable one in view of the nature of the request.
- (4) The Commission may ask a company to lodge with the Commission any of the following documents for a financial year:
  - (a) the financial statements
  - (b) the Division 5 statements
  - (c) the Division 6 report
  - (d) the auditor's report on the financial statements.
- (5) A request under subsection (4) must specify the date by which the documents have to be lodged. The date must be at least 14 days after the date on which the request is served on the company.
- (6) A request under subsection (1) or (4) must:
  - (a) be made in writing; and
  - (b) be served on the company; and
  - (c) specify the financial year or years concerned.

**57. After section 317A**

Insert:

*317B Lodgment of accounts by proprietary companies*

- (1) Proprietary company accounts and reports

Subject to subsection (2), a proprietary company that is not a disclosing entity must lodge copies of the following documents with the Commission before the deadline for a financial year:

- (a) the company's financial statements for the year
- (b) the Division 5 statements for the year
- (c) the Division 6 report for the year
- (d) the report about the financial statements that section 331A requires from the company's auditor.

Note: This lodgment obligation will generally not apply to small proprietary companies because of subsections 283(4), (5) and (6).

- (2) Subsection (1) does not apply to a large proprietary company for a financial year if:
- (a) the company was an exempt proprietary company on 30 June 1994; and
  - (b) the company has continued to meet the definition of exempt proprietary company (as in force at 30 June 1994) at all times since that date; and
  - (c) the company is a large proprietary company at the end of the first financial year after the commencement of this section; and the company's financial statements have been audited for the financial year ending during 1993 and each later financial year; and
  - (d) within 4 months after the end of the first financial year of the company that ends after the commencement of this section, the company lodges with the Commission a notice that the company wants this subsection to apply to the company.
- (3) The Commission may extend the period referred to in paragraph (2)(e).

**58. Paragraphs 324(1)(f), (2)(g) and (2)(h)**

Omit "an exempt proprietary company", substitute "a proprietary company".

**59. Subsection 324(12)**

Omit "an exempt proprietary company", substitute "a proprietary company".

**60. Sections 325 and 326**

Repeal, substitute:

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

- (1) A small proprietary company only has to appoint an auditor under subsection 327(1), (3) or (5) or subsections 327(10) and (11) if it is covered by subsection 283(1) or (4).
- (2) If:
- (a) a small proprietary company receives a request under section 283B for a financial year; and
  - (b) to comply with the request the company has to have its financial statements for the year audited; and
  - (c) the company does not have an auditor;

the directors of the company must appoint an auditor for the company.

**61. Paragraphs 327(5)(b) and (12)(b)**

Omit "an exempt proprietary company", substitute "a proprietary company".

**62. Subsection 329(9):**

Omit "an exempt proprietary company", substitute "a proprietary company".

**63. Subsection 331A(2)**

After "(2)", insert "or (M)".

**64. Subsections 358(1) and (4)**

Omit.

**65. After subsection 363(3)**

Insert:

(3A) Without limiting the operation of subsection (1), a document may be served on a registered body that is registered as a proprietary company and has only one director by delivering a copy personally to that director.

**66. Subsection 372(2)**

Omit the subsection.

**67. Subsection 382(2)**

Omit, substitute:

(2) The Commission must not approve a change of name of a company under subsection (1) unless the proposed new name is available to the company within the meaning of section 367.

**68. Section 382A**

Repeal.

**69. Paragraphs 382(3)(a)**

Omit "to a name that is reserved in respect of that company under section 375", substitute "to a name that is available to the company".

**70. Subsection 532(4)**

Omit "that is an exempt proprietary company or is a subsidiary of a public company".

**71. Subsection 857(19)**

Omit "(other than an exempt proprietary company)", substitute "(except a proprietary company)".

**72. Subsection 858(7)**

Omit "(other than an exempt proprietary company)", substitute "(except a proprietary company)".

**73. Subsection 1215(19)**

Omit "(other than an exempt proprietary company)", substitute "(except a proprietary company)".

**74. Subsection 1216(7)**

Omit "(other than an exempt proprietary company)", substitute "(except a proprietary company)".

**75. Schedule 3**

(a) insert before "Section 126":

Subsection 116(2):

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

(b) Omit:

Section 170:

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

substitute:

Section 170:

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

(c) insert before "Section 333":

Section 317:

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

Section 317A:

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

**76. Acts repealed**

- Close Corporations Act 1989
- Close Corporations (Liquidators' Recovery Trust Fund Contribution) Act 1989
- Close Corporations (Additional Liquidators' Recovery Trust Fund Contribution) Act 1989
- Close Corporations (Fees) Act 1989.

## **COMPANY REGISTERS**

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### **COMMENTARY ON COMPANY REGISTERS**

1. The Corporations Law requires companies to keep various registers and make them available for public inspection.
2. The Bill will abolish the requirement to keep 5 of the existing registers. While requiring disclosure of essential information, it will eliminate duplication where information is available from ASC records and remove the need to keep less important information on registers.
3. The existing requirements have been criticised because:
  - some of the information is of little relevance or use to the company or the public
  - company registers are seldom inspected
  - information in the registers which is useful is also kept by the ASC or the ASX, and often more accessible there than through the company's registers
  - the rules differ from register to register and are spread throughout the Law.
4. There are also more specific problems with the provisions:
  - company officers are unable to withhold their residential address from the public record, even if there is a safety risk
  - material on registers can be misused for purposes such as the compilation of commercial mailing lists
  - directors and secretaries who leave a company can be unable to have their names removed from the ASC database.

#### **Members, option holders and debenture holders**

5. The Bill will insert a new Part 2.5 to deal with registers of members, option holders and debenture holders. It will bring together and make uniform the various requirements for these registers dealing with location, access, court correction, evidentiary value and agents' obligations (sections 216A to 216J). The register of options, which currently records information about grants of options, will be made more effective as a register of option holders (section 216C).
6. Branch registers will be abolished because they no longer serve a useful purpose (items 20 and 59).
7. The Bill recognises the role of computers in keeping registers by providing for access by computer where this is agreed and enabling a person to obtain a copy of a register in a form generated by the computer system on which the register is kept. The period within which a copy of a register must be given to a person who requests it and pays any applicable fee will be 7 days (section 216F).
8. A person will not be able to use information in the registers of members, option holders or debenture holders to contact anyone for purposes unrelated to their holding in the securities. Most significantly, this rule will preclude the use of these registers in connection with the sale and use of

commercial mailing lists. It will not interfere with use of the information for purposes such as contacting shareholders in relation to takeovers or in order to influence company management about the operation of the company. Civil and criminal remedies will be available for breaches of this rule (section 216J).

9. A company will, however, be able to approve use of the registers for relevant purposes. This will ensure that the company's management is accountable to the holders of its securities for any approved use made of the registers (section 216J).

#### **Directors, principal executive officers and secretaries**

10. Companies will no longer have to keep a register of directors, principal executive officers and secretaries (item 33). Information on directors and secretaries of companies will be available through the ASC.

11. The position of principal executive officer is not required for Corporations Law purposes and will no longer be recognised under the Law (item 33).

12. The company will be required to obtain each director's and secretary's signed consent to act before appointment, and will have to retain that consent permanently (section 222A).

13. A director or secretary who resigns or retires will be able to notify the ASC of their resignation or retirement (section 242C). This will enable the ASC to correct the public record. The company will still have an obligation to notify the ASC of the resignation or retirement (subsection 242(8)).

14. Directors will not be required to have their residential address available on-line from the ASC database where their safety or that of their family might be at risk (but the ASC will continue to hold these addresses). This facility will be based on the present system for the electoral roll under the *Commonwealth Electoral Act 1918*. Where directors satisfy the requirements of this Act for removal of their address from the electoral roll, they will be able to inform the ASC and provide an alternative address for service of legal process to be shown on ASC records. A similar procedure will be provided for the ASC to grant an exemption for directors who are not eligible to be included on the electoral roll (subsection 242(5)).

15. The Bill will also remove the requirement for:

- directors' consents to be lodged with the ASC in certain cases (items 21 and 22)
- companies to lodge with the ASC a list of continuing directors when providing details of a change in directors (item 33).

#### **Directors' shareholdings**

16. Companies will no longer have to keep this register (item 24). However, it is important that information be disclosed about trading in securities by directors of listed companies - as occurs in the United States, the United Kingdom and Canada.

17. For this reason the Bill will require that directors of listed companies disclose to the ASX the same information within the same timeframe as they are currently required to disclose to their companies (section 235). Disclosure to the ASX will be consistent with the role of the ASX in keeping the market informed of relevant information.

18. Initially, directors of listed companies will be required to notify the ASX of the information which is currently required to be on the company's register (section 235).

19. Under the *Corporate Law Reform Act 1994*, the information provided to the ASX and released to the market will be given to the ASC and accessible as part of the ASC records.

#### **Other registers**

20. Companies will no longer be required to keep registers of:

- substantial shareholders (item 51)
- notices of beneficial ownership (item 53)
- buy-backs (new share buy-backs Division).

21. Substantial shareholders will still be required to lodge notices with the company and with the ASX.

22. Companies will still be able to send a notice to a person requiring that they give details of their beneficial ownership of the company's shares.

23. Where a buy-back occurs, the share transfers will be recorded in the register of members (section 216B).

24. Listed companies will continue to give this information to the ASX and, as with other information the ASX releases to the market, it will also be accessible through the ASC. Information on buy-backs by listed companies will also be lodged with the ASC (section 206J new share buy-backs Division).

## **NEW PROVISIONS**

### **Part 2.5 - Registers**

- 216A Registers to be maintained
- 216B Register of members
- 216C Register of option holders and copies of options documents
- 216D Register of debenture holders
- 216E Location of registers
- 216F Right to inspect and get copies
- 216G Agent's obligations
- 216H Correction of registers
- 216I Evidentiary value of registers
- 216J Use of information on registers

## **PART 2.5 - REGISTERS**

### **216A Registers to be maintained**

A company must set up and maintain:

- (a) a register of members (see section 216B); and
- (b) if the company grants options over unissued shares - a register of option holders and copies of options documents (see section 216C); and
- (c) if the company issues debentures - a register of debenture holders (see section 216D).

Note 1: See also section 271 (register of charges) and section 702 (register of unclaimed property of dissenting shareholders).

Note 2: The registers may be kept on computer (see section 1306).

### **216B Register of members**

#### **(1) General requirements**

The register of members must contain the following information about each member:

- (a) the member's name and address
- (b) the date on which the member's name was entered in the register.

#### **(2) Index to register**

If the company has more than 50 members, the company must include in the register an up-to-date index of members' names. The index must be convenient to use and allow a member's entry in the register to be readily found. A separate index need not be included if the register itself is kept in a form that operates effectively as an index.

#### **(3) Companies with share capital**

If the company has a share capital, the register must also show:

- (a) the date on which every allotment of shares takes place; and
- (b) the number of shares allotted to each allottee; and
- (c) the shares held by each member; and
- (d) the class of shares; and
- (e) the share numbers (if any), or share certificate numbers (if any), of the shares; and
- (f) the amount paid, or agreed to be considered as paid, on the shares.

Note: Transfers of shares are entered in the register under section 1092. Section 213 deals with the registration of trustees etc. on the death, incapacity or bankruptcy of the shareholder.

(4) For the purposes of subsection (3), 2 or more persons who jointly hold shares in the company are taken to be a single member of the company in relation to those shares. They may also be members of the company because of shares that they hold in their own right or jointly with others.

(5) Companies with stock

If the company converts shares to stock, the register must show the amount of stock, or the number of stock units, held by each member who holds stock.

(6) Non-beneficial ownership - companies other than listed companies

The register of a company that:

- (a) has a share capital; and
- (b) is neither a listed company (within the meaning of section 603) nor a company covered by an order under section 707;

must indicate any shares or stock that a member does not hold beneficially.

Note: See also section 208 (in particular, subsection 208(9) which contains relevant presumptions about beneficial ownership).

(7) In deciding for the purposes of subsection (6) whether a member holds shares beneficially or non-beneficially, the company is to have regard only to information in notices given to the company under section 208 or 722.

(8) Former members

The register must also show:

- (a) the name and details of each person who stopped being a member of the company within the last 7 years; and
- (b) the date on which the person stopped being a member.

The company may keep these entries separately from the rest of the register.

**216C Register of option holders and copies of options documents**

(1) The register of option holders must contain the following information about each holder of options over unissued shares in the company:

- (a) the option holder's name and address
- (b) the date on which the option holder's name was entered in the register
- (c) the date of grant of the options
- (d) the number and description of the shares over which the options were granted
- (e) the period during which the options may be exercised
- (f) the time at which the options may be exercised
- (g) any event that must happen before the options can be exercised
- (h) any consideration for the grant of the options
- (i) any consideration for the exercise of the options or the method by which that consideration is to be determined.

Note: As the register is a register of the holders of current options, the register will need to be updated when options expire or are exercised.

(2) Information about the grant of an option must be entered in the register within 14 days after the grant of the option.

(3) Copies of options documents

The company must keep with the register a copy of every document that grants an option over unissued shares in the company unless the option has been granted official quotation by a securities exchange.

(4) If:

(a) an option over unissued shares in a company is transferred from one person to another; and

(b) the transferor gives the company written notice of the transfer;

the company must change the register to reflect the transfer.

(5) A company's failure to comply with this section in relation to an option does not affect the option itself.

#### **216D Register of debenture holders**

(1) The register of debenture holders must contain the following information about each debenture holder:

(a) the debenture holder's name and address

(b) the amount of the debentures held.

(2) A company's failure to comply with this section in relation to a debenture does not affect the debenture itself.

(3) For the purposes of this section, a document is a debenture even if it would normally fall within an exception set out in paragraph (a), (b), (c) or (f) of the definition of "debenture" in section 9.

#### **216E Location of registers**

(1) A register kept under this Part must be kept at:

(a) the company's registered office; or

(b) an office (whether of the company or of someone else) where the work involved in maintaining the register is done; or

(c) another office approved by the Commission.

The office must be in Australia.

(2) Notice to ASC

The company must lodge with the Commission a notice of the address at which the register is kept if the register is:

- (a) established at an office that is not the company's registered office; or
- (b) moved from one office to another.

The company must lodge the notice within 7 days after establishing or moving the register.

## **216F Right to inspect and get copies**

### (1) Right to inspect

A company must allow anyone to inspect a register kept under this Part. If the register is not kept on a computer, the person inspects the register itself. If the register is kept on a computer the person inspects a hard copy of the information on the register unless the person and the company agree that the person is to access the information by computer.

Note: Other provisions that are relevant to the inspection of registers are:

- section 1300 (place and times for inspection)
- section 1301 (the location of documents that are kept on computers)
- section 1306 (form and evidentiary value).

### (2) Inspection fees

A member of a company may inspect the company's register of members, register of option holders or register of debenture holders without charge. A registered option holder may inspect the company's register of option holders without charge. A registered debenture holder may inspect the company's register of debenture holders without charge. Other inspections take place only on payment of any fee (up to the prescribed amount) required by the company.

### (3) Right to get copies

If a person:

- (a) asks the company for a copy of the register or a part of the register; and
- (b) pays any fee (up to the prescribed amount) required by the company;

the company must give the person the copy within 7 days (or a longer period approved by the Commission). If the register is kept on a computer and the person asks for the data on disk, the company must give the data to the person on disk. The company does not have to give the data in a particular format requested by the person.

(4) A person has the same rights to inspect, and obtain copies of, a company's options documents kept under subsection 216C(3) as the person has in respect of the register of option holders itself.

(5) The company is not required under subsection (1) or (3) to allow a person to see, or to give a person a copy that contains, share certificate numbers.

## **216G Agent's obligations**

A person who agrees to maintain a register on behalf of a company for the purposes of this Part must:

- (a) make the register available for inspection under this Part; and
- (b) provide the copies required by this Part.

## **216H Correction of registers**

- (1) A company or a person aggrieved may apply to the Court to have a register kept by the company under this Part corrected.
- (2) If the Court orders the company to correct the register, it may also order the company to compensate a party to the application for loss or damage suffered.
- (3) If:
  - (a) the Court orders a company to correct its register of members; and
  - (b) the company has lodged a list of its members with the Commission;

the company must lodge notice of the correction with the Commission.

## **216I Evidentiary value of registers**

A register kept under this Part is prima facie evidence of the matters shown in the register under this Part.

## **216J Use of information on registers**

- (1) A person must not:
  - (a) use information about a person obtained from a register kept under this Part to contact the person or send material to the person; or
  - (b) sell information of that kind;unless that use of the information is:
  - (c) relevant to the holding of the securities concerned or the exercise of the rights attaching to those securities; or
  - (d) approved by the company.

**Note:** An example of using information to send material to a person is putting a person's name and address on a mailing list for advertising material.

- (2) A person who contravenes subsection (1) is liable to compensate anyone else who suffers loss or damage because of the contravention.
- (3) A person who makes a profit from a contravention of subsection (1) owes a debt to the company. The amount of the debt is the amount of the profit.

## OTHER AMENDMENTS

### 1. Section 9

Insert the following definition:

"Australian register" of a foreign company means a branch register of members kept under section 351;

### 2. Section 9 (definitions of "branch register", "principal executive officer", "principal Australian register" and "principal register")

Omit, substitute:

"branch register" means a register kept under section 351 of the members of a foreign company;

### 3. Subsection 31(1)

Omit "sections 234, 235 and 236", substitute "section 235".

### 4. Paragraph 43(a)

Omit "sections 234, 235 and 236", substitute "section 235".

### 5. Section 109X

Add at the end:

(3) Service on director or secretary

A document may be served on, or delivered to, a director or secretary:

- (a) in their capacity as a director or secretary; or
- (b) for the purposes of a proceeding in respect of conduct they engaged in as a director or secretary;

by leaving it at, or posting it to, the alternative address notified to the Commission under subsection 242(5).

(4) Subsection (3) applies whether the service or delivery is made for the purposes of a provision of this Law or for the purposes of another law.

### 6. Paragraph 152(1)(a)

Omit "209, 215, 235, 242, 271, 715, 724", substitute "216A, 271".

### 7. Paragraph 152(4)(a)

Omit "210(3), 215(5), 235(8), 242(6), 271(4), 715(3), 724(4)", substitute "216F(1), 216F(3), 271(4)".

### 8. Paragraph 164(3)(b)

- (a) Omit ", the principal executive officer".
- (b) Omit ", by the principal executive officer".

(c) Insert "notices or" after "from".

**9. Paragraph 164(3)(f)**

Omit "the principal executive officer,".

**10. Subsection 180(5)**

Omit ", the principal executive officer".

**11. Heading to Division 5 of Part 2.4 Omit, substitute:**

*Division 5 - Miscellaneous*

**12. Section 207**

Repeal.

**13. Subsection 208(9)**

Omit "209", substitute "216B".

**14. Sections 209 to 212**

Repeal.

**15. Subsection 213(1) (definition of "share")**

Omit "or branch register".

**16. Subsection 213(9)**

Omit "or branch register" (wherever occurring).

**17. Subsection 213(10)**

Omit "209", substitute "216B".

**18. Paragraph 213(10)(a)**

Omit "or a branch register".

**19. Paragraph 213(10)(b)**

Omit "209", substitute "216B".

**20. Sections 214 to 215**

Repeal.

**21. Subsection 222(1)**

Omit ", either personally or by an agent authorised in writing for the purpose, signed and lodged with the Commission a consent in writing to act as a director and".

**22. Subsection 222(3)**

Omit "(other than the provisions relating to the signing of a consent to act as director) ".

**23. After section 222**

Insert:

**222A Consent to act as director or secretary**

- (1) A company contravenes this subsection if a person does not give the company a signed consent to act as director or secretary of the company before being appointed.
- (2) The company must keep the consent permanently.

**24. Section 235**

Repeal, substitute:

**235 Listed company - director to notify securities exchange of shareholdings etc.**

- (1) Notifiable interests

A director of a listed company must notify the relevant securities exchange under subsections (3) and (4) of the following interests of the director:

- (a) relevant interests in shares of the company or of a related body corporate
- (b) relevant interests in debentures of, or prescribed interests made available by, the company or a related body corporate
- (c) rights or options over shares in, debentures of, or prescribed interests made available by, the company or a related body corporate
- (d) contracts:
  - (i) to which the director is a party or under which the director is entitled to a benefit; and
  - (ii) that confer a right to call for or deliver shares in, debentures of, or prescribed interests made available by, the company or a related body corporate.

- (2) A notice of a relevant interest under paragraph (1)(a) or (b) must give details of the nature and extent of the relevant interest.

- (3) Occasions for initial notification

The director must notify the exchange within 14 days after each of the following occasions:

- (a) the commencement of this section
- (b) appointment as a director of the company after that commencement
- (c) the listing of the company after that commencement.

Paragraph (b) does not apply to a director who retires and is then reappointed at the same meeting.

- (4) Updating notices

The director must notify the exchange within 14 days after any change in the director's interests.

(5) The director need not give the information to the exchange under this section if the director has already given the information to the exchange under Part 6.7.

**25. Paragraphs 236(1)(a) and (b)**

Omit.

**26. Paragraphs 236(2)(a) and (b)**

Omit.

**27. Subsection 236(4)**

Omit "the principal executive officer, or a secretary," substitute "a secretary".

**28. Paragraph 236(5)(b)**

Omit "the principal executive officer, or a secretary, as the case may be," substitute "a secretary".

**29. Subsections 236(6) and (7)**

Omit.

**30. Subsection 237(19) (paragraph (a) of the definition of "prescribed office")**

Add at the end "and".

**31. Subsection 237(19) (paragraph (b) of the definition of "prescribed office")**

Omit.

**32. Subsection 237(19) (paragraph (c) of the definition of "prescribed office")**

Omit "or (b)".

**33. Sections 242 and 242A**

Repeal, substitute:

*242 Notice of name and address of directors and secretaries*

(1) Registration

Within 1 month after it is registered under section 120 or 137, a must lodge with the Commission a notice of the personal f each director and secretary.

(2) New directors or secretaries

If a person is appointed as a director or secretary of the company, any must lodge with the Commission, within 1 month after intment, a notice of the personal details of the director or secretary.

(3) Personal details

The personal details of a director or secretary are:

- (a) present given and family name; and

- (b) all former given and family names; and
- (c) date and place of birth; and
- (d) address.

(4) Address

Subject to subsection (5), a person's address must be their usual residential address.

(5) A person is entitled to have a different address included in notices under subsections (1), (2) and (7) if:

- (a) their name, but not their residential address, is on an electoral roll under the *Commonwealth Electoral Act 1918* because of section 104 of that Act; or
- (b) their name is not on an electoral roll under that Act and the Commission determines, in writing, that including their residential address in the notices under this section would put at risk their personal safety or the personal safety of members of their family.

This alternative address must be in Australia and be one at which documents can be served on the person. At any particular time, a person is entitled to have only one alternative address in current notices under this section.

Note: See subsection 109X(3) on the status of the alternative address as an address for service.

(6) A person who takes advantage of subsection (5) must:

- (a) before or at the same time as the alternative address is first included in a notice under this section, lodge with the Commission notice of the person's usual residential address; and
- (b) lodge with the Commission notice of any change in the person's usual residential address within 14 days after the change.

(7) Changes in details

The company must notify the Commission of any change in the personal details of a director or secretary. The notice must be given within 1 month after the change.

(8) Notice of directors or secretaries leaving the company

If a person stops being a director or secretary of the company, the company must notify the Commission of the fact within 1 month.

**242A** *ASC power to ask for information about person's position as director or secretary*

(1) The Commission may ask a person, in writing, to inform the Commission:

- (a) whether the person is a director or secretary of a particular company; and
- (b) if the person is no longer a director or secretary of the company - the date on which the person stopped being a director or secretary.

(2) The person must give the information to the Commission in writing by the date specified in the request.

**242B** *Commission certificate*

The Commission may certify that a person was a director or secretary of a company at a particular time or during a particular period. The certificate is prima facie evidence of the matters stated in it.

Note: See section 1274B for the evidentiary status of documents prepared by the ASC from the national database.

**242C** *Director or secretary may notify ASC of resignation or retirement*

(1) If a director or secretary of a company resigns, they may notify the Commission of the resignation by lodging with the Commission a copy of the letter of resignation given to the company.

(2) If a director or secretary of a company retires, they may give the Commission written notice of their retirement.

(3) Nothing in this section affects the company's obligations to notify the Commission of the resignation or retirement.

**34. At the end of subparagraphs 244(3)(d)(i), (ii) and (iii)**

Add "and" .

**35. Subparagraph 244(3)(d)(iv)**

Omit "and" .

**36. Subparagraph 244(3)(d)(v)**

Omit.

**37. Paragraph 307(1)(b)**

Omit, substitute:

(b) if the company is a listed company - that director's relevant interests in shares of the company or of a related body corporate that paragraph 235(1)(a) requires the director to notify to the relevant securities exchange; and

**38. Paragraph 337(1)(b)**

Omit "principal register", substitute "register of members".

**39. Paragraph 341(c)**

Omit, substitute:

(c) a list of its directors containing personal details of those directors that are equivalent to the personal details of directors referred to in subsection 242(3);

**40. Paragraph 344(c)**

Omit, substitute.

(c) a list of its directors containing personal details of those directors that are equivalent to the personal details of directors referred to in subsection 242(3);

**41. Section 351**

- (a) Omit from paragraph (2)(a) "a principal", substitute "an".
- (b) Omit from subsections (3), (4) and (5) "principal".
- (c) Omit from subsection (4) "that does not keep a register under section 352".

**42. Section 352**

Repeal.

**43. Subsection 353(1)**

Omit "or 352".

**44. Subsection 353(2)**

Omit "principal register", substitute "register of members".

**45. Subsection 353(5)**

Omit "rectification" (wherever occurring), substitute "correction".

**46. Paragraphs 354(a) and (c)**

Omit "or 352".

**47. Paragraph 355(b)**

Omit "or 352".

**48. Section 355**

Omit "352,".

**49. Section 356**

Repeal, substitute:

*356 Index of members and inspection of registers*

(1) Subsection 216B(2) applies, with such modifications as are necessary, in relation to a register kept under section 351.

(2) Sections 216F and 216G apply, with such modifications as are necessary, to the inspection of a register kept under section 351.

**50. Section 357**

Omit "or 352".

Other amendments

**51. Subsections 715(1), (2) and (3)**

Omit.

**52. Subsections 716(2) and (3)**

Omit.

**53. Section 724**

Repeal.

**54. Subsection 726(2)**

Omit.

**55. Subsection 726(3)**

Omit ", 723 or 724", substitute "or 723".

**56. Section 727**

Omit all the words from and including "proved that:", substitute "proved that the giving of the notice was frivolous or vexatious."

**57. Subsection 742(3)**

Omit all the words from and including "satisfied:", substitute "satisfied that the giving of the notice was frivolous or vexatious. "

**58. Subsection 1047(1)**

Omit.

**59. Section 1048**

Repeal.

**60. Subsection 1070(2)**

Omit "(except section 214)", substitute "and Part 2.5".

**61. Subsection 1083(2) (definition of "prescribed provision")**

Omit all the words after "means", substitute "section 216D or a provision of Division 2, 4 or 6 of this Part. "

**62. Subsection 1085(3)**

Omit, substitute:

(3) For the purposes of any law, a share or other interest of a member in a company is taken to be situated in the State or Territory in which the company's register of members is kept.

**63. Paragraph 1087(1)(a)**

Omit, substitute:

(a) must be under the common seal of the company; and

**64. Before subparagraph 1274(2) (a) (i) Insert:**

(iaa) a notice lodged under subsection 242(6);

**65. Subsection 1302(1)**

Omit "209, 215, 235, 242, 271, 715, 724", substitute "271".

**66. Subsection 1302(2)**

Omit.

**67. Subsections 1302(3) and (4)**

Omit "or (2)".

**68. Subsections 1302(3), (4) and (5)**

Omit "or branch register" (wherever occurring).

**69. Subsection 1302(6)**

Omit.

**70. Schedule 3**

(a) insert before "Section 219":

Section 216A:

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

Subsection 216C(3):

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

Section 216E:

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

Section 216F:

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

Section 216G:

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

Section 216J:

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

(b) insert before "Section 224":

Section 222A:

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

(c) insert before "Section 236":

Section 235:

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

(d) insert before "Section 243ZF" :

Section 242:

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

Section 242A:

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

## LIST OF NEW AND AMENDED SECTIONS

This list sets out the items that amend existing sections of the Corporations Law and that insert new sections into the Corporations Law. A reference in the list to the item number for a topic is a reference to the item number of an amendment in the "other amendments" area for that topic. New sections are marked with an asterisk.

<b>Corporations Law section</b>	<b>amended/inserted by</b>	<b>topic</b>
9	Item 1	Buy-backs
	Items 1 and 2	Registers
	Items 1 to 3	Proprietary companies
31	Item 3	Registers
*42A	Item 2	Buy-backs
43	Item 4	Registers
Division 5A of Part 1.2	Item 4	Proprietary companies
58C	Item 5	Proprietary companies
69	Item 6	Proprietary companies
109X	Item 5	Registers
Part 1.4	Part 1.4	Small business guide
114	Item 7	Proprietary companies
116	Item 8	Proprietary companies
118	Item 9	Proprietary companies
120	Item 10	Proprietary companies
135	Items 11 to 13	Proprietary companies
136	Item 14	Proprietary companies
137	Item 15	Proprietary companies
152	Items 6 and 7	Registers
164	Item 16	Proprietary companies
	Items 8 and 9	Registers
168	Item 17	Proprietary companies
170	Item 18	Proprietary companies
171	Item 19	Proprietary companies
177 and 178	Item 20	Proprietary companies
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