

Reprint
as at 1 November 2007

Companies Amendment Act 2006

Public Act 2006 No 56
Date of assent 7 November 2006

Contents

	Page
1 Title	9
2 Commencement	10
3 Principal Act amended	10
4 Interpretation	10
5 Interpretation	10
Voluntary administration	
6 New Part 15A inserted	10
Part 15A	
Voluntary administration	
Subpart 1—Preliminary	
239A Objects of this Part	10
239B Interpretation of some key terms	11
239C Interpretation of other terms	11
239D When administration begins	12

Note

Changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in this eprint.

A general outline of these changes is set out in the notes at the end of this eprint, together with other explanatory material about this eprint.

This Act is administered by the Ministry of Economic Development.

239E	When administration ends	12
	Subpart 2—Appointment of administrator	
239F	Who may be appointed administrator	13
239G	Administrator must consent in writing	13
239H	Who may appoint administrator	13
239I	Appointment by company	14
239J	Appointment by liquidator or interim liquidator	14
239K	Appointment by secured creditor	15
239L	Appointment by Court	15
239M	Appointment must not be revoked	15
239N	Appointment of 2 or more administrators	16
239O	Remuneration of administrator	16
	Subpart 3—Resignation and removal of administrator	
239P	When office of administrator is vacant	16
239Q	Administrator may resign	17
239R	Removal of administrator	17
239S	Appointor may appoint new administrator to fill vacancy	17
239T	Creditors must consider appointment of replacement administrator	18
	Subpart 4—Effect of appointment of administrator	
239U	Outline of administrator's role	18
239V	Administrator's powers	19
239W	Administrator is company's agent	19
239X	Effect on directors	19
239Y	Effect on employees	20
239Z	Effect on dealing with company property	20
239AA	Company officer's liability for compensation for void transaction or dealing	21
239AB	Effect on transfer of shares	21
239AC	Effect on liquidation	22
239AD	Effect on receivership	22
	Subpart 5—Administrator's investigation of company's affairs	
239AE	Administrator must investigate company's affairs and consider possible courses of action	22
239AF	Directors' statement of company's position	23
239AG	Administrator's right to documents, etc	23
239AH	Administrator may lodge report with Registrar	23
239AI	Administrator must report misconduct	23

Subpart 6—Creditors’ meetings generally	
239AJ	Administrator must call creditors’ meetings 24
239AK	Conduct of creditors’ meetings 25
239AL	Joint meetings of creditors of related companies in administration 25
239AM	Power of Court where outcome of voting at creditors’ meeting determined by related entity 26
Subpart 7—First creditors’ meeting to appoint creditors’ committee	
239AN	Administrator must call first creditors’ meeting 28
239AO	Notice of first and subsequent creditors’ meetings 28
239AP	Administrator must table interests statement 28
239AQ	Functions of creditors’ committee 28
239AR	Membership of creditors’ committee 29
Subpart 8—Watershed meeting	
239AS	What watershed meeting is 29
239AT	Administrator must convene watershed meeting 29
239AU	Notice of watershed meeting 29
239AV	When watershed meeting must be held 30
239AW	Directors must attend watershed meeting 30
239AX	Disclosure of voting arrangements 31
239AY	Court may order that pooled property owners are separate class 31
239AZ	Adjournment of watershed meeting 32
239ABA	What creditors may decide at watershed meeting 32
239ABB	What happens if proposed deed not fully approved at watershed meeting 32
Subpart 9—Protection of company’s property during administration	
239ABC	Charge unenforceable 33
239ABD	Owner or lessor must not recover property used by company 33
239ABE	Proceeding must not be begun or continued 33
239ABF	Administrator not liable in damages for refusing consent 34
239ABG	Enforcement process halted 34
239ABH	Duties of court officer in relation to company’s property 34
239ABI	<i>Lis pendens</i> taken to exist 35

239ABJ	Administration not to trigger enforcement of guarantee of liability of director or relative Subpart 10—Rights of secured creditor, owner, or lessor	35
239ABK	Meaning of terms used in this subpart	36
239ABL	If secured creditor acts before or during decision period	37
239ABM	If enforcement of charges begins before administration	38
239ABN	Charge over perishable property	39
239ABO	Court may limit powers of secured creditor, etc, in relation to property subject to charge	39
239ABP	Giving notice under security agreement	40
239ABQ	If recovery of property begins before administration	40
239ABR	Recovering perishable property	40
239ABS	Court may limit powers of receiver, etc, in relation to property used by company	41
239ABT	Giving notice under agreement about property Subpart 11—Interface with liquidation	41
239ABU	When liquidator may be appointed to company in administration	42
239ABV	Court may adjourn application for liquidation	42
239ABW	Court must not appoint interim liquidator if administration in creditors' interests	42
239ABX	Effect of appointment of liquidator	42
239ABY	Former administrator is default liquidator	42
239ABZ	Person in control of company must lodge revised report with Registrar	43
239ACA	Act of administrator in good faith must not be set aside in liquidation	43
239ACB	Voidable transactions Subpart 12—Deed administrator	44
239ACC	Who is deed administrator	44
239ACD	Who may be appointed deed administrator	44
239ACE	Deed administrator must consent in writing	44
239ACF	Appointment of deed administrator must not be revoked	45
239ACG	Appointment of 2 or more deed administrators	45
239ACH	When office of deed administrator vacant	45
239ACI	Deed administrator may resign	45

239ACJ	Removal of deed administrator	45
239ACK	Remuneration of deed administrator	46
239ACL	Deed administrator may sell shares in company	46
	Subpart 13—Execution and effect of deed of company arrangement	
239ACM	When this subpart applies	46
239ACN	Preparation and contents of deed	47
239ACO	Execution of deed	47
239ACP	Procedure if deed not fully approved at watershed meeting	48
239ACQ	Creditor must not act inconsistently with deed, etc, before execution	49
239ACR	Company's failure to execute deed	49
239ACS	Who is bound by deed	49
239ACT	Extent to which deed binds creditors	50
239ACU	Person bound by deed must not take steps to liquidate, etc	50
239ACV	Court may restrain creditors and others from enforcing charge or recovering property	51
239ACW	Effect of deed on company's debts	51
239ACX	Court may rule on validity of deed	52
	Subpart 14—Administrator's duty to file accounts	
239ACY	Administrator includes deed administrator	52
239ACZ	Administrator must file accounts	52
	Subpart 15—Variation and termination of deed	
239ADA	Creditors may vary deed	53
239ADB	Court may cancel creditors' variation	53
239ADC	Termination of deed	53
239ADD	Termination by Court	54
239ADE	Termination by creditors	55
239ADF	Creditors' meeting to consider proposed variation or termination of deed	55
	Subpart 16—Administrator's liability and indemnity for debts of administration	
239ADG	Administrator not liable for company's debts except as provided in this subpart and in section 239Y	56
239ADH	Administrator liable for general debts	56
239ADI	Administrator's liability for rent	56
239ADJ	Administrator not liable for rental if non-use notice in force	57

239ADK	Court may exempt administrator from liability for rent	58
239ADL	Administrator's indemnity	58
239ADM	Administrator's right of indemnity has priority over other debts	58
239ADN	Lien to secure indemnity	59
	Subpart 17—Powers of Court	
239ADO	Court's general power	59
239ADP	Orders to protect creditors during administration	59
239ADQ	Court may rule on validity of administrator's appointment	60
239ADR	Administrator may seek directions	60
239ADS	Court may supervise administrator or deed administrator	60
239ADT	Court may order administrator or deed administrator to remedy default	61
239ADU	Court's power when office of administrator or deed administrator vacant, etc	61
239ADV	Prohibition order	62
	Subpart 18—Notices about steps taken under this Part	
239ADW	Administrator must give notice of appointment	63
239ADX	Secured creditor who appoints administrator must give notice to company	64
239ADY	Deed administrator must give notice of execution of deed of company arrangement	64
239ADZ	Deed administrator must give notice of failure to execute deed of company arrangement	64
239AEA	Deed administrator must give notice of termination by creditors of deed of company arrangement	65
239AEB	Company must disclose fact of administration	65
239AEC	Notice of change of name	65
239AED	Effect of contravention of this subpart	66
	Subpart 19—Miscellaneous	
239AEE	Effect of things done during administration of company	66
239AEF	Interruption of time for doing act	66
	Subpart 20—Set-off and netting agreements	
239AEG	Mutual credit and set-off	66
239AEH	Application of set-off under netting agreement	67

239AEI	Calculation of netted balance	67
239AEJ	Mutuality required for transactions under bilateral netting agreements	68
239AEK	When mutuality required for transactions under recognised multilateral netting agreements	68
239AEL	Application of set-off under section 239AEG to transactions subject to netting agreements	68
239AEM	Transactions under netting agreement and effect on certain sections	68
239AEN	Rights under netting agreement not affected by commencement of administration	69
239AEO	Effect of declaration of person as recognised clearing house under section 310K	69
239AEP	Transactions under recognised multilateral netting agreement not affected by variation or revocation of declaration under section 310K	70
	Subpart 21—Single administration of related companies in administration	
239AEQ	Interpretation of terms for purposes of this subpart	70
239AER	Court may order single administration for related companies in administration	70
239AES	Notice that application filed must be given to administrators and creditors	71
239AET	Guidelines for single administration order	71
239AEU	Court may order that related company in administration be added to existing pool	72
239AEV	Creditors' meetings in single administration of pool companies	72
239AEW	Pool companies may execute single deed of company administration	73
	Amendments to Companies Act 1993 consequential on new voluntary administration provisions	
7	Commencement of liquidation	73
8	Commencement of liquidation to be recorded	73
9	Liquidator to summon meeting of creditors	74
10	Court may terminate liquidation	74
11	Restrictions on rights of creditors to complete execution, distraint, or attachment	74
12	Other duties of liquidator	75
13	Restriction on enforcement of lien over documents	75

14	Power of Court to require persons to repay money or return property	75
	Appointment of liquidator	
15	New section 241AA inserted	75
	241AA Restriction on appointment of liquidator by shareholders or board after application filed for Court appointment	75
	Liquidator's duty to report to creditors	
16	Liquidator to summon meeting of creditors	76
17	Liquidator may dispense with meetings of creditors	76
18	New section 245A inserted	76
	245A Power of Court where outcome of voting at meeting of creditors determined by related entity	76
19	Other duties of liquidator	78
20	Duty to notify suspected offences	78
	Assignment of liquidator's statutory right to sue	
21	New section 260A inserted	78
	260A Liquidator may assign right to sue under this Act	78
	Liquidator's power of disclaimer	
22	Power to disclaim onerous property	79
	Pooling of assets of related companies	
23	New section 271A inserted	79
	271A Notice that application filed must be given to administrators and creditors	79
	Qualifications and supervision of liquidators	
24	Qualifications of liquidators	80
25	Meaning of failure to comply	81
26	Orders to enforce liquidator's duties	81
	Voidable transactions	
27	Transactions having preferential effect	81
28	Voidable charges	83
29	New section 294 substituted	83
	294 Procedure for setting aside transactions and charges	83
30	New section 295 substituted	85
	295 Other orders	85
31	Additional provisions relating to setting aside transactions and charges	85

32	Transactions at undervalue	86
	New offence for directors	
33	Carrying on business fraudulently	87
	Prohibition order	
34	Registrar may prohibit persons from managing companies	87
	Phoenix companies	
35	New sections 386A to 386F inserted	87
	386A Director of failed company must not be director, etc, of phoenix company with same or substantially similar name	87
	386B Definitions for purpose of phoenix company provisions	88
	386C Liability for debts of phoenix company	88
	386D Exception for person named in successor company notice	89
	386E Exception for temporary period while application for exemption is made	90
	386F Exception in relation to non-dormant phoenix company known by pre-liquidation name of failed company for at least 12 months before liquidation	91
36	Consequential amendments to section 126	91
37	Consequential amendment to section 275	91
38	Consequential amendment to section 312	91
39	Consequential amendments to section 373	91
	Schedule 7	
40	Schedule 7 substituted	92
	Consequential amendments to other enactments	
41	Consequential amendments to other enactments	92
	Schedule 1	92
	New Schedule 7 substituted	
	Schedule 2	99
	Consequential amendments to other enactments	

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Companies Amendment Act 2006.

2 Commencement

This Act comes into force on a date to be appointed by the Governor-General by Order in Council; and 1 or more orders may be made bringing different provisions into force on different dates.

Section 2: Companies Amendment Act 2006 brought into force, on 1 November 2007, by clause 2 of the Companies Amendment Act 2006 Commencement Order 2007 (SR 2007/297).

3 Principal Act amended

This Act amends the Companies Act 1993.

4 Interpretation

(1) Section 2(1) is amended by inserting the following definition after the definition of “property”:

“**receiver** has the same meaning as in section 2(1) of the Receiverships Act 1993”.

(2) Section 2(1) is amended by inserting the following definition in its appropriate alphabetical order:

“**spouse**, in relation to a person (A), includes a person with whom A has a de facto relationship (whether that person is of the same or a different sex) and a civil union partner”.

5 Interpretation

Section 227 is amended by inserting the following definition in its appropriate alphabetical order:

“**company** includes an overseas company registered under Part 18”.

Voluntary administration

6 New Part 15A inserted

The following Part is inserted after Part 15:

“Part 15A

“Voluntary administration

“Subpart 1—Preliminary

“239A Objects of this Part

The objects of this Part are to provide for the business, property, and affairs of an insolvent company, or a company that

may in the future become insolvent, to be administered in a way that—

- “(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- “(b) if it is not possible for the company or its business to continue in existence, results in a better return for the company’s creditors and shareholders than would result from an immediate liquidation of the company.

“Compare: Corporations Act 2001 (Australia) s 435A

“239B Interpretation of some key terms

The following are some key terms used in this Part and their meanings:

“**administrator** means the person who is appointed the administrator of the company in administration

“**deed administrator**, who may or may not be the same person as the administrator, is the person who is appointed the administrator of the deed of company arrangement

“**deed of company arrangement** means the deed that is executed by the company and its creditors providing for payments towards the creditors’ debts

“**watershed meeting** means the creditors’ meeting called by the administrator to decide the future of the company and, in particular, whether the company and the deed administrator should execute a deed of company arrangement.

“239C Interpretation of other terms

In this Part, unless the context otherwise requires,—

“**company** includes an overseas company

“**convening period** has the meaning given to it in section 239AT(2)

“**creditor** includes—

- “(a) a person who, in a liquidation, would be entitled to claim in accordance with section 303 that a debt is owing to that person by the company; and
- “(b) a secured creditor

“**enforcement process**, in relation to property, means—

- “(a) execution against that property; or

“(b) any other enforcement process in relation to that property that involves a court or a sheriff

“**insolvent** means, in relation to a company, that the company is unable to pay its debts

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

“239D When administration begins

The administration of a company begins when an administrator is appointed under this Part.

“Compare: Corporations Act 2001 (Australia), s 435C(1)

“239E When administration ends

“(1) The administration of a company ends when—

“(a) a deed of company arrangement is executed by both the company and the deed administrator; or

“(b) the company’s creditors resolve that the administration should end; or

“(c) the company’s creditors appoint a liquidator by a resolution passed at the watershed meeting.

“(2) However, the administration of a company may also end in the following instances:

“(a) if the Court orders that the administration end, for example because the Court is satisfied that the company is solvent, the administration ends on the date specified in the order or, if no date is specified, when the order is made; or

“(b) if the convening period expires without the watershed meeting having been convened or without an application having been made to extend the convening period, the administration ends at the end of that period; or

“(c) if an application has been made to extend the convening period, which has expired after the application was made, the administration ends when the application is refused or otherwise disposed of without the convening period being extended; or

“(d) if the watershed meeting ends without a resolution that the company execute a deed of company arrangement, the administration ends at the end of that meeting; or

- “(e) if the company fails to execute a proposed deed of company arrangement within the time allowed by section 239ACO or 239ACP, the administration ends when that time expires; or
- “(f) if the Court appoints a liquidator or an interim liquidator, the administration ends at the time when the order is made.

“Compare: Corporations Act 2001 (Australia) s 435C(2), (3)

“Subpart 2—Appointment of administrator

“239F Who may be appointed administrator

- “(1) A natural person who is not disqualified under subsection (2) may be appointed an administrator of a company.
- “(2) Unless the Court orders otherwise, a person is disqualified from appointment as an administrator if that person—
 - “(a) is disqualified under section 280(1) from being appointed or acting as a liquidator of the company; or
 - “(b) is prohibited from being an administrator by an order made under section 239ADV.

“239G Administrator must consent in writing

A person must not be appointed the administrator of a company unless that person has consented in writing and has not withdrawn the consent at the time of appointment.

“Compare: Corporations Act 2001 (Australia) s 448A

“239H Who may appoint administrator

- “(1) An administrator may be appointed to a company by—
 - “(a) the company (*see* section 239I); or
 - “(b) if the company is in liquidation, the liquidator (*see* section 239J); or
 - “(c) if an interim liquidator has been appointed, the interim liquidator (*see* section 239J); or
 - “(d) a secured creditor holding a charge over the whole, or substantially the whole, of the company’s property (*see* section 239K); or
 - “(e) the Court (*see* section 239L).

- “(2) If the company is already in administration, an administrator may be appointed only by—
- “(a) the Court; or
 - “(b) the creditors, as a replacement administrator for an administrator that the creditors have removed; or
 - “(c) the appointor of the first administrator, if that administrator has died, resigned, or become disqualified.

“Compare: Corporations Act 2001 (Australia) s 436D

“239I Appointment by company

- “(1) A company may appoint an administrator if the board of the company has resolved that,—
- “(a) in the opinion of the directors voting for the resolution, the company is insolvent or may become insolvent; and
 - “(b) an administrator of the company should be appointed.
- “(2) The appointment must be in writing and must state the date of the appointment.
- “(3) The company must not appoint an administrator if the company is already in liquidation.
- “(4) If an application has been filed for the appointment of a liquidator of the company by the Court under section 241(2)(c), the company may only appoint an administrator if the administrator is appointed within 10 working days after service on the company of the application.
- “(5) Subsection (4) does not apply once the application has been finally disposed of.

“Compare: Corporations Act 2001 (Australia) s 436A

“239J Appointment by liquidator or interim liquidator

- “(1) The liquidator or interim liquidator of a company may appoint an administrator if he or she thinks that the company is insolvent or is likely to become insolvent.
- “(2) The appointment must be in writing and must state the date of the appointment.
- “(3) The liquidator or interim liquidator may appoint himself or herself administrator if he or she first obtains—
- “(a) the permission of the Court; or

- “(b) in the case of a liquidator but not an interim liquidator, the approval of the company’s creditors in the form of a resolution passed at a meeting of the creditors.
- “(4) A liquidator or interim liquidator must not appoint as administrator a person who is the liquidator’s or interim liquidator’s business or professional partner, employer, or employee, unless the appointment has been approved by the company’s creditors in the form of a resolution passed at a creditors’ meeting.
- “(5) An administrator who is appointed to a company already in liquidation may apply to the Court for an order under section 250 terminating the liquidation.

“Compare: Corporations Act 2001 (Australia) s 436B

“239K Appointment by secured creditor

- “(1) A person who holds a charge over the whole, or substantially the whole, of a company’s property may appoint an administrator if the charge has become, and is still, enforceable.
- “(2) The appointment must be in writing and must state the date of the appointment.
- “(3) A secured creditor must not appoint an administrator if the company is already in liquidation.

“Compare: Corporations Act 2001 (Australia) s 436C

“239L Appointment by Court

- “(1) The Court may appoint an administrator on the application of a creditor, the liquidator (if the company is in liquidation), or the Registrar.
- “(2) The Court may appoint an administrator if—
 - “(a) the Court is satisfied that the company is or may become insolvent and that an administration is likely to result in a better return for the company’s creditors and shareholders than would result from an immediate liquidation of the company; or
 - “(b) it is just and equitable to do so.

“239M Appointment must not be revoked

- “(1) The appointment of an administrator must not be revoked.

- “(2) This does not apply to removal by the Court or by the creditors.
“Compare: Corporations Act 2001 (Australia) s 449A

“239N Appointment of 2 or more administrators

- “(1) Two or more persons may be appointed administrators in any case where this Act provides for the appointment of an administrator.
- “(2) If 2 or more persons are appointed administrators of a company,—
- “(a) an administrator’s function or power may be performed or exercised by any 1 of them, or by any 2 or more of them together, except so far as the order, instrument, or resolution appointing them provides otherwise; and
 - “(b) a reference in this Act to an administrator or the administrator refers to whichever 1 or more of the administrators the case requires.

“Compare: Corporations Act 2001 (Australia) s 451A

“239O Remuneration of administrator

- “(1) The administrator is entitled to charge reasonable remuneration for carrying out his or her duties and exercising his or her powers as administrator.
- “(2) The Court may, on the application of the administrator, a director or officer of the company, a creditor, or a shareholder, review or fix the administrator’s remuneration at a level that is reasonable in the circumstances.
- “(3) A creditor or shareholder may make an application under subsection (2) only with the leave of the Court.

“Compare: 1993 No 105 ss 276(1), 284(1)(e)

“Subpart 3—Resignation and removal of
administrator

“239P When office of administrator is vacant

The office of administrator is vacant if the administrator—

- “(a) resigns; or
- “(b) dies; or
- “(c) becomes disqualified from appointment as an administrator (*see* section 239F(2)); or

“(d) is removed by the Court.

“Compare: Corporations Act 2001 (Australia) s 449C(1)

“239Q Administrator may resign

“(1) The administrator may resign by giving written notice to the company and to his or her appointor.

“(2) The administrator must—

“(a) give written notice of the resignation to as many of the company’s creditors as practicable; and

“(b) advertise the resignation in accordance with section 3(1)(b).

“Compare: Corporations Act 2001 (Australia) s 449C(1)(c)

“239R Removal of administrator

“(1) The administrator may be removed—

“(a) by the Court, on the application of a creditor, the liquidator (if the company is in liquidation), or the Registrar; or

“(b) by a resolution of creditors passed at the first creditors’ meeting; or

“(c) by a resolution of creditors at a meeting convened under section 239T(1) to consider whether to remove a replacement administrator.

“(2) The creditors may not remove the administrator by a resolution passed at a creditors’ meeting unless—

“(a) the same resolution also appoints as administrator another person who is not disqualified; and

“(b) the person named in the resolution as the new administrator has, before the resolution is considered, tabled at the meeting—

“(i) a signed, written consent to act as administrator; and

“(ii) an interests statement.

“Compare: Corporations Act 2001 (Australia) ss 436E(4), 449B

“239S Appointor may appoint new administrator to fill vacancy

“(1) The appointor of an administrator may appoint a replacement to fill the vacancy that occurs if the administrator—

“(a) resigns; or

- “(b) dies; or
- “(c) becomes disqualified.

“(2) The appointment of a replacement administrator by a company must be made by a resolution of the board of the company.

“Compare: Corporations Act 2001 (Australia) s 449C

“239T Creditors must consider appointment of replacement administrator

“(1) A replacement administrator, unless appointed by the Court or by the creditors under section 239R(1)(b), must convene a meeting of the creditors at which the creditors may vote to remove the replacement administrator and appoint another person in his or her place.

“(2) The meeting must be held not more than 5 working days after the date on which the replacement administrator is appointed.

“(3) The replacement administrator must convene the meeting by—

- “(a) giving written notice of the meeting to as many of the company’s creditors as reasonably practicable; and
- “(b) advertising the meeting in accordance with section 3(1)(b).

“(4) The replacement administrator must take the steps in subsection (3) not less than 2 working days before the meeting.

“Compare: Corporations Act 2001 (Australia) s 449C(4), (5)

“Subpart 4—Effect of appointment of administrator

“239U Outline of administrator’s role

While a company is in administration, the administrator—

- “(a) has control of the company’s business, property, and affairs; and
- “(b) may carry on that business and manage that property and those affairs; and
- “(c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and

“(d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not in administration.

“Compare: Corporations Act 2001 (Australia) s 437A(1)

“239V Administrator’s powers

“(1) The administrator has the powers—

“(a) to carry out the functions and duties of an administrator under this Act; and

“(b) conferred on an administrator under this Act.

“(2) An administrator’s powers include the powers to—

“(a) begin, continue, discontinue, and defend legal proceedings; and

“(b) carry on, to the extent necessary for the administration of the company, the business of the company; and

“(c) appoint an agent to do anything that the administrator has power to do.

“Compare: 1993 No 105 s 260(1)

“239W Administrator is company’s agent

The administrator of a company, when performing a function or exercising a power in that capacity, is the company’s agent.

“Compare: Corporations Act 2001 (Australia) s 437B

“239X Effect on directors

“(1) The appointment of an administrator does not remove the directors of the company from office.

“(2) However, a director of a company that is in administration must not exercise or perform, or purport to exercise or perform, a function or power as a director of the company except—

“(a) with the prior, written approval of the administrator; or

“(b) as expressly permitted by this Part.

“Compare: Corporations Act 2001 (Australia) s 437C

“239Y Effect on employees

- “(1) The appointment of an administrator does not automatically terminate an employment agreement to which the company is a party.
- “(2) The administrator is not personally liable for any obligation of the company under an employment agreement to which the company is a party, unless—
- “(a) the administrator expressly adopts the agreement in writing; or
 - “(b) subsection (3) applies.
- “(3) The administrator is personally liable for payment of wages or salary that, during the administration of the company, accrue under a contract of employment with the company that was entered into before the administrator’s appointment, unless the administrator has lawfully given notice of the termination of the contract within 14 days of appointment.
- “(4) The Court may, on the administrator’s application, extend the period of 14 days in subsection (3) within which notice of termination must be given, and may extend it on the terms and conditions, if any, that the Court thinks appropriate.
- “(5) From the date of the appointment of the administrator, the duty of good faith set out in section 4 of the Employment Relations Act 2000 continues to apply between each employee of the company and his or her employer (who may be the administrator if the administrator has adopted the employment agreement under subsection (2)).

“239Z Effect on dealing with company property

- “(1) A transaction or dealing by a company in administration, or by a person on behalf of the company, that affects the company’s property is void unless the transaction or dealing was entered into—
- “(a) by the administrator, on the company’s behalf; or
 - “(b) with the administrator’s prior written consent; or
 - “(c) under an order of the Court.
- “(2) The Court may validate a transaction or dealing that is void under subsection (1).

- “(3) Subsection (1) does not apply to a payment made by a registered bank—
- “(a) out of an account kept by the company with the bank; and
 - “(b) in good faith and in the ordinary course of the bank’s banking business; and
 - “(c) on or before the day on which the bank was notified in writing by the administrator that the administration had begun, or before the bank had reason to believe that the company was in administration, whichever was earlier.
- “(4) A director or officer of the company commits an offence if he or she—
- “(a) purported, on the company’s behalf, to enter into a transaction or dealing that is void under subsection (1); or
 - “(b) was in any other way knowingly concerned in, or party to, the void transaction or dealing, whether—
 - “(i) by act or omission; or
 - “(ii) directly or indirectly.

“Compare: Corporations Act 2001 (Australia) s 437D

“**239AA Company officer’s liability for compensation for void transaction or dealing**

The Court may order a director or officer of a company who is convicted of an offence under section 239Z(4) to compensate any person, including the company, who has suffered loss as a result of the act or omission constituting the offence.

“Compare: Corporations Act 2001 (Australia) s 437E(1)

“**239AB Effect on transfer of shares**

- “(1) A share in a company in administration must not be transferred and the rights or liabilities of a shareholder of the company must not be altered.
- “(2) However, the administrator may consent to the transfer of a share in a company in administration if the administrator is satisfied that the transfer is in the best interests of the company’s creditors.
- “(3) Also, despite subsection (1), the Court may make an order—

- “(a) for the transfer of a share in a company in administration, but only after the administrator has been asked to consent to the transfer and has refused or failed to respond in a reasonable time; or
- “(b) altering the rights and liabilities of a shareholder in a company in administration.

“Compare: Corporations Act 2001 (Australia) s 437F

“239AC Effect on liquidation

- “(1) The appointment of an administrator to a company in liquidation suspends the liquidation, including the powers of the liquidator to act on the company’s behalf, but does not remove the liquidator from office.
- “(2) The liquidator may apply to the Court for any orders that may be necessary in relation to the suspension of the liquidation.
- “(3) In this section, liquidator includes a liquidator or interim liquidator appointed before the administration began.

“239AD Effect on receivership

The appointment of an administrator to a company in receivership does not remove the receiver from office.

“Subpart 5—Administrator’s investigation of company’s affairs

“239AE Administrator must investigate company’s affairs and consider possible courses of action

As soon as practicable after the administration of a company begins, the administrator must—

- “(a) investigate the company’s business, property, affairs, and financial circumstances; and
- “(b) form an opinion about each of the following matters:
 - “(i) whether it would be in the creditors’ interests for the company to execute a deed of company arrangement:
 - “(ii) whether it would be in the creditors’ interests for the administration to end:

“(iii) whether it would be in the creditors’ interests for a liquidator to be appointed.

“Compare: Corporations Act 2001 (Australia) s 438A

“239AF Directors’ statement of company’s position

“(1) Within 5 working days after the administration of a company begins, the directors must give to the administrator a statement about the company’s business, property, affairs, and financial circumstances.

“(2) The administrator may extend the time for compliance with subsection (1).

“(3) The administrator must table the directors’ statement—

“(a) at the first creditors’ meeting; or

“(b) if the administrator has extended the time for compliance by the directors, at the watershed meeting.

“Compare: Corporations Act 2001 (Australia) s 438B(2)

“239AG Administrator’s right to documents, etc

Sections 261 and 263 to 267 apply with all necessary modifications as if every reference to liquidator and liquidation was a reference to administrator and administration.

“239AH Administrator may lodge report with Registrar

The administrator may lodge a report with the Registrar specifying any matter that, in his or her opinion, should be brought to the Registrar’s notice.

“Compare: Corporations Act 2001 (Australia) s 438D(2)

“239AI Administrator must report misconduct

“(1) The administrator must as soon as practicable report the matter to the Registrar if the administrator believes that—

“(a) a past or present director, officer, or shareholder of the company has committed an offence in relation to the company; or

“(b) an offence material to the administration has been committed by the company or any director, officer, or shareholder of the company under this Act or any of the following Acts:

- “(i) the Crimes Act 1961:
 - “(ii) the Securities Act 1978:
 - “(iii) the Securities Markets Act 1988:
 - “(iv) the Financial Reporting Act 1993:
 - “(v) the Takeovers Act 1993; or
 - “(c) a person who has taken part in the formation, promotion, administration, management, or liquidation of the company—
 - “(i) may have misapplied or retained or become liable or accountable for the company’s money or property (whether in New Zealand or elsewhere); or
 - “(ii) may have been guilty of negligence, default, or breach of duty or trust in relation to the company.
 - “(2) In any case where the administrator makes a report under subsection (1), the administrator must give the Registrar assistance that the Registrar may reasonably require by way of—
 - “(a) provision of information; and
 - “(b) access to documents; and
 - “(c) facilities for inspecting and copying documents.
 - “(3) In any case where the Court is satisfied that the administrator should make a report under subsection (1) and has not done so, the Court may, on the application of an interested person, direct the administrator to make a report.
- “Compare: Corporations Act 2001 (Australia) s 438D

“Subpart 6—Creditors’ meetings generally

“239AJ Administrator must call creditors’ meetings

The administrator must call—

- “(a) the first creditors’ meeting, for the appointment (if any) of a committee of creditors; and
- “(b) the watershed meeting (*see* section 239AS); and
- “(c) other creditors’ meetings as required (for example, because an administrator has been replaced).

“239AK Conduct of creditors’ meetings

- “(1) The following clauses of Schedule 5 apply to creditors’ meetings called under this Part as if references to the liquidator were references to the administrator:
- “(a) subject to section 239AZ, clause 4; and
 - “(b) clauses 6 to 11.
- “(2) At any meeting of creditors or class of creditors held under this Part, a resolution is adopted if a majority in number representing 75% in value of the creditors or class of creditors voting in person, or by proxy vote or by postal vote, vote in favour of the resolution.
- “(3) The administrator or the administrator’s nominee must chair a creditors’ meeting, and has a casting vote.
- “(4) For the purposes of voting at a creditors’ meeting, the administrator may estimate the amount of a creditor’s claim that is for any reason uncertain.
- “(5) On the application of the administrator, or of a creditor who is aggrieved by an estimate made by the administrator, the Court must determine the amount of the claim as it sees fit.

“239AL Joint meetings of creditors of related companies in administration

- “(1) The administrators of related companies may call meetings of creditors of their respective companies to be held at the same time and place, but only with the consent of all the creditors.
- “(2) In the case of a joint meeting, a creditor of a company in administration may vote only on a resolution that relates to the administration of the company of which that person is a creditor.
- “(3) For the purposes of subsection (1), a creditor is taken to have consented to the joint meeting if—
- “(a) a written notice that complies with subsection (4) accompanies the notice of meeting; and
 - “(b) the creditor has not objected to the joint meeting within the time, and in the manner, specified in the written notice.
- “(4) The notice must—
- “(a) be in writing; and

- “(b) state the administrator’s postal, email, and street addresses; and
 - “(c) state the names of the related companies in respect of which the joint meeting is to be held; and
 - “(d) state that the creditor to whom it is sent may object to the joint meeting by sending a written objection to the administrator at the administrator’s postal, email, or street address for receipt by the administrator within the time specified in the notice; and
 - “(e) state that, unless the creditor objects in accordance with the notice, the creditor will be taken to have agreed to the joint meeting.
- “(5) For the purposes of subsection (4)(d), the administrator may in his or her discretion determine the time for receipt of an objection, but must specify a time that is reasonably practicable in the circumstances.

“239AM Power of Court where outcome of voting at creditors’ meeting determined by related entity

- “(1) This section applies if the Court is satisfied that—
- “(a) a resolution at a creditors’ meeting under this Part was passed, defeated, or required to be decided by a casting vote; and
 - “(b) the resolution would not have been passed, defeated, or required to be decided by a casting vote if the vote or votes cast by a particular related creditor or particular related creditors were disregarded; and
 - “(c) the passing of the resolution, or the failure to pass it,—
 - “(i) is contrary to the interests of the creditors, or a class of creditors, as a whole; and
 - “(ii) has prejudiced, or is reasonably likely to prejudice, the interest of the creditors who voted against the resolution, or for it, as the case may be, to an extent that is unreasonable having regard to—
 - “(A) the benefits accruing to the related creditor, or to some or all of the related creditors, from the resolution, or from the failure to pass the resolution; and

- “(B) the nature of the relationship between the related creditor and the company, or between the related creditors and the company; and
 - “(C) any other related matter.
- “(2) The Court may, on the application of a creditor or the administrator,—
- “(a) order that the resolution be set aside;
 - “(b) order that a new meeting be held to consider and vote on the resolution;
 - “(c) order that a specified related creditor or creditors must not vote on the resolution or on a resolution to vary or amend it;
 - “(d) make any other orders that the Court thinks necessary.
- “(3) In this section,—
- “**promoter** has the same meaning as in section 2(1) of the Securities Act 1978
 - “**related creditor** means a creditor who is a related entity of the company in administration
 - “**related entity** means, in relation to the company in administration,—
- “(a) a promoter; or
 - “(b) a relative or spouse of a promoter; or
 - “(c) a relative of a spouse of a promoter; or
 - “(d) a director or shareholder; or
 - “(e) a relative or spouse of a director or shareholder; or
 - “(f) a relative of a spouse of a director or shareholder; or
 - “(g) a related company; or
 - “(h) a beneficiary under a trust of which the company in administration is or has at any time been a trustee; or
 - “(i) a relative or spouse of that beneficiary; or
 - “(j) a relative of a spouse of that beneficiary; or
 - “(k) a company one of whose directors is also a director of the company in administration; or
 - “(l) a trustee of a trust under which a person (A) is a beneficiary, if A is a related entity of the company in administration under this subsection.

“Compare: Corporations Act 2001 (Australia) s 600A

“Subpart 7—First creditors’ meeting to
appoint creditors’ committee

“239AN Administrator must call first creditors’ meeting

- “(1) The administrator must call the first creditors’ meeting to—
- “(a) decide whether to appoint a creditors’ committee and, if so, to appoint its members; and
 - “(b) decide whether to replace the administrator.
- “(2) The meeting must be held within 8 working days after the date on which the administration began.

“Compare: Corporations Act 2001 (Australia) s 436E(1), (2)

“239AO Notice of first and subsequent creditors’ meetings

- “(1) The administrator must call the first and subsequent creditors’ meetings by—
- “(a) giving written notice of the meeting to as many of the company’s creditors as reasonably practicable; and
 - “(b) advertising the meeting in accordance with section 3(1)(b).
- “(2) The administrator must take the steps in subsection (1) not less than 5 working days before the meeting.

“Compare: Corporations Act 2001 (Australia) s 436E(3)

“239AP Administrator must table interests statement

- “(1) The administrator must table at the first creditors’ meeting an interests statement that complies with subsection (2).
- “(2) The interests statement must disclose whether the administrator, or a firm of which the administrator is a partner, has a relationship (whether professional, business, or personal) with the company in administration, or any of its officers, shareholders, or creditors.
- “(3) The administrator must, before tabling the interests statement, make the inquiries that are reasonably necessary for ensuring that the interests statement is complete.

“239AQ Functions of creditors’ committee

- “(1) The functions of the creditors’ committee of a company in administration are—

- “(a) to consult with the administrator about matters relating to the administration; and
 - “(b) to receive and consider reports by the administrator.
- “(2) The committee must not give directions to the administrator, but the administrator must report to the committee about matters relating to the administration as and when the committee reasonably requires.
- “Compare: Corporations Act 2001 (Australia) s 436F

“239AR Membership of creditors’ committee

A person may be a member of the creditors’ committee only if he or she is—

- “(a) a creditor of the company; or
- “(b) the agent of a creditor under a general power of attorney; or
- “(c) authorised in writing by a creditor to be a member.

“Compare: Corporations Act 2001 (Australia) s 436G

“Subpart 8—Watershed meeting

“239AS What watershed meeting is

The watershed meeting is the meeting of creditors called by the administrator to decide the future of the company and, in particular, whether the company and the deed administrator should execute a deed of company arrangement.

“239AT Administrator must convene watershed meeting

- “(1) The administrator must convene the watershed meeting within the convening period.
- “(2) The **convening period** is the period of 20 working days after the date on which the administrator is appointed, and includes any period for which it is extended under subsection (3).
- “(3) The Court may, on the administrator’s application, extend the convening period.
- “(4) The application to extend may be made before or after the convening period has expired.

“239AU Notice of watershed meeting

- “(1) The administrator must convene the watershed meeting by—

- “(a) giving written notice of the meeting to as many of the company’s creditors as reasonably practicable; and
 - “(b) advertising the meeting in accordance with section 3(1)(b).
- “(2) The administrator must take the steps in subsection (1) not less than 5 working days before the meeting.
- “(3) The following documents must accompany the notice of the watershed meeting that is sent to the company’s creditors:
- “(a) a report by the administrator about—
 - “(i) the company’s business, property, affairs, and financial circumstances; and
 - “(ii) any other matter material to the creditors’ decisions to be considered at the meeting; and
 - “(b) a statement setting out the administrator’s opinion, with reasons for that opinion, about each of the following matters:
 - “(i) whether it would be in the creditors’ interests for the company to execute a deed of company arrangement;
 - “(ii) whether it would be in the creditors’ interests for the administration to end;
 - “(iii) whether it would be in the creditors’ interests for the company to be placed in liquidation; and
 - “(c) if a deed of company arrangement is proposed, a statement setting out the details of the proposed deed.
- “Compare: Corporations Act 2001 (Australia) s 439A(3), (4)

“239AV When watershed meeting must be held

The watershed meeting must be held within 5 working days after the end of the convening period or extended convening period, as the case may be.

“Compare: Corporations Act 2001 (Australia) s 439A(2)

“239AW Directors must attend watershed meeting

- “(1) The directors of the company must attend the watershed meeting, including any occasion to which the meeting is adjourned, but cannot be required to answer questions at the meeting.
- “(2) A director need not attend the watershed meeting if—
 - “(a) the director has a valid reason for not attending; or

- “(b) the administrator or the creditors by resolution have excused the director from attending.
- “(3) A director attending the watershed meeting must leave for all or part of the remainder of the meeting if required by a resolution of the creditors to do so.
- “(4) A director who contravenes subsection (1) commits an offence, unless subsection (2) applies, and is liable on conviction to the penalty set out in section 373(1).

“**239AX Disclosure of voting arrangements**

The administrator and the directors of the company under administration must, before the meeting votes on any resolution, inform the meeting of any voting arrangement of which the administrator or a director, as the case may be, is aware that requires 1 or more creditors to vote in a particular way on any resolution that will or may be voted on by the meeting.

“**239AY Court may order that pooled property owners are separate class**

- “(1) On the application of the administrator, the Court may order that, for the limited purposes of this section only, pooled property owners are a separate class.
- “(2) In this section—
- “**pooled property owners** means all the owners or lessors of property that is pooled in a single enterprise forming part of the business of a company in administration
- “**requisite majority** means a majority in number representing 75% in value of the pooled property owners voting in person or by proxy vote or by postal vote
- “**resolution** means a resolution that the company in administration execute the deed of company arrangement specified in the resolution.
- “(3) Each pooled property owner is bound by the deed of company arrangement as if that person had voted in favour of the resolution at the watershed meeting if—
- “(a) the Court has ordered that the pooled property owners are a separate class; and

- “(b) at the watershed meeting the creditors (including the pooled property owners) approved the resolution; and
 - “(c) the requisite majority of the pooled property owners were included in the creditors who voted in favour of the resolution.
- “(4) It is not necessary that a separate meeting of the pooled property owners be held for the purpose of voting on the resolution.
- “(5) Subsection (3) applies no matter what sections 239ACS and 239ACT say.

“239AZ Adjournment of watershed meeting

- “(1) The watershed meeting may be adjourned, but only to a day that is not more than 30 working days after the first day on which the meeting was held.
- “(2) However, the Court may, on the administrator’s application, order that the meeting be adjourned for more than 30 working days.
- “Compare: Corporations Act 2001 (Australia) s 439B(2)

“239ABA What creditors may decide at watershed meeting

At the watershed meeting, the creditors may—

- “(a) resolve that the company execute a deed of company arrangement specified in the resolution (and it does not matter that the deed to be executed differs from any proposed deed of which details were given in the notice of the meeting); or
- “(b) resolve that the administration should end; or
- “(c) unless the company is already in liquidation, by resolution appoint a liquidator.

“Compare: Corporations Act 2001 (Australia) s 439C

“239ABB What happens if proposed deed not fully approved at watershed meeting

- “(1) If, at the watershed meeting, the creditors resolve that the company execute a deed of company arrangement, but the proposed deed is not fully approved at the meeting, then the administrator must take the steps set out in section 239ACP

(briefly, the administrator must draft a deed and circulate it to creditors).

- “(2) The administrator must inform the creditors at the watershed meeting that—
- “(a) they have the right to inspect and comment on the draft deed; and
 - “(b) the administrator has the ultimate responsibility for drafting the deed and the executed deed may differ from the draft.

“Subpart 9—Protection of company’s property during administration

“239ABC Charge unenforceable

Subject to subpart 10, a person must not, during the administration of a company, enforce a charge over the property of the company, except—

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

“Compare: Corporations Act 2001 (Australia) s 440B

“239ABD Owner or lessor must not recover property used by company

During the administration of a company, the owner or lessor of property that was used or occupied by, or is in the possession of, the company must not take possession of the property or otherwise recover it, except—

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

“Compare: Corporations Act 2001 (Australia) s 440C

“239ABE Proceeding must not be begun or continued

During the administration of a company, a proceeding in a court against the company or in relation to any of its property must not be begun or continued, except—

- “(a) with the administrator’s written consent; or
- “(b) with the permission of the Court and in accordance with the terms that the Court imposes.

“Compare: Corporations Act 2001 (Australia) s 440D

“239ABF Administrator not liable in damages for refusing consent

An administrator is not liable in damages for a refusal to give an approval or consent for the purposes of this subpart.

“Compare: Corporations Act 2001 (Australia) s 440E

“239ABG Enforcement process halted

During the administration of a company, an enforcement process in relation to the company’s property must not be begun or continued except with the permission of the Court and in accordance with the terms that the Court imposes.

“Compare: Corporations Act 2001 (Australia) s 440F

“239ABH Duties of court officer in relation to company’s property

- “(1) This section applies to a court officer, that is, a sheriff or registrar or other appropriate officer of the court, who receives written notice that a company is in administration.
- “(2) During the administration, the court officer must not—
- “(a) take action to sell property of the company under an execution process; or
 - “(b) pay to a person (other than the administrator)—
 - “(i) proceeds of the sale of the company’s property (at any time) under an execution process; or
 - “(ii) money of the company seized (at any time) under an execution process; or
 - “(iii) money paid (at any time) to avoid seizure or sale of property of the company under an execution process; or
 - “(c) take action in relation to the attachment of a debt due to the company; or
 - “(d) pay to any person (other than the administrator) money received because of the attachment of a debt due to the company.
- “(3) The court officer must deliver to the administrator any property of the company that is in the court officer’s possession under an execution process (whenever begun).
- “(4) The court officer must pay to the administrator all proceeds or money of a kind referred to in subsection (2)(b) or (d) that—

- “(a) are in the court officer’s possession; or
 - “(b) have been paid into the court and have not since been paid out.
- “(5) The costs of the execution or attachment are a first charge over property delivered under subsection (3) or proceeds or money paid under subsection (4).
- “(6) In order to give effect to a charge under subsection (5) on proceeds or money the court officer may retain, on behalf of the person entitled to the charge, so much of the proceeds as the court officer thinks necessary.
- “(7) The court may, if it is satisfied that it is appropriate to do so, permit the court officer to take action, or make a payment, that subsection (2) would otherwise prevent.
- “(8) A person who buys property in good faith under a sale under an execution process obtains a good title to the property as against the company and the administrator, despite anything else in this section.

“Compare: Corporations Act 2001 (Australia) s 440G

“**239ABI *Lis pendens* taken to exist**

- “(1) This section has effect only for the purposes of a law about the effect of a *lis pendens* on purchasers or mortgagees.
- “(2) During the administration of a company, an application for the appointment of a liquidator to the company is taken to be pending.
- “(3) An application that is taken because of subsection (2) to be pending constitutes a *lis pendens*.

“Compare: Corporations Act 2001 (Australia) s 440H

“**239ABJ Administration not to trigger enforcement of guarantee of liability of director or relative**

- “(1) During the administration of a company, except with the Court’s permission and in accordance with the terms that the Court may impose, a guarantee of a liability of the company must not be enforced against—
- “(a) a director of the company; or
 - “(b) that person’s spouse or relative.

“(2) In this section, **liability** means a debt, liability, or other obligation.

“Compare: Corporations Act 2001 (Australia) s 440J(1)

“Subpart 10—Rights of secured creditor,
owner, or lessor

“**239ABK Meaning of terms used in this subpart**

In this subpart, unless the context otherwise requires,—

“**decision period** means, in relation to a secured creditor holding a charge over property of a company in administration, the period that—

“(a) begins—

“(i) if notice of the appointment of the administrator must be given to the secured creditor under section 239ADW(1)(c), on the day when that notice is given; or

“(ii) in any other case, on the day when the administration begins; and

“(b) ends at the end of the tenth working day after the day when it begins

“**enforce**, in relation to a charge over property of a company in administration, includes—

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

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

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

“(d) to appoint a person to enter into possession or assume control (whether as agent for the secured creditor or for the company) for that purpose; or

“(e) to exercise, as secured creditor or as a receiver or person so appointed, a right, power, or remedy existing because of the charge, whether arising under an instrument relating to the charge, under a written or unwritten law, or otherwise.

“239ABL If secured creditor acts before or during decision period

- “(1) This section applies if—
- “(a) the whole, or substantially the whole, of the property of a company in administration is subject to a charge; and
 - “(b) before or during the decision period, the secured creditor enforces the charge in relation to all property of the company subject to the charge, whether or not the charge is enforced in the same way in relation to all that property.
- “(2) This section also applies if—
- “(a) a company is in administration; and
 - “(b) the same person is the secured creditor in relation to each of 2 or more charges over the property of the company; and
 - “(c) the property of the company (in this subsection called the **charged property**) subject to the respective charges together constitutes the whole, or substantially the whole, of the company’s property; and
 - “(d) before or during the decision period, the secured creditor enforces together the charges in relation to all the charged property—
 - “(i) whether or not the charges are enforced in the same way in relation to all the charged property; and
 - “(ii) whether or not any of the charges is enforced in the same way in relation to all the property of the company subject to that charge; and
 - “(iii) in so far as the charges are enforced in relation to property of the company in a way referred to in paragraph (a), (b), or (d) of the definition of enforce in section 239ABK, whether or not the same person is appointed in respect of all of the last-mentioned property.
- “(3) Nothing in section 239ABC or in an order under section 239ABO prevents any of the following persons from enforcing the charge:
- “(a) the secured creditor:

- “(b) a receiver or person appointed as mentioned in paragraph (a), (b), or (d) of the definition of enforce in section 239ABK as that definition applies in relation to the charge, or any of the charges (even if appointed after the decision period).
- “(4) Section 239Z does not apply in relation to a transaction or dealing that affects property of the company and is entered into by the secured creditor or a receiver or person of a kind referred to in subsection (3)(b) in the performance or exercise of a function or power as that secured creditor, receiver, or person, as the case may be.

“Compare: Corporations Act 2001 (Australia) s 441A

“239ABM If enforcement of charges begins before administration

- “(1) This section applies if, before the beginning of the administration of a company, a secured creditor, receiver, or other person, for the purpose of enforcing a charge over the property,—
 - “(a) entered into possession, or assumed control, of the property of the company; or
 - “(b) entered into an agreement to sell the property; or
 - “(c) made arrangements for the property to be offered for sale by public auction; or
 - “(d) publicly invited tenders for the purchase of the property; or
 - “(e) exercised any other power in relation to the property.
- “(2) Nothing in section 239ABC prevents the secured creditor, receiver, or other person from enforcing the charge in relation to the property.
- “(3) Section 239Z does not apply in relation to a transaction or dealing that affects the property and is entered into, as the case may be,—
 - “(a) in the exercise of a power of the secured creditor as secured creditor; or
 - “(b) in the performance or exercise of a function or power of the receiver or other person.

“Compare: Corporations Act 2001 (Australia) s 441B

“239ABN Charge over perishable property

- “(1) This section applies if perishable property of a company in administration is subject to a charge.
- “(2) Nothing in section 239ABC prevents the secured creditor, a receiver, or a person appointed (at any time) as mentioned in paragraph (a), (b), or (d) of the definition of enforce in section 239ABK from enforcing the charge, so far as it is a charge over perishable property.
- “(3) Section 239Z does not apply in relation to a transaction or dealing that affects perishable property of the company and is entered into, as the case may be,—
- “(a) in the exercise of a power of the secured creditor as secured creditor; or
 - “(b) in the performance or exercise of a function or power of the receiver or other person.

“Compare: Corporations Act 2001 (Australia) s 441C

“239ABO Court may limit powers of secured creditor, etc, in relation to property subject to charge

- “(1) This section—
- “(a) applies if,—
 - “(i) for the purpose of enforcing a charge over property of a company, the secured creditor, a receiver, or other person does an act of a kind referred to in section 239ABM(1); and
 - “(ii) the company is in administration when the secured creditor, receiver, or other person does that act, or an administrator is later appointed to the company:
 - “(b) does not apply in a case where section 239ABL applies.
- “(2) On an application by the administrator, the Court may order the secured creditor, receiver, or other person not to perform specified functions or exercise specified powers, except as permitted by the order.
- “(3) The Court may make an order only if satisfied that what the administrator proposes to do during the administration will adequately protect the secured creditor’s interests.
- “(4) An order—

“(a) may be made only, and has effect only, during the administration; and

“(b) has effect despite section 239ABM and 239ABN.

“Compare: Corporations Act 2001 (Australia) s 441D

“239ABP Giving notice under security agreement

Section 239ABC does not prevent a person from giving a notice under the provisions of a security agreement.

“Compare: Corporations Act 2001 (Australia) s 441E

“239ABQ If recovery of property begins before administration

“(1) This section applies if, before the beginning of the administration of a company, a receiver or other person, for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it,—

“(a) entered into possession of, or assumed control of, property used or occupied by, or in the possession of, the company; or

“(b) exercised any other power in relation to the property.

“(2) Section 239ABD does not prevent the receiver or other person from performing a function, or exercising a power, in relation to the property.

“(3) Section 239Z does not apply in relation to a transaction or dealing that affects the property and is entered into in the performance or exercise of a function or power of the receiver or other person.

“Compare: Corporations Act 2001 (Australia) s 441F

“239ABR Recovering perishable property

“(1) Nothing in section 239ABD prevents a person from taking possession of, or otherwise recovering, perishable property.

“(2) Section 239Z does not apply in relation to a transaction or dealing that affects perishable property and is entered into for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it.

“Compare: Corporations Act 2001 (Australia) s 441G

“239ABS Court may limit powers of receiver, etc, in relation to property used by company

“(1) This section applies if,—

“(a) for the purpose of enforcing a right of the owner or lessor of property used or occupied by, or in the possession of, a company to take possession of the property or otherwise recover it, a person—

“(i) enters into possession, or assumes control, of the property; or

“(ii) exercises any other power in relation to the property; and

“(b) the company is in administration when the person does so, or an administrator is later appointed to the company.

“(2) On an application by the administrator, the Court may order the person not to perform specified functions, or exercise specified powers, in relation to the property, except as permitted by the order.

“(3) The Court may make an order only if satisfied that what the administrator proposes to do during the administration will adequately protect the interests of the owner or lessor.

“(4) An order—

“(a) may be made only, and has effect only, during the administration; and

“(b) has effect despite sections 239ABQ and 239ABR.

“Compare: Corporations Act 2001 (Australia) s 441H

“239ABT Giving notice under agreement about property

Nothing in section 239ABD prevents a person from giving a notice to a company under an agreement relating to property that is used or occupied by, or is in the possession of, the company.

“Compare: Corporations Act 2001 (Australia) s 441J

“Subpart 11—Interface with liquidation

“**239ABU When liquidator may be appointed to company in administration**

A liquidator may be appointed to a company in administration—

- “(a) by the Court, on an application for the appointment of a liquidator under section 241(2)(c); or
- “(b) by resolution of the creditors at the watershed meeting or at a meeting convened under section 239ADF to consider the termination of the deed of company arrangement.

“**239ABV Court may adjourn application for liquidation**

The Court may adjourn an application under section 241(2)(c) for the appointment of a liquidator of a company in administration if the Court is satisfied that it is in the interests of the company’s creditors for the company to continue in administration rather than be placed in liquidation.

“Compare: Corporations Act 2001 (Australia) s 440A(2)

“**239ABW Court must not appoint interim liquidator if administration in creditors’ interests**

The Court must not appoint an interim liquidator of a company in administration if the Court is satisfied that it is in the interests of the company’s creditors for the company to continue in administration rather than have an interim liquidator appointed.

“Compare: Corporations Act 2001 (Australia) s 440A(3)

“**239ABX Effect of appointment of liquidator**

The appointment of a liquidator to a company in administration ends the administration.

“**239ABY Former administrator is default liquidator**

In the case of the appointment of a liquidator to a company in administration by the creditors, the former administrator is the liquidator if—

- “(a) the creditors’ resolution does not nominate a person for appointment; or
- “(b) the person nominated is disqualified from acting as the liquidator or has not consented in writing; or
- “(c) the person nominated is for any other reason unable or unwilling to act as liquidator.

“239ABZ Person in control of company must lodge revised report with Registrar

- “(1) This section applies when a liquidator is appointed to a company that is in administration or under a deed of company arrangement.
- “(2) The administrator or, if the company is under a deed of company arrangement, the deed administrator must as soon as practicable lodge the following documents with the Registrar:
 - “(a) a copy of the administrator’s report that accompanied the notice to creditors of the watershed meeting; and
 - “(b) a further report updating the administrator’s report with any matters of which the administrator or deed administrator is aware that—
 - “(i) are not referred to in the administrator’s report, or have changed since that report; and
 - “(ii) affect the financial position of the company.
- “(3) If there is no administrator or deed administrator acting when the company is placed in liquidation, the director or directors of the company at the date of liquidation must take the steps described in subsection (2) as if they were the administrator or deed administrator.

“239ACA Act of administrator in good faith must not be set aside in liquidation

A payment made, transaction entered into, or any other act or thing done, in good faith, by or with the consent of the administrator of a company in administration, must not be set aside in a liquidation of the company.

“Compare: Corporations Act 2001 (Australia) s 451C(b)

“239ACB Voidable transactions

- “(1) The voidable transaction provisions do not apply to a transaction by a company in administration if the transaction is—
- “(a) carried out by or with the authority of the administrator or deed administrator; or
 - “(b) specifically authorised by the deed of company arrangement and carried out by the deed administrator.
- “(2) In this section, **voidable transaction provisions** means sections 292 to 296.

“Subpart 12—Deed administrator**“239ACC Who is deed administrator**

The administrator of the company is the deed administrator, unless the creditors at the watershed meeting by resolution appoint someone else to be the deed administrator.

“Compare: Corporations Act 2001 (Australia) s 444A(2)

“239ACD Who may be appointed deed administrator

- “(1) A natural person who is not disqualified under subsection (2) may be appointed deed administrator.
- “(2) Unless the Court orders otherwise, a person is disqualified from appointment as a deed administrator if that person is—
- “(a) disqualified under section 280(1) from acting as a liquidator of the company; or
 - “(b) prohibited from being a deed administrator by an order made under section 239ADV.

“239ACE Deed administrator must consent in writing

A person must not be appointed deed administrator unless that person has consented in writing and has not withdrawn the consent at the time when the deed of company arrangement is executed.

“Compare: Corporations Act 2001 (Australia) s 448A

“239ACF Appointment of deed administrator must not be revoked

Except in the case of removal by the Court, the appointment of the deed administrator must not be revoked.

“Compare: Corporations Act 2001 (Australia) s 449A

“239ACG Appointment of 2 or more deed administrators

“(1) Two or more persons may be appointed deed administrators in any case where this Act provides for the appointment of a deed administrator.

“(2) If 2 or more persons are appointed deed administrators jointly,—

“(a) a deed administrator’s function or power may be performed or exercised by any 1 of them, or by any 2 or more of them together, except so far as the order, instrument, or resolution appointing them provides otherwise; and

“(b) a reference in this Act to a deed administrator or the deed administrator refers to whichever 1 or more of the deed administrators the case requires.

“Compare: Corporations Act 2001 (Australia) s 451B

“239ACH When office of deed administrator vacant

The office of the deed administrator is vacant if the deed administrator—

“(a) resigns; or

“(b) becomes disqualified from appointment as a deed administrator (*see* section 239ACD(2)); or

“(c) is removed by the Court.

“239ACI Deed administrator may resign

The deed administrator may resign by giving written notice to the company.

“239ACJ Removal of deed administrator

“(1) The Court may—

“(a) remove the deed administrator, and appoint a person in his or her place; or

- “(b) appoint a new deed administrator, if the deed of company arrangement has not yet terminated but for some reason no deed administrator is acting.
- “(2) The Court may make an order under subsection (1) on the application of a creditor of the company, a shareholder, the liquidator (if the company is in liquidation), or the Registrar.

“239ACK Remuneration of deed administrator

- “(1) The deed administrator is entitled to charge reasonable remuneration for carrying out his or her duties and exercising his or her powers as deed administrator.
- “(2) The Court may, on the application of the deed administrator, a director or officer of the company, a creditor, or a shareholder, review or fix the deed administrator’s remuneration at a level that is reasonable in the circumstances.
- “(3) A creditor or shareholder may make an application under subsection (2) only with the leave of the Court.

“Compare: 1993 No 105 ss 276(1), 284(1)(e)

“239ACL Deed administrator may sell shares in company

- “(1) The deed administrator may sell existing shares in the company—
 - “(a) with the consent of the shareholder in question; or
 - “(b) if the shareholder does not consent, with the permission of the Court given on an application of the deed administrator.
- “(2) The shareholder concerned, a creditor, or the Registrar may oppose an application by the administrator for the Court’s permission.

“Subpart 13—Execution and effect of deed
of company arrangement

“239ACM When this subpart applies

This subpart applies when the creditors, at the watershed meeting, have resolved that the company execute a deed of company arrangement.

“Compare: Corporations Act 2001 (Australia) s 444A(1)

“239ACN Preparation and contents of deed

- “(1) The deed administrator must prepare a document that sets out the terms of the deed.
- “(2) The document must also specify the following:
- “(a) who the deed administrator is:
 - “(b) the property of the company (whether or not it is already owned by the company when it executes the deed) that will be available to pay creditors:
 - “(c) the nature and duration of any moratorium period for which the deed provides:
 - “(d) to what extent the company will be released from its debts:
 - “(e) the conditions (if any) for the deed to come into operation:
 - “(f) the conditions (if any) for the deed to continue in operation:
 - “(g) the circumstances in which the deed terminates:
 - “(h) the order in which the proceeds of realisation of the property referred to in paragraph (b) will be distributed among creditors who are bound by the deed:
 - “(i) the day (which is called the **cut-off day** and which must not be later than the day when the administration began) on or before which creditors’ claims must have arisen if they are to be admissible under the deed.
- “(3) The document is treated as including any prescribed provisions, except those prescribed provisions that the document expressly excludes.

“Compare: Corporations Act 2001 (Australia) s 444A(3)–(5)

“239ACO Execution of deed

- “(1) The deed is a deed of company arrangement when it is executed by both the company in administration and the deed administrator.
- “(2) The deadline for the execution of the deed by the company and the deed administrator is—
- “(a) 15 working days after the watershed meeting has approved it; or
 - “(b) the further time that the Court allows, if the deed administrator has applied to the Court for an extension before

the end of the initial period of 15 working days after approval.

- “(3) The company may not execute the deed unless the board of the company has, by resolution, authorised the deed to be executed by the company or on its behalf.
- “(4) Subsection (3) has effect despite section 239X, but does not limit the functions and powers of the administrator of the company.

“Compare: Corporations Act 2001 (Australia) s 444B

“**239ACP Procedure if deed not fully approved at watershed meeting**

- “(1) If, at the watershed meeting, the creditors resolve that the company execute a deed of company arrangement, but the proposed deed is not fully approved at the meeting, then—
- “(a) the administrator must draft the complete deed and circulate it to the creditors within 10 working days after the meeting (called in this section the **preparation period**); and
- “(b) the creditors have a period of 3 working days (called in this section the **inspection period**) after the end of the preparation period in which to inspect and comment on the deed; and
- “(c) the company and the deed administrator must execute the deed within 2 working days (called in this section the **execution period**) after the end of the inspection period.
- “(2) The Court may extend the preparation period by up to 10 working days, on an application by the administrator, but only if the application is made within the original preparation period.
- “(3) The Court may extend the execution period by up to 2 working days, on an application by the administrator, but only if the application is made within the original execution period.

“239ACQ Creditor must not act inconsistently with deed, etc, before execution

- “(1) In this section, **interim period** means the period between a resolution passed at the watershed meeting that the company execute a deed of company arrangement and the sooner of—
- “(a) execution of the deed by the company and the deed administrator; or
 - “(b) expiry of the period during which the deed may be executed.
- “(2) In the interim period, in so far as a person would be bound by the deed if it had already been executed, that person—
- “(a) must not do anything inconsistent with the deed, except with the permission of the Court; and
 - “(b) must not take a step that is prohibited under section 239ACU.

“Compare: Corporations Act 2001 (Australia) s 444C

“239ACR Company’s failure to execute deed

If the creditors at the watershed meeting have passed a resolution that the company execute a deed of company arrangement, and the company fails to do so within the deadline for execution, then, notwithstanding section 239E(2)(e),—

- “(a) the administrator must apply for the appointment of a liquidator to the company; or
- “(b) if the company is already in liquidation, the administrator must apply for the liquidation to resume.

“239ACS Who is bound by deed

A deed of company arrangement binds—

- “(a) the company’s creditors, to the extent provided by section 239ACT; and
- “(b) the company; and
- “(c) the company’s directors, officers, and shareholders; and
- “(d) the deed administrator.

“Compare: Corporations Act 2001 (Australia) s 444G

“239ACT Extent to which deed binds creditors

- “(1) A deed of company arrangement binds all creditors in respect of claims that arise on or before the cut-off day (*see* section 239ACN(2)(i)) specified in the deed.
- “(2) This section does not prevent a secured creditor from enforcing or otherwise dealing with the charge, except so far as—
- “(a) the deed provides otherwise in relation to a secured creditor who at the watershed meeting voted in favour of the resolution as a result of which the company executed the deed; or
 - “(b) the Court orders otherwise under section 239ACV(1)(a).
- “(3) This section does not affect a right that an owner or lessor of property has in relation to that property, except so far as—
- “(a) the deed provides otherwise in relation to an owner or lessor of property who at the watershed meeting voted in favour of the resolution as a result of which the company executed the deed; or
 - “(b) the Court orders otherwise under section 239ACV(1)(b).

“Compare: Corporations Act 2001 (Australia) s 444D

“239ACU Person bound by deed must not take steps to liquidate, etc

- “(1) A person who is bound by a deed of company arrangement must not, while the deed is in force,—
- “(a) apply, or continue with an application, to the Court for the appointment of a liquidator of the company;
 - “(b) except with the Court’s permission, begin or continue a proceeding against the company or in relation to any of its property;
 - “(c) except with the Court’s permission, begin or continue an enforcement process against the company’s property.
- “(2) In this section, **property** includes property used or occupied by the company, or in its possession.

“Compare: Corporations Act 2001 (Australia) s 444E

“239ACV Court may restrain creditors and others from enforcing charge or recovering property

- “(1) The Court may, at any time after creditors have resolved at the watershed meeting that a deed of company arrangement be executed, order that, except as permitted by the order,—
- “(a) a secured creditor must not enforce or otherwise deal with the charge; or
 - “(b) the owner or lessor of property that is used or occupied by the company or is in the company’s possession must not take possession of the property or otherwise recover it.
- “(2) The Court may make the order only if—
- “(a) it is satisfied that achieving the purposes of the deed would be materially adversely affected if the order was not made; and
 - “(b) having regard to the terms of the deed and the order, and any other relevant matter, it is satisfied that the interests of the person affected by the order, that is the creditor, property owner, or lessor, will be adequately protected.
- “(3) An application for an order under this section may be made only,—
- “(a) if the deed has not yet been executed, by the administrator; or
 - “(b) if the deed has been executed, by the deed administrator.
- “(4) The Court’s order may be made subject to conditions.
- “Compare: Corporations Act 2001 (Australia) s 444F

“239ACW Effect of deed on company’s debts

- “(1) A deed of company arrangement releases the company from a debt only in so far as—
- “(a) the deed provides for the release; and
 - “(b) the creditor concerned is bound by the deed.
- “(2) The release of the company from a debt under subsection (1) does not discharge or otherwise affect the liability of—
- “(a) a guarantor of the debt; or
 - “(b) a person who has indemnified the creditor concerned against default by the company in relation to the debt.
- “Compare: Corporations Act 2001 (Australia) s 444H

“239ACX Court may rule on validity of deed

- “(1) The Court may rule on the validity of a deed of company arrangement if there is doubt, on a specific ground, whether a deed of company arrangement—
- “(a) was entered into in accordance with this Part; or
 - “(b) complies with this Part.
- “(2) An application under this section may be made by—
- “(a) the deed administrator; or
 - “(b) a shareholder or creditor of the company; or
 - “(c) the Registrar.
- “(3) On an application under this section,—
- “(a) the Court may declare the deed void or not void;
 - “(b) if the deed is void for contravention of a provision of this Part, the Court may validate the deed, or any part of it, provided the Court is satisfied that—
 - “(i) the provision was substantially complied with; and
 - “(ii) no injustice will result for anyone bound by the deed if the contravention is disregarded.
- “(4) The Court may, if it declares that a provision of the deed is void, vary the deed, but only if the deed administrator consents.

“Compare: Corporations Act 2001 (Australia) s 445G

**“Subpart 14—Administrator’s duty to file
accounts****“239ACY Administrator includes deed administrator**

In this subpart, unless the context otherwise requires, **administrator** includes a deed administrator.

“239ACZ Administrator must file accounts

- “(1) Every administrator must file an account with the Registrar for each of the following periods:
- “(a) the period of 6 months (or shorter, as the administrator decides) after the day on which the administrator was appointed; and
 - “(b) each subsequent period of 6 months during which the administrator holds office; and

- “(c) the period between the last period of the kind referred to in paragraph (b) and the day on which the administrator vacates office.
- “(2) The administrator must file the account within 20 working days after the end of the period in question.
- “(3) The account must be in the prescribed form and must show,—
 - “(a) for each period, the administrator’s receipts and payments; and
 - “(b) for each period except the first, the aggregates of the administrator’s receipts and payments since the day on which the administrator was appointed.

“Compare: Corporations Act 2001 (Australia) s 432(1), (1A)(a), (b)

“Subpart 15—Variation and termination of deed

“239ADA Creditors may vary deed

The creditors may vary a deed of company arrangement by a resolution passed at a meeting convened under section 239ADF, but the variation must not be materially different from the proposed variation set out in the notice of the meeting.

“Compare: Corporations Act 2001 (Australia) s 445A

“239ADB Court may cancel creditors’ variation

- “(1) A creditor of a company in administration may apply to the Court for an order cancelling the variation of the deed of company arrangement by the creditors.
- “(2) On the application, the Court may, if it is just and equitable to do so,—
 - “(a) cancel or confirm the variation, wholly or in part, on specified conditions (if any); and
 - “(b) make any other orders that the Court thinks appropriate.

“Compare: Corporations Act 2001 (Australia) s 445B

“239ADC Termination of deed

A deed of company arrangement may be terminated—

- “(a) by the Court under section 239ADD; or

- “(b) by a resolution of the creditors under section 239ADE;
or
- “(c) automatically, if the deed specifies circumstances in which the deed will terminate, and those circumstances occur.

“Compare: Corporations Act 2001 (Australia) s 445C

“239ADD Termination by Court

- “(1) The Court may terminate a deed of company arrangement on the application of—
 - “(a) the company; or
 - “(b) a creditor; or
 - “(c) the deed administrator; or
 - “(d) any other interested person.
- “(2) The Court may terminate a deed of company arrangement if it is satisfied that—
 - “(a) an information breach has occurred; or
 - “(b) there has been a material contravention of the deed by a person bound by it; or
 - “(c) effect cannot be given to the deed without injustice or undue delay; or
 - “(d) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be done or made under the deed would be,—
 - “(i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, 1 or more of the creditors;
or
 - “(ii) contrary to the interests of the company as a whole; or
 - “(e) the deed should be terminated for some other reason.
- “(3) The Court must not terminate the deed without first taking into account the rights of third parties.
- “(4) In this section, an **information breach** has occurred if—
 - “(a) false or misleading information about the company’s business, property, affairs, or financial circumstances—
 - “(i) was given to the administrator or the creditors; or
 - “(ii) was contained in a report or statement under section 239AU(3) that accompanied a notice of the watershed meeting at which a resolution that the

company execute a deed of company arrangement was passed; or

- “(b) there was an omission from the report or statement referred to in paragraph (a)(ii); and
- “(c) the information or the omission, as the case may be, can reasonably have been expected to be material to the creditors in deciding whether to vote in favour of the resolution that the company execute the deed of company arrangement.

“Compare: Corporations Act 2001 (Australia) s 445D

“239ADE Termination by creditors

- “(1) The creditors, by a resolution passed at a meeting convened under section 239ADF, may terminate the deed if there has occurred a material breach of the deed that has not been rectified.
- “(2) The creditors may also appoint a liquidator if the notice of the meeting sets out a proposed resolution that a liquidator be appointed to the company.

“Compare: Corporations Act 2001 (Australia) s 445E

“239ADF Creditors’ meeting to consider proposed variation or termination of deed

- “(1) The deed administrator—
 - “(a) may at any time convene a meeting of the company’s creditors to consider a variation to, or the termination of, the deed; and
 - “(b) must convene a meeting if requested to do so in writing by creditors whose claims against the company are not less than 10% in value of the total value of all creditors’ claims.
- “(2) The deed administrator must convene the meeting by—
 - “(a) giving written notice to as many of the company’s creditors as reasonably practicable; and
 - “(b) advertising the meeting in accordance with section 3(1)(b).
- “(3) The administrator must take the steps in subsection (2) not less than 5 working days before the meeting.

“(4) The notice given to the creditors must set out any resolution for varying or terminating the deed that is to be considered by the meeting.

“(5) The deed administrator must preside at the meeting.

“(6) The meeting may be adjourned from time to time.

“Compare: Corporations Act 2001 (Australia) s 445F

“Subpart 16—Administrator’s liability and indemnity for debts of administration

“239ADG Administrator not liable for company’s debts except as provided in this subpart and in section 239Y

The administrator is not liable for the debts of the company except as provided in this subpart and in section 239Y.

“Compare: Corporations Act 2001 (Australia) s 443C

“239ADH Administrator liable for general debts

“(1) The administrator is liable for debts that he or she incurs in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for—

“(a) the purpose of funding the company; or

“(b) any services rendered; or

“(c) any goods bought; or

“(d) any property hired, leased, or occupied.

“(2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator’s rights against the company or anyone else.

“Compare: Corporations Act 2001 (Australia) s 443A

“239ADI Administrator’s liability for rent

“(1) The administrator is personally liable, to the extent specified in subsection (2), for rent and other payments becoming due by the company under an agreement—

“(a) made before the administration began; and

“(b) relating to the use, possession, or occupation of property by the company.

“(2) The administrator is liable for rent and other payments that accrue in the period—

- “(a) beginning more than 7 days after the administration begins; and
 - “(b) throughout which—
 - “(i) the company continues to use or occupy, or be in possession of, the property; and
 - “(ii) the administration continues; and
 - “(c) ending on the earliest of the following:
 - “(i) the end of the administration; or
 - “(ii) the administrator ceasing to hold office; or
 - “(iii) the appointment of a receiver of the property; or
 - “(iv) the appointment of an agent by a secured creditor of the property, under the provisions of a charge over the property, to enter into possession or to assume control of the property; or
 - “(v) when a secured creditor takes possession or assumes control of the property under the provisions of a charge over the property.
 - “(3) The administrator is not taken, because of subsection (2),—
 - “(a) to have adopted the agreement; or
 - “(b) to be liable under the agreement except as set out in subsection (2).
 - “(4) This section does not affect the liability of the company for rent and other payments due under the agreement.
- “Compare: Corporations Act 2001 (Australia) s 443B(1), (2), (7), (9)

“239ADJ Administrator not liable for rental if non-use notice in force

- “(1) The administrator is not liable under section 239ADI for any period for which a non-use notice is in force.
- “(2) In this section, **non-use notice** means, in relation to the property to which it refers, a notice that—
 - “(a) is given by the administrator to the owner or the lessor of the property within 7 days after the administration begins; and
 - “(b) specifies the property to which it relates; and
 - “(c) states that the company does not propose to use the property or otherwise exercise any rights in relation to it.
- “(3) A non-use notice ceases to have effect if—

- “(a) the administrator revokes it by written notice to the owner or lessor; or
 - “(b) the company exercises, or purports to exercise, a right in relation to the property.
- “(4) In subsection (3)(b), the company does not exercise, or purport to exercise, a right in relation to the property merely because the company continues to occupy, or to be in possession of, the property, unless the company—
- “(a) also uses the property; or
 - “(b) asserts a right, as against the owner or the lessor, to continue to occupy or be in possession.
- “(5) A non-use notice does not affect the company’s liability for rent and other payments.
- “Compare: Corporations Act 2001 (Australia) s 443B(3)–(6)

“239ADK Court may exempt administrator from liability for rent

The Court may exempt an administrator from liability for rent and other payments under section 239ADI, but the Court’s order does not affect the company’s liability.

“Compare: Corporations Act 2001 (Australia) s 443B(8)

“239ADL Administrator’s indemnity

The administrator is indemnified out of the company’s property for—

- “(a) a personal liability incurred in the due performance of his or her duties, but not a personal liability incurred in bad faith or negligently; and
- “(b) the remuneration to which the administrator is entitled under section 239O.

“Compare: Corporations Act 2001 (Australia) s 443D

“239ADM Administrator’s right of indemnity has priority over other debts

Subject to section 312, the administrator’s right of indemnity under this subpart has priority over—

- “(a) all the company’s unsecured debts; and

“(b) debts of the company secured by a charge of the kind described in clause 2(1)(b) of Schedule 7.

“Compare: Corporations Act 2001 (Australia) s 443E

“239ADN Lien to secure indemnity

“(1) The administrator has a lien on the company’s property to secure a right of indemnity under this subpart.

“(2) A lien under subsection (1) has priority over a charge to the same extent as the right of indemnity has priority over debts secured by the relevant charge.

“Compare: Corporations Act 2001 (Australia) s 443F

“Subpart 17—Powers of Court

“239ADO Court’s general power

“(1) The Court may make any order that it thinks appropriate about how this Part is to operate in relation to a particular company.

“(2) For example, the Court may terminate the administration under subsection (1) if the Court is satisfied that the administration should end—

“(a) because the company is solvent; or

“(b) because the provisions of this Part are being abused; or

“(c) for some other reason.

“(3) The Court’s order may be made subject to conditions.

“(4) The Court may make an order under this section on the application of—

“(a) the company or a shareholder of the company; or

“(b) a creditor of the company; or

“(c) the administrator; or

“(d) the deed administrator; or

“(e) the Registrar; or

“(f) any other interested person.

“Compare: Corporations Act 2001 (Australia) s 447A

“239ADP Orders to protect creditors during administration

“(1) On the application of the Registrar, the Court may make any order that it thinks necessary to protect the interests of the company’s creditors while the company is in administration.

“(2) On the application of a creditor of a company, the Court may make any order that it thinks necessary to protect the interests of that creditor while the company is in administration.

“(3) An order may be made subject to conditions.

“Compare: Corporations Act 2001 (Australia) s 447B

“239ADQ Court may rule on validity of administrator’s appointment

“(1) If there is doubt, on a specific ground, as to the validity of the appointment of a person as administrator or deed administrator, any of the following persons may apply to the Court for a ruling on the validity of the appointment:

“(a) the person appointed; or

“(b) the company in question; or

“(c) any of the company’s creditors.

“(2) In ruling that the appointment is invalid, the Court is not limited to the grounds specified in the application.

“Compare: Corporations Act 2001 (Australia) s 447C

“239ADR Administrator may seek directions

“(1) The administrator or the deed administrator may apply to the Court for directions in relation to the performance or exercise of any of the administrator’s functions and powers.

“(2) The deed administrator may apply to the Court for directions in relation to the operation of, or giving effect to, the deed.

“Compare: Corporations Act 2001 (Australia) s 447D

“239ADS Court may supervise administrator or deed administrator

“(1) The Court may make any order it thinks just if it is satisfied that—

“(a) the administrator’s or the deed administrator’s management of the company’s business, property, or affairs is prejudicial to the interests of some or all of the company’s creditors or shareholders; or

“(b) the administrator’s or deed administrator’s conduct or proposed conduct has been or is or will be prejudicial to those interests.

“(2) An application for an order under this section may be made by—

“(a) a creditor or shareholder of the company in question; or

“(b) the Registrar.

“Compare: Corporations Act 2001 (Australia) s 447E(1)

“239ADT Court may order administrator or deed administrator to remedy default

“(1) The Court may order an administrator or deed administrator to remedy his or her default.

“(2) Examples of default include the following:

“(a) the administrator or deed administrator has failed, as required by this Act or otherwise by law, to make or file any return, account, or other document or to give a notice, and has not remedied the default within 10 working days after service on him or her of a notice by a shareholder or creditor of the company in administration requiring that the default be remedied:

“(b) the administrator or deed administrator has failed, after being required at any time by the liquidator of the company to do so,—

“(i) to render proper accounts of, and to vouch, his or her receipts and payments as administrator or deed administrator:

“(ii) to pay to the liquidator the amount properly payable to the liquidator.

“(3) An application for an order under this section may be made by—

“(a) a shareholder or creditor of the company, in the case of a default referred to in subsection (2)(a):

“(b) the liquidator, in the case of a default referred to in subsection (2)(b):

“(c) in any case, by the Registrar.

“239ADU Court’s power when office of administrator or deed administrator vacant, etc

“(1) The Court may make any order it thinks just if it is satisfied that,—

- “(a) in the case of a company in administration, the office of the administrator is vacant or no administrator is acting;
or
 - “(b) in the case of a deed of company arrangement that is still in force, the office of the deed administrator is vacant or no deed administrator is acting.
- “(2) An application for an order under this section may be made by—
- “(a) a creditor or shareholder of the company; or
 - “(b) if the company is in liquidation, the liquidator; or
 - “(c) the Registrar.
- “Compare: Corporations Act 2001 (Australia) s 447E(2)

“**239ADV Prohibition order**

- “(1) The Court must make a prohibition order in relation to a person if it is shown to the satisfaction of the Court that that person is unfit to act as administrator or deed administrator by reason of persistent failures to comply or the seriousness of a failure to comply.
- “(2) The period of the order is a matter for the discretion of the Court and the Court may make a prohibition period for an indefinite period.
- “(3) A person to whom a prohibition order applies must not act as an administrator or deed administrator in a current or other administration.
- “(4) The Court may make an order under this section in relation to a past or current administrator or deed administrator of a company in administration on the application of—
- “(a) the company or a shareholder of the company; or
 - “(b) a creditor of the company; or
 - “(c) the administrator or deed administrator of the company;
or
 - “(d) the Registrar; or
 - “(e) any other interested person.
- “(5) In this section, **failure to comply** means a failure of an administrator or deed administrator to comply with a relevant duty arising—

- “(a) under this or any other enactment or law or rules of court; or
 - “(b) under any order or direction of the Court made under this subpart.
- “(6) In subsection (5), **relevant duty** includes the duty of a person in his or her capacity as liquidator of a company.
- “(7) A copy of every order made under subsection (1) must, within 10 working days of the order being made, be delivered by the applicant to the Official Assignee for New Zealand who must keep it on a file indexed by reference to the name of the administrator or deed administrator concerned.

“Subpart 18—Notices about steps taken
under this Part

“**239ADW Administrator must give notice of appointment**

- “(1) An administrator appointed by the company under section 239I, by the liquidator or interim liquidator under section 239J, by a secured creditor under section 239K, by the Court under section 239L, or by the creditors under section 239R(2)(a) must,—
- “(a) before the end of the next working day after appointment, lodge a notice of the appointment with the Registrar; and
 - “(b) not later than 3 working days after appointment, advertise the appointment in accordance with section 3(1)(b); and
 - “(c) as soon as practicable, and in any event not later than the end of the next working day after appointment, give written notice of the appointment to—
 - “(i) each person who holds a charge over the whole, or substantially the whole, of the company’s property; or
 - “(ii) each person who holds 2 or more charges in the property of the company if the property of the company subject to those charges together is the whole, or substantially the whole, of the company’s property; and

“(d) in the notice referred to in paragraph (c), set out the rights of the creditor to enforce the charge under section 239ABL.

“(2) The administrator need not give notice under subsection (1) to the person who appointed him or her.

“Compare: Corporations Act 2001 (Australia) s 450A(1), (3), (4)

“239ADX Secured creditor who appoints administrator must give notice to company

A secured creditor who appoints an administrator under section 239K must give written notice of the appointment to the company as soon as practicable and in any event before the end of the next working day.

“Compare: Corporations Act 2001 (Australia) s 450A(2)

“239ADY Deed administrator must give notice of execution of deed of company arrangement

As soon as practicable after a deed of company arrangement is executed, the deed administrator must—

“(a) send to each creditor a written notice of the execution of the deed; and

“(b) advertise the execution of the deed in accordance with section 3(1)(b); and

“(c) file a copy of the deed with the Registrar.

“Compare: Corporations Act 2001 (Australia) s 450B

“239ADZ Deed administrator must give notice of failure to execute deed of company arrangement

If a company does not meet the deadline under section 239ACO or 239ACP(1)(c) for the execution of a deed of company arrangement, the deed administrator must as soon as practicable—

“(a) cause a notice of the failure to execute the deed to be advertised in accordance with section 3(1)(b); and

“(b) file a copy of the notice with the Registrar.

“Compare: Corporations Act 2001 (Australia) s 450C

“239AEA Deed administrator must give notice of termination by creditors of deed of company arrangement

If the creditors terminate the deed of company arrangement, the deed administrator must as soon as practicable—

- “(a) send a notice of the termination to each of the creditors; and
- “(b) advertise the termination in accordance with section 3(1)(b); and
- “(c) file a copy of the notice with the Registrar.

“Compare: Corporations Act 2001 (Australia) s 450D

“239AEB Company must disclose fact of administration

“(1) A company must set out, in every document issued or signed by, or on behalf of, the company that evidences or creates a legal obligation of the company, after the company’s name where it first appears,—

- “(a) for as long as the company is in administration, the words ‘administrator appointed’; and
- “(b) for as long as a deed of company arrangement is in force, the words ‘subject to deed of company arrangement’.

“(2) The Court may, on an application by the company, exempt the company from the requirement in subsection (1)(b).

“(3) A company that fails to comply with subsection (1) commits an offence and is liable on conviction to the penalty set out in section 373(1).

“Compare: Corporations Act 2001 (Australia) s 450E

“239AEC Notice of change of name

“(1) A company in administration that changed its name less than 6 months before the appointment of the administrator must, in any document of the company where its name appears, include also its former name.

“(2) If a company to which subsection (1) applies is, in the course of the administration, placed in liquidation, the liquidator must, in any document of the company where its name appears, include also its former name.

“239AED Effect of contravention of this subpart

A contravention of this subpart does not affect the validity of anything done or omitted under this Part, except so far as the Court orders otherwise.

“Compare: Corporations Act 2001 (Australia) s 450F

“Subpart 19—Miscellaneous**“239AEE Effect of things done during administration of company**

A payment made, transaction entered into, or any other act or thing done, in good faith, by or with the consent of the administrator of a company in administration is valid and effective for the purposes of this Act.

“Compare: Corporations Act 2001 (Australia) s 451C(a)

“239AEF Interruption of time for doing act

If there is a time before which, or a period during which, an act for any purpose may or must be done, and this Act prevents the act from being done in time, then the time or period in question is extended by the period during which this Act prevents the act from being done in time.

“Compare: Corporations Act 2001 (Australia) s 451D

“Subpart 20—Set-off and netting agreements**“239AEG Mutual credit and set-off**

Where there have been mutual credits, mutual debts, or other mutual dealings between a company and a person who seeks or, but for the operation of this section, would seek to have a claim admitted under a deed of company arrangement,—

- “(a) an account must be taken of what is due from the one party to the other in respect of those credits, debts, or dealings; and
- “(b) an amount due from one party must be set off against an amount due from the other party; and
- “(c) only the balance of the account may be admitted under the deed of company arrangement, or is payable to the company, as the case may be.

“239AEH Application of set-off under netting agreement

- “(1) Sections 239AEI to 239AEP apply—
- “(a) to a netting agreement—
 - “(i) made in or evidenced by writing; and
 - “(ii) in which the application of sections 239AEI to 239AEP has not been expressly excluded; and
 - “(iii) whether made before or after the commencement of this section; and
 - “(b) to all obligations under a netting agreement (whether those obligations are payable in New Zealand currency or in some other currency).
- “(2) Sections 239AEI to 239AEP apply despite—
- “(a) any disposal of rights under a transaction that is subject to a netting agreement, in contravention of a prohibition in the netting agreement; or
 - “(b) the creation of a charge or other interest in respect of the rights referred to in paragraph (a) in contravention of a prohibition in the netting agreement.
- “(3) Nothing in sections 239AEI to 239AEP applies to an amount paid or payable by a shareholder—
- “(a) as the consideration, or part of the consideration, for the issue of a share; or
 - “(b) in satisfaction of a call in respect of an outstanding liability of the shareholder made by the board of the company or by the administrator.

“239AEI Calculation of netted balance

If a company in administration is a party to a netting agreement,—

- “(a) any netted balance payable by or to the company must be calculated in accordance with the netting agreement; and
- “(b) that netted balance constitutes, in respect of the transactions that are included in the calculation,—
 - “(i) the debt that is owed to the creditor and that may be admitted under the deed of company arrangement; or
 - “(ii) the amount that is payable to the company,—
as the case may be.

“239AEJ Mutuality required for transactions under bilateral netting agreements

Sections 239AEI to 239AEP apply to transactions that are subject to a bilateral netting agreement only if those transactions constitute mutual credits, mutual debts, or other mutual dealings.

“239AEK When mutuality required for transactions under recognised multilateral netting agreements

“(1) Sections 239AEI to 239AEP apply to transactions that are subject to a recognised multilateral netting agreement, whether or not those transactions constitute mutual credits, mutual debts, or other mutual dealings.

“(2) Despite subsection (1), sections 239AEI to 239AEP do not apply to transactions that are subject to a recognised multilateral netting agreement if—

- “(a) those transactions do not constitute mutual credits, mutual debts, or other mutual dealings; and
- “(b) a party to any of those transactions is acting as a trustee for another person; and
- “(c) the party acting as trustee is not authorised by the terms of the trust of which the party is a trustee to enter into the transaction.

“239AEL Application of set-off under section 239AEG to transactions subject to netting agreements

“(1) Section 239AEG does not apply to transactions that are subject to a netting agreement to which sections 239AEI to 239AEP apply.

“(2) However, a netted balance is to be treated as an amount to which section 239AEG applies if the company in administration and the other party to the netting agreement also have mutual credits, mutual debts, or other mutual dealings between them that are not subject to the netting agreement.

“239AEM Transactions under netting agreement and effect on certain sections

“(1) Nothing in sections 239AEH to 239AEP prevents the operation of section 56 or, subject to section 239ACB, section 292,

297 or 298 in respect of a transaction that is subject to a netting agreement.

- “(2) However, nothing in section 292(3) applies to a transaction that is subject to a netting agreement.
- “(3) For the purposes of sections 292 and 297, the term **transaction**, in relation to a company, does not include a netting agreement entered into by the company, except to the extent that the effect of entering into the netting agreement is to reduce any amount that was owing by or to the company at the time the company entered into the agreement.

“**239AEN Rights under netting agreement not affected by commencement of administration**

Nothing in section 239Z affects, in respect of a company in administration, the exercise of any of the following rights under a netting agreement:

- “(a) the termination, in accordance with the netting agreement, of all or any transactions that are subject to the netting agreement by reason of the occurrence of an event specified in the netting agreement, being an event (including the appointment of an administrator) occurring not later than the commencement of the administration; or
- “(b) the taking of an account, in accordance with the netting agreement, of all money due between the parties to the netting agreement in respect of transactions affected by the termination.

“**239AEO Effect of declaration of person as recognised clearing house under section 310K**

A person who is declared a recognised clearing house under section 310K is deemed to be a recognised clearing house for the purposes of sections 239AEI to 239AEP also.

“239AEP Transactions under recognised multilateral netting agreement not affected by variation or revocation of declaration under section 310K

The variation or revocation of a declaration under section 310K does not affect the application of sections 239AEI to 239AEP to any transaction—

- “(a) that is or was subject to a recognised multilateral netting agreement; and
- “(b) that was entered into before the variation or revocation of the declaration.

“Subpart 21—Single administration of related companies in administration

“239AEQ Interpretation of terms for purposes of this subpart

“(1) In this subpart,—

“**pool** means a pool of related companies in a single administration under a single administration order made under section 239AER

“**pool administrator** means the administrator of a pool

“**pool company** means a company in respect of which a single administration order has been made under section 239AER.

“(2) For the purposes of the single administration of a pool, in this Part, unless the context indicates otherwise,—

“**administrator** includes a pool administrator

“**company** includes a pool

“**deed administrator** includes the deed administrator of a deed of company administration executed by a pool

“**deed of company administration** includes a deed of company administration executed under section 239AEW.

“239AER Court may order single administration for related companies in administration

“(1) If 2 or more related companies are in administration, the Court may, if it is satisfied that it is just and equitable, order that the administration in respect of each company must proceed together as if they were 1 company to the extent that the Court

orders and subject to the terms and conditions that the Court imposes.

- “(2) An application under subsection (1) may be made by the administrator or a creditor of any of the companies in administration.
- “(3) Notwithstanding anything in this Part, the Court may, on first making the order and otherwise from time to time, make any other order, or give any direction to facilitate giving effect to an order, under subsection (1) as it sees fit.
- “(4) The fact that creditors of the company in administration relied on the fact that another company was, or is, related to it is not a ground for making an order under this section.

“Compare: 1993 No 105 s 271(b)

“239AES Notice that application filed must be given to administrators and creditors

- “(1) Unless the Court orders otherwise, an applicant for an order under section 239AER must give notice that the application has been filed to—
 - “(a) the administrator of each company in administration; and
 - “(b) each creditor of each company in administration.
- “(2) The notice must—
 - “(a) identify each company to which the proposed order relates; and
 - “(b) summarise all information known to the applicant that is material to whether the order should be made; and
 - “(c) state that a person to whom the notice must be given may oppose the application by filing a statement of defence in accordance with the High Court Rules.
- “(3) The notice requirement in this section is in addition to anything required by the High Court Rules to be done.

“239AET Guidelines for single administration order

In deciding whether it is just and equitable to make an order under section 239AER, the Court must have regard to the following criteria:

- “(a) the extent to which any of the companies took part in the management of any of the other companies in the proposed pool:
 - “(b) the conduct of any of the companies towards the creditors of any of the other companies in the proposed pool:
 - “(c) the extent to which the circumstances that gave rise to any of the companies in the proposed pool being placed in administration are attributable to the actions of any of the other companies:
 - “(d) the extent to which the businesses of the companies in the proposed pool have been combined:
 - “(e) any other matters that the Court thinks fit.
- “Compare: 1993 No 105 s 272(2)

“239AEU Court may order that related company in administration be added to existing pool

- “(1) The Court may order that a company in administration that is related to the companies in an existing pool be added to the pool for the purposes of administration.
- “(2) An application under subsection (1) may be made by—
 - “(a) the administrator or any creditor of the company; or
 - “(b) the administrator or any creditors of the pool.
- “(3) The Court may make the order if it is satisfied that it is just and equitable to do so having regard to any 1 or more of the criteria in section 239AET.
- “(4) Sections 239AER and 239AES apply with all necessary modifications to an application under this section.
- “(5) The Court must not make the order unless the pool administrator consents.

“239AEV Creditors’ meetings in single administration of pool companies

- “(1) The provisions of this Part in relation to creditors’ meetings apply except that, subject to subsection (2), a creditor of a pool company may only vote on a matter related to the pool company of which that person is a creditor.
- “(2) If separate voting by creditors is impracticable (because, for example, the affairs of the pool companies are intermingled),

the Court may, on the application of the pool administrator, give directions as to how voting at a creditors' meeting must proceed.

“239AEW Pool companies may execute single deed of company administration

For the purposes of the single administration of a pool, the pool companies may execute a single deed of company arrangement.”

**Amendments to Companies Act
1993 consequential on new voluntary
administration provisions**

7 Commencement of liquidation

Section 241 is amended by repealing subsection (2) and substituting the following subsection:

“(2) A liquidator may be appointed by—

- “(a) special resolution of those shareholders entitled to vote and voting on the question; or
- “(b) the board of the company on the occurrence of an event specified in the constitution; or
- “(c) the Court, on the application of—
 - “(i) the company; or
 - “(ii) a director; or
 - “(iii) a shareholder or other entitled person; or
 - “(iv) a creditor (including any contingent or prospective creditor); or
 - “(v) if the company is in administration, the administrator; or
 - “(vi) the Registrar; or
- “(d) a resolution of the creditors passed at the watershed meeting held under section 239AT.”

8 Commencement of liquidation to be recorded

Section 241A(1) is amended by adding the following paragraph:

“(d) a liquidator is appointed under section 241(2)(d), the creditors must record in the resolution appointing the liquidator the date on which, and the time at which, the resolution was passed.”

9 Liquidator to summon meeting of creditors

Section 243 is amended by adding the following subsection:

“(11) Except for subsection (5), this section does not apply if the liquidator is appointed under section 241(2)(d).”

10 Court may terminate liquidation

Section 250 is amended by repealing subsection (2) and substituting the following subsections:

“(2) An application under this section may be made by—

“(a) the liquidator; or

“(b) if the company has executed a deed of company arrangement, the deed administrator; or

“(c) a director or shareholder of the company; or

“(d) any other entitled person; or

“(e) a creditor of the company; or

“(f) the Registrar.

“(2A) On an application by a deed administrator, the Court must have regard to—

“(a) any misconduct by the company’s officers reported by the deed administrator, the liquidator, or the Registrar; and

“(b) the commercial decision of the creditors in accepting the deed of company arrangement; and

“(c) whether the deed of company arrangement would leave the company insolvent; and

“(d) any other matters that the Court thinks fit.”

11 Restrictions on rights of creditors to complete execution, distraint, or attachment

Section 251(1)(a) is amended by omitting “section 241(2)(a) of this Act” and substituting “section 241(2)(a) or a resolution under section 241(2)(d)”.

12 Other duties of liquidator

Section 255(3)(a) is amended by omitting “under paragraph (a) or (b) of subsection (2) of section 241 of this Act” and substituting “under section 241(2)(a), (b), or (d)”.

13 Restriction on enforcement of lien over documents

Section 263(2) is amended by omitting “to the extent of \$500 or such greater amount as may be prescribed at the commencement of the liquidation” and substituting “to the extent of 10% of the total value of the debt, up to a maximum amount of \$2,000”.

14 Power of Court to require persons to repay money or return property

- (1) Section 301(1) is amended by inserting “administrator,” after “manager,” wherever it appears.
- (2) Section 301 is amended by adding the following subsection:
“(4) In making an order under subsection (1) against a past or present director, the Court must, where relevant, take into account any action that person took for the appointment of an administrator to the company under Part 15A.”

Appointment of liquidator

15 New section 241AA inserted

The following section is inserted after section 241:

“241AA Restriction on appointment of liquidator by shareholders or board after application filed for Court appointment

- “(1) This section applies if an application has been filed for the appointment of a liquidator of a company by the Court under section 241(2)(c).
- “(2) A liquidator of the company may only be appointed under section 241(2)(a) or (b) if the liquidator is appointed within 10 working days after service on the company of the application.
- “(3) If a liquidator is appointed under section 241(2)(a) or (b), the creditor who filed the application referred to in subsection (1) may apply to the Court under section 283(4) for the review of

his or her appointment as if the words ‘successor to a liquidator’ in section 283(4) read ‘liquidator’.

“(4) Subsection (2) does not apply once the application has been finally disposed of.”

Liquidator’s duty to report to creditors

16 Liquidator to summon meeting of creditors

Section 243 is amended by repealing subsection (2) and substituting the following subsection:

“(2) Notice in writing of a meeting of creditors—

“(a) must be given to every known creditor together with the report and notice referred to in section 255(2)(c); and

“(b) if the liquidator receives a notice under section 245(1)(b)(iii), must be given within 10 working days after receiving the notice.”

17 Liquidator may dispense with meetings of creditors

Section 245 is amended by repealing subsection (2) and substituting the following subsection:

“(2) Notice under subsection (1)(b) must be given to every known creditor together with the report and notice referred to in section 255(2)(c).”

18 New section 245A inserted

The following section is inserted after section 245:

“245A Power of Court where outcome of voting at meeting of creditors determined by related entity

“(1) This section applies if the Court is satisfied that—

“(a) a resolution at a meeting of creditors was passed, defeated, or required to be decided by a casting vote; and

“(b) the resolution would not have been passed, defeated, or required to be decided by a casting vote if the vote or votes cast by a particular related creditor or particular related creditors were disregarded; and

“(c) the passing of the resolution, or the failure to pass it,—
“(i) is contrary to the interests of the creditors, or a class of creditors, as a whole; and

- “(ii) has prejudiced, or is reasonably likely to prejudice, the interest of the creditor who voted against the resolution, or for it, as the case may be, to an extent that is unreasonable having regard to—
 - “(A) the benefits accruing to the related creditor, or to some or all of the related creditors, from the resolution, or from the failure to pass the resolution; and
 - “(B) the nature of the relationship between the related creditor and the company, or between the related creditors and the company; and
 - “(C) any other related matter.
- “(2) The Court may, on the application of the liquidator or a creditor,—
 - “(a) order that the resolution be set aside;
 - “(b) order that a new meeting be held to consider and vote on the resolution;
 - “(c) order that a specified related creditor or creditors must not vote on the resolution or on a resolution to vary or amend it;
 - “(d) make any other orders that the Court thinks necessary.
- “(3) In this section,—
 - “**promoter** has the same meaning as in section 2(1) of the Securities Act 1978
 - “**related creditor** means a creditor who is a related entity of the company in liquidation
 - “**related entity** means, in relation to the company in liquidation,—
 - “(a) a promoter; or
 - “(b) a relative or spouse of a promoter; or
 - “(c) a relative of a spouse of a promoter; or
 - “(d) a director or shareholder; or
 - “(e) a relative or spouse of a director or shareholder; or
 - “(f) a relative of a spouse of a director or shareholder; or
 - “(g) a related company; or
 - “(h) a beneficiary under a trust of which the company in liquidation is or has at any time been a trustee; or
 - “(i) a relative or spouse of that beneficiary; or

- “(j) a relative of a spouse of that beneficiary; or
- “(k) a company one of whose directors is also a director of the company in liquidation; or
- “(l) a trustee of a trust under which a person (A) is a beneficiary, if A is a related entity of the company in liquidation under this subsection.

“Compare: Corporations Act 2001 (Australia) s 600A”.

19 Other duties of liquidator

- (1) Section 255(2)(c) is amended by repealing subparagraph (i) and substituting the following subparagraph:
 - “(i) prepare a list of every known creditor of the company with each creditor’s address (if known); and.”
- (2) Section 255(2)(c)(ii) is amended by adding the following subparagraph:
 - “(C) the list of creditors referred to in subparagraph (i); and”.
- (3) Section 255 is amended by repealing subsections (5) and (6).

20 Duty to notify suspected offences

Section 258A(1) is amended by inserting the following paragraph after paragraph (c):

- “(ca) the Securities Markets Act 1988:”.

Assignment of liquidator’s statutory right to sue

21 New section 260A inserted

The following section is inserted after section 260:

“260A Liquidator may assign right to sue under this Act

- “(1) The liquidator may, if the Court has first approved it, assign any right to sue that is conferred on the liquidator by this Act.
- “(2) The application for approval may be—
 - “(a) made by the liquidator or the person to whom it is proposed to assign the right to sue; and

- “(b) opposed by a person who is a defendant to the liquidator’s action, if already begun, or a proposed defendant.”

Liquidator’s power of disclaimer

22 Power to disclaim onerous property

Section 269(2)(a) is amended by repealing subparagraph (ii) and substituting the following subparagraphs:

- “(ii) property of the company that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act; or
- “(iii) a litigation right that, in the opinion of the liquidator, has no reasonable prospect of success or cannot reasonably be funded from the assets of the company; but”.

Pooling of assets of related companies

23 New section 271A inserted

The following section is inserted after section 271:

“271A Notice that application filed must be given to administrators and creditors

- “(1) Unless the Court orders otherwise, an applicant for an order under section 271(1)(b) must give notice that the application has been filed to the liquidator and each creditor of each related company in liquidation.
- “(2) An applicant need not give notice to himself or herself.
- “(3) The notice must—
- “(a) identify each company to which the proposed order relates; and
 - “(b) summarise all information known to the applicant that is material to whether the order should be made; and
 - “(c) state that a person to whom the notice must be given may oppose the application by filing a statement of defence in accordance with the High Court Rules.

- “(4) The notice requirement in this section is in addition to anything required to be done by the High Court Rules.”

Qualifications and supervision of liquidators

24 Qualifications of liquidators

- (1) Section 280(1) is amended by inserting the following paragraphs after paragraph (c):
- “(ca) a person who has, or whose firm has, within the 2 years immediately before the commencement of the liquidation, provided professional services to the company, unless, within 20 working days before the appointment of the liquidator, the board of the company resolves that the company will, on the appointment of the liquidator, be able to pay its debts and a copy of the resolution is delivered to the Registrar for registration:
- “(cb) a person who has, or whose firm has, within the 2 years immediately before the commencement of the liquidation, had a continuing business relationship (other than through the provision of banking or financial services) with the company, its majority shareholder, any of its directors, or any of its secured creditors, unless, within 20 working days before the appointment of the liquidator, the board of the company resolves that the company will, on the appointment of the liquidator, be able to pay its debts and a copy of the resolution is delivered to the Registrar for registration.”
- (2) Section 280(1) is amended by adding the following paragraph:
- “(m) a person who is prohibited from being administrator or deed administrator under section 239ADV.”
- (3) Section 280 is amended by inserting the following subsection after subsection (1):
- “(1A) Subsection (1)(ca) or (cb) does not apply if all the creditors consent to the appointment of the person in question.”
- (4) Section 280 is amended by adding the following subsection:
- “(4) A person other than the Official Assignee must not be appointed a liquidator unless he or she has first certified in writing that he or she is not disqualified under subsection (1).”
- (5) Nothing in this section affects the qualification of a liquidator in office when this section came into force.

25 Meaning of failure to comply

Section 285 is amended by adding the following subsection as subsection (2):

- “(2) In subsection (1), **relevant duty** includes the duty of a person in his or her capacity as administrator or deed administrator of a company.”

26 Orders to enforce liquidator’s duties

- (1) Section 286 is amended by repealing subsection (5) and substituting the following subsection:

- “(5) If the Court is satisfied that a person is unfit to act as a liquidator by reason of persistent failures to comply or the seriousness of a failure to comply,—

“(a) the Court must make a prohibition order; and

“(b) the period of the order is a matter for the discretion of the Court but the Court may make a prohibition period for an indefinite period.”

- (2) Section 286(7) is amended by omitting “within the preceding 5 years”.

Voidable transactions

27 Transactions having preferential effect

- (1) The heading to section 292 is omitted and the heading “**Insolvent transaction voidable**” substituted.

- (2) Section 292 is amended by repealing subsections (1) to (4) and substituting the following subsections:

- “(1) A transaction by a company is voidable by the liquidator if it—

“(a) is an insolvent transaction; and

“(b) is entered into within the specified period.

- “(2) An **insolvent transaction** is a transaction by a company that—

“(a) is entered into at a time when the company is unable to pay its due debts; and

“(b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company’s liquidation.

- “(3) In this section, **transaction** means any of the following steps by the company:

- “(a) conveying or transferring the company’s property:
 - “(b) creating a charge over the company’s property:
 - “(c) incurring an obligation:
 - “(d) undergoing an execution process:
 - “(e) paying money (including paying money in accordance with a judgment or an order of a court):
 - “(f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.
- “(4) In this section, **transaction** includes a transaction by a receiver, except a transaction that discharges, whether in part or in full, a liability for which the receiver is personally liable under section 32(1) of the Receiverships Act 1993 or otherwise personally liable under a contract entered into by the receiver.
- “(4A) A transaction that is entered into within the restricted period is presumed, unless the contrary is proved, to be entered into at a time when the company is unable to pay its due debts.
- “(4B) Where—
- “(a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including a relationship to which other persons are parties); and
 - “(b) in the course of the relationship, the level of the company’s net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;
then—
 - “(c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
 - “(d) the transaction referred to in paragraph (a) may only be taken to be an insolvent transaction voidable by the liquidator if the effect of applying subsection (1) in accordance with paragraph (c) is that the single transaction referred to in paragraph (c) is taken to be an insolvent transaction voidable by the liquidator.”
- (3) Section 292(5) is amended by omitting “subsection (2)(a)(ii) of this section” and substituting “subsections (1) and (4B)”.

- (4) Section 292(6) is amended by omitting “(3) of this section” and substituting “(4A)”.
- (5) Nothing in this section makes voidable a transaction that was completed before this section came into force, if that transaction would not have been voidable if this section had not come into force.

28 Voidable charges

- (1) Section 293 is amended by repealing subsection (1) and substituting the following subsections:
 - “(1) A charge over any property or undertaking of a company is voidable by the liquidator if—
 - “(a) the charge was given within the specified period; and
 - “(b) immediately after the charge was given, the company was unable to pay its due debts.
 - “(1A) Subsection (1) does not apply if—
 - “(a) the charge secures money actually advanced or paid, or the actual price or value of property sold or supplied to the company, or any other valuable consideration given in good faith by the grantee of the charge at the time of, or at any time after, the giving of the charge; or
 - “(b) the charge is in substitution for a charge given before the specified period.”
- (2) Section 293(3) is amended by omitting “(1)(c) of this section” and substituting “(1A)(b)”.
- (3) Section 293(5) is amended by omitting “(1)(a)” and substituting “(1A)(a)”
- (4) Section 293(6) is amended by omitting “a year” wherever it appears and substituting in each case “2 years”.

29 New section 294 substituted

Section 294 is repealed and the following section substituted:

“294 Procedure for setting aside transactions and charges

- “(1) A liquidator who wishes to set aside a transaction or charge that is voidable under section 292 or 293 must—
 - “(a) file a notice with the Court that meets the requirements set out in subsection (2); and
 - “(b) serve the notice as soon as practicable on—

- “(i) the other party to the transaction or the charge holder, as the case may be; and
 - “(ii) any other party from whom the liquidator intends to recover.
- “(2) The liquidator’s notice must—
- “(a) be in writing; and
 - “(b) state the liquidator’s postal, email, and street addresses; and
 - “(c) specify the transaction or charge to be set aside; and
 - “(d) describe the property or state the amount that the liquidator wishes to recover; and
 - “(e) state that the person named in the notice may object to the transaction or charge being set aside by sending to the liquidator a written notice of objection that is received by the liquidator at his or her postal, email, or street address within 20 working days after the liquidator’s notice has been served on that person; and
 - “(f) state that the written notice of objection must contain full particulars of the reasons for objecting and must identify any documents that evidence or substantiate the reasons for objecting; and
 - “(g) state that the transaction or charge will be set aside as against the person named in the notice if that person does not object; and
 - “(h) state that if the person named in the notice does object, the liquidator may apply to the Court for the transaction or charge to be set aside.
- “(3) The transaction or charge is automatically set aside as against the person on whom the liquidator has served the liquidator’s notice, if that person has not objected by sending to the liquidator a written notice of objection that is received by the liquidator at his or her postal, email, or street address within 20 working days after the liquidator’s notice has been served on that person.
- “(4) The notice of objection must contain full particulars of the reasons for objecting and must identify documents that evidence or substantiate the reasons for objecting.
- “(5) A transaction or charge that is not automatically set aside may still be set aside by the Court on the liquidator’s application.”

30 New section 295 substituted

Section 295 is repealed and the following section substituted:

“295 Other orders

If a transaction or charge is set aside under section 294, the Court may make 1 or more of the following orders:

- “(a) an order that a person pay to the company an amount equal to some or all of the money that the company has paid under the transaction:
- “(b) an order that a person transfer to the company property that the company has transferred under the transaction:
- “(c) an order that a person pay to the company an amount that, in the Court’s opinion, fairly represents some or all of the benefits that the person has received because of the transaction:
- “(d) an order that a person transfer to the company property that, in the Court’s opinion, fairly represents the application of either or both of the following:
 - “(i) money that the company has paid under the transaction:
 - “(ii) proceeds of property that the company has transferred under the transaction:
- “(e) an order releasing, in whole or in part, a charge given by the company:
- “(f) an order requiring security to be given for the discharge of an order made under this section:
- “(g) an order specifying the extent to which a person affected by the setting aside of a transaction or by an order made under this section is entitled to claim as a creditor in the liquidation.

“Compare: Corporations Act 2001 (Australia) s 588FF(1)(a)–(d)”.

31 Additional provisions relating to setting aside transactions and charges

Section 296 is amended by repealing subsection (3) and substituting the following subsection:

- “(3) A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the per-

son from whom recovery is sought (**A**) proves that when **A** received the property—

- “(a) **A** acted in good faith; and
- “(b) a reasonable person in **A**’s position would not have suspected, and **A** did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and
- “(c) **A** gave value for the property or altered **A**’s position in the reasonably held belief that the transfer of the property to **A** was valid and would not be set aside.”

32 Transactions at undervalue

(1) Section 297 is amended by repealing subsections (1) and (2) and substituting the following subsections:

“(1) Under subsection (2) the liquidator may recover from a person (**X**) the amount **C** in the formula $A - B = C$, where—

- “(a) **A** is the value that **X** received from a company under a transaction to which the company was or is a party; and
- “(b) **B** is the value (if any) that the company received from **X** under the transaction.

“(2) The liquidator may recover the difference in value (that is, **C** in the formula in subsection (1)) from **X** if—

- “(a) the company entered into the transaction within the specified period; and
- “(b) either—
 - “(i) the company was unable to pay its due debts when it entered into the transaction; or
 - “(ii) the company became unable to pay its due debts as a result of entering into the transaction.”

(2) Section 297(3) is amended by repealing paragraph (a) and substituting the following paragraph:

- “(a) **transaction** has the same meaning as in section 292(3).”

- (3) Section 297(3) is amended by omitting “a year” wherever it appears and substituting in each case “2 years”.

New offence for directors

33 Carrying on business fraudulently

Section 380 is amended by adding the following subsection after subsection (2):

- “(3) Every director of a company commits an offence and is liable on conviction to the penalties set out in section 373(4), who, with intent to defraud a creditor or creditors of the company, does any thing that causes material loss to any creditor.”

Prohibition order

34 Registrar may prohibit persons from managing companies

Section 385(1) is amended by adding the following paragraph:

- “(g) that is in voluntary administration under Part 15A.”

Phoenix companies

35 New sections 386A to 386F inserted

The following sections are inserted after section 386:

“386A Director of failed company must not be director, etc, of phoenix company with same or substantially similar name

- “(1) Except with the permission of the Court, or unless 1 of the exceptions in sections 386D to 386F applies, a director of a failed company must not, for a period of 5 years after the date of commencement of the liquidation of the failed company,—
- “(a) be a director of a phoenix company; or
 - “(b) directly or indirectly be concerned in or take part in the promotion, formation, or management of a phoenix company; or
 - “(c) directly or indirectly be concerned in or take part in the carrying on of a business that has the same name as the failed company’s pre-liquidation name or a similar name.

“(2) A person who contravenes subsection (1) commits an offence and is liable on conviction on indictment to the penalty set out in section 373(4).

“Compare: Insolvency Act 1986 (UK) s 216

“**386B Definitions for purpose of phoenix company provisions**

“(1) In sections 386A to 386F,—

“**director of a failed company** means a person who was a director of a failed company at any time in the period of 12 months before the commencement of its liquidation, and **director of the failed company** has a corresponding meaning

“**failed company** means a company that was placed in liquidation at a time when it was unable to pay its due debts

“**phoenix company** means, in relation to a failed company, a company that, at any time before, or within 5 years after, the commencement of the liquidation of the failed company, is known by a name that is also—

“(a) a pre-liquidation name of the failed company; or

“(b) a similar name

“**pre-liquidation name** means any name (including any trading name) of a failed company in the 12 months before the commencement of that company’s liquidation

“**similar name** means a name that is so similar to a preliquidation name of a failed company as to suggest an association with that company.

“(2) For the purposes of sections 386A to 386F, a company is known by a name if that name is its registered name or if it carries on business, or carries on a part of its business, under that name.

“Compare: Insolvency Act 1986 (UK) s 216(6)

“**386C Liability for debts of phoenix company**

“(1) A person who contravenes section 386A(1)(a) or (b) is personally liable for all of the relevant debts of the phoenix company.

“(2) A person (A) who is involved in the management of a phoenix company is personally liable for all of the relevant debts of the company if—

- “(a) in the management of the company A acts or is willing to act on instructions given by another person (**B**); and
 - “(b) at that time A knows that B is contravening section 386A(1)(a) or (b) in relation to the company.
- “(3) In this section, **relevant debts**—
- “(a) in subsection (1), means the debts and liabilities incurred by the phoenix company during the period when the person liable was involved in the management of the company and the phoenix company was known by a pre-liquidation name of the failed company or a similar name:
 - “(b) in subsection (2), means the debts and liabilities incurred by the phoenix company during the period when A was acting or was willing to act on the instructions of B and the phoenix company was known by a pre-liquidation name of the failed company or a similar name.
- “(4) Liability under this section is joint and several.
- “(5) For the purposes of this section, a person who, as a person involved in the management of a company, has at any time acted on instructions given by a person who he or she knew at the time to be in contravention of section 386A is presumed, unless the contrary is shown, to have been willing at any later time to act on any instructions given by that person.
- “Compare: Insolvency Act 1986 (UK) s 217

“**386D Exception for person named in successor company notice**

- “(1) Section 386A does not apply to a person named in a successor company notice.
- “(2) A **successor company** is a company that acquires the whole or substantially the whole of the business of a failed company under arrangements made by a liquidator or receiver or made under a deed of company arrangement under Part 15A.
- “(3) A **successor company notice** is a notice by a successor company that—
 - “(a) is sent by the successor company to all creditors of the failed company for whom the successor company has an address; and

- “(b) is sent to those creditors within 20 working days after the arrangements for the acquisition of the business are made under subsection (2); and
- “(c) specifies—
 - “(i) the name and registered number of the failed company; and
 - “(ii) the circumstances in which the business has been acquired by the successor business; and
 - “(iii) the name that the successor company has assumed, or proposes to assume, for the purpose of carrying on that business; and
 - “(iv) any change of name that the successor company has made, or proposes to make, for the purpose of carrying on that business; and
- “(d) states, in respect of a person named in the notice,—
 - “(i) his or her full name; and
 - “(ii) the duration of his or her directorship of the failed company; and
 - “(iii) the extent of his or her involvement in the management of the failed company.

“Compare: Insolvency Rules 1986 (UK) rule 4.228

“386E Exception for temporary period while application for exemption is made

- “(1) A person does not contravene a prohibition in section 386A for the temporary period set out in subsection (2) if that person applies to the Court within 5 working days after the commencement of the liquidation of the failed company for an order exempting that person from the prohibition in question.
- “(2) The temporary period in subsection (1) is the period beginning on the date of the commencement of the liquidation of the failed company and ending on the earlier of—
 - “(a) the close of 6 weeks after the commencement of liquidation; and
 - “(b) the date on which the Court makes an order of exemption.

“Compare: Insolvency Rules 1986 (UK) rule 4.229

“386F Exception in relation to non-dormant phoenix company known by pre-liquidation name of failed company for at least 12 months before liquidation

- “(1) The prohibitions in section 386A(1)(a) and (b) do not apply in respect of a phoenix company that has been known by a name or names that are the same as the failed company’s preliquidation name or are similar names if—
- “(a) it has been known by that name or those names for not less than the period of 12 months before liquidation commences; and
 - “(b) it has not been dormant during those 12 months.
- “(2) For the purposes of subsection (1), a company has not been dormant during the 12-month period if transactions that are required by section 194(2) to be recorded in its accounting records have occurred throughout that period.

“Compare: Insolvency Rules 1986 (UK) rule 4.230”.

36 Consequential amendments to section 126

- (1) Section 126(1)(b) is amended by omitting “and clause 12(ab)” and substituting “386A to 386F, and clause 3(4)(b)”.
- (2) Section 126(1)(c) is amended by omitting “and clause 12(ab)” and substituting “386A to 386F, and clause 3(4)(b)”.
- (3) Section 126(1)(d) is amended by omitting “clause 12(ab)” and substituting “clause 3(4)(b)”

37 Consequential amendment to section 275

Section 275(4) is amended by omitting “paragraph (a) of clause 1” and substituting “clause 1(1)(a)”.

38 Consequential amendment to section 312

Section 312(2) is amended by omitting “clause 9(b)” and substituting “clause 2(1)(b)”.

39 Consequential amendments to section 373

- (1) Section 373(1) is amended by inserting the following paragraphs after paragraph 27:
 - “(27A) section 239AEA(3) (which relates to the failure by a company in administration to disclose the fact of administration):

“(27B) section 239AW(4) (which relates to attendance by a director at a watershed meeting):”.

- (2) Section 373(4) is amended by adding the following paragraph:
“(j) section 386A(2) (which relates to acting as a director of a phoenix company).”

Schedule 7

40 Schedule 7 substituted

- (1) Schedule 7 is repealed and the Schedule 7 set out in Schedule 1 is substituted.
- (2) If a liquidator is appointed to a company before this section comes into force, the property of the company must be applied in accordance with the priorities stated in Schedule 7 as if this section had not come into force.

Consequential amendments to other enactments

41 Consequential amendments to other enactments

The enactments specified in Schedule 2 are amended in the manner indicated in that schedule.

Schedule 1

s 40

New Schedule 7 substituted

Schedule 7

s 312

Preferential claims

1 Priority of payments to preferential creditors

- (1) The liquidator must first pay, in the order of priority in which they are listed,—
- (a) the fees and expenses properly incurred by the liquidator in carrying out the duties and exercising the powers of the liquidator, and the remuneration of the liquidator; and
- (b) the fees and expenses properly incurred by the administrator in carrying out the duties and exercising the

Schedule 7—*continued*

- powers of the administrator and the remuneration of the administrator; and
- (c) the reasonable costs of a person who applied to the Court for an order that the company be put into liquidation, including the reasonable costs incurred between lawyer and client in procuring the order; and
 - (d) the actual out-of-pocket expenses necessarily incurred by a liquidation committee; and
 - (e) to any creditor who protects, preserves the value of, or recovers assets of the company for the benefit of the company's creditors by the payment of money or the giving of an indemnity,—
 - (i) the amount received by the liquidator by the realisation of those assets, up to the value of that creditor's unsecured debt; and
 - (ii) the amount of the costs incurred by that creditor in protecting, preserving the value of, or recovering those assets.
- (2) After paying the claims referred to in subclause (1), the liquidator must next pay, to the extent that they remain unpaid, the following claims:
- (a) subject to clause 3(1), all wages or salary of any employee, whether or not earned wholly or in part by way of commission, and whether payable for time or for piece work, in respect of services provided to the company during the 4 months before the commencement of the liquidation:
 - (b) subject to clause 3(1), any holiday pay payable to an employee on the termination of his or her employment before, or because of, the commencement of the liquidation:
 - (c) subject to clause 3(1), any compensation for redundancy owed to an employee that accrues before, or because of, the commencement of the liquidation:
 - (d) subject to clause 3(1), amounts deducted by the company from the wages or salary of an employee in order to satisfy obligations of the employee (including

Schedule 7—*continued*

amounts payable to the Commissioner of Inland Revenue in accordance with section 163(1) of the Child Support Act 1991 and section 167(2) of the Tax Administration Act 1994 as applied by section 25 of the Student Loan Scheme Act 1992):

- (e) subject to clause 3(1), any reimbursement or payment provided for, or ordered by, the Employment Relations Authority, the Employment Court, or the Court of Appeal under section 123(1)(b) or section 128 of the Employment Relations Act 2000, to the extent that the reimbursement or payment does not relate to any matter set out in section 123(1)(c) of the Employment Relations Act 2000, in respect of wages or other money or remuneration lost during the 4 months before the commencement of the liquidation:
 - (f) amounts that are preferential claims under section 263(2):
 - (g) all amounts payable to the Commissioner of Inland Revenue in accordance with section 167(2) of the Tax Administration Act 1994 as applied by section 67 of the KiwiSaver Act 2006:
 - (h) all sums that, by any other enactment, are required to be paid in accordance with the priority established by this subclause.
- (3) After paying the claims referred to in subclause (2), the liquidator must next pay all sums, for which a buyer is a creditor in the liquidation of the company under section 11 of the Layby Sales Act 1971,—
- (a) paid by the buyer to a seller on account of the purchase price of goods; or
 - (b) to which the buyer is or becomes entitled to receive from a seller under section 9 of the Layby Sales Act 1971.
- (4) After paying the claims referred to in subclause (3), the liquidator must next pay the amount of any costs referred to in section 234(c).

Schedule 7—*continued*

- (5) After paying the claims referred to in subclause (4), the liquidator must next pay, to the extent that it remains unpaid to the Commissioner of Inland Revenue or to the Collector of Customs, as the case may require, the amount of—
- (a) tax payable by the company in the manner required by Part 3 of the Goods and Services Tax Act 1985; and
 - (b) tax deductions made by the company under the PAYE rules of the Income Tax Act 2004; and
 - (c) non-resident withholding tax deducted by the company under the NRWT rules of the Income Tax Act 2004; and
 - (d) resident withholding tax deducted by the company under the RWT rules of the Income Tax Act 2004; and
 - (e) duty payable within the meaning of section 2(1) of the Customs and Excise Act 1996.

2 Conditions to priority of payments to preferential creditors

- (1) The claims listed in each of subclauses (2), (3), (4), and (5) of clause 1—
- (a) rank equally among themselves and, subject to any maximum payment level specified in any Act or regulations, must be paid in full, unless the assets of the company are insufficient to meet them, in which case they abate in equal proportions; and
 - (b) in so far as the assets of the company available for payment of those claims are insufficient to meet them,—
 - (i) have priority over the claims of any person under a security interest to the extent that the security interest—
 - (A) is over all or any part of the company's accounts receivable and inventory or all or any part of either of them; and
 - (B) is not a purchase money security interest that has been perfected at the time specified in section 74 of the Personal Property Securities Act 1999; and

Schedule 7—*continued*

- (C) is not a security interest that has been perfected under the Personal Property Securities Act 1999 at the commencement of the liquidation and that arises from the transfer of an account receivable for which new value is provided by the transferee for the acquisition of that account receivable (whether or not the transfer of the account receivable secures payment or performance of an obligation); and
 - (ii) must be paid accordingly out of any accounts receivable or inventory subject to that security interest (or their proceeds).
 - (2) For the purposes of subclause (1)(b), the terms **account receivable**, **inventory**, **new value**, **proceeds**, **purchase money security interest**, and **security interest** have the same meanings as in the Personal Property Securities Act 1999.
 - (3) To the extent that the claims to which subclause (1) applies are paid out of assets referred to in paragraph (b) of that subclause, the amount so paid is an unsecured debt due by the company to the secured party.
 - (4) Clause 9 of this schedule, as was in force immediately before the commencement of the Personal Property Securities Act 1999, continues to apply in respect of a company whose property was subject to a floating charge that, before the commencement of that Act, became a fixed or specific charge.
- 3 Provisions concerning preferential payments to employees**
- (1) The total sum to which priority is to be given under any, or all, of paragraphs (a) to (e) of clause 1(2) must not, in the case of any one employee, exceed \$16,420 or any greater amount that is prescribed under subclause (2) at the commencement of the liquidation.
 - (2) The sum stated in subclause (1) must be adjusted as follows:
 - (a) subject to paragraph (d), an adjustment must be made, by the Governor-General by Order in Council, after the 3-year period starting on 1 July 2006 and ending on 30

Schedule 7—*continued*

- June 2009 and after every 3-year period following that (an **adjustment period**):
- (b) subject to paragraph (d), the Order in Council must be made within 3 months of the end of an adjustment period:
 - (c) each adjustment must reflect any overall percentage increase, over the relevant adjustment period, in average weekly earnings (total, private sector), calculated by reference to the last Quarterly Employment Survey published by Statistics New Zealand (or, if that survey ceases to be published, a survey certified by the Government Statistician as an equivalent to that survey) within the relevant adjustment period:
 - (d) if, in an adjustment period, there is no change, or an overall decrease, in the percentage movement in average weekly earnings (total, private sector), as so calculated, no adjustment may be made for that adjustment period:
 - (e) if, in accordance with paragraph (d), no adjustment is made, the next adjustment made for any succeeding adjustment period must reflect any overall percentage increase in average weekly earnings (total, private sector) between the date of the last adjustment and the end of the relevant adjustment period for which the adjustment is to be made:
 - (f) all adjustments are cumulative and must be rounded to the nearest \$20:
 - (g) any correction to the Quarterly Employment Survey on which an adjustment is based must be disregarded until the adjustment that takes effect in the following adjustment period, which must reflect the corrected information in the calculation of that adjustment and must otherwise be made in accordance with this subclause.
- (3) The sum stated in subclause (1), or any greater amount prescribed under subclause (2) that applies on the date of commencement of a liquidation, continues to apply to that liquid-

Schedule 7—*continued*

ation regardless of any change to that sum that is prescribed after the date of commencement of the liquidation.

- (4) For the purposes of this clause and clause 1,—
- (a) remuneration in respect of a period of holiday or of absence from work through sickness or other good cause is to be treated as wages in respect of services rendered to the company during that period:
 - (b) **employee** means any person of any age employed by an employer to do any work for hire or reward under a contract of service (including a homemaker as defined in section 5 of the Employment Relations Act 2000); but does not include a person who is, or was at any time during the 12 months before the commencement of the liquidation, a director of the company in liquidation, or a nominee or relative of, or a trustee for, a director of the company:
 - (c) **holiday pay**, in relation to a person, means all sums payable to that person by the company under subpart 1 of Part 2 of the Holidays Act 2003, and includes all sums that by or under any other enactment or any award, agreement, or contract of service are payable to that person by the company as holiday pay.

4 Subrogation of persons if payment has been made

If a payment has been made to a person (**A**) on account of any preferential claim set out in this schedule out of money advanced by another person (**B**) for that purpose, then B has, in a liquidation, the same right of priority in respect of the money so advanced as A would have if the payment had not been made.

5 Priority given to person who distrains on goods

If a landlord or other person has distrained on goods or effects of the company during the 20 working days before the commencement of the liquidation, the preferential claims set out in this schedule are a first charge on the goods or effects so distrained, or the proceeds from their sale; but if any money

Schedule 7—*continued*

is paid to a claimant under that charge, the landlord or other person has the same rights of priority as that claimant.

6 Saving provision for liquidation that has commenced

If a liquidation of a company commenced before the Companies Amendment Act 2006 came into force, that company's property must be applied in accordance with the priorities stated in this schedule on the date the liquidation commenced as if the Companies Amendment Act 2006 had not come into force.

Schedule 2

s 41

Consequential amendments to other enactments

Corporations (Investigation and Management) Act 1989 (1989 No 11)

Section 42(1)(c): add “or voluntary administration” after “liquidation”.

Industrial and Provident Societies Amendment Act 1952 (1952 No 45)

Section 13(1)(a)(i): insert “that has been perfected at the time specified in section 74 of the Personal Property Securities Act 1999” after “interest”.

Section 13(1)(a)(ii): omit “does not arise” and substitute “is not a security interest that has been perfected under the Personal Property Securities Act 1999 at the time of the receiver's appointment, or at the time at which possession of the property was taken, as the case may be, and that arises”.

Section 13(2): omit and substitute:

“(2) In the application of Schedule 7 of the Companies Act 1993, references to the commencement of the liquidation must be

read as a reference to the appointment of the receiver or the taking possession of the property, as the case may be.”

Property Law Act 1952 (1952 No 51)

Section 104PPA(2)(b): omit “clauses 1 and 9(b)” and substitute “clauses 1(1) and 2(1)(b)”.

Receiverships Act 1993 (1993 No 122)

Definition of preferential claims in section 2(1): omit “clause 1” and substitute “clause 1(1)”.

Section 30(1)(b): insert “that has been perfected at the time specified in section 74 of the Personal Property Securities Act 1999” after “interest”.

Section 30(1)(c): omit “does not arise” and substitute “is not a security interest that has been perfected under the Personal Property Securities Act 1999 at the time of the receiver’s appointment and that arises”.

Section 30(2): repeal and substitute:

- “(2) A receiver to whom this section applies must apply accounts receivable and inventory that are subject to the security interest or their proceeds—
- “(a) first, to reimburse the receiver for his or her expenses and remuneration; and
 - “(b) secondly, to pay the claims of any person who has—
 - “(i) a purchase money security interest over all or any of those assets, that has been perfected at the time specified in section 74 of the Personal Property Securities Act 1999;
 - “(ii) a security interest over all or any of those assets, that has been perfected under the Personal Property Securities Act 1999 at the time of the receiver’s appointment and that arises from the transfer of an account receivable for which new value is provided by the transferee for the acquisition of that account receivable (whether or not the transfer of the account receivable secures payment or performance of an obligation); and

- “(c) thirdly, to pay preferential claims to the extent and in the order of priority specified in Schedule 7 (except clauses 1(1) and 2(1)(b)) of the Companies Act 1993.
- “(2A) The receiver must apply the accounts receivable and inventory as set out in subsection (2) before paying the claims of any person under a security interest, other than a security interest referred to in subsection (2)(b).”

Section 30(3): add:

- “(d) the reference to a period of 4 months before the commencement of the liquidation in clause 1(2)(a) is to be read as a reference to a period beginning 4 months before the date of appointment of the receiver and ending either—
- “(i) 14 days after the date of appointment of the receiver; or
 - “(ii) if notice of the termination of that employee’s employment is lawfully given to the employee within 14 days after the date of appointment of the receiver or by any later date to which the period for giving notice is extended under section 32(3) of the Receiverships Act 1993, on the day on which the contract of employment is terminated:
- “(e) the reference to before, or because of, the commencement of the liquidation in clause 1(2)(b) and (c) is to be read as a reference to before the expiry of 14 days after the date of appointment of the receiver, or because notice of the termination of that employee’s employment is lawfully given to the employee within 14 days after the date of appointment of the receiver or by any later date to which the period for giving notice is extended under section 32(3) of the Receiverships Act 1993.”

Reserve Bank of New Zealand Act 1989 (1989 No 157)

Paragraph (b)(iii) of the definition of **voting right** in section 2(1): add “or voluntary administration”.

Paragraph (b)(v) of the definition of voting right in section 2(1): insert “voluntary administration,” after “receivership,”.

Section 122(1)(c): add “or voluntary administration”.

Section 143(1): repeal and substitute:

- “(1) Where a registered bank, or any subsidiary or associated person of a registered bank, becomes subject to statutory management, and that registered bank, subsidiary, or associated person is already being wound up or is already in liquidation, receivership, or voluntary administration,—
- “(a) the winding up, liquidation, receivership, or voluntary administration of that registered bank, subsidiary, or associated person must, for so long as it continues to be subject to statutory management, cease; and
 - “(b) the person appointed as liquidator, receiver, or administrator must be discharged.”

Section 143(2): insert “or voluntary administration” after “receivership”.

Section 143(3): repeal and substitute:

- “(3) Where any liquidation, receivership, or voluntary administration revives under subsection (2), the person specified in the order as such must be the liquidator, receiver, or administrator of that registered bank, subsidiary, or associated person for the time being.”

Paragraph (a) of the definition of **insolvency** in section 156L: insert after subparagraph (i):

- “(ia) voluntary administration under Part 15A of the Companies Act 1993; or”.

Paragraph (a)(iv) of the definition of **insolvency** in section 156L: insert “voluntary administration,” after “winding up,”.

Contents

- 1 General
 - 2 About this eprint
 - 3 List of amendments incorporated in this eprint (most recent first)
-

Notes

1 *General*

This is an eprint of the Companies Amendment Act 2006. It incorporates all the amendments to the Companies Amendment Act 2006 as at 1 November 2007. The list of amendments at the end of these notes specifies all the amendments incorporated into this eprint since 3 September 2007. Relevant provisions of any amending enactments that contain transitional, savings, or application provisions are also included, after the Principal enactment, in chronological order.

2 *About this eprint*

This eprint has not been officialised. For more information about officialisation, please see "Making online legislation official" under "Status of legislation on this site" in the About section of this website.

3 *List of amendments incorporated in this eprint (most recent first)*

Companies Amendment Act 2006 Commencement Order 2007 (SR 2007/297)
