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*Report No 16*

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COMPANY LAW REFORM:  
TRANSITION AND REVISION

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September 1990  
Wellington, New Zealand

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The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

The Commissioners are:

The Rt Hon Sir Owen Woodhouse KBE, DSC - President

Jack Hodder

Sir Kenneth Keith KBE

The Hon Mr Justice Wallace

The Director of the Law Commission is Alison Quentin-Baxter. The office is at Fletcher Challenge House, 87-91 The Terrace, Wellington. Telephone (04) 473 3453. Facsimile: (04) 471 0959. Postal address: PO Box 2590, Wellington, New Zealand.

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4 September 1990

Dear Minister

I am pleased to submit to you Report No 16 of the Law Commission, *Company Law Reform: Transition and Revision*.

This Report supplements our earlier Report No 9, *Company Law: Reform and Restatement* in two respects. Firstly, since the earlier Report was published in June 1989 the Law Commission has had the advantage of receiving a range of comments upon both that Report and the draft legislation recommended in it. Accordingly, the present Report contains recommendations for a variety of improvements to the draft legislation. Secondly, it contains recommendations for and drafts of transitional and consequential legislation which will be required for comprehensive company law reform to be implemented.

You will recall that on 24 May 1990 the Commission submitted to you a package of materials which included virtually all of the material contained in the present Report. At the same time the Commission advised that, to comply with the Law Commission Act 1985 and to ensure availability to those interested in this area, those materials - together with an introduction addressing the more significant policy issues - would be published as a formal Report. The interval of three months since 24 May has been occupied by further discussions with interested parties, including the Department of Justice, and the making of some further minor adjustments.

The consequential and transitional legislation contained in this latest Report deals with the reregistration of companies already registered under the present Companies Act 1955, changes to the 1955 Act during a three year transitional period, flat and office owning companies, and insurance companies. The topic of receiverships is covered by the draft Property Law Amendment Act set out and recommended in our Report No 9. Company charges would be dealt with by the draft Personal Property Securities Act set out and recommended in our Report No 8 (April 1989)

We recommend the draft legislation contained in this Report, and that in our Reports Nos 8 and 9 (subject to our proposals for modification). If the legislation is introduced into Parliament we will of course be pleased to assist in any way we can.

Yours sincerely

Owen Woodhouse, President.

Hon W P Jeffries MP, Minister of Justice.

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## Preface

In this Report the Law Commission revisits the law relating to companies which was the subject of its earlier Reports No 9, *Company Law: Reform and Restatement* (June 1989) and, in part, No 8 *in A Personal Property Securities Act for New Zealand* (April 1989). This involves both "fine tuning" of the three pieces of draft legislation contained in those earlier Reports, and the production of four further pieces of legislation which would be necessary if the Companies Act 1955 were replaced by the legislation recommended in the earlier Reports.

### REVISITING COMPANY LAW

The Law Commission has a continuing statutory responsibility to promote the systematic review, reform and development of New Zealand law. That responsibility enables it to revisit its earlier work - unlike, say, a Royal Commission which dissolves after reporting on a specific topic - and to improve and enlarge upon the work it has already done. That revisiting process has been assisted by the maintenance of the many channels of communication with the professional and commercial communities which were established by the Commission while it was preparing its Reports Nos 8 and 9. So the present Report has benefited from the discussions we have had with many interested individuals as well as those with such bodies as the Department of Justice, the New Zealand Society of Accountants and the Securities Commission.

The response to Reports Nos 8 and 9 has been generally favourable, and occasionally flattering. The Commission is pleased that its work on Report No 8 has apparently contributed to, and is specifically made part of the reviews being made of the law on security interests in personal property by the Law Reform Commissions of the Commonwealth of Australia, and of the State of Victoria, at the direction of their respective Attorney-General. The connection between the New Zealand and Australian work on this topic will be enhanced by the appointment as consultants to the Australian inquiry of two of the members of the group which prepared the draft legislation included in our Report No. 8.

The Commission is also pleased that Dr Len Sealy, a New Zealander, a fellow of Gonville and Caius College, Cambridge, and a leading writer on company law, felt able to commence a paper on directors' duties delivered to the Commonwealth Law Conference held in Auckland earlier this year, with the following remarks:

Last year, the New Zealand Law Commission published a Report containing proposals for a major overhaul of company law - perhaps the most radical reappraisal of this branch of law that has been put forward anywhere in the Commonwealth (including the UK) since limited liability was introduced in 1855; certainly a document to be ranked with the Gower report (Ghana, 1961) and the Dickerson report (Federal Canada, 1971) for its rigorous analysis and forward-looking approach.

``Fine tuning''

Chapters 1, 2 and 3 of this Report explain the Commission's proposed alterations and revisions to the draft Companies, Property Law Amendment and Personal Property Securities Bills which were set out and recommended in Reports 8 and 9. A full text of the draft Companies Bill is set out in the Appendix to this report and shows the changes now recommended. Although there are a significant number of changes, most are minor. Those of greater significance include the following:

- the streamlining of provisions on company names;
- incorporation of a cash value equivalent factor in the process of share issue;
- extension of the distribution ``claw back'' provisions to reduction of liability;
- clarification of provisions on redeemable shares;
- new provision for unanimous assent to company actions;
- adjustments to the ``fundamental duty'' of directors (of particular relevance to joint venture companies);
- removal of auditors from the court's discretionary relief provision;

- changes to provisions governing dealings between a company and other persons;
- recast provisions on the departure of auditors;
- the conferring of powers of inspection of the Registrar of Companies; and
- an additional sanction of personal liability for company debts where a director acts in breach of a disqualification order.

In suggesting these changes the Law Commission has taken considerable care to retain the integrity of the underlying principles of the original draft. As to those principles, the Commission emphasises the importance of the purposes articulated in Section 2 of the draft Bill and in paragraphs 14 to 33 of Report No 9.

While there is always scope for further improvement, those proposing changes to the Commission's draft will need to bear in mind that the draft was its own coherence and internal consistency. It is not based on the 1955 Act and employs distinctly different concepts and terminology in a number of critical areas. Nor is the Commission's draft based on any one overseas model, although the (US) Model Business Corporations Act has been of great assistance, as was the work of the Dickerson report which preceded the Canada Business Corporations Act.

On the question of drafting, the Law Commission retained Richard Clarke and David Goddard of Chapman Tripp Sheffield Young, who drafted the Commission's Companies Bill, to assist with the draft legislation contained in this Report. Their assistance was extensive and greatly appreciated.

#### TRANSITIONAL AND RELOCATED PROVISIONS

Chapter 4 of the Report contains a commentary on and the text of a new draft Companies (Reregistration) Act to govern the process whereby companies registered under the Companies Act 1995 would become subject a new Companies Act during a three year transition period.

Chapter 5 contains a commentary on and the text of a new draft Companies (Transitional Provisions) Act which would make significant amendments to the 1995



Act so as to apply to all companies at the beginning of the transition period some of the reforms contained in the proposed new Act.

The process of streamlining the subject matter of the 1955 Acts meant the exclusion from the Commission's draft of provisions on flat and office owning companies. The Commission recommends that this topic be dealt with in the Land Transfer Act 1952, and Chapter 6 contains the commentary on and text of a new draft Land Transfer Amendment Act to that effect.

Chapter 7 contains a commentary on and the text of a new draft Insurance Companies' Deposits Amendment Act which would relocate and streamline provisions dealing with insurance companies which are presently found in Part XIII of the Companies Act 1995.

The relocation of provisions relating to flat and office owning companies and insurance companies continues the theme established by our proposals in Reports Nos 8 and 9 whereby provisions on company charges and receiverships will be dealt with in statutes other than the Companies Act.

If legislation along the lines of the Commission's draft Companies Bill is to be enacted it would have to be accompanied by the six other enactments contemplated in this Report: A personal Property Securities Act; a Property Law Amendment Act; a Land Transfer Amendment Act; an Insurance Companies' Deposits Amendment Act; a Companies (Reregistration) Act; and a Companies (Transitional Provisions) Act.

The Commission has not attempted to prepare consequential changes to the Income Tax Act 1976 or the Securities Act 1978. The Inland Revenue Department and the Securities Commission respectively are currently considering the implications for those Acts of the enactment of legislation along the lines of that recommended by the Law Commission.

The Commission's package of legislation makes no express provision for co-operative companies. Submissions from such companies indicate some strong feelings that the Commission's proposal would disturb a satisfactory state of affairs. We suspect that such concerns may be met if the flexibility of redeemable shares is fully appreciated. However, a review of laws governing a range of mutual organisations may be

appropriate, depending in part on the terms of any legislation introduced by the Government.

## SECURITIES LAW REFORM

As was emphasised in our Report No 9, the Commission's draft Companies Bill is intended to be "core" company law, dealing with the formation and termination of companies and their internal organisation between those events. Although necessarily concerned with the powers of directors and appropriate protection of minority shareholders, the Bill is not directly concerned with specific regulation of securities and other investments offered to the general public. The distinction between securities law and company law was emphasised in Report No 9, and it was assumed that "additional safeguards imposed in the public interest under the Securities Act 1978 will be superimposed upon companies that offer securities to the public" (paragraph 18).

Although a distinction may properly be made between company law and securities law, the latter is built upon the former. Accordingly, the Commission welcomed the announcement contained in the Economic Statement presented to Parliament by the Minister of Finance on 20 March 1990 that:

... the Government has decided that the first step [ie, in business law reform] is to get the basic structure right. Accordingly, the Minister of Justice, will shortly bring to Parliament a Bill to revise the Companies Act, based on the draft work last year of the Law Commission.

The reasoning underlying the Minister of Finance's statement together with the Commission's wide statutory responsibilities mean that it has taken a close interest in proposals for reform of the laws relating to the securities market. Since the publication of Report No 9 in June 1989 the Sharemarket Inquiry Establishment Unit (better known as "the [Sir Spencer] Russell Committee") has produced a major report (published in November 1989), which includes a substantial rewrite of the Securities Act 1978.

As might be expected, there were some differences of emphasis between the work of the Unit and that of the Commission - for example, the Unit would appear to favour a rather greater role for the Registrar of Companies in enforcement matters than is contemplated in the Commission's draft Companies Bill.

In December 1989 the Commission arranged several meetings and seminars in Wellington for Mr R P Falkner, a New Zealander at Norton Rose, Solicitors, London, with particular expertise on the operation of the Financial Services Act (UK). Mr Falkner has also taken a keen interest in the work of the Unit but indicated some concern that

- the Unit's proposals contemplated a significant number of self-regulating organisations but even some of the UK SROs with substantial membership numbers were and are stretched by the financial and administrative demands of self-regulation, and
- the UK experience suggested strongly that there were great advantages in spelling out in detail the rules considered appropriate for a securities market and then, depending on the nature and complexity of such rules, devising a system for their enforcement, and noting that the Unit's work offers well defined procedure but lack detail on the rules thought desirable for the securities markets.

More recently there has been some discussion of the possibility of closely aligned or common rules for the securities markets of Australia and New Zealand as part of the process of harmonisation of the business law of the two countries. The Commission notes that, although its proposals for a new Companies Act would result in legislation markedly different from that in Australia (for reasons discussed at paragraphs 36 to 41 of Report No 9), that should not be an impediment to any decision to harmonise the securities laws of the two countries. As is well known, in the USA there are a variety of state companies statutes yet a single federal Securities and Exchange Act.

## FINANCIAL REPORTING

In April 1990 the Minister of Justice released the Securities Commission's substantial report, Capital Structure and Financial Reporting in New Zealand (December 1989). That report indicated that the Securities Commission had carefully considered our Report No 9 and included some suggestions for amendments to our draft Companies Bill. Accordingly, we commissioned an analysis and comparison of our proposals and those of the Securities Commission by Greg Tower, a lecturer in accountancy at Massey

University with a practical and academic experience in both the USA and New Zealand. Mr Tower's work was the subject of a meeting with the Securities Commission, the New Zealand Society of Accountants and the Department of Justice, and those and other discussions assisted our own further thinking on these issues.

The primary requirement for financial statements under the draft Bill would remain the provision by directors of financial statements given "a true and fair view" of the state of affairs, profit or loss, and cash flow of a company. The primary requirement is reinforced by the reversed onus of proof, the terms of the audit report (where applicable), and the right of shareholders to enforce the board's duty to prepare "true and fair" accounts. The Bill does not carry forward the present Eighth Schedule to the 1995 Act or any equivalent requirements. Amplification of "true and fair" by reference to reasonable and accepted accounting practices is assumed.

The Bill also requires financial statements to comply with any "regulations" made by Order in Council. That reference to regulations was inserted in anticipation of the Securities Commission's report on financial reporting, and is based on the proposition that regulation of financial reporting in the securities market may (but need not necessarily) produce rules which could properly be applied to all companies.

It is not a pre-condition to the operation of the financial reporting provisions of the Bill that any such regulations be promulgated. Indeed, in order to avoid unnecessary regulation and cost being imposed on smaller companies, the power to make standards mandatory for all companies should be used cautiously.

As a result of the various discussions on these topics, the Law Commission recommends limited changes to the "accounting" provisions in our draft Companies Bill - in the "solvency test", in a reference to compliance with financial reporting requirements imposed under other enactments, in elaboration of the nature of the audit report, and in further provisions on non-reappointment of auditors which enhance the independence of the audit.

#### STATE CAPITAL REQUIREMENT

The Securities Commission's report proposes an "equity cushion" for companies operating in the securities market which would take the form of a requirement that no

distribution be made by the company unless its assets exceed the sum of its liabilities together with the amount in a "stated capital account".

The Law Commission is inclined to agree that maintenance of confidence in the securities market is likely to be enhanced by a requirement for some cushion in addition to the "bare" solvency test in our draft Bill. However, it retains a preference for a multiplier factor being applied to the solvency test - such as the 1.25:1 ratio of assets to liabilities mentioned in the California statute - and so avoiding the reintroduction of unnecessary complexity which would be removed for other companies with the abolition of par value.

In addition, Mr Tower has pointed out that the amounts recorded in a stated capital account would not be particularly relevant as they would be based on historical or modified historical costs. In part, this difference of opinion reflects the fundamental and continuing debate in accounting between the merits of "objective" but less relevant data as against contemporary but more "subjective" data.

#### ACCOUNTING STANDARDS

The Law Commission is also inclined to agree with the Securities Commission that comparability of financial reporting is an important aspect of the securities market, and that there is a need for mandatory rules containing more detail than is appropriate for a statute. On the other hand, as mentioned earlier, we would be concerned if financial reporting obligations imposed on companies soliciting funds from the public were automatically imposed on the vast majority of smaller companies which do not operate in the securities market.

The Securities Commission's proposals for a three-tier system (the Securities Act 1978, the regulations thereunder, and accounting standards approved by the Review Board) are difficult to evaluate in the absence of indications of the policy to be reflected in those regulations. On the other hand, we have reservations about the Russell Committee's proposal that all approved accounting standards be mandatory (the Securities Commission would require only that non-compliance with lesser standards be explained).

The conflict between the recommendations of the Russell Committee and the Securities Commission in this area appears to derive from their different perception of the role of a Securities Commission in the future. In any event, when a decision is made on the manner of promulgating additional rules on financial reporting (ie, by regulations, or by accounting standards approved by a Review Board) it would be sensible for that decision to be reflected in the mechanism operating under a new Companies Act.

## DIRECTORS' DUTIES

The topic of directors' duties is central to company law. Opinions on the way in which those duties should be defined vary widely, and any legislation reform will attract considerable interest. In its work on this topic, the Commission identified overwhelming support for the proposition that the law on directors' duties should be extracted from the common law and made accessible in a companies statute. It was also satisfied of the need to strive to achieve a balance between ensuring accountability and making the position of directors so onerous that people with appropriate skills are dissuaded from retaining or taking up directorships. The Commission is aware that there is already evident a trend for professionals to refuse to accept directorships, and that this cannot assist in improving the quality of corporate management.

The Commission also remains of the view that a coherent set of provisions governing directors' duties must involve some ranking of those duties in order to avoid a confusing conflict between them. It is on that basis that the Commission has provided for a hierarchy of duties in section 101, 102 and 103 of its draft Companies Bill. (See also paragraphs 194-5, 504-5 and 511-13 of Report No 9.)

Any definition of directors' duties in a companies statute raises the question of the relevance of the previous common law. The Commission has refrained from a recommendation that its proposals on directors' duties be described as a code but is confident that the courts would recognise a statutory set of directors' duties as the text of first resort in considering issues in that area. Further, if (as we recommend) the main problem areas of modern company law are addressed directly (eg, minority shareholder remedies, and restrictions on share issues) then some of the current common law rules developed to avoid apparent injustices can be safely set aside. One example may be the concept of "proper purposes" which involves great uncertainty in the absence of

identifiable limits to the powers of companies and directors. (The use of the concept to prevent disruption of existing constitutional balances - as in the Privy Council decision in *Howard Smith Ltd v Ampol Petroleum Ltd* [1947] AC 821 would be overtaken by the Commission's draft dealing with class rights and minority remedies.)

In considering various expressions of concern that the Commission's draft Bill imposes duties on directors which are too onerous, the Commission has noted some misunderstanding of the relevant provisions and has also stressed the importance of the explicit references to "business risk" and "business judgment" in section 2 [Purpose of the Act]. However, the Commission notes that the Companies and Securities Law Review Committee in Australia has recently gone further in recommending the enactment of a specific "business judgment rule" (see the Committee's Report No 10, *Company Directors and Officers: Indemnification, Relief and Insurance*; May 1990).

On this and various other topics, the Law Commission looks forward to the introduction of legislation, and an informed debate during the legislative process.

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# I

## The Draft Companies Act: “Fine Tuning”

- 1 This chapter explains the Law Commission's recommended modifications to the draft Companies Act contained in the Commission's June 1989 report, *Company Law: Reform and Restatement* (NZLC R9). These modifications are the result of the further consultations on and consideration of this topic by the Commission since the publication of that report.
- 2 For the purposes of this Report the term “the 1955 Act” refers to the Companies Act 1955 and (for the sake of convenience - if optimistically) **the term “the 1990 Act” refers to the draft Companies Act 1990.**
- 3 The text of the 1990 Act is set out in the Appendix to this report and indicates additions (double underlined) and deletions (double angle brackets and italicised).
- 4 The paragraphs below provide a concise commentary on the modifications in each section.

### PART 1 - PRELIMINARY

#### **Interpretation**

- 5 Changes made to the definitions in section 3(1) are as follows:
  - “document” - this definition is based on that found in section 2 of the Evidence Amendment Act (No 2) 1980, and is relevant to several provisions, including the definition of “records” (see sixth definition in this list), sections 139 [Investigation of records], and 147 [Company records to be kept], and the new section 275A [Powers of the inspection by Registrar];



- ``entitled person" - this definition has been added in recognition of the existence of companies where some significant power or entitlement (eg, the right to residue where a solvent company is liquidated) is vested in a person other than a shareholder, and of the right of that person to protect that interest; the defined term is employed in sections 42(3)(b) [Board may authorise a distribution], 102 [Existing shareholders], 126 [Injunction to restrain action], 135 [Prejudiced shareholders] and sections 219 to 221 relating to liquidations;
- ``existing company" - the additional words reflect the registration under Part X of the 1955 Act of companies not formed under that Act;
- ``interests register" - corrects an incorrect cross-reference;
- ``personal representative" - this definition is employed in sections 63 [Transfer of shares] and 74 [Liability of personal representative];
- ``records" - the change reflects the new definition of ``documents" (see first definition of this list);
- ``redeemable" - this definition foreshadows the new section 54A [Meaning of ``redeemable"], and the clarification of section 28 [No nominal value];
- ``special resolution" - this change recognises the possibility that a company constitution may require a special majority in excess of 75 percent in certain circumstances and that such a requirement should be effective.

### **The solvency test**

- 6 The solvency test is a major innovation in the 1990 Act, being of key importance in such provisions as sections 42 [Board may authorise a distribution] and 105 [Solvency]. The dual nature of the test (ie, trading as well as balance sheet solvency) was adopted from the US Model Business Corporations Act. The three changes to section 3(3) of the 1990 Act are designed to clarify this important concept:

- ``normal course of business" - these words were used in section 6.40(c)(1) of the MBCA but omitted from our June 1989 draft as unnecessary, and their reinstatement is designed to minimise fears of uncertainty expressed to us by the NZ Society of Accountants and others;
- ``reasonable in the circumstances" - this language is also taken directly from section 6.40 of the MBCA, and confirms both the basic trust and the flexibility of the solvency test: that company directors should be able to point to some reason for a belief that the company will remain solvent after execution of an action under consideration; and
- ``realisable value" - this elaboration is not found in the MBCA but is designed to incorporate the conventional approach to current valuations, and thus clarify uncertainties (eg, removing the possibility that ``realisable value" means value under ``fire sale" conditions).

## PART 2 - INCORPORATION UNDER THIS ACT

### **Capacity and powers**

- 7 The change to section 8 reflects the division of section 135 [Prejudiced shareholders] to create a new section 135A [Failure by directors to comply with Act] containing similar remedies.

### **Incorporators**

- 8 Correction of proofreading slip in section 10.

### **Application for incorporation**

- 9 As the 1990 Act does not specify any maximum number of directors or require a company's constitution to do so (although such may be specified under the constitution: see section 22), section 11(2)(b) has been amended to reflect this optionality. Section 11(2)(d) has been amended in recognition of the possibility of corporate shareholders and their lack of a ``residential" address.

### **Existing companies to apply for registration**

- 10 The deletion of section 13(1) reflects the subsequent development of the draft Companies (Reregistration) Act. The changes to (what was) section 13(2) leave the form, including authentication, of an application to be prescribed under regulations. The change to (what was) section 13(3) reflects the optional character of a maximum number for directors (see also paragraph 9, above, on section 11).

### **Effect of Effect of registration**

- 11 Section 15 has been rewritten to confirm and elaborate the continuity of an existing company which has reregistered.

## **PART 3 - COMPANY NAMES**

### **Registered names**

- 12 Correction of typographical slip in section 17(3).

### **Application for registration of names**

- 13 Section 18 has been streamlined to reflect a revised policy under which constraints on company names would be further reduced, and the Registrar relieved from making decisions on the criterion of "undesirability". The revised prohibitions relate to

- names identical to those on the company names register;
- names expressly protected by statute; and
- names registered otherwise than in good faith for identification purposes.

The last of these is designed to provide a remedy for those aggrieved by the "pirating" of a name.

### **Registration of name**

- 14 The change to section 19(2) reflects the policy changes discussed in paragraph 13, and extends protection to assigned names.

### **Cessation notice**

- 15 The revised title of section 20 reflects the fact that "order" carries connotations of an order from the Court. The textual changes reflect the policy discussed in paragraph 13.

## **PART 4 - COMPANY CONSTITUTION**

### **Initial constitutional document**

- 16 Section 23(2) features a minor drafting improvement.

## **PART 5 - SHARES**

### **Rights attached to shares**

- 17 A reference in section 26(1)(b) to "winding up" has been replaced with the appropriate defined term, "liquidation".

### **No nominal value**

- 18 A new section 28(2) has been added to clarify that the prohibition of nominal or par value does not prevent the issue of redeemable shares. Redeemable share are now defined in section 54A [Meaning of "redeemable"], discussed in paragraph 34.

### **Share options**

- 19 The effect of the former section 30 was less than clear, and its effect in conferring certain shareholder rights on option holders was on further consideration, unnecessary. The new section 30 protects existing shareholders' rights in relation to that grant of share options, and provides that a contract entered into in breach of

its requirements is illegal, and so of no effect (unless validated by the Court under the Illegal Contracts Act 1970).

### **Consideration for issue to be decided on by board**

- 20 Sections 39(1) and (2) have been amended to reflect the Securities Commission's recommendation for directors to fix and certify a present cash value for non-cash consideration for shares issued (Capital Structure and Financial Reporting, December 1989, page 5). The fairness and reasonableness of consideration relates to all shareholders, hence the change to subsection (1)(b). And the accidental omission of an offence provision has been remedied with the new subsection (5) (also reflected in section 277(1) [Failure to comply with Act]). Board may authorise a distribution
- 21 A reference to entitled persons with fixed entitlement has been included in section 42(3)(b), as such persons should not be prejudiced by a distribution to shareholders unless the entitlement is expressed to be subject to distributions.

### **Recovery of distributions**

- 22 The more specific reference in section 46(1) to section 42(3) and its modification of the solvency test (as defined in section 3(3)) increases the accuracy of the cross reference and avoids complications in sections 56(2) and 57(2).

### **Reduction of shareholder liability a distribution**

- 23 The new section 46A is concerned with a reduction of shareholder liability which results in the company failing to satisfy the solvency test. It is a replacement for the present rules as to reduction of capital and reregistration of unlimited companies as limited companies.
- 24 Any alteration of the constitution, or acquisition or redemption of shares that reduced the liability of the shareholder to the company is treated as a distribution to that shareholder. Section 42 [Board may authorise a distribution] applies, and the board is required to authorise the alteration, acquisition or redemption in the light of the solvency test. If the solvency test is breached, section 46 [Recovery of

distributions] applies, and the liability which was cancelled or reduced is effectively revived.

- 25 Where a reduction in liability is effected by an amalgamation, as where two shares each with a liability to pay \$1 are converted into one share in the amalgamated company with no liability attached, section 42 [Board may authorise a distribution] does not apply as the amalgamation provisions already require a solvency resolution. Section 46 [Recovery of distributions] is however applied to such reductions of liability.

### **Company holding its own shares**

- 26 The exception in section 47 referred to sections 49 to 53, which relate to voluntary acquisitions of shares by a company, but not to the compulsory but-out provisions in sections 81 to 83. This omission has been remedied.

### **Cross-holdings**

- 27 Comments were received by the Law Commission that the existing section 48 was inappropriate, as it dealt only with cross-holdings resulting in insolvency and did not address questions of:

- concentration of control;
- watering down of shareholders' interests, falling short of causing actual insolvency; and
- use of subsidiaries to purchase shares to circumvent the share repurchase provisions.

- 28 The Law Commission agrees that the former section 48 should be deleted. After consultation, the Commission has concluded that existing provisions are sufficient to deal with the concerns set out above. The duties of directors of the company and existing shareholders prevent abuse of a concentration of control. These duties, coupled with section 105 [Solvency], require directors not to pay excessive consideration for shares in any company, and may be enforced under Part 8

[Enforcement] in relation to a subsidiary which is paying too much for the company's shares (see in particular section 127 [Derivative actions]).

- 29 The third potential abuse is of more concern, and in Australia has resulted in an assimilation of the rules relating to self-purchase and purchase by subsidiaries. If a parent company procures a subsidiary to make purchases the parent could not make, the parent company's directors would commit a clear breach of section 101 [Fundamental duty] or section 102 [Existing shareholders], which could found actions against the directors under section 127 [Derivative action] or, in the case of a breach of section 102, under section 131 [Personal action by shareholder against directors]. An application could also be made under section 135 [Prejudice shareholders]. Where the subsidiary pays an excessive price for shares in the parent company to selected shareholders, the subsidiary's directors are in breach of their duties to the subsidiary and to the parent company, as a shareholder whose equity is diluted by payments made with an ulterior motive. Shareholders in the parent company could enforce these duties also under section 127 [Derivative actions].
- 30 The Law Commission has concluded that no extra duties or controls are required in relation to cross-holdings, but that a "flag" provision drawing attention to the duties governing the acquisition and use of cross-holdings is desirable. The new section 48 draws attention to the relevant provisions.

#### **Board may make offer to acquire shares**

- 31 The reference in section 50(1)(b) to acquisitions of shares, where all shareholders consent in writing, has been deleted. It is superseded by the new section 78A [Unanimous assent to company action] which permits any acquisition to be made with the consent or concurrence of all entitled persons, notwithstanding section 50. The reference in section 51(1) [Special offers to acquire shares] to section 50(1)(b)(ii) has been amended accordingly.

#### **Disclosure document**

- 32 Incorrect cross-references in section 52 has been corrected. Cancellation of shares repurchased

- 33 Section 53 provided that shares repurchased voluntarily were cancelled, but did not deal with shares repurchased as a result of a shareholder exercising buy out rights. This omission has been remedied by the inclusion of a reference to acquisition of shares under section 83 [Purchase by company].

#### **Meaning of ``redeemable''**

- 34 Section 54A is new, and defines a redeemable share. The importance of a share being redeemable is that if it is redeemable at the option of the holder, or on a fixed date, the repurchase provisions need not be complied with. Those provisions are not relevant where the company has no say in the time of redemption, or the price of redemption. thus the essence of ``redeemability'' is that the constitution provides for redemption for a consideration which is specified, or to be calculated according to a formula, or to be fixed by a suitably qualified and independent person.

#### **Redemption at the option of the company**

- 35 A reference to section 54 [Enforceability of contract to repurchase shares] has been included in section 55 to clarify the position in relation to company redemptions.

#### **Redemption at the option of the shareholder**

- 36 Section 56 has been redrafted in order to clarify its effect, and ensure that such redemptions need not be authorised in advance by the board under section 42 [Board may authorise a distribution]. The redemption payment made can, if it results in a company failing to satisfy the solvency test, be recovered under section 46 [Recovery of distributions].

#### **Redemption upon a fixed date**

- 37 Section 57 has been redrafted in the same manner as section 56.



### **Financial assistance**

- 38 The reference in section 58(1)(b) to financial assistance given where all shareholders consent in writing has been deleted, as it is superseded by the new section 78A [Unanimous assent to company action] which permits financial assistance to be given with the consent or concurrence of all entitled persons, notwithstanding section 58. The references to section 58(1)(b)(ii) in sections 59(1) and 59(3) [Special financial assistance] have been amended accordingly.

### **Transfer of shares**

- 39 Section 63(2) has been amended in two respects. The first recognises the primacy of the Securities Transfer Act 1977 which could be amended to permit scripless share trading. The second enables the personal representatives of a shareholder to sign a share transfer. In the absence of such an express provision, the Law Commission was concerned that the reference to signature by "the present holder" might be understood as excluding this possibility. No such provision is required in relation to assignees in bankruptcy, as section 74 of the Insolvency Act 1967 expressly deals with transfer by the assignee.

### **Company to maintain share register**

- 40 Section 65 has been clarified in a number of minor respects, and the former ambiguous reference to "particulars" of an issue or transfer replaced with specific requirements to name a transferor or transferee. A reference to repurchases and redemptions has been inserted.
- 41 Subsection (1A) [A company may appoint an agent to maintain the share register of the company] is the former section 66(1) [Place of register]. The provision is more relevant to the duty to keep the register than to the place where it is kept, as it may be maintained by an agent even when kept at the company's registered office.

### **Place of register**

- 42 Section 66 has been replaced with a section which expressly permits the establishment of branch registers. Such registers are of particular importance

where a company's shares are listed on an overseas exchange. A register within New Zealand must be nominated as the principal register, and copies of other registers kept with it.

## PART 6 - SHAREHOLDERS AND THEIR RIGHTS AND OBLIGATIONS

### **Liability of shareholders**

- 43 A new paragraph (d) has been inserted in section 73(2), to refer to the liability imposed on shareholders in a liquidation under section 210 [Power of liquidators to make calls], which is discussed at paragraph 102. Subsection (4) has been amended to clarify the position established under this Part, namely, that if a liability is set out in the constitution it attaches at any given time to whoever holds the share at that time. Any other outstanding consideration for a share (where, for example, it is issued for a price to be paid over time, although "fully paid" in terms of the 1995 Act) is payable by the person who originally contracted to pay it, rather than by a transferee of the share.

### **Liability of personal representative**

- 44 As the term "personal representative" is now defined in section 3(1) [Interpretation], it has been used in section 74(1), with a consequential amendment to section 74(2).

### **Unanimous assent to company action**

- 45 Section 78A is a very important new provision. The Law Commission accepts the submissions made by a number of bodies and individuals that the 1990 Act imposed excessive formalities on the day-to-day operation of small (and, in particular, one-shareholder) companies. This section permits the formalities which were considered to be a problem to be disregarded completely, if all entitled persons agree, or if they concur in the informal action taken. In a normal company, in which all the section 6 [Essential rights and powers] rights and powers are attached to shares, a company will be able to issue shares, or repurchase shares, for example, without any formalities at all, where the shareholders agree to or concur in the issue or repurchase. The action which may

be taken informally is described in subsection (1), and the Sixth Schedule lists the provisions which do not in these circumstances apply.

### **Liability of shareholders in respect of exercise of powers**

- 46 The policy which underlies section 80 is that in exercising basic rights attached to shares, shareholders should be free to consult their interests alone. Consistent with this policy, a reference to resolution of interest groups under section 88(4) [Alteration of shareholder rights] has been inserted.

### **Minority buy-out rights**

- 47 Section 81(b) has been amended to permit a person who holds shares with different beneficial owners to vote one parcel against a resolution, and the other in favour of the resolution, or not at all. The parcel voted against the resolution could then be required to be purchased, under this section. This amendment is required to avoid the denial of buy out rights to trustees, and in particular trustee corporations, holding a number of parcels of shares for a number of beneficial owners, who may have different interests in relation to a proposal. Consequential amendments have been made to refer to "those shares", rather than all of a shareholder's shares, in sections 81 and 82.

### **Purchase by third party**

- 48 An incorrect cross-reference in section 84 has been amended.

### **No buy out if insolvent**

- 49 The redraft of section 86 introduces a "reasonable grounds" test for the opinion of the board on the matters referred to in section 86(1).

### **Classes and interest groups**

- 50 Section 87 has been amended to provide that holders of one class of shares may be divided into two or more interest groups, and will thus vote separately, where a proposal expressly distinguishes between them. This would not result in separation of holders of one class into separate interest groups in situations such

as that which arose in *Re National Dairy Association of NZ Ltd* (1988) NZCLC 64, 198, but would apply in a case such as *Alexander v Westeel-Rosco Ltd* 93 DLR (3d) 116 (Ontario HCJ), where under an amalgamation proposal a majority holder of ordinary shares in an amalgamating company would receive ordinary shares in the amalgamated company, but the other shareholders in the amalgamating company would receive shares which were redeemable for a fixed price at the option of the amalgamated company.

### **Alteration of shareholder rights**

- 51 Section 88(4), which gives buy out rights to dissenting shareholders in an interest group, has been amended in a similar manner to section 81 [Minority buy out rights], discussed at paragraph 47, to make allowance for voting by a trustee for a number of beneficial owners.

### **Annual meetings of shareholders**

- 52 The changes to section 90(a) are designed to mesh better with section 157 (which deals with balance dates) and to avoid unnecessary complications over "calendar years".

## **PART 7 - DIRECTORS AND THEIR POWERS AND DUTIES**

### **Meaning of "director"**

- 53 The additional references in section 96(1)(b) extend the operation of sections 209 [Powers of a liquidator] and 282 [Disqualification of director] to those who control the board or exercise the powers of a board but are not within the definition of section 96(1)(a). The omission of the reference to section 97 is designed to avoid uncertainty as to the membership of a board. At last "and" has been added after section 96(1)(b).

### **Major transactions**

- 54 Section 99(1) has been rearranged to alter the restrictions on entry into major transactions, reflecting the primacy of the constitution (which may either permit

major transactions without a special resolution, or impose further conditions and restrictions in relation to such transactions).

### **Fundamental duty**

- 55 The changes to section 101 recognise that a limited situations (eg, joint venture companies) the constitution may expressly contemplate or require that a director put the interests of one or more shareholders ahead of those of the company itself. The import obligation of good faiths remains in all cases.

### **Existing shareholders**

- 56 The changes of section 102 follow those made to section 101 discussed at paragraph 55.

### **Qualifications of directors**

- 57 Section 115(2) features four distinct changes:
- in paragraph (c), the court is empowered to grant leave for a convicted person to act as a director (eg, where the offence is minor, and the consequences of disqualification would be disproportionate);
  - in paragraph (c), the disqualification consequences of conviction are made non-retrospective;
  - also in paragraph (c), there is recognition that "crime involving dishonesty" is the term defined in section 2(1) of the Crimes Act 1961; and
  - in paragraph (d), the continuing effect of disqualification orders under the 1955 Act is expressly provided for.

### **Indemnity and insurance**

- 58 The changes in section 125 reflect a consideration of policy and permit insurance (where a company retains an incentive to sue an errant director) and treat it separately from indemnity (where there is no such incentive). As the 1990 Act emphasises directors' responsibilities, insurance in the context should not be

artificially inhibited. The addition to the definition of "indemnify" in section 125(5) is designed to make it quite clear that contractual exemption clauses are governed by the section.

## PART 8 - ENFORCEMENT

### **Injunction to restrain action**

- 59 The changes to section 126(1) extend the availability of the anticipatory injunctive remedy to "entitled persons" (see new definition in section 3(1)).

### **Personal action by shareholder against directors**

- 60 Section 131(2) has been made subject to subsection (3) to overcome any potential difficulty arising from the fact that section 104 imports all duties under the Act, not all of which should be owed to shareholders personally.

### **Prejudiced shareholders**

- 61 In addition to having remedies extended to "entitled persons" (see paragraph 5, above), section 135 [Prejudiced shareholders] has been divided into two in recognition of the different nature of the former subsections (3) and (4) (ie, relating to all shareholders rather than an oppressed minority). The shortened section 135 relates directly to the duties imposed on directors under section 102 [Existing shareholders].

### **Failure by directors to comply with Act**

- 62 As noted in the preceding paragraph, section 135A replaces the previous sections 135(3) and (4). It is more clearly focussed on enforcement of specific duties imposed on directors, and avoids any concept of deemed oppression of all shareholders.

### **Ratification of directors' acts**

- 63 The words "fail to" in section 136(3) produced a result contrary to sense and the sense intended, and have accordingly been deleted.

### **Court may grant relief**

- 64 Section 137 carries forward a jurisdiction for the Court to grant relief in terms similar to section 468 of the 1995 Act. Further research and consideration has led to the conclusion that section 468 is a corollary of section 204 of the 1955 Act which prevents officers and auditors from contracting to limit their liability to the company. As section 125 [Indemnity and insurance] of the 1990 Act is broadly equivalent to section 204 of the 1955 Act but has no application to auditors, the application to auditors of section 137 has been removed.

### **Information for shareholders**

- 65 The new section 138(6) is designed to minimise the costs disincentive facing a shareholder contemplating a challenge to the company's refusal to supply information, and thus enhance the potency of the section as a whole.

### **Investigation of records**

- 66 The changes to section 139 feature the incorporation of the defined term "document" (paragraph 5) and, in subsection (2A), the costs disincentive removal approach mentioned in paragraph 65.

## **PART 9 - ADMINISTRATION OF COMPANIES**

### **Method of contracting etc**

- 67 Section 140 has been rewritten to state more clearly the different manners in which a company may enter into an obligation. In particular, the new section makes it clear that nothing in a company's constitution prevents it being bound if the requirements of this section are complied with, although the constitution may relax those requirements (subsection (1)(a)(iii)). Subsection (2) resolves an uncertainty about whether section 140(1) would apply to contracts entered into outside New Zealand, or governed by foreign law. To the extent that New Zealand law can do so, subsection (2) ensures that a company can enter into an obligation in the same manner in any country, and without reference to the governing law. This is a simple and practical rule.

### **Dealings between company and other persons**

68 In Report No 0 (at paragraph 347) the Law Commission indicated that while there were doubts about the appropriateness of the exception to section 18C(1) of the 1955 Act where a third party "has or ought to have by virtue of his position with or relationship to the company knowledge to the contrary", it did not feel justified in departing from such a recently enacted test. The exception was reproduced in section 142 of the 1990 Act. Subsequent discussions have satisfied the Law Commission that the exception currently creates unwarranted uncertainty in commercial transactions. In the common case of a person entering into a transaction with a company, whose solicitors obtain a search of the company and have either read or had the opportunity to read the articles, it is not clear whether that person has sufficient knowledge of the articles (imputed to him or her) to fall foul of the exception, where action is taken which either clearly contravenes the articles or which would contravene them unless other steps to authorise the action had previously been taken. It is arguable that, even in the latter case, the person concerned is put on inquiry as to the irregularity, and cannot rely on section 18C. This uncertainty is neither necessary nor desirable, and the Law Commission considers that the exception should be deleted. Section 142 has been amended accordingly.

### **No constructive notice**

69 Section 143 benefits from the arrival of a missing comma.

### **Company records to be kept**

70 Section 147 has been rewritten to improve its clarity and reflect the changes to section 66 [Place of register] and the new section 156A [Place of accounting records].

### **Inspection of records by directors**

71 Section 149(1) has been rewritten to improve clarity and to introduce the concept of reasonable notice of desire to inspect and recognise the possibility of records



being kept in a non-written form (eg, on a computer system) except where required for inspection.

### **Address for service**

- 72 Section 150(1) features a drafting preference for ``must' over ``shall" in the context, and clarification of the requirement for the service to be on a human representative of the company, while section 150(3) has had superfluous words exercised.

### **Service by delivery**

- 73 Section 154 features a drafting preference for ``must'.

## **PART 10 - ACCOUNTS AND AUDIT**

### **Place of accounting records**

- 74 The new section 156A elaborates and clarifies matters previously dealt with in the former section 147(2).

### **Content of financial statements**

- 75 The addition to section 160(3) recognises that the financial statements of some companies may have to comply with other statutory requirements (eg, regulations under the Securities Act 1978), and that the enforcement provisions of the 1990 Act - eg, section 131(4) [Personal action by shareholder against directors] - may promote such compliance.

### **Removal of auditor**

- 76 Section 170 has been rewritten as part of a revision of the provisions on termination of appointments of auditors, a matter of importance in connection with the independence required of auditors.

### **Auditor ceasing to hold office**

- 77 The rewritten section 171 deals with the various modes of ceasing to hold office as auditor, including death but excluding resignation before the end of the relevant term.

### **Deemed reappointment of auditor**

- 78 The new section 171A is similar to previous 171 but contains additional provisions on the terms and conditions of the reappointment.

### **Auditors may comment on removal, replacement or resignation**

- 79 The new section 171B elaborates the earlier provisions for endangered or departing auditors to have access to the shareholders of a company (in writing, or at a meeting, and at the company's expense) to comment on the threatened or actual departure.

### **Auditor's report**

- 80 Section 172(2), paragraphs (aa) and (ab) adopt from companies in general two recommendations from the Securities Commission's report on Capital Structure and Financial Reporting in New Zealand (December 1989). The provisions are designed to increase understanding of what an audit report is and is not.

### **Auditor's right of access**

- 81 The changes to section 173(1) reflect the introduction of the definition of "documents" in section 3[Interpretation].

### **Remuneration and relief from liability of auditor**

- 82 Section 175(2) has been overtaken by the new section 171B(4); and section 175(3) by the changes to section 137; and, on reflection, section 175(1) is inappropriate as remuneration must be a matter of contract not one to be "fixed" under a constitution.

## PART 11 - DISCLOSURE BY COMPANIES

### **Contents of annual report**

- 83 Correction of proofreading slip in section 177.

### **Other disclosure to shareholders**

- 84 Section 179 features a drafting preference for ``must" over ``shall".

### **Company records available for inspection by shareholders**

- 85 The additional paragraph in section 184(1) is designed to ensure that financial information is available even if shareholders have unanimously agreed under sections 176 and 177 to have an annual report or an abbreviated annual report.

### **Manner of inspection**

- 86 Superfluous words in section 185(1) have been excised.

## PART 12 - AMALGAMATIONS

### **Reconstructions**

- 87 After careful analysis of section 187, the content and the term ``reconstruction" appeared to add nothing to provisions on amendment of the constitution, class rights, amalgamations and compromises. Deletion removes the potential for confusion.

### **Amalgamation proposal**

- 88 In section 189(1)(i) the substitution of ``consideration" for ``amount of money" recognises the possibility of consideration other than money. The word ``first" has been removed from section 189(1), paragraphs (b), (d), (e) and (g) to better reflect the fact that an amalgamated company may either be a new company or a restructured existing company. the new section 189(1A) is self-explanatory and is linked to the new section 193(2) [Certificate of amalgamation].

### **Manner of approving amalgamation proposal**

- 89 The changes to section 190(1) recognise that only the solvency of the amalgamated company is of relevance. The first change to section 190(4) reflect the general policy that non-compliance does not involve invalidity (cf, section 8(2)). Section 190(4)(a) has been altered to make it clear that constitutional arrangements can qualify or remove the power which shareholders would otherwise have under section 190.

### **Short form amalgamation**

- 90 The changes to sections 191(1) and (2) add the requirement that boards approving a short form amalgamation must resolve (and under the new section 191(4), individual directors must certify) that the amalgamated company will satisfy the solvency test. This provides protection for creditors and, in the case of an amalgamation under section 191(1), the shareholders of the holding company - particularly the minority shareholders. Section 191(5) is the usual offence provision applying where the directors fail to sign a certificate.

### **Registration of short form amalgamations**

- 91 The new section 191(3) ties the short form amalgamation approval procedure into the registration procedure under sections 192 and 193.

### **Certificate of amalgamation**

- 92 The new section 193(2) recognises that an amalgamation may be designed to become effective on a fixed date falling after the date of registration of the amalgamation proposal.

### **Effect of certificate**

- 93 The new section 194(aa) addresses the question of the name of the amalgamated company so as to avoid a separate name registration application where the name is specified in the proposal as that of one of the amalgamating companies.

### **Recovery of losses by creditors**

- 94 the new section 194A has been added to clarify the rights that creditors have in relation to losses suffered as a result of an amalgamation. The section does not refer to shareholders as their rights are dealt with by section 135A.

### **Powers of Court in relation to amalgamations**

- 95 The changes to section 195 reflect the demise of the term "reconstructions" (paragraph 87).

## PART 13 - COMPROMISES WITH CREDITORS

### **Notice of proposed compromise**

- 96 In section 199, three separate proofreading slips have been corrected.

## PART 14 - LIQUIDATIONS

### **Commencement of liquidation**

- 97 Section 203(1)(b) has been amended to reflect the primacy of the constitution, while section 203(1)(c) extends standing to "entitled persons" (see definition in section 3(1)); and substitutes a reference to the Registrar for that to the Attorney-General.

### **Interim liquidator**

- 98 The change to section 204(1) recognises that urgent steps may be required where assets other than those owned by the company appear to be at risk.

### **Other duties of liquidator**

- 99 An incorrect cross reference in section 208(2)(c)(ii) has been rectified. The saving of validity in section 208 (2)(i) duplicated that in section 8(2) [Capacity and powers], and has been excised.

### **Powers of a liquidator**

- 100 The addition to section 209(2)(b)(v) of "bank officer" is designed to promote the efficiency of the liquidation through enhanced access to financial information held by a bank.
- 101 The new subsections (2A), (2B) and (2C) in section 209 recognise that outsiders required to assist a liquidator ought to be remunerated, and provide for such remuneration to be fixed by the liquidator but subject to revision on application to the Court.

### **Power of liquidator to make calls**

- 102 The new subsections (2), (3) and (4) of section 210 recognise the need for a liquidator to be able to recover from shareholders, former shareholders or (in the 1955 Act terms) members where an earlier liability (eg, as a shareholder in an unlimited liability company) has been reduced (eg, by reregistration as a limited company) but liabilities incurred by the company at that earlier time are outstanding. These provisions are linked with section 46A [Reduction of shareholder liability a distribution] and with section 12 of the Companies (Reregistration) Act 1990 so as to avoid double jeopardy.

### **Offences, search and seizure**

- 103 The changes to section 213 reflect the new definition of "document" in section 3(1) (see paragraph 5).

### **Persons qualified to be liquidators**

- 104 Section 217(3) has been amended to add former receivers to the list of those ordinarily disqualified from being a liquidator, to confer a general dispensation power on the Court, and to recognise that the term defined in the Crimes Act 1961 is "crime involving dishonesty".

### **Vacancies in the office of liquidator**

- 105 The additions to sections 219(4) and 220(1) reflect the new definition of "entitled person" in section 3(1) (see paragraph 5).

### **Enforcement of a liquidator's duties**

- 106 The reference to "committee of inspection" inserted in section 221(2)(bb) is linked to the new provisions in section 242 [Committees of inspection] discussed at paragraph 108.

### **Preferential claims**

- 107 In section 239(2), paragraphs (b) and (c) the references to "taxed" (meaning "revised" - normally in accordance with rules of a court) have been replaced as inappropriate and inconsistent with modern usage. Disputes over these matters may be determined under section 220 [Court supervision of liquidation].

### **Committees of inspection**

- 108 The changes to section 242 reflect a policy change to enhance the position of creditors in a liquidation through a committee of inspection being empowered to make applications under sections 220 and 221 with the costs ordinarily falling on the assets held by the liquidator.

## **PART 15 - REMOVAL FROM THE NEW ZEALAND REGISTER**

### **Grounds for removal from register**

- 109 The changes to section 252(1)(c)(ii) reflect the primacy accorded to express provisions in the constitution of a company, and are similar to those in section 203(1)(b) [Commencement of liquidation]. The additional requirement for a statement in section 252(2) introduces scope for the criminal sanction under section 279 [False statements] to reinforce the integrity of the section 252(1)(c) removal procedure.

### **Property of a company removed from register**

- 110 The amendment to section 257(1) ensures that causes of action of a dissolved company (existence of which may not be known) may be preserved for the benefit of creditors and shareholders, as well as other undistributed property. The substitution of the reference to "public money" in section 257(8) reflects the terms of the Public Finance Act 1989.

## PART 16 - OVERSEAS COMPANIES

### **Application for registration**

- 111 The changes to section 259(2) reflect the changes relating to company names made in sections 18 and 20, discussed above.

### **Registration of overseas company**

- 112 Section 260 has been rewritten to reflect deemed registration under section 258(2), and to increase its clarity.

### **Name of overseas company**

- 113 The changes to section 261(1) reflect the changes to section 259(2), discussed at paragraph 111, and through those, changes to sections 18 and 20.

## PART 17 - REGISTRAR OF COMPANIES

### **Powers of inspection by Registrar**

- 114 Sections 275A to 275E reflect a change in policy and are to similar effect as - but not identical to sections 9A, 9AA, 9B and 9BA of the 1955 Act. Significant aspects of section 275A include
- the "public interest" threshold in subsection (1)(b) - analogous to that in section 134 [Standing of Attorney-General];
  - the application of subsection (1)(c) to "any person" - expressly including bankers;



- provision for retention of evidential documents in the circumstances specified in subsection (1)(f); and
- a full recognition of legal privilege, including that for settlement negotiations (cf, *Rush & Tompkins Ltd v GLC* [1988] 3 All ER 737, HL).

#### **Disclosure of information and reports**

- 115 The new section 275B has a wider scope than section 9AA of the 1955 Act, extending to reports and to documents or information received from those directly involved in the inspection.

#### **The Official Information Act 1982 and section 275A inspections**

- 116 The new section 275C essentially follows section 9AA(3) and (4) of the 1995 Act.

#### **Appeals from decisions under section 275C**

- 117 The new section 275D follows section 9BA of the 1955 Act, except for the reference to "15 working days" rather than "21 days".

#### **Inspector's report admissible in liquidation proceedings**

- 118 The new section 275E generally follows section 219(3) of the 1955 Act.

#### **Appeal from Registrar**

- 119 The new subsections (3) and (4) in section 276 essentially reproduced section 9B(4) of the 1955 Act.

### **PART 18 - OFFENCES AND PENALTIES**

#### **Failure to comply with Act**

- 120 The changes to section 277 reflect the insertion of new criminal sanctions in sections 39, 66, 147, 156A, 191, 275A and 275B.

### **Liability of directors for failure by board or by company**

- 121 The changes to section 278 reflect new criminal sanctions in sections 66, 147 and 156A.

### **Disqualification of director**

- 122 The new section 282(6) provides an additional civil sanction against those who breach an order disqualifying them from acting as directors. The sanction involves the personal liability of the banned director for debts incurred by the company while that director acted as such in breach of the Court's disqualification order.

### **Schedules**

- 123 A number of minor drafting improvements have been made to the Schedules. The new Sixth Schedule relates to the new section 78A [Unanimous assent to company action], discussed at paragraph 45.

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## II Receiverships; Draft Property Law Amendment Act

124 The Law Commission's proposals for receivership provisions to be revised and relocated in the Property Law Act 1952 are set out in Chapter VI of Report No 9. the only changes to the draft Property Law Amendment Act that the Commission recommends at this time are those designed to:

- allow for reregistration as the appropriate basis for the transitional scheme from the 1955 to 1990 Companies Act' and
- correct draft slips.

125 The text of the draft Amendment Act sections for which amendments are proposed - sections 104AB [Interpretation], 104AC [Application of this Part], 104AD [Persons qualified to be receivers], 104AL [Other duties of receiver] and 104AO [Liabilities of a receiver] - and a new section 4 are set out below.

126 As the 1955 Act will remain in force for three years after commencement of the Property Law Amendment Act, allowance must be made for companies which are subject to that Act. Appropriate changes have been made to the definitions of ``company'', `1`director'', and ``liquidator'' in section 104AB(1) of the draft Property Law Amendment Act.

127 The changes made to section 104AC(2)(a) have the effect of applying section 104AD(3), paragraphs (e) to (j) to receiverships commenced prior to the commencement of the draft Act. this recognises the possibility that the events contemplated by those paragraphs could arise after appointment, so that the receiver's authority to act should be withdrawn.

- 128 Section 104AC(2)(c) has been changed to prevent receivers incurring liability under section 104AO(3) in respect of periods prior to the commencement of the draft Act.
- 129 It was intended (see paragraph 762 of Report No 9) that the Court have power, in special circumstances, to permit the appointment as receivers of persons otherwise not qualified. by oversight this was not made clear in the original draft. Section 104AD(3) has been amended to clarify the point and to correspond with the revised section 217 of the draft Companies Act 1990.
- 130 Section 104AL(2) has been changed to allow for the fact that a receiver, while always responsible for the issuing of documents, will in many cases delegate such tasks.
- 131 It was always intended that, in respect of contracts of employment with directors, there would be no personal liability on the receiver unless the receiver had expressly confirmed the contract. Section 104AO(1)(b), as it appeared in Report No 0, suggested the contrary would apply. The provision has been changed to reflect the original intent.
- 132 Section 4 has been added to make necessary consequential repeals of provisions in the Companies Act 1955 and the Industrial and Provident Societies Amendment Act 1952.

# DRAFT PROPERTY LAW AMENDMENT ACT

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[\* not reproduced]

## PROPERTY LAW AMENDMENT ACT 1990

1990, No SS

[amended provisions only]

### 3 New Part inserted relating to receivers

The principal Act is amended by adding, after section 104AA ...

...

#### 104AB Interpretation

(1) In this Part:

*<< "Official Assignee" means, in relation to the estate of a bankrupt, any Official Assignee or Deputy Assignee appointed under the Insolvency Act 1967 and having charge of that estate;>>*

*<< "company" has the same meaning as in the Companies Act [ ] and includes an overseas company;>>*

"company" includes an overseas company and otherwise has the same meaning as in:

(a) the Companies Act 1955; or

(b) the Companies Act [ ]:

whichever is appropriate in the circumstances;

"Court" means the High Court or a District Court;

"creditor" includes every person who, in a liquidation, would be entitled to claim in accordance with section 230 [Admissible claims] of the Companies Act [ ] that a debt is owing to that person by the company;

``director''

(a) in respect of a company subject to the Companies Act 1955, has the same meaning as in <<*the Companies Act* [ ]>> that Act; and

(aa) in respect of a company subject to the Companies Act [ ], has the same meaning as that Act' and

(b) in respect of an overseas company, includes any agent, officer or employee responsible in New Zealand for the business of the overseas company; and

(c) in respect of any other body corporate, means a person having functions similar to those of a director of a company;

but does not include a receiver;

``grantor'' means the person in respect of whose property a receiver is, or may be appointed;

``liquidator'' means a liquidator appointed under Part VI of the Companies Act 1955 prior to the commencement of this section or under Part 14 of the Companies Act [ ] and ``liquidation'' has a corresponding meaning;

``Official Assignee'' means, in relation to the estate of a bankrupt, any Official Assignee or Deputy Assignee appointed under the Insolvency Act 12967 and having charge of that estate;

``overseas company'' has the same meaning as in the Companies Act [ ];

``preferential claims'' are the claims referred to in section 239(3), (4) and (5) [Preferential claims] of the Companies Act [ ], as applied by section 104AM [Priority of preferential claims] of this Act;

``property in receivership'' means property in respect of which a receiver is appointed;

``receiver'' means a receiver, or a manager, or a receiver and manager in respect of any property, and includes any person appointed as a receiver



- (a) by or under any instrument; or
- (b) by the Court in the exercise of a power to make such an appointment given by any Act or any rule of court or in the exercise of its inherent jurisdiction

whether or not the person appointed is empowered to sell any of the property in receivership; but does not include a mortgagee who, whether personally or through an agent, exercises a power to:

- (c) receive income from any mortgaged property; or
- (d) enter into possession or assume control of any mortgaged property; or
- (e) sell or otherwise alienate any mortgaged property.

“Registrar” <<means>>, in relation to

<<(a) a company, the Registrar of Companies appointed in accordance with section 268 [Registrar and Deputy Registrars of Companies] of the Companies Act [ ]; and>>

(a) a company subject to the Companies Act [ ], has the same meaning as in that Act; and

(aa) a company subject to the Companies Act 1955, has the same meaning as in that Act; and

(b) a society registered under the Industrial and Provident Societies Act 1908, means the Registrar of Industrial and Provident Societies; and

(c) a society registered under the Incorporated Societies Act 1908, means the Registrar of Incorporated Societies; and

(d) a friendly society or a credit union registered under the Friendly Societies and Credit Unions Act 1982, means the Registrar of Friendly Societies and Credit Unions; and

- (e) any other body corporate registered under any enactment, means any person discharging the powers, functions and duties of a registrar under that enactment.
- (2) A person required to give public notice of any matter shall do so by inserting notice of that matter
- (a) in a latest one issue of the New Zealand Gazette; and
  - (b) in at least two issues of a newspaper circulating in the area in which is situated the grantor's place of business, or the grantor's chief executive office if the grantor has more than one place of business, or the grantor's principal residence if the grantor has no place of business.

#### **104AC Application of this Part**

- (1) This Part applies
- (a) to every receiver appointed after the coming into force of this Part; and
  - (b) with the exceptions and modifications specified in subsection (2), to every receiver holding office on the coming into force of this Part.
- (2) In the application of this Part to a receiver holding office on the coming into force of this Part
- (a) sections 104AD(1), 104AD(2), 104AD(3)(a), 104AD(3)(b), 104AD(3)(c), 104AD(3)(d) [Persons qualified to be receivers] do not apply; and
  - (b) section 104AO(1) [Liabilities of a receiver] does not apply to a contract entered into before the coming into force of this Part; but nothing in this paragraph affects any personal liability which a receiver otherwise has in respect of the contract; and
  - (c) in section 104AO(4), the expression <<`7 days">> the receiver's appointment" shall be read as <<`one month">> the date of the coming into force of this Part".

#### **104AD Persons qualified to be receivers**

- (1) A person who had substantial experience in administering or advising on the insolvency of individuals, or the liquidation of companies or receiverships is an experienced insolvency practitioner for the purposes of this Part.
- (2) Unless the Court orders otherwise, a sole receiver, or where there is more than one receiver at least one of them, must be an experienced insolvency practitioner.
- (3) Unless the Court orders otherwise, <<T>> the following persons may not be appointed or act as a receiver:
  - (a) a person less than 20 years old;
  - (b) a body corporate;
  - (c) a mortgage of the property in receivership;
  - (d) a person who has, within the two years immediately preceding the commencement of the receivership, been shareholder, director or auditor of any mortgagee of the property in receivership;
  - (e) an undischarged bankrupt;
  - (f) a person who is mentally disordered within the meaning of the Mental Health Act 1969;
  - (g) a person in respect of whom an order has been made under section 30 [Temporary orders] or 31 [Appointment of manager] of the Protection of Personal and Property Rights Act 1988;
  - (h) a person in respect of whom a prohibition order has been made under section 104AS [Enforcement of a receiver's duties] of this Act or under section 221 [Enforcement of a liquidator's duties] of the Companies Act [ ];
  - (i) any person who has been convicted in the preceding five years of an <<offence">>
    - (i) an offence under the Companies Act [ ], the Companies Act 1955 or the Securities Act 1978; or

- (ii) a crime involving dishonesty as defined in section 2(1) [Interpretation] of the Crimes Act 1961;
  - (j) a person who is disqualified from acting as a receiver by the instrument giving the power to appoint a receiver.
- (4) The fact that a person is disqualified under this section from acting as a receiver does not affect the validity of anything done while so acting, unless the Court orders otherwise.

...

#### **104AL Other duties of receiver**

- (1) A receiver shall keep all money relating to the property in receivership separate from other money received in the course of, but not relating to, the receivership and from other money held by or under the control of the receiver.
- (2) A receiver shall give, or cause to be given, adequate notice of the receivership in entering into any transaction or issuing any document in connection with the property in receivership, but a failure to comply with this subsection does not affect the validity of the transaction or document.
- (3) At all times during a receivership the receiver shall keep, in accordance with generally accepted accounting procedures and standards, full account and other records of all receipts, expenditure and other transactions relating to the property in receivership, and to any associated business carried on by the receiver; and shall retain the accounts and records for not less than six years after the receivership ends.
- (4) Within two months of appointment a receiver shall prepare a report o the state of affairs with respect to the property in receivership including:
  - (a) particulars of the assets comprising the property in receivership; and
  - (b) particulars of the debts and liabilities to be satisfied from the property in receivership; and

- (c) he name an addresses of all creditors with an interest in the property in receivership; and
  - (d) he names and addresses of all creditors of any associated business; and
  - (e) particulars of any encumbrance over the property in receivership held by any creditor (including the date on which it was created); and
  - (f) particulars of any default by the grantor is making available any relevant information; and
  - (g) such other information as may be prescribed.
- (5) The report referred to in subsection (4) shall include a description of
- (a) the events leading up to the appointment of the receiver, so far as the receiver is aware of them; and
  - (b) the disposal or proposed disposal of the property in receivership; and
  - (c) the carrying on, or proposed carrying on, of any associated business; and
  - (d) any amounts owing, as at the date of appointment, to any person in whose interests the receiver was appointed; and
  - (e) any amounts owing, as at the date of appointment, to creditors of the grantor having preferential claims; and
  - (f) any amounts likely to be available for payment to creditors other than those referred to in paragraphs (d) and (e); and
  - (g) where the grantor is a company, any breaches of the Companies Act [ ] by the grantor or any director of the grantor so far as the receiver is aware of them.
- (6) A receiver shall, within two months after
- (a) the end of each period of six months following the appointment of the receiver; and

- (b) the date on which the receivership ends; prepare a further report summarising the state of affairs with respect to the property in receivership as at those dates, and the conduct of the receivership, including all amounts received and paid, during the period to which the report relates, with particular reference, so far as relevant, to the matters specified in subsections (4) and (5).
- (7) The receiver may omit from any report required under this section any matter which, if included, would materially prejudice the exercise of the receiver's functions' but the fact of the omission must be stated in the report.
- (8) A receiver has qualified privilege in any proceedings for defamation in respect of any matter included in a report prepared under this section.
- (9) A receiver shall send to the grantor and to all persons in whose interests the receiver is appointed a copy of every report prepared under this section, and, if the receiver was appointed by the Court, shall file a copy of every report in the registry of that Court.
- (10) Within 21 days after receiving a written request for a copy of any report prepared under this section from
- (a) any creditor, director or surety of the grantor; or
  - (b) any other person with an interest in any of the property in receivership; or
  - (c) the authorised agent of any of them;
- a receiver shall send the copy of the report to the person requesting it, if the receiver's reasonable costs in making and sending the copy have been paid.
- (11) A receiver shall permit a person entitled to receive a copy of any report prepared under this section to inspect the report at the receiver's office during regular business hours.
- (12) Where the grantor is a body corporate, the receiver must send or delivery to the Registrar

- (a) within seven days of its preparation, a copy of every report prepared under this section; and
- (b) within seven days after the ending of the receivership, written notice of that fact.

...

#### **104AO Liabilities of a receiver**

- (1) A receiver is personally liable
  - (a) on any contract entered into by the receiver in the exercise of any of the receiver's powers; and
  - (b) for wages or salary that, during the receivership, accrue under any contract or employment relating to the property in receivership <<unless>> if,
    - (i) notice to the termination of the contract of employment is not lawfully given within 14 days after the date of the receiver's appointment; or
    - (ii) in the case of a contract of employment with any director of a corporate grantor, the receiver has expressly confirmed the contract.
- (2) The terms of any contract referred to in subsection (1)(a) may exclude or limit the personal liability of a receiver other than a receiver appointed by the Court.
- (3) If
  - (a) a grantor continues to use, possess or occupy property in receivership under an agreement subsisting at the date of the receiver's appointment; and
  - (b) the legal title to the property is not vested in the grantor; the receiver is personally liable, to the extent specified in subsection (4), for rent and any other payments becoming due under the agreement.
- (4) A receiver's liability under subsection (3) is limited to that portion of the rent or other payments which accrue in the period commencing seven days after the receiver's appointment and ending on

- (a) the date on which the receivership ends; or
  - (b) the date on which the grantor ceases to use, possess or occupy the property; whichever is the earlier; but the Court may further limit or excuse the liability of the receiver.
- (5) Nothing in subsections (3) or (4)
- (a) is to be taken as an adoption by the receiver of any agreement referred to in subsection (3); or
  - (b) renders the receiver liable to perform any other obligation under the agreement.
- (6) The receiver is entitled to an indemnity out of the property in receivership in respect of any personal liability under this section.
- (7) Nothing in this section
- (a) limits any other right of indemnity to which a receiver may be entitled; or
  - (b) limits a receiver's liability on any contract entered into without authority; or
  - (c) confers on a receiver any right to an indemnity in respect of liability on any contract entered into without authority.

...

#### **4 Consequential repeals**

(1) The Companies Act 1955 is consequentially amended by repealing section 101 and Part VII.

(2) The Industrial and Provident Societies Amendment Act 1952 is consequentially amended by repealing section 13.



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### III

## Charges and Security Interests; Draft Personal Property Securities Act

- 133 In both its April 1989 (NZLC R8) and June 1989 (NZLC R9) Reports, the Law Commission stressed that a new Personal Property Securities Act was an important part of its recommendations for company law reform. The proposed new PPS Act would involve a major simplification of the law relating to chattels securities and the repeal of Part IV of the Companies Act 1955.
- 134 At the time of the draft PPS Act was completed, the contents of the new Companies Act had not been settled, and the Motor Vehicles Securities Act 1989 had not been enacted (although it was before Parliament). Those matters have had an impact on the PPS Act, and are noted in the paragraphs below and in the recommended changes to that draft.
- 135 The commencement of a PPS Act would require the repeal of the Motor Vehicles Securities Act 1989 (and the fees regulations) and is provided for in the amendments to the Third and Fourth Schedules to the PPS Act.
- 136 The register established under the Motor Vehicles Securities Act 1989 would become part of the register under the PPS Act, and this is reflected in the recommended new section 35(2). Preservation of other existing registers is provided for in section 57A(1) to (3).
- 137 Pre-repeal registrations under the Motor Vehicles Securities Act 1989 would be covered by the amended transitional provisions in section 57 of the draft PPS Act, and be able to be amended or discharged under section 38. The new sections 41(2A) and 57A(4) are designed to preserve the confidentiality which attaches to certain information under provisions in the Motor Vehicles Securities Act 1989

not repeated in the PPS Act. Section 57(4) should also be amended to expressly refer to registration of notices as well as security documents under the prior law.

138 The changes to the Second Schedule of the draft PPS Act reflect the repeal of sections 101 and 308 of the Companies Act 1955 contemplated by our draft Property Law Amendment Act (Chapter II, above), and the Companies (Transitional Provisions) Amendment Act (Chapter V, below).

139 The commencement of the Motor Vehicles Securities Act 1989 raises the question of inclusion of special provisions relating to motor vehicles in the PPS Act. Such provisions were set out in Appendix C to our April 1989 Report but, if such provisions are to be included consideration will also have to be given to preservation of a provision on notices about stolen motor vehicles similar to section 9 of the Motor Vehicles Securities Act 1989.

# **DRAFT PERSONAL PROPERTY SECURITIES ACT**

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[\* not reproduced]

# PERSONAL PROPERTY SECURITIES ACT 1990

1990, No TT

[amended provisions only]

...

## 35 Register of Personal Property Securities

(1) The Registrar shall establish and maintain a register of security interests in personal property to be known as the Register of Personal Property Securities and for that purpose shall set up and operate a registry.

[cf MVSB, s 5]

(2) The Register of Personal Property Securities shall include the register established and maintained under the Motor Vehicle Securities Act 1989 and for that purpose the Registrar shall take full custody and control of the register and all records relating to it.

...

## 41 Register searches

- (1) A person may, in the manner prescribed, request one or more of the following:
- (a) a search of the register against the name of a debtor and the issue of the search result;
  - (b) a search of the register according to the serial number of goods of a kind that are required or permitted to be described by serial number in a financing statement and the issue of the search result;
  - (c) a search according to a registration number and the issue of the search result;
  - (d) a copy of any registered financing statement or other registered document.

- (2) A printed search result or a copy of a financing statement or registered document that purports to be issued by the registry is receivable in evidence and for all other purposes as prima facie proof of its contents.

[cf BC PPSB s 48]

(2A) Nothing in this section entitles any person to information which was supplied to the Registrar of Motor Vehicle Securities, and required to be kept confidential, under the Motor Vehicle Securities Act 1989 [New]

- (3) The date and time of registration of a financing statement as shown on a printed search result issued under this section is prima facie proof of the date and time of registration of the financing statement.

[cf BC PPSB s 48]

...

## **57 Transition: registrations**

- (1) IN this section, "prior registration law" means the Chattels Transfer Act 1924, the Companies Act 1955, <<and>> the Industrial and Provident Societies Amendment Act 1952 and the Motor Vehicles Securities Act 1989 as they existed immediately before the coming into force of this Act.
- (2) Except as otherwise provided in this section, a prior security interest that, on the coming into force of this Act, is covered by a registration under prior registration law is deemed to be registered and perfected under this Act.
- (3) Subject to compliance with this Act, the registered and perfected status of a prior security interest deemed to be registered and perfected under subsection (2) continues for the unexpired period of the registration and may be further continued by registration under this Act.
- (4) A registration under any Act of a prior security interest, or notice of such interest,  
in
  - (a) the office of the Registrar of Companies; or



(b) the office of the Registrar of Industrial and Provident Societies; or

(c) any other of the High Court of New Zealand; or

(d) the office of the Registrar of Motor Vehicle Securities;

is deemed to be registered and perfected under this Act for the period of 5 years after the day on which this Act comes into force and, subject to compliance with this Act, may be perfected for a further period by registration under this Act.

(5) A prior security interest that

(a) is an instrument by way of bailment which is registrable under the Chattels Transfer Act 1924; or

(b) under prior law had the status of a perfected security interest without filing or registration and without the secured party taking possession of the collateral;

is perfected for the purposes of this Act as at the date the security interest was created, and that perfection continues for 3 years from the date this Act comes into force, after which period it becomes unperfected unless it is otherwise perfected under this Act.

(6) A prior security interest that, when this Act comes into force, could have been, but was not

(a) registered under prior registration law, or

(b) perfected under prior law through possession of the collateral by the secured party

may be perfected by registration or possession in accordance with this Act.

(7) A prior security interest that under this Act may be perfected by the secured party taking possession of the collateral is perfected for the purposes of this Act when possession of the collateral is taken in accordance with section 18 whether the possession was taken before or after this Act comes into force and even if under

prior law the security interest could not be perfect by taking possession of the collateral.

[cf BC PPSB s77 (8)]

- (8) A prior security interest that, when this Act come into force, was covered by a registration under prior registration law, and is perfected under this Act without registration or the secured party taking possession of the collateral, remains perfected under this Act.
- (9) A prior security interest that, when this Act came into force, could have been, but was not, covered by a registration under prior registration law and that, under this Act, may be perfected without registration or the secured party taking possession of the collateral, is perfected under this Act if all of the conditions for perfection of a security interest are met.
- (10) A person who fails to indicate in the prescribed manner the appropriate prior registration law on a financing change statement providing for the continuation of a registration under prior law fails to discharge an obligation within the meaning of section 52 to any person who has suffered loss or damage as a result of reliance on the financing change statement; but the failure is not seriously misleading for the purposes of section 37.

[cf BC PPSB s 43(10) and (11)]

- (11) Nothing in section 44 applies to a prior security interest registered under prior registration law and deemed by this section to be registered and perfected under this Act.

{cf BC PPSB s 77]

...

#### 57A Savings: registers

(1) In this section, "prior register" means the registers and indexes required by

(a) section 105 of the Companies Act 1955; and

(b) section 20 of the Industrial and Provident Societies Amendment Act 1952:  
and

(c) section 9 of the Chattels Transfer 1924.

(2) The persons who, prior to the commencement of this Act, were responsible for keeping and maintaining a prior register, must

(a) preserve that register intact; and

(b) keep that register available for public search in the same manner as applied prior to the commencement of this Act.

(3) Subsection (1) ceases to have effect on the expiry of the fifth year following commencement of this Act.

(4) The amount of the debt or details of other obligations secured by any security interest registered on the register previously maintained under the Motor Vehicle Securities Act 1989 must not be disclosed by the Registrar unless he or she is satisfied that the information is required to determine the priorities of any 2 or more security interests in respect of the relevant collateral.

**SECOND SCHEDULE**

**Section 54**

ENACTMENTS AMENDED

<b>Title of Enactment</b>	<b>Amendment</b>
...	...
<<1952, No 45 - <i>The Industrial and Provident Societies Amendment Act 1952</i> >>	<<By amending section 13 in a manner similar to that adopted for section 101 of the Companies Act 1955. See Note B to this Schedule.>>
...	...
1955, No 63 - The Companies Act 1955	<<By amending sections 101 and 308 as discussed in Note B to this Schedule.>> By deleting from the First Schedule all references to fees in respect of registration of instruments under Part IV; instruments creating or evidencing a charge; and satisfaction or partial satisfactions thereof.,
...	...

**THIRD SCHEDULE**

**Section 55(1)**

ENACTMENTS REPEALED

1924, No 49 - The Chattels Transfer Act 1924 together with all amendments.

1952, No 45 - The Industrial Provident Societies Amendment Act 1952, Part II (sections 15-29).

1955, No 63 - The Companies Act 1955, Part IV (sections 102-114).

1989, No 14 - The Motor Vehicle Securities Act 1989 together with all amendments.

**FOURTH SCHEDULE**

**Section 55(2)**

REGULATION AND ORDERS REVOKED

<b>Title</b>	<b>Statutory Regulation</b>
The Chattels Transfer Fees Regulations 1987	1987/41
<i>[All Orders-in-Council gazette pursuant to the Chattels Transfer Act 1924 or its amendments. All Chattels Transfer (Customary Hire Purchase) Orders.]</i>	
<u>The Motor Vehicle Securities (Fees) Regulations</u>	<u>1990 1990/36</u>

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## IV Transition: A Draft Companies (Reregistration) Act

- 140 Having developed a new legislative regime for company law which is significantly different from the existing regime and requires replacement rather than amending legislation, the "formidably difficult problem of transition" (the words are those of the Dickerson Committee whose work gave rise to the Canada Business Corporations Act) cannot be avoided. Our June 1989 Report (NZLC R9) did no more than indicate a general approach to transitional issues: see paragraphs 52 to 65. Much more detailed consideration has preceded this report and is reflected in Chapter V, detailing with amendments to the Companies Act 1955, as well as in the present chapter which sets out a draft Companies (Reregistration) Act.
- 141 The broad approach outlined in our June 1989 Report involved new companies being incorporated under and subject to the new regime, with existing companies having a three year period within which to reregister under the new regime, and liquidation as the sanction for failure to reregister within that period. Our further consideration of issues relating to transition has largely confirmed that approach while producing significant amplification and some modifications.
- 142 Our revised proposals (with our draft Companies Act referred to as "the 1990 Act") may be summarised as follows:
- (a) all new companies to be incorporated under the 1990 Act from the date of its commencement;
  - (b) all existing companies to reregister within three years of the commencement of the 1990 Act (11th transitional period");

- (c) the directors of existing companies to take the initiative in adopting a reregistration proposal to be submitted for adoption by shareholders;
- (d) if the shareholders decline a reregistration proposal, the directors would then prepare another proposal designed to preserve all existing rights, entitlements, duties and liabilities of members of the existing company;
- (e) if no steps to reregister are taken by an existing company, it is to be deemed to have reregistered with the constitution presumed (in the absence of express provisions) by the 1990 Act (but disadvantaged shareholders to be entitled to seek the appointment of a liquidator or relief against the directors); and
- (f) the 1955 Act to be repealed at the end of the transitional period.

**The deemed reregistration option**

143 In discussions subsequent to the publication of our June 1989 Report, the Department of Justice noted that in Manitoba company law reform has proceeded with a new regime immediately applying to existing companies but with certain transitional provisions. Section 261(2) of the Manitoba Corporations Act 1976 provides in part:

Notwithstanding any provision of this Act, where any provision of [the existing constitutional documents] of a corporation ...

- (a) that was in force immediately prior to the date this Act comes into force; and
- (b) that was not unlawful under the law as it was immediately prior to the date this Act comes into force;

is inconsistent with, repugnant to, or not in compliance with, the provisions of this Act, such provisions are not invalid, a nullity or illegal, solely by reason of that inconsistency, repugnancy, or non-compliance, until two years from the date this Act comes into force ...

144 We have considered the potential for applying the Manitoba approach in relation to the 1990 Act but have concluded that it should not be followed. Perhaps the major reason for that conclusion is the avoidance of confusion and uncertainty. The 1955 and 1990 Acts employ different concepts and terminology and companies registered under the 1955 Act will have a memorandum and articles of association reflecting the structure, concepts and terminology of the 1955 Act which in all probability will be substantially different from a constitution adopted for operation under the 1990 Act after proper consideration. On the Manitoba approach, there would be a significant degree of "inconsistency, repugnancy, [and] non-compliance" between 1955 Act constitution and the provisions of the 1990 Act. We reiterate our agreement with the Albereta approach which regarded

the one-time cost of filing new documents [as] a lesser evil than the long-term cost of trying to live indefinitely with constitutional documents which do not fit in with the legislation.

145 In addition, we are optimistic that the new 1990 Act regime will survive for at least a generation - the 1955 Act has already survived for 35 years - and consider that a longer term perspective justifies an allowance of time for putting the new regime on a proper footing at the outset. At the same time, a transition period and individually considered reregistration proposals provided fair opportunities for those involved in corporate activity to fashion a constitutional document which preserves the expectations and distribution of powers provided by the existing company structure.

### **Timetable**

146 Timetables are essentially arbitrary, and reasonable people may disagree about appropriate time limits in particular circumstances. The period of three years suggested in our June 1989 Report was the same as that favoured by the farmers of the Canada and Alberta Business Corporations Acts, and seems to us to be realistic if there are not to be undue demands placed on, in particular, professional advisers and the Companies Office itself. Given that there are in excess of 150,000 companies on the Register at present, a three year transition period still calls for an average reregistration tally exceeding 1,000 per week.



147 On the other hand, the adoption of the 1990 Act will reflect a judgment that the 1955 Act is no longer suitable and it follows that its departure should not be unduly delayed. We have no doubt that the permanent existence of two company law systems would be costly and confusing but that the longer term gains justify a dual system for a limited transitional period.

### **Shareholder protection**

148 As will be seen from the draft Companies (Reregistration) Act contained in this chapter, the reregistration procedure contemplates initiatives by directors but provides significant shareholder protections. Those protections include

- the requirement for reregistration proposals to be certified by directors as not unfairly prejudicial or unfairly discriminatory against any member;
- the requirement that the directors' reregistration proposal be submitted to shareholder meetings for approval by special resolution (except where all members agree in writing);
- the provision for applications to restrain submission of directors' registration proposals to the Registrar;
- the provision for a second (section 6) reregistration proposal to preserve existing rights and entitlements of members, and to be circulated to members with sufficient time for challenges; and
- the remedies against the company (appointment of liquidator, or application for relief under section 135 of the 1990 Act) or the directors (under section 9) for shareholders who have been disadvantaged where no specific reregistration proposal has been registered during the transitional period.

### **Failure to reregister**

149 Perhaps the most significant modification to the general scheme outlined in our June 1989 Report relates to the consequences of failure to reregister during the transitional period. As mentioned above, the June 1989 Report proposal was that liquidation would be the sole sanction for such a failure. given that the three year

transitional period gives a fair opportunity for such proposals to be developed and processed, and that remedies can be crafted for those members who are disadvantaged by the company being deemed to have the constitution provided by the 1990 Act itself, mandatory liquidation does not seem necessary.

150 In relation to companies limited by shares (which most existing companies are), the major difficulty likely to be encountered by a deemed registration in accordance with the Second Schedule will relate to the standardisation of entitlements attaching to shares. Thus, in those companies where there is a special class of share which preserves the power or interest of one shareholder or class of shareholder, the effect of a deemed reregistration will be to reduce that share to the status of all other "ordinary" shares. However, in most cases it may be expected that the holder of such a share will be at least aware of, and perhaps deeply involved in, development of a reregistration proposal, and the need for such shareholders to avail themselves of the remedies provided seems likely to arise only very rarely.

151 The position of companies other than those limited by shares is somewhat more complex as the 1990 Act requires shares as an essential component of companies registered under that Act, and presumes limited liability. This complexity is reflected in the alternative forms provided under the Second Schedule. In addition, it may be anticipated that the Registrar will use the requisition powers set out in the Third Schedule at a rather earlier date in relation to these unusual companies for which deemed registration is required.

152 The removal of liquidation as the sanction for non-reregistration as prevents a potential distortion of bargaining power as between various shareholders within a company in negotiating a reregistration proposal. In other words, if liquidation were the sole sanction, there could be situations where one group of shareholders in a company - those likely to be less adversely affected by liquidation than another group with which they were negotiating - could use the reregistration process as an opportunity to re-negotiate the contract underlying the formation of the company. The risk of that distortion is also addressed by the terms of the section 6 second reregistration proposal, and by the range of remedies provided in sections 9, 10 and 11.

### **Reduction of liability**

- 153 Section 12 of the draft statute recognises the possibility of reregistration reducing liabilities of shareholders, and treats any such reduction as a distribution so as to enable the operation of the "claw back" of sections 46(1) and (3) of the 1990 Act. It is analogous to section 46A [Reduction of shareholder liability a distribution] of the 1990 Act.

# **DRAFT COMPANIES (REREGISTRATION) ACT**

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# COMPANIES (REREGISTRATION) ACT 1990

1990, No UU

(Enacting words)

## **An Act to make provision for the reregistration under the Companies Act 1990 of companies incorporated or registered under the Companies Act 1955**

### **1 Short title and commencement**

- (1) This Act may be cited as the Companies (Reregistration) Act 1990.
- (2) This Act comes into force on [            ].

### **2 Interpretation**

- (1) In this Act, unless the context otherwise requires,

“application for registration” means an application for registration of an existing company under Part II of the Companies Act 1990;

“existing company” means a body corporate other than an overseas company:

- (a) that is registered or deemed to be registered, whether or not it was formed, under the Companies Act 1955, the Companies Act 1933, the Companies Act 1908, the Companies Act 1903, the Companies Act 1882, or the Joint Stock Companies Act 1860; and
- (b) that is not being wound up;

“overseas company” means a body corporate incorporated outside New Zealand;

“transition period”, in relation to an existing company, means the period which begins at the commencement of this Act and which expires on the date there years after the commencement of this Act, or on such later date as may be specified by the Court in an order made under section 7.

- (2) Terms or expressions that are not defined in this Act, but are defined in the Companies Act 1990 have the meaning given to them by that Act.

- (3) Terms or expressions that are not defined in this Act or the Companies Act 1990, but are defined in the Companies Act 1955, have the meaning given to them by that Act.

### **3 Existing companies to register under Companies Act 1990**

- (1) Every existing company must submit an application for registration to the Registrar before the end of the transition period.
- (2) No application for registration of an existing company may be submitted to the Registrar except as is provided for in this Act.
- (3) Notwithstanding sections 4 and 6, an existing company may at any time during the transition period submit to the Registrar an application for registration to which each member of the company has consented in writing.

### **4 Registration proposal**

- (1) The board of an existing company may at any time during the transition period resolve to submit to members of registration proposal.
- (2) A registration proposal must be in Form 1 in the First Schedule and must have annexed to it the application for registration which the directors propose to submit to the Registrar under section 13 of the Companies Act 1990.
- (3) The board of an existing company must, before a registration proposal is submitted to members, resolve that the registration proposal is not unfairly prejudicial to and does not unfairly discriminate against any member.
- (4) The directors who vote in favour of a resolution required by subsection (3) must sign a certificate that, in their opinion, the condition set out in that subsection is satisfied.
- (5) At any time after the resolution required by subsection (3) has been passed, the directors of an existing company may call meetings of the holders of each class of shares in the existing company to consider the registration proposal.

- (6) The provisions governing the calling of, and procedure at, a meeting of that class of members or, if there are no such provisions, at a general meeting of the existing company apply, with any necessary modifications, to meetings held for the purposes of this section.
- (7) The directors of an existing company may submit an application for registration prepared under this section to the Registrar
  - (a) 20 working days after the registration proposal including that application for registration has been approved by a special resolution of each of the meetings held under subsection (5), if within that period no application by a member under section 5 has been served on the company; or
  - (b) if every application made by a member under section 5 has been refused by the Court, at any time after all such applications have been finally determined.
- (8) Every director who fails to comply with subsection (4) may be convicted of an offence under section 13.

## **5 Application to restrain submission to Registrar under registration proposal**

- (1) Where a member
  - (a) did not receive notice of a meeting held for the purposes of section 4 which he or she was entitled to attend; or
  - (b) attended a meeting held for the purposes of section 4 and cast all the votes attached to shares registered in his or her name and with the same beneficial owner against approval of the registration proposal,that shareholder may make an application to the Court under section 209 of the Companies Act 1955 to restrain the submission of an application for registration to the Registrar.
- (2) An application made under subsection (1) must be
  - (a) filed in the High Court; and

(b) served o the company

within 20 working days of the date on which the last meeting for the purposes of section 4 was held.

(3) Where

(a) an application is made to the Court in accordance with subsection (1); and

(b) no other available remedy could adequately compensate the applicant for the prejudice or disadvantage suffered the Court may restrain the submission of an application for registration to the Registrar.

## **6 Registration where registration proposal not approved**

(1) Where a registration proposal submitted to shareholders under section 4 has not been approved, or the submission of an application for registration has been restrained under section 5, the directors of an existing company must prepare an application for registration in accordance with this section.

(2) An application for registration prepared under this section must preserve the existing rights and entitlements and duties and liabilities of members of the existing company in relation to:

(a) voting at meetings of members;

(b) appointment and removal of directors;

(c) preferential or fixed entitlements to distributions;

(d) liability to contribute to the company in respect of calls on share

(e) distribution of surplus assets of the company;

except insofar as those rights, entitlements, duties or liabilities will be affected by sections 31 to 139 and 176 to 195 of the Companies Act 1990.

(3) The directors must send a copy of an application for registration prepared under this section to each member of the company with a notice in Form 2 in the First Schedule.



- (4) The notice sent to members must specify the date on which the directors of the existing company may submit the application for registration to the Registrar (referred to in this section as "the submission date"). The submission date must be not less than 30 working days after the date on which the notice is sent to all members.
- (5) A member to whom a notice is sent may at any time before the submission date
  - (a) apply to the Court for an order that the application for registration accompanying the notice does not comply with subsection (2); and
  - (b) serve that application on the company.
- (6) The directors of an existing company may submit an application for registration prepared under this section to the Registrar
  - (a) on or after the submission date, if prior to that date no application by a member under subsection (5) has been served on the company; or
  - (b) if every application made by a member under subsection (5) has been refused by the Court, at any time after all such applications have been finally determined.
- (7) On an application made under subsection (5) the Court may, if it is satisfied that the application for registration does not comply with subsection (2), make any of the following orders:
  - (a) an order that the application for registration may not be submitted to the Registrar;
  - (b) an order that the application for registration may, with any amendments that have been proposed to the Court by the directors and are specified in the order, be submitted to the Registrar;
  - (c) an order requiring the directors of the existing company to prepare a new application for registration in accordance with this section;

- (d) an order that the existing company pay the whole or part of the costs of the applicant member on a solicitor and own client basis.

## **7 Extension of transition period where proceedings commenced**

- (1) Where an application has been made to the Court under section 5(1) or section 6(5) the Court may, either before or at the time of disposing of the application, and on the application of a member or of the existing company, make such order extending the period in which the existing company must register under the Companies Act 1990 as it thinks fit.
- (2) A copy of any order made under subsection (1) must be served on the Registrar by the company within 10 registration days.

## **8 Failure to register in time**

Where an existing company has not submitted an application for registration to the Registrar within the transition period

- (a) that company is deemed to have submitted on the date on which the transition period expired an application for registration in the form set out in the Second Schedule, completed in the manner specified in that Schedule; and
- (b) that company is liable to pay to the Registrar the fee that would have been payable if an application for registration had been submitted to the Registrar on the date of expiry of the transition period; and
- (c) that company is deemed to be registered under the Companies Act 1990, notwithstanding section 14 of that Act; and
- (d) the provisions of the Third Schedule relating to requisitions by the Registrar apply to that company.

## **9 Directors' liability**

- (1) Where
  - (a) a company is a company deemed to have submitted an application for registration under section 8; and

- (b) any member of that company is materially adversely affected by the registration of the company under the Companies Act 1990, as provided for in that section;

that member may within two years of the end of the transition period apply to the Court for an order under this section against a director or former director of the company.

- (2) Where the Court is satisfied on an application under this section that:
  - (a) a person against whom an order is sought under this section was a director of the company at any time during the transition period; and
  - (b) that company was a company to which section 8 applied; and
  - (c) that person could reasonably have been expected to take steps to ensure that the company submitted an application for registration to the Registrar;

the Court may make either or both the following orders:

- (d) an order requiring that person to pay such compensation to the application as is fair and reasonable having regard to:
  - (i) the extent of any loss or damage suffered by the applicant as a result of the registration of the company under section 8; and
  - (ii) the extent to which that person is responsible for the failure of the company to submit an application for registration to the Registrar;
- (e) an order requiring that person to pay the whole or any part of the applicant's costs on a solicitor and own client basis.

## **10 Deemed registration a ground for appointment of liquidator**

- (1) Where
  - (a) a company is a company deemed to have submitted an application for registration under section 8; and

- (b) any member of that company is materially adversely affected by the registration of the company under the Companies Act 1990, as provided for in that section;

that member may within two years of the end of the transition period apply to the Court for an order appointing a liquidator under this section, in the same manner as an application is made under section 203(1)(c) of the Companies Act 1990, whether or not that member has applied for an order under section 9.

- (2) On an application under this section the Court shall make an order appointing a liquidator unless
  - (a) the applicant is acting unreasonably in seeking to have the company put into liquidation; or
  - (b) the company resolves, prior to the hearing of the application, to amend its constitution in such a manner that the emended constitution no longer materially adversely affects the applicant; or
  - (c) an order is made under section 9 which adequately compensates the applicant for any loss or damage he or she may have suffered.
- (3) Where an order appointing a liquidator is made under this section, the liquidation shall proceed
  - (a) as if the company had not been registered under the Companies Act 1990 but had remained registered under the Companies Act 1955 with the memorandum of association and articles of association of that company as at the expiry of the transition period; and
  - (b) as if section 210A of the Companies Act 1955 applied to the liquidation.

## **11 Application of section 135 of 1990 Act to registration**

Where a company has been registered under the Companies Act 1990, a shareholder may make an application to the Court under section 135 of that Act in connection with the registration of the company, but the Court may not set aside that registration on such an application.

## **12 Reduction of member's liability on registration**

Where the registration of an existing company under the Companies Act 1990, cancels or reduces the liability of a member to the company in respect of

- (a) any share held by him or her prior to that registration; or
- (b) in the case of an unlimited company or a company limited by guarantee, any undertaking to contribute to the assets of the company in the event of its being wound up;

that cancellation or reduction of liability is to be treated as a distribution to that member of the amount by which his or her liability was reduced, for the purposes of section 46(1) and (3) of the Companies Act 1990.

## **13 Offences**

Every person who acts in contravention of or fails to comply in any respect with any of the following provisions of this Act, or any requirement imposed under any such provision, namely

- (a) section 4(4);
- (b) paragraph 2 of the Third Schedule;

commits an offence and is liable on conviction to a fine not exceeding \$5,000.

## **14 Regulations**

The Governor-General may, by Order in Council, make regulations

- (a) prescribing fees payable to the Registrar on presentation of an application for registration, and those fees may be set at different levels in respect of different periods during the transition period;
- (b) providing for such other matters, not inconsistent with this Act, as are necessary for giving full effect to this Act and for its due administration.

## FIRST SCHEDULE

## Sections 4,6

### FORM 1

#### Notice of Registration Proposal

[Name of company]

[Note: where a company is limited by shares, the notice may refer to shareholders throughout. If it is unlimited, or limited by guarantee, references must be to members throughout.]

- 1 The Companies (Reregistration) Act 1990 requires [name of company] to register under the Companies Act 1955.
- 2 The registration proposal has been prepared by the directors of the company. The directors who voted in favour of the proposal were [names of directors who voted in favour of proposal]. These directors have signed a certificate that this proposal is not unfairly prejudicial to, and does not unfairly discriminate against, any shareholder.
- 3 At present your rights as a [shareholder/member (delete as appropriate)] are governed by the Companies Act 1955 and the Memorandum of Association and Articles of Association of the company. Copies of the Memorandum and Articles may be inspected at the registered office of the company at [insert address] or at the Companies Office in [insert city] or at [specify any other locations]. After registration in accordance with this proposal, your rights as a [shareholder/member (delete as appropriate)] would be governed by the Companies Act 1990 and the attached application for registration.
- 4 The directors believe that this registration proposal will:  
  
(delete (a) or (b), as appropriate:)  
  
(a) [preserve your existing rights and entitlements, and duties and liabilities, as a [shareholder/member (delete as appropriate)], except to the extent that

those rights are affected by sections 31 to 139 and 176 to 195 of the Companies Act 1990.]

- (b) [in addition to the effect of sections 31 to 139 and 176 to 195 of the Companies Act 1990, have the following effects on your existing rights and entitlements, and duties and liabilities, as a [shareholder/member (delete as appropriate)]:

(list all respects in which the rights, entitlements, duties or liabilities of the person to whom the notice is sent are materially altered by the registration proposal).

- 5 If you are in any doubt about the effects that registration may have, you should consider obtaining legal advice.
- 6 [A meeting/meetings (delete as appropriate)] of [shareholders/members (delete as appropriate)] will be held at [place] on [dates] to consider the registration proposal. The notice calling the [meeting(s)] is enclosed with this notice.

(signed) \_\_\_\_\_

Director/Secretary

FORM 2

Notice of intended application for registration under Companies Act 1990

[Name of company]

[Note: where a company is limited by shares, the notice may refer to shareholders throughout. If it is unlimited, or limited by guarantee, references must be to members throughout.]

- 1 Companies (Reregistration) Act 1990 requires [name of company] to register under the Companies Act 1955.
- 2 The registration proposal sent to [shareholder/members (delete as appropriate)] on [date] was not approved at the meeting(s) of [shareholders/members (delete as appropriate)] held on [date(s)].

[OR:

- 2 The Court has ordered that the application for registration set out in the registration proposal sent to [shareholders/members (delete as appropriate)] on [date] cannot be submitted to the Registrar, as it is unfairly prejudicial to some [shareholders/members (delete as appropriate)].]
- 3 Under section 6 of the Companies (Reregistration) Act 1990 the directors of the company are therefore required to prepare and send [shareholders/members (delete as appropriate)] an application for registration that will preserve the existing rights and entitlements, and duties and liabilities, of [shareholders/members (delete as appropriate)] in relation to:
  - (a) voting at meetings of [shareholders/members (delete as appropriate)];
  - (b) appointment and removal of directors;
  - (c) preferential or fixed entitlements to distributions;
  - (d) liability to contribute to the company in respect of calls on shares;



(e) distribution of surplus assets of the company;

except to the extent that those rights are affected by sections 31 to 139 and 176 to 195 of the Companies Act 1990.

- 4 The attached application for registration has been prepared by the directors under section 6.
- 5 If the application for registration does not preserve existing rights, entitlements, duties and liabilities as required by section 6, any member may apply to the Court for an order preventing the application for registration from being filed with the Registrar. An application to the Court for such an order must be made before [date on which the directors may submit the application for registration to the Registrar, which must be not less than 30 working days after the date on which the notice will be sent to all members]. On that date the directors may submit the enclosed application for registration to the Register if no application to stop them doing so has been served on the company.
- 6 If you consider that:
  - (a) this application for registration may not preserve the rights, entitlements, duties or liabilities of [shareholders/members (delete as appropriate)] and
  - (b) you may be adversely affected by the change; you should seek legal advice immediately.

DO NOT DELAY

(signed)\_\_\_\_\_

Director/Secretary

## SECOND SCHEDULE

## Section 8

### APPLICATION FOR REGISTRATION DEEMED TO BE FILED AT EXPIRY OF TRANSITION PERIOD

- 1 In any case where a company is deemed to have submitted an application for registration under section 8, the company is deemed to have submitted an application for registration in the following form, in which the details required to complete the form were entered in accordance with the registers kept for the purposes of the Companies Act 1955 as at the date of expiry of the transition period.

``Application for registration of [name of company] under the Companies Act 1990''

- ``1 The name of the company is [name of company].
- 2 The maximum number of directors of the company is [number of directors holding office at the date of expiry of the transition period as shown in the latest return furnished by the company under section 200(4) of the Companies Act 1955].
- 3 The full names and residential addresses of the directors of the company on [date of expiry of transition period] and [names and address of directors of the company on that date as shown in the latest return furnished by the company under section 200(4) of the Companies Act 1955].
- 4 (a) The number of shares of the company of [date of expiry of transition period] is [number of shares in company that are issued at that date].  
  
(b) The shares specified in this paragraph have attached to them the liability to make the payments specified, if the holder is called on to do so by the board [list or describe any shares in respect of which capital is shown as uncalled in the latest return furnished by the company under section 130 of the Companies Act 1955 - if there are no such shares, write `nil''].

- 5 The registered office of the company on [date of expiry of transition period] is at [address of registered office under Companies Act 1955].
- 6 The address for service of the company on [date of expiry of transition period] is at the registered office of the company.]]
- 2 In the case of an unlimited company or a company limited by guarantee, if the company does not have a share capital, paragraph 4 in the form set out above should be replaced with the following paragraph:
- “(4)(a) The number of shares of the company on [date of expiry of transition period] is [number of members of company set out in articles of Association, or in any increase of members registered].
- (b) Every member of the company on [date of expiry of transition period] is deemed to have been issued one share in the company on that date, and no further consideration for the issue of that share need be paid by any such person.
- (c) The following are terms of every share of the company:
- (i) the holder agrees to contribute to the assets of the company in the event of its being liquidated while he or she is a shareholder, or within three years afterwards, for payment of the debts and liabilities contracted before he or she ceases to be a shareholder, and the costs, charges and expenses of liquidation, and for the adjustment of the rights of shareholders among themselves, such amount as may be required [(in the case of a limited company) not exceeding the sum specified in the Memorandum of Association].
- (ii) the holder of a share may at any time surrender that share to the company by notice in writing to the company without any payment by the company, and without affecting any liability of that shareholder to the company under subparagraph (i). A share surrendered in accordance with this subparagraph is deemed to be cancelled.

(d) The board may not issue any shares in the company."

3 In the case of an unlimited company or a company limited by guarantee, if the company has a share capital, paragraph 4 in the form set out above should be replaced with the following paragraph:

4(a) The number of A shares of the company on [date of expiry of transition period] is [number of persons who are members of the company other than by reason only of holding a share in the company as set out in the latest return furnished by the company under section 130 of the Companies Act 1955].

(b) The number of B shares of the company on [date of expiry of transition period] is [number of shares in company that are issued as at that date].

(c) Every person who is a member of the company other than by reason only of holding a share in the company on [date of expiry of transition period] is deemed to have been issued one A share in the company on that date, and no further consideration for issue of that share need be paid by any such person.

(d) Every share in the company on [date of expiry of transition period] is deemed to be a B share as of that date.

(e) The following are terms of every A share of the company:

(i) the holder agrees to contribute to the assets of the company in the event of its being liquidated while he or she is a shareholder, or within three years afterwards, for payment of the debts and liabilities contracted before he or she ceases to be a shareholder, and the costs, charges and expenses of liquidation, and for the adjustment of the rights of shareholders among themselves, such amount as may be required [(in the case of a limited company) not exceeding the sum specified in the memorandum of association].

- (ii) the holder of an A share may at any time surrender that share to the company by notice in writing to the company without any payment by the company, and without affecting any liability of that shareholder to the company under subparagraph (i). A share surrendered in accordance with this subparagraph is deemed to be cancelled.
  
- (f) The B shares specified in this paragraph have attached to them the liability to make the payments specified, if the holder is called on to do so by the board [list or describe any shares in respect of which capital is shown as uncalled in the latest return furnished by the company under section 130 of the Companies Act 1955 - if there are no such share, write ``nil"].
  
- (g) The board may not issue any A shares in the company."

## THIRD SCHEDULE

### REQUISITIONS BY THE REGISTRAR

- 1 At any time following the expiry of the transition period, the Registrar may require a company which is deemed to have submitted an application for registration, or any person who is or appears from the registers kept for the purposes of the Companies Act 1955 to be a director of such a company to either
  - (a) confirm the correctness of the terms of the application for registration which that company is deemed to have submitted; or
  - (b) provide information relating to:
    - (i) the number of directors holding office on the date of expiry of the transition period;
    - (ii) the full names and addresses of the directors of the company on the date of expiry of the transition period;
    - (iii) the membership of the company on the date of expiry of the transition period;
    - (iv) the number of shares of the company issued as at the date of expiry of the transition period;
    - (v) the amount (if any) uncalled in respect of any share of the company as at the date of expiry of the transition period.
- 2 The Registrar may
  - (a) specify a period, being not less than 20 working days from the day of receipt of the request, within which any confirmation or information requested under paragraph 1 must be provided;
  - (b) require any confirmation or information requested under paragraph 1 to be verified by a statutory declaration by the person from whom it is request or,

in the case of a request to the company, by one or more directors of that company.

- 3 Where information has been requested and provided under paragraph 1, the application for registration which is deemed to have been submitted by the company is to be treated as incorporating that information in place of the information which appears in the registers kept for the purposes of the Companies Act 1955 and is specified in the form set out in the Second Schedule.
- 4 Every person who fails to comply with a requirement imposed by the Registrar under paragraph 2 may be convicted of an offence under section 13 [Offences].

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V

Transition: A Draft Companies (Transitional Provisions) Amendment Act

- 154 Given reregistration as the favoured process for bringing existing companies under a new Companies Act (the subject of Chapter IV, above), the topic of transition also raises the question of immediate application to existing companies of some of the reforms proposed in our June 1989 Report: in other words, the question of amendments to the 1995 Act to apply during the three year transitional period contemplated for reregistration.
- 155 As indicated in our June 1989 Report (see paragraphs 52 to 54), we consider that it would be necessary to be selective in applying new reforms to existing companies. Further consideration has confirmed our views on that point. In particular, we recommend against major changes to the 1995 Act provisions which deal with shares and shareholders. Such provisions are closely interrelated and often reflect a careful arrangement of power between various shareholders and between shareholders generally and directors. Further, on all matters where immediate application of reforms is contemplated it is necessary to recognise that the 1955 and 1990 Acts have a different structure, and employ different concepts and terminology. Such considerations are reflected in the limits and complexity of the draft Companies (Transitional Provisions) Amendment Act set out below.
- 156 The draft Amendment Act also provides the vehicle for various repeals, consequential amendments and savings provisions (although the Act Interpretation Act 1924 contains savings provisions of general application). It should be noted that the structure of the draft Amendment Act is unorthodox in collecting together the repeals, savings provisions and insertion relating to a particular topic, rather than simply listing all repeals and amendments. The object of this approach is to clarify the effects of the draft Amendment Act.



- 157 The definitional difficulties of immediate application of some reforms is reflected in section 2 and the First Schedule of the draft Amendment Act. As these provisions indicate, the new Companies Act does not employ the terminology or concept of "member", "contributory", "Memorandum or Articles of Association" or "winding up".
- 158 Section 3 of the draft Amendment Act gives effect to the logical corollary of commencement of a new Companies Act: that all new companies should be incorporated under that Act, and not under the 1955 Act.
- 159 Most of the remaining provisions of the draft Amendment Act either import various provisions from the new Companies Act into the 1955 Act, or export self-contained areas to be dealt with under provisions of the new Act. Thus the appointment of the Registrar would, under section 4 be dealt with under the new Act but be recognised expressly in the 1955 Act. Conversely, the directors' duties imported into the 1955 Act through section 9 of the draft Amendment Act essentially replicate those in the new Companies Act (sections 101 to 113).
- 160 Section 7 of the draft Amendment Act is designed to bring section 18C of the 1995 Act into line with the revised section 142 of the new Companies Act (see the commentary at paragraph 53 of Chapter I, above). Similarly, section 8 of the draft Amendment Act would import sections 140 and 141 of the 1990 Act into the 1955 Act, and with consequential changes to sections 4 and 5 of the Property Law Act 1952.
- 161 As mentioned above, section 9 of the draft Amendment Act imports the restatement of directors' duties from the 1990 Act - and also the disclosure of directors' interests provisions. The corollary of those duties is enhanced effectiveness of their enforcement, hence the importation through section 10 of the shareholder enforcement provisions from the 1990 Act.
- 162 The effect of sections 11 and 12 of the draft Amendment Act is to export the areas of amalgamation, compromises with creditors, liquidations and removal from the registrar to Parts 12 to 15 of the 1990 Act, and repeal Parts VI and XI of the 1955 Act. An express jurisdiction for liquidation of insolvent associations would be

inserted as a new section 17A of the Judicature Act 1908 (see Fourth Schedule to the draft Amendment Act).

163 Section 13 of the draft Amendment Act provides for the position of overseas companies to be governed by Part 16 of the new Companies Act alone.

164 In comparison with the 1955 Act, the new Companies Act contains fewer offences provisions but with increased maximum penalties. Section 14 of the draft Amendment Act and the Third Schedule (which is in the form of drafting instructions only) are designed to eliminate major discrepancies between the criminal sanctions under the two Acts during the transitional period.

165 The topic of takeovers has been dominated by discussion of provisions applicable to major listed public companies, and the report of the Securities Commission on that topic has been under active consideration by the Government. In that report, the Securities Commission confirmed the widely held opinion of that the Companies Amendment Act 1963 provisions on takeover are ineffectual. That view also underlaid our June 1989 Report, and section 15 of the draft Amendment Act would both repeal the 1963 Amendment Act and import a provision equivalent to section 178 of the new Companies Act.

166 Section 16 of the draft Amendment Act deals with several miscellaneous matters:

- (a) section 86 of the 1955 Act [Vesting shares of debentures of deceased holder without requiring Probate or Letters of Administration] would be repealed and replaced by a better located provision in a new section 64A of the Amendment Act 1969;
- (b) section 97 of the 1955 Act [Perpetual debentures] would also be relocated as a new section 75A of the Property Law Act 1952; and
- (c) sections 98 to 100 of the 1955 Act would be repealed and not replaced on the basis that, while possibly relevant to public issues of debenture stock (and appropriate to be considered for retention in the Securities Act 1978), they are irrelevant to core company law; and corresponding provisions in the Industrial and Provident Societies Amendment Act 1952 would also be repealed.

167 In summary, these proposals - together with those in the other chapters of this Report - would effectively remove the following Parts from the 1955 Act at the commencement of the transition period;

- (a) Part IV - Registration of charges;
- (b) Part VI - Winding up
- (c) Part VII - Receivers and managers;
- (d) Part XI - Winding up of unregistered companies;
- (e) Part XII - Overseas companies; and
- (f) Part XIII - Insurance companies.

# DRAFT COMPANIES (TRANSITIONAL PROVISIONS) ACT

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# COMPANIES (TRANSITIONAL PROVISIONS) AMENDMENT ACT 1990

1990, No VV

(Enacting words)

## **An Act to amend the Companies Act 1955 consequent upon the commencement of the Companies Act 1990**

### **1 Short title and commencement**

- (1) This Act may be cited as the Companies (Transitional Provisions) Amendment Act 1990 and shall be read together with and deemed part of the Companies Act 1955 (the principal Act).
- (2) This Act comes into force on [the date of commencement of the Companies Act 1990].

### *Interpretation*

### **2 Interpretation**

Section 2 of the principal Act is amended in the manner specified in the First Schedule

### *Incorporation*

### **3 Prohibition on further incorporation**

- (1) The principal Act is amended by inserting in Part II, after the heading "Incorporation of companies and incidental thereto", the following sections:

#### **12A Prohibition on incorporation**

No company may be formed under this Part, or Part VII, of this Act after [date of commencement of 1990 Act]."

- (2) Section 13 of the principal Act is amended by omitting from subsection (1) the word "Any" and substituting the words "Subject to section 12A, any".



- (3) Section 353(1) of the principal Act is amended by omitting the words "Notwithstanding anything in this Act" and substituting the words "Subject section 12A, but notwithstanding any other provision of this Act".

### *Registrar*

#### **4 Registrar**

- (1) The principal Act is amended by repealing section 3(1), section 4(1) and section 5(1).
- (2) The principal Act is consequentially amended by inserting after section 2 the following section:

#### **2A Register of Companies and other officers**

Every reference in this Act or in any other Act to

- (a) the Registrar of Companies appointed in accordance with section 3(1) of this Act; or
- (b) a Deputy Registrar of Companies appointed in accordance with section 4(1) of this Act; or
- (c) A District Registrar of Companies or an Assistant Registrar of Companies appointed in accordance with section 5(1) of this Act,

is to be read as a reference to a person who holds the corresponding office under the 1990 Act."

#### **5 Seals**

The principal Act is amended by repealing section 6 and substituting the following section

#### **6 Official seals**

- (1) There shall be an official seal in the custody of the Registrar, and there shall also be an official seal in the custody of each District Registrar.

- (2) Each official seal kept in accordance with subsection (1) must be distinguishable from every seal kept by any person under section 270 [Official seals] of the 1990 Act."

*Company names*

**6 Company names**

- (1) The principal Act is amended by inserting in Part II, after the heading "Provisions with respect to names of companies", the following section:

**30A Company names**

- (1) Subject to subsection (2) and (3), the provisions of Part 3 of the 1990 Act apply in relation to companies registered under this Act as if they were companies registered under the 1990 Act.
- (2) The registration number of a company at the commencement of this section is deemed to have been assigned by the Registrar for the purposes of section 16(2) of this 1990 Act.
- (3) In relation to a company registered under this Act,
- (a) Part 3 of the 1990 Act applies as if references to the "New Zealand Register" were references to the register kept for the purposes of this Act;
- (b) section 17 of the 1990 Act applies as the words "under section 73 [Liability of shareholders]" were omitted from subsection (5);
- (c) section 19(1) of the 1990 Act applies as if the words "unless the name is registered at the time of incorporation or registration of the company under Part 2" were omitted from paragraph (b);
- (d) section 20(1) of the 1990 Act applies as if the following paragraph were inserted after paragraph (a):
- "(aa) in the case of a name entered on the register before the commencement of section 30A of the Companies Act 1955, that

name would not have been entered on the register if section 19 of this Act has applied at the time it was entered; or";

(e) section 21(2) of the 1990 Act applies as if the reference to "section 140 [Method of contracting]" were a reference to section 42 of this Act."

(2) The principal Act is consequentially amended by repealing:

- (a) section 8(1)(b) and (c);
- (b) sections 31 and 33;
- (c) sections 116(1)(a), 116(2), 116(3) and 116(5);
- (d) sections 462.

(3) Where, at the time of commencement of this section

- (a) a company had been directed to change its name under section 32(2) of the Companies Act 1955; and
- (b) that company had not done so,

that company is deemed to have been served on the date of commencement of this section with a notice under section 20(2) of the 1990 Act, in relation to that name.

(4) Nothing in this Act or in Part 3 of the 1990 Act affects the registration under the Companies Act 1955 of a name which does not contain the word "Limited", in accordance with an authorisation granted under section 33 of that Act.

#### *Contracts etc*

### **7 Dealings between company and other persons**

(1) Section 18C of the principal Act is amended by omitting from subsection (1) the words "unless that person knows or by reason of his position with or relationship to the company ought to know of the matter referred to in paragraphs (a), (b), (c), (d), (e), or (f), as the case may be, of this subsection".

- (2) Section 18C of the principal Act is further amended by repealing subsection (2).

## **8 Form of contracts**

- (1) The principal Act is amended by repealing section 42 and substituting the following section:

### **``42 Form of contracts**

Sections 140 and 141 of the 1990 Act apply in relation to companies registered under this Act as if references to companies registered under the 1990 Act were references to companies registered under this Act."

- (2) Nothing in this Act affects the validity of any contract or obligation entered into by a company before the commencement of this Act
- (3) Section 4 of the Property Law Act 1952 is consequentially amended by inserting in subsection (2), after the word ``corporation", the words ``to which section 140 of the Companies Act 1990 does not apply".
- (4) Section 5 of the Property Law Act 1952 is consequentially amended by omitting from subsection (3) the words ``within the meaning of the Companies Act 1955" and substituting the words ``to which section 140 of the Companies Act 1990 applies".

### *Directors' duties*

## **9 Directors' duties**

- (1) The principal Act is amended by inserting, immediately after section 180, the following sections:

### **``180A Management of company**

The business and affairs of a company shall be managed by or under the direction of the board of the company who shall have all powers necessary for that management except to the extent that the constitution of this Act expressly requires those powers to be exercised by the members or any other person.

### **180B Delegation of powers**

- (1) Subject to this Act and to any restrictions in the constitution of the company, the board of a company may delegate, either formally or informally (including by course of conduct), to a committee of directors, any director or employee of the company, or any other person, any one or more of its powers other than its powers under section 17 of the 1990 Act.
- (2) A board that delegates any power under subsection (1) is responsible for every exercise of the power by the delegate, as if the power was exercised by the board, unless the board
  - (a) believes on reasonable grounds at all times before the exercise of the power that the delegate will exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and
  - (b) has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

### **180C Fundamental duty**

- (1) The fundamental duty of every director of a company, when exercising powers or performing duties as a director, is to act
  - (a) in good faith; and
  - (b) in a manner that he or she believes on reasonable grounds is in the best interests of the company, except insofar as this obligation is limited by the constitution in accordance with subsection (2).
- (2) The constitution of a company may provide that a director may, when exercising powers or performing duties as a director, act in a manner which he or she believes on reasonable grounds is in the best interests of a member or group of members, or any other entitled persons, notwithstanding that such action may not be in the best interests of the company.

### **180D Existing members**

A director of a company must not, when exercising powers or performing duties as a director, act or agree to the company acting in a manner that unfairly prejudices or unfairly discriminates against any existing member of the company, unless the director

- (a) believes on reasonable grounds that the duty set out in section 180C [Fundamental duty] requires him or her to do so; or
- (b) is acting in accordance with a provision in the constitution which permits him or her to act in a manner which he or she believes on reasonable grounds is in the best interests of a member, or group of members, or any other entitled persons.

### **180E Creditors and employees**

A director of a company may, when exercising powers or performing duties as a director, have regard to the interests of creditors and employees of the company, but nothing in this section limits the duties or obligations of directors set out in this Act.

### **180F Compliance with constitution and this Act**

A director of a company must not act or agree to the company acting in a manner that contravenes the constitution of the company of this Act.

### **180G Solvency**

- (1) A director of a company must not agree to the company entering into a contract or arrangement or acting in any other manner unless he or she believes at that time on reasonable grounds that the act concerned does not involve an unreasonable risk of causing the company to fail to satisfy the solvency test.
- (2) A director of a company must not agree to the company incurring an obligation unless he or she believes at that time on reasonable grounds that the company will be able to perform the obligation when required to do so.
- (3) (a) For the purposes of this section, a company satisfies the solvency test if
  - (i) it is able to pay its debts as they become due in the normal course of business; and

- (ii) the realisable value of the company's assets is greater than the aggregate of the present value of its liabilities, whether contingent or otherwise.
- (b) In determining whether a company satisfies the solvency test regard may be had either to financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances, or a fair valuation or other method that is reasonable in the circumstances.
- (c) In this subsection, "realisable value", in relation to any asset, means the price that would be paid for that asset by a willing but not anxious buyer to a willing but not anxious seller.

### **180H Standard of care of directors**

Every director of a company, when exercising powers of performing duties as a director, must exercise the care, diligence and skill reasonably to be expected of a director acting in like circumstances.

### **180I Use of information and advice**

Every director of a company, when exercising powers or performing duties as a director, may accept as correct, reports, statements, financial data and other information prepared, and professional or expert advice given, by any of the following persons to the extent only that the director acts in good faith, after reasonable inquiry when the need for inquiry is indicated by the circumstances, and without knowledge that would cause such acceptance to be unwarranted:

- (a) any employee of the company when the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
- (b) any professional or expert person in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence;
- (c) any other director, or committee of directors upon which the director did not serve, in relation to matters within the director's or committee's designated authority.

### **180J Meaning of "interested"**

- (1) Subject to subsection (2), for the purposes of this Act, a director of a company is to be treated as interested in a transaction to which the company is a party if and only if the director
  - (a) is a party to or will or may derive a material financial benefit from the transaction; or
  - (b) has a material financial interest in another party to the transaction; or
  - (c) is a director, officer or trustee of another party to, or person who will or may derive a material financial benefit from, the transaction (not being a party or person that is a related company of the company); or
  - (d) is the parent, child, or spouse of another party to, or person who will or may derive a material financial benefit from, the transaction; or
  - (e) is otherwise directly or indirectly materially interested in the transaction.
- (2) For the purposes of this Act, a director of a company is not to be treated as interested in a transaction to which the company is a party if the transaction comprises only the giving by the company of any security to a third party which is unconnected with the director, at the request of the third party, in respect of a debt or obligation of the company for which the director or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.
- (3) Sections 180K [Disclosure of interest] and 180L [Transactions may be avoided] do not apply
  - (a) to any remuneration or other benefit given to a director in accordance with section 180P [Remuneration and other benefits]; or
  - (b) to any indemnity given or insurance provided in accordance with section 180Q [Indemnity and insurance].

### **180K Disclosure of interest**



- (1) A director of a company who is interested in a transaction or proposed transaction with the company, must forthwith after becoming aware of the transaction or proposed transaction disclose to the board of the company by notice in writing, the nature and extent of the director's interest.
- (2) For the purposes of subsection (1), a general notice in writing to the board to the effect that a director is a member, director, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person, is a sufficient disclosure of interest in relation to any such transaction.
- (3) A failure by a director to comply with subsection (1) does not affect the validity of any transaction entered into by the company or the director, but the director commits an offence and is liable on conviction to a fine not exceeding \$10,000.

#### **180L Transactions may be avoided**

- (1) A transaction entered into by the company in which a director of the company is in any way interested may be avoided by the company within three months of the transaction being disclosed to all the members (whether by means of the directors' annual report or otherwise), unless the company receives fair value under the transaction.
- (2) For the purposes of subsection (1), the question whether a company receives fair value under a transaction shall be determined on the basis of the information known to the company and to the interested director at the time the transaction is entered into.
  - (a) where a person seeking to uphold a transaction knew of the director's interest at the time the transaction was entered into, the onus of establishing fair value is on that person;
  - (b) in any other case, the company has the onus of establishing that it did not receive fair value.

- (5) Subject to subsection (1) and to the constitution of a company, no transaction entered into by the company in which a director is interested shall be liable to be avoided, nor shall any director be liable to account to the company for any profit realised by any such transaction by reason only of such interest.
- (6) The avoidance by a company of any transaction under this section does not affect the title or interest of a person in property which that person had acquired
  - (a) from a person other than the company; and
  - (b) for valuable consideration; and
  - (c) without knowledge of the circumstances of the transaction under which the second-mentioned person acquired the property from the company.

#### **180M Interested director may vote etc**

Subject to the constitution of a company, a director of the company who is interested in a transaction entered into or to be entered into by the company may

- (a) vote in respect of the transaction; and
  - (b) attend any meeting of directors and be included amongst the directors present for the purpose of a quorum; and
  - (c) sign any documents relating to the transaction on behalf of the company; and
  - (d) do any other thing in his or her capacity as a director in relation to the transaction;
- as if he or she was not interested.

#### **180N Use of company information or opportunity**

- (1) Where a director of a company has information in his or her capacity as director or employee of the company (being information that would not otherwise be available to him or her), the director must not disclose that information to any person, or act on the basis of that information, other than
  - (a) for the purposes of the company; or

- (b) as required by law; or
  - (c) in accordance with subsection (2) or subsection (3); or
  - (d) in accordance with section 108K [Disclosure of interest].
- (2) A director of a company may disclose any information to any person who is named in a written notice previously given to the board as a person in accordance with those directions or instructions the director may be required or is accustomed to act in respect of his or her duties and powers as director.
- (3) A director of a company may disclose, use, or act on the basis of any information if
- (a) a written notice seeking authorisation of, and setting out particulars of such disclosure, use, or act is given to the board; and
  - (b) the director is authorised to do so by the board; and
  - (c) the company receives fair value in respect of the disclosure, use, or act.

### **1800 Directors' share dealings**

- (1) A director of a company who acquires or disposes of shares or other securities issued by the company or a related company, or a direct or indirect interest in such shares or other securities, must forthwith after the acquisition or disposal is made, disclose to the board by notice in writing the number and type of shares acquired or disposed of, the consideration paid or received therefore and the date of acquisition or disposal.
- (2) Where a director of a company has information in his or her capacity as a director or employee of the company or a related company (being information that would not otherwise be available to him or her) and that information is material to an assessment to the value of the shares or other securities issued by the company or a related company, the director may acquire or dispose of any such shares or other securities, or a direct or indirect interest therein, only if

- (a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of this securities or interest acquired; or
  - (b) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the securities or interest disposed of.
- (3) For the purposes of subsection 20, the fair value of any securities or interest therein is to be arrived at on the basis of all information known to the director or publicly available.
- (4) Subsection (2) shall not apply in respect of any security or interest acquired or disposed of by a director only as a nominee for the company or any related company.
- (5) For the purposes of this section and without limiting the meaning of the term "interest", a director of a company has an interest in securities if another body corporate holds or has an interest in them and either
- (a) that body corporate, or its board, are accustomed or required to act in accordance with the director's directions or instructions; or
  - (b) the director is entitled to exercise or control the exercise of one-third or more of the voting power at a meeting of that body corporate.
- (6) In this section, the term "director" includes the persons referred to in section 96(1)(d) [Meaning of "director"].

### **180P Remuneration and other benefits**

- (1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise
- (a) the making of payments of the company to a director by way of remuneration for his services as such or in any other capacity or by way of compensation for loss of office; and
  - (b) the making of payments by the company for debts incurred by directors; and
  - (c) the giving of guarantees by the company for debts incurred by directors; and

(d) entry into a contract to do any of the things set out in paragraphs (a), (b) (c);

provided that the board is satisfied that the making of such provided payments or giving of such guarantees is fair to the company and a written notice setting out particulars of the payment to or guarantee for the benefit of, or contract with, that director is approved by the board.

- (2) The payment of remuneration, or any other benefit given to a director in accordance with a contract authorised under subsection (1) need not be separately authorised under subsection (1).
- (3) Directors who vote in favour of authorising a payment or guarantee or contract under subsection (1) must sign a certificate that in their opinion the making of the payment or giving of the guarantee or entry into the contract is fair to the company.
- (4) Where a payment is made or guarantee given to which subsection (1) applies and either
  - (a) the procedures set out in subsections (1) and (3) have not been followed: or
  - (b) there did not exist reasonable grounds for the opinion set out in the certificate given under subsection (3);

the director to whom the payment is made or in respect of whom the guarantee is given, is personally liable to the company for the amount of the payment, or any amount paid by the company under the guarantee, except to the extent to which he or she proves that the payment or the guarantee was fair to the company at the time it was made or given.

### **180Q Indemnity and insurance**

- (1) Except as provided in this section, no company may indemnify any director or employee of the company in respect of any liability or costs incurred by him or her in any proceedings, and any indemnity given in breach of this section is void.

- (2) A company may, if expressly authorised to do so by its constitution, indemnify a director or employee of the company in respect of any costs incurred by him or her in any proceeding
- (a) brought by the company against the director or employee in that capacity; and
  - (b) in which judgment is given in his or her favour, or he or she is acquitted, or relief is granted to him or her under section 468 of this Act.
- (3) A company may indemnify a director or employee of the company in respect of any liability or costs incurred by him or her in any proceedings
- (a) brought by any person other than the company against the director or employee in that capacity; and
  - (b) which do not result from a failure by the director or employee to act in good faith in a manner that he or she believes on reasonable grounds to be in the best interests of the company.
- (4) Nothing in this section prevents a company from providing insurance for a director or employee in respect of any liability or costs incurred by him or her in any proceedings.
- (5) The board of a company shall ensure that a written notice setting out particulars of every indemnity given to or insurance provided for any director or employee of the company is forthwith approved by the board.
- (6) In this section
- ``director'' includes a former director;
  - ``employee'' includes a former employee'
  - ``indemnify'' includes relieve or excuse from liability;
  - ``proceedings'' includes civil, criminal and administrative proceedings.

### **180R Notices of interest in annual report**

Particulars of any notice given to or approved by the board for the purposes of sections 180K, 180N, 180O, 180P of 180Q, must be set out in the directors' report prepared under section 161 of this Act in respect of the period in which the notice was given.

### **180S Extended meaning of ``director''**

- (1) For the purposes of sections 180C to 180Q of this Act, and section 226 of the 1990 Act, the term ``director'' includes any person to whom any power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, and any person who exercises any such power or duty with the consent or acquiescence of the board.
- (2) For the purposes of sections 180N and 180O of this Act, the term ``director'' includes
  - (a) a person in accordance with whose directions or instructions a director may be required or is accustomed to act in respect of his other duties and powers as director; and
  - (b) any employee of the company to the extent that he or she receives information concerning the company or its activities on the basis that it is to be kept confidential.
- (3) Notwithstanding subsections (1) and (2) of this section, a person is not a director for the purposes of any provision of this Act by reason only of acting in a professional capacity."
- (2) The principal Act is amended by repealing
  - (a) sections 190 to 199A; and
  - (b) section 204.

### *Enforcement*

## **10 Enforcement**

- (1) The principal Act is amended by inserting after Part V the following part:

PART VA  
ENFORCEMENT

**209 A Injunction to restrain action**

- (1) Where a company or the board proposes to engage in any conduct that contravenes the constitution of the company or the Act, the company or any director, member or other entitled person, or any creditor of the company may apply to the Court for an order restraining the company or the director, as the case may be, from so acting.
- (2) Where the Court grants an order under subsection (1), it may grant such consequential relief as it thinks proper.
- (3) No order may be made under this section in respect of any conduct or course of conduct that has been completed at the time the order is to be made.

**209B Derivative actions**

- (1) Subject to subsection (2), a member or director of a company may apply to the Court for leave to bring any proceedings in the name of and on behalf of the company or any of its subsidiaries, or intervene in proceedings to which the company or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the proceedings on behalf of the company or subsidiary, as the case may be.
- (2) No proceedings may be brought and no intervention in proceedings may be made under subsection (1) unless the Court is satisfied that either
  - (a) the company or subsidiary does not intend to bring, diligently prosecute, defend or discontinue the proceedings, and it appears to be in the interests of the company or its subsidiary that the proceedings be brought, prosecuted, defended or discontinued; or



- (b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the members as a whole.
- (3) Notice of application for the leave of the Court under subsection (1) must be served on the company or subsidiary, which may appear and oppose the application, and which must advise the Court whether it intends to bring, prosecute, defend, or discontinue the proceedings.
- (4) Save as provided in subsection (1), no member shall be entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary.

#### **209C Cost of derivative action to be borne by company**

- (1) Subject to subsection (2), where leave is granted under section 209B [Derivative actions] the Court may from time to time order that the whole or any part of the reasonable costs of bringing or intervening in the proceedings shall be borne by the company.
- (2) The Court shall not make an order under subsection (1) in respect of the whole or any part of the costs of the proceedings where it is of the opinion that it would be unjust or inequitable for the company to bear those costs.
- (3) Any order made under subsection (1) may include an order that the company advance to the member a sum in respect of costs to be incurred, on such terms and subject to the provision of such security for repayment as the Court may think fit.

#### **209D Powers of Court where leave granted**

In connection with any proceedings brought or intervened in under section 209B [Derivative actions] the Court may at any time make any order it thinks fit including, without limiting the generality of this provision, an order

- (a) authorising the member or any person to control the conduct of the action;
- (b) giving directions for the conduct of the action;

- (c) requiring the company, of the directors, to provide information or assistance in relation to the action;
- (d) directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present members of the company or its subsidiary instead of to the company or subsidiary.

### **209E Compromise or settlement of derivative action**

No proceedings brought or intervened in under section 209B [Derivative actions] may be settled or compromised without the approval of the Court, which upon granting approval may make such order as it thinks fit as to costs, including an order requiring a member to repay some or all of any sums advanced under section 209C(3) [Cost of derivative action to be borne by company].

#### *Personal actions*

### **2090F Personal action by member against directors**

- (1) A member may bring an action against a director in respect of any breach of a duty owed to him or her personally, but not
  - (a) in respect of a breach of a duty owed solely to the company; or
  - (b) where the only damage complained of is a diminution in or prevention of increase in the value of shares in the company as a result of loss suffered by or gain foregone by the company; except in accordance with section 209B [Derivative actions].
- (2) The duties of directors set out in sections 180D [Existing members], 180F [Compliance with constitution and this Act] and 1800 [Directors's share dealings] are duties owed to members personally.
- (3) The duties of directors set out in sections 180C [Fundamental duty], 180G [Solvency], 180K [Disclosure of interest] and 180N [Use of company information or opportunity], are duties owed solely to the company.

- (4) Notwithstanding subsection (3), a member may apply to the Court for an order requiring the directors of a company to take any action required to be taken by them under the constitution or this Act and, the Court may, if it is in all the circumstances just and equitable to do so, make such an order and grant such consequential relief as it thinks fit.

### **209G Personal action by member against company**

- (1) A member may bring an action against the company in respect of any breach of a duty owed by the company to him or her personally.
- (2) Notwithstanding subsection (1), a member may apply to the Court for an order requiring the company to take any action required to be taken by it under its constitution or this Act, and the Court may, if it is in all the circumstances just and equitable to do so, make such an order and grant such consequential relief as it thinks fit.

### **209H Representative actions**

Where a member brings an action against the company or a director, and other members have the same or substantially the same interest in relation to the subject-matter of the action, the Court may appoint that member to represent all or some of the members having the same or substantially the same interest, and may make such order as it thinks fit including, without limiting the generality of this provision, an order

- (a) as to the control and conduct of the action;
- (b) as to the costs of the action;
- (c) directing the distribution of any amount adjudged payable by a defendant in the action among those members represented.

### *Standing of Attorney-General*

### **209I Standing of Attorney-General**

The Attorney-General may, where it is in his or her opinion in the public interest to do so, make an application section 209A [Injunction to restrain action], 209B [Derivative

actions] or 209H [Representative actions] as if he or she were a member of the company concerned.

*Prejudiced members*

**209J Prejudiced members**

- (1) Where the affairs of a company have been or are being or are likely to be conducted in a manner that is, or any act or acts of the company have been or are or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial, to a former or existing member or other entitled person, he or she may apply to the Court for an order under this section.
- (2) If on an application under this section the Court considers that it is just an equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this provision, an order
  - (a) for the acquisition of the member's shares by the company or any other person;
  - (b) for the payment of compensation to any person by the company or any other person;
  - (c) regulating the conduct of the company's affairs in future;
  - (d) appointing a receiver of the company;
  - (e) directing the rectification of the records of the company;
  - (f) putting the company into liquidation."
- (2) The principal Act is amended by
  - (a) omitting from section 18(2) the expression to ``sections 36 and 209(3)" and substituting the expression ``section 36";
  - (b) repealing subsections (3) to (5) of section 173;
  - (c) repealing section 209;

- (d) omitting from section 383(6) the words ``apart from those of subsection (3) of section 209 thereof'';
- (e) omitting from section 468(1) the words ``an officer of a company or a person employed by a company as auditor (whether he is or is not an officer or of the company)'' and substituting the words ``a director of a company'';
- (f) omitting from section 468(1) the words ``that officer or person'' and substituting the words ``that director'';
- (g) omitting from section 468(2) the words ``any such officer or person'' and substituting the words ``any such director'';
- (h) omitting from section 468(2) the words ``against that officer or person'' and substituting the words ``against that director''.

*Compromises and amalgamation*

**11 Compromises and amalgamations**

- (1) The principal Act is amended by inserting after Part VA (as inserted by section 10) the following Part:

``PART VB

COMPROMISES WITH CREDITORS

**209AA Compromises with creditors**

Part 13 of the 1990 Act applies in relation to a company registered under this Act as if

- (a) references to a company registered under the 1990 Act were references to a company registered under this Act; and
  - (b) references to a shareholder in a company where references to a member of a company."
- (2) The principal Act is amended by repealing sections 205 to 207.
  - (3) Nothing in this Act affects

- (a) any application made to the Court in relation to any proposed compromise or arrangement under section 205 of this Act; or
- (b) any order made in relation to sections 205 to 207 of this Act prior to the commencement of this Act, and for the purposes of any such application or order and of any proposal in respect of which the application or order was made, sections 205 to 207 of this Act shall continue to operate and apply as if this Act had not been passed.

*Liquidation and removal from the registrar*

**12 Liquidation and removal from the register**

- (1) The principal Act is amended by repealing Part VI and Part XI and substituting the following Part:

PART VI

LIQUIDATION AND REMOVAL FROM THE REGISTRAR

**210A Liquidation and removal from the register**

- (1) Subject to subsections (2) to (5), Parts 14 and 15 of the 1990 Act apply in relation to companies registered under this Act as if they were companies registered under the 1990 Act.
- (2) The following provisions of the 1990 Act do not apply in relation to companies registered under this Act;
  - (a) section 222(4); and
  - (b) section 241(6).
- (3) In relation to a company registered under this Act,
  - (a) Parts 14 and 15 of the 1990 Act apply as if
    - (i) references to the New Zealand register were references to the register kept for the purpose of this Act; and

- (ii) references to a shareholder in a company were references to a member of a company;
  - (b) section 203(1)(c) applies as if
    - (i) the reference in subparagraph (ii) to the 1990 Act were a reference to this Act; and
    - (ii) subparagraph (iii) were omitted, and the following subparagraph substituted;
      - “(iii) the number of members is reduced below seven or, in the case of a private company, below two”;
  - (c) section 213(3) applies as if the words “may be convicted of an offence under section 277(2) [Failure to comply with Act]” were omitted, and the words “commits an offence and is liable on conviction to a fine not exceeding \$10,000” were substituted;
  - (d) section 254(1) applies as if the words “under Part 8” were omitted from paragraph (e).
- (4) Nothing in section 210 of the 1990 Act shall impose on any person a greater liability than would have been imposed on him or her in the winding up of a company if the Companies (Transitional Provisions) Act 1990 had not been passed, in respect of any share transferred by him or her to another person prior to the commencement of this section.
  - (5) Where a demand has been served on a company under section 218(a) of this Act prior to the commencement of this section, that demand is deemed to be a statutory demand made in accordance with section 223 of the 1990 Act."
  - (2) Section 67(7) of the principal Act is amended by omitting the words “or paragraph (d) of section 217, or subparagraph (i) of paragraph (a) of the provision to subsection (1) of section 219 of this Act”.
  - (3) Section 354(2)(a) of the principal Act is amended by repealing subparagraphs (ii) and (iii).

- (4) Section 362(8) and (9) of the principal Act are repealed.
- (5) Section 364 of the principal Act is repealed.
- (6) Section 461B of the principal Act is repealed.
- (7) Nothing in this Act affects
  - (a) any application made to the Court for the winding up of a company under the principal Act; or
  - (b) any resolution of a company to be wound up by the Court; or
  - (c) any resolution of a company for voluntary winding up; or
  - (d) any order made by the Court under Part VI of the Act,prior to the commencement of this Act, and for the purposes of any such application, resolution or order, the provisions of of the principal Act (other section 335) shall continue to operate and apply as if this Act has not been passed.
- (8) Nothing in this Act affects
  - (a) any application made to the Court for the winding up of an unregistered company under of the principal Act; or
  - (b) any order made by the Court under Part XI of the principal Act, prior to the commencement of this Act, and for the purposes of any application or order and of any winding up resulting from such application or order, the provisions of the principal Act (other than section 335) shall continue to operate and apply as if this Act had been passed.
- (9) Nothing in this Act affects
  - (a) any notice given; or
  - (b) any application made to the Registrar under section 335A of of the principal Act, prior to the commencement of this Act, and for the purposes of any such notice or application and of any dissolution resulting from such notice



or application, section 335A of the principal Act shall continue to operate and apply as if the expression "20 years" were omitted from subsection (8) and the expression "two years" substituted, but otherwise as if this Act had not been passed.

(10) Nothing in this Act affects

- (a) any letter sent by the Registrar; or
- (b) any notice given by the Registrar under sections 336 or 336A of the principal Act, prior to the commencement of this Act, and for the purposes of any such letter or notice and of any steps taken to strike a company off the register resulting from such letter or notice, sections 336 and 336A of the 1995 Act shall continue to operate and apply as if the expression "20 years" were omitted from subsection (8) and the expression "two years" substituted, but otherwise as if this Act had not been passed.

### **13 Overseas companies**

(1) The of the principal Act is amended by repealing sections 395 to 412 and substituting the following section:

**"386A Act does not apply to overseas companies**

Notwithstanding any other provision of this Act, or of any other Act, the provisions of this Act shall not apply in relation to an overseas company."

- (2) The principal Act is consequentially amended in the manner indicated in the Second Schedule to this Act.
- (3) Section 6(1) of the Companies Amendment Act 1969 is amended by omitting the words "or overseas company".

### **14 Offences**

The principal Act is amended in the manner indicated in the Third Schedule to this Act.

### **15 Takeovers**

- (1) The principal Act is amended by inserting after section 207 the following heading and section:

*Takeovers*

**207A Takeovers**

Where an offer (whether written or not) is made to acquire shares in a company which represent in aggregate 20 percent or more of the total issued shares of the same class, the board of the company shall, upon written request by any member to whom the offer has been made, forthwith advise (in such manner as the board thinks fit) all members to whom the offer has been made of the following information;

- (a) whether, having regard to information known only to the board, the offer is clearly inadequate;
  - (b) whether any director of the company directly or indirectly holds or has an interest in any shares to which the offer relates and, if so, whether the director intends to accept or recommend acceptance of the offer;
  - (c) any direct or indirect interest of any director of the company in the offeror or in the offer."
- (2) The Companies Amendment Act 1963 is consequentially repealed.

**16 Consequential repeals and amendments**

- (1) The principal Act is consequentially amended by repealing
  - (a) sections 86;
  - (b) sections 97 to 100; and
  - (c) section 458
- (2) The enactments specified in the Fourth Schedule are consequentially amended in the manner indicated in that Schedule.

Section 2(1) of the Companies Act 1955 is amended as follows

(1) by inserting the following definition

“ `board' in relation to a company, means, for the purposes of Part VA

- (a) directors of a company of a number not less than the required quorum, acting together as a board of directors, or
- (b) if the constitution provides that a company has only one director, that director,

and `board of directors' has the same meaning:";

(2) by inserting the following definition

“ `constitution' means, in relation to a company,

- (a) the Memorandum of Association and the Articles of Association of that company and all equivalent documents; and
- (b) all amendments to those documents; and
- (c) all documents of the type specified in section 147(4):";

(3) by repealing the definition of `contributory';

(4) by inserting the following definition

“ `entitled person' in relation to a company, means

- (a) any member; and
- (b) any person upon whom the constitution confers any of the following rights and powers
  - (i) the power to appoint or remove directors;

- (ii) the power to approve any alteration to the constitution;
- (iii) the power to approve any major transaction;
- (iv) the power to approve any amalgamation or reconstruction;
- (v) the power to approve the liquidation or removal from the register of the company;
- (vi) the right to receive any surplus assets of the company:";

(5) by inserting the following definition

`` `liquidation' has the same meaning as the 1990 Act:";

(6) by inserting the following definition

`` `1990 Act' means the Companies Act 1990:";

(7) by inserting the following definition

`` `voluntary winding up' means a liquidation commencement by appointment of a liquidator in accordance with section 203(1)(a) or (b) of the 1990 Act:";

(8) by inserting the following definition

`` `winding up' means a liquidation within the meaning of the 1990 Act, resulting in removal from the register, and the expressions `wound up' and `being wound up' have corresponding meanings:";

(9) by inserting the following definition

`` `winding up by the Court' means a liquidation commenced by appointment of a liquidator under section 203(1)(c) of the 1990 Act:";

(10) by inserting the following definition

`` `winding up order' means an order appointing a liquidator made under section 203(1)(c) of the 1990 Act:";

(11) by inserting the following definition

“ ‘winding up petition’ means an application for an order appointing a liquidator under section 203(1)(c) of the 1990 Act.”.

**SECOND SCHEDULE****Section 13(3)**

## AMENDMENTS RELATING TO OVERSEAS COMPANIES

Provision amended	How amended
Section 9A	By repealing subsection (13)
Section 9AA	By repealing subsection (5)
Section 188	By repealing subsection (3)
Section 188A	By repealing subsection (5)
Section 189	By repealing subsection (6)
Section 189A	By repealing subsection (9)
Section 456A(2)	By omitting the words "or overseas company"
Section 456A(4)	By omitting the words "or overseas company"
	By omitting words "or overseas companies"
Section 457(3)	By omitting the words "or, in the case of shares in an overseas company, either by such a statement as aforesaid, or by such a prospectus as complies with the Securities Act 1978"
Section 458	By repealing the whole section
Section 470(1)	By omitting paragraph (g)

**OFFENCE PROVISIONS AMENDED AND REPEALED**

(Drafting instructions only:)

**Offence-creating provisions**

**(Proposed fine of \$5,000)**

ss 37(2),l 38(2), 84(2), 88(2), 90(2), 90(6), 115A(6), 134(9), 140(2), 152(3), 154(6), 154(3), 159(2), 160(3), 161(3), 162(3), 185(5), 193(2), 201(3), 359(1), 362(6) 363(2), 430(6), 435(2), 436(4)

**Offence-creating provisions**

**(Proposed fine of \$10,000)**

ss 9A (10), 9A(11), 9A(12),l 9AA(2), 18(18), 21(3), 60(4), 61(5), 62(2), 62(4), 71(2), 72(3), 81(5), 115(6), 117(6), 118(4), 119(4), 212(4), 127(3), 128(8), 130(6), 131(3), 132(2), 133(3), 144(7), 147(5), 147(6), 149(4), 150(3), 151(7), 163(7), 177(3), 178(4), 178(5), 188(1), 195(7) 195A(7), 196(3), 198(3), 199(4), 200(7), 205(4), 207(3), 361(4), 361(5),l 443(3) 444(1)(d), 456A(3), 457(6), 459(2)

**Offence-creating provisions**

**(Proposed fine of \$200,000)**

ss 188A(4), 189(5), 189A(8), 461E(1) [relates to ss 461, 461A, 461B, 461C, 461D]

**Offence-creating provisions to be repealed**

Section

135(5) [Annual general meeting]

165(5) [Disqualifications for appointment as auditor]

1965(6)(b) [Disqualifications for appointment as auditor]

- 166(5) [Auditor's report and right of access to books and to attend and be hear at general meetings]
- 184(4) [Restrictions on appointment or advertisement of director]
- 188(1) [Undischarged bankrupts acting as directors]



ENACTMENTS AMENDED

**Title of Enactment**

**Amendment**

1908, No 89 - The  
Judicature Act 1908

By inserting, after section 17, the following  
section

**17A Jurisdiction as to liquidation of  
insolvent associations**

- (1) The Court shall have jurisdiction to appoint a liquidator of any association which is unable to pay its debts.
- (2) Subject to subsections (3) and (4), Part 14 of the Companies Act 1990 applies to an association as if references to
  - (a) a company registered under that Act included a reference to an association; and
  - (b) a director included references to any person occupying the position of director by whatever name called; and
  - (c) shareholders or to persons entitled to surplus assets under the constitution of a company and the Companies Act 1990, were references to such persons as the Court may determine to be justly entitled to any surplus

assets after the satisfaction of the claims of all the creditors.

- (3) The following provisions of the Companies Act 1990 do not apply in relation to an association:
  - (a) section 203(1)(a) and (b), and section 203(1)(c)(i), (iii) and (iv);
  - (b) section 210;
  - (c) sections 243 to 250.
- (4) Where the Court makes an order appointing a liquidator of an insurance company, the Court may impose such terms and conditions as it thinks fit, and may limit or exclude the exercise of any power that would otherwise be conferred on the liquidator under the Companies Act 1990.
- (5) In this section, "association" includes any partnership, company or other body corporate, or unincorporated body of persons other than
  - (a) a company or overseas company, as defined in the Companies Act 1990;
  - (b) a company registered under the Companies Act 1955."

1952, No 45 - The Industrial and Provident Societies  
Amendment Act 1952

By repealing section 10 and 12.

1952, No 51 - The Property Law Act 1952

By inserting after section 75 the following Part

``PART VIA  
DEBENTURES

**75A `Perpetual' Debentures -**

- (1) In this section ``debentures" means debentures issued by
  - (a) a company within the meaning of the Companies Act 1955; or
  - (b) a company within the meaning of the Companies Act 1990; or
  - (c) an industrial and provident society within the meaning of the Industrial and Provident Societies Act 1952.
- (2) A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the commencement of this Act, is not invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding."

1969, No 52 – The Administration Act 1969

By inserting after section 64 the following section:

**“64A Vesting of shares or debentures without administration -**

- (1) This section applies to
  - (a) a company within the meaning of the Companies Act 1955; or
  - (b) a company within the meaning of the Companies Act 1990, which has issued shares or debentures.
- (2) In this section “value”, in respect of shares, means the amount paid up on the shares and, in respect of debentures, means the amount owing under the debentures.
- (3) Where the registered holder of shares or debentures dies, whether before or after this Act, and the value of the shares or debentures does not exceed \$9,000, the directors of a company to which this section applies may resolve that any person be registered as the holder of the shares or debentures who proves to their satisfaction
  - (a) that he or she is entitled to be so registered under the will or intestacy of the deceased holder; or
  - (b) that he or she is entitled to obtain probate of the will of the deceased holder or letters of administration of that person's estate; and
  - (c) that in neither case has any grant of probate or letters of administration been made or resealed in New Zealand in respect of the deceased holder; and
  - (d) that the Commissioner of Inland Revenue has been notified of the proposed resolution and is satisfied either that

- (i) the value of the shares or debentures is less than \$9,000; or
- (ii) death duty will not be payable in New Zealand in the estate of the deceased holder."

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## VI Flat and Office Owning Companies: A Draft Land Transfer Amendment Act

168 The topic of flat and office owning companies was discussed as paragraphs 256 to 261 of our June 1989 Report (NZLC R9), and was not specifically addressed in the draft Companies Act contained in that Report (referred to in this chapter as "the 1990 Act"). In essence, the 189 Report made the following points:

- the registration of licence provisions contained in the Companies Amendment Act 1964 cannot simply be repealed;
- those provisions relate to registration under the Land Transfer Act 1952 and conceptually and logically should be relocated in that Act;
- existing flat and office owning companies could have some difficulty in operating under the 1990 Act; and
- the future of such companies should be considered in a general review of the land statutes, including the Unit Titles Act 1972.

169 Further research and consultation has broadly confirmed those proportions save that flat and office owning companies seem likely to have less difficulty in operating under the 1990 Act than we were initially inclined to believe.

### THE COMPANIES ACT 1995

170 At present, flat and office owning companies receive particular attention in three areas of the Companies Act 1955;

- (a) s 62 - subsection (1) (d), (2) and (3) were inserted by the Companies Amendment Act 1963 as an exception to the general prohibition of financial assistance being provided by a company for the purchase of its own shares;
- (b) s 80A - was inserted by s 2 of the Companies Amendment Act (No 2) 1965 to reverse the effect of the Court of Appeal decision in *Jenkins v Harbour View Courts Ltd* [1966] NZLR 1 (that the grant of licences and leases by flat and office owning companies amounted to an illegal return of capital to shareholders) but that section imposed an implied term permitting creditors or a liquidator to seek forfeiture of such grants where the company is wound up; and
- (c) the Companies Amendment Act 1964 - providing for the registration under the Land Transfer Act 1952 of licences to occupy issued by flat and office owning companies to shareholders.

171 The Commission's considered view is that relevant parts of section 62 of the 1955 Act should continue (along with all other provisions relating to shares and shareholders) during the three year transition period - as should section 80A - but be repealed along the rest of the 1955 Act at the end of that period. In relation to section 80A, there should be an early amendment to provide (and warn) that the implied term created by subsection (2) will be revoked on the repeal of the 1955 Act (see further paragraph 12, below). The 1964 Amendment Act should be repealed but its provisions should become a new Part of the Land Transfer Act 1952 with definitional modifications to enable its application to companies registered under both the 1955 and 1990 Acts, and with provisions dealing with penalties and service of notices brought into line with the 1990 Act.

172 The history of flat and office owning companies in New Zealand seems to date from the early 1950s when the "block share" was pioneered as a way around the problem posed by the inability, under the Land Transfer Act 1952, to issue separate titles to parts of buildings. Investigation of departmental files suggests that, although governments were not unsympathetic to such a development in the 1950s, there was a reluctance to pass any specific legislation. But in the early 1960s as urban growth and owner-occupier flats proliferated - and new strata title

legislation was repeatedly delayed - the various amendments to the 1955 Act set out in paragraph 3, above, were enacted.

- 173 The present use of the flat or office owning company structure appears not to be extensive. Our consultations suggest that this form of development has been largely eclipsed by the Unit Titles Act 1972. The Companies Office register does not reveal the present number of flat and office owning companies but it is possible that no such companies have been registered since the commencement of the Unit Titles Act 1972. In addition, many eligible licences have not been registered under the 1964 Amendment Act.

#### OPERATING UNDER THE 1990 ACT

- 174 The Commission believes that the 1990 Act offers sufficient flexibility for flat and office owning companies to operate and that special provisions in the Act for such companies are neither necessary nor desirable. This will mean only changes from the position under the 1955 Act (for example, as to Companies Office fees - see section 449(2) of the 1955 Act).
- 175 Under the 1990 Act, a flat or office owning company would make it clear that the rights attached to shares explicitly include (cf, section 26(1) of the 1990 Act) the occupancy rights of interest to a potential shareholder. The removal of the capital maintenance rules which underlay the 1955 Act avoid the need to make any legal distinction between the sale of a share in a flat or office owning company and the grant of occupation rights (or a lease or licence). In other words, the occupancy rights will be one of the bundle of rights associated with the share as an item of property. However, those rights can also be seen as an interest in land. Thus transactions relating to them need to be in writing to conform with the Contractors Enforcement Act 1956. Further, the evidential requirements of the land transfer registration system justify continuation of the present use of a document which is executed by both parties and evidences the occupancy rights involved.
- 176 One point mentioned in our Report No 9 was a possible need of modification of the definition of "distribution" in section 2 of the draft Act. It was thought that this term might be taken as referring to the issue and/or transfer of shares in a flat or office owning company and create unhelpful complexities. After further



consideration were are satisfied that occupancy rights are not (and should not be) covered by the definition of "distribution" which is confined to "transfers", and expressly excludes transfers of the company's own shares. Nor, we believe, is it possible to argue that occupation rights can be separated out from other rights as "other property" - a share is no more than a form of property (see section 26(1)); further, it is difficult to argue that the transfer is "in respect of ... shares" (as are, for example, dividends) in terms of the definition. Finally, the structure of Part 5 of the 1990 Act - in which the issue of shares is dealt with prior to and separately from the topic of distributions - is consistent with this approach.

177 It may be appropriate to record explicitly that the reasoning in Jenkins has no application under the 1990 Act. All questions touching on return of capital are effectively covered by the statute itself and there is no room for common law rules relating to maintenance of capital. That being so, there is no reason or basis for avoiding the contract between a company and its shareholders to issue shares carrying rights to occupancy.

178 Share certificates have less significance under the 1990 Act than under the 1955 Act. Nevertheless, there is provision for their issue on request under section 71 of the 1990 Act. For the purposes of the transfer and registration of occupancy rights under the proposed amendment to the Land Transfer Act, the present documentation and practices would remain unchanged.

#### CONSEQUENTIAL STATUTORY AMENDMENTS

179 The need for the Joint Family Homes Act 1964 and the Unit Titles Act 1972 to apply in respect of companies registered under the 1990 Act as well as those registered under the 1955 Act has given rise to most of the minor consequential amendments set out in drafting instructions contained in the Schedule of the draft Land Transfer Amendment Act. In addition to changes reflecting different terminology (including abandoning the term "officer"), provisions concerning offences and service of notices should be made consistent with the 1990 Act. Consistency of definition in this area justifies the one change proposed for the Stamp and Cheque Duties Act 1971.

## CREDITORS AND FORFEITURE

180 We considered whether creditors of flat and office owning companies might have placed reliance on the forfeiture power given by section 80A(2) of the 1955 Act and would be adversely affected by its repeal. We are satisfied that this is not the case and, more importantly, that the forfeiture power is potentially far-reaching and quite disproportionate. Creditors of such companies will normally be protected by their contractual remedies (for example, sale by a mortgagee) or their ability to enforce (ultimately through judgment and/or winding up and appointment of a receiver or liquidator) the directors' powers to seek contributions from the shareholders. That leads us to recommend that not only should section 80A be repealed but that the implied term which subsection (2) has created should be expressly revoked on the repeal of the 1955 Act. Nevertheless, it is appropriate to provide some warning of the impending repeal of the section 80A(2) remedy. We therefore recommend that a new section 80B be inserted expressly declaring that all terms implied by subsection (2) will be deemed to be revoked on the repeal of the 1955 Act: see the draft set out in the Schedule.

## IMPLEMENTATION

181 In preparing a draft Land Transfer Amendment Act to reflect these proposals, the Law Commission has had regard to the fact that it would form part of the Land Transfer Act 1952. The inclusion in that Act of the provisions at present contained in the Companies Amendment Act 1964 does not provide the opportunity for a thorough-going review of the substance and the drafting of the land transfer legislation.

## A WIDER REVIEW

182 The Law Commission's further work on this topic has confirmed the need for a comprehensive review of the law relating to strata titles and other forms of subdivided land ownerships. The publication of consultative paper on "Flathold" in late 1989 by the Department of Justice is a useful initiative, and the Commission expects to have early discussions with the Department on this topic.

## THE DRAFT AMENDMENT ACT

183 Some of the points which may be noted in our draft Land Transfer Amendment Act, as compared with the Companies Amendment Act 1963, include the following:

- Alterations have been made to:
  - convert to gender neutral language
  - separate provision into separate subsections
  - break up lengthier passages into separate subsections
  - remove unnecessary cross-references
  - refer to the "Registrar", not the "District Land Register", as in the Land Transfer Act 1952 itself.
- Definitions added are:
  - "share register" (to distinguish between the old and new Companies Acts)
  - "company" (to distinguish between the old and new Companies Acts) (the old definition was discarded as superfluous)
  - "constitution" (to distinguish between the old and new Companies Acts).
- Definitions deleted are:
  - "relative shares of the licensee" replaced in the text with "shares to which the licence relates"
  - "registered" appeared redundant in a Part of the Land Transfer Act 1952.
- Definitions changed are:

``company" (see paragraph 6 above)

``flat or office owning company" amended to incorporate the type of structure envisaged for 1990 Act companies

``licence to occupy" amended to incorporate the type of structure envisaged for 1990 Act companies (see limb (b) of the definition)

``licence to occupy" amended by deleting part of the original definition and moving it into a separate subsection (3) to cover both limbs of the definition without repetition

``licence to occupy" amended by deleting part of the original definition and moving it into a separate subsection (3) to cover both limbs of the definition without repetition

``licence to occupy" amended by deleting the corresponding definition of licensee which appears superfluous

``licence to occupy" amended by deleting the reference to articles.

- Substantive changes in the balance of the draft Act include:

section 121O which takes advantages of the improved notice provisions of the new Companies Act

``register" used in place of ``register book" to better accord with the usage in the Land Transfer Act

section 121B(4) added to take account of the new form of licence replacement of offence and penalty provisions to accord with the 1990 Act (eg section 121F(5) and (6))

section 121G(b) which addresses the fact that constitutional changes could alter the terms of a licence, the registered version of which may only ``evidence" the grant.

# **DRAFT LAND TRANSFER AMENDMENT ACT**

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- 1 Short title and commencement
- 2 New Part inserted related to flat and office owning companies

## PART VIIA

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4 Repeal

Schedule Amendments consequential on the enactment of the Land Transfer  
Amendment Act 1990.

# LAND TRANSFER AMENDMENT ACT 1990

1990 No WW

(Enacting words)

## An Act to amend the Land Transfer Act 1952

### 1 Short title and commencement

- (1) This Act may be cited as the Land Transfer Amendment Act 1990, and forms part of the Land Transfer Act 1952 (referred to as the principal Act).
- (2) This Act comes into force on [ ].

### 2 New Part inserted relating to flat and office owning companies

The principal Act is amended by adding, after section 121, the following Part:

``PART VIIA

FLAT AND OFFICE OWNING COMPANIES

#### 121A Interpretation

- (1) In this Part:

``company" has the same meaning of as in the Companies Act 1955 or the Companies Act 1990, whichever is applicable;

``constitution", in relation to a company within the meaning of that term in the Companies Act 1990, has the same meaning as in that Act; and, in relation to a company within the meaning of that term in the Companies Act 1955, means the articles of association:

“flat or office owning company” means a company which owns a building comprising one or more offices or residential flats and has a constitution which provides, in respect of a particular flat or office, that the right to occupy or use such flat or office vests in or through the registered holder of specified shares;

“licence to occupy” or “licence” means any instrument (not being an instrument registrable otherwise than pursuant to this Part) whether issued before or after the commencement of this Part, which is executed by a flat or office owning company and by a shareholder and

- (a) grants to that shareholder the right to occupy or use a specified office or residential flat by virtue of the shares of which the shareholder is the registered holder; or
- (b) is evidence of the right of that shareholder (arising by virtue of the shares of which the shareholder is the registered holder) to occupy or use a specified office or residential flat:

“office” includes premises used or intended to be used for commercial, industrial, business, or professional purposes:

“share certificate” means the certificate issued in respect of the shares to which a licence relates:

“share register” in relation to a company within the meaning of that term in the Companies Act 1990 has the same meaning as in that Act and, in relation to a company within the meaning of that term in the Companies Act 1955, means the register of members.

- (2) Every licence to occupy is a company lease within the meaning of subsection (1) of section 270 of the Local Government Act 1974.
- (3) A reference in this section to a right of occupy or use a specified office or residential flat includes a reference to any right of user of any garage, outbuilding or other structure, or of any passages, stairways, or other appurtenances, services or conveniences of the building of which the flat or office forms part, or of the



land appurtenant to that building which is specified in the relevant constitution or licence.

cf 1964, No 42, s 2

### **121B Registration of licence to occupy**

- (1) Subject to this Part, a licence may be registered by constituting it a folium of the register, and the relevant provisions of this Act apply with any necessary modifications.
- (2) Subject to this Part, all the provisions of this Act which relate to leases, as far as they are applicable and with the necessary modifications, shall apply with respect to a licence registered under this section as if it were a lease; and the same registration fee is payable in respect thereof as on a memorandum of lease.
- (3) Where a licence is presented for registration, and the Registrar is satisfied that for the purposes of section 36 no duplicate of the licence is in existence or can reasonably be obtained, the Registrar may accept as a duplicate of the licence a copy of the licence if satisfied that it is duly authenticated as a true copy, and every such authenticated copy shall, for the purposes of part III, be treated as a duplicate of the licence of the licence, and shall be the copy to be constituted a folium of the register pursuant to this section.

cf 1964, No 42, s 3

### **121C Registrar may require plan**

Without limiting the powers conferred on the Registrar by section 167, where application is made to the Registrar for registration of a licence, the Registrar may require the applicant to deposit in the Land Registry Office of the district, or cause to be endorsed on or attached to the licence, a plan, authenticated as required by the Registrar, sufficient to identify

(a) the flat or office comprised in the licence in relation to the land in the certificate of title and to the building of which the flat or office forms part, and, if the Registrar thinks fit, in relation to other flats or offices; and

(b) every garage, outbuilding, other structure, passage, stairway, or other appurtenance or convenience of the building of which the office or flat forms part in respect of which the licensee has a right of user, and also any land of which the licensee has a right of user and which is appurtenant to that building.

cf 1964, No 42, s 4

#### **121D Registration of instruments against licence**

(1) Where any licence has been registered pursuant to this Part, any instrument which could be registered against a registered lease of land may be registered against the licence in the same manner as an instrument may be registered against a lease of land.

(2) Nothing in subsection (1) renders it necessary to record any such instrument against the register constituted by any relative instrument of title in the name of the company or in the name of any person through or under whom the company obtained its instrument of title.

cf 1964, No 42, s 5

#### **121E Effect of registration of licence**

(1) Subject to this Part, registration of a licence shall not give the licence any greater operation or effect than it would have without registration, but otherwise every registered licence shall be an interest within the meaning of section 62 suitably modified.

(2) Every entry made on a registered licence, if purporting to be duly made and signed, shall be received in all Courts of law and equity as evidence of the particulars therein set forth and shall, as against the person named in the original licence and all persons claiming through, under, or in trust for that person, be conclusive evidence that the person named in that entry is sized or possessed of

the estate or interest of which the person so named is expressed to be the registered proprietor.

cf 1964, No 42, s 6

#### **121F Mortgage of licence**

- (1) Upon the registration of a mortgage of any registered licence, every share certificate issued by the company in respect of the shares to which the licence relates shall be produced to the Registrar, who shall make an entry thereon that the licence is subject to the mortgage, the Registrar shall, when the share certificate is produced to the Registrar for that purpose, cancel that entry.
- (2) The Registrar shall, in writing, notify the company of the registration of a mortgage of any licence giving all necessary particulars of the mortgage or of the discharge, as the case may be, on any office copy of the share certificate and of the licence held by the company, and shall in its share register against the entry relating to the licensee record the fact that the licence has been mortgaged, together with the registered number of the mortgage, or, as the case may be, that the mortgage has been discharged.
- (4) Where a company issue any new share certificate to replace a lost or defaced certificate to which particulars of any mortgage had been recorded, it shall be the duty of the company to enter a like record in respect of the new certificate.
- (5) Every company which acts in contravention of if fails to comply in any respect with subsections (3) or (4) commits an offence and is liable on conviction to a fine not exceeding \$10,000.
- (6) Where a company acts in contravention of or fails to comply with subsections (3) or (4), then every director of the company commits an offence, and is liable on conviction to a fine not exceeding \$10,000 unless he or she shows that
  - (a) he or she did not know of and could not reasonably have been expected to know of the contravention or failure to comply; or

- (b) he or she took all reasonable steps to ensure that the requirements of the Act would be complied with .

cf 1964, No 42, s 7

**121G Mortgagee to have custody of licence and share certificate, and proxy rights**

The mortgagee, or first mortgagee for the time being, of any registered licence shall be entitled

- (a) to the possession of the licensee's copy of the licence and of the share certificate issued in respect of the shares to which the licence relates; and
- (b) in the case of a registered mortgage, to receive notice of any meeting of the company in respect of which the licensee is entitled to notice; and
- (c) to attend at meetings of the company as proxy of the licensee, and (if present) to vote at those meetings instead of the licensee.

cf 1964, No 42, s 8

**121H Consent of mortgagee required on disposal of license or shares**

- (1) The licensee under a licence that is subject to a registered mortgage shall not sell or otherwise dispose of the license or the shares to which the licence relates or any of them without the consent in writing of the mortgagee of the licence.
- (2) Subject to any provision of the mortgage requiring the consent of the mortgagee to the sale or other disposition of the licence or of any of the shares to which the licence relates, the consent of the mortgagee shall not be required under subsection (1) in any case where,
  - (a) the mortgage expressly provides that no such consent is necessary; or
  - (b) the person acquiring the interest of the licensee continues to hold that interest under the existing licence subject to the mortgage' or

- (c) the company cancels, revokes, rescinds, or accepts a surrender of the existing licence and issues in its place a new licence in the name of the person acquiring the interest of the licensee and that person requests the Registrar, in writing, to record the mortgage against the new licence under section 121K.
- (3) Where a licence is subject to a registered mortgage, the company and the directors of the company shall not register a transfer or other disposition of the shares to which the licence relates or any of them, unless and until
- (a) any consent of the mortgagee required by this section has been endorsed on or attached to the instrument of transfer or other disposition; or
  - (b) the request referred to in paragraph (c) of subsection (2) has been deposited with the company for delivery to the Registrar pursuant to paragraph (c) of subsection (2) of section 121J.
- (4) Unless such of the requirements of this section as are applicable are complied with, no transfer or other disposition of a licence or of the shares to which the licence relates or any of them and no new licence issued in the place of a cancelled, revoked, rescinded, or surrendered licence shall have any force or effect.

cf 1964, No 42, s 9

#### **121I Restrictions on cancellation etc, of licence**

Where a licence is subject to a registered mortgage, then, except with the consent of the mortgagee or, in any case to which section 121H applies, after compliance with the applicable provisions of that section, the company shall not cancel, revoke, rescind, accept the surrender of, or issue a new licence in place of that licence or forfeit the shares to which the licence relates or any of them, unless,

- (a) notice in writing is given by the company to the mortgagee specifying the matters required to be remedied in order to avoid the cancellation, revocation, rescission, acceptance of surrender, forfeiture, or issue of a new licence, and allowing a reasonable time, specified in the notice, for those matters to be remedied; and

- (b) those matters have not been remedied within the time specified in the notice. cf 1964, No 42, s 10

**121J Registration of cancellation, etc, of licence**

- (1) Where the company cancels, revokes, rescinds, or accepts the surrender of a registered licence, the company shall,
  - (a) if the company is able to obtain production of the licensee's copy of the licence for the purpose, endorse thereon or attach thereto a memorandum executed by the company of the cancellation, revocation, rescission, or acceptance of surrender and forward it to the Registrar, together, in the case of a surrender, with the instrument of surrender duly executed by the company and by the licensee:
  - (b) if the company is unable to obtain production of the licensee's copy of the licence for that purpose, notify the Registrar, by notice in writing executed by the company, of the cancellation, revocation, rescission, or acceptance of surrender and of the grounds thereof, together, in the case of a surrender, with the instrument of surrender duly executed by the company and by the licensee.
- (2) Where the company cancels, revokes, rescinds, or accepts the surrender of a licence that is subject to a registered mortgage, the company shall also forward to the Registrar together with the licence or notice, as the case may be, forwarded under subsection (1)
  - (a) a copy of the mortgagee's consent certified as a true copy by the company;  
or
  - (b) a certificate executed by the company that the notice required by section 121I to be given to the mortgagee has been duly given and that the matters specified in the notice have not been remedied within the time specified therein; or
  - (c) the request deposited with the company pursuant to paragraph (c) of subsection (2) of section 121H.

- (3) The Registrar, on receipt of the licence or notice forwarded in accordance with paragraph (a) or paragraph (b) of subsection (1) and, where necessary, on compliance by the company with subsection (2), shall, without fee, register the cancellation or revocation or rescission or surrender of the licence.
- (4) No cancellation, revocation, rescission, or surrender to which this section applies shall have any force or effect until it has been registered under subsection (3).
- (5) Every company which acts in contravention of or fails to comply in any respect with subsections (1) and (2) commits an offence and is liable on conviction to a fine not exceeding \$10,000.
- (6) Where a company acts in contravention of or fails to comply with subsections (1) or (2), then every director of the company commits an offence, and is liable on conviction to a fine not exceeding \$10,000, unless he or she shows that
  - (a) he or she did not know of and could not reasonably have been expected to know of the contravention or failure to comply; or
  - (b) he or she took all reasonable steps to ensure that the requirements of the Act would be complied with.

**121K Bringing down of mortgage on new licence**

- (1) Where
  - (a) a licence is subject to a registered mortgage; and
  - (b) the licensee transfers or otherwise disposes of the shares to which the licence relates; and
  - (c) the company, in consequence of the transfer or disposition, cancels or revokes or rescinds or accepts a surrender of the licence and issues a new licence for the same flat or office to the person acquiring those shares, the licensee under the new licence may, upon applying for registration thereof or for the registration of the cancellation, revocation, rescission, or surrender of the former licence, requests the Registrar, in writing, to record against the

new licence the mortgage registered against the former licence or, if there are more mortgages than one, such of them as the licensee specifies.

- (2) Upon registration of the new licence the Register shall record against it the mortgage or mortgages specified in the request in the order of their registered priority, and thereupon the new licence shall be deemed to be subject to the mortgage or mortgages accordingly, and the provisions of section 104 of the Property Law Act 1952 shall apply as if the licensee had acquired the licence by conveyance or transfer subject to the mortgage or mortgages so recorded.
- (3) Where any mortgage or mortgages are recorded against a new licence pursuant to this section, all references in any such mortgage to the licence or to the estate or interest of the licensee thereunder shall be deemed to be references to the new licence or, as the case may be, to the estate or interest of the licensee thereunder.

cf 1964, No 42, s 12

#### **121L Registration of transfer of licence or new licence**

- (1) The Registrar shall refuse to register any memorandum of transfer of a registered licence, unless and until the Registrar is satisfied that an instrument disposing of the shares to which the licence relates to the person acquiring the licence under the memorandum of transfer has been registered by the company or its directors.
- (2) The Register shall refuse to register any licence issued by a company in the place of any other licence registered in the Registrar's office, unless and until that other licence has been cancelled, revoked, rescinded, or surrendered, and the cancellation, revocation, rescission or surrender has been registered under subsection (3) of section 121J.

cf 1964, No 42, s 13

#### **121M Transfer of shares on exercise of power of sale by mortgagee of licence**

- (1) Where a registered licence is subject to a registered mortgage, and in exercise of the power of sale contained or implied in the mortgage the licence is transferred to the mortgagee or to some other person, the mortgagee shall be entitled to execute



a transfer to itself or, as the case may be, to that other person of the shares to which the licence relates as if the mortgagee had been duly appointed to be the attorney of the licensee for that purpose by an irrevocable power of attorney.

- (2) On the presentation to it of a transfer of those shares duly executed pursuant to this section and otherwise in due form, the company shall, subject to any provision in its constitution requiring the approval of the directors or of the company to the transfer, register the transfer accordingly. Where such an approval is required, it shall not be unreasonably withheld.

cf 1964, No 42, s 14

### **121N Priority of replacement mortgage over land of company**

Where

- (a) any mortgage registered against any land of a flat or office owning company is discharged; and
- (b) a new mortgage is registered against the land to secure (whether to the same mortgagee or not) an amount not exceeding the amount secured by the discharged mortgage immediately before it was discharged; and
- (c) the new mortgage contains a statement to the effect that it is in replacement of the discharged mortgage and that the money advanced thereunder was used for the purpose of repaying the money previously secured by the discharged mortgage,

the new mortgage shall have the same priority in relocation to registered licences affecting the land or any part thereof as was enjoyed by the discharged mortgage immediately before it was discharged.

cf 1964, No 42, s 15

### **121O Service of notices**

- (1) Where, under this Part, notice is required to be given to any person other than a company, that notice may be
  - (a) delivered by hand to that person; or

- (b) posted or delivered to that person at the last known address; or
  - (c) sent by telex, facsimile machine, or other similar means of communication to the number of that person.
- (2) Where, under this Part, notice is required to be given to a company, that notice shall be given in accordance with section 152 or section 153 of the Companies Act 1990.
- (3) For the purposes of this section
- (a) any document which is posted, or delivered to a document exchange, shall be deemed to be received by the addressee five working days (or such shorter period as the Court may determine in any particular case) after it is so posted or delivered;
  - (b) any document sent by telex, facsimile machine, or other similar means of communication shall be deemed to be received by the addressee on the working day following the day on which it was sent.
- (4) In proving the sending of any document to any person by post or delivery to a document exchange for the purposes of this section, it shall be sufficient to prove that the document was properly addressed to that person, that all postal or delivery charges were paid, and that the document was posted or delivered to the document exchange."

cf 1964, No 42, s 16

### **3 Consequential amendments**

The enactments specified in the Schedule to this Act are consequentially amended in the manner indicated in that Schedule.

### **4 Repeal**

The Companies Amendment Act 1964 is repealed.

## SCHEDULE

## Section 3

### AMENDMENTS CONSEQUENTIAL ON THE ENACTMENT OF THE LAND TRANSFER AMENDMENT ACT 1990

#### UNIT TITLES ACT 1972

Change reference to the "Companies Amendment Act 1964" to "Part VIIA of the Land Transfer Act 1952" (section 56(1)(a)).

Change all references to "member(s)" to "shareholder(s)".

In section 60(8) change "officer" to "director"; remove reference to "default fine" and substitute provision parallel to section 277 of the Companies Act 1990.

Repeal section 61 and substitute provision in same form as section 121O Land Transfer Act 1952 (or cross refer).

In section 64(2), add reference to the Companies Act 1990.

#### STAMP AND CHEQUE DUTIES ACT 1971

Amend definition of "shares in a flat or office owning company" by substituting wording of Land Transfer amendment definition but incorporating a reference to land in New Zealand.

#### JOINT FAMILY HOMES ACT 1964

Amend section 2

- by inserting in section 2, after the definition of the term "Applicant", the following definition:

"constitution", in relation to a company within the meaning of that term in the Companies Act 1990, has the same meaning as in that Act; and, in

relation to a company within the meaning of that term in the Companies Act 1955, means the articles of association;

- by omitting from the definition of the term "Flat-owning company" the words "Part I of the Companies Amendment Act 1964" and substituting the words "Part VIIA of the Land Transfer Act 1952";
- by omitting from the definition of the term "Land" the words "Part I of the Companies Amendment Act 1964" and substituting the words "Part VIIA of the Land Transfer Act 1952";
- by omitting from the definition of the term "Registered proprietor" the words "register of members" and substituting the words "share register";
- by omitting from the definition of the term "Relative shares" the words "articles of association" and substituting the words "constitution";
- by omitting from the definition of the term "share certificate" the words "a share certificate issued under section 90 of the Companies Act 1955 in respect of those shares" and substituting the words "the certificate issued in respect of those shares";
- by inserting after the definition of the term "share certificate", the following definition: "'share register' means in respect of a company subject to the Companies Act 1955, the register of members";

Amend section 5 by omitting paragraph (d) of subsection (1) the words "Part I of the Companies Amendment Act 1964" and substituting the words "Part VIIA of the Land Transfer Act 1952".

Amend section 8

- by omitting from paragraph (a) of subsection (1) the words "register of members" and substituting the words "share register";
- by omitting from paragraph (b) of subsection (1) the words "register of members" and substituting the words "share register";

- by omitting from paragraph (c) of subsection (1) the expression:  
 ``Notwithstanding anything in section 90 of the Companies Act 1955 or in the articles of association of the company";
- by omitting from subsection (2) the words ``articles of association" and substituting the word ``constitution";
- by omitting from section (2) the words ``register of members" and substituting the words ``share register";
- by inserting in subsection (3) after the words ``paragraph (c)" the words ``of subsection (1)";
- by inserting the following subsection after subsection (3)  
 ``(3A) For the purposes of section 67 of the Companies Act 1990, the persons named in a memorandum which, pursuant to section 7(1)(c) or section 8(1)(d), is endorsed on a share certificate and signed by the Registrar shall be deemed to be the registered holders of the share.";
- by repealing subsection (4) and substituting the following subsections:  
 ``(4) Every company which acts in contravention of or fails to comply in any respect with paragraphs (b), (d), or (e) of subsection (1) commits an offence and is liable on conviction to a fine not exceeding \$10,000.  
 (4A) Where a company acts in contravention of or fails to comply with paragraphs (b), (d), or (e) of subsection (1), then every director of the company commits an offence, and is liable on conviction to a fine not exceeding \$10,000, unless he or she shows that  
 (a) he or she did not know of and could not reasonably have been expected to know of the contravention or failure to comply; or  
 (b) he or she took all reasonable steps to ensure that the requirements of the Act would be complied with."

Amend section 9 by omitting in paragraph (a) of subsection (1) the words "articles of association" and substituting the word "constitution".

Amend section 12 by repealing subsection (2) and substituting the following subsections:

(2) Every company which acts in contravention of or fails to comply in any respect with subsection (1) commits an offence and is liable on conviction to a fine not exceeding \$10,000.

(2A) Where a company acts in contravention of or fails to comply in with subsection (1), then every director of the company commits an offence, and is liable on conviction to a fine not exceeding \$10,000, unless he or she shows that

- (a) he or she did not know of and could not reasonably have been expected to know of the contravention or failure to comply; or
- (b) he or she took all reasonable steps to ensure that the requirements of the Act would be complied with."

Amend section 13 by inserting after the date "1955" the words "or section 69 of the Companies Act 1990".

Throughout, change all references to "officer(s)" or to a company "Secretary" to "directors".

#### COMPANIES ACT 1955

Insert after section 80A the following section :

#### **"80B Effect of impending repeal of section 80A**

The term implied by section 80A(2) in a grant referred to in section 80A(1) shall cease to have effect on [date of repeal of the Companies Act 1955] unless before that date the Court has granted leave to the liquidator to forfeit the grant, or an application for such leave has been made but not determined."

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## VII

# Insurance Companies: A Draft Insurance Companies' Deposits Amendment Act

- 184 Part XIII of the Companies Act 1955 contains a dozen sections dealing with the regulation and liquidation of companies carrying on insurance business. The draft Companies Act ("the 1990 Act") contained in our June 1989 Report contains no equivalent provisions. That omission was deliberate and based on the premise that insurance company regulation did not fit comfortably in a statute concerned with core company law, as well as on the expectation that the provisions in Part XII could be relocated in other legislation (see paragraph 73 of our June 1989 Report).
- 185 A brief survey of the miscellaneous pieces of legislation which impact on the business of insurance has persuaded us that this is an area which requires a separate and more fundamental review in due course. In the meantime, however, the provisions presently located in Part XIII of the 1955 Act can conveniently be relocated as a new Part II of the Insurance Companies' Deposits Act 1953 (to be renamed) and that is the effect of the draft Amendment Act set out below. After consultation with offices of the Department of Justice, we decided that it was possible to streamline the provisions contained in Part XIII without major re-examination of the underlying policies, and that is reflected in the draft Amendment.
- 186 It will be seen that the proposed new Part II of the 1953 Act deals with the following matters:
- definitions and scope;
  - a minimum capital or deposit requirement;

- a prohibition on proposals for insurance containing applications for shares;
- power for the Registrar, under the control of the Secretary for Justice, to apply for the liquidation of an insurance company (widely defined to include entities other than companies); and
- power for the Registrar to investigate insurance companies (as so widely defined).

187 It should be noted that the new Part II does not carry forward the distinction between local and overseas companies carrying on a non-life insurance business which is a feature of Part XIII of the 1955 Act. Further, the requirement for local insurance companies to file periodical statements in accordance with the Twelfth Schedule to the 1955 Act (see section 418) has been dropped. This follows advice from there Department of Justice that the requirement serves no practical purpose.

188 The new Part II is designed to apply to companies registered under either the 1955 or the 1990 Acts (as well as the other entities caught by the definition of "insurance company" in the new section 29), and to link with the liquidation and Registrar's inspection provision in Parts 14 and 17 of 1990 Act.

189 It may be as well to conclude by reiterating that the drafting and policies contained in our draft Insurance Companies' Deposits Amendment Act are designed to maintain the status quo, and do not reflect a considered policy preference - or drafting style - adopted by the Law Commission.



# **DRAFT INSURANCE COMPANIES' DEPOSITS AMENDMENT ACT**

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# INSURANCE COMPANIES' DEPOSITS AMENDMENT ACT 1990

1990, No XX

(Enacting words)

## **An Act to amend the Insurance Companies' Deposits Act 1953**

### **1 Short title and commencement**

- (1) This Act may be cited as the Insurance Companies' Deposits Amendment Act 1990, and it forms part of the Insurance Companies' Deposits Act 1953 (the principal Act).
- (2) This Act comes into force on [ ].

### **2 Altering short title of principal Act**

- (1) The principal Act may be cited as the Insurance Companies Act 1953.
- (2) The short title of the principal Act is consequentially amended by omitting the words ``Companies Deposits'' and substituting the word ``Companies''.
- (3) Every reference in any enactment to the principal Act is consequentially amended by omitting the words ``Companies' Deposits' and substituting the word ``Companies''.

### **3 Altering long title of principal Act**

The long title of the principal Act is amended by omitting the words ``deposits required from''.

### **4 Part I**

The principal Act is amended by inserting after section 1, the following heading:

``PART I

## INSURANCE COMPANIES' DEPOSITS"

### **5 Interpretation**

The principal Act is amended by omitting from section 2 the words "In this Act", and substituting the words "In this Part".

### **6 Penalty for non-compliance**

Section 20 of the principal Act is amended by

- (a) omitting from subsection (1) the word "Act", and substituting the words "Part of this Act";
- (b) omitting from paragraph (b) of subsection (2) the word "Act", and substituting the words "Part of this Act".

### **7 New Part inserted**

The principal Act is amended by inserting after section 25, the following Part:

#### ``PART II

#### MISCELLANEOUS

*Companies carrying on insurance business other than life insurance*

### **26 Interpretation and application**

(1) In this Part, unless the context otherwise requires,

"Company" means a company or an existing company or an overseas company within the meaning of the Companies Act 1990:

"Director" includes

- (a) any person occupying the position of director by whatever name called; and

- (b) a person in accordance with whose directions or instructions the persons occupying the position of directors of a company are accustomed to act:

“Intact capital”, in relation to any company, means capital held by the company clear of all claims or demands for the time being due or pending or enforceable against the company, not be in contingent liabilities arising out of or in relation to the business of the company:

“Officer of the company who is in default”, for the purposes of any section which provides that an officer of the company who is in default shall be liable to fine, means any officer of the company who

- (a) knowingly and wilfully authorises or permits the default or contravention mentioned in the section; or
- (b) knew or ought to have known of the default or contravention and did not take all reasonable steps to secure compliance by the company with the requirements specified in or imposed under the section:

“Registrar” means the Registrar of Companies appointed in accordance with the Companies Act 1990:

“Shareholder” in relation to a company incorporated or registered under Part 2 of the Companies Act 1990 has the meaning set out in that Act, and in any other context means a member of or shareholder in the company by whatever name called.

- (2) Section 27 applies to every class of insurance business except
  - (a) life insurance; and
  - (b) any insurance business commonly carried on by life insurance companies as such.

## **27 Minimum capital or deposit required before companies commence insurance business**

- (1) No company may carry on in New Zealand any insurance business unless it

- (a) has intact capital of not less than \$100,000; or
  - (b) keeps deposited with the Public Trustee a sum which, after deducting any deposit required to be made by it in respect of that business under Part I, amounts to not less than \$100,000.
- (2) Sections 8 to 14, and 19 apply in relation to every sum deposited under subsection (1) as if it were a sum deposited under Part I.
- (3) If a company carries on business in contravention of subsection (1), the shareholders of the company are liable for its obligations incurred or entered into while the business was so carried on notwithstanding any limitation of liability in any other enactment or in the constitution of the company, and as if the constitution of the company provided that the liability of each shareholder was unlimited.
- (4) If any company carries on business in contravention of this section, the company and every officer of the company who is in default is liable to a fine of \$100 for every day during which the contravention continues.

*General*

**28 Application for shares in or membership of a company not to be contained in a proposal for insurance**

- (1) No form of proposal for insurance by any company that contains or purports to be an application for shares in or membership of the company may be issued by or on behalf of the company.
- (2) Where any person makes a proposal for insurance to any company, the company must be allot any shares to, or admit, that person to the membership of the company without first receiving an application for shares or membership that is contained in a document separate from the proposal for insurance.
- (3) If a company acts in contravention of this section, the company and every officer of the company who is in default is liable to a fine not exceeding \$200.

- (4) Nothing in this section affects the validity of any policy of insurance or of any allotment of shares or admission to membership.

### *Liquidation of insurance companies*

## **29 Interpretation**

In this section and sections 30 to 32, unless the context otherwise requires,

“Insurance business” means every class of insurance business except insurance against earthquake:

“Insurance company” means any body corporate, or association of persons, whether incorporated or not, which is or has been carrying on in New Zealand any class of insurance business.

## **30 Investigation of insurance companies of doubtful solvency**

Subject to the control of the Secretary of Justice, the Registrar or any person authorised by the Registrar may exercise, in relation to an insurance company the powers of inspection conferred on the Registrar by the Companies Act 1990, whether or not that company is registered under that Act, for the purpose of determining whether that company is unable to pay its debts.

## **31 Appointment of liquidator on ground of insolvency**

- (1) Subject to the control of the Secretary of Justice, the Registrar may apply to the Court to appoint a liquidator of an insurance company on the ground that the company is unable to pay its debts.
- (2) Subject to subsection (3) and (4) of this section, Part 14 of the Companies Act 1990 applies to an insurance company in respect of which a liquidator is appointed under subsection (1) of this section as if references to
- (a) a company registered under that Act included a reference to an insurance company; and
  - (b) a director included references to any person occupying the position of director by whatever name called; and

- (c) shareholders or to persons entitled to surplus assets under the constitution of a company and the Companies Act 1990, were references to such persons as the Court may determine to be justly entitled to any surplus assets after the satisfaction of the claims of all the creditors.
- (3) Sections 243 to 250 of the Companies Act 1990 do not apply in relation to an insurance company.
- (4) Where the Court makes an order appointing a liquidator of an insurance company, the Court may make the appointment on such terms and conditions as it thinks fit, and may limit or exclude the exercise of any power that would otherwise be conferred on the liquidator under the Companies Act 1990.

### **32 Supplemental provisions**

- (1) Regulations made under section 285 of the Companies Act 1990 may regulate the practice and procedure to be followed in the case of proceedings under section 31 of this Act.
- (2) In any proceedings upon an application of appoint a liquidator presented under section 31, evidence that the company was unable to pay its debts at the end of the financial year to which the most recent balance sheet of the company deposited under the Life Insurance Act 1908, or Part I of this Act, relates, is evidence that the company continues to be unable to pay its debts unless the contrary is proved."

### **8 Repeal**

Part XII (sections 413 to 423) of the Companies Act 1955 is repealed.



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APPENDIX TO REPORT  
DRAFT COMPANIES ACT:  
RECOMMENDED MODIFICATIONS

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Additions are double underlined. Deletions are enclosed in double angle brackets and italicised. See Chapter I.

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# COMPANIES ACT 1990

1990, NO YY

*(Enacting words)*

**An Act to restate and reform the law governing the incorporation, organisation, operation and termination of companies**

## **1 Short title and commencement**

- (1) This Act may be cited as the Companies Act ( ).
- (2) This Act comes into force on [ ]

## PART 1 PRELIMINARY

## **2 Purpose of the Act**

The purposes of this Act are

- (a) to provide a structure for the organisation and operation of companies that imposes minimum standards but is adaptable to meet diverse needs and circumstances;
- (b) to recognise the value of the limited liability company as a means of attaining the economic and social benefits of the aggregation of capital for productive purposes, the spreading of economic risk and the taking of business risks;
- (c) to clarify the relationships between companies, their directors, shareholders and creditors;
- (d) to encourage the efficient management of companies by permitting directors a wide measure of discretion in matters of business judgement while protecting shareholders and creditors against abuses of management power;

- (e) to provide simple and fair procedures for realising and distributing the assets of insolvent companies.

### **3 Interpretation**

(1) In this Act, unless the context otherwise requires,

“accounting period” in relation to a company, means a year ending on a balance date of the company; and, where by reason of any alteration of the balance date of the company, the period ending on that date is greater or less than a year that greater or lesser period shall be deemed to be an accounting period;

“address for service” has the meaning set out in section 150 [Address for service];

“annual meeting” means a meeting required to be held by virtue of section 90 [Annual meetings of shareholders];

“assigned name”, in relation to a company, means the name of the company referred to in section 16 [Assigned names];

“balance date” has the meaning set out in section 157 [Balance date of company];

“board” and “board of directors” have the meaning set out in section 97 [Meaning of “board”];

“charge” includes any right or interest in relation to property owned by, or in or under the custody or control of, a company, by virtue of which a creditor of the company may claim to be entitled to payment in priority to creditors entitled to be paid under section 240 [Claims or other creditors];

“class” has the meaning set out in section 87 [Classes and interest groups];

“company” means a body corporate incorporated or registered under Part 2;

“constitution” means a constitution of a company that complies with Part 4;

“Court” means the High Court, or a District Court;

“director” has the meaning set out in section 96 [Meaning of “director”];

“distribution” means a direct or indirect transfer of money or other property (except the company's own shares) or incurrence or indebtedness by a company to or for the benefit of a shareholder in respect of any of its shares, and may be in the form of a declaration or payment of a dividend, a purchase, redemption or other acquisition of shares, a distribution of indebtedness, or otherwise;

“dividend” has the meaning set out in section 43 [Dividends];

“document” means a document in any form, and includes

(a) any writing or any material; and

(b) any information recorded or stored by means of any taperecorder, computer, or other device; and any material subsequently derived from information so recorded or stored; and

(c) any book, graph or drawing; and

(d) any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of any equipment) of being reproduced;

“entitled person” means, in relation to a company

(a) any shareholder; and

(b) any person upon whom the constitution confers any of the rights and powers specified in paragraphs (a) to (f) of section 6 [Essential rights and powers]

“existing company” means a body corporate registered or deemed to be registered under Part II or Part X of the Companies Act 1955, or under the Companies Act 1933, the Companies Act 1908, the Companies Act 1903, the Companies Act 1882, or the Joint Stock Companies Act 1860;

“financial statements” has the meaning set out in section 164 [Meaning of “group financial statements”];

“group of companies” has the meaning set out in section 162 [Meaning of “group of companies”];

``holding company" has the meaning set out in section 161 [Meaning of ``holding company" and ``subsidiary"];

``incorporator" means a person who applies for incorporation of a company in accordance with Part 2;

``interested", in relation to a director, has the meaning set out in section 108 [Meaning of ``interests"];

``interest group" has the meaning set out in section 87 [Classes and interest groups];

``interests register" means the register kept under section 147 (1) <<(e)>> (d) [Company records to be kept];

``major transaction" has the meaning set out in section 99 [Major transactions];

``New Zealand register" means the register of companies incorporated in New Zealand kept pursuant to section 272 (1)(a) [Registers];

``ordinary resolution" has the meaning set out in section 77 [Simple majority of shareholders to exercise powers];

``overseas company" means a body corporate incorporated outside New Zealand;

``overseas register" means the register of bodies corporate incorporated outside New Zealand kept pursuant to section 272(1)(b) [Registers];

``personal representatives", in relation to any person, means the executor, administrator or trustee of the estate of that person:

``pre-emptive rights" means the rights conferred on shareholders under section 36 [Pre-emptive rights];

``prescribed form" means a form prescribed by regulations made under this Act and containing and having attached such information and documents as those regulations may require;

``receiver" has the same meaning as in Part VIIA of the Property Law Act 1952;

``records" means the documents <<and information>> required to be kept by a company under section 147 [Company records to be kept];

``redeemable" has the meaning set out in section 54A [Meaning of ``redeemable"]:

``registered name" means means a name of a company registered under section 17 [Registered names];

``registered office", in relation to a company, means the office referred to in section 145 [Registered office];

``Registrar" means the Registrar of Companies appointed in accordance with section 145 [Register and Deputy Registrars of Companies];

``registration day", in relation to any document or other matter relating to a company, means a day on which the District Registrar's office that contains the part of the New Zealand register (or the overseas register) relating to that company is open for registration of documents;

``related company" has the meaning set out in subsection (2);

``secured creditor", in relation to any company, means a person entitled to a charge in relation to property owned by, or in or under the custody or control of, that company;

``securities" has the same meaning as the Securities Act 1978;

``share" has the meaning set out in section 26 [Rights attached to shares];

``share description" means a share description adopted in accordance with section 34 [Issued decided on by board];

``shareholder" has the meaning set out in section 72 [Meaning of ``shareholder"];

``share register" means the share register required to be kept under section 65 [Company to maintain share register];

``solvency test" has the meaning set out in subsection (3);

``special meeting" means a meeting called in accordance with section 91 [Special meetings of shareholders];

``special resolution" means a resolution approved by a majority of 75 percent (or any higher majority specified in the constitution) of the votes of those shareholders entitled to vote and voting on the question;

``subsidiary" has the meaning set out in section 161 [Meaning of ``holding company" and ``subsidiary"];

``surplus assets" means assets of a company remaining after the payment of all its creditors and available for distribution in accordance with the company's constitution and this Act prior to its removal from the New Zealand register;

``working day" means any day of the week other than

(a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's

Birthday, Labour Day and Waitangi Day; and

(b) a day in the period commencing with the 25th day of December in any year, and ending with the 2nd day of January in the following year.

(2) In this Act, a company is related to another company if

(a) the other company is its holding company or subsidiary; or

(b) there is another company to which both companies are related by virtue of paragraph

(a)

and ``related company" has a corresponding meaning.

(3) (a) A company satisfies the solvency test if

<<(a)>> (i) it is able to pay its debts as they become due in the normal course

of business; and

<<b)>> (ii) the realisable value of the company's assets is greater than the aggregate of the present value of its liabilities, whether contingent or otherwise

(b) In determining whether a company satisfies the solvency test regard may be had either to financial statements prepared on the basis of accounting practices and

principles that are reasonable in the circumstances, or a fair valuation or other method that is reasonable in the circumstances

(c) In this subsection, "realisable value", in relation to any asset, means the price that would be paid for that set by a willing but not anxious buyer to a willing but not anxious seller.

(4) A person required to give public notice of any matter in relation to a company must do so by inserting notice of that matter

(a) in at least one issue of the New Zealand Gazette; and

(b) in at least two issues of a newspaper circulating in the area in which is situated the company's place of business, or the company's chief executive office if the company has more than one place of business, or the company's registered office if the company has no place of business.

#### **4 Act binds Crown**

This Act binds the Crown.

## PART 2

### INCORPORATION UNDER THIS ACT

#### *Characteristics of a company*

#### **5 Essential components**

Every company shall have

(a) a name, which may be a registered name or an assigned name;

(b) a constitution;

(c) one or more shares;

(d) one or more shareholders, whose liability for the obligations of the company may be limited or unlimited; and

(e) one or more directors, who have the powers and duties set out in Part 7.

## **6 Essential rights and powers**

The issued shares of a company must at all times carry between them the following rights and powers:

(a) the powers to appoint or remove directors;

(b) the powers to approve any alteration to the constitution;

(c) the powers to approve any major transactions;

(d) the powers to approve any amalgamation or reconstruction;

(e) the powers to approve the liquidation or removal from the New Zealand register of the company;

(f) the right to receive any surplus assets of the company except to the extent that those rights and powers are by its constitution limited, or conferred on persons other than shareholders.

## **7 Separate personality**

A company is a person in its own right separate from its shareholders, and continues in existence until it is removed from the New Zealand register in accordance with this Act.

## **8 Capacity and powers**

(1) Subject to its constitution, a company

(a) has the capacity, rights, powers and privileges of a natural person; and

(b) without limiting paragraph (a), may do anything which it is permitted to or required to do by its constitution or by any enactment or rule of law.



(2) No act of a company, including any transfer of property to or by a company, is invalid by reason only that the act or transfer is contrary to its constitution or this Act, but this subsection does not limit section 126 [Injunction to restrain action], 127 [Derivative actions], 131 [Personal action by shareholder against directors], 132 [Personal action by shareholders against company], <<and>> 135 [Prejudiced shareholders], and 135A [Failure by directors to comply with Act].

## **9 Authority to bind a company**

A company is bound by the actions of its directors, employees and agents in the manner set out in Part 9.

### *Method of incorporation*

## **10 Incorporators**

<<(1)>> Any person (other than a natural person who is disqualified from becoming a director under section 115(2)(a) to (c) [Qualifications of directors] may, either alone or together with any other such person, apply for incorporation of a company under this Act.

## **11 Application for incorporation**

(1) An application for incorporation of a company under this Act must be sent or delivered to the Registrar, and must

(a) be in the prescribed form; and

(b) be signed by each incorporator; and

(c) be accompanied by consents in the prescribed form signed by each of the persons named as directors or shareholders of the company in the application form.

(2) Without limiting subsection (1), every application for incorporation must state

(a) the full name and residential address of each incorporator; and

(b) <<the>> any maximum number of directors of the company; and

(c) the full names and residential addresses of the first director or directors of the proposed company; and

(d) the full names and <<residential>> address of the first shareholder or shareholders of the proposed company, the number of shares held by each shareholder and the rights, privileges, limitations and conditions attached to each of those shares, if different from those set out in section 26(2) [Rights attached to shares]; and

(e) the first registered office of the proposal company; and

(f) the first address for service of the proposed company.

## **12 Incorporation**

(1) Forthwith after receipt of a properly completed application for incorporation of a company, the Registrar must

(a) enter on the New Zealand register the particulars of the company required by section 272 [Registers]; and

(b) issue a certificate of incorporation in the prescribed form.

(2) A certificate in incorporation of a company issued under this section must include, among other things, the first name of the company, which will be

(a) the first registered name, if any, of the company; or

(b) if there is no such registered name, the assigned name of the company.

(3) A certificate of incorporation of a company issued under this section is conclusive evidence that

(a) all the requirements of this Act as to incorporation of the company have been complied with; and

(b) the company has been incorporated under this Act with effect on and from the date of incorporation stated in the certificate.

### *Registration of existing companies*

### **13 Existing companies to apply for registration under this Act**

*<<(1) Every existing company must apply for registration under this Part no later than three years after the commencement of this Act.>>*

<<(2)>> (1) An application for registration of an existing company under this Part must be delivered to the Registrar and must <<(a)>> by in the prescribe form >>; and

(b) be signed by the existing company>>.

<<(3)>> (2) Without limiting subsection (1) <<(2)>>, every application for registration must state

(a) the name of the existing company; and

(b) <<the>> any maximum number of directors of the existing company; and

(c) the full names and residential addresses of the directors of the existing company at the date of the application; and

(d) the number of shares of the existing company, and the rights, privileges, limitations and conditions attached to each of those shares, if different from those set out in section 26(2) [Rights attached to shares]; and

(e) the registered office of the existing company at the date of the application; and

(f) the address for service of the existing company at the date of registration.

### **14 Registration**

(1) Forthwith after receipt of a properly completed application for registration under this Part of an existing company, the Registrar must

(a) enter on the New Zealand register the particulars of the company required under section 272 [Registers]; and

(b) issue a certificate of registration in the prescribed form.

(2) A certificate of registration of a company issued by the Registrar under this section 272 [Registers]; and

(b) issue a certificate of registration in the prescribed form.

(2) A certificate of registration of a company issued by the Registrar under this section is conclusive evidence that

(a) all the requirements of this Act as to registration of the company have been complied with; and

(b) the company has been registered under this Act with effect on and from the date of registration stated in the certificate.

## **15 Effect of registration**

*<<Every existing company that is registered under this Part shall be the same body corporate before and after registration, and registration does not affect any rights or obligations of the existing company, or render defective any legal proceedings by or against the company.>>*

### Where an existing company is registered under this Part

(a) the registration of the company does not

(i) create a new legal entity; or

(ii) prejudice or affect the identity of the body corporate constituted by the company or its continuity as a body corporate; or

(iii) affect the property, rights or obligations of the company; or

(iv) affect any proceedings by or against the company; and

(b) any proceedings that could have been commenced or continued by or against the company before registration under this Part may be commenced or continued by or against the company after its registration

## PART 3

### COMPANY NAMES

## **16 Assigned names**

(1) Every company shall have a name (and "assigned name") by which it will be known wherever it does not have a registered name.

(2) Subject to subsection (3), the assigned name of a company will be "Company No X Limited" where "X" is the number assigned by the Registrar for this purpose upon its incorporation or registration.

(3) The assigned name for the company shall not include the word "Limited" if the constitution of the company provides that the liability of the shareholders of the company is not limited, in accordance with section 73 (3) [Liability of shareholders].

## **17 Registered names**

(1) A company may have a name that has been registered as the name of the company by the Registrar pursuant to section 19 [Registration of name].

(2) Subject to the constitution of a company

(a) the incorporators of the company may apply to the Registrar for registration of the first registered name of the company; and

(b) any director of the company may, with the prior approval of the company's board, apply to the Registrar for registration of the first or a subsequent name of the company.

(3) The inclusion of the name of the company in its constitution does not affect the power of the board to approve an application under subsection (2)(b), and no such application is an amendment of the constitution for the purposes of this Act, unless the constitution expressly so provides

(4) The registered name of a company must comprise Roman letters and Arabic numerals only .

(5) If the liability of the shareholders of a company is limited under section 73 [Liability of shareholders], the registered name of the company must end either with the word "Limited" or the abbreviation "Ltd."

## **18 Application for registration of name**

(1) An application for registration of the first or subsequent registered name of a company must be sent or delivered to the Registrar, and must

(a) be in the prescribed form; and

(b) contain or have attached such information and documents as the prescribed form may require; and

<<(c) have attached any consents of the kind referred to in subsection (3); and>>

(c) <<(d)>> contain the statement specified in subsection subsection (2); and

(d) <<(e)>> if the application is made by a director, contain a statement that the board of the company has approved the making of the application by the director; and

(e) <<(f)>> be signed by each applicant.

(2) Every application for registration of the first or a subsequent name of a company must contain a statement by each applicant that

<<(a) the applicant has caused a search to be made during the period of 10 working days immediately preceding there date of the application, of such registers, directories, and records of names or trademarks as are then prescribed by the Registrar for the purposes of this subsection; and>>

<<(b)>> the applicant has good reason to believe that <<the name for which registration is sought was adopted in good faith for the purposes of identifying the company and is readily distinguishable from every name, trademark or service mark included in those registers, directories and records, other than any name, trademark, or service mark to which subsection (3) applies.>> registration of the name is sought in good faith for the purpose of identifying the company.

<<(3) *An application for registration of the first or a subsequent name of a company may have attached a consent in the prescribed form to the registration of name signed by the owner of any similar name, trademark or service mark.*>>

## **19 Registration of name**

(1) Subject to subsection (2), forthwith after receipt of a properly completed application for registration of the first or subsequent name of a company, the Registrar must

(a) enter the name of the New Zealand register as being the registered name of the company; and then

(b) unless the name is registered at the time of incorporation or registration of the company under Part 2, issue a certificate of change of name in the prescribed form.

(2) The Registrar is not obliged to enter a name on the New Zealand register if

(a) disregarding the word "Limited" (if any), the name is identical to the assigned or registered name of any <<body>> company registered on any register prescribed by the Registrar for the purposes of <<section 18 [*Application for registration of name*]>> this section; or

(b) the use of the name by a company would contravene any Act which prohibits the use of certain words or names.

(3) A change of name of a company

(a) takes effect from the date of the certificate issued under subsection (1)(b); and

(b) does not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against the company by its former name may be continued or commenced against it by its new name.

## **20 Cessation <<order>> notice**

(1) If at any time the Registrar believes on reasonable grounds that

(a) registration of a name of a company was not sought in good faith for the purposes of identifying the company; or

(b) <<(a)>> a name of a company should not have been registered under section 19 [*Registration of name*] <<; or>>,

<<(b) continued registration of the name under that section is undesirable>>the Registrar may serve written notice on the company to the effect that the name will cease to be registered name of the company from a date specified in the notice (being a date not less than 20 working days after the date on which the notice is served on the company).

(2) Where the Registrar has served notice on the company under subsection (1), then, unless the company has changed its registered name from the name specified in the notice, the name of the company will be its assigned name from the date specified in the notice and the Registrar must forthwith after the date issue a certificate of change of name in the prescribed form.

## **21 Use of name**

(1) Every company must ensure that its full name is clearly sated in

(a) all communications sent by or on behalf of the company; and

(b) all documents issued or signed by or on behalf of the company that evidence or create a legal obligation of the company.

(2) For the purposes of subsection (1) and of section 140 [Method of contracting etc], it is lawful to use any generally recognised abbreviation of a word or words in the name of a company, so long as it is not misleading to do so.

## PART 4

### COMPANY CONSTITUTION

## **22 Every company has a constitution**

(1) Every company and the board, the shareholders and each director and shareholder of a company have the rights, powers, duties and obligations set out in this Act except in so far as they are negated or modified by the constitution of the company in accordance with this Act.

(2) Every company has a constitution which comprises



(a) the application for incorporation or registration or amalgamation proposal of the company; and

(b) any share descriptions registered under Part 5; and

(c) any document of the kind referred to in section 23 [Initial constitutional document], section 24(3) [Alteration of constitution] or section 25(2) [Power of Court to alter constitution].

(3) No provision of a constitution may contravene or be inconsistent with this Act, and a provision which contravenes or is inconsistent with this Act is invalid to the extent of that contravention or inconsistency.

### **23 Initial constitutional document**

(1) An application for incorporation of a company under Part 2 may, but need not, be accompanied by a document certified by at least one of the incorporators as being the initial constitutional document for the company.

(2) An application for registration of an existing company under Part 2 may, but need not, be accompanied by a document certified <<by>> on behalf of the existing company as being its initial constitutional document under this Act.

### **24 Alteration of constitution**

(1) Subject to its constitution and without limiting sections 88 [Alteration of shareholder rights] and 135 [Prejudiced shareholders], the shareholders of a company may at any time alter the constitution by special resolution.

(2) The adoption of a constitutional document for a company is deemed to be an alteration of that company's constitution.

(3) Within 10 registration days of the alteration of the constitution of a company the board must ensure that a notice of change of constitution in the prescribed form is received by the Registrar.

(4) If the board of a company fails to comply with subsection (3), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

## **25 Power of Court to alter constitution**

(1) Where it is not practicable to alter the constitution of a company by means of the procedure set out in this Act or in its constitution, any director or shareholder of the company may apply to the Court for an order altering the constitution, and the Court may make an order altering the constitution on such terms and conditions as it thinks fit.

(2) Where an order is made under subsection (1), the applicant for the order must ensure that a copy of the order is received by the Registrar within 10 registration days.

(3) If an applicant fails to comply with subsection (2) he or she may be convicted of an offence under section 272(2) [Failure to comply with Act].

## PART 5

### SHARES

#### *Nature of shares*

## **26 Rights attached to shares**

(1) A share is a form of personal property issued in accordance with section 31 [Issue of shares] which represents an entitlement in respect of the capital, income or control of a company and confers on the holder all or any of the following rights:

(a) the right to share in the distribution of income of the company;

(b) the right to share in the distribution of the surplus assets of the company upon its <<winding up>> liquidation;

(c) the right to vote at meetings of the company;

(d) the right to repayment of a sum in consideration of which the share was issued, at a future date;

(e) the right to be paid a return at a specified rate on a sum in consideration of which the share was issued together with such other rights and privileges and subject to such limitations or conditions as may be provided for in the constitution of the company or the share description in respect of the share.

(2) Unless otherwise specified in the constitution or share description in respect of any share, each share has attached to it the following rights:

(a) the right to one vote at any meeting (other than an interest group meeting) which is held to do any one or more of the following:

(i) to appoint or remove a director or auditor;

(ii) to approve any alteration to the constitution;

(iii) to approve a major transaction;

(iv) to approve an amalgamation of the company, under section 190 [Manner of approving amalgamation proposal];

(v) to approve the liquidation of the company;

(b) the right to an equal share in dividends authorised by the directors;

(c) the right to an equal share in the distribution of the surplus assets of the company.

## **27 Types of share**

Without limiting section 26 [Rights attached to shares], shares may be convertible, redeemable, subject to calls, entitled to preferential distribution (whether of income or of capital), and may have special, conditional, limited or no voting rights.

## **28 No nominal value**

(1) No share shall have a nominal or par value.

(2) Nothing in this section prevents the issue by a company of a redeemable share.

## **29 Transferability of shares**

(1) A share may be either transferable or non-transferable.

(2) Any share which is transferable may be transferred by entry on the company's register, in accordance with section 63 [Transfer of shares], and may not be transferred in any other way.

(3) Unless otherwise specified in the constitution of the company, a share is transferable.

### **30 Share options**

*<<Sections 34 [Issue decided on by board], 36 [Pre-emptive rights], 37 [Persons to whom share may be issued], 58 [Financial assistance], 59 [Special financial assistance], 60 [Disclosure document] and 61 [Enforceability of prohibited transactions] apply to any deed or contract under which the company is or may be required to issue shares as if that contract were a share, and as if entry into such a contract were the issue of a share.>>*

(1) No company may enter into any contract or deed under which it is or may be required to issue any share unless

(a) the company is entitled to issue the shares under section 33 [Company may issue shares]; and

(b) any issue of shares which the company may be required to make complies with section 37 [Persons to whom shares may be issued]; and

(c) the board has approved the consideration for terms of issue in accordance with section 39 [Consideration for issue to be decided on by board].

(2) Notwithstanding section 8 [Capacity and powers], a contract or deed entered into by a company in breach of subsection (1) is deemed to be an illegal contract for the purposes of the Illegal Contracts Act 1970.

#### *Issue of shares*

### **31 Issue of shares**

Every share in a company must be either

(a) an initial share; or

(b) issued by the company, in accordance with section 33 [Company may issue shares].

### **32 Initial shares**

(1) A share is an initial share if

(a) the holder of the share is named in the application for incorporation of a company; or

(b) in the case of an existing company, the share is issued at the date of registration under Part 2; or

(c) in the case of an amalgamated company, the share is provided for in the amalgamation proposal, and the holder of the share becomes entitled to the share under the amalgamation proposal.

(2) Where a share is an initial share the company must forthwith enter the name of the holder on the share register, in accordance with section 65 [Company to maintain share register].

(3) Where an initial share is transferable, that share may, subject to any restrictions in the constitution, be transferred by entry on the share register and any such transfer does not require and is not for the purposes of this Act an alteration of the constitution.

### **33 Company may issue shares**

Subject to the Act and to any restrictions in its constitution, a company may issue shares at any time and in any number, provided that either

(a) its constitution makes provision for such shares, and they have not yet been issued; or

(b) the board has resolved to issue shares, in accordance with section 34 [Issue decided on by board].

### **34 Issue decided on by board**

Shares may be issued under section 33(b) [Company may issue shares] only if the board has passed a resolution

- (a) that shares should be issued, specifying
  - (i) the rights, privileges, limitations and conditions attached to each share to be issued, if different from those set out in section 26(2) [Rights attached to s
  - (ii) the maximum number of shares to be issued; and
  - (iii) whether the shares are transferable or non-transferable, and if transferable, whether their transfer is subject to any conditions or limitation; and
- (b) adopting as the share description a written statement of the matters referred to in paragraph (a) in the prescribed form.

### **35 Share description to be registered**

- (1) Within 10 registration days of the adoption of a share description under section 34(b) [Issue decided on by board], the board must ensure that the share description is received by the Registrar.
- (2) Upon registration the share description forms part of the constitution of the company, provided that
  - (a) no provision in the constitution prior to the registration of a share description which relates to the rights attached to shares shall apply to the shares described in the share description, unless the share description so provides;
  - (b) no provision in the share description which relates to the rights attached to shares shall apply to other shares of the company.
- (3) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

#### *Persons to whom shares may be issued*

### **36 Pre-emptive rights**

Unless excluded or limited by the constitution, all shareholders are entitled to pre-emptive rights, which are the rights

(a) to be offered any further issue of shares which rank equally with or prior to their shares, whether as to voting or distribution rights, or both, in such a manner and on such terms as would, if accepted, preserve their relative voting and distribution rights; and

(b) to be afforded a reasonable opportunity of accepting any such offer.

### **37 Persons to whom shares may be issued**

(1) Shares must be issued in accordance with shareholders' pre-emptive rights, unless either

(a) the constitution permits the issue in question to be made in the manner proposed by the board; or

(b) the board obtains approval for the issue in the same manner as approval is required for an alteration to the constitution which would permit such an issue.

(2) Within 10 registration days of approval being given under subsection (1)(b), the board must ensure that notice of that approval in the prescribed form is received by the Registrar.

(3) Nothing in this section affects the need to obtain the approval of an interest group, where the issue of shares affects the rights of that interest group, in accordance with section 88 [Alteration of shareholder rights].

(4) A failure to comply with this section does not affect the validity of any issue of shares, but has the consequences set out in section 135(3) [Prejudiced shareholders].

(5) If the board of a company fails to comply with subsection (2), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

#### *Consideration for issue of shares*

### **38 Consideration for issue of shares**

The consideration for which a share is issued may be cash, promissory notes, contracts for future services, real or personal property or other securities of the company.

### **39 Consideration for issue to be decided on by board**

(1) Before the company issues shares under section 33 [Company may issue shares] other than as a share split, the board must

(a) decided the consideration for which the shares will be issued and the terms on which they will be issued; and

(aa) if the shares are to be issued other than for cash immediately payable on issue, determine the reasonable present cash value of the consideration for issue; and

(b) resolve that in its opinion the consideration for and terms of the issue are fair and reasonable to the company and to all <<the>> existing shareholders.

(2) The directors who vote in favour of the resolution required by subsection (1) must sign a certificate <<that, in their opinion, the conditions set out in subsection (1) are satisfied.>>

(a) stating the consideration for and terms of the issue; and

(b) where a present cash value has been determined in accordance with subsection (1)(aa), stating that value; and

(c) stating that in their opinion the consideration for and terms of issue are fair and reasonable to the company and to all existing shareholders.

(3) The board may at any time resolve to issue shares as a share split, and subsections (1) and (2) do not apply to any such issue.

(4) A share split is an issue of shares where

(a) notwithstanding any provision in the constitution of the company, the issue is in accordance with shareholders' pre-emptive rights; and

(b) the shares issued are not redeemable; and

(c) the shares issued do not carry any fixed or preferential rights to distributions or to the surplus assets of the company.



(5) Every director who fails to comply with subsection (2) may be convicted of an office under section 277(1) [Failure to comply with Act].

*Consent to, and time of issue*

**40 Consent to issue**

A company may not issue a share to any person if the issue of that share increases any liability of that person to the company or imposes any new liability on that person unless that person has consented in writing to become the holder of that share and any issue without such consent is void.

<<*Time of issue*>>

**41 Time of issue**

A share is issued when

- (a) the constitution or share description which provides for the share has been registered on the New Zealand register; and
- (b) either the holder of the share is named in the constitution, or the name of the holder of the share has been entered on the register of shareholders.

*Distributions*

**42 Board may authorise a distribution**

(1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise a distribution of the company at such time and on such amount and to such shareholders as it thinks fit, provided that it is satisfied that the company will, after the distribution, satisfy the solvency test.

(2) The directors who vote in favour of a distribution must sign a certificate that in their opinion the company will, after the distribution, satisfy the solvency test.

(3) In applying the solvency test for the purposes of this section.

(a) "debts" is to be treated as including fixed preferential returns on shares ranking ahead of those in respect of which a distribution is made; and

(b) "liabilities" is to be treated as including the amount that would be required, if the company were to be removed from the New Zealand register immediately after the time of distribution, to satisfy the fixed entitlements of all shareholders or other entitled persons at that time, or upon an earlier redemption;

except where the fixed preferential return or entitlement is expressed in the constitution as being subject to the power of the directors to make distributions.

(4) Every director who fails to comply with subsection (2) may be convicted of an offence under section 277(1) [Failure to comply with Act].

### **43 Dividends**

(1) A dividend is a distribution which does not fall within section 49 [Acquisition of company's own shares] or section 58 [Financial assistance].

(2) The board of a company may not authorise a dividend

(a) in respect of some shares in a class, and not of others of that class; or

(b) of a greater value per share in respect of some shares of a class than in respect of others of that class except where the amount of the dividend is proportional to the amount paid to the company in respect of the shares.

(3) Notwithstanding subsection (2), a shareholder may waive his or her entitlement to receive a dividend by notice in writing to the company signed by or on behalf of the shareholder.

### **44. Shares in lieu of dividend options**

(1) Notwithstanding section 43(2) [Dividends], but subject to section 31 [Issue of shares] and to the constitution of the company, a board may offer shareholders the option of receiving shares in the company in lieu of any proposed dividend.

(2) The dividend option offered to shareholders must comply with section 43(2) [Dividends].

(3) The share option offered to shareholders must be an offer made in accordance with shareholders' pre-emptive rights.

(4) The board must give notice to shareholders of the shares in lieu of dividend option stating the date by which the option must be exercised, and all shareholders must be afforded a reasonable opportunity of exercising the option.

(5) Upon the date specified in the notice given under subsection (4) of the board may

(a) subject to section 31 [Issue of shares], issue shares to those shareholders who have elected to receive shares in lieu of the proposed dividend; and

(b) subject to section 42 [Board may authorise a distribution], authorise the proposed dividend to be paid to those shareholders who have not elected to receive shares.

#### **45 Shareholder discounts**

(1) Notwithstanding section 42 [Board may authorise a distribution] and section 43 [Dividends], the board of a company may resolve that the company should offer shareholders discounts in respect of some or all of the trading activities of the company.

(2) The board may approve a discount scheme under subsection (1) only if it has previously resolved that the proposed discounts

(a) are fair and reasonable to the company and to the shareholders; and

(b) are to be available to all shareholders on the same terms.

(3) No discount scheme may be approved or continued by the board if there are reasonable grounds for believing that the company does not satisfy the solvency test.

#### **46 Recovery of distributions**

(1) A distribution to a shareholder made at a time when the company did not immediately after the distribution satisfy the solvency test as <<required>> modified by section 42(3) [Board may authorise a distribution] may be recovered by the company from the shareholder unless the shareholder

(a) received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test; and

(b) has altered his or her position in reliance on the validity of the distribution, so that having regard to all possible implications in respect of other persons it is inequitable to require repayment in full or at all, as the case may be.

(2) Where a distribution has been made and, either,

(a) the procedure set out in section 42 [Board may authorise a distribution] has not been followed; or

(b) a certificate was given under section 42(2) [Board may authorise a distribution], and there did not exist reasonable grounds for the opinion set out in the certificate; those directors who failed to take reasonable steps to ensure the procedure was followed, or who signed the certificate, are personally liable to the company to restore the distribution, except in so far as it may be recoverable from shareholders under subsection (1).

(3) If in any action brought against a director or shareholder under this section the Court is satisfied that the company could properly have made a distribution of lesser value which would not have caused the company to fail to satisfy the solvency test, the Court may

(a) relieve the director for liability in respect of; or

(b) permit the shareholder to retain; the distribution made up to the value of any distribution that might properly have been made.

#### **46 A Reduction of shareholder liability a distribution**

(1) Where a company proposes to alter its constitution, or to acquire or redeem shares issued by it, in a manner which would cancel or reduce the liability of a shareholder to the company in respect of any share held by him or her prior to that alteration, acquisition or redemption, the proposed cancellation or reduction of liability is to be treated

(a) for the purposes of section 42, as if it were a distribution; and

(b) for the purposes of subsection (2) and (3) of section 43, as if it were a dividend.

(2) Where a company has altered its constitution, or acquired or redeemed shares, in a manner which cancels or reduces the liability of a shareholder to the company in respect of any share held by him or her prior to that alteration, acquisition or redemption, that cancellation or reduction of liability is to be treated for the purposes of section 46 as a distribution of the amount by which his or her liability was reduced.

(3) Where the liability of a shareholder of an amalgamating company to that company in respect of any share held by him or her before an amalgamation is

(a) greater than the liability of that shareholder to the amalgamated company in respect of any share or shares into which the share is converted; or

(b) is cancelled by the cancellation of that share in the amalgamation; the reduction of liability effected by the amalgamation is to be treated for the purposes of section s46(1) and (3) [Recovery of distributions] as a distribution of the amount by which his or her liability was reduced.

### *Company holding its own shares*

#### **47 Company holding its own shares**

Except as provided in sections 49 to 53 and 81 to 83, a company shall not hold shares in itself.

#### **48 Cross-holdings**

*<<(1) Where one company (referred to as "the owning company") holds share is in another company (referred to as "the partly-owned company")*

*(a) the partly-owned company may acquire shares in the owning company unless there are at the time of the acquisition reasonable grounds for believing that the partly-owned company does not, or would not after the acquisition, satisfy the solvency test; and*

*(b) the owning company, where the partly-owned company is its subsidiary, shall not permit the partly-owned company to acquire any shares in the owning company where*

*there are at the time of acquisition reasonable grounds for believing that the owning company does not, or would not after the acquisition, satisfy the solvency test.*

*(2) Each director of the partly-owned company owes a duty to that company to take reasonable steps to ensure that it complies with subsection (1)(a). (3) Each director of the owning company owes a duty to that company to take reasonable steps to ensure that it complies with subsection (1)(b).*

*(4) In applying the solvency test for the purposes of this section*

*(a) "debts" is to be treated as including fixed returns on shares; and*

*(b) "liabilities" is to be treated as including the amount that would be required, if the company were to be removed from the New Zealand register immediately after the time of the acquisition, to satisfy the fixed entitlements of all shareholders to surplus assets at that time, or upon an earlier redemption.>>*

Where one company ("the owning company") holds shares in another company ("the partly owned company"), the partly owned company may acquire or dispose of shares in the owning company subject to the Act and in particular to:

(a) section 101 [Fundamental duty];

(b) section 102 [Existing shareholders];

(c) section 105 [Solvency];

(d) section 135 [Prejudiced shareholders].

*Acquisition by company of its own shares*

#### **49 Acquisition of company's own shares**

(1) Subject to section 42 [Board may authorise a distribution], a company may purchase or otherwise acquire shares issued by it, if expressly permitted to do so by its constitution, in accordance with section 50 [Board may make offer to acquire shares].

(2) Notwithstanding subsection (1) and sections 50 to 54, a company may purchase or otherwise acquire shares issued by it

(a) in accordance with an order of the Court made under this Act on the terms and conditions set out in that order; or

(b) in accordance with section 81 [Minority buy-out rights] or section 88 [Alteration of shareholder rights].

## **50 Board may make offer to acquire shares**

(1) At any time when a company is entitled to acquire its own shares by virtue of section 49(1) [Acquisition of company's own shares], the board may

(a) make an offer to all shareholders to acquire a proportion of their shares, where

(i) such an offer will, if accepted in full, leave unaffected relative voting and distribution rights; and

(ii) all shareholders are afforded a reasonable opportunity to accept the offer; or

(b) make an offer to one or more shareholders to acquire shares, other than in accordance with paragraph (a), if

<< (i) *all shareholders have consented in writing to that offer; or*

(ii)>> such an offer is expressly permitted by the constitution, and the procedure set out in section 51 [Special offers to acquire shares] is followed.

(2) The board may make an offer under subsection (1) only if it has previously resolved

(a) that the acquisition in question is in the best interests of the company; and

(b) that the terms of the offer and the consideration offered for the shares are fair and reasonable to the company; and

(c) that it is not aware of any information not available to shareholders

(i) which is material to an assessment of the value of the shares; and

(ii) as a result of which the terms of the offer and consideration offered for the share are unfair to shareholders accepting the offer; and any such resolution must set out full reasons for the directors' conclusions.

(3) The directors who vote in favour of a resolution required by subsection (2) must sign a certificate as to the matters set out in subsection (2), which may be combined with the certificate required by section 42 [Board may authorise a distribution] and any certificate required under section 51 [Special offers to acquire shares].

(4) Every director who fails to comply with subsection (3) may be convicted of an offence under section 277(1) [Failure to comply with Act].

## **51 Special officer to acquire shares**

(1) The board may make an offer under section 50(1)(b) <<(ii)>> [Board may make offer to acquire shares] only if it has previously resolved

(a) that the acquisition in question is of benefit to the remaining shareholders; and

(b) that the terms of the offer and the consideration offered for the shares are fair and reasonable to the remaining shareholders; and any such resolution must set out full reasons for the directors' conclusions.

(2) The directors who vote in favour of a resolution required by subsection (1) must sign a certificate as to the matters set out in subsection (1).

(3) Before an offer is made pursuant to a resolution under subsection (1), the company must send each shareholder a disclosure document which complies with section 52 [Disclosure document].

(4) The offer may be made not less than 10 and not more than 30 working days after the disclosure document has been sent to each shareholder.

(5) A shareholder, the company or any creditor of the company, may apply to the Court of an order restraining the proposed acquisition on the grounds that

(a) it is not in the best interests of the company and of benefit to remaining shareholders; or

(b) the terms of the offer and the consideration offered for the shares are not fair and reasonable to the company and remaining shareholders.



(6) Every director who fails to comply with subsection (2) may be convicted of an offence under section 277(1) [Failure to comply with Act].

## **52 Disclosure document**

The document to be sent to all shareholders by way of disclosure pursuant to section <<48(3) [Cross-holdings]>> 51(3) [Special offers to acquire shares] must set out

(a) the nature and terms of the offer, and if made to specified shareholders, to whom it will be made; and

(b) the text of the resolution required by section <<48(1) [Cross-holdings]>> 51(1) [Special offers to acquire shares], together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed acquisition.

## **53 Cancellation of shares re-purchased**

(1) Any shares acquired by a company pursuant to section 49 [Acquisition of company's own shares] or section 83 [Purchase by company] shall immediately upon acquisition be deemed to be cancelled.

(2) Shares are acquired for the purposes of subsection (1) on the date upon which the company would, apart from this section, become entitled to exercise the rights attached to the shares.

(3) Where a share is cancelled under this section

(a) all the rights and privileges attached to that share expire; but

(b) the constitution of the company is not affected, and the share may be reissued in accordance with this Part.

## **54 Enforceability of contract to re-purchase shares**

(1) A contract with a company providing for the acquisition by the company of its shares is specifically enforceable against the company except to the extent that the

company cannot perform the contract without thereby being in breach of section 42 [Board may authorise a distribution].

(2) In any action brought on a contract referred to in subsection (1), the company has the burden of proving that performance of that contract is prevented by section 42 [Board may authorise a distribution].

(3) Until the company has fully performed a contract referred to in subsection (1), the other party retains the status of a claimant entitled to be paid as soon as the company is lawfully able to do so or, prior to the removal of the company from the New Zealand register, to be ranked subordinate to the rights of creditors but in priority to the other shareholders.

### *Redemption of shares*

#### **54A Meaning of "redeemable"**

For the purposes of this Act, a share is redeemable if the constitution of the company makes provision for the redemption or repurchase of that share by the company

(a) on a date specified in the constitution; or

(b) at the option of the company; or

(c) at the option of the holder of the share for a consideration which is

(d) specified; or

(e) to be calculated by reference to a formula; or

(f) required to be fixed by a suitably qualified person who is not associated with or interested in the company.

#### **55 Redemption at the option of the company**

Where a share is redeemable at the option of the company, any such redemption shall be deemed to be an acquisition of the share for the purposes of sections 50 to <<53>> 54.

#### **56 Redemption at the option of the shareholder**

(1) Where a share is redeemable at the option of the holder of the share, and the holder gives proper notice to the company requiring the share to be redeemed<<, >>

(a) the company <<shall>> must redeem the share <<upon>> on the date specified in the notice, or if <<none upon>> no date is specified, on the date of receipt of the notice<<, >>; and

(b) <<as of the date of redemption>> the share is deemed to be cancelled on the date of redemption; and

(c) from the date of redemption the former shareholder ranks as an unsecured creditor to the company in respect of the sum specified in the constitution as being payable upon <<such>> redemption.

<<(2) Notwithstanding subsection (1), any sum payable upon redemption is deemed to be a distribution for the purposes of section 46 [Recovery of distributions].>>

(2) A redemption under this section:

(a) is not a distribution for the purposes of section 42 [Board may authorise a distribution] and 43 [Dividends]; but

(b) is deemed to be a distribution for the purposes of section 46(1) and (3) [Recovery of distributions].

## **57 Redemption upon a fixed date**

(1) Where a share is redeemable upon a date specified in the constitution <<, >>:

(a) the company <<shall>> must redeem the share upon that date <<, >>; and

(b) <<as of that date>> the share is deemed to be cancelled on that date; and

(c) <<the holder of the share>> from that date the former shareholder ranks as an unsecured creditor of the company in respect of the sum specified in the constitution as being payable upon such redemption.

<<(2) Notwithstanding subsection (1), a sum payable upon redemption is deemed to be a distribution for the purposes of section 46 [Recovery of distributions].>>

(2) A redemption under this section:

(a) is not a distribution for the purposes of section 42 [Board may authorise a distribution] and 43 [Dividends]; but

(b) is deemed to be a distribution for the purposes of section 46(1) and (3) [Recovery of distributions].

*Assistance by a company in the purchase of its own shares*

## **58 Financial assistance**

(1) Subject to section 42 [Board may authorise a distribution] a company may give financial assistance by means of a loan, guarantee, the provision of security or otherwise to any person for the purpose of or in connection with the purchase of any share issued or to be issued by the company, whether directly or indirectly, only if either

(a) the company

(i) gives the financial assistance in the ordinary course of business and on usual terms and conditions; and

(ii) receives fair value in connection with the assistance; or

(b) the financial assistance is given in accordance with subsection <<(3)>> 4, and <<either

*(i) all shareholders have consented in writing to the giving of the assistance; or*

*(ii) >>the procedure set out in section 59 [Special financial assistance] is followed.*

(2) Financial assistance given under subsection (1)(a) is deemed not to be a distribution for the purposes of this Act.

(3) Financial assistance given otherwise than under subsection (1)(a) is deemed to be a distribution in respect of the shares purchased, or to be purchased, whether or not the person to whom the assistance is given holds or acquires shares in the company at the time the assistance is given.

(4) A company may give financial assistance under subsection (1)(b) if the board has previously resolved that

(a) the company should provide the assistance; and

(b) the giving of such assistance is in the best interests of the company; and

(c) the terms and conditions under which the assistance is given are fair and reasonable to the company; and any such resolution must set out full reasons for the board's conclusions.

(5) The directors who vote in favour of a resolution required by subsection (4) must sign a certificate as to the matters set out in subsection (4), and that certificate may be combined with the certificate required under section 42 [Board may authorise a distribution] and any certificate required under section 59 [Special financial assistance].

(6) For the purpose of determining whether financial assistance may be given under section 42 [Board may authorise a distribution],

“assets” is to be taken to exclude the amount of any financial assistance in the form of a loan; and

“liabilities” includes the face value of any liability, whether contingent or otherwise, incurred in connection with the giving of the assistance.

(7) Every director who fails to comply with subsections (5) may be convicted of an offence under section 277(1) [Failure to comply with Act].

## **59 Special financial assistance**

(1) Financial assistance may be given under section 58(1)(b) <<(ii)>> [Financial assistance] only if the Board has previously resolved

(a) that giving the assistance in question is of benefit to those shareholder not receiving the assistance; and

(b) that the terms and conditions under which the assistance is given are fair and reasonable to those shareholders not receiving the assistance; and any such resolution must set out full reasons for the directors' conclusions.

(2) The directors who vote in favour of a resolution required by subsection (1) must sign a certificate as to the matters set out in subsection (1).

(3) Before assistance is given under section 58(1)(b) <<(ii)>> [Financial assistance], the company must send each shareholder a disclosure document which complies with section 60 [Disclosure document].

(4) The assistance may be given not less than 10 and nor more than 30 working days after the disclosure document has been sent to each shareholder.

(5) A shareholder, the company or any creditor of the company, may apply to the Court for an order restraining the proposed financial assistance on the grounds that

(a) it is not in the best interests of the company and of benefit to those shareholders not receiving the assistance; or

(b) the terms and conditions under which the assistance is to be given are not fair and reasonable to the company and to those shareholders not receiving the assistance.

(6) Every director who fails to comply with subsection (2) may be convicted of an offence under section 277(1) [Failure to comply with Act].

## **60 Disclosure document**

The document to be sent to all shareholders by way of disclosure pursuant to section 59(4) [Special financial assistance] must set out

(a) the nature and terms of the assistance to be given, and to whom it will be given; and

(b) the text of the resolution required by section 59(2) [Special financial assistance], together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholder of the proposed acquisition.

## **61 Enforceability of prohibited transactions**

(1) A failure to comply with the provisions of section 58 [Financial assistance] does not affect the validity of any transaction, but has the consequences set out in section 135 [Prejudiced shareholders].

(2) This section does not affect any liability of a director or any other person for breach of any duty, or as a constructive trustee, or otherwise.

### *Statement of shareholder rights*

#### **62 Statement of shareholder rights**

(1) Every shareholder is entitled to be issued by the company, upon request, with a statement of the number of shares held by him or her, and the rights, privileges, conditions and limitations, including restrictions on transfer, attached to his or her shares; and their relative position in relation to other classes of shares (if any).

(2) The company is not obliged to provide a shareholder with a statement under subsection (1) if

(a) such a statement has been provided within the previous six months; and

(b) the shareholder has not acquired or disposed of shares since the previous statement was issued; and

(c) the rights attached to shares of the company have not been altered since the previous statement was issued; and

(d) there are no special circumstances which would make it unreasonable of other company to refuse the request.

(3) No person other than the shareholder to whom a statement is issued under this section is entitled to rely on that statement as evidence of title to the shares or of any of the matters set out in the statement, or otherwise.

(4) If a company fails to comply with subsection (1)

(a) the company may be convicted of an offence under section 227(1) [Failure to comply with Act]; and

(b) every director of the company may be convicted of an offence under section 278(1) [Liability of directors for failure by board or company].

### *Transfer of shares*

### **63 Transfer of shares**

(1) Shares which are transferable are transferable by entry of the name of the transferee on the share register.

(2) Subject to the Securities Transfer Act 1977, where shares are to be transferred, a form of transfer signed by the present holder of the shares or his or her personal representative must be delivered to the company.

(3) The form of transfer required by subsection (2) must be signed by the transferee if registration as holder of the shares imposes any liability to the company on the transferee.

(4) Upon receipt of a form of transfer in accordance with subsection (2), the company must forthwith enter the name of the transferee on the share register as holder of the shares, unless

(a) the board resolves within 30 working days of receipt of the transfer to refuse or delay the registration of the transfer, and the resolution sets out full reasons for so doing; and

(b) notice of the resolution, including reasons, is sent to the transferor and to the transferee within five working days of its approval by the board; and

(c) the Act or the constitution expressly permits the board to refuse or delay registration for the reasons stated.

(5) Subject to the constitution of a company, the board may refuse or delay the registration of a transfer of shares where the holder of the shares has failed to pay to the company any amount due in respect of those shares, whether by way of consideration for the issue of the shares or in respect of sums payable by the holder of the share in accordance with the constitution.

(6) If a company, fails to comply with subsection (4)

(a) the company may be convicted of an offence under section 277(1) [Failure to comply with Act]; and



(b) every director of the company may be convicted of an offence under section 278(1) [Liability of directors for failure by board or company].

#### **64 Permissible dealings with non-transferable shares**

Shares which are non-transferable may not be voluntarily transferred to any person by the holder of the shares, but may pass by transmission or by operation of law, or may be repurchased or redeemed by the company in accordance with this Act unless the constitution of the company provides otherwise.

#### *Share register*

#### **65 Company to maintain share register**

(1) Every company must maintain a share register in which it records the share issued by the company, showing whether the shares are transferable or non-transferable, and with respect to each class of shares the share register must state

(a) the names, alphabetically arranged, and the latest known address of each person who is or has within the last 10 years been a shareholder;

<<(b) the number of shares of that class held by each shareholder;

(c) the date and particulars of the issue and transfer within the last 10 years of each share.>>

(b) the number of shares of that class held by each such shareholder within the last 10 years;

(c) the date of any

(i) issue of shares to; or

(ii) repurchase or redemption of shares from; or

(iii) transfer of shares by or to each such shareholder within the last 10 years, and in relation to any such transfer, the name of the person to or from whom the shares were transferred.

(1A) A company may appoint an agent to maintain the share register of the company.

(2) If a company fails to comply with subsection (1)

(a) the company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and

(b) every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

### **<<66 Place of register**

*(1) A company may appoint an agent to maintain the share register of the company.*

*(2) The share register must be kept at the registered office of the company, provided that*

*(a) if the maintenance of the register is carried out at another office of the company in New Zealand, it may be kept at that other office; and*

*(b) if the company arranges with some other person to maintain the register on behalf of the company, it may be kept at the office in New Zealand of that other person at which the work is done.*

*(3) If a share register is not kept at the registered office of the company, or if the place at which it is kept is changed, the company must ensure that within 10 registration days of it first being kept elsewhere or moved, as the case may be, notice is received by the Registrar of the place where the share register is kept.*

*(4) If a company fails to comply with subsection (3)*

*(a) the company may be convicted of an offence under section 277(2) [failure to comply with Act] and*

*(b) every director of the company may be convicted to an offence under section 278(2) [Liability of directors for failure by board or company].>>*

### **66 Place of share register**

**(1) The share register may, if expressly permitted by the constitution, be divided into two or more registers kept in different places.**

(2) The principal register must be kept in New Zealand.

(3) Where a share register is divided into two or more registers kept in different places

(a) notice of the place in which each register is kept must be given to the Registrar in accordance with section 147(3) [Company records to be kept]; and

(b) a copy of every register must be kept at the same place as the principal

register; and

(c) where an entry is made in a register other than the principal register, a corresponding entry must be made within 10 working days in the copy of that register kept with the principal register.

(4) In this section "principal register" means, in relation to a company

(a) if the share register is not divided into two or more registers, the share register;

(b) if the share register is divided into two or more registers, the register described as the principal register in the last notice sent to the Registrar under section 147(3) [Company records to be kept].

(5) If a company fails to comply with subsections (2) or (3)

(a) the company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and

(b) every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board of company].

## **67 Share register determines legal title**

(1) Subject to section 69 [Power of Court to rectify share register], the entry of the name of a person in the share register as holder of a share is effective to vest legal title to that share in that person

(2) A company may treat the registered holder of a share as the person exclusively entitled to vote, to receive notices, to receive any distribution in respect of the share, and otherwise to exercise all the rights and powers of an owner of the share.

## **68 Directors' duty to supervise share register**

(1) It is the duty of each director to take responsible steps to ensure that the share register is properly kept and that share transfers are promptly entered on the share register, in accordance with section 63 [Transfer of shares].

(2) Every director who fails to comply with subsection (1) may be convicted of an offence under section 277(2) [Failure to comply with Act].

## **69 Power of Court to rectify share register**

(1) If the name of any person is wrongly entered in or omitted from, or wrongly continues to be entered in the share register of a company, the person aggrieved, or any shareholder, may apply to the Court for rectification of the share register or for compensation for any loss sustained, or both.

(2) Where an application is made under this section, the Court may order rectification of the register and payment of compensation by the company or any director for any loss sustained by any party aggrieved.

(3) On an application under this section the Court may decide any question relating to the entitlement of any person who is a party to the application to have his or her name entered in or omitted from the share register, and generally may decide any question necessary or expedient to be decided for rectification of the share register.

## **70 Trusts not to be entered on share register**

No notice of any trust, express, implied, or constructive may be entered on the share register

### *Share certificates*

## **71 Share certificate may be issued**

(1) Subject to the constitution of the company, a shareholder may apply to the company for a certificate relating to some or all of his or her shares in the company.

(2) Upon receipt of an application for a share certificate under this section the company must forthwith

(a) separate the shares shown in the register as owned by the applicant into separate parcels; one parcel being the shares to which the share certificate relates, and the other parcel being any remaining shares;

(b) send to the shareholder a certificate stating

(i) the name of the company;

(ii) the class of shares represented by the certificate;

(iii) the number of shares represented by the certificate.

(3) Notwithstanding section 63(3) [Transfer of shares], where a share certificate has been issued which relates to a parcel of shares, a transfer of that parcel may not be registered by the company unless the form of transfer required by section 63(2) [Transfer of shares] is accompanied by the share certificate relating to that parcel, or by evidence as to its loss or destruction and, if required, an indemnity to the satisfaction of the board.

(4) Where a parcel of shares to which a share certificate relates is to be transferred, and the share certificate is sent to the company to enable the registration of the transfer, the share certificate must be cancelled and no further share certificate issued without a specific request by the transferee.

## PART 6

### SHAREHOLDERS AND THEIR RIGHTS AND OBLIGATIONS

#### **72 Meaning of "shareholder"**

In this Act, the term "shareholder" means, in relation to a company

(a) any person registered on the share register as the owner of one or more shares in the company; and

(b) any person named as a shareholder in the constitution at the time of incorporation of the company, until such time as his or her name is entered on the share register.

#### *Liability of shareholders*

### **73 Liability of shareholders**

(1) Subject to section 26 [Rights attached to shares], a shareholder is not liable for any obligation of the company by virtue only of his or her status as shareholder.

(2) The liability of a shareholder to the company is limited to

(a) any liability expressly provided for in the constitution, including any amount unpaid on any share held by the shareholder; and

(b) any liability under section 80(2) [Liability of shareholders in respect of exercise of powers]; and

(c) any distribution received by the shareholder to the extent that the distribution is recoverable under section 46 [Recovery of distributions]<<.>>; and

(d) any liability under section 210(2) [Power of liquidators to make calls].

(3) The constitution of a company may provide that the liability of the shareholders to the company is unlimited.

<<(4) *For the avoidance of doubt*

(a) *where*

(i) *all or part of the consideration for the issue of a share remains unsatisfied; and*

(ii) *the person to whom the share was issued no longer holds that share;*

*the person to whom the share was issued continues to be liable in respect of the unsatisfied consideration, and no liability in respect of that unsatisfied consideration attaches to subsequent holders of the share;*

(b) *where the constitution provides that a share renders its holder liable to call, or otherwise imposes a liability on its holder, that liability attaches to the holder of the share for the time being, and no such liability attaches to prior holders of the share.>>*

(4) *For the avoidance of doubt*

(a) where the constitution of a company provides that a share renders its holder liable to calls, or otherwise imposes a liability on its holder, that liability attaches to the holder of the share for the time being, and not to prior holder of the share, whether or not the liability became enforceable before the share was registered in the name of the current holder:

(b) subject to paragraph (a), where

(i) all or part of the consideration for the issue of a share remains unsatisfied: and

(ii) the person to whom the share was issued no longer holds that share, liability in respect of that unsatisfied consideration does not attach to subsequent holders of the share, but remains the liability of the person to whom the share was issued, or of any other person who assumed that liability at the time of issue.

(5) Nothing in this section affects a shareholder's liability to the company on any contract (including a contract for the issue of shares) or for any tort or breach of fiduciary duty or other actionable wrong committed by him or her .

#### **74 Liability of personal representative**

(1) The liability of <<*an executor, administrator or trustee of the estate*>> a personal representative of a deceased person, who is registered as the holder of a share comprised in that estate, shall, in respect of that share, not exceed the value of any assets which, at the time when any demand is made for the satisfaction of any such liability, are held by that <<*executor, administrator or trustee*>> personal representative upon the same trusts as are applicable to that share.

(2) For the purposes of this section "trust" extends to the duties of a personal representative <<*and "trustee" has a corresponding meaning*>>.

#### **75 Liability of an assignee**

(1) The liability of the assignee of the property of a bankrupt, who is registered as the holder of a share which is comprised in the property of the bankrupt, shall, in respect of that share, not exceed the value of any property of the bankrupt which, at the time when any demand is made for the satisfaction of any such liability, is vested in the assignee.

(2) In this section, "assignee" means the assignee in whom the property of a bankrupt is vested pursuant to the Insolvency Act 1967.

### *Powers of shareholders*

#### **76 Exercise of powers reserved to shareholders**

Powers reserved to the shareholders of a company by this Act or by the constitution may be exercised either at a meeting of shareholders pursuant to sections 90 [Annual meetings of shareholders] and 91 [Special meetings of shareholders], or by a resolution in lieu of meeting pursuant to section 92 [Resolution in lieu of meeting].

#### **77 Simple majority of shareholders to exercise powers**

Unless otherwise specified in this Act or the constitution of a company, any power reserved to shareholders may be exercised by an ordinary resolution, being a simple majority of the votes of those shareholders entitled to vote and voting on the matter.

#### **78 Powers exercised by special resolution**

(1) Notwithstanding any provision in the constitution of a company, when shareholders exercise a power

(a) to approve any alteration of to the constitution; or

(b) to approve a major transaction; or

(c) to approve an amalgamation; or

(d) to approve the liquidation of the company; that power may be exercised only by a special resolution.

(2) Any decision made by a special resolution pursuant to subsection (1) may be rescinded only by a special resolution.

#### **78A Unanimous assent to company action**

**(1) Subject to section 42(1) [Board may authorise a distribution], a company may, where all entitled persons have so agreed to concur in so doing**



(a) issue shares other than in accordance with pre-emptive rights, and for such consideration as the Board thinks fit; or

(b) acquire or redeem any shares issued by the company; or

(c) give financial assistance for the purpose of or in connection with the purchase of share issued or to be issued by the company; or

(d) make a distribution to any shareholder; or

(e) enter into a transaction in which a director is interested, where that interest is known to each interested person; or

(f) make a payment to a director by way of remuneration or ban. or guarantee debts incurred by a director, or enter into a contract to make such a payment or give such a guarantee.

(2) The provisions specified in the Sixth Schedule do not apply in relation to any action taken by a company or its board to which subsection (1) applies.

## **79 Management review by shareholders**

Notwithstanding section 98 [Management of company] or any provision in the constitution of a company

(a) any shareholder may question or discuss the management of a company at a meeting of shareholders of the company; and

(b) a meeting of shareholders may pass a resolution relating to the management of a company (with every shareholder of the company having one vote per share), but no such resolution shall be binding on the board unless this Act or the constitution of the company expressly provides otherwise.

## **80 Liability of shareholders in respect of exercise of powers**

(1) A shareholder voting on the exercise of any of the powers set out in section 26(2)(a) [Rights attached to shares] or on resolution for the purposes of section 88(1) [Alteration of shareholder rights] does not owe any duty to the company or to any other person and

does not incur any liability in respect of the exercise of or failure to exercise votes to which that shareholder is entitled.

(2) If the constitution of a company

(a) confers any power on shareholders which would otherwise fall to be exercised by the board; or

(b) requires any director or the board to exercise or refrain from exercising a power in accordance with a decision or direction of shareholders; the shareholders who vote on or control

(c) the exercise of that power; or

(d) the decision or direction that the power should be or should not be exercised; are deemed to be directors for the purposes of sections 101 to 107.

(3) Nothing in this section affects any liability arising out of a contract or other obligation expressly entered into by a shareholder.

### *Minority buy-out rights*

## **81 Minority buy-out rights**

Where

(a) a shareholder is entitled to vote on the exercise of one of the powers set out in

(i) section 78(1)(a) [Powers exercised by special resolution], and the proposed alteration removes any restriction on the activities of the company; or

(ii) section 78(1)(b) and (c) [Powers exercised by special resolution]; and

(b) he or she cast all the votes <<to which he or she was entitled>> attached to shares registered in his or her name and with the same beneficial owner against the exercise of the power; and

(c) the shareholders resolve pursuant to section 78 [Powers exercised by special resolution] to exercise the power;

that shareholder is entitled to require the company to purchase <<his or her>> those shares, in accordance with section 82 [Procedure for buy-out].

## **82 Procedure for buy-out**

(1) Any shareholder entitled to require the company to purchase shares by virtue of section 81 [Minority buy-out rights] or section 88 [Alteration of shareholder rights] may within 10 working days of the announcement of the result of the vote in question or the company becoming entitled to take the action, as the case may be, give a written notice to the company requiring it to purchase all <<his or her>> those shares <<in the company>>.

(2) Within 20 working days of receiving a notice under subsection (1), the board must either

(a) agree to the purchase of the shares by the company; or

(b) arrange for some other person to agree to purchase the shares; or

(c) apply to the Court for an order exempting the company from minority buy-out under section 85 [Exemption from buy-out] or section 86 [No buy-out if insolvent]; or

(d) arrange for the resolution to be rescinded, in accordance with section 78(2) [Powers exercised by special resolution], or decide in the appropriate manner not to take the action concerned, as the case may be.

## **83 Purchase by company**

(1) If the board agrees to purchase shares in accordance with section 82(2)(a) [Procedure for buy-out], the company must pay a fair and reasonable price for the shares.

(2) Within five working days of agreeing to purchase shares, the board must nominate a fair and reasonable price for the shares to be acquired, and must give notice of the price to the holders of those shares.

(3) If a shareholder considers that the price nominated by the board is not fair and reasonable, he or she must forthwith give notice of objection to the company.

(4) If within 10 working days of giving notice to shareholders under subsection (2), no objections to the price had been received by the company, the company must purchase all the shares concerned at the nominated price.

(5) If within 10 working days of giving notice to shareholders under subsection (2), an objection to the price has been received by the company, the company must

(a) refer the price to arbitration forthwith; and

(b) within five working days, pay an interim price in respect of each share equal to the price nominated by the board.

(6) Any reference to arbitration under this section is deemed to be a "submission" for the purposes of the Arbitration Act 1908.

(7) The arbitrator must expeditiously determine a fair and reasonable price for the shares to be purchased. If the price determined equals or exceeds the interim price, the company must purchase the share at the price determined, and must forthwith pay any balance owing to shareholders. If the price determined is less than the interim price paid, the company must purchase the shares at the price determined, and may recover the excess paid to shareholders.

(8) The arbitrator may award interest on any balance payable or excess to be repaid under subsection (7) at such rate as he or she thinks fit taking into account the reasonableness of the interim price paid and of the reference to arbitration, and may provide for interest to be paid to or payable by some or all of the shareholders whose shares are to be purchased.

#### **84 Purchase by third party**

(1) If the company arranges for another person to agree to purchase shares in accordance with <<subsection 78(2)(b) [Powers exercised by special resolution]>> section 82(2)(b) [Procedure for buy-out], that person must agree to purchase the shares at a fair and reasonable price.

(2) The price to be paid by the purchaser shall be determined under section 83 [Purchase by company], as if the company were to purchase the shares, save that

(a) any payment which that section requires to be made by the company must be made by the third party; and

(b) the shares must be purchased by the third party and not by the company; and

(c) any excess paid to shareholders may be recovered by the third party and not by the company.

(3) The company must indemnify the holders of the shares to be purchased in respect of any failure by the intended purchaser to purchase the shares at the price nominated or fixed by the arbitrator, as the case may be.

## **85 Exemption from buy-out**

(1) Where a shareholder seeks to exercise minority buy-out rights, a company may apply to the Court for an order that it should be exempted from the requirement to purchase his or her shares on the grounds that

(a) such a purchase would be disproportionately damaging to the company; or

(b) the company cannot reasonably be required to fund the repurchase; or

(c) the company 's notice was not given in good faith or was frivolous or vexatious.

(2) Upon an application under this section, the Court may order the at the company should not purchase the shares, and may make such further order as it thinks fit, including, without limiting the generality of this provision, an order that

(a) any resolution of the shareholders be set aside;

(b) the company should refrain from taking or should take certain action;

(c) compensation be paid by the company to the shareholders affected;

(d) the company be put into liquidation.

(3) No company may seek an exemption from buy-out on the grounds set out in paragraphs (a) or (b) of subsection (1) unless it can satisfy the Court that it has made reasonable endeavours to arrange a sale of the shares to a third party.

## **86 No buy-out if insolvent**

<<(1) If

(a) one or more shareholders seek to exercise buy-out rights; and

(b) the company has made reasonable endeavours to arrange the purchase of their shares by a third party; and

(c) the board considers that if the company purchase these shares which are not to be purchased by a third party, it will not satisfy the solvency test; the board must apply to the Court for an order under this section.

(2) If an application is made under this section, the Court shall order that the company must not purchase the shares, and the Court may make such further order as it thinks fit, including without limiting the generality of this provision, any order that might be made under section 85(2) [Exemption from buy-out].>>

(1) If one or more shareholders seek to exercise buy-out rights, and the board considers that

(a) the company has made reasonable endeavours to arrange the purchase of shares by a third party; and

(b) if the company purchases those shares which are not to be purchased by a third party, it will not satisfy the solvency test; chased by a third party, it will not satisfy the solvency test; the board must apply to the Court for an order under this section.

(2) If an application is made under this section, and the Court is satisfied that there are reasonable grounds for the opinion of the board as to the matters referred to in subsection (1)(a) and (b), the Court shall order that the company must not purchase the shares, and the Court may make such further order as it thinks fit, including any order that might be made under section 85(2) [Exemption from buy-out].

### *Interest groups*

## **87 Classes and interest groups**

(1) In this Act

“class” means a class of shares <<comprising all those shares>> having attached to them identical rights, privileges, limitations and conditions;

“interest group”, in relation to any action or proposal affecting rights attached to shares, means an interest group of shareholders, and each interest group comprises the holders of shares

(a) whose affected rights are identical; and

(b) whose rights are affected by the action or proposal in the same way.

(2) In relation to any action or proposal there may be one or more interest groups, and each interest group will comprise the holders of shares of one or more classes, except where

(a) action is taken in relation to some holders of shares in a class and not others; or

(b) a proposal expressly distinguishes between some holders of shares in a class and other holders of shares in that class, in which case holders of shares in the same class may fall into two or more interest groups.

## **88 Alteration of shareholder rights**

(1) No action may be taken by a company which affects the rights attached to any shares unless that action has been approved by a special resolution of each interest group.

(2) For the purposes of subsection (1), the right attached to a share include

(a) the rights, privileges, limitations and conditions attached to the share by this Act or the constitution, including any voting rights and rights to distributions attached to the share;

(b) pre-emptive rights in accordance with section 36 [Pre-emptive rights];

(c) the right that any acquisition of shares by the company be made in accordance with section 50(1)(a) [Board may make offer to acquire shares], unless the constitution otherwise permits;

(d) the right to have the procedure set out in this section, and any further procedure required by the constitution for the amendment or alteration of rights, duly observed by the company;

(e) the right that any procedure required by the constitution for the amendment or alteration of rights not be amended or altered itself.

(3) For the purposes of subsection (1), the issue of further shares ranking equally with or in priority to existing shares, whether as to voting rights or distributions, is deemed to be action affecting the rights attached to the existing shares, unless

(a) the constitution of the company expressly permits the issue of further shares ranking equally with or in priority to those shares; or

(b) the issue is made in accordance with the shareholders' pre-emptive rights.

(4) Where an interest group by special resolution approves the taking of action by a company, and the company becomes entitled to take that action, a shareholder belonging to that interest group who <<voted>> cast all the votes attached to shares registered in his or her name with the same beneficial owner against approval of the action is entitled to require the company to purchase <<the>> those shares <<voted by him or her,>> pursuant to section 82 [Procedure for buy-out].

## **89 Failure to seek interest group approval**

If action is taken by a company which required the approval of an interest group under section 88 [Alteration of shareholder rights], and that approval was not obtained, that action

(a) is not for that reason invalid; but

(b) is deemed to be conduct which is unfairly prejudicial to the members of that interest group, and the court is not precluded by paragraph (a) from setting it aside.

### *Meetings of shareholders*

## **90 Annual meetings of shareholders**

The board of a company must call an annual meeting of all shareholders to be held



(a) not later than six months after <<the>> each balance date <<in each calendar year>> of the company; and

(b) at a time such that not more than 15 months will elapse between one annual meeting and the following annual meeting.

## **91 Special meetings of shareholders**

(1) A special meeting of shareholders entitled to vote on one or more issues may be called to consider those issues at any time by the directors or any other person authorised to do so by the constitution.

(2) Such a meeting must be called by the board upon a request being made by written notice to the board signed by persons holding the right to exercise not less than 5 percent of the votes entitled to be cast on the issues set out in the notice as to be discussed at the special meeting.

## **92 Resolution in lieu of meeting**

(1) A resolution in writing signed by all the shareholders entitled to vote on that resolution at a meeting of shareholders is a valid as if it had been passed at a meeting of those shareholders.

(2) A resolution in writing dealing with all matters to be dealt with at a meeting of shareholders, and signed by all the shareholders entitled to vote at the meeting, satisfies all the requirements of this Act relating to meetings of shareholders.

## **93 Meeting called by Court**

If for any reason

(a) it is impracticable to call a meeting of shareholders in the manner prescribed by this Act or the constitution or to conduct the meeting in the manner prescribed; or

(b) it is in the opinion of the Court in the interests of the company that a meeting be held; the Court may, on application by a director, shareholder or creditor of a company, order a meeting to be called or conducted in such manner as the Court directs and upon

such terms as the costs of the meeting and as to security for those costs as the Court may think fit.

#### **94 Proceedings at meetings**

The provisions set out in the First Schedule govern proceedings at meetings of shareholders.

##### *Date for determining shareholder entitlements*

#### **95 Determination of shareholders entitled to receive distributions, attend meetings etc**

(1) For the purpose of determining shareholders

(a) entitled to receive a distribution; or

(b) entitled to pre-emptive rights in respect of an issue; or

(c) for any other purpose except the right to receive notice of or to vote at a meeting, the board may fix in advance a date on which the shareholders of the company are to be determined, provided that the date fixed may not precede by more than 40 working days the particular action to be taken.

(2) For the purpose of determining shareholders entitled to receive notice of a meeting of shareholders, the board may fix in advance a date on which shareholders of the company are to be determined, provided that the date fixed may not precede by more than 40 working days or by less than 15 working days the date on which the meeting is to be held.

(3) If no date is fixed by the board under subsections (1) and (2)

(a) the date for the determination of shareholders entitled to receive notice of a meeting of shareholders shall be

(i) at the close of business on the day immediately preceding the day on which the notice is given; or

(ii) if no notice is given, the day on which the meeting is held; and

(b) the date for the determination of shareholders for any purpose except determining the right to receive notice of or to vote at a meeting shall be at the close of business on the day on which the board passes the resolution relating thereto.

## PART 7

### DIRECTORS AND THEIR POWERS AND DUTIES

#### **96 Meaning of "director"**

(1) In this Act, the term "director", in relation to a company, includes

(a) any person occupying the position of director of the company by whatever name called; and

(b) for the purposes of sections <<97,>> 101 to 110, 112, 113, <<and>> 226, 209 and 282,

(i) a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act; and

(ii) a person who is entitled to exercise or control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the board; and

(c) for the purposes of sections 101 to 113 and 226, any person to whom any power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, and any person who exercises any such power or duty with the consent or acquiescence of the board; and

(d) for the purposes of sections 112 [Use of company information or opportunity] and 113 [Directors' share dealings]

(i) a person in accordance with whose directions or instructions a person referred to in paragraphs (a) to (c) may be required or is accustomed to act in respect of his or her duties and powers as director; and

(ii) any employee of the company to the extent that he or she receives information concerning the company or its activities on the basis that it is to be kept confidential.

(2) Paragraphs (b) to (d) of subsection (1) do not include a person to the extent that the person acts only in a professional capacity.

## **97 Meaning of "board"**

In this Act, the terms "board" and "board of directors", in relation to a company, mean

(a) directors of the company of a number not less than the required quorum, acting together as a board of directors; or

(b) if the constitution provides that a company has only one director, that director.

### *Powers of management*

## **98 Management of company**

The business and affairs of a company shall be managed by or under the direction of the board of the company who shall have all powers necessary for that management except to the extent that the constitution of this Act expressly requires those powers to be exercised by the shareholders or any other person.

## **99 Major transactions**

(1) Subject to its constitution, a company may not enter into a major transaction (as defined in subsection (2)) unless the transaction is

<<(a) of a kind expressly permitted by the constitution of the company; or>>

<<(b) >> approved by special resolution or contingent upon approval by special resolution.

(2) In this section

"assets" includes property of any kind, whether tangible or intangible;

"major transaction" in relation to a company, means

(a) the acquisition of (or an agreement to acquire, whether contingent or otherwise) assets equivalent to the greater part of the assets of the company before the acquisition;

or

(b) the disposition of (or an agreement to dispose of, whether contingent or otherwise) the whole the greater part of the assets of the company.

### **100 Delegation of powers**

(1) Subject to this Act and to any restrictions in the constitution of the company, the board of a company may delegate, either formally or informally (including by course of conduct),<sup>1</sup> to a committee of directors, any director or employee of the company, or any other person any one or more of its powers other than its powers under the following sections:

- (a) section 17 [Registered names]
- (b) section 34 [Issue decided on by board]
- (c) section 39 [Consideration for issue to be decided on by board]
- (d) section 42 [Board may authorise a distribution]
- (e) section 44 [Shares in lieu of dividend options]
- (f) section 45 [Shareholder discounts]
- (g) section 50 [Board may make offer to acquire shares]
- (h) section 51 [Special offers to acquire shares]
- (i) section 58 [Financial assistance]
- (j) section 59 [Special financial assistance]
- (k) section 64(4) [Transfer of shares]
- (l) section 146 [Change of registered office]
- (m) section 151 [Change of address for service]
- (n) section 190 [Manner of approving amalgamation proposal]
- (o) section 191 [Short form amalgamation].

(2) A board that delegates any power under subsection (1) is responsible for every exercise of the power by the delegate, as if the power was exercised by the board, unless the board

(a) believes on reasonable grounds at all times before the exercise of the power that the delegate will exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and

(b) has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

### *Directors' duties*

#### **101 Fundamental duty**

(1) The fundamental duty of every director of a company, when exercising powers or performing duties as a director, is to act

(a) in good faith; and

(b) in a manner that he or she believes on reasonable grounds is in the best interests of the company, except insofar as this obligation is limited by the constitution in accordance with subsection (2).

(2) The constitution of a company may provide that a director may, when exercising powers or performing duties as a director, act in a manner which he or she believes on reasonable grounds is in the best interests of a shareholder or group of shareholders, or any other entitled persons, notwithstanding that such action may not be in the best interests of the company.

#### **102 Existing shareholders**

A director of a company must not, when exercising powers or performing duties as a director, act or agree to the company acting in a manner that unfairly prejudices or unfairly discriminates against any existing shareholder of the company, unless the director

(a) believes on reasonable grounds that the duty set out in section 101(1) [Fundamental duty] requires him or her to do so; or

(b) is acting in accordance with provision in the constitution which permits him or her to act in a manner which he or she believes on reasonable grounds is in the best interests of another shareholder, or group of shareholders, or any other entitled persons.

### **103 Creditors and employees**

A director of a company may, when exercising powers or performing duties as a director, have regard to the interests of creditors and employees of the company, but nothing in this section limits the duties or obligations of directors set out in this Act.

### **104 Compliance with constitution and this Act**

A director of a company must not act or agree to the company acting in a manner that contravenes the constitution of the company or this Act.

### **105 Solvency**

(1) A director of a company must not agree to the company entering into a contract or arrangement or acting in any other manner unless he or she believes at that time on reasonable grounds that the act concerned does not involve an unreasonable risk of causing the company to fail to satisfy the solvency test.

(2) A director of a company must not agree to the company incurring an obligation unless he or she believes at that time on reasonable grounds that the company will be able to perform the obligation when required to do so.

### **106 Standard of care of directors**

Every director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence and skill reasonably to be expected of a director acting in like circumstances.

### **107 Use of information and advice**

Every director of a company, when exercising powers or performing duties as a director, may accept as correct, reports, statements, financial data and other information

prepared, and professional or expert advice given, by any of the following persons to the extent only that the director acts in good faith, after reasonable inquiry when the need for inquiry is indicated by the circumstances, and without knowledge that would cause such acceptance to be unwarranted:

(a) any employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;

(b) any professional or expert person in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence;

(c) any other director, or committee of directors upon which the director did not serve, in relation to matters within the director's or committee's designated authority.

#### *Self-interested transactions*

### **108 Meaning of "interested"**

(1) Subject to subsection (2), for the purposes of this Act, a director of a company is to be treated as interested in a transaction to which the company is a party if and only if the director

(a) is a party to or will or may derive a material financial benefit from the transaction; or

(b) has a material financial interest in another party to the transaction; or

(c) is a director, officer or trustee of another party to, or person who will or may derive a material financial benefit from the transaction (not being a party or person that is a related company of the company); or

(d) is the parent, child, or spouse of another party to, or person who will or may derive a material financial benefit from, the transaction; or

(e) is otherwise directly or indirectly materially interested in the transaction.

(2) For the purposes of this Act, a director of a company is not to be treated as interested in a transaction to which the company is a party if the transaction comprises only the giving by the company of any security to a third party which is unconnected with the director, at the request of the third party, in respect of a debt or obligation of the



company for which the director or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.

(3) Sections 109 [Disclosure of interest] and 110 [Transactions may be avoided] do not apply

(a) to any remuneration or other benefit given to a director in accordance with section 124 [Remuneration and other benefits]; or (b) to any indemnity given or insurance provided in accordance with section 125 [Indemnity and insurance].

### **109 Disclosure of interest**

(1) A director of a company who is interested in a transaction or proposed transaction with the company, must forthwith after becoming aware of the transaction or proposed transaction cause to be entered in the interests register, and disclose to the board of the company, the nature and extent of the director's interest.

(2) For the purposes of subsection (1), a general notice entered in the interests register or disclosed to the board to the effect that a director is a shareholder, director, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person, is a sufficient disclosure of interest in relation to any such transaction.

(3) A failure by a director to comply with subsection (1) does not affect the validity of any transaction entered into by the company or the director, but the director may be convicted of an offence under section 277(2) [Failure to comply with Act].

### **110 Transactions may be avoided**

(1) A transaction entered into by the company in which a director of the company is in any way interested may be avoided by the company within three months of the transaction being disclosed to all the shareholders (whether by means of the company's annual report or otherwise), unless the company receives fair value under the transaction.

(2) For the purposes of subsection (1), the question whether a company receives fair value under a transaction shall be determined on the basis of the information known to the company and to the interested director at the time the transaction is entered into.

(3) If a transaction is entered into by the company in the ordinary course of its business and on usual terms and conditions, the company is presumed to receive fair value under the transaction.

(4) For the purpose of subsection (1)

(a) where a person seeking to uphold a transaction knew of the director's interest at the time the transaction was entered into, the onus of establishing fair value is on that person;

(b) in any other case, the company has the onus of establishing that it did not receive fair value.

(5) Subject to subsection (1) and to the constitution of a company, no transaction entered into by the company in which a director is interested shall be liable to be avoided, nor shall any director be liable to account to the company for any profit realised by any such transaction by reason only of such interest.

(6) The avoidance by a company of any transaction under this section does not affect the title or interest of a person in property which that person has acquired

(a) from a person other than the company; and

(b) for valuable consideration; and

(b) without knowledge of the circumstances of the transaction under which the second-mentioned person acquired the property from the company.

### **111 Interested director may vote etc**

Subject to the constitution of a company, a director of the company who is interested in a transaction entered into or to be entered into by the company may

(a) vote in respect of the transaction; and

(b) attend any meeting of directors and be included amongst the directors present for the purpose of a quorum; and

(c) sign any documents relating to the transaction on behalf of the company; and

(d) do any other thing in his or her capacity as a director in relation to the transaction as if he or she was not so interested.

## **112 Use of company information or opportunity**

(1) Where a director of a company has information in his or her capacity as a director or employee of the company (being information that would not otherwise be available to him or her), the director must not disclose that information to any person, or use or act on the basis of that information, other than

(a) for the purposes of the company; or

(b) as required by law; or

(c) in accordance with subsection (2) or subsection (3); or

(d) in accordance with section 109 [Disclosure of interest].

(2) A director of a company may disclose any information to any person who is named in the interests register as a person in accordance with whose directions or instructions the director may be required or is accustomed to act in respect of his or her duties and powers as director.

(3) A director of a company may disclose, use, or act on the basis of any information if particulars of such disclosure, use, or act are entered in the interests register and the director is authorised to do so by the board and the company receives fair value in respect of the disclosure, use, or act.

(4) In this section, the term "director" includes the persons referred to in section 96(1)(d) [Meaning of "director"].

## **113 Director's share dealings**

(1) A director of a company who acquires or disposes of shares or other securities issued by the company or a related company, or a direct or indirect interest in such shares or other securities, must

(a) forthwith after the acquisition or disposal is made, disclose to the board the number and type of shares acquired or disposed of, the consideration paid or received therefor and the date of acquisition or disposal; and

(b) ensure that particulars of the acquisition or disposal are forthwith entered in the interests register.

(2) Where a director of a company has information in his or her capacity as a director or employee of the company or a related company (being information that would not otherwise be available to him or her) and that information is material to an assessment of the value of the shares or other securities issued by the company or a related company, the director may acquire or dispose of any such shares or other securities, or a direct or indirect interest therein, only if

(a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the securities or interest acquired; or

(b) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the securities or interest disposed of.

(3) For the purposes of subsection (2), the fair value of any securities or interest therein is to be arrived at on the basis of all information known to the director or publicly available.

(4) Subsection (2) shall not apply in respect of any security or interest acquired or disposed of by a director only as a nominee for the company or any related company.

(f) For the purposes of this section and without limiting the meaning of the term "interest", a director of a company has an interest in securities if another body corporate holds or has an interest in them and either

(a) that body corporate, or its board, are accustomed or required to act in accordance with the director's directions or instructions; or

(b) the director is entitled to exercise or control the exercise of one-third or more of the voting power at a meeting of that body corporate.

(6) In this section, the term "director" includes the persons referred to in section 96(1)(d) [Meaning of "director"].

### *Appointment and removal of directors*

#### **114 Number of directors**

Every company must have at least one director.

#### **115 Qualifications of directors**

(1) Any natural person who is not disqualified by subsection (2) may be appointed as a director of a company.

(2) The following persons are disqualified from becoming or remaining as a director of a company:

(a) anyone who is under 20 years of age;

(b) anyone who is an undischarged bankrupt;

(c) unless the leave of the Court is obtained, anyone who has been convicted after the commencement of this Act and in the immediately preceding five years of <<an offence<<:

(i) an offence under this Act, the Companies Act 1955, or the Securities Act 1978; or

(ii) the crime involving dishonesty as defined in section <<3(1)>> 2(1) [Interpretation] of the Crimes Act 1961, unless the leave of the Court is obtained;

(d) anyone who is subject to a disqualification order made under section 282 [Disqualification of director] or under the Companies Act 1955;

(e) anyone who is subject to a property order made under section 30 or section 31 of the Protection of Personal and Property Rights Act 1988;

(f) in relation to any particular company, a person who does not comply with any qualification for directors contained in the constitution of that company;

(g) any person who is not a natural person.

(3) Any person who is disqualified from being a director but nevertheless acts as a director shall be a director for the purposes of any provision of this Act imposing liability on directors.

### **116 Director's consent required**

No person shall be appointed as a director of a company unless he or she has signed a consent to act as such in the prescribed form.

### **117 Appointment of first and succeeding directors**

(1) Every person named as a director in an application for incorporation or registration or an amalgamation proposal is a director from the date of incorporation or registration until the person ceases to hold office as such in accordance with this Act.

(2) Subject to the constitution of a company succeeding directors of the company shall be appointed by ordinary resolution.

(3) If

(a) there are no directors of a company, or the number of directors is less than the quorum required for a meeting of the board; and

(b) it is not possible or practicable to appoint directors in accordance with the company's constitution any shareholder or creditor of the company may apply to the Court to appoint one or more persons as directors of the company, and the Court may make any such appointment if it considers that it is in the best interest of the company to do so, and on such terms and conditions as the Court thinks fit.

### **118 Appointment of directors to be voted on individually**

(1) Subject to the constitution of a company, a motion at a meeting of shareholders for the appointment of two or more persons as directors of the company by a single resolution

may not be made unless a resolution that it shall be so made has first been passed without any vote being given against it.

(2) A resolution moved in contravention of subsection (1) is void, whether or not its being so moved was objected to at the time, provided that

(a) this subsection shall not be taken as excluding the operation of section 121 [Validity of director's acts];

(b) where a resolution so moved is passed, no provision of the automatic reappointment of retiring directors in default of another appointment shall apply.

(3) Nothing in this section shall be deemed to prevent the election of two or more directors by ballot or poll.

### **119 Removal of directors**

Subject to the constitution of a company, any director of the company may be removed by ordinary resolution passed at a meeting called for the purpose or for purposes including that removal, and the purpose of removal must be stated in notice of the meeting.

### **120 Director ceasing to hold office**

(1) An office of director of a company is vacated if the person holding that office

(a) resigns in accordance with subsection (2); or

(b) is removed from office in accordance with this Act or the constitution of the company; or

(c) become disqualified from being a director pursuant to section 115 [Qualifications of directors]; orations of directors]; or

(d) dies; or

(e) otherwise vacates office in accordance with the constitution of the company.

(2) A director of a company may resign office as such by signing a written notice of resignation and delivering it to the address for service of the company and any such

notice shall be effective from the time of receipt at the address for service of the company or from such later time as is specified in the notice.

(3) Notwithstanding vacation of an office of director, a person who held that office remains liable under the provisions of this Act imposing liabilities on directors, in relation to all acts done and decisions made while that person was a director.

### **121 Validity of director's acts**

The acts of any person as director are valid notwithstanding any defect that may afterwards be discovered in the person's appointment or qualification.

### **122 Notification to Registrar of directors**

(1) The board of a company must ensure that, within 20 working days of a change in directors of the company, notice of the change in the prescribed form is received by the Registrar.

(2) A notice to the Registrar of a change in directors of the company must

(a) include the full name and residential address of every person who is a director of the company from the date of the notice; and

(b) have attached the consents to act of any new directors under section 116 [Director's consent required].

(3) If the board of a company fails to comply with subsection (1) or (2), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

### *Miscellaneous provisions relating to directors*

### **123 Proceedings of board**

Subject to the constitution of a company, the provisions set out in the Second Schedule govern proceedings of the board of the company.

### **124 Remuneration and other benefits**



(1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise

(a) the making of payments by the company to a director by way of remuneration for his or her services as such or in any other capacity or by way of compensation for loss of office; and

(b) the making of payments by the company to a director by way of loan; and

(c) the giving of guarantees by the company for debts incurred by directors; and

(d) entry into a contract to do any of the things set out in paragraphs (a), (b) and (c); provided that the board is satisfied that the making of such payments or giving of such guarantees is fair to the company and particulars of the payment to or guarantee for the benefit of, or contract with, that director are entered in the interests register.

(2) The payment of remuneration, or any other benefit given to a director in accordance with a contract authorised under subsection (1) need not be separately authorised under subsection (1).

(3) Directors who vote in favour of authorising a payment or guarantee or contract under subsection (1) must sign a certificate that in their opinion the making of the payment or giving of the guarantee or entry into the contract is fair to the company.

(4) Where a payment is made or guarantee given to which subsection (1) applies and either

(a) the procedures set out in subsections (1) and (3) have been followed; or

(b) there did not exist reasonable grounds for the opinion set out in the certificate given under subsection (3); the director to whom the payment is made or in respect of whom the guarantee is given, is personally liable to the company for the amount of the payment, or any amount paid by the company under the guarantee, except to the extent to which he or she proves that the payment or the guarantee was fair to the company at the time it was made or given.

## **125 Indemnity and insurance**

(1) Except as provided in this section, no company may indemnify <<, or provide insurance for,>> any director or employee of the company in respect of any liability or costs incurred by him or her in any proceedings, and any indemnity given <<or insurance provided>> in breach of this section is void.

(2) A company may, if expressly authorised to do so by its constitution, indemnify <<or provide insurance for>> a director or employee of the company in respect of any costs incurred by him or her in any proceedings

(a) brought by the company against the director or employee in that capacity; and

(b) in which judgement is given in his or her favour, or he or she is acquitted, or relief is granted to him or her under section 1137, [Court may grant relief].

(3) A company may indemnify <<or provide insurance for>> a director or employee of the company in respect of any liability or costs incurred by him or her in any proceedings

(a) brought by any person other than the company against the director or employee in that capacity; and

(b) which do not result from a failure by the director or employee act in good faith in a manner that he or she believes on reasonable grounds to be in the best interests of the company.

(3A) Nothing in this section prevents a company from providing insurance for a director or employee in respect of any liability or costs incurred by him or her in any proceedings.

(4) The board of a company shall ensure that particulars of every indemnity given to insurance provided for any director or employee of the company shall forthwith be entered in the interests register.

(5) In this section

``director" includes a former director;

``employee" includes a former employee;

“indemnify” includes relieve or excuse from liability, whether before or after the liability arises;

“proceedings” includes civil, criminal and administrative proceedings.

## PART 8

### ENFORCEMENT

#### **126 Injunction to restrain action**

(1) Where a company or the board proposes to engage in any conduct that contravenes the constitution of the company or the Act, the company or any director, shareholder or other entitled person, or any creditor of the company may apply to the Court for an order restraining the company or the director, as the case may be, from so acting.

(2) Where the Court grants an order under subsection (1), it may grant such consequential relief as it thinks proper.

(3) No order may be made under this section in respect of any conduct or course of conduct that has been completed at the time the order is to be made.

#### **127 Derivative actions**

(1) Subject to subsection (2), a shareholder or director of a company may apply to the Court for leave to bring any proceedings in the name of and on behalf of the company or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the proceedings on behalf of the company or subsidiary, as the case may be.

(2) No proceedings may be brought and no intervention in proceedings may be made under subsection (1) unless the Court is satisfied that either

(a) the company or subsidiary does not intend to bring, diligently prosecute, defend or discontinue the proceedings, and it appears to be in the interest of the company or its subsidiary that the proceedings be brought, prosecuted, defended or discontinued; or

(b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.

(3) Notice of application for the leave for the Court under subsection (1) must be served on the company or subsidiary, which may appear and oppose the application, and which must advise the Court whether it intends to bring, prosecute, defend, or discontinue the proceedings.

(4) Save as provided in subsection (1), no shareholder shall be entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary.

### **128 Cost of derivative action to be borne by company**

(1) Subject to subsection (2), where leave is granted under section 127 [Derivative actions] the Court may from time to time order that the whole or any part of the reasonable costs of bringing or intervening in the proceedings shall be borne by the company

(2) The Court shall not make an order under subsection (1) in respect of the whole or part of the costs of the proceedings where it is of the opinion that it would be unjust or inequitable for the company to bear those costs.

(3) Any order made under subsection (1) may include an order that the company advance to the shareholder a sum in respect of costs to be incurred, on such terms and subject to the provision of such security for repayment as the Court may think fit.

### **129 Powers of Court where leave granted**

In connection with any proceedings brought or intervened in under section 127 [Derivative actions] the Court may at any time make any order it thinks fit including, without limiting the generality of this provision, an order

(a) authorising the shareholder or any other person to control the conduct of the action;

(b) giving directions for the conduct of the action;

(c) requiring the company, or the directors, to provide information or assistance in relation to the action;

(d) directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present shareholders of the company or its subsidiary instead of to the or subsidiary.

### **130 Compromise or settlement of derivative action**

No proceedings brought or intervened in under section 127 [Derivative actions] may be settled or compromised without the approval of the Court, which upon granting approval may make such order as it thinks fit as to costs, including an order requiring a shareholder to repay some or all of any sums advanced under section 128(3) [Cost of derivative action to be borne by company].

#### *Personal actions*

### **131 Personal action by shareholder against directors**

(1) A shareholder may bring an action against a director in respect of any breach of a duty owed to him or her personally, but not

(a) in respect of a breach of a duty owed solely to the company; or

(b) where the only damage complained of is a diminution in or prevention of increase in the value of shares in the company as a result of loss suffered by or gain foregone by the company; except in accordance with section 127 [Derivative actions].

(2) Subject to subsection (3) the duties of directors set out in sections 68 [Directors' duty to supervise share register], 102 [Existing shareholders], 104 [Compliance with constitution and this Act] and 113 [Directors' share dealings] are duties owed to shareholders personally.

(3) The duties of directors set out in sections 48 [Cross-holdings], 101 [Fundamental duty], 105 [Solvency], 109 [Disclosure of interest] and 112 [Use of company information or opportunity] are duties owed solely to the company.

(4) Notwithstanding subsection (3), a shareholder may apply to the Court for an order requiring the directors of a company to take any action required to be taken by them under the constitution of this Act and, the Court may, if it is in all the circumstances just

an equitable to do so, make such an order and grant such consequential relief as it thinks fit.

### 132 Personal action by shareholder against company

(1) A shareholder may bring an action against the company in respect of any breach of a duty owed by the company to him or her personally.

(2) Notwithstanding subsection (1), a shareholder may apply to the Court for an order requiring the company to take any action required to be taken by it under its constitution or this Act, and the Court may, if it is in all the circumstances just and equitable to do so, make such an order and grant such consequential relief as it thinks fit.

### **133 Representative actions**

Where a shareholder brings an action against the company or a director, and other shareholders have the same or substantially the same interest in relation to the subject-matter of the action, the Court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest, and may make such order as it thinks fit including without limiting the generality of this provision, an order

(a) as to the control and conduct of the action;

(b) as to the costs of the action;

(c) directing the distribution of any amount adjudged payable by a defendant in the action among those shareholders represented.

### *Standing of Attorney-General*

### **134 Standing of Attorney-General**

The Attorney-General may, where it is in his or her opinion in the public interest to do so, make an application under section 126 [Injunction to restrain action], 127 [Derivative actions], 133 [Representative actions], 138 [Information for shareholders] or 139 [Investigation of records] as if he or she were a shareholder in the company concerned.

## *Prejudiced shareholders*

### **135 Prejudiced shareholders**

(1) Where the affairs of a company have been or are being or are likely to be conducted in a manner that is, or any act or acts of the company have been or are or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial, to a former or existing shareholder or other entitled person, he or she may apply to the Court for an order under this section.

(2) If on an application under this section the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this provision, and order

- (a) for the acquisition of the shareholder's shares by the company or any other person;
- (b) for the payment of compensation to any person by the company or any other person;
- (c) regulating the conduct of the company's affairs in future;
- (d) appointing a receiver of the company;
- (e) directing the rectification of the records of the company;
- (f) putting the company into liquidation.

<<(3) *Failure to comply with the procedure required by any of the following sections is deemed to be conduct which is unfairly prejudicial to all shareholders:*

- (a) *section 37 [Persons to whom shares may be issued];*
- (b) *section 39 [Consideration for issue to be decided on by board];*
- (c) *section 43 [Dividends];*
- (d) *section 50 [Board may make offer to acquire shares];*
- (e) *section 58 [Financial assistance];*
- (f) *section 99 [Major transactions].>>*

<<(4) Where directors have signed a certificate required by this Act, and there do not exist reasonable grounds for any opinion set out in the certificate, the signing of that certificate is deemed to be conduct which is unfairly prejudicial to all shareholders.>>

**135A Failure by directors to comply with Act**

(1) The company or any entitled person may apply to the Court for an order under this section where

(a) the board has failed to comply with the procedure required by any of the following sections:

(i) section 37 [Persons to whom shares may be issued];

(ii) section 39 [Consideration for issue to be decided on by board];

(iii) section 43 [Dividends];

(iv) section 50 [Board may make offer to acquire shares];

(v) section 58 [Financial assistance]; 58 [Financial assistance];

(vi) section 99 [Major transactions]; or

(b) a director has signed a certificate required by this Act, and there did not at the time it was signed exist reasonable grounds for any opinion set out in the certificate.

(2) If on an application under this section the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this provision, an order

(a) for the acquisition of shares by a director or any other person;

(b) for the payment of compensation to any person by a director or any other person;

(c) setting aside any action taken by 20 the company or the board in breach of this Act

(3) No order may be made against the company under subsection (2) unless it is a party to the proceeding in which the application is made.



## *Ratification of directors' acts*

### **136 Ratification of directors' acts**

(1) Where a director or the board has purported to exercise a power vested in the shareholders or in some other person or persons, the shareholders or that person or those persons may ratify the exercise of the power by the director or board in the same manner as would be required to exercise the power.

(2) Any purported exercise of power ratified under subsection (1) shall be deemed to be and always to have been a proper and valid exercise of that power.

(3) Except as provided in this section, ratification or approval by the shareholders or any other person or persons of any lawful act and shall not of itself preclude the Court from granting any relief or exercising any power which might, apart from such ratification or approval, be granted or exercised in relation to the act.

## *Relief of directors <<and auditors>>*

### **137 Court may grant relief**

(1) If, in any proceeding for negligence, default, breach of duty, or breach of trust against a director <<or auditor>> of the company, it appears to the Court hearing the case that the director <<or auditor>> is or may be liable in respect of the negligence, default, breach of duty, or breach of trust, but that he or she has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his or her appointment, he or she ought fairly to be excused for the negligence, default, breach of duty, or breach of trust, the Court may relieve him or her, either wholly or partly, from liability on such terms as the Court may think fit.

(2) Where any such director <<or auditor>> has reason to believe that any claim will or might be made against him or her in respect of any negligence, default, breach of duty, or breach of trust, he or she may apply to the Court for relief, and the Court on any such application shall have the same power to grant relief under this section as it would have had if it had been a Court before which proceedings had been brought against that person.

(3) Where any case to which subsection (10) of this section applies is being tried by a Judge with a jury, the Judge, after hearing the evidence, may, if he or she is satisfied that the defendant ought under that subsection to be relieved in whole or in part from liability, withdraw the case in whole or in part from the jury and direct judgment to be entered for the defendant on such terms as to costs or otherwise as the Judge may think proper.

### *Inspection of records*

#### **138 Information for shareholders**

(1) A shareholder may at any time make a written request to a company for information held by the company.

(2) The request must specify the information sought with sufficient particularity.

(3) Within 10 working days of receiving a request under subsection (1), the company must either

(a) provide the information; or

(b) agree to provide the information within a specified period;

(c) agree to provide the information within a specified period if the shareholder pays a specified charge to the company to meet the cost of providing the information, and explain how the specified charge is calculated; or

(d) refuse to provide the information, and give full reasons for the refusal.

(4) Where the company requires the shareholder to pay a charge for information, the shareholder may withdraw the request, and is deemed to have done so unless within 10 working days of receiving notification of the charge he or she informs the company that he or she will pay the charge.

(5) A shareholder aggrieved by the decision of a company in relation to a request for information may apply to the Court for relief on the grounds that (a) the period specified for providing the information is manifestly unreasonable

(b) the charge set by the company is manifestly unreasonable; or

(c) the refusal to provide information is manifestly unreasonable; and on an application under this subsection the Court may make such order as it thinks fit, including, without limiting the generality of this provision, an order

(d) as to the provision of the information; or

(e) as to the use that may be made of the information, and the persons to whom it may be disclosed; or

(f) as to the costs of the application.

(6) The company must meet the applicant's reasonable solicitor and own client costs in relation to an application under subsection (5), unless the Court orders otherwise.

### **139 Investigation of records**

(1) Where

(a) a shareholder or creditor of a company applies to the Court for an order appointing a suitable person to inspect records or other documents of the company; and

(b) The Court is satisfied that the shareholder or creditor is acting in good faith and that the inspection is to be made for a proper purpose; and

(c) the Court is satisfied that the person, at such time as is specified in the order, to inspect and to make copies of, or take extracts from, the records or other documents of the company or such of the records or documents of the company as are specified in the order and may make such ancillary order as it thinks fit, including an order that the accounts of the company be audited by that person.

(2) A person appointed by the Court under subsection (1) must diligently carry out the inspection and must make a full report to the Court.

(2A) The reasonable costs of the inspection shall be met by the company unless the Court orders otherwise.

(3) When the Court receives the report of an inspector in accordance with subsection (2), it may make such order in relation to the disclosure and use that may be made of records and information obtained as it thinks fit.

(4) An order of the Court made under subsection (3) may be varied from time to time.

(5) No person may disclose or make use of information or records obtained under this section other than in accordance with an order of the Court made under subsections (3) or (4). Any person who discloses or makes use of information or records obtained under this section other than in accordance with an order of the Court made under subsection (3) or (4) commits an offence, and is liable upon conviction to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding two years, or both.

(6) Every person who acts in contravention of subsection (5) may be convicted of an offence under section 277(2) [Failure to comply with Act].

## PART 9

### ADMINISTRATION OF COMPANIES

#### *Authority to bind a company*

#### **140 Method of contracting etc**

(1) A contract or <<*Subject to its constitution, contracts and*>> other enforceable obligation<<s>> may be entered into <<*on behalf of*>> by a company as follows:

(a) an obligation which if <<*made between*>> entered into by a natural persons<<s>> would by law be required to be by deed may be entered into on behalf of the company by

<<*(i) two or more directors of the company (or, if there is only one such director, by that director); or*

*(ii) one or more attorneys appointed by the company in accordance with section 141 [Attorneys];>>*

(i) two or more directors of the company; or

(ii) if there is only one director, by that director; or

(iii) any one director, or any other person or class of persons, if the constitution so provides; or

(iv) one or more attorneys appointed by the company in accordance with section 141 [Attorneys];

(b) any other obligation may be entered into on behalf of the company by any person acting under its authority, express or implied.

(2) Subsection (1) applies to a contract or other obligation (a) whether or not the contract or obligation was entered into in New Zealand; and

(b) whether or not the law governing the contract or obligation is the law of New Zealand.

### **141 Attorneys**

(1) Subject to its constitution, a company may be deed empower any person as its attorney either generally or in respect of any specified matters, and any act of the attorney in accordance with the deed binds the company.

(2) The provisions of Part XII of the Property Law Act 1952 apply, with the necessary modifications, with respect to any power of attorney executed by a company to the same extent as if the company were a natural person and as if the commencement of the liquidation or, if there is no liquidation, the removal from the register of the company were the death of a person within the meaning of that Part XII.

### **142 Dealings between company and other persons**

(1) A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with any person who has acquired any property, rights or interests from the company that

(a) the constitution of the company has not been complied with;

(b) the persons named as directors of the company in the most recent notice received by the Registrar under section 122 [Notification to Registrar of directors] are not the directors of the company;

(c) a person held out by the company as a director, employee or agent of the company has not been duly appointed, or has no authority to exercise a power that is customary in the operations of the company or usual for such director, employee or agent;

(d) a document issued on behalf of a company by any director, employee or agent of the company with actual or usual authority to issue the document is not valid or not genuine

*<<except where the person has or ought to have by virtue of his or her position with or relationship to the company knowledge to the contrary>>.*

(2) Subsection (1) applies where a person of the kind referred to in paragraphs (b) and (d) of that subsection acts fraudulently, unless the person dealing with the company or with any person who has acquired any property, rights or interests from the company has actual knowledge of the fraud.

#### **143 No constructive notice**

No person is affected by or deemed to have notice or knowledge of the contents of the constitution of, or any other document relating to, a company by reason only that the constitution or document is referred to in or forms part of the New Zealand registrar or is available for inspection at an office of the company.

#### **144 Pre-incorporation contracts**

(1) In this section, the term "pre-incorporation contract" means

(a) a contract purporting to be made by a company before its incorporation;

(b) a contract made by a person on behalf of a company before and in contemplation of its incorporation.

(2) Notwithstanding any enactment or rule of law, a pre-incorporation contract may be ratified within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the incorporation of the company in the name of which, or on behalf of which, it has been made. A contract so ratified shall, upon ratification, be valid and enforceable as if the company had been a party to the contract when it was made.

(3) A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company under section 140 [Method of contracting etc].

(4) Notwithstanding any enactment or rule of law, in a pre-incorporation contract, unless a contrary intention is expressed in the contract, there is an implied warranty by the person who purports to make the contract in the name of, or on behalf of, the company

(a) that the company will be incorporated within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the making of the contract; and

(b) that the company will ratify the contract within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the incorporation of the company.

(5) The amount of any damages recoverable in an action for breach of a warranty implied by virtue of subsection (4) shall be the same as the amount of damages that would be recoverable in an action against the company for damages for breach by the company of the unperformed obligations under the contract if the contract had been ratified and cancelled.

(6) Where a company after its incorporation does not ratify a pre-incorporation contract, any party to that contract may apply to the Court for an order (a) directing the company to return any property, whether real or personal, acquired pursuant to the contract to that party; or

(b) for any other relief in favour of that party respecting any such property; or

(c) validating the contract, whether in whole or in part; and the Court may, if it considers it just and equitable to do so, make an order or grant such relief as it thinks fit and whether or not an order has been made under subsection (5).

(7) In any proceedings against a company for breach of a pre-incorporation contract which has been ratified by the company, the Court may, on the application of the company, any other party to the proceedings, or of its own motion, make such order for

the payment of damages or other relief, in addition to or in substitution for any order which may be made against the company, against any person by whom that contract was made in the name of, or on behalf of the company, as the Court considers just and equitable.

(8) Where a company, after its incorporation, enters into a contract in the same terms as, or in substitution for, a pre-incorporation contract (not being a contract ratified by the company under this section), the liability of any person under subsection (4) (including any liability under an order made by the Court thereunder for the payment of damages) shall be discharged.

(9) Notwithstanding the Contracts (Privity) Act 1982, if a pre-incorporation contract has not been ratified by a company, or validated by the Court under subsection (6), the company may not enforce or otherwise take the benefit of that contract.

#### *Registered office*

### **145 Registered office**

(1) Every company must at all time have a registered office New Zealand.

(2) The registered office of a company at any time shall subject to section 146(2) [Change of registered office], be the place that is described as such on the New Zealand register at that time.

### **146 Change of registered office**

(1) Subject to the company's constitution and to subsection (2) the board of a company may change the registered office of the company at any time.

(2) No change of the registered office of a company has effect until at least five registration days after notice of the change in the prescribed form is entered on the New Zealand register, by the Registrar.

#### *Company records*

### **147 Company records to be kept**



*<<(1) Subject to subsection (2) every company must keep at its registered office, or at some other place in New Zealand, notice of which in the prescribed form has been registered by the Registrar, each of the following documents and information relating to the company:*

*(a) the constitutional documents referred to in section 22 [Every company has a constitution];*

*(b) minutes of all meetings and resolutions of shareholders within the last 10 years;*

*(c) the share register;*

*(d) an interests register;*

*(e) minutes of all meetings and resolutions of directors and directors' committees within the last 10 years;*

*(f) certificates given by directors under this Act within the last 10 years;*

*(g) the full names and addresses of the current directors;*

*(h) copies of all written communications to shareholders during the preceeding 10 years, including annual reports made under section 176 [Annual report to shareholders];*

*(i) the accounting records required by section 156 [Accounting records to be kept] in relation to the last 10 completed financial years of the company; (j) copies of all financial statements required by section 159 [Obligation to prepare financial statements for company] in relation to the last 10 completed financial years of the company.*

*(2) A company need not keep its accounting records at a place in New Zealand, but if it does not do so the board of the company must ensure that there shall be sent to, and kept at a place in New Zealand, such accounts and returns with respect to the operations of the company as will enclose with reasonable accuracy the financial position of the company at intervals not exceeding six months and will enable to be prepared in accordance with this Act the company's balance sheet, its profit and loss*

*account or income and expenditure account, and any other document giving information required by this Act.*

*(3) If a company fails to comply with subsection (1) or (2)*

*(a) the company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and*

*(b) every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board of company].>>*

(1) Subject to subsection (2) and to sections 66 and 156A, every company must keep at its registered office the following documents relating to the company:

(a) the constitutional documents referred to in section 22 [Every company has a constitution];

(b) minutes of all meetings and resolutions of shareholders within the last 10 years;

(c) an interests register;

(d) minutes of all meetings and resolutions of directors and directors' committees within the last 10 years;

(e) certificates given by directors under this Act within the last 10 years;

(f) the full names and addresses of the current directors;

(g) copies of all written communications to shareholders during the preceding 10 years, including annual reports made under section 176 [Annual report to shareholders];

(h) copies of all financial statements required by section 159 [Obligations to prepare financial statements for company] in relation to the last 10 completed financial years of the company;

(i) the accounting records required by section 156 [Accounting records to be kept] in relation to the last 10 completed financial years of the company;

(j) the share register.

(2) the records referred to in paragraphs (a) to (h) of subsection (1) may be kept at any place in New Zealand, notice of which is given to the Registrar in accordance with subsection (3).

(3) Where any records are not kept at the registered office of the company, or the place at which they are kept is changed, the company must ensure that within 10 registration days of their first being kept elsewhere or moved, as the case may be, notice is received by the Registrar of the places where the company's records are kept.

(4) If a company fails to comply with subsections (1) or (3)

(a) the company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and

(b) every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board of company].

#### **148 Form of records**

(1) All records of a company must be kept either in written form or so as to enable the documents and information to be readily accessible and readily convertible into written form.

(2) The board of a company must ensure at all times that adequate precautions are taken against falsification of the company's records, and for facilitating the discovery of any such falsification.

#### **149 Inspection of records by directors**

<<(1) *The board of a company must ensure that all records of the company are available in written form at all reasonable times for inspection without charge by any director of the company.*>>

(1) The board of a company must ensure that, where a director gives reasonable notice to the company of his or her desire to inspect any records or other documents of the company, those documents are made available to the director

(a) in written form; and

(b) without charge; and

(c) at any reasonable time specified by the director.

(2) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278(2) [Liability of director for failure by board or company].

### *Service of documents upon companies*

#### **150 Address for service**

(1) Every company <<shall>> must at all times have an address for service in New Zealand at which a document may be delivered to a director, employee or agent of the company at any time between 9.00 a.m. and 5.00 p.m. on any working day.

(2) An address for service may be the company's registered office or another place, but may not be a box or bag at a postal centre or document exchange.

(3) The address for service of a company at any time <<shall, subject to section 151(2) [Change of address for service], be>> is the place that is described as such in the New Zealand register at that time.

#### **151 Change of address for service**

(1) Subject to the company's constitution and to subsection (2) the board of a company may change the address for service of the company at any time.

(2) No change of the address for service of a company has effect until at least five registration days after notice of the change in the prescribed form is entered on the New Zealand register by the Registrar.

#### **152 Methods of service of documents**

(1) A summons, writ, claim, notice, order, or other document of similar nature may be served on a company as follows:

(a) by delivery to a director, employee or agent of the company at the company's address for service, or to a person who appears to be in charge of that place at the time of delivery; or

(b) if delivery in accordance with paragraph (a) is not practicable at the relevant time, by delivery to a director, employee or agent of the company at any place where the company carries on its operations, or to a person who appears to be in charge of that place at the time of delivery; or

(c) if delivery in accordance with paragraph (b) is not practicable at the relevant time, by posting the document to the company's address for service, or delivering it to a box at a document exchange which the company is then using.

(2) In addition to subsection (1), a particular document may be served on a company in a manner approved by the Court.

(3) Subsections (1) and (2) shall have effect notwithstanding any other Act or rule of law, but shall not limit section 153 [Agreements as to service].

### **153 Agreements as to service**

A company may agree with another person that service of a document on the company by that person may be made other than in accordance with section 152(1) [Methods of service of documents], and any such agreement is effective as between the company and that person.

### **154 Service by delivery**

For the purposes of section 152 [Methods of service of documents], where service of a document on a company is to be made by delivery to a natural person, service <<shall>> must be made

(a) by handing the document to the person; or

(b) if the person refuses to accept the document, by bringing the document to the attention of, and leaving it in a place accessible to, the person.

### **155 Service by post or document exchange**

(1) For the purposes of section 152 [Methods of service of documents], any document posted to a company, or delivered to a document exchange box or bag of the company, is deemed to be received by the company five working days (or such shorter period as the Court may determine in any particular case) after it is so posted or delivered.

(2) Improving service of any document on a company by post or by delivery to a document exchange for the purposes of section 152 [Methods of service of documents], it is sufficient to prove that the document was properly addressed to the company, that all postal or delivery charges were paid, and that the document was posted or delivered to the document exchange.

## PART 10

### ACCOUNTS AND AUDIT

#### *Accounting records*

#### **156 Accounting records to be kept**

(1) The board of a company must cause to be kept accounting records that

(a) correctly record and explain the transactions of the company; and

(b) from which the financial position of the company may be ascertained with reasonable accuracy at any time; and

(c) will enable the directors to ensure that any financial statements of the company comply with section 160 [Content of financial statements]; and

(d) will enable the financial statements to the company to be readily and properly audited.

(2) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

#### **156A Place of accounting records**

**(1) A company need not keep its accounting records at a place in New Zealand.**

(2) Where a company does not keep its accounting records in New Zealand

(a) the company must ensure that accounts and returns with respect to the operations of the company that

(i) disclose with reasonable accuracy the financial position of the company at intervals not exceeding six months; and

(ii) will enable the preparation in accordance with this Act of the company's financial statements and any other document required by this Act are sent to and kept at a place in New Zealand; and

(b) notice of the places where

(i) the accounting records; and

(ii) the accounts and returns required under paragraph (a) are kept must be given to the Registrar in accordance with section 147(2) [Company records to be kept].

(3) If a company fails to comply with subsection (2)

(a) the company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and

(b) every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board of company].

### *Financial statements for companies*

#### **157 Balance date of company**

(1) In this Act, the term "balance date" in regard to a company, means the close of the 31 March or of such other date as the board of the company adopts as the company's balance date.

(2) Every company shall have a balance date in every calendar year, except that

(a) if a company is incorporated after 31 March in any calendar year, it need not have a balance date in that year so long as its first balance date is no later than 30 June in the succeeding calendar year; and

(b) if a company changes its balance date, it need not have a balance date in a calendar year so long as the period between any two balance dates does not exceed 15 months.

### **158 Meaning of ``financial statements''**

In this Act, the term ``financial statements" means, in relation to a company and a balance date,

(a) a balance sheet for the company as at that balance date; and

(b) in the case of a company trading for profit, a profit and loss statement or the company in respect of the accounting period ending at that balance date; and

(c) in the case of a company not trading for profit, and income and expenditure statement for the company in respect of the accounting period ending at that balance date; and

(d) a statement of cash flows for the company in respect of the accounting period ending at that balance date together with any notes thereon or documents attached thereto giving information relating to the balance sheet or statement.

### **159 Obligation to prepare financial statements for company**

(1) The board of every company must ensure that, within three months of every balance date of the company, financial statements that comply with section 160 [Content of financial statements] are

(a) completed in respect of the company and that balance date; and

(b) signed on behalf of the board by two directors of the company (or, if there is then only one director, by that director).

(2) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278(8) [Liability of directors for failure by board or company].

### **160 Content of financial statements**



(1) The financial statements of a company shall give a true and fair view of the state of affairs, and the profit or loss (or income and expenditure) and the cash flows of the company as at the balance date, and for the accounting period, concerned.

(2) The onus of establishing that financial statements of a company comply with subsection (1) shall be that of the board of the company.

(3) Without limiting subsection (1), financial statements must comply with any regulations made under section 285 [Regulations] and any requirements applicable to the company under any other enactment.

### *Group financial statements*

#### **161 Meaning of "holding company" and "subsidiary"**

(1) For the purposes of this Act, and subject to subsection (3), a company is a subsidiary of another company if, but only if,

(a) that other company

(i) controls the composition of the board of the first-mentioned company; and

(ii) is entitled to receive more than half of every dividend paid by the first-mentioned company; and

(iii) is entitled to receive more than half of the surplus assets of the first-mentioned company; or

(b) the first-mentioned company is a subsidiary of any company which is that other company's subsidiary.

(2) For the purposes of subsection (1), the composition of a company's board shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove the holders of all or a majority of the directorships; and for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, namely:

(a) that a person cannot be appointed thereto without the exercise in his or her favour by that other company of such a power; or

(b) that a person's appointment thereto follows necessarily from his or her appointment as director of that other company.

(3) In determining whether one company is a subsidiary of another company

(a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to paragraphs (c) and (d) any shares held or power exercisable

(i) by any person or a nominee for that other company (except where that other company is concerned only in a fiduciary capacity); or

(ii) by a nominee for a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity, shall be treated as held or exercisable by that other company;

(b) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded;

(d) any shares held or power exercisable by, or by a nominee for, that other company or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other company if the ordinary business of that other company or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is exercisable as aforesaid by way of security only for the purpose of a transaction entered into the ordinary course of that business.

(4) For the purposes of this Act, a company is another company's holding company if, but only if, that other company is its subsidiary.

(5) In this section the expression "company" includes any body corporate.

## **162 Meaning of "group of companies"**

In this Act the term "group of companies" means a company and all its subsidiaries.

### **163 Balance date of group of companies**

(1) The board of a company shall ensure that, unless in the board's opinion there are good reasons against it, the balance date of each subsidiary of the company shall be the same as the balance date of the company.

(2) Where the balance date of the subsidiary of a company is not the same as that of the company, the balance date of the subsidiary for the purposes of any particular group financial statements shall be that preceding the balance date of the company.

### **164 Meaning of "group financial statements"**

(1) In this Act the term "group financial statements" means, in regard to a group of companies and a balance date

(a) a consolidated balance sheet for the group as at that balance date; and

(b) where any member of the group trades for profit, a consolidated profit and loss account for the group in respect of the accounting period ending on that balance date; and

(c) where no member of the group trades for profit, a consolidated income and expenditure statement for the group in respect of the accounting period ending on that balance date; and

(d) a consolidated statement of cash flows for the group in respect of the accounting period ending on that balance date; together with any notes thereon or documents attached thereto giving information relating to the balance sheet or statement.

(2) If a company's board is of the opinion that it is better for the purpose

(a) of presenting the same or equivalent information about the state of affairs, profit or loss (or income and expenditure), or cash flows of the company and its subsidiaries; and

(b) of so presenting it that it may be readily appreciated by the company's shareholders - the group financial statements for the company and its subsidiaries may be prepared in a form other than that required by subsection (1) and in particular may consist of more than one set of consolidated statements dealing respectively with the company and one

group of subsidiaries and with other groups or subsidiaries or of separate statements dealing with each of the subsidiaries, or of statements expanding the information about the subsidiaries in the company's own statements, or any combination of those forms.

(3) The group financial statements for a company and its subsidiaries may be wholly or partly incorporated in the company's own balance sheet and profit and loss (or income and expenditure) and cash flow statements.

### **165 Obligation to prepare group financial statements**

(1) Subject to subsections (2) and (3), where on a balance date of a company, the company has one or more subsidiaries, the board of the company must ensure that within three months of the balance date, group financial statements that comply with section 166 [Content of group financial statements] are

(a) completed in respect of that group of companies and that balance date; and

(b) signed on behalf of the board by two directors of the company (or, if there is then only one director, by that director).

(2) Group financial statements shall not be required in respect of a company and a balance date if the only shareholders of the company at that balance date are any or all of another body corporate incorporated in New Zealand, subsidiaries of that body corporate, and its or their nominees.

(3) Group financial statements need not deal with a subsidiary of a company if the board of the company is of the opinion that

(a) it is impracticable, or would be of no real value to shareholders of the company, in view of the insignificant amounts involved, or would involve expense or delay out of proportion to the value to shareholders of the company; or

(b) the result would be misleading, and, if the board is of such an opinion about every subsidiary of the company, group financial statements are not required.

(4) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

## **166 Content of group financial statements**

(1) The group financial statements of a group of companies must give a true and fair view of the state of affairs and the profit or loss (or income and expenditure), and the cash flow of the group as at the balance date, and for the accounting period, concerned.

(2) The onus of establishing that group financial statements of a company comply with subsection (1) is that of the board of the company.

(3) Without limiting subsection (1), group financial statements must comply with any regulations made under section 285 [Regulations].

### *Auditors*

## **167 Requirement for audit**

(1) If

(a) the constitution of a company requires that the financial statements of the company and all or any of its subsidiaries for all or any accounting periods be audited; or

(b) a shareholder or director of a company gives written notice to the board of the company that the shareholder or director requires that the financial statements of the company and all or any of its subsidiaries for all or any accounting periods ending after the date of receipt of the notice by the board be audited an auditor must be appointed in accordance with this Part to audit the financial statements of the company and its subsidiaries for the accounting periods concerned.

(2) Any notice given or resolution passed for the purposes of subsection (1) may be withdrawn or amended in the same manner as it was given or passed.

(3) Subject to subsection (1), the financial statements of a company need not be audited.

## **168 Qualifications of auditors**

(1) No person may be appointed or act as auditor of a company unless the person is

(a) a member of the New Zealand Society of Accountants who holds a certificate of public practice; or

(b) a member, fellow or associate of an association of accountants constituted outside New Zealand which is for the time being approved for the purposes of this section by the Minister of Justice by notice in the Gazette.

(2) None of the following persons may be appointed or act as auditor of a company:

(a) a director of employee or the company;

(b) a person who is a partner of or in the employment of a director or employee of the company;

(c) a body corporate;

(d) a person who, by virtue of either of paragraphs (a) or (b), may not be appointed or act as auditor of a related company.

### **169 Appointment of auditors**

(1) Subject to the constitution of a company and to any ordinary resolution, every auditor of a company must be appointed by the board for such period and on such terms as the board may agree with the auditor.

(2) The appointment of a partnership by the firm name to be the auditors of a company is deemed to be the appointment of all the persons who are partners in the firm from time to time.

### **170 Removal of auditor**

*<<(1) Subject to subsection (3), an auditor may be removed from office at any time by ordinary resolution.*

*(2) Subject to subsection (3), on the expiry of a term of appointment of an auditor, another person may be appointed in his or her place in accordance with section 169(1) [Appointment of auditors].*

*(3) No auditor may be removed from office, or another person appointed in his or her place, unless*

*(a) at least 10 working days' written notice of intention to do so has been given to the auditor; and*

*(b) the auditor has been given a reasonable opportunity to make representations to the shareholders on the removal, or appointment of another person, either in writing or by the auditor or his or her representative speaking at a shareholders meeting (whichever the auditor shall choose).>>*

Subject to the constitution of a company, and subject to section 171B(1) [Auditor may comment on removal, replacement or resignation], an auditor may be removed from office at any time by ordinary resolution

### **<<171 Reappointment of retiring auditors**

*Where the term of appointment of an auditor of a company expires and the company is required by section 167 [Requirement for audit] to continue to have an auditor, the retiring auditor is deemed to be reappointed for a further year (which year is itself a term of appointment for the purposes of this section) unless*

*(a) the auditor is not qualified for reappointment; or*

*(b) another person is appointed auditor of the company no later than two months from the expiry of the auditor's term; or*

*(c) the auditor has given the board written notice of his or her unwillingness to be reappointed.>>*

### **171 Auditor ceasing to hold office**

A person ceases to hold office as auditor of a company if

(a) he or she is removed from office in accordance with section 170 [Removal of auditor]; or

(b) his or her term of appointment as auditor expires, and

(i) another person is appointed as auditor of the company no later than two months from the expiry of his or her term; or

(ii) he or she is not qualified for reappointment; or

(iii) he or she has given the board written notice of his or her unwillingness to be reappointed; or

(c) he or she dies.

#### **171A Deemed reappointment of auditor**

If the term of appointment of an auditor expires, but he or she does not cease to hold office as auditor of the company pursuant to section 171 [Auditor ceasing to hold office], he or she is deemed to have been reappointed for a further term of one year from the date of expiry of the previous term, and (a) on such other terms and conditions as are agreed between the board and the auditor; or

(b) if no such terms and conditions are agreed, on the same terms and conditions as that person was initially appointed.

#### **171B Auditor may comment or removal, replacement or resignation**

(1) No auditor may be removed from office unless

(a) at least 10 working days' written notice of a resolution to do so has been given to the auditor; and

(b) the auditor has been given a reasonable opportunity to make representations to the shareholders on the removal, either in writing or by the auditor or his or her representative speaking at a shareholders' meeting (whichever the auditor may choose).

(2) Where a company proposes to appoint a new auditor in the place of an auditor who is qualified for reappointment, it may not do so unless

(a) at least 10 working days' written notice of intention to do so has been given to the auditor; and

(b) the auditor has been given a reasonable opportunity to make representations to shareholders on the appointment of another person, either in writing or by the auditor or his or her representative speaking at a shareholders' meeting (whichever the auditor may choose).



(3) Where an auditor has given the board of a company written notice of his or her unwillingness to be reappointed the board must, if requested to do so by that auditor

(a) distribute to all shareholders at the expense of the company a written statement of the auditor's reasons for his or her unwillingness to be reappointed; or

(b) permit the auditor or his or her representative to explain at a shareholders' meeting the reasons for his or her unwillingness to be reappointed.

(4) An auditor is entitled to be paid by the company reasonable fees and expenses for making representations to shareholders under this section

## **172 Auditor's report**

(1) The auditor of a company must make a report to the shareholders and to each director on the financial statements audited by him or her.

(2) An auditor's report under subsection (1) must state

(aa) the work done by the auditor;

(ab) the scope and limitations of the audit;

(a) whether the auditor has obtained all information and explanations that he or she has required;

(b) whether, in the auditor's opinion, proper accounting records have been kept by the company, so far as appears from their examination of those records;

(c) whether, in the auditor's opinion, according to the best of the information and the explanations given to him or her as shown by the accounting records, documents and other information of the company, the financial statements comply with section 160 [Content of financial statements] or section 166 [Content of group financial statements] (as the case may be) and, where they do not, the respects in which they fail to comply.

## **173 Auditor's right of access**

(1) The board of a company must ensure that an auditor of a company has a right of access at all times of the accounting records<<, >> and other documents <<*and other information*>> of the company.

(2) An auditor of a company is entitled to require from any director or employee of the company such information and explanation as he or she thinks necessary for the performance of his or her duties as auditor.

#### **174 Auditor's attendance at shareholders' meetings**

The board of a company must ensure that an auditor of the company

(a) is permitted to attend any meeting of shareholders of the company; and

(b) receives all notices of and other communications relating to any meeting which any shareholder of the company is entitled to receive; and

(c) may be heard at any meeting of shareholders which he or she attends on any part of the business of the meeting which concerns him or her as auditor.

<<175 *Remuneration and relief from liability of auditor*

(1) *The fees and expenses of an auditor of a company shall be fixed*

(a) *in the manner provided in the constitution of the company; or*

(b) *if the constitution does not provide, by the board.*

(2) *An auditor is entitled to be paid by the company reasonable fees and expenses for making representations to shareholders under section 170(3) [Removal of auditor].*

(3) *A court may relieve an auditor from liability in any proceedings in accordance with section 137 [Court may grant relief].>>*

## PART 11

### DISCLOSURE BY COMPANIES

#### *Disclosure to shareholders*

#### **176 Annual report to shareholders**

Unless all the shareholders of a company otherwise agree, the board of each company must cause to be sent to every shareholder of the company within 20 working days of each date on which financial statements of the company are signed under section 159(b) [Obligation to prepare financial statements for company], an annual report on the affairs of the company during the accounting period to which those statements relate.

#### **177 Contents of annual report**

<<(1)>> Every annual report for a company must be in writing and unless all the shareholders of the company otherwise agree must

(a) describe, so far as the board believes is material for the appreciation of the state of the company's affairs by its shareholders and will not be harmful to the business of the company or of any of its subsidiaries, any change during the accounting period in the nature of the business of the company or of its subsidiaries, or in the classes of business in which the company has an interest (whether as a shareholder or another company or otherwise); and

(b) where group financial statements for the company and its subsidiaries for that accounting period are required to be completed and signed under section 165(1)(b) [Obligation to prepare group financial statements], include those group financial statements; and

(c) where no such group financial statements are required to be so completed and signed, include the financial statements for the company for that accounting period signed under company 159(b) [Obligation to prepare financial statements for company]; and

(d) where an auditor's report is required under Part 10 in respect of the financial statements included in the report, include that auditor's report; and

(e) describe any change in accounting policies made since the date of the previous annual report; and

(f) state particulars of any entries in the interests register made since the date of the previous annual report (other than disclosures under section 113(1) [Directors' share dealings] by employees who are not also directors); and

(g) state any donations, including charitable or political donations made by the company since the date of the previous annual report; and

(h) state the names of the directors of the company; and

(i) state the amount of any fees paid to auditors since the date of the previous annual report; and

(j) be signed on behalf of the board by two directors of the company (or, if there is then only one director, by that director).

### **178 Takeovers**

Where an offer (whether written or not) is made to acquire shares in a company which represent in aggregate 20 percent or more of the total issued shares of the same class, the board of the company shall, upon written request by any shareholder to whom the offer has been made, forthwith advise (in such manner as the board thinks fit) all shareholders to whom the offer has been made of the following information:

(a) whether, having regard to information known only to the board, the offer is clearly inadequate;

(b) whether any director of the company directly or indirectly holds or has an interest in any shares to which the offer relates and, if so, whether the director intends to accept or recommend acceptance of the offer;

(c) any direct or indirect interest of any director of the company in the offeror or in the offer.

### **179 Other disclosure to shareholders**

Disclosure <<shall>> must be made to shareholders in accordance with the following provisions of this Act:

- (a) section 51 [Special offer to acquire shares];
- (b) section 59 [Special financial assistance];
- (c) section 62 [Statement of shareholder rights];
- (d) section 94 [Proceedings at meetings];
- (e) section 138 [Information for shareholders];
- (f) section 139 [Investigation of records];
- (g) section 184 [Company records available for inspection by shareholders];
- (h) section 190 [Manner of approving amalgamation proposal];
- (i) section 208 [Other duties of liquidator].

### **180 Method of disclosure to shareholders**

(1) Any annual report, notice, or other document to be sent to a shareholder may be

- (a) delivered by to the shareholder; or
- (b) posted or delivered to the address for that shareholder shown on the share register;  
or
- (c) sent by telex, facsimile machine, or other similar means of communication to the number of the shareholder.

(2) For the purposes of subsection (1)

- (a) any document posted to a shareholder, or delivered to a document exchange, shall be deemed to be received by the shareholder five working days (or such shorter period as the Court may determine in any particular case) after it is so posted or delivered;

(b) any document sent by telex, facsimile machine, or other similar means of communication shall be deemed to be received by the shareholder on the working day following the day on which it was sent.

(3) In proving the sending of any document to a shareholder by post or delivery to a document exchange for the purposes of this section, it shall be sufficient to prove that the document was properly addressed to the shareholder, that all postal or delivery charges were paid, and that the document was posted or delivered to the document exchange.

(4) If documents sent to a shareholder at its address shown on the share register are returned unclaimed three consecutive times, the company need not send any further documents to the shareholder until the shareholder notifies the company of its new address.

(5) A shareholder of a company may, by written notice to the company, waive the right to receive all or any documents from the company, and may revoke any such waiver in the same manner. While any such waiver is in effect, the company need not send to the shareholder the documents to which the waiver relates.

#### *Disclosure to Registrar*

### **181 Disclosure required by Act**

Documents must be sent or delivered to the Registrar in accordance with the following provisions of this Act:

- (a) section 11 [Application for incorporation];
- (b) section 13 [Existing companies may apply for registration under this Act];
- (c) section 18 [Application for registration of name];
- (d) section 24 [Alteration of constitution];
- (e) section 25(2) [Share description to be registered];
- (f) section 35 [Share description to be registered];

- (g) section 37 [Persons to whom shares may be issued];
- (h) section 66 [Place of register];
- (i) section 122 [Notification to Registrar of directors];
- (j) section 146 [Change of registered office;];
- (k) section 147 [Company records to be kept];
- (l) section 151 [Change of address for service];
- (m) section 182 [Annual return];
- (n) section 192 [Registration of amalgamation];
- (o) section 195 [Powers of court in relation to reconstruction etc];
- (p) section 199 [Notice of proposed compromise];
- (q) section 206 [Completion of liquidation];
- (r) section 208 [Other duties of liquidator];
- (s) section 241 [Meetings of creditors or shareholders];
- (t) section 250 [Liquidator's report];
- (u) section 252 [Grounds for removal from register];
- (v) section 254 [Grounds for objecting to removal from register];
- (w) section 257 [Property of company removed from register];
- (x) section 259 [Application for registration];
- (y) section 263 [Alteration of constitution, name, etc];
- (z) section 264 [Annual return of overseas company];
- (aa) section 266 [Ceasing to carry on business in New Zealand].

## **182 Annual return**

(1) The board of a company must ensure that the Registrar receives each year, during the month allocated to the company for the purposes of this section, an annual return in the prescribed form confirming that the information of the kind referred to in the return that is on the New Zealand register in respect of the company at the date of the return is correct.

(2) An annual return must be dated as at a day within the month during which the return is required to be received by the Registrar.

(3) On incorporation or registration of a company under Part 2 the Registrar must allocate a month to the company for the purposes of this section.

(4) The Registrar may, by written notice to a company, alter the month allocated to the company under subsection (3) or under this subsection.

(5) Notwithstanding subsection (1)

(a) a company need not make an annual return in the calendar year of its incorporation or registration under Part 2;

(b) a subsidiary may, with the written approval of the Registrar, make an annual return during the month allocated to its holding company for the purposes of this section rather than during the month allocated to it.

(6) If the board of a company fails to comply with subsections (1) and (2), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board of company].

### *Inspection of company records*

#### **183 Company records available for public inspection**

(1) Every company must keep the following records available for inspection in the manner specified in section 185 [Manner of inspection] by any person who serves written notice of intention to inspect on the company:

(a) the certificate of incorporation or registration of the company; and

(b) the current constitution of the company; and



<<(b)>> (c) the share register; and

<<(c)>> (d) the full names and addresses of the current directors; and

<<(d)>> (e) the current registered office and address for service of the company.

(2) If a company fails to comply with subsection (1)

(a) the company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and

(b) every director of a company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

#### **184 Company records available for inspection by shareholders**

(1) In addition to the records available for public inspection, every company must keep the following records available for inspection in the manner specified in section 185 [Manner of inspection] by any shareholder of the company (or by any person authorised in writing by a shareholder for this purpose) who serves written notice of intention to inspect on the company:

(a) minutes of all meetings and resolutions of shareholders; and

(b) copies of all written communications to shareholders during the preceding three years, including annual reports under section 176 [Annual report to shareholders]; and

(c) copies of all financial statements, any group financial statements, any auditor's reports, and descriptions of any changes in accounting policies; and

<<(c)>> (d) certificates given by directors under this Act; and

<<(d)>> (e) the interests register of the company.

(2) If a company fails to comply with subsection (1)

(a) the company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and

(b) every director of a company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

### **185 Manner of inspection**

(1) Documents which may be inspected by any person or shareholder under section 183 [Company records available for public inspection] or section 184 [Company records available for inspection by shareholders] must be available for inspection at the place at which the company records are kept <<*in accordance with section 147 [Company records to be kept]*>> between the hours of 9.00 a.m. to 5.00 p.m. on each working day during the inspection period.

(2) In this section, the term "inspection period" means the period commencing on the third working day after the day on which notice of intention to inspect is served on the company by the person or shareholder concerned and ending with the eighth working day after that day of service.

### **186 Copies of documents**

(1) Any person may require a company of or extract from any document which is available for inspection by him or her in accordance with section 183 [Company records available for public inspection] or section 184 [Company records available for inspection by shareholders] to be sent to him or her within five working days after he or she has made a request in writing for the copy or extract and has paid a reasonable copying and administration fee prescribed by <<*the board of*>> the company.

(2) If a company fails to provide a copy of or extract from a document in accordance with a request under subsection (1)

(a) the company may be convicted of an offence under section 277(1) [Failure to comply with Act]; and

(b) every director of a company may be convicted of an offence under section 278(1) [Liability of directors for failure by board or company].

## PART 12

### <<RECONSTRUCTION AND>> AMALGAMATIONS

#### <<Reconstructions>>

#### <<187 Reconstructions

(1) Any reconstruction of the share structure of a company, whether or not entered into as part of a compromise with creditors, must be effected by amendment of the constitution in accordance with the procedures required by this Act.

(2) Any reconstruction which affects the likelihood of the company meeting its obligations to creditors must be approved as a compromise with creditors under Part 13.>>

#### <<Amalgamations>>

#### **188 Amalgamations**

Two or more companies may amalgamate, and continue as one company, which may be one of the amalgamating companies, or may be a new company.

#### **189 Amalgamation proposal**

(1) Each company which proposes to amalgamate must approve an amalgamation proposal setting out the terms of the amalgamation, and in particular

(a) the name of the amalgamated company, if it is the same as the name of one of the amalgamating companies;

(b) the <<first>> registered office of the amalgamated company;

(c) the maximum number of directors of the amalgamated company;

(d) the full names and residential addresses of the <<first>> director or directors of the amalgamated company;

(e) the <<first>> address for service of the amalgamated company;

- (f) the share structure of the amalgamated company, specifying
  - (i) the number of shares of the company;
  - (ii) the rights, privileges, limitations and conditions attached to each share of the company, if different from those set out in section 26(2) [Rights attached to shares];
  - (iii) whether the shares are transferable or non-transferable, and if transferable, whether their transfer is subject to any conditions or limitations;
- (g) a copy of the <<first>> constitutional document, if any, of the amalgamated company;
- (h) the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company;
- (i) if any shares of an amalgamating company are not to be converted into shares of the amalgamated company, the <<amount of money>> consideration that holders of these shares are to receive instead of shares of the amalgamated company;
- (j) any payment to be made to any shareholder or director of an amalgamating company, other than a payment of the kind described in paragraph (i);
- (k) details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamating company.

(1A) An amalgamation proposal may specify the date on which the amalgamation is intended to become effective.

(2) If shares of one of the amalgamating companies are held by or on behalf of another of the amalgamating companies, the amalgamation proposal must provide for the cancellation of those shares when the amalgamation becomes effective without any payment in respect of those shares, and no provision may be made in the proposal for the conversion of such shares into shares of the amalgamated company.

### **190 Manner of approving amalgamation proposal**

(1) The board of each amalgamating company must resolve that in its opinion

(a) the amalgamation is in the best interests of the shareholders of the company; and

<<(b) the amalgamating company will satisfy the solvency test immediately prior to the time at which the merger is to become effective; and

(c)>> (b) the amalgamated company will satisfy the solvency test immediately after the time at which the <<merger>> amalgamation is to become effective.

(2) The directors voting in favour of a resolution required by subsection (1) must sign a certificate that, in their opinion, the conditions set out in subsection (1) are satisfied.

(3) The board of each amalgamating company must send to each shareholder of that company not less than 20 working days before the amalgamation is to take effect

(a) a copy of the amalgamation proposal;

(b) copies of the certificates given by each board under subsection (2);

(c) a statement of any material interests of the directors, whether in that capacity or otherwise;

(d) such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed amalgamation.

(4) The amalgamation proposal <<will not take effect unless it has been>> must be approved

<<(a) by the shareholders of each amalgamating company, in accordance with section 78 [Powers exercised by special resolution]; and>>

(a) subject to the constitution of each such company, by the shareholders of each amalgamating company by special resolution; and

(b) by any interest group of an amalgamating company, where any provision in the amalgamation proposal would, if contained in an amendment to that company's constitution or otherwise proposed in relation to that company, require the approval of that interest group.

(5) Every director who fails to comply with subsection (2) may be convicted of an offence under section 277(1) [Failure to comply with Act].

### **191 Short form amalgamation**

(1) A company and one or more of its wholly-owned subsidiaries may amalgamate and continue as one company without complying with section 189 [Amalgamation proposal] and 190 [Manner of approving amalgamation proposal] if the board of each amalgamating company resolves

(a) <<the amalgamation is approved by a resolution of the board of each amalgamating company>> to approve an amalgamation of the amalgamating companies on the terms that

(i) the shares of each amalgamating subsidiary company will be cancelled without any payment or any other consideration in respect of those shares; and

(ii) the constitution of the amalgamated company will be the same as the constitution of the amalgamating holding company; and

(b) <<the resolutions provide that

(i) the shares of each amalgamating subsidiary company shall be cancelled without any payment or any other consideration in respect of those shares;

(ii) the constitution of the amalgamated company will be the same as the constitution of the amalgamating holding company>>

that in its opinion the amalgamated company will satisfy the solvency test immediately after the time at which the amalgamation will become effective.

(2) Two or more wholly-owned subsidiary companies of the same holding may amalgamate and continue as one company without complying with sections 189 [Amalgamation proposal] and 190 [Manner of approving amalgamation proposal] if the board of each amalgamating resolves

(a) *<<the amalgamation is approved by a resolution of the board of each amalgamating company>> to approve an amalgamation of the amalgamating companies on the terms that*

*(i) the shares of all but one of the amalgamating companies will be cancelled without any payment or other consideration in respect of those shares; and*

*(ii) the constitution of the amalgamated will be the same as the constitution of the amalgamating whose shares are not cancelled; and*

(b) *<<the resolutions provide that*

*(i) the shares of all but one of the amalgamating companies shall be cancelled without any payment or other consideration in respect of those shares;*

*(ii) the constitution of the amalgamated will be the same as the constitution of the amalgamating whose shares are not cancelled>>*

that in its opinion the amalgamated will satisfy the solvency test immediately after the time at which the amalgamation will become effective.

(3) The resolution referred to in subsections (1)(a) or (2)(a) is deemed to be an amalgamation proposal of the purposes of sections 192 [Registration of amalgamation] and 1994 [Effect of certificate].

(4) The directors voting in favour of a resolution required by subsections (1) or (2) must sign a certificate that, in their opinion, the conditions set out in paragraph (b) of the relevant subsection is satisfied.

(5) Every director who fails to comply with subsection (4) may be convicted of an offence under section 277(1) [Failure to comply with Act].

## **192 Registration of amalgamation**

After an amalgamation has been approved under sections 190 [Manner of approving of amalgamation proposal] or 191 [Short form amalgamation] the following documents must be sent to the Registrar:

(a) the amalgamation proposal, if any;

(b) any certificates required under section 190 [Manner of approving amalgamation proposal];

(c) a certificate signed by the board of each amalgamating stating that the has approved the amalgamation in the manner required by this Act and by the constitution of the;

(d) a certificate signed by the board, or proposed board, of the amalgamated stating that in their opinion no creditor will be prejudiced by the amalgamation;

(e) consents in the prescribed form signed by each of the persons named as directors in the amalgamation proposal.

### **193 Certificate of amalgamation**

(1) Forthwith after receipt of the documents required under section 192 [Registration of amalgamation], the Registrar <<shall>> must

(a) if the amalgamated company is the same as one of the amalgamating companies, issue a certificate of amalgamation in the prescribed form; or

(b) if the amalgamated company is a new company, enter on the New Zealand register the particulars of the company required by section 272 [Registers], and issue a certificate of amalgamation in the prescribed form together with a certificate of incorporation in the prescribed form.

(2) Where an amalgamation proposal specifies a date on which the amalgamation is intended to become effective, and that date is the same as or later than the date on which the Registrar receives the documents required under section 192 [Registration of amalgamation], the certificate of amalgamation and any certificate of incorporation issued by the Registrar must be expressed to have effect on that date.

### **194 Effect of certificate**

On the date shown in a certificate of amalgamation

(a) the amalgamation becomes effective;

(aa) the amalgamated company has the registered name specified in the amalgamation proposal, if it is the same as a name of one of the amalgamating companies;



- (b) the Registrar is required to remove the amalgamating companies other than the amalgamated company from the New Zealand register;
- (c) the amalgamated company succeeds to all the property, rights and privileges of each of the amalgamating companies;
- (d) the amalgamated company succeeds to all the liabilities of each of the amalgamating companies;
- (e) proceedings pending by or against any amalgamating company may be continued by or against the amalgamated company;
- (f) any conviction, ruling, order or judgment in favour of or against any amalgamating company may be enforced by or against the amalgamated company;
- (g) the shares and rights of the shareholders in the amalgamating companies are converted into the shares and rights provided for in the amalgamation proposal, if any.

#### **194A Creditors' rights on amalgamation**

Where immediately after the time when an amalgamation becomes effective, an amalgamated company does not satisfy the solvency test, any creditor of any of the amalgamating companies may recover any loss he or she suffered by reason of the amalgamation

(a) if no certificate was given by directors of that amalgamating company, in accordance with section 190(2) [Manner of approving amalgamation proposal] or 191(4) [short form amalgamation], from the directors of that amalgamating company at the time the amalgamation was approved; or

(b) if such a certificate was given, and if there were no reasonable grounds for the opinion that the amalgamated company would satisfy the solvency test, from the directors who signed the certificate.

*Powers of Court in relation to <<reconstructions and>> amalgamations*

#### **195 Powers of Court in relation to <<reconstructions etc> amalgamations**

(1) Notwithstanding any provision in this Act or in the constitution of any company, where it is not practicable to effect <<a reconstruction or>> an amalgamation in respect of one or more companies in accordance with the procedures set out in this Act or the constitutions of those companies, those companies may apply to the Court for approval of <<a reconstruction or>> an amalgamation and the Court may approve any such proposal on such terms and subject to such conditions as it thinks fit.

(2) Within 10 registration days of any order being made by the Court under subsection (1), the board of each applicant company must ensure that a copy of the order is received by the Registrar, who must take such steps (if any) as the order may prescribe.

(3) If the board of a company fails to comply with subsection (3), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

## PART 13

### COMPROMISES WITH CREDITORS

#### **196 Interpretation**

In this Part, unless the context otherwise requires,

“compromise” means a compromise between a company and its creditors cancelling all or part of a company, or varying the terms upon which the debt is payable or is secured, or agreeing to an alteration of a company's constitution which affects the likelihood of the company being able to pay its due debts;

“creditor” includes every person who, in a liquidation, would be entitled to claim in accordance with section 30 [Admissible claims] that a debt is owing to that person by the company;

“proposer” means any person referred to in section 197 [Proposal of compromise] who proposes a compromise in accordance with this Part.

#### **197 Proposal of compromise**

Where there is reason to believe that a company is or will be unable to pay its debts within the meaning of section 222 [Inability to pay debts],

- (a) the board of directors of the company
- (b) a receiver appointed in respect of the whole or substantially the whole of the assets and undertaking of the company; or
- (c) a liquidator of the company; or
- (d) with the leave of the Court, any two or more creditors or shareholders of the company;

may propose a compromise under this Part.

### **198 Binding effect of compromise**

(1) A compromise approved by creditors or any class of creditors of a company in accordance with this Part is binding on the company and on

- (a) all creditors; or
- (b) if there is more than one class of creditors, on all creditors of that class

to whom notice of the proposal was given under section 199 [Notice of proposed compromise].

(2) Subject to subsection (3), a compromise is approved by creditors or any class of creditors if, at a meeting of creditors or that class of creditors conducted in accordance with the Third Schedule,

- (a) a resolution proposing the compromise is put to a vote; and
- (b) not less than 75% of the votes validly cast by the creditors or that class of creditors are in favour of the resolution.

(3) Where a resolution proposing a compromise is put to the vote of more than one class of creditors, it shall be presumed, unless the contrary is expressly stated in the resolution, that the approval of the compromise by that class is conditional of the approval of the compromise by every other class voting on the resolution.

## **199 Notice of proposed compromise**

(1) The proposer must compile a list of known creditors of the company who would be affected by the proposed compromise, setting out the amount owing or estimated to be owing to each, and the number of votes which each is entitled to cast on a resolution approving the compromise; and if there is more than one class of creditors so affected, a list of the known creditors in each class.

(2) The proposer must give to each known creditor, the company, any receiver, any liquidator and the Registrar

(a) notice in accordance with the Third Schedule of the intention to hold a meeting of creditors or any two or more classes of creditors for the purpose of voting on the draft resolution; and

(b) the name and address of the proposer and the capacity in which the proposer is acting; and

(c) the address and telephone number to which inquiries may be directed by any creditor during normal business hours; and

(d) the statement fairly setting out the reasons for the proposed compromise and all reasonably foreseeable consequences, for creditors and for the company, if the resolution is approved, including the extent, if any, to which any director is interested in the proposed compromise; and

(e) a copy of the list or lists of creditors referred to in subsection (1).<< and>>

(3) <<(4)>> The proposer must give to each known creditor, the company, any receiver, any liquidator and the Registrar written notice of the result of the voting.

(4) <<(5)>> Unless the Court orders otherwise, there costs incurred in organising and conducting a meeting of creditors for the purpose of voting on a proposed compromise

(a) must be met by the company; or

(b) if incurred by a receiver or a liquidator, are an expense of the receivership or liquidation; or

(c) if incurred by any other person, are a debt due to that person by the company.

## **200 Powers of Court**

(1) On the application of the proposer or the company, the Court may

(a) give directions in relation to any procedural requirement imposed by this Part, or waive or vary any such requirement if satisfied that it would be just to do so; or

(b) order that, during any period specified in the order, beginning not earlier than the date on which notice was given of the proposed compromise and ending not later than 10 working days after the date on which notice was given of the result of the voting thereon,

(i) any proceedings in relation to a debt owing by the company be stayed; or

(ii) any creditor refrain from taking any other measure to enforce payment of any debt owing by the company;

but nothing in this paragraph affects the right of any secured creditor during that period to take possession of, realise or otherwise deal with any property of the company over which the creditor has a charge.

(2) Not later than 10 working days after the date of a notice that, as a result of the voting, a compromise was approved, a creditor who was entitled to take part in the vote may apply to the Court for an order that the creditor is not bound by the compromise on the grounds that

(a) insufficient notice of the meeting or of the matter required to be notified under section 199(3) [Notice of proposed compromise] was given to that creditor;

(b) there was some other material irregularity in obtaining approval of the compromise; or

(c) that, in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor or to the class or creditors to which that creditor belongs.

## PART 14

### LIQUIDATIONS

#### *The process of liquidation*

#### **201 Interpretation**

In this Part, unless the context otherwise requires <<;>> :

“committee of inspection” means the committee of inspection elected or appointed under section 241 [Meetings of creditors or shareholders];

“liquidator” includes interim liquidator and an Official Assignee when acting as liquidator;

“Official Assignee” means any Official Assignee or Deputy Assignee appointed under the Insolvency Act 1967;

“statutory demand” has the meaning set out in section 223 [Statutory demand].

#### **202 Purposes of this Part**

The purpose of this Part is to establish that

(a) liquidation is a process which requires a company to cease carrying on business and its assets to be collected, realised and distributed in accordance with this Part; and at the completion of the liquidation a company is ready to be removed from the New Zealand register in accordance with Part 15.

#### **203 Commencement of liquidation**

(1) A company may be put into liquidation by the appointment of a named person, or of an Official Assignee for a name district, as liquidator by

(a) those shareholders entitled to vote and voting on the question, by special resolution;  
or

(b) the board of directors or any other person, if the constitution of the company so requires or permits <<,by resolution passed at a meeting of the board>>; or

(c) the Court, on the application of the company or of any <<shareholder, director or creditor of the company,>> director, shareholder or other entitled person, or any creditor of company, or of the <<Attorney-General>> Registrar, if the Court is satisfied that

(i) the company is unable to pay its debts; or

(ii) the company or the board has persistently or seriously failed to comply with this Act; or

(iii) the company does not comply with section 5 [Essential components]; or

(iv) it is just an equitable that the company be put into liquidation.

(2) The liquidation commences on the date on which the liquidator is appointed.

#### **204 Interim liquidator**

(1) Where an application has been made to the Court for an order that a company be put into liquidation, the Court may appoint a name person or an Official Assignee for a named district as interim liquidator on the ground that the appointment is necessary or expedient for the preservation of the value of the <<company's>> assets owned or managed by the company.

(2) An interim liquidator has all the powers, duties and entitlements of a liquidator, unless the Court limits the powers or places conditions on their exercise.

#### **205 Effect of commencement of liquidation**

(1) As from the commencement of the liquidation of a company

(a) the liquidator takes custody and control of the company's assets;

(b) the directors remain in office but cease to have any powers, functions or duties other than those required or permitted to be exercised by this Part;

(c) no person may commence or continue legal proceedings against the company or with respect to its property, or enforce any other remedy against property of the company, unless the liquidator otherwise agrees or the Court otherwise orders;

(d) no share of the company may be transferred or other alteration made in the rights or liabilities of any shareholder, and no shareholder may exercise any power under the company's constitution or this Act, other than this Part;

(e) the constitution of the company may not be altered.

(2) Subsection (1) does not affect the right of a secured creditor to take possession of and realise or otherwise deal with any property of the company over which that creditor has a charge, subject to compliance with section 232 (4)(b) [Rights and duties of secured creditors].

## **206 Completion of liquidation**

The liquidation of a company is complete when the liquidator files with the Registrar a final report and final accounts of the liquidation and a statement that:

(a) all known assets have been disclaimed, realised or distributed without realisation;

(b) all proceeds of realisation have been distributed; and

(c) the company is ready to be removed from New Zealand register.

### *Duties, powers and entitlements of liquidator*

## **207 Primary duty of liquidator**

The primary duty of a liquidator is to take, in a reasonable and expeditious manner, all steps necessary to collect, realise and distribute the assets or the proceeds of the assets of the company to its creditors in accordance with this Part, and, if there are any surplus assets, to the persons entitled to them under the company's constitution and this Act.

## **208 Other duties of liquidator**

(1) Without limiting section 207 [Primary duty of liquidator], the liquidator has the other functions and duties specified in this Act.

(2) Without limiting subsection (1), the liquidator must

(a) within 10 working days of the commencement of the liquidation,



(i) give public notice of the appointment to the liquidator, the date of the commencement of the liquidation and the address and telephone number to which inquiries may be directed by any creditor or shareholder during normal business hours;

(ii) send or deliver to the Registrar a notice of the appointment of the liquidator in the prescribed form;

(b) prepare as soon as practicable and after such inquiries as are in all the circumstances reasonable, a list of every known creditor of the company;

(c) within 40 working days of the commencement of the liquidation, or such further period as the Court may allow for the preparation of the list referred to in paragraph (b), prepare and send to every known creditor and every shareholder, and send or deliver to the Registrar,

(i) a report on the state of the company's affairs, proposals for conducting the liquidation and the estimated date of its completion; and

(ii) a notice explaining the right of any creditor or shareholder to require the liquidator to call a meeting of creditors under <<section 240 [*Claims of other creditors' surplus assets*]>> section 241 [Meetings of creditors or shareholders];

(d) within 20 working days of the end of each period of six months following the commencement of the liquidation, prepare and send to every known creditor and every shareholder, and send or deliver to the Registrar, a report on the conduct of the liquidation during the preceding six months and the liquidator's further proposals for its completion;

(e) prepare and send to every known creditor and every shareholder the final report and final accounts of the liquidation, and the statement referred to in section 206 [Completion of liquidation], together with a summary of the grounds on which the creditor or shareholder may object to the removal of the company from the New Zealand register under section 254 [Grounds for objecting to removal from register];

(f) send or deliver to the Registrar copies of the documents referred to in paragraph (e);

(g) keep accounts and records of the liquidation and permit those accounts and records, and the accounts and records of the company, to be inspected by

(i) any committee of inspection appointed under section 241 [Meetings of creditors or shareholders], unless the liquidator believes on reasonable grounds that inspection would be prejudicial to the liquidation; or

(ii) if the Court so orders, any creditor or shareholder;

(h) retain the accounts and records of the liquidation and of the company for not less than six years after the completion of the liquidation, unless the Court orders otherwise;

(i) in every document issued by the liquidator on the company's behalf, give notice that the company is in liquidation <<, *but failure to comply with this paragraph does not affect the validity of the document*>>.

## **209 Powers of a liquidator**

(1) A liquidator has all the powers necessary to carry out the functions and duties of liquidator under this Act.

(2) Without limiting subsection (1), a liquidator may

(a) subject to subsection (4), require any director or shareholder of the company or other person having possession of books, records or documents of the company to delivery them to the liquidator;

(b) require

(i) any director or shareholder of the company;

(ii) any person who has been a director of the company;

(iii) any person who was an incorporator of the company;

(iv) any person who is or has been an employee of the company;

(v) a receiver, solicitor, accountant, <<or>> auditor, bank officer or any other person having knowledge of the financial affairs of the company;

to attend on the liquidator at any reasonable time, provide the liquidator with such information concerning the business, accounts or other affairs of the company as the liquidator requests, be examined on oath or affirmation by the liquidator on any of those matters, and assist in the liquidation to the utmost of the person's ability.

(2A) Any person required to attend on or otherwise assist the liquidator under subsection (2)(b)(iv) or (v) is entitled to reasonable remuneration for so doing unless that person is, at the time of the attendance or assistance, an employee of the company.

(2B) The remuneration to be received by a person under subsection (2A) shall be determined

(a) by the liquidator; or

(b) where that person considers that the remuneration determined by the liquidator is not reasonable, by the Court on an application by that person or by the liquidator, under section 220 [Court supervision of liquidation]. The leave of the Court to make such application is not required, notwithstanding anything in section 220 [Court supervision of liquidation] to the contrary.

(2C) A person is not entitled to refuse to attend or assist the liquidator, if required to do so under subsection (2)(b)(iv) or (v), by reason only that the remuneration to be received by him or her under subsection (2A)

(a) has not been determined; or

(b) has not been paid in advance.

(3) A liquidator may administer an oath to, or take the affirmation of, any person required to be examined under subsection (2).

(4) No person may withhold a document of the company from the liquidator on the ground that possession of the document creates a charge over property of the company, but, subject to subsection (5), production of a document to the liquidator does not prejudice the existence or priority of the charge, and the liquidator must make the document available to any person otherwise entitled to it for the purpose of dealing with or realising the charge or the secured property.

(5) No person may enforce a lien over any document of the company in respect of a debt for services rendered to the company before the commencement of the liquidation, but the debt is a preferential claim against the company under section 239 [Preferential claims] to the extent of \$500 (or such greater amount as may be prescribed at the commencement of the liquidation).

(6) Where any person fails to comply with a requirement of the liquidator under subsection (2), the Court on the application of the liquidator, may order the person to comply.

(7) On the application of the liquidator, the Court may order any person to whom subsection (2) applies to attend before the Court and be examined on oath or affirmation by the Court or the liquidator on any matter relating to the company.

(8) A person examined under subsections (2) or (7) is not excused from answering any question on the ground that the answer may incriminate or tend to incriminate him or her.

(9) The testimony of any person examined under subsections (2) or (6) is not admissible as evidence in any criminal proceedings against that person, except on a charge of perjury in respect of that testimony.

(10) A person examined under subsection (2) or (7) may apply to the Court to be exculpated from any allegation made or suggested against him or her. p11On the hearing of any application under subsection (10), the liquidator shall appear and call the attention of the Court to any matter which appears to be relevant.

## **210 Power of liquidator to make calls**

(1) Where the company's constitution provides that a share renders its holder liable to calls or otherwise imposes a liability on its holder, the liquidator may make calls or enforce all or part of any outstanding liability.

### (2) Where

(a) a person was at any time liable to the company in respect of share held by him or her; and

(b) that liability was cancelled or reduced by

(i) any alteration of the reconstitution, repurchase or redemption of the share, or amalgamation; or

(ii) registration under this Act; or

(iii) a change of registration under section 30 of the Companies Act 1955; and

(c) the company is at the commencement of liquidation subject to liabilities incurred prior to the alteration of the constitution, purchase or redemption of the share, amalgamation, registration under this Act or change of registration under the Companies Act 1955; and

(d) the assets of the company are not sufficient to discharge those liabilities in full

the liquidator may make a call on that person to contribute to the company the lesser of

(e) the amount by which the liability in respect of that share was reduced; and

(f) the amount required to be contributed in respect of each such share in order to discharge those liabilities.

(3) If an amount has been recovered from any person

(a) as a distribution in respect of a share under section 46A [Reduction of shareholder liability a distribution] of this Act or section 12 of the Companies (Reregistration) Act 19[ ], that person's liability to calls under subsection (2) in respect of that share is reduced accordingly;

(b) pursuant to a call made under subsection (2) in respect of a share, any distribution which that person is deemed to have received in respect of that share under section 46A [Reduction of shareholder liability a distribution] of this Act or section 12 of the Companies (Reregistration) Act 19[ ] is reduced accordingly.

(4) For the purposes of this section

(a) the term "company" includes any amalgamating company which amalgamated with one or more other amalgamating companies to continue as that company; and

(b) a member of a company limited by guarantee registered under the Companies Act 1955 is to be treated as if he or she were, prior to registration of that company under this Act, the holder of a share which rendered him or her liable to calls not exceeding the amount of contribution specified in the memorandum of association as the amount undertaken to be contributed by that member in a winding up; and

(c) a member of an unlimited company registered under the Companies Act 1955 is to be treated as if he or she were, prior to registration of that company under this Act, the holder of a share which rendered him or her liable to unlimited calls.

## **211 Power to disclaim onerous property**

(1) The liquidator may disclaim any onerous property, even if the liquidator has taken possession of it, tried to sell it, or those exercised rights of ownership.

(2) For the purposes of this section "onerous property" means

(a) any unprofitable contract; or

(b) any other property of the company which is unsaleable or not readily saleable or may give rise to a liability to pay money or perform any other onerous act.

(3) A disclaimer under this section

(a) brings to an end the rights, interests and liabilities of the company in respect of the property disclaimed; but

(b) does not, except so far as necessary to release the company from any liability, affect the rights or liabilities of any other person.

(4) A person suffering loss or damage as a result of a disclaimer under this section may

(a) claim as a creditor of the company for the amount of the loss or damage (taking account of the effect of any order made by the Court under paragraph (b));

(b) apply to the Court for an order that the disclaimed property be delivered to or vested in that person, and the Court may make such an order.

## **212 Pooling of assets of related companies**

On the application of the liquidator or any creditor or shareholder, the Court is satisfied that it is just and equitable to do so, may order that

(a) any company that is or has been related to the company in liquidation shall pay to the liquidator the whole or part of any or all of the claims made in the liquidation;

(b) where two or more related companies are in liquidation, the liquidations in respect of each company shall proceed together, as if they were one company, to the extent that the Court so orders and subject to such terms and conditions as the Court may impose.

### **213 Offences, search and seizure**

(1) Where a company is in liquidation or an application has been made to the Court for an order that a company be put into liquidation, no person may

(a) leave New Zealand with the intention of

(i) avoiding payment of money due to the company; or

(ii) avoiding examination with respect to the affairs of the company; or

(iii) avoiding compliance with an order of the Court or some other obligation under this Part with respect to the affairs of the company; or

(b) conceal or remove property of the company with the intention of preventing or delaying the assumption of custody or control of the property by the liquidator; or

(c) destroy, conceal or remove <<books,>> records or other documents <<or records>> of the company.

(2) Upon the commencement of the liquidation of a company, it is the duty of every present or former director and employee of the company

(a) to discover fully and truly to the liquidator all the property of the company, and the details of the disposal of any property by the company other than in the ordinary course of business; and

(b) to deliver to the liquidator, or in accordance with the liquidator's directions

(i) all property of the company; and

(ii) all <<books,>> records or other documents <<or records>> belonging to the company;

in or under his or her custody or control.

(3) A person who

(a) acts in contravention of subsection (1); or

(b) fails to comply with subsection (2);

may be convicted of an offence under section 277(2) [Failure to comply with Act].

(4) Where a company is in liquidation or an application has been made to the Court for an order that a company be put into liquidation, and the Court is satisfied, on the application of the liquidator, that there are reasonable grounds for believing that there is, in or on any place or thing, an any property, <<books,>> records or other documents <<or records>> of the company in respect of which an offence under subsection (1) or (2) has been or is about to be committed, the Court may issue a warrant authorising the person named in the warrant to search for and seize property, books, documents or records of the company in or on that place or thing and deliver them to the liquidator.

(5) In issuing a search warrant under subsection (2), the Court may specify in the warrant such reasonable conditions as it thinks fit.

(6) Subject to any conditions specified in the warrant, the person named in the warrant may

(a) enter and search the place or thing at any time which is reasonable in the circumstances on one occasion within 14 days of the date of issue of the warrant

(b) use such assistance as is reasonable in the circumstances; and

(c) use such force, both for making entry (whether by breaking open doors or otherwise) and for breaking open anything therein or thereon as is reasonable in the circumstances.

## **214 Refusal of essential services prohibited**

(1) For the purposes of this section as "essential service" means:



- (a) the supply of gas;
- (b) the supply of electricity;
- (c) the supply of water;
- (d) telecommunication services;
- (e) any other prescribed service

(2) .For the purposes of this section ``telecommunication services" means the conveyance from one device to another by any line, radio frequency or other medium of any sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of any person using the device.

(3) Nothing in any other Act or in any contract entitles a supplier of an essential service to:

(a) refuse to supply the service to a liquidator or to the company in liquidation by reason of the company's default in paying any charges due for the service in respect of any period before the commencement of the liquidation; or

(b) make it a condition of the further supply of the service to a liquidator or to a company in liquidation that payment be made of any outstanding charges due for the service in respect of any period before the commencement of the liquidation.

(4) <<(2)>> A supplier of an essential service may make it a condition of the supply of the service to a company in liquidation that the liquidator shall personally guarantee the payment of charges to be incurred for the supply.

### **215 Expenses of liquidation**

The expenses of the liquidation, including the reasonable remuneration of the liquidator, are payable out of the assets of the company.

### **216 When liquidator ceases to hold office**

On sending or delivering to the Registrar the final report, the final accounts and the statements referred to section 206 [Completion of liquidation], the liquidator ceases to

hold office, but this section does not limit section 220 [Court supervision of liquidation] or section 221 [Enforcement of a liquidator's duties].

*Qualifications and supervision of liquidator*

**217 Persons qualified to be liquidators**

(1) A person who has substantial experience in administering or advising on the insolvency of individuals, or the liquidation of companies, or receiverships in an experienced insolvency practitioner for the purposes of this Part.

(2) Unless the Court orders otherwise, a sole liquidator, or where there is more than one liquidator, at least one of them, must be an experienced insolvency practitioner or an Official Assignee.

(3) Unless the Court orders otherwise, the following persons may not be appointed or act as a liquidator:

(a) a person less than 20 years old;

(b) a body corporate;

(c) a creditor of the company in liquidation;

(d) a person who has, within the two years immediately preceding the commencement of the liquidation, been a shareholder, director, <<or>> auditor or receiver of the company in liquidation or of any related company;

(e) an undischarged bankrupt;

(f) a person who is mentally disorder within the meaning of the Mental Health Act 1969;

(g) a person in respect of whom an order has been made under section 30 [Temporary orders] or 31 [Appointment of manager] of the Protection of Personal and Property Rights Act 1988;

(h) a person in respect of whom a prohibition order has been made under section 221 [Enforcement of a liquidator's duties], or under section 104AS [Enforcement of a receiver's duties] of the Property Law Act 1952;

(i) any person who has been convicted in the preceding five years of <<*an offence*>>

(i) an offence under this Act, the Companies Act 1955 or the Securities Act 1978, or

(ii) a crime involving dishonesty as defined in section 2(1) [Interpretation] of the Crimes Act 1961.

(4) The fact that a person is disqualified under this section from acting as a liquidator does not affect the validity of anything done while so acting, unless the Court orders otherwise.

### **218 Consent to appointment as liquidator**

(1) A person's appointment as liquidator is of no effect unless that person has consented in writing to the appointment.

(2) An Official Assignee may not withhold consent to an appointment as liquidator unless satisfied that there is another qualified person willing to consent to appointment.

### **219 Vacancies in the office of liquidator**

(1) The office of liquidator becomes vacant if the person holding office resigns, dies, or becomes disqualified under section 217 [Persons qualified to be liquidators].

(2) An experienced insolvency practitioner may resign from the office of liquidator by appointing another experienced insolvency practitioner as his or her successor and sending or delivering notice in writing of the appointment of the Official Assignee for New Zealand.

(3) An Official Assignee may resign from the office of liquidator by appointing an experienced insolvency practitioner as his or her successor.

(4) The Court, on the application of the company or of any shareholder, other entitled person, director or creditor of the company, may review any appointment of a successor to a liquidator made under subsection (2) or (3), and, if it thinks fit, may appoint instead

any other experienced insolvency practitioner or an Official Assignee of a named district.

(5) Where, for any reason other than resignation, a vacancy occurs in the office of liquidator, written notice of the vacancy shall forthwith be sent or delivered to the Official Assignee for New Zealand by the person vacating office, or if that person is unable to act, by his or her personal representative.

(6) Where, as the result of the vacation of office by a liquidator, no person, or no experienced insolvency practitioner, is acting as liquidator, the Official Assignee of New Zealand shall appoint an Official Assignee of a named district to act as liquidator until a successor is appointed under subsection (3).

(7) A person vacating the office of liquidator must, where practicable, provide such information and give such assistance in the conduct of the liquidation as that person's successor reasonably requires.

## **220 Court supervision of liquidation**

(1) On the application of the liquidator, any committee of inspection or the Attorney-General, or, with the leave of the Court, any creditor, shareholder, other entitled person or director of a company in liquidation, the Court may

(a) give directions in relation to any matter arising in connection with the liquidation;

(b) confirm, reverse or modify any act or decision of the liquidator;

(c) order an audit of the accounts of the liquidation;

(d) order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with such information concerning the conduct of the liquidation as the auditor requests;

(e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances;

(f) to the extent that an amount retained by the liquidator as remuneration is found by the Court to be unreasonable in the circumstance, order the liquidation to refund the amount;

(g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of any property;

(h) make an order concerning the retention or the disposition of the accounts and records of the liquidation or of the company.

(2) The powers given by subsection (1) are in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators under this Part, and may be exercised in relation to any matter occurring either before or after the commencement of the liquidation or the removal of the company from the New Zealand register, and whether or not the liquidator has ceased to act as liquidator when the application or the order is made.

(3) Subject to subsection (4), a liquidator who has

(a) obtained a direction of a Court with respect to a matter connected with the exercise of the powers or functions of liquidator; and

(b) acted in accordance with the direction;

is entitled to rely on having so acted as a defence to any claim in respect of anything done or not done in accordance with the direction.

(4) A Court may order that, by reason of the circumstances in which a direction is obtained under subsection (1), the liquidator shall not have the protection given by subsection (3).

## **221 Enforcement of a liquidator's duties**

(1) In this section, unless the context otherwise requires, "failure to comply" means a failure of a liquidator to comply with any relevant duty arising

(a) under the special resolution or unanimous shareholder agreement or resolution of the board or the order of the Court by which the liquidator was appointed; or

(b) under this or any other Act or rule of law or rules of court; or

(c) under any order or direction of a Court other than an order so to comply made under this section;

and "comply", "compliance" and "failed to comply" have corresponding meanings.

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

(a) a liquidator;

(b) a person seeking appointment as a liquidator;

(bb) a committee of inspection;

(c) any creditor, shareholder, other entitled person or director of the company in liquidation;

(d) a receiver appointed in respect of any property of the company in liquidation;

(e) the President of the New Zealand Society of Accountants;

(f) the President of the New Zealand Law Society;

(g) an Official Assignee.

(3) No application may be made to a Court by any person other than a liquidator in respect of any failure to comply unless notice of the failure to comply has been served on the liquidator not less than 5 working days before the date of the application and, as at the date of the application, there is a continuing failure to comply.

(4) In respect of any failure to comply, a Court may

(a) relieve the liquidator of the duty to comply, wholly or in part; or

(b) without prejudice to any other remedy which may be available in respect of any breach of duty by the liquidator, order the liquidator to comply to the extent specified in the order.

(5) A Court may, in respect of a person who fails to comply with an order made under subsection (4)(b), or is or becomes disqualified under section 217 [Persons qualified to be liquidators] to become or remain a liquidator,

(a) remove the liquidator from office; or

(b) order that the person may be appointed and act or may continue to act as liquidator, notwithstanding the provisions of section 217.

(6) Where it is shown to the satisfaction of a Court that a person is unfit to act as liquidator by reason of

(a) persistent failures to comply within the meaning of this section or

(b) the seriousness of any failure to comply the Court shall make in respect of that person a prohibition order having such duration not exceeding 5 years as the Court thinks fit.

(7) For so long as a prohibition order under subsection (6) remains in force in respect of any person, that person shall not

(a) act as a liquidator in any current or other liquidation; or

(b) act as a receiver in any current or other receivership.

(8) Evidence that, on two or more occasions within the preceding 5 years, while a person was acting as a liquidator or as a receiver,

(a) a Court has made

(i) an order to comply under this section; or

(ii) an order to comply under section 104AS [Enforcement of a receiver's duties] of the Property Law Act 1952; in respect of the same person; or

(b) an application for

(i) an order to comply under this section; or

(ii) an order to comply under section 104AS of the Property Law Act 1952 has been made in respect of the same person and that in each case the person has complied after the making of the application and before the hearing; is, in the absence of special reasons to the contrary, evidence of persistent failures to comply within the meaning of this section.

(9) In making any order under this section a Court may if it sees fit

(a) make an order extending any time for compliance; or

(b) impose any term or condition; or

(c) make any other ancillary order.

(10) All proceedings relating to any application for an order under this section shall be served on the Official Assignee for New Zealand who shall keep a copy of the proceedings on a public file indexed by reference to the name of the liquidator concerned.

### *Company unable to pay its debts*

#### **222 Inability to pay debts**

(1) Unless the contrary is proved, and subject to subsection (2), a company is presumed to be unable to pay its debts if

(a) the company has failed to comply with a statutory demand; or

(b) execution issued against the company in respect of a judgment debt has been returned unsatisfied in whole or in part; or

(c) all or substantially all the assets of the company are in the possession or control of a receiver or some other person empowered to enforce or charge over those assets; or

(d) a compromise between a company and its creditors had been put to a vote in accordance with Part 13 but has not been approved.

(2) On an application to the Court for an order that a company be put into liquidation, evidence of failure to comply with a statutory demand is not receivable as evidence that



a company is unable to pay its debts unless the application is made within 30 working days after the last date for compliance with the demand.

(3) Subsection (1) does to prevent proof by other means that a company is unable to pay its debts.

(4) Information or records acquired under section 138 [Information for shareholders] or, if the Court so orders, under section 139 [Investigation of records] may be received as evidence that a company is unable to pay its debts.

(5) In determining whether a company is unable to pay its debts, its contingent or prospective liabilities may be taken into account.

(6) An application to the Court for an order that a company be put into liquidation on the ground that it is unable to pay its debts may be made by a contingent or prospective creditor only with the leave of the Court; and the Court may give such leave, with or without conditions, only if it is satisfied that a prima facie case has been made out that the company is unable to pay its debts.

### **223 Statutory demand**

(1) A demand by a creditor in respect of a debt owing by a company made in accordance with this section is a statutory demand.

(2) A statutory demand must

(a) be in respect of a debt that is due and is not less than the prescribed amount; and

(b) be in writing; and

(c) except where the debt is a judgment debt, be verified by affidavit attached to the demand; and

(d) be served on the company; and

(e) require the company to pay the debt, or enter into a compromise under Part 13 or otherwise compound with the creditor or give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the creditor, within 20 working days of the date of service, or such longer period as the Court may order.

## **224 Setting aside a statutory demand**

(1) The Court may, on the application of the company, set aside a statutory demand.

(2) The application must

(a) be made within 10 working days of the date of service of the demand; and

(b) be supported by affidavit; and

(c) be served on the creditor with the affidavit within 10 working days of the date of service on demand.

(3) No extension of time may be given for making or serving an application to have a statutory demand set aside, but, at the hearing of the application, the Court may extend the time for compliance with the statutory demand.

(4) The Court may grant an application to set aside a statutory demand if it is satisfied that

(a) there is a substantial dispute whether the debt is owing or is due; or

(b) the company appears to have a counterclaim, set-off or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount; or

(c) the demand ought to be set aside on other grounds.

(5) If, on the hearing of the application, the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of a substantial dispute or is not subject to a counterclaim, set-off or cross-demand, the Court may

(a) order that the company pay the debt within a specified period and that, in default of payment, the creditor may forthwith make an application to put the company into liquidation; or

(b) dismiss the application and forthwith make an order under section 203(1)(c) [Commencement of liquidation] putting the company into liquidation;

on the ground that the company is unable to pay its debts.

(6) On the hearing on an application to put the company into liquidation pursuant to an order made under subsection (5)(a), failure of the company to pay the debt within the specified period is presumptive evidence that the company is unable to pay its debts.

(7) A demand shall not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.

(8) In subsection (7), "defect" includes a material misstatement of the amount due to the creditor and a material misdescription of the debt referred to in the demand.

(9) An order under this section may be made subject to conditions.

### *Voidable transactions*

#### **225 Voidable transfers**

(1) A transaction involving a transfer of property by the company to another person is voidable on the application of the liquidator if the transfer

(a) was made

(i) on account of antecedent debt; and

(ii) at a time when the company was unable to pay its due debts; and

(iii) within the year preceding the commencement of the liquidation; and

(b) enabled that person to receive more toward satisfaction of the debt than the person would otherwise have received or be likely to receive in the liquidation;

unless the debt was incurred in the ordinary course of business and the transfer was made no later than 45 working days after the debt was incurred.

(2) Unless the contrary is proved, a transfer made within six months preceding the commencement of the liquidation is presumed to have been made

(a) at a time when the company was unable to pay its due debts; and

(b) on account of a debt not incurred in the ordinary course of business.

## **226 Transactions at undervalue**

(1) A transaction entered into by a company is voidable on the application of the liquidator if

(a) it was entered into within the year preceding the commencement of the liquidation; and

(b) the value of the consideration received by the company was significantly less than the value of the consideration provided by the company; and

(c) when the transaction was entered into, the company

(i) was unable to pay its due debts; or

(ii) was engaged or about to engage in business for which its financial resources were unreasonably small; or

(iii) incurred the obligation knowing that the company would not be able to perform the obligation when required to do so; or

(d) the company became unable to pay its due debts as a result of the transaction.

(2) Unless the contrary is proved, the value of the consideration received by the company under a transaction

(a) with a related company; or

(b) in which a director of the company is interested;

entered into within the six months preceding the commencement of the liquidation is presumed to be significantly less than the value of the consideration provided by the company.

## **227 Voidable charges**

(1) A transaction providing for or creating a charge over any property or undertaking of a company in respect of any debt is voidable on the application of the liquidator if the charge was given within the year preceding the commencement of the liquidation on account of antecedent debt, unless

(a) the charge secures the actual price or value of property sold or supplied to the company, or any other valuable consideration given by the grantee of the charge prior to the execution of the security, and, immediately after the charge was given, the company was able to pay its due debts; or

(b) the charge is in substitution for a charge given more than one year preceding the commencement of the liquidation.

(2) Unless the contrary is proved, a company giving charge within the six months preceding the commencement of the liquidation is presumed to have been unable to pay its due debts immediately after giving the charge.

### **228 Procedure for setting aside voidable transactions**

(1) A liquidator who wishes to have a transaction that is voidable under sections 225 [Voidable transfer], 226 [Transactions at undervalue] or 227 [Voidable charges] set aside must

(a) file in the Court a notice to that effect specifying the transaction to be set aside and the property or value thereof which the liquidator wishes to recover, and also the effect of subsections (2), (3) and 94); and

(b) serve a copy of the notice on the person with whom the transaction was entered into, and on every other person from whom the liquidator wishes to recover, and also the effect of subsections (2), (3) and (4); and

(b) serve a copy of the notice on the person with whom the transaction was entered into, and on every other person from whom the liquidator wishes to recover.

(2) Any person

(a) who would be affected by the setting aside of the transaction specified in the notice; and

(b) who considers that the transaction is not voidable under sections 225 [Voidable transfers], 226 [Transactions at undervalue] or 227 [Voidable charges]

may apply to the Court for an order that the transaction not be set aside.

(3) Unless a person on whom the notice was served has applied to the Court under subsection (2), the transaction is set aside as from the twentieth working day after the date of service of the notice.

(4) Where one or more persons have applied to the Court under subsection (2), the transaction is set aside as from the day on which the last such application is finally determined, unless the Court orders otherwise.

(5) Where a transaction is set aside under this section, any person affected may, after giving up the benefit of the transaction, claim for the value of the benefit as a creditor in the liquidation.

(6) Where a transaction is set aside under this section, the Court may make one or more of the following orders:

(a) an order requiring a person to pay to the liquidator, in respect of benefits received by that person as a result of the transaction, such sums as fairly represent those benefits;

(b) an order requiring property transferred as part of the transaction to be restored to the company;

(c) an order requiring property to be vested in the company if it represents in a person's hands the application, either of the proceeds of sale of property, or of money, so transferred;

(d) an order releasing, in whole or in part, a charge given by the company;

(e) an order requiring security to be given for the discharge of an order made under this section;

(f) an order specifying the extent to which a person affected by the setting aside of a transaction or by a declaration or order made under this section is entitled to claim as a creditor in the liquidation.

(7) The setting aside of a transaction or a declaration or order made under this section does not affect the title or interest of a person in property which that person has acquired

(a) from a person other than the company; and

(b) for valuable consideration; and

(c) without knowledge of the circumstances of the transaction under which the second-mentioned person acquired the property from the.

(8) Recovery by the liquidator of any property or the value thereof (whether under this section or any other section of this Act or under any other enactment or in equity or otherwise) may be denied wholly or in part if

(a) the person from whom recovery is sought received the property in good faith and has altered his or her position in the reasonably held belief that the transfer or payment of the property to that person was validly made and would not be set aside; and

(b) in the opinion of the Court it is inequitable to order recovery, or recovery in full.

(9) Nothing in the Land Transfer Act 1952 restricts the operation of this section.

(10) In this section, "transaction" includes an execution under any judicial proceedings, or a payment (including a payment made in pursuant of a judgment or order of a court) in respect of any transaction to which sections 225, 226 or 227 applies.

### *Creditors' claims*

#### **229 Application of bankruptcy rules to a liquidator**

(1) Subject to this Part, the rules in force under the law of bankruptcy with respect to the estates of persons adjudged bankrupt apply in a liquidation to

(a) the rights of secured and unsecured creditors;

(b) claims by creditors;

(c) the valuation of annuities and future and contingent liabilities;

and all persons who in any such case would be entitled to make claims and receive payment in whole or in part are so entitled in a liquidation.

(2) In applying in a liquidation the rules in force under the law of bankruptcy, a claim made under section 231 [Claims by unsecured creditors] and admitted by the liquidator

is to be treated as if it were a debt proved in accordance with the requirements of the Insolvency Act 1967.

### **230 Admissible claims**

Any debt or liability, present or future, certain or contingent, whether it is an ascertained debt or liability or a liability sounding only in damages, may be admitted as a claim against a in liquidation.

### **231 Claims by unsecured creditors**

(1) Unless otherwise required by the liquidator, an unsecured creditor may make a claim without formality.

(2) Where the liquidator requires a claim to be made formally, the claimant must complete and give to the liquidator a claim verified by statutory declaration

(a) setting out full particulars of the claim; and

(b) identifying any documents that evidence or substantiate the claim.

(3) The liquidator may require the production of any document mentioned in paragraph (2)(b).

(4) The liquidator may admit or reject any claim in whole or in part, and if the liquidator subsequently considers that a claim has been wrongly admitted or rejected in whole or in part, the liquidator may revoke or amend any such decision.

### **232 Rights and duties of secured creditors**

(1) As soon as practicable after the liquidator of a has given public notice of the commencement of the liquidation under section 208(2)(a)(i) [Other duties of liquidator], every secured creditor of a company in liquidation must send or delivery to the liquidator written notice of any debt secured by a charge over any property of the company; including particulars of the property subject to the charge and the amount secured.



(2) On the expiry of 30 working days from the time at which the liquidator has given public notice of the commencement of the liquidation under section 208(2)(a)(i) [Other duties of liquidator], a secured creditor whose charge is not

(a) a charge relating to land

(i) created by an instrument registered under the Deeds Registration Act 1908, the Land Transfer Act 1952; or

(ii) in respect of which a caveat or other notice has been lodged or recorded under the Land Transfer Act 1952; or

(b) a transfer or assignment or mortgage or assignment of a mortgage of any ship or vessel or any share of any ship or vessel registered under Part XII of the Shipping and Seamen Act 1952; or

(c) a charge perfected by registration under the personal Property Securities Act [ ];

and who has not sent notice of his or her charge to the liquidator in accordance with subsection (1), is to be taken as having surrendered that charge to the liquidator under subsection (3)(c).

(3) A secured creditor may

(a) realise any property subject to a charge, if entitled to do so; or

(b) claim as a secured creditor in the liquidation; or

(c) surrender the charge to the liquidator for the general benefit of creditors, and claim in the liquidation as an unsecured creditor for his or her whole debt.

(4) A secured creditor who realises property subject to a charge

(a) may claim as an unsecured creditor for any balance due to him or her, after deducting the net amount realised;

(b) must account to the liquidator for any surplus remaining from the net amount realised after satisfaction of his or her whole debt, including any interest payable in

respect of that debt up to the time of its satisfaction, and after making any proper payments to the holder of any other charge over the property subject to the charge.

(5) If a creditor claims as a secured creditor in the liquidation, the claim must be verified by statutory declaration and must

(a) set out full particulars of the claim; and

(b) set out full particulars of the charge including the date on which it was given; and

(c) identify any documents that substantiate the claim and the charge;

and sections 233 [Ascertainment of amount of claim], 234 [Claim not of an ascertainment amount] and 236 [Claim in respect of debts payable at a future time] apply to any claim as a secured creditor.

(6) The liquidator may require production of any document mentioned in subsection 5(c).

(7) Where a claim is made by a creditor as a secured creditor, the liquidator must

(a) meet the claim in full and redeem the security; or

(b) realise the property subject to the charge, and pay the secured creditor the lesser of the amount of the claim and the net amount realised taking into account the liquidator's reasonable remuneration; or

(c) reject the claim in whole or in part, but

(i) where a claim is rejected in whole or in part, the creditor may make a revised claim as a secured creditor within 10 working days of receiving notice of the rejection; and

(ii) the liquidator may, if he or she subsequently considers that a claim was wrongly rejected in whole or in part, revoke or amend any such decision.

(8) A creditor who claims in the liquidation as a secured creditor may claim as an unsecured creditor for any balance due to him or her, after deducting any payment made by the liquidator under subsection (6).

(9) The liquidator may at any time require a secured creditor by notice in writing either to

(a) take possession of property subject to a charge, if entitled to do so; or

(b) file a claim as a secured creditor in accordance with subsection (5);

within not more than 20 working days of receipt to the notice, if he or she intends to rely on the security.

(10) A secured creditor on whom notice has been served under subsection (9) who fails to comply with the notice, is to be taken as having surrendered his or her charge to the liquidator under subsection (3)(c) for the general benefit of creditors, and may claim in the liquidation as an unsecured creditor for his or her whole debt.

(11) A secured creditor who has surrendered his or her charge under this section may, with the leave of the Court or the liquidator and subject to such terms and conditions as the Court or the liquidator thinks fit, at any time before the liquidator has realised the property charged

(a) withdraw the surrender and rely on the charge; or

(b) submit a new claim under this section.

### **233 Ascertainment of amount of claim**

(1) The amount of a claim shall be ascertained as at the date of the commencement of the liquidation.

(2) The amount of a claim based on a debt or liability denominated in a currency other than New Zealand currency shall be converted into New Zealand currency at the rate of exchange on the date of commencement of the liquidation, or, if there is more than one such rate of exchange on that date, at the average of those rates.

### **234 Claim not of an ascertained amount**

(1) If a claim is subject to a contingency or is for damages or if for some other reason the amount of the claim is not certain, the liquidator may

(a) make an estimate of the amount of the claim; or

(b) refer the matter to the Court for a decision on the amount of the claim.

(2) On the application of the liquidator, or of any claimant who is aggrieved by an estimate made by the liquidator, the Court shall determine the amount of the claim as it sees fit.

### **235 Fines and penalties**

A fine or other monetary penalty imposed on a company, whether before or after the commencement of the liquidation, in respect of an offence committed before the commencement of the liquidation, and costs ordered to be paid with respect to proceedings for the offence, may be admitted as a claim in the liquidation.

### **236 Claim in respect of debts payable at a future time**

The amount of a claim made in respect of a debt that, but for the liquidation, would not be due and payable until 6 months after the commencement of the liquidation shall be ascertained according to the present value of the debt, having regard to the prescribed rate of interest as at the date of commencement of the liquidation.

### **237 Mutual credit and set-off**

(1) Subject to section 227 [Voidable charges], 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 in the liquidation of the company

(a) an account shall 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 shall be set off against any amount due from the other party; and

(c) only the balance of the account may be claimed in the liquidation, or is payable to the company, as the case may be.

(2) This section does not apply to any amount paid or payable by a shareholder as the consideration or part of the consideration for the issue of a share or in satisfaction of a call in respect of any outstanding liability of the shareholder made by the board of directors or by the liquidator.

### **238 Ascertainment of amount of interest**

If there is a surplus after payment in full of all admitted claims, interest on a claim accrues as from the date of the commencement of the liquidation at a rate not exceeding the prescribed rate.

### **239 Preferential claims**

(1) Subject to section 232(7)(a) and (b) [Rights and duties of secured creditors], the liquidator must pay, out of the assets of the company, the following expenses, fees and claims, to the extent and in the order of priority specified in this section.

(2) 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 collecting, preserving, realising or distributing the company's assets, including the remuneration of the liquidator other than a liquidator appointed by the Court;

(b) the <<taxed>> reasonable costs of any person who applied to the Court for an order that the company be put into liquidation, including the <<taxed>> reasonable costs of any person appearing on the application whose costs are allowed by the Court;

(c) the remuneration of any special manager;

(d) the costs and expenses of any person who makes or concurs in making the report on the state of the company's affairs;

(e) the <<taxed>> reasonable charges of any shorthand writer appointed to take an examination of any person under this Part (other than a shorthand writer appointed at the instance of an Official Assignee, in which case the charges are an expense incurred by the Official Assignee in collecting and realising the company's assets);

(f) the necessary disbursements of any liquidator appointed by the Court, other than fees and expenses payable under paragraph (a);

(g) <<The>> the costs of any person properly employed by a liquidator appointed by the Court;

(h) <<The>> the remuneration of a liquidator appointed by the Court;

(i) <<The>> the actual out-of-pocket expenses necessarily incurred by any committee of inspection, subject to the approach of the Audit Office.

(3) After paying the expenses and fees referred to in subsection (2), the liquidator must next pay the following claims;

(a) subject to subsection (6), 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 rendered to the company during the four months preceding the commencement of the liquidation;

(b) subject to subsection (6), all holiday pay becoming payable to any employee (or where the employee has died, to any other person in the employee's right) on the termination of the employment before or by reason of the commencement of the liquidation;

(c) all amounts due in respect of any compensation or liability for compensation under the Workers; Compensation Act 1956 accrued before the commencement of the liquidation;

(d) subject to subsection (6), all amounts deducted by the company from the wages or salary of any employee in order to satisfy obligations of the employee;

(e) all amounts that are preferential claims under section 209(4) [Powers of a liquidator];

(f) subject to subsection (8), any sum that, in accordance with section 57 [First week] of the Accident Compensation Act 1982 is payable by a company in respect of time lost before the commencement of the liquidation;

(g) any amount that, under section 23 [Winding up of businesses] of the Apprenticeship Act 1983 the Court may order to be paid to an apprentice who is deprived of employment by reason of the commencement of the liquidation;

(h) all sums that the Motor Vehicle Dealers Institute Incorporated is entitled to recover from a defaulting licensee company under section 42 [Subrogation of rights of action against defaulting motor dealers] of the Motor Vehicle Dealers Act 1975 in the event of the company being put into liquidation;

(i) subject to subsection (9), any sum ordered or adjudged to be paid by a company under section 6 [Workers not to be dismissed by reason of protected voluntary service or training] of the Volunteers Employment Protection Act 1973 as compensation in respect of a default or contravention occurring before the commencement of the liquidation, whether or not the order or judgment for compensation was made or given before that date;

(j) all sums which by any other enactment are required to be paid in accordance with the priority established by this subsection.

(4) After paying the claims referred to in subsection (3),<sup>1</sup> the liquidator must next pay all sums

(a) paid by a buyer to a seller on amount of the purchase price of goods; or

(b) to which a buyer is or becomes entitled to receive from a seller under section 9 [Rights of seller and buyer on cancellation of layby sale] of the Layby Sales Act 1971;

and for which the buyer is a creditor in the liquidation of the company under section 11 [Preference on winding up, bankruptcy, or receivership of seller] of the Layby Sales Act 1971.

(5) After paying the sums referred to in subsection (4), the liquidator must next pay the amount of

(a) any tax payable by the company in the manner required by Part III of the Goods and Services Tax Act 1985;

(b) any tax deductions made by the company under Part XI of the Income Tax Act 1976;

(c) any non-resident withholding tax deducted by a company under Part IX of the Income Tax Act 1976;

(d) every resident withholding tax deducting made by a company under Part IXA of the Income Tax Act 1976 )as inserted by section 11 of the Income Tax Amendment (No. 8) Act 1989);

to the extent that the amount is for the time being unpaid to the Commissioner of Inland Revenue.

(6) The total sum to which priority is to be given under subsection (3)(a), (b), or (d) shall not, in the case of any one employee, exceed \$6,000 or such greater amount as is prescribed at the commencement of the liquidation.

(7 Where any payment has been made

(a) to any employee of a company, on account of wages or salary; or

(b) or any such employee or, where the employee has died, to any other person in the employee's right, on account of holiday pay;

out of money advanced by some person for that purpose, the person by whom the money was advanced shall in a liquidation have the same right of priority in respect of the money so advanced as the employee, or other person receiving the payment in right of the employee, would have had if the payment had not been made.

(8) The total sum to which priority is to be given under subsection (3)(f) shall not, in the case of any one claimant, exceed \$1,500; but where the Accident Compensation Corporation is a claimant in respect of time lost by more than one employee, its claim in respect of the time lost by each of those employees shall be treated as a separate claim made by a separate claimant.

(9) The total sum to which priority is to be given under subsection (3)(i) shall not, in the case of any one claimant, exceed \$200.



(10) The claims listed in each of subsections (3), (4) and (5)

(a) rank equally among themselves and must be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions; and

(b) so far as the assets of the available for payment of general creditors are insufficient to meet them, have priority over the claims of secured parties in respect of assets

(i) which are subject to a security interest; and

(ii) became subject to that security interest by reason of its application to certain existing assets of the and those of its future assets which were after acquired property or proceeds;

and must be paid accordingly out of those assets.

(11) To the extent that the claims to which subsection (10) applies are paid out of assets referred to in paragraph (b) of that subsection, the amount out of assets referred to in paragraph (b) of that subsection, the amount so paid is an unsecured debt due by the company to the secured party.

(12) If a landlord or other person has distrained on any goods or effects of the within the month preceding the commencement of the liquidation, the claims to which priority is given by this section are a first charge on the goods or effects so distrained on, or the proceeds from their sale, but where any money is paid to a claimant under any such charge, the landlord or other person has the same rights of priority as that claimant.

(13) For the purposes of this section

(a) any 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) the expression "holiday pay", in relation to any person, means all sums payable to that person by the under sections 11 to 23 of the Holidays Act 1981, and includes all sums which 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.

(c) the expressions "after acquired property"; "proceeds"; "security interest"; and "security party" have the same meanings as in the Personal Property Securities Act [ ].

#### **240 Claims of other creditors; surplus assets**

(1) After paying preferential claims in accordance with section 239 [Preferential claims], the liquidator shall apply the assets of the company in satisfaction of all other claims.

(2) The claims referred to in subsection (1) rank equally among themselves and shall be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions.

(3) Where, before the commencement of a liquidation, a creditor agrees to accept a lower priority in respect of a debt than that which it would otherwise have under this section, nothing in this section prevents the agreement from having effect according to its terms.

(4) After paying the claims referred to in subsection (1), the liquidator shall distribute the company's surplus assets in accordance with its constitution and this Act.

#### *Rights of creditors and shareholders*

#### **241 Meetings of creditors and shareholders**

(1) Any two or more creditors or shareholders of a company in liquidation may, by notice served on the liquidator at any time in the course of the liquidation, request the liquidator to call a meeting of creditors or of shareholders

(a) to vote on a proposal that a committee of inspection be appointed to act with the liquidator; and

(b) if it is so decided, to choose the member of the committee.

(2) A liquidator may decline any such request to call a meeting on the ground that

(a) the request is frivolous or vexatious; or

(b) the request was not made in good faith; or

(c) the costs of calling a meeting would be out of proportion to the value of the company's assets.

(3) The decision of a liquidator to decline a request to call a meeting of creditors or of shareholders may be reviewed by the Court on the application of any one or more creditors or shareholders, as the case may be.

(4) Subject to subsections (2) and (3), a liquidator who receives a request to call a meeting of creditors or of shareholders shall forthwith call such a meeting of creditors or of shareholders shall forthwith call such a meeting in accordance with the Third Schedule or the Second Schedule as the case may be.

(5) The members of a committee of inspection chosen by any meeting of creditors or of shareholders take office forthwith, but if there is a difference between the decisions of meetings of creditors and meetings of shareholders on

(a) the question of appointing a committee of inspection; or

(b) the membership of a committee of inspection;

the liquidator shall refer the matter to the Court which may make such decision thereon as it thinks fit.

(6) The sole shareholder of a company may present to the liquidator a view of any matter which could have been decided at a meeting of shareholders under this section, and that view shall for all purposes be treated as though it were a decision taken at a meeting of shareholders.

(7) The liquidator shall send or delivery to the Registrar a copy of all communications received or sent by the liquidator, and all decisions taken at any meeting of creditors or shareholders, in accordance with this section.

## **242 Committees of inspection**

(1) A committee of inspection shall consist of not less than three persons who are creditors or shareholders, or persons holding general powers of attorney from creditors or shareholders, or authorised directors of companies which are creditors or shareholders of the company in liquidation.

(2) A committee of inspection has the power to

(a) call for reports from the liquidator on the progress of the liquidation;

(b) call a meeting of creditors or of shareholders;

(bb) apply to the Court under section 220 [Court supervision of liquidation] and section 221 [Enforcement of liquidator's duties]; and

(c) assist the liquidator as appropriate in the conduct of the liquidation.

(2A) Unless the Court orders otherwise, the liquidator must pay the reasonable solicitor and own client costs incurred by a committee of inspection in exercising its powers under subsection (2)(bb), and those costs are deemed to be expenses properly incurred in the liquidation.

(3) The provisions set out in the Fourth Schedule govern proceedings at meetings of committees of inspection.

(4) Where, by reason of vacancies in a committee of inspection the committee is unable to act, the liquidator must call attention to the situation in the next six-monthly report required to be prepared and sent under section 208(2)(c) [Other duties of liquidator].

### *Assetless companies fund*

## **243 Interpretation**

For the purposes of section 244-250, unless the context otherwise requires,

“Fund” means the Insolvency (Assetless Companies) fund established by section

244(1) [Insolvency (Assetless Companies Fund)];

“supervisory board” means the supervisory board set up under section 244(2).

### 244 Insolvency (Assetless Companies) fund

(1) The Registrar shall establish, maintain and administer a fund to be called the Insolvency (Assetless Companies) Fund.

(2) The Registrar shall convene a supervisory board consisting of nominees of

(a) the Registrar; and

(b) the President of the New Zealand Law Society; and

(c) the President of the New Zealand Society of Accountants.

(3) The Registrar may invest money forming part of the Fund in the manner in which money in the Public Account may be invested under section <<50>> 23 [Investment of Public money <<in Public Account>>] of the Public Finance Act <<1977>> 1989.

### **245 Property of the Fund**

The Fund consists of

(a) all contributions paid under section 247 [Payment of contributions];

(b) all interest received from the investment of moneys forming part of the Fund; and

(c) any other money lawfully paid into the Fund.

### **246 Expenditure from the Fund**

There shall be paid out of the Fund

(a) the expenses of maintaining and administering the Fund; and

(b) the amounts advanced from the Fund under section 248 [Advances for inquiries or proceedings].

### **247 Payment of contributions**

A company that lodges an annual return shall pay to the Registrar, at the time of lodging the return, such fee by way of contribution to the Fund as is prescribed.

### **248 Advances for inquiries or proceedings**

(1) On the application of the liquidator of a company in liquidation that does not have unencumbered assets immediately available to the liquidator or a value greater than the prescribed amount (an "assetless company"), the supervisory board may make one or

more advances from the Fund under this section, if it is satisfied that it would be in the interests of the company's creditors or shareholders, or both, for the liquidator to

(a) make inquiries concerning the business, property, affairs or entitlements of the company; or

(b) bring, continue or defend proceedings relating to the business, property or affairs of the company;

for the purpose of recovering, retaining or realising the company's assets.

(2) Advances from the Fund under this section shall be of such amount as the supervisory board determines, having regard to the proposals of the liquidator for the conduct of the proceedings or the inquiry, and may be made in relation to any one or more stages of the proceedings or the inquiry, and on such terms and conditions as the supervisory board thinks fit.

(3) Advances from the Fund include an amount to meet any costs awarded against the liquidator.

#### **249 Priority of the Fund**

(1) Where an advance has been authorised by the supervisory board under section 248 [Advances for inquiries or proceedings], the Registrar has, in the liquidation of the company concerned, a claim to be repaid the amount of that advance.

(2) The Registrar's claim under subsection (1) shall be treated as an expense properly incurred by the liquidator under section 239(2)(a) [Preferential claims].

#### **250 Liquidator's report**

As soon as practicable after the completion of the inquiry or proceedings, or any stage of the inquiry or proceedings, in respect of which an advance was made under section 248 [Advances for inquiries or proceedings], the liquidator must send or delivery to the Registrar a report on the purposes for which the money advanced was expended and the outcome of the proceedings or inquiry to date.

### **PART 15**

## REMOVAL FROM THE NEW ZEALAND REGISTER

### **251 Effect of removal from register**

A company ceases to exist when it is removed from the New Zealand register.

### **252 Grounds for removal from register**

(1) Subject to subsection (3), the Registrar shall remove a company from the New Zealand register if

(a) the company is an amalgamating company other than amalgamated company and, on the same day, the Registrar issues a certificate of amalgamation under section 193 [Certificate of amalgamation] or

(b) the Registrar is satisfied that the company has ceased to carry on business; or

(c) there is sent or delivered to the Registrar a request made by

(i) those shareholders entitled to vote and voting on the question, by special resolution; or

(ii) the board of directors or any other person, if the constitution of the so requires or permits <<*by resolution passed at a meeting of the board*>>;

that the be removed from the New Zealand register on one or other of the grounds specified in subsection (2); or

(d) a liquidator sends or delivers to the Registrar the final report and final accounts of the liquidation and the statement required by section 206 [Completion of liquidation].

(2) A request that a company be removed from the New Zealand register under subsection (1)(c) may be made on the grounds, and must be accompanied by a statement by a director or some other person to the effect.

(a) that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and this Act; or

(b) that the company has no surplus assets after paying its debts in full or in part, and no creditor has applied to the Court under section 203 [Commencement of liquidation] for an order putting the company into liquidation.

(3) The Registrar shall remove a company from the New Zealand register under subsection (1) paragraphs (b), (c) or (d) only when

(a) the Registrar has given the notice required by section 253 [Notice of intention to remove company from register] and

(b) the Registrar

(i) is satisfied that no person has objected to the removal under section 254 [Grounds for objecting to removal from register]; or

(ii) if an objection to the removal has been received, has carried out the duties required by section 255 [Duties of Registrar where objection received].

### **253 Notice of intention to remove company from register**

(1) Where the Registrar

(a) has reason to believe that a company has ceased to carry on business and ought to be removed from the New Zealand register under section 252(1)(b) [Grounds for removal from register]; or

(b) has received a request that the company be removed from the New Zealand register under section 252(1)(c); or

(c) has received from a liquidator the documents referred to in section 252(1)(d);

the Registrar must, as soon as practicable, give public notice of the matters specified in subsection (3).

(2) Where the Registrar intends to remove the company from the New Zealand register on the ground referred to in subsection (1)(a) or (b), the Registrar must also give notice of the matters specified in subsection (3) to

(a) the company; and



(b) any secured party who has registered a financing statement under the Personal Property Securities Act [] in relation to any property of the company; and

(c) the Inland Revenue Department.

(3) The notice to be given under this section must specify

(a) the name of the company and its registered office;

(b) the section under and the grounds on which the Registrar proposes to remove the company from the New Zealand register;

(c) the date by which an objection to the removal under section 254 [Grounds for objecting to removal from register] must be sent or delivered to the Registrar, which shall be not less than 20 working days after the date of the notice.

#### **254 Grounds for objecting to removal from register**

(1) Where the Registrar give notice of an intention to remove a company from the New Zealand register, any person may send or delivery to the Registrar, not later than the date specified in the notice, an objection to the removal on any one or more of the following grounds:

(a) that the company is still carrying on business; or

(b) that the company is a party to legal proceedings; or

(c) that the company is in receivership, or liquidation, or both; or

(d) that the person is a creditor, a shareholder or any other person who has an undischarged claim against the company; or

(e) that the person believes that there exists, and intends to pursue, a right of action on behalf of the company under Part 8; or

(f) that for any other reason it would not be just and equitable to remove the company from the New Zealand register.

(2) For the purposes of subsection (1)(d),

(a) a claim by a creditor against a company is not an undischarged claim where:

(i) the claim has been paid in full; or

(ii) the claim has been paid in part under a compromise entered into under Part 13 or by being otherwise compounded to the reasonable satisfaction of the creditor; or

(iii) the claim has been paid in full or in part by a receiver or a liquidator in the course of a complete receivership or liquidation; or

(iv) a receiver or a liquidator has notified the creditor that the assets of the company are not sufficient to enable any payment to be made to the creditor; and

(b) a claim by a shareholder or any other person is not undischarged where

(i) payment has been made to the shareholder or that person in accordance with any right under the company's constitution and this Act to receive or share in any of the company's surplus assets; or

(ii) a receiver or liquidator has notified the shareholder or that person that the company has no surplus assets.

### **255 Duties of Registrar where objection received**

(1) Where an objection to the removal of a company from the New Zealand register is made on a ground specified in section 254(1)(a), (b) or (c) [Grounds for objecting to removal from register], the Registrar shall not proceed with the removal unless the Registrar is satisfied that

(a) the objection has been withdrawn; or

(b) any facts on which the objection is based are not, or are no longer, correct; or

(c) the objection is frivolous or vexatious.

(2) Where an objection to the removal of a company from the New Zealand register is made on a ground specified in section 254(1)(d), (e) or (f) [Grounds for objecting to removal from register],

(a) the Registrar shall give notice to the person objecting that, unless notice of an application to the Court by that person for an order

(i) under section 203(1)(c) [Commencement of liquidation], that the company be put into liquidation; or

(ii) under section 256 [Powers of the Court], that, on any ground specified in section 254 [Grounds for objecting to removal from register], the company not be removed from the New Zealand register;

is served on the Registrar not later than 30 working days after the date of notice, the Registrar intends to proceed with the removal; and

(b) if

(i) notice of such an application to the Court is not duly served on the Registrar; or

(ii) on the hearing of such an application, the Court refuses to grant either an order putting the company into liquidation or an order that the company not be removed from the New Zealand register; the Registrar shall proceed with the removal.

(3) The Registrar shall send

(a) a copy of any objection under section 254 [Grounds for objecting to removal from register]; and

(b) a copy of any notice given by or served on the Registrar under this section; and

(c) if the company is removed from the New Zealand register, notice of the removal;

to any person who sent or delivered to the Registrar a request that the company be removed from the New Zealand register under section 252(1)(c) [Grounds for removal from register] or, while acting as liquidator, sent or delivered to the Registrar the documents referred to in section 252(1)(d).

## **256 Powers of the Court**

On any application by any person for an order that, on any ground specified in section 254 [Grounds for objecting to removal from the register], the company not be removed from the New Zealand register, the Court may make such order as it thinks fit.

### **257 Property of a company removed from register**

(1) If, <<after>> immediately prior to the removal of a company from the New Zealand register, <<it should be found that property of the former company has not been distributed>> any property vested in that company had not been distributed or disclaimed, that property is to be treated as unclaimed property and vests in the Crown upon removal of the company from the New Zealand register.

(2) For the purposes of this section, property of the former company includes leasehold property and all other rights vested in or held on trust for the former company, but does not include property held by the former company on trust for any other person.

(3) When the vesting of any property under this section comes to the notice of the Secretary to the Treasury, the Secretary must forthwith give public notice of the vesting, setting out the name of the former company and particulars of the property vesting, and must send or deliver a copy of the notice to the Registrar.

(4) The Secretary to the Treasury may claim the Crown's title to any property vesting in the Crown under this section if the property is onerous property within the meaning of section 211(2) [Power to disclaim onerous property].

(5) The Secretary to the Treasury must forthwith give public notice of any disclaimer under subsection (4) and send or deliver a copy of the notice to the Registrar.

(6) Whether or not any property vesting in the Crown under this section is disclaimed under subsection (4), any person who would have been entitled to receive all or part of the property or payment from the proceeds of its realisation if it had been in the hands of the company immediately before the removal of the company from the New Zealand register, or any other person claiming through any such person, may apply to the Court for an order

(a) vesting all or part of the property in that person; or

(b) awarding that person compensation from the Crown of an amount not greater than the value of the property.

(7) On an application made under subsection (6), the Court may

(a) decide any question concerning the value of the property vesting in the Crown under this section, the entitlement of an applicant to any such property or to compensation, and the apportionment of any property or compensation among any two or more applicants;

(b) order that the hearing of any two or more applications be consolidated;

(c) order that any application be treated as an application on behalf of all persons, or all members of a class of persons, with an interest in the property;

(d) make any ancillary order.

(8) Any compensation awarded under subsection (6) shall be paid out of <<the Consolidated Account>> public money as defined in the Public Finance Act 1989 without further appropriation than this Act.

## PART 16

### OVERSEAS COMPANIES

#### **258 Overseas companies to register under this Act.**

(1) Every overseas company that, on or after the commencement of this Act, establishes a place of business (including a share transfer or share registration office) within New Zealand must apply for registration under this Part in accordance with section 259 [Application for registration] within 10 registration days of establishing the place of business.

(2) Every overseas company that, on or after the commencement of this Act, establishes a place of business (including a share transfer or share registration office) within New Zealand must apply for registration under this Part in accordance with section 259 [Application for registration] within 10 registration days of establishing the place of business.

(2) Every overseas company whose constitutional documents are registered under Part XII of the Companies Act 1955 immediately before the date of commencement of this Act is, on and from the date, deemed to be registered under this Part instead of under Part XII of the Companies Act 1955.

(3) Every overseas company that, before the commencement of this Act, has established a place of business (including a share transfer or share registration office) within New Zealand but whose constitutional documents are not registered under Part XII of the Companies Act 1955, must apply for registration under this Part in accordance with section 259 [Application for registration] within 10 registration days of the commencement of this Act.

(4) If an overseas company fails to comply with subsections (1) or (3)

(a) the overseas company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and

(b) every director of the overseas company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

### **259 Application for registration**

(1) An application for registration of an overseas company under this Part must be delivered to the Registrar and must

(a) be in the prescribed form; and

(b) be signed by or on behalf of the overseas company.

(2) Without limiting subsection (1), every application for registration of an overseas company under this Part must

(a) state the name of the overseas company; and

(b) contain a statement by the applicant

*<<(i)>> that <<the applicant has caused a search to be made, during the period of 10 working days immediately preceding the date of the application, of such registers,*

*directories and records of names, trademarks, or service marks as are then prescribed by the Registrar for the purposes of this paragraph; and*

(ii) *whether*>>, disregarding the word "Limited" (if any), the name of the overseas company is not identical to the assigned or registered name of any body registered on any register prescribed by the Registrar for the purposes of this section <<*subparagraph (i) and, if the name of the overseas company is so identical, whether the body has consented to the use of the name in New Zealand by the overseas company*>>; and

(c) state the full names and residential addresses of the directors of the overseas company at the date of the application; and

(d) state the full address of the principal place of business of the overseas company; and

(e) have attached evidence of incorporation of the overseas company and a copy of the instrument constituting or defining the constitution of the company, both being certified in accordance with regulations made under this Act; and

(f) state a full name and address of one or more persons resident or incorporated in New Zealand who are authorised to accept service in New Zealand of documents on behalf of the overseas company.

## **260 Registration of overseas company**

*<<Forthwith after receipt of a properly completed application for registration under this Part of an overseas company, the Registrar must*

*(a) enter on the overseas register the particulars of the company required under section 272 [Registers]; and*

*(b) assign a number of the overseas company for the purposes of section 261 [Name of overseas company].>>*

### Where

(a) an overseas company is deemed to be registered under this Part by virtue of section 258(2) [Overseas companies to register under this Act]; or

(b) the Registrar receives a properly completed application for registration under this Part of an overseas company;

the Registrar must forthwith

(c) enter on the overseas register the particulars of the company required under section 272 [Registers]; and

(d) assign a number of the overseas company for the purposes of section 261 [Name of overseas company-].

### **261 Name of overseas company**

(1) If at any time the Registrar believes on reasonable grounds that

(a) disregarding the word "Limited" (if any), the name of an overseas company is identical to the name of any body registered on any register prescribed by the Registrar for the purposes of this section <<259(2)(b)(i) [*Application for registration*]>>; or

(b) the use in New Zealand by an overseas company of its name contravenes any Act which prohibits the use of certain words or names; <<or

*(c) the use in New Zealand by an overseas company of its name is undesirable;*>>

the Registrar may serve written notice on the overseas company to the effect that the overseas company must not use its name in New Zealand from the date specified in the notice (being a date not less than 20 working days after the date on which the notice is served on the overseas company).

(2) Subject to subsection (3), where the Registrar has served notice on an overseas company under subsection (1) then, unless the overseas company has changed its name from the name specified in the notice, from the date specified in the notice the name of the overseas company in New Zealand will be "Company No X Limited" where "X" is the number assigned by the Registrar for this purpose upon the overseas company's registration under this Part.

(3) The name given to an overseas company under subsection (2) shall not include the word "Limited" if the liability of the members of the overseas company is unlimited.



## **262 Use of name by overseas company**

(1) Every overseas company must ensure that its full name, and the name of the country where it was incorporated, are clearly stated in

(a) all communications sent by or on behalf of the company; and

(b) all documents issued or signed by or on behalf of the company that evidence or create a legal obligation of the company.

(2) For the purposes of subsection (1), it is lawful to use any generally recognised abbreviation of a word or words in the name of an overseas company, so long as it is not misleading to do so.

## **263 Alteration of constitution, name, etc**

(1) Where there is

(a) an alteration to the instrument constituting or defining the constitution of an overseas company; or

(b) a change in the directors of an overseas company; or

(c) a change in the persons authorised to accept service in New Zealand of documents on behalf of the overseas company

the overseas company must ensure that the Registrar receives notice in the prescribed form of the alteration or change within 20 registration days of the day on which the alteration or change takes effect.

(2) If an overseas company fails to comply with subsection (1)

(a) the overseas company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and

(b) every director of the overseas company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

## **264 Annual return of overseas company**

(1) Every overseas company must ensure that the Registrar receives each year, during the month allocated to the overseas company for the purposes of this section, an annual return in the prescribed form confirming that the information of the kind referred to in the return on the overseas register in respect of the overseas company at the date of the return is correct.

(2) An annual return must be dated a day within the month during which the return is required to be received by the Registrar.

(3) On registration of an overseas company under this Part, the Registrar must allocate a month to the company for the purposes of this section.

(4) The Registrar may, by written notice to an overseas company, alter the month allocated to the company under subsection (3) or under this subsection.

(5) Notwithstanding subsection (1), an overseas company need not make an annual return in the calendar year of its registration under this Part.

(6) If an overseas company fails to comply with subsections (1) and (2)

(a) a company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and

(b) every director of the overseas company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

## **265 Service of documents upon overseas company**

(1) A summons, writ, claim, notice, order or other document of similar nature may be served on an overseas company registered under this Part as follows:

(a) by delivery to a person named in the overseas register as being authorised to accept service in New Zealand of documents on behalf of the overseas company; or

(b) if delivery in accordance with paragraph (a) is not practicable at the relevant time, by delivery to a director, employee or agent of the company at any place of business of the company in New Zealand, or to a person who appears to be in charge of that place at the time of delivery; or

(c) if delivery in accordance with paragraph (b) is not practicable at the relevant time, by posting the document to the address of a person referred to in paragraph (a), or delivery it to a box at a document exchange which that person is then using; or

(d) if delivery in accordance with paragraph (c) is not practicable at the relevant time, by posting the document to the address of any place of business in New Zealand of the company, or delivering it to a box at a document exchange which the company is then using.

(2) In addition to subsection (1), a particular document may be served on an overseas company in a manner approved by the Court.

(3) Subsections (1) and (2) have effect notwithstanding any other Act or rule of law, but do not limit section 153 [Agreements as to Service] (as applied by subsection (4)).

(4) Sections 153 [Agreements as to service], 154 [Service by delivery] and 155 [Service by post or document exchange] apply in respect of an overseas company as if

(a) every reference therein to a company were a reference to an overseas company; and

(b) every reference therein to section 152 [Methods of service of documents] were a reference to subsection (1).

## **266 Ceasing to carry on business in New Zealand**

(1) Every overseas company registered under this Part that intends to cease to have a place of business in New Zealand must

(a) give public notice of that intention; and

(b) no earlier than three months after giving notice in accordance with paragraph (a), give notice to the Registrar in the prescribed form stating the date on which it will cease to have a place of business in New Zealand.

(2) The Registrar must remove an overseas company from the overseas register forthwith after receipt of a notice given in accordance with subsection (1)(b), or by a liquidator in accordance with the provisions of the Fifth Schedule.

(3) An application may be made to the Court for the liquidation of the assets in New Zealand of an overseas company in accordance with Part 14, subject to the modifications and exclusions set out in the Fifth Schedule.

(4) An application may be made under subsection (3) whether or not

(a) the overseas company is registered under this Part; or

(b) the overseas company has given public notice of an intention to cease to have a place of business in New Zealand; or

(c) the overseas company has given notice to the Registrar in accordance with subsection (1)(b); or

(d) it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of any other country.

#### 267 Attorneys of overseas companies

(1) Part XII of the Property Law Act 1952 applies, with the necessary modifications, with respect to any power of attorney executed by an overseas company registered under this Part of the same extent as if the company were a person and as if the commencement of the winding up of the company were the death of a person within the meaning of the said Part XII.

(2) A declaration endorsed under or annexed to any instrument appointing, or purporting to appoint an attorney of an overseas company, made or purporting to be made by one of the directors before a person authorised by section 11 [Declarations made outside New Zealand] to take a declaration for use in New Zealand, in the country concerned.

(a) the company is incorporated under the style mentioned in the instrument, in accordance with the law of the country in which it is so incorporated, the name of the country being specified in the declaration; and

(b) the instrument has been executed, and the powers and authorities purporting to be conferred upon the attorney are authorised to be conferred under the constitution of the company, or in pursuance of the Act or instrument under which the company is

incorporated, or by any other instrument constituting or defining the constitution of the company; and

(c) the declarant is a director or general manager of the company, is conclusive evidence of the facts set forth therein.

## PART 17

### REGISTRAR OF COMPANIES

#### **268 Registrar and Deputy Registrars of Companies**

(1) There shall be appointed in accordance with the State Sector Act 1988

(a) a Registrar of Companies; and

(b) as many Deputy Registrars of Companies as may be found necessary for the purposes of this Act.

(2) Subject to the control of the Registrar of Companies, a Deputy Registrar shall have and may exercise all the powers, duties and functions of the Registrar of Companies under this Act. The fact that a deputy Registrar exercises any such power, duty, or function is conclusive evidence of his or her authority to do so.

#### **269 District and Assistant Registrars of Companies**

(1) There shall from time to time be appointed in accordance with the State Sector Act 1988 as many District Registrars of Companies and Assistant Registrars of Companies as may be found necessary for the purposes of this Act.

(2) Subject to the control of the Registrar, every District Registrar shall have and may exercise all the powers, duties and functions of the Registrar.

(3) Subject to the control of the Registrar and of the District Registrar, every Assistant Registrar shall have and may exercise all the powers, duties and functions of the Registrar.

(4) The fact that a District Registrar or an Assistant Registrar exercises any powers or functions conferred by this Act on the Registrar is conclusive evidence of his or her authority to do so.

## **270 Official seals**

There shall be an official seal in the custody of the Registrar, and there shall also be an official seal in the custody of each District Registrar.

## **271 Fees**

(1) The Governor-General may by Order in Council, prescribe

(a) fees payable to the Registrar for the performance of the Registrar's functions under this Act; and

(b) penalty fees payable to the Registrar for failure to lodge a document with the Registrar within the time prescribed by this Act; and

(c) fees payable to the Registrar for the purposes of or as contemplated by this Act.

(2) Where a fee is prescribed for the performance of a function of the Registrar, the Registrar may refuse to perform the function until the fee is paid.

(3) The Registrar may waive or reduce a penalty fee prescribed pursuant to subsection (1)(b) in any particular case if the Registrar considers that in the circumstances it is proper and reasonable to do so.

## **272 Registers**

(1) the Registrar shall cause to be kept in New Zealand

(a) a register of companies incorporated or registered in New Zealand under Part 2; and

(b) a register of overseas companies registered in New Zealand under Part 16

each of which must contain such information as is prescribed by regulations made under this Act.

(2) The New Zealand register may be divided into different parts which may be kept in different places in New Zealand.

(3) The overseas register must be kept in full at Wellington.

(4) The Registrar may, after giving notice to such persons as the Registrar considers have an interest in the transfer, direct the transfer or any part of the New Zealand register, and of any record relating to any company, from one place in New Zealand to another such place.

### **273 Registration of documents**

(1) On receipt of a document for registration under this Act the Registrar shall

(a) mark the time and date of receipt on the document; and

(b) subject to subsection (2), forthwith register it in the New Zealand register or the overseas register, as the case may be; and

(c) forthwith give written advice of registration to the person from whom the document was received.

(2) If any document received by the Registrar for registration under this Act

(a) is not in the prescribed form, it any; or

(b) has not been duly completed; or

(c) contains any matter that is not clearly legible,

the Registrar may refuse the document, and in that event shall forthwith request either that the document be appropriately amended or completed and submitted for registration again or that a fresh document be submitted in its place.

(3) Neither registration, nor refusal of registration, of a document by the Registrar shall affect, or create any presumption as to, the validity or invalidity of the document or the correctness or otherwise of the information contained in the document.

### **274 Inspection and evidence of registers**

(1) Any person may, on payment of the prescribed fee and during normal business hours on any registration day, inspect the New Zealand register or overseas register and any information or document forming part of either register.

(2) Any person may, on payment of the prescribed fee, require a certificate of the incorporation or registration of any company, or a copy of or extract from any document or any part of any document forming part of the New Zealand register or the overseas register to be given or certified by the Registrar.

(3) Not process for compelling the production of any document kept by the Registrar shall issue from any Court, except with the leave of that Court, and any such process is issued must have attached a statement that it is issued with the leave of the Court.

(4) A copy of or extract from any document forming part of the New Zealand register or the overseas register, certified to be a true copy under the hand and seal of the Registrar (whose official position and signature it shall not be necessary to prove), shall in all legal proceedings be admissible in evidence as of equal validity with the original document.

### **275 Notice by Registrar**

(1) Where the Registrar is required by this Act to give notice to any person, the Registrar shall give such notice in writing in such manner as the Registrar considers appropriate in the circumstances.

(2) Without limiting subsection (1), the Registrar may give notice in writing to a person by

(a) having a notice delivered to the person; or

(b) sending a notice to the person by registered post, ordinary post or courier; or

(c) having a notice published in a newspaper or other publication in circulation in the area where the person resides.

### **275A Powers of inspection by Registrar**

(1) The Registrar or any person authorised by the Registrar may



(a) for the purpose of

(i) ascertaining whether a company or any director of a company is complying or has complied with this Act; or

(ii) ascertaining whether the Registrar should exercise any of his or her rights or powers under this Act; or

(iii) detecting offences under this Act; and

(b) if it is in the public interest to do so.

do any of the following:

(c) require any person, including a person carrying on the business of banking, to produce for inspection any relevant documents within that person's possession or control;

(b) inspect and take copies of any relevant documents:

(e) take possession of relevant documents and remove them from the place where they are kept, and retain them for a reasonable time, for the purpose of taking copies;

(f) retain any relevant documents of a period which is in all the circumstances reasonable, if there are reasonable grounds for believing that

(i) they are evidence of the commission of an offence; and

(ii) they may be destroyed, if returned to the person from whom they were obtained.

(2) Nothing in this section requires any person to disclose any privileged document or communication brought into existence or made for the purpose of

(a) obtaining or giving legal advice or legal assistance; or

(b) negotiations entered into in good faith in an attempt to settle any dispute or litigation.

(3) Nothing in this section limits or affects the Inland Revenue Department Act 1974 or the Statistics Act 1975.

(4) In this section:

“company” includes an overseas company:

“relevant document” means, in relation to a company, and document that contains information relating to

(a) the company; or

(b) any money or other property that is or has been managed, supervised, controlled or held in trust by or for the company.

(5) No person may obstruct or hinder the Registrar, or any person authorised by the Registrar, while he or she is making an inspection or otherwise exercising any powers under subsection (1).

(6) Any person who

(a) fails to comply with a requirement under subsection (1)(c); or

(b) acts in contravention of subsection (5)

may be convicted of an offence under section 277(2) [Failure to comply with this Act].

### **275B Disclosure of information and reports**

(1) Where

(a) any person has obtained any documents or information in the course of making an inspection under section 275A [Powers of inspection by Registrar]; or

(b) any person has prepared a report in relation to an inspection under section 275A [Powers of inspection of Registrar]; or

(c) any person has received any documents, information or reports of the kind referred to in paragraphs (a) and (b).

that person must not disclose those documents, information or reports except

(d) with the approval of the Registrar, and

(i) with the consent of every person to whom any information relates; or

(ii) to the extent that the information is available under any Act, or in a public document; or

(iii) for the purposes of this Act or in connection with the exercise of powers conferred under this Act; or

(e) in the course of any criminal proceedings.

(2) A person who fails to comply with subsection (1) may be convicted of an offence under section 277(2) [Failure to comply with Act], 275C The Official Information Act 1982 and section 275A inspections

(1) Notwithstanding anything in the Official Information Act 1982, any person may refuse to disclose any documents, information or reports in his or her possession obtained in making, or acquired as a result of, an inspection under section 275A(1) of this Act, until the purpose for which the inspection is carried out has been satisfied.

(2) Notwithstanding anything in the Official Information Act 1982, where any person requests disclosure of whether an inspection under section 275A(1) of this Act is being, or is proposed to be, or has been carried out, as the case may be, no person is required to disclose that information under the Official Information Act 1982 unless

(a) the disclosure of that information would not be likely to prejudice the commercial position of any person; and

(b) there is no other good reason for withholding that information under that Act.

#### **275D Appeals from decisions under section 275C**

(1) An person who is aggrieved by the refusal of any person to disclose any documents, information or reports under section 275C of this Act may appeal to the Court within 15 working days after being notified of that refusal, or within such further time as the Court may allow.

(2) On hearing the appeal, the Court may confirm the refusal, or give such directions or make such determination in the matter as the Court thinks fit.

### **275E Inspector's report admissible in liquidation proceedings**

Notwithstanding any other Act or rule of law, a report prepared by any person in relation to an inspection carried out by him or her under section 275A [Powers of inspection by Registrar] is admissible in evidence at the hearing of an application to the Court to appoint a liquidator.

### **276 Appeal from Registrar**

(1) Any person who is aggrieved by any act or decision of the Registrar under this Act may appeal to the Court within 15 working days after the date of notification of the act or decision, or within such further time as the Court may allow.

(2) On hearing the appeal, the Court may approve the Registrar's act or decision or may give such directions or make such determination in the matter as the Court thinks fit.

(3) Subject to subsection (4), notwithstanding any other provision of any Act or any rule of law, where a person appeals or applies to the Court in respect of an act or decision of the Registrar under section 275A, until a decision on the appeal or application is given

(a) the Registrar, and any person authorised by the Registrar under that section for the purpose, may continue to exercise his or her powers under that section as if no such appeal or application had been made; and

(b) no person is excused from fulfilling his or her obligations under that section by reason of that appeal or application.

(4) Where an appeal or application in respect of any act or decision of the Registrar under section 275A [Powers of inspection by Registrar] is allowed or granted, as the case may be

(a) the Registrar must ensure that, forthwith after the decision on the appeal or application is given, any copies or documents taken or regained by the Registrar, or by a person authorised by the Registrar under section 275A(1) [Powers of inspection by Registrar] in respect of that act or decision are destroyed or expunged; and

(b) no information acquired under section 275A [Powers of inspection by Registrar] in respect of that act or decision is admissible in evidence in any proceedings.

## PART 18

### OFFENCES AND PENALTIES

#### **277 Failure to comply with Act**

(1) Every person who acts in contravention of or fails to comply in any respect with any of the following provisions of this Act, or any requirement imposed under any such provision, namely

(a) section 39(2) [Consideration for issue to be decided on by Board];

<<(a)>> (b) section 42(2) [Board may authorise a distribution];

<<(b)>> (c) section 50(3) [Board may make offer to acquire shares];

<<c>> (d) section 51(2) [Special offers to acquire shares];

<<(d)>> (e) section 58(5) [Financial assistance];

<<(e)>> (f) section 59(2) [Special financial assistance];

<<(f)>> (g) section 62(1) [Statement of shareholder rights];

<<(g)>> (h) section 63(4) [Transfer of shares];

<<(h)>> (i) section 186(1) [Copies of documents];

<<(i)>> (j) section 190(2) [Manner of approving amalgamation proposal];

(k) section 191(4) [Short form amalgamation].

commits an offence and is liable on conviction to a fine not exceeding \$5,000.

(2) Every person who acts in contravention of or fails to comply in any respect with any of the following provisions of this Act, or any requirement imposed under any such provisions, namely

(a) section 25(2) [Power of Court to alter constitution];

(b) section 65(1) [Company to maintain share register];

(ba) section 66(2) [Place of share register];

(c) section 66(3) [Place of share register];

(d) section 68(1) [Directors' duty to supervise share register];

(e) section 109(1) [Disclosure of interest];

(f) section 139(5) [Investigation of records];

(g) section 147(1) [Company records to be kept];

(ga) section 147(3) [Company records to be kept];

(gb) section

(h) section 213(1) [Offences, search and seizure];

(i) section 213(2) [Offences, search and seizure];

(j) section 258(1) [Overseas companies to register under this Act];

(k) section 258(3) [Overseas companies to register under this Act];

(l) section 264(10) [Alteration of constitution, name etc];

(m) section 264(1) and (2) [Annual return of overseas company];

(ma) section 275A(1)(c) [Powers of inspection by Registrar];

(mb) section 275A(5) [Powers of inspection by Registrar];

(mc) section 275B(1) [Disclosure of information and reports];

commits an offence and is liable on conviction to a fine not exceeding \$10,000.

## **278 Liability of directors for failure by board or by company**

(1) Where a company or the board of a company acts in contravention of or fails to comply with any of the following provisions of this Act, or any requirement imposed pursuant to any such provision, namely

(a) section 62(1) [Statement of shareholder rights];

(b) section 63(4) [Transfer of shares];

(c) section 186(1) [Copies of documents],

then, without limiting the liability of any person under section 277 [Failure to comply with Act] every director of the company commits an offence, and is liable on conviction to a fine not exceeding \$5,000.

(2) Where a company or the board of a company acts in contravention of or fails to comply with any of the following provisions of this Act, or any requirement imposed pursuant to any such provision, namely

(a) section 24(3) [Alteration of constitution];

(b) section 35(1) [Share description to be registered];

(c) section 37(2) [Persons to whom shares by be issued];

(d) section 65(1) [Company to maintain share register]; a section 66(2) [Place of share register];

(e) section 66(3) [Place of share register];

(f) section 122 [Notification on Registrar of directors];

(g) section 147(1) [Company records to be kept];

(ga) section 147(3) [Company records to be kept];

(h) section 149(1) [Inspection of records by directors];

(i) section 156(1) [Accounting records to be kept];

(ia) section 156A(2) [Place of accounting records];

(j) section 159(1) [Obligations to prepare financial statements for company];

(k) section 165(1) [Obligation to prepare group financial statements];

- (l) section 182(1) and (2) [Annual return];
- (m) section 183(1) [Company records available for public inspection];
- (n) section 184(1) [Company records available for inspection by shareholders];
- (o) section 195(2) [Powers of Court in relation to reconstruction etc];
- (p) section 258(1) [Overseas companies to register under this Act];
- (q) section 258(3) [Overseas companies to register under this Act];
- (r) section 263(1) [Alteration of constitution, name etc];
- (s) section 264(1) and (2) [Annual return of overseas company];

then, without limiting the liability of any person under section 277 [Failure to comply with Act], every director of the company commits an offence, and is liable on conviction to a fine not exceeding \$10,000.

(3) Where a director is charged under subsection (1) or (2) in respect of a duty imposed on the board of a company, it is a defence to the charge to show that the board had taken reasonable and proper steps in all the circumstances to ensure that the requirements of the Act would be complied with.

(4) Where a director is charged under subsection (1) or (2) in respect of a duty imposed on a company, it is a defence to the charge to show that (a) he or she did not know of and could not reasonably have been expected to know of the contravention or failure to comply; or

(b) he or she took all reasonable steps to ensure that the requirements of the Act would be complied with.

## **279 False statements**

(d) Every person who, with respect to a document required by or for the purposes of this Act.

(a) makes or authorises the making of a statement therein that is false or misleading in a material particular knowing it to be false or misleading; or



(b) omits or authorises the omission there from of any matter knowing that the omission renders the document false or misleading in a material particular

commits an offence, and is liable on conviction to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding five years, or to both.

(2) Every director or employee of a company who makes or furnishes, or authorises or permits the making or furnishing of, a statement or report that relates to the affairs of the company and that is false or misleading in a material particular, to

(a) a director, employee, auditor, shareholder, debenture holder, or trustee for debenture holders of the company; or

(b) a liquidator, committee of inspection, or receiver or manager of any property of the company; or

(c) where the company is a subsidiary, a director, employee, or auditor of the holding company

knowing it to be false or misleading, commits an offence, and is liable on conviction to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding five years, or to both.

(3) Where a person at a meeting votes in favour of the making of a statement the person shall, for the purposes of this section, be deemed to have authorised the making of the statement.

## **280 Fraudulent destruction of property**

Every director, employee, or shareholder of a company who

(a) fraudulently takes or applies property of the company for his or her own use or benefit, or for any use or purpose other than the use or purpose of the company; or

(b) fraudulently conceals or destroys any property of the company commits an offence, and is liable on conviction to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding five years, or to both.

## **281 Falsification of records**

(1) Every director, employee, or shareholder of a company who, with intent to defraud or deceive any person,

(a) destroys, parts with, mutilates, alters, or falsifies, or is a party to the destruction, mutilation, alteration, or falsification of any register, accounting records, book, paper, or other document belonging or relating to the company; or

(b) makes, or is party to the making of, a false entry in any register, accounting records, book, paper, or other document belonging or relating to the company

commits an offence, and is liable on conviction to a fine not exceeding \$200,000 or imprisonment for a term not exceeding five years, or to both.

(2) Where any mechanical, electronic, or other device is used in connection with the keeping or preparation of any register, accounting or other records, index, book, paper, or other document for the purposes of a company or this Act, every person who

(a) records or stores in the device, or makes available to any person from the device, any matter that he or she knows to be false or misleading in a material particular; or

(b) with intent to falsify or render misleading any such register, accounting or other records, index, book, paper, or other document, destroys, removes, or falsifies any matter recorded or stored in the device, or fails or omits to record or store in the device any matter commits an offence, and is liable on conviction to a fine not exceeding \$200,000, or to imprisonment for a term not exceeding five years, or to both.

## **282 Disqualification of director**

(1) Where

(a) it appears that a person has been guilty of any offence for which the person is liable (whether convicted or not) under this Part; or

(b) it appears that a person has, while a director of a company and whether convicted or not

(i) persistently failed to comply with this Act, the Companies Act 1955 or the Securities Act 1978; or

(ii) been guilty of fraud in relation to the company or of any breach of duty to the company or any shareholder or third party; or

(iii) acted in a reckless or incompetent manner in the performance of his or her duties as director; or

(c) any person was a director of a company which went into liquidation (whether while that person was a director or subsequently) and was unable to pay its debts at that time; and was also the director of another unrelated company which went into liquidation (whether while that person was a director or subsequently) within five years of the date on which the first mentioned company went into liquidation; and it appears that that person's conduct as director of either of the companies makes him or her unfit to be a director of a company; or

(d) it appears that a person has become of unsound mind;

that Court may make an order that the person shall not, without the leave of the Court, be a director of any company for such period not exceeding 10 years as may be specified in the order.

(2) A person intending to apply for an order under this section must give not less than 10 days' notice of that intention to the person against whom the order is sought, and on the hearing of the application the last-mentioned person may appear and give evidence or call witnesses.

(3) An application for an order under this section may be made by the Registrar, the Official Assignee, or by the liquidator of the company, or by any person who is or has been a shareholder or creditor of the company; and on the hearing of

(a) any application for an order under this section by the Registrar or the Official Assignee or the liquidator; or

(b) of any application for leave under this section by a person against whom an order has been made on the application of the Registrar, the Official Assignee, or the liquidator;

the Registrar, Official Assignee, or liquidator shall appear and call the attention of the Court to any matters which seem to him or her to be relevant, and may himself or herself give evidence or call witnesses.

(4) An order may be made under this section notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the order is to be made.

(5) If any person acts in contravention of an order made under this section, that person shall, in respect of each offence, be liable on conviction to imprisonment for a term not exceeding 5 years, or to a fine not exceeding \$200,000 or to both.

(6) If any person acts as a director of any company in contravention of an order made under this section, that person shall be personally liable to

(a) any liquidator of that company for every unpaid debt incurred by that company; and

(b) any creditor of that company for any debt to that creditor incurred by that company; while that person was so acting.

## PART 19

### MISCELLANEOUS

#### **283 Information for creditors**

(1) Any notice, statement, report, accounts or other documents to be sent to a creditor may be

(a) delivered by hand to the creditor, or, if the creditor is a company, delivered in accordance with section 152(a), (b) or (c) [Methods of service of documents]; or

(b) posted or delivered to the last known address of the creditor or if the creditor is a company to the company's address for service, or delivered to a box at a document exchange which the creditor is then using; or

(c) sent by telex, facsimile machine, or other similar means of communication to the number of the creditor.

(2) For the purposes of subsection (1)

(a) any document posted to a creditor, or delivered to a document exchange, shall be deemed to be received by the creditor five working days (or such shorter period as the Court may determine in any particular case) after it is so posted or delivered;

(b) any document sent by telex, facsimile machine, or other similar means of communication shall be deemed to be received by the creditor on the working day following the day on which it was sent.

(3) In proving the sending of any document to a creditor by post or delivery to a document exchange for the purposes of this section, it shall be sufficient to prove that the document was properly addressed to the creditor, that all postal or delivery charges were paid, and that the document was posted or delivered to the document exchange.

(4) If documents sent to a creditor's last known address, or if the creditor is a company, to the company's address for service are returned unclaimed three consecutive times, the liquidator need not send any further documents to the creditor until the creditor notifies the company of its new address.

#### **284 Prescribed forms**

The Governor-General may, by regulations made under this Act,

(a) prescribe forms for the purposes of this Act; and

(b) require the inclusion in or attachment to any such form, when used for the purposes of this Act, of any information or document; and

(c) require the signing of any such form by specified persons.

#### **285 Regulations**

The Governor-General may, by Order in Council, make regulations providing for such matters, not inconsistent with this Act, as are contemplated by or necessary for giving full effect to this Act and for its due administration.

## FIRST SCHEDULE

### PROCEEDINGS AT MEETINGS OF SHAREHOLDERS

#### **1 Chairman**

(1) If the directors have elected a chairman of the board, and the chairman of the board is present at a meeting of shareholders, he or she shall chair the meeting.

(2) If no chairman of the board has been elected or if, at any meeting of shareholders, the chairman of the board is not present within five minutes of the time appointed for the commencement of the meeting, the shareholders present may choose one of their number to be chairman of the meeting.

#### **2 List of shareholders entitled to notice of meetings**

(1) A company must prepare a list of shareholders entitled to receive notice of a meeting, arranged in alphabetical order and showing the number of shares held by each shareholder.

(a) if a date has been fixed under section 95(2) [Determination of shareholders entitled to distribution, attend meetings etc], not later than the working days after that date; or

(b) if no such date has been fixed,

(i) at the close of business on the day immediately preceding the day on which the notice is given; or

(ii) where no notice is given, on the day on which the meeting is held.

(2) A person named in a list prepared under paragraph (1) is entitled to attend the meeting and to vote the shares shown opposite his or her name in person or by proxy or by postal vote, except to the extent that

(a) that person has, since the date on which shareholders entitled to receive notice of the meeting were determined, transferred the ownership of any of his or her shares; and

(b) the transferee of those shares has been registered as the holder of those shares and demands not later than ten working days before the meeting that his or her name be included in the list before the meeting.

(3) A shareholder may examine the list of shareholders during normal business hours at the registered office of the company.

### **3 Notice of meetings**

(1) Written notice of the time and place of any meeting of shareholders must be given to every shareholder entitled to receive notice of the meeting and to every director and any auditor of the company not less than ten working days before the meeting.

(2) The notice must state

(a) the nature of the business to be transacted at the meeting in sufficient detail to enable a shareholder to form a reasoned judgment in relation to it; and

(b) the text of any resolution to be submitted to the meeting.

(3) Any irregularity in notice for a meeting is waived if all the shareholders entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity, or if all such shareholders agree to the waiver.

(4) If a meeting of shareholders is adjourned for less than 30 days it is not necessary to give notice of the time and place of the adjourned meeting other than by announcement at the meeting which is adjourned.

### **4 Methods of holding meetings**

Subject to the constitution, a meeting of shareholders may be held either

(a) by a number of shareholders, who constitutes a quorum, being assembled together at the place, date and time appointed for the meeting; or

(b) by means of audio, or audio and visual, communication by which all shareholders participating, being a quorum, can simultaneously hear each other throughout the meeting.

## **5 Quorum**

(1) A quorum for a meeting of shareholders is present if shareholders or their proxies are present or have cast postal votes who are between them able to exercise a majority of the votes to be cast on the business to be transacted by the meeting.

(2) No business may be transacted at a meeting of shareholders if a quorum is not present.

## **6 Voting**

(1) Unless a poll is demanded, voting at a meeting of shareholders is to be by show of hands.

(2) A declaration by the chairman of the meeting that a resolution is carried by the requisite majority is conclusive evidence of that fact unless a poll is demanded by any shareholder entitled to vote on the resolution.

(3) A poll may be demanded by any shareholder entitled to vote on the resolution either before or after the vote is taken on a resolution.

(4) If a poll is taken, votes must be counted according to the votes attached to the shares of each shareholder present and voting.

(5) The chairman of a shareholders' meeting is not entitled to a casting vote.

## **7 Proxies**

(1) A shareholder may exercise the right to vote either by being present in person or by proxy.

(2) A proxy for any shareholder is entitled to attend and be heard at a meeting of shareholders as if the proxy were the shareholder.

(3) A proxy must be appointed by notice in writing signed by the shareholder and the notice must state whether the appointment is for a particular meeting or a specified term not exceeding 12 months.



(4) No proxy is effectively in respect of any meeting unless a copy of the notice of appointment is produced before the start of the meeting.

## **8 Postal votes**

(1) Subject to the constitution of a company, a shareholder may exercise the right to vote at a meeting by casting a postal vote in accordance with the provisions of this clause.

(2) The notice of any meeting at which shareholders are entitled to cast a postal vote must state the names of the person authorised by the board to receive and count postal votes at that meeting.

(3) If no person has been authorised to receive and count postal votes at a meeting, or if no person is named as being so authorised in the notice of the meeting, every director is deemed to be so authorised.

(4) A shareholder may cast a postal vote on all or any of the matters to be voted on at the meeting by sending a notice of the manner in which his or her shares are to be voted on a matter to a person authorised to receive and count postal votes at that meeting, which must reach that person not less than 24 hours before the start of the meeting.

(5) It is the duty of a person authorised to receive and count postal votes at a meeting

(a) to collect together all postal votes received by him or her, or by any other authorised person, or by the company;

(b) in respect of each resolution to be voted on at the meeting, to count

(i) the number of shareholders voting in favour of the resolution and the number of votes cast by each shareholder in favour of the resolution; and

(ii) the number of shareholders voting against the resolution, and the number of votes cast by each shareholder against the resolution;

(c) to sign a certificate that he or she has carried out the duties set out in subparagraphs

(a) and (b) and which sets out the results of the counts required by subparagraph (b);

(d) to ensure that the certificate required by subparagraph (c) is presented to the chairman of the meeting.

(6) If a vote is taken at a meeting on any resolution on which postal votes have been cast, the chairman of the meeting must

(a) on any vote by show of hands, count each shareholder who has submitted a postal vote for or against the resolution;

(b) on any poll, count the votes cast by each shareholder who has submitted a postal vote for or against the resolution.

(7) The chairman of a meeting must call for a poll on any resolution on which he or she holds sufficient postal votes that he or she believes that if a poll is taken the result may differ from that obtained on a show of hands.

(8) The chairman of a meeting must ensure that any certificate of postal votes held by him or her is annexed to the minutes of the meeting.

## **9 Minutes**

(1) The board must ensure that full and accurate minutes are kept of all proceedings at all meetings of shareholders.

(2) Minutes which have been signed correct by the chairman of the meeting are prima facie evidence of the proceedings.

## **10 Shareholder proposals**

(1) A shareholder may give written notice to the board of any matter the shareholder proposes to raise for discussion or resolution at the next meeting of shareholders at which the shareholder is entitled to vote.

(2) The written notice given under paragraph (1) must be received by the board no less than five working days before the last day on which notice of the relevant meeting of shareholders is required to be given by the board.

(3) The board must give notice of any shareholder proposal and the text of any proposed resolution received by it under paragraph (1) in the notice of the meeting given to

shareholders, and, if the directors intend that shareholders may vote on that proposal by proxy or by postal vote, they must give the proposing shareholder the right to include in the notice of meeting a statement of not more than 1,000 words prepared by the proposing shareholder in support of the proposal, together with the name and address of the proposing shareholder.

(4) The board is not required to include in the notice of meeting any statement prepared by a shareholder which the directors consider to be defamatory, frivolous or vexatious.

### **11 Corporations may act by representatives**

A body corporate which is a shareholder may appoint a representative to attend a meeting of shareholders on its behalf in the same manner as that in which it could appoint a proxy.

### **12 Votes of joint holders**

Where two or more persons are registered as the holder of a share, the vote of the person named first in the share register and voting on any matter shall be accepted to the exclusion of the votes of other joint holders.

### **13 Loss of voting rights if calls unpaid**

Subject to the constitution of a company, where any sum is due to a company in respect of a share and has not been paid, that share may not be voted at any shareholders' meeting other than a meeting of an interest group.

### **14 Other proceedings**

Except as provided above, and subject to the constitution of a company, a meeting of shareholders may regulate its own procedure.

## SECOND SCHEDULE

### PROCEEDINGS OF THE BOARD OF A COMPANY

#### 1 Chairman

(1) The directors may elect one of their number as chairman of the board and determine the period for which the chairman is to hold office.

(2) If no such chairman is elected, or if at any meeting of the board the chairman is not present within five minutes after the time appointed for the commencement of the meeting, the directors present may choose one of their number to be chairman of the meeting.

#### 2 Notice of meeting

(1) Any director or, if requested by a director to do so, any employee of the company may convene a meeting of the board by giving notice in accordance with this clause.

(2) Not less than two days notice of a meeting of the board <<*shall*> must be given to every director who is in New Zealand, and the notice <<*shall*>> must include the date, time and place of the meeting and the matters to be discussed.

(3) Any irregularity in notice for a meeting <<*shall be*>> is waived if all directors attend the meeting without protest as to the irregularity or if all directors agree to the waiver.

#### 3 Methods of holding meetings

A meeting of the board may be held either

(a) by a number of the directors, <<*not less than the*>> who constitute a quorum, being assembled together at the place, date and time appointed for the meeting; or

(b) by means of audio, or audio and visual, communication by which all directors participating, being a <<*number not less than the*>> quorum, can simultaneously hear each other throughout the meeting.

#### 4 Quorum

(1) A quorum for a meeting of the board <<shall be>> is a majority of the directors.

(2) No business may be transacted at a meeting of directors if a quorum is not present.

## **5 Voting**

(1) Every director <<shall have>> has one vote.

(2) The chairman of the board <<shall>> does not have a casting vote.

(3) A resolution of the board <<shall be>> is passed if it is agreed to by all directors present without dissent, or if a majority of the votes cast on it are in favour of it.

(4) A director present at a meeting of the board is presumed to have agreed to, and to have voted in favour of, a resolution of the board unless he or she expressly dissents from or votes against the resolution at the meeting.

## **6 Minutes**

The board <<shall>> must ensure that full and accurate minutes are kept of all proceedings at meetings of the board.

## **7 Unanimous resolution**

A resolution in writing, signed or assented to by all directors then entitled to receive notice of a board meeting, <<shall be>> is as valid and <<effectual>> effective as if it had been passed at a meeting of the board duly convened and held. Any such resolution may consist of several documents (including facsimile or other similar means of communication) in like form each signed or assented to by one or more directors. A copy of any such resolution <<shall>> must be entered in the minute book of board proceedings.

## **8 Other proceedings**

Except as <<stated> provided above, the board may <<meet for the dispatch of business, adjourn, and otherwise>> regulate its <<meetings as it thinks fit>> own procedure.

## THIRD SCHEDULE

### PROCEEDINGS AT MEETINGS OF CREDITORS

#### **1 Methods of holding meetings**

A meeting of creditors may be held

- (a) by assembling together those creditors entitled to take part and whose choose to attend at the place, date and time appointed for the meeting; or
- (b) by means of audio, or audio and visual communication by which all creditors participating can simultaneously hear each other throughout the meeting; or
- (c) by conducting a postal ballot in accordance with clause 5 of those creditors entitled to take part.

#### **2 Notice of meeting**

(1) Written notice of

- (a) the time and place of every meeting to be held under clause 1(a); or
- (b) the time and method of communication for every meeting to be held under clause 1(b); and
- (c) the time and address for the return of voting papers for every meeting to be held under clause 1(a) or (b) or (c)

must be given to every creditor entitled to attend the meeting, and to any liquidator not less than ten working days before the meeting.

(2) The notice must:

- (a) state the nature of the business to be transacted at the meeting in sufficient detail to enable a creditor to form a reasoned judgment in relation to it; and
- (b) set out the text of any resolution to be submitted to the meeting;

(c) include a voting paper in respect of each such resolution and voting and mailing instructions.

(3) Any irregularity in a notice for a meeting shall not invalidate anything done by that meeting if it is not material or all the creditors entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity or if all such creditors agree to waive the irregularity.

(4) If a meeting of creditors under clause 1(a) or (b) is adjourned for less than thirty days, it is not necessary to give notice of the time and place of the adjourned meeting other than by announcement at the meeting which is adjourned.

### **3 Chair**

(1) If a liquidator has been appointed and is present, he or she shall chair a meeting held in accordance with clause 1(a) or (b).

(2) In any case where there is no liquidator or the liquidator is not present, the creditors participating shall choose one of their number to chair the meeting.

(3) The person convening a meeting under clause 1(c) shall do any necessary thing that would otherwise be done by the person chairing a meeting.

### **4 Voting**

<<(1)>> At any meeting, (a) each creditor is entitled to cast a number of votes proportionate to the value which the amount of the debt owing to that creditor bears to the aggregate of the debts owing to all creditors or, if there is more than one class of creditors, to the aggregate of the debts owing to all creditors of the class to which the creditor belongs;

(b) a resolution is adopted if approved by a majority of the votes cast, unless in the particular case a greater majority is required by this Act;

(c) a creditor chairing the meeting does not have a casting vote.

### **5 Postal votes**

(1) Any creditor entitled to vote at a meeting of creditors held in accordance with clause 1(a) or (b) or (c) may exercise the right to vote by casting a postal vote in respect of any matter to be decided at that meeting.

(2) The notice of any meeting must state the name of the person authorised to receive and count postal votes in respect of that meeting.

(3) If no person has been authorised to receive and count postal votes in respect of a meeting, or if no person is named as being so authorised in the notice of the meeting, every director, or if the company is in liquidation, the liquidator is deemed to be so authorised.

(4) A creditor may cast a postal vote on all or any of the matters to be voted on at the meeting by sending a marked voting paper to a person authorised to receive and count postal votes in respect of that meeting, so as to reach that person no later than 24 hours before the start of the meeting or, if the meeting is held under clause 1(c), not later than the date named for the return of the voting paper.

(5) It is the duty of a person authorised to receive and count postal votes in respect of a meeting

(a) to collect together all postal votes received by him or her, or by any other authorised person;

(b) in respect of each resolution to be voted on, to count

(i) the number of creditors voting in favour of the resolution,; and the number of votes cast by each creditor in favour of the resolution; and

(ii) the number of creditors voting against the resolution, and the number of votes cast by each creditor against the resolution;

(c) to sign a certificate

(i) that he or she has carried out the duties set out in paragraphs (a) and (b); and

(ii) stating the results of the counts required by paragraph (b);



(d) to ensure that the certificate required by paragraph (c) is presented to the person chairing or convening the meeting.

(6) If a vote is taken at a meeting held under clause 1(a) or (b) on any resolution on which postal votes have been cast, the person chairing the meeting must count the votes cast by each creditor who has sent in a voting paper duly marked as for or against the resolution.

(7) Any certificate given under subclause (5) in relation to the postal votes cast in respect of any meeting of creditors must be annexed to the minutes of the meeting.

## **6 Minutes**

(1) The person chairing a meeting of creditors, or in the case of a meeting held under clause 1(c), the person convening the meeting, must ensure that full and accurate minutes are kept of all proceedings.

(2) Minutes which have been signed correct by the person chairing or convening the meeting are prima facie evidence of the proceedings.

## **7 Corporations may act by representatives**

A body corporate which is a creditor may appoint a representative to attend a meeting of creditors on its behalf.

## **8 Other proceedings**

Except as provided above, a meeting of creditors may regulate its own procedure.

## FOURTH SCHEDULE

### PROCEEDINGS AT MEETINGS OF COMMITTEES OF INSPECTION

#### **1 Frequency of meetings**

The committee shall meet at such times as it from time to time appoints, and the liquidator or any member of the committee may also call a meeting of the committee as and when necessary.

#### **2 Majorities**

The committee may act by a majority of its members present at a meeting, but may not act unless a majority of the committee are present.

#### **3 Resignation**

A member of the committee may resign by notice in writing signed by him or her and delivered to the liquidator.

#### **4 Office becoming vacant**

If a member of the committee becomes bankrupt, or compounds or arranges with his or her creditors, or is absent from 3 consecutive meetings of the committee without the leave of those members who together with that member represent the creditors or shareholders, as the case may be, the office of that member shall thereupon become vacant.

#### **5 Removal of a member**

A member of the committee may be removed by a resolution carried at a meeting of creditors, if the member represents creditors, or of shareholders, if the member represents shareholders, of which five working days' notice has been given, stating the object of the meeting.

#### **6 Vacancy filled**

A vacancy in the committee may be filled by the appointment by the committee of the same or another creditor or shareholder, as the case may be, (or of a person holding a

general power of attorney from, or being an authorised director of, a company which is a creditor or shareholder, as the case may be).

#### **7 Committee with vacancy may act**

The continuing members of the committee, if not less than 2, may act notwithstanding any vacancy in the committee.

## FIFTH SCHEDULE

### LIQUIDATION OF ASSETS OF OVERSEAS COMPANIES

#### **1 Application of Part 14**

Part 14 applies to the liquidation of the assets in New Zealand of an overseas company, with the following modifications and exclusions;

- (a) all references to assets are to be taken as references to assets in New Zealand;
- (b) all references to a company are to be taken as references to an overseas company;
- (c) all references to removal from the New Zealand register are to be taken as references to ceasing to carry on business in New Zealand;
- (d) the following provisions do not apply to such a liquidation:
  - (i) section 205(1)(d) and (e) [Effect of commencement of liquidation];
  - (ii) section 210 [Power to make calls];
  - (iii) sections 243-250, relating to the Insolvency (Assetless Companies) Fund;
- (e) section 205(1)(b) [Effect of commencement of liquidation] does not affect the tenure of directors of an overseas company in any way, but the overseas company and its directors shall cease to have any powers, functions or duties in respect of the company's assets in New Zealand, other than those required or permitted to be exercised by Part 14;
- (f) section 206 [Completion of liquidation] applies to such a liquidation, but instead of making the statement required by paragraph (c),<sup>1</sup> the liquidator shall state that the company has ceased to carry on business in New Zealand and is ready to be removed from the overseas register.

#### **2 Rights of action not affected**

Nothing in this Act shall be taken to exclude the right of a creditor of an overseas company in respect of the assets of which a liquidator has been appointed

(a) to bring any proceedings outside New Zealand against the overseas company in respect of any debt not claimed in the liquidation, or any balance of a debt remaining unpaid after the completion of a liquidation; or

(b) to bring an action in New Zealand in respect of any balance of a debt remaining unpaid after the completion of a liquidation.

## SIXTH SCHEDULE

### CONSEQUENCES OF UNANIMOUS ASSENT TO COMPANY ACTION

1 The following provisions do not apply in relation to any action by a company or its board to which section 78A(1) applies:

(a) section 36 [Pre-emptive rights];

(b) section 37 [Persons to whom shares may be issued];

(c) section 39 [Consideration for issue to be decided on by board];

(d) section

(e) section 43 [Dividends];

(f) section 45(1) and (2) [Shareholder discounts];

(g) section 46(2) [Recovery of distributions];

(h) sections 49 to 52;

(i) sections 58 to 60;

(j) sections 109 and 110;

(k) section 124 [Remuneration and other benefits].

2 Without limiting the generality of paragraph 1, where action is taken by a company or its board to which section 78A(1) applies, no person may be convicted of an offence under section 277 [Failure to comply with Act] for acting in contravention of or failing to comply with any of the following provisions:

(a) section 49(2) [Consideration for issue to be decided on by board];

(b) section 42(2) [Board may authorise a distribution];

(c) section 50(3) [Board may make offer to acquire shares];

(d) section 51(2) [Special offers to acquire shares];

(e) section 58(5) [Financial assistance];

(f) section 59(2) [Special financial assistance];

(g) section 109(1) [Disclosure of interest];

(h) section 124(3) [Remuneration and other benefits].

## FURTHER ACKNOWLEDGEMENT

Appendix A of NZLC R9 (Company Law Reform and Restatement) listed those people and organisations from which submissions were received by the Commission. We regret that the name of one respondent, the Wellington Community Law Centre, was inadvertently omitted from that list and wish to reaffirm the gratitude with which that submission (and all others) were received by the Commission.