



**LAW REFORM
COMMITTEE**

Curbing the Phoenix Company

SECOND REPORT

MAY 1995

PARLIAMENT OF VICTORIA

LAW REFORM COMMITTEE

**CURBING THE PHOENIX
COMPANY**

SECOND REPORT
ON THE LAW RELATING TO DIRECTORS AND
MANAGERS OF INSOLVENT CORPORATIONS
THE LAW IN OVERSEAS JURISDICTIONS

Ordered to be Printed

Melbourne

L. V. North, Government Printer

MAY 1995

MEMBERSHIP

MEMBERSHIP OF THE LAW REFORM COMMITTEE FOR THIS REPORT

- Hon James Guest, MLC, Chairman
- Mr Neil Cole, MP, Deputy Chair
- Dr Robert Dean, MP
- Hon Bill Forwood, MLC
- Mr Peter Loney, MP
- Hon Jean McLean, MLC
- Mr Peter Ryan, MP
- Dr Gerard Vaughan, MP
- Mr Kim Wells, MP
 - Denotes Membership of the Corporations Sub-Committee

STAFF

SECRETARY and DIRECTOR OF RESEARCH

Mr Douglas Trapnell

CONSULTANT

Mr Mark Settle (Principal Author)

RESEARCH OFFICER

Mr Mark Cowie

OFFICE MANAGER

Mrs Rhonda MacMahon

CONTENTS

Membership	3
Functions of Committee	6
Terms of Reference	7
Chairman's Foreword.....	9
Recommendations	10
Chapter 1 <u>INTRODUCTION</u>	13
Chapter 2 <u>LEGISLATIVE PROVISIONS IN SELECTED JURISDICTIONS</u>	18
The United Kingdom	18
Company Directors Disqualification Act 1986	18
Insolvency Act 1986.....	20
New Zealand	23
Companies Act 1993.....	23
Corporations (Investigation and Management Act) 1989	25
Conclusions	26
Canada	26
Conclusions	28
Malaysia & Singapore	28
Conclusions	29
Germany	29
Conclusions	30
Chapter 3 <u>A COMPARISON BETWEEN AUSTRALIA AND SELECTED</u> <u>OVERSEAS JURISDICTIONS</u>	31
Introduction	31
The Adequacy of Existing Disqualifications Procedures	31
Section 230—Court may order persons not to manage certain bodies corporate	32
Section 599—Court may order persons not to manage certain corporations	32
Section 600—Commission may order persons not to manage corporations.....	34
Part 9.4B —Civil penalty provisions	36
Section 229—Certain persons not to manage corporations	37

Section 243—Register of disqualified company directors and other officers.....	37
The Adequacy of Penalties where Disqualified Persons Act in the Management of Companies.....	38
Conclusions.....	38
The Adequacy of Existing Supervisory and Enforcement Arrangements in relation to Disqualified Persons.....	39
Remedies against Directors and Execution against Directors' Assets where those Directors have been Involved in the Management of Limited Companies.....	39
Whether the <i>Corporations Law</i> Provides Appropriate Means of Tracing, for the Benefit of Creditors, Assets Divested by Company Directors	41
Jurisdiction of the Supreme Court and Federal Court as Forums for Civil Actions against Directors	42
Other Safeguards for the Protection of Creditors.....	42
<u>Chapter 4</u> <u>CONCLUSION</u>	44
 APPENDICES	
A Submissions.....	47
B Evidence	50
C Selected Provisions of the <i>Corporations Law</i>	51
D United Kingdom <i>Company Directors Disqualification Act 1986</i>	94
E United Kingdom <i>Insolvency Act 1986</i> —Selected Provisions.....	115
F United Kingdom <i>Insolvency Rules 1986</i> —Selected Provisions.....	125
G New Zealand <i>Companies Act 1993</i> —Selected Provisions	127
H New Zealand <i>Corporations (Investigation and Management) Act 1989</i>	138

FUNCTIONS OF THE COMMITTEE

PARLIAMENTARY COMMITTEES ACT 1968

- 4E. The functions of the Law Reform Committee are—
- (a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;
 - (b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

TERMS OF REFERENCE

To inquire into and report to Parliament as to—

1.1 The adequacy of the existing disqualification procedures where company directors and persons acting in the management of companies have been involved in failed companies and in particular the adequacy of section 599 of the Corporations Law as a means of achieving creditor protection.

1.2 The adequacy of penalties imposed where disqualified persons act in the management of companies.

1.3 The adequacy of existing supervisory and enforcement arrangements in relation to disqualified persons.

2.1 Whether the Corporations Law provides appropriate remedies against directors and effective execution against directors' personal assets where those directors have been involved in the management of companies which have failed to meet financial obligations.

2.2 Whether the Corporations Law provides appropriate means of tracing, for the benefit of creditors, assets divested by company directors.

2.3 Whether the Supreme Court of Victoria and the Federal Court of Australia are appropriate forums for civil actions against directors (for instance under section 592 of the Corporations Law) having regard to the costs of such actions.

2.4 What other safeguards might be introduced to protect creditors in their dealings with companies.

3.1 The means by which Victoria might implement any recommendations arising out of this inquiry.

In the conduct of its reference, the committee should have regard to—

(i) The necessity to regulate the formation of new companies by persons who have been directors of or have been involved in the management of recently failed companies or companies unable to pay their debts;

(ii) The measures that may be taken to control the participation of such persons, either as consultants or by any other form of employment or engagement, whether or not remunerated, in other newly created or existing companies by individuals related to them.

(iii) Measures that may be taken to prevent companies and their operators from avoiding their liabilities by starting again under a new name.

Victoria Government Gazette, G1, 7 January 1993, pp. 53-54 (original terms of reference)

Victoria Government Gazette, G12, 25 March 1993, pp. 711-712 (amended terms of reference)

Victoria Government Gazette, G25, 1 July 1993, p. 1772 (extension of time to Autumn 1994 Session)

CHAIRMAN'S FOREWORD

The Committee's Second Report is based on research and a report to the Committee by Mr Mark Settle of the Victorian Bar. He examined, so far as it could be done in Australia, the means adopted in several foreign jurisdictions for dealing with what we call for convenience the phoenix company phenomenon. The Committee's new Secretary and Director of Research, Mr Douglas Trapnell, has taken over the essential role of editorial intermediary and part author in relation to this inquiry and the Second Report very efficiently. The work of Mr Settle and Mr Trapnell has resulted in the Committee moving on from its First Report to some further and some amended recommendations.

While the Committee has been disappointed at the Victorian Government's decision not to act at this stage on some of the recommendations in its First Report, particularly number 11 relating to re-use of business names and number 14 suggesting a twelve month pilot program for the State Revenue Office and WorkCover Authority to fund liquidators' investigations, it is pleased that the Corporations Law Simplification Task Force of the Commonwealth Attorney-General's Department has taken notice of the Committee's recommendations, particularly number 1, relating to directors of a failed company which is struck off without a formal liquidation.¹

The work of the Committee on this inquiry into Directors and Managers of Insolvent Corporations, and the response to it, has demonstrated that there is a place for a State Parliamentary law reform body in the area of corporations law. Whether a matter for inquiry is in fact worthwhile, and should be regarded as important enough to be referred to the Committee, cannot be answered definitively without considering whether the Government is willing to take an interest in the subject matter beyond the initial referral.

In the end, the effort which should be put into curbing the phoenix company phenomenon depends upon an assessment of the costs of making business unprofitable and risk taking too hazardous, against the costs to creditors and confidence of an excessively *laissez faire* approach to the misuse of the limited liability company.

The problem of the phoenix company is common and perhaps endemic. It should not be ignored. Attempts to find remedies and to strike the right balance between competing considerations cannot be expected to result in a once and for all solution and should be kept under review.

The Hon. James Guest, MLC
Chairman
May 1995

¹ Australia, Attorney-General's Department, Corporations Law Simplification Task Force, *Defunct companies – Deregistration and reinstatement*, Canberra, August 1994, p. 4.

LIST OF RECOMMENDATIONS

Recommendation 1 Confirmation of Previous Recommendations

The Committee recommends that Recommendation 3 and Recommendation 4 of this report be substituted respectively for Recommendation 3 and Recommendation 2 of the First Report. Otherwise the Recommendations made in the First Report be confirmed.

Paragraphs 1.16, 3.30, 3.34, 3.45, 3.50

Recommendation 2 Corporations Considered to be at Risk of Financial Failure

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* by the inclusion of provisions similar to those contained in the *New Zealand Corporations (Investigation and Management) Act 1989* which apply to corporations considered to be at risk of financial failure and which seeks to prevent further deterioration in the financial affairs of those corporations and to protect the public interest.

Paragraph 2.45

Recommendation 3 Disqualification of Directors by the Court

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* by the inclusion of a provision which deals with the duty of a court to disqualify a person from acting as a company director where that person has been a director of an insolvent corporation and his or her conduct as a director makes him or her unfit to continue acting in the management of any corporation. Such a provision should be in substitution for section 599 of the *Corporations Law* and should be modelled on section 383 of the *New Zealand Companies Act 1993*.

Paragraph 3.13

Recommendation 4 Disqualification of Directors by the Commission

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* by replacing section 600 of the *Corporations Law* with a provision similar to that contained in section 385 of the *New Zealand Companies Act 1993* which deals with the exclusion by the regulatory authority of certain persons from the management of companies. However, the Committee recommends that, in lieu of the New Zealand provision's requirement that a person may be prohibited by the regulatory authority from being a director or promoter of a company if he/she has taken part in the management of two or more failed companies, there should be a two tiered approach: where a corporation is liquidated and pays less than fifty cents in the dollar of its liabilities the ASC

should have a discretion to require a director to show cause why he or she should not be disqualified; and when a person is involved as a director or manager in two such insolvencies the disqualification should be automatic unless the person can satisfy the ASC otherwise.

Paragraph 3.21

Recommendation 5 Disqualification of Directors on Conviction

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for an amendment to section 229 of the *Corporations Law*, which currently provides that on conviction for certain specified offences a person is disqualified from managing a corporation for a period of five years. The Committee recommends that there should be a minimum disqualification period of two years and an increased maximum disqualification period of fifteen years.

Paragraph 3.28

Recommendation 6 Assetless Companies Fund

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for the establishment of an Assetless Companies Fund as recommended by the Australian Law Reform Commission in its Report No. 45, *General Insolvency Inquiry* (1988) to provide a fund from which payments could be made so as to enable the winding up of and investigations into insolvent assetless companies.

Paragraph 3.53

Recommendation 7 Grouping of Provisions relating to Directors

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* which would ensure that all provisions dealing with directors duties, obligations, liabilities, disqualification and associated offences and penalties are contained within the one part of the *Corporations Law*.

Paragraph 4.6

Recommendation 8 Public Awareness Education and Advertising Programs

The Committee recommends that the Victorian Government should fund Small Business Victoria and the Office of Fair Trading and Business Affairs to design and conduct education and advertising programs targeted at those most at risk, and aimed at increasing general public awareness of the risks that may be inherent when dealing with limited liability companies.

Paragraph 4.7

Recommendation 9 Increasing Public Awareness of the Use of Guarantees

The Committee recommends that the Victorian Government should take steps to increase the general public awareness of the use that can be made by persons dealing with limited liability companies, of guarantees which are designed to protect those persons' financial position. The preparation and distribution of a standard form of guarantee, to be given by company directors to secure their company's financial liabilities, would be a cost effective means of improving the

situation of creditors, especially those likely to be confronted by the phoenix company phenomenon.

Paragraph 4.8

1.1 In early 1993 the Law Reform Committee was given a reference by the Governor-in-Council to inquire into and report to Parliament on the adequacy of provisions in the *Corporations Law* concerning the phoenix company phenomenon. The phoenix company is a company of limited liability that fails and is unable to pay its debts to creditors, employees and the State. At the same time, or soon afterwards, the same business rises from the ashes of the former company with the same directors or management, under the guise of a new limited liability company, but disclaiming any responsibility for the debts of its predecessor.

1.2 The Committee published its First Report, *Curbing the Phoenix Company*, in June 1994. It did this after examining the provisions of the *Corporations Law* that had been referred to it and the recent amendments that had been made to that legislation. In addition, the Committee took account of numerous written submissions and oral evidence.² As a result of that examination the Committee made fourteen recommendations as follows –

1. The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* so that the directors of a failed company which is struck off without a formal liquidation and which pays less than 50¢ in the dollar of its liabilities are subject to the same sanctions as if there had been a formal liquidation and an adverse liquidator's report.
2. The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the disqualification provisions in s. 600 of the *Corporations Law*. There should be two levels: where a corporation is liquidated and pays less than 50¢ in the dollar of its liabilities the ASC should have a discretion to require a director of the corporation to show cause why he or she should not be disqualified; and when a person is involved as a director or manager in two such insolvencies the disqualification should be automatic unless the director can satisfy the ASC otherwise.
3. The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to section 599 of the *Corporations Law*. That section should enable the Court to disqualify a director if satisfied at the civil standard of the matters of mismanagement now requiring proof beyond reasonable doubt, and in the event of only a single insolvency.
4. The Committee recommends that the Victorian Government should seek a review of the resources devoted to detecting and prosecuting persons who involve themselves in the management of companies while disqualified.
5. The Committee recommends that the Victorian Government should take steps to change the public and judicial attitudes to culpable mismanagement of corporations and abuse of the corporate form, so that persons who manage companies when disqualified or whose culpable management leads to

² See Appendices A and B of this Report.

serious losses to creditors are as likely to go to prison as those who deprive others of their money by theft.

6. The Committee recommends that the Victorian Government should encourage the ASC to give a higher priority to developing computer programs to detect disqualified persons becoming involved in the management of companies, and should seek the support of the Ministerial Council to require all directors of limited liability companies to have and use a unique identity number.
7. The Committee recommends that the Victorian Government should take steps both by itself and in cooperation with the other members of the Ministerial Council to secure wider and more regular dissemination of the register of disqualified directors, and should urge banks and other financial institutions to make use of this information so as to make it harder for disqualified persons to manage companies.
8. The Committee recommends that when a liquidator takes a *bona fide* action against directors or managers of a corporation to recover property of the corporation or to secure compensation for the corporation the Court should not be able to make an order for costs or an undertaking as to damages against the liquidator personally, and the inability of the corporation to provide security for costs or damages should not be a bar to the action proceeding; but that such an action should be subject to the leave of the Court; and that in these circumstances the costs and damages of a successful defendant should have priority over all other claims on the corporation's assets.
9. The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* to create a statutory process analogous to a Mareva injunction to enable the courts to freeze assets of a director or manager which are *prima facie* assets on which the corporation has a just claim.
10. The Committee recommends that the enforcement of money judgments be made the subject of a separate inquiry.
11. The Committee recommends that Victoria legislate to place restrictions on the use of business names similar to those of a failed corporation by persons associated with the failed corporation, except by leave of the court, based on sections 216 and 217 of the *Insolvency Act 1986* (United Kingdom); and that the Victorian Government seek to persuade the other Australian jurisdictions to do likewise.
12. The Committee recommends that the Victorian Government fund Small Business Victoria to investigate the dimensions of the risk to small business posed by the phoenix company phenomenon, and to develop and evaluate a training package to help small businesses improve their credit assessment and credit management.
13. The Committee recommends that the Victorian Government investigate requiring State licensing and registration bodies to take account of a person's previous involvement with a company which failed without paying its creditors.
14. The Committee recommends
 - that the Government allocate funds to establish a 12 month pilot program within the State Revenue Office or the WorkCover administration to provide funds to liquidators to do more detailed investigations and reports on failed companies where there may be an action against the directors or managers, and where appropriate to take action to recover assets from them

- that the goal of the pilot be to assess whether successful recovery actions would recover sufficient money (where the debts would previously have been written off) to cover the costs of the unsuccessful investigations and actions
- that the Government report to the Parliament within twelve months of the conclusion of the pilot program whether the pilot program meets its objectives, giving details of the cost, the number of phoenix companies detected, the amounts recovered for the State, and the amounts recovered for business creditors who would otherwise have got nothing.

1.3 On 30 April 1995 the Victorian Government responded to the recommendations made in the Committee's First Report by indicating that it would be premature to consider allocating further funds, or enacting legislation dealing with matters that could be unilaterally undertaken by the Government, until the full range of the Committee's recommendations have been received and evaluated.

1.4 This Second Report examines the law in a number of overseas jurisdictions to ascertain what is being done to curb the phoenix company phenomenon. A comparative analysis of the most relevant overseas legislation with certain Australian legislative provisions is also presented. The Report discusses the legislative provisions in the United Kingdom, New Zealand, Canada, Malaysia, Singapore and Germany.

1.5 Legislators and regulators in all the jurisdictions examined are aware of the phoenix company phenomenon. In the common law jurisdictions the provisions of the law are not identical, but the design is recognisably similar. There are a number of matters raised that are worthy of consideration. These include: how the provisions concerning corporate officers are grouped within the legislation; the minimum and maximum penalties provided for certain proscribed conduct; the provisions of the *New Zealand Corporations (Investigation and Management) Act 1989*; and the placing of restrictions on the registration of business names.

1.6 The provisions concerning corporate officers in the *Corporations Law* are found throughout the Act and are not easy to locate. By contrast, the United Kingdom provisions concerning the disqualification of directors are found in a separate piece of legislation. Whilst the Committee does not advocate that a separate piece of legislation dealing with all matters concerning corporate officers should be enacted, the grouping of these provisions in the one Part or Division of the *Corporations Law* is desirable.

1.7 Another area which could be better grouped within the *Corporations Law* is the imposition of penalties. In New Zealand these provisions are clearly set out in a few sections which give a brief description of the breaches that are intended to be covered. The *Corporations Law* by comparison, lists the sections and the penalties in a schedule to the Act without giving any indication of the offence covered by the section. This can only be determined by referring back to the body of the Act.

1.8 One piece of legislation that has no equivalent in Australia is the *New Zealand Corporations (Investigation and Management) Act 1989*. This Act in part seeks to render assistance to corporations at risk by empowering the Registrar of Companies to investigate the affairs of such companies so as to minimise the likelihood of a corporate failure. The Australian Law Reform

Commission recommended the introduction of an Insolvent (Assetless Companies) Fund,³ as has the New Zealand Law Commission⁴. This measure should be adopted for Australia.

1.9 The Committee's examination of the law in overseas jurisdictions supports the recommendation in the First Report concerning the introduction of legislation that places restrictions on the use of business names, similar to those of a failed corporation, by persons associated with a failed corporation. In this context the Committee notes that the Commonwealth Attorney-General has recently asked his Department to carry out a review of the directors' disqualification provisions in the *Corporations Law*. Apparently, one aspect of this review will deal with the re-use of the names of failed companies by people associated with those companies.⁵

1.10 The First Report briefly mentioned the need to educate directors about their responsibilities as well as the need to educate creditors. The Committee has concluded, not from the examination of any particular piece of legislation, but from more general considerations, that a cost effective way in which Victoria can contribute to reducing the phoenix company phenomenon is the education of the public. It is the Committee's opinion that when members of the general public deal with a company, they often do not understand the nature of limited liability and that the corporation is a separate entity from the officers of the corporation. Victoria can itself sensibly seek to increase general public understanding of what the implications are and what the ramifications may be for creditors when dealing with limited liability companies. As the Committee suggested in its First Report, this could be a particular function of Small Business Victoria.

1.11 Corporations often protect themselves by personal guarantees when dealing with other companies. Members of the public might also wish to protect themselves when dealing with a company by receiving guarantees from the corporation's officers. The preparation and distribution of a standard form of guarantee, to be given by company directors in respect of their company's indebtedness, would be a cost effective means of improving the situation of creditors especially those likely to be confronted by the phoenix company phenomenon.

1.12 The Second Report also recommends changes that could be made to the *Corporations Law*; some at minimal cost. These changes would require amendments to the *Corporations Law*. The last item of the Committee's Terms of Reference is the means by which Victoria might implement any recommendations arising out of the inquiry. Victoria should rarely act unilaterally, if at all. Since these changes would affect the national scheme, any amendments to the *Corporations Law* should be on a national basis.

1.13 The Second Report concludes by making certain observations as to the cost involved in introducing legislation which achieves a greater control over the activities of directors. The cost is twofold. First, stricter control may deter those who would be suitable directors from becoming company directors. Secondly, legislation tends to have the effect of increasing the cost of running a business.

³ Australia, Law Reform Commission, Report No. 45, *General Insolvency Inquiry*, vol. 1, Australian Government Publishing Service, Canberra, 1987, (ALRC 45), pp. 150-155.

⁴ New Zealand, Law Commission, Report No. 9, *Company Law Reform and Restatement*, Law Commission, Wellington, 1989, (NZLC R9), pp. 28, 152, 165, 334-336.

⁵ Australia, Attorney-General's Department, Corporations Law Simplification Task Force, *Company Names: Proposals for Simplification*, Canberra, November 1994, p.3.

1.14 Each jurisdiction examined is aware, as is the Committee, that the degree of control exerted over a company comes down to balancing two competing interests. First, the interest of company promoters and officers who do not want to be so burdened by government regulation that business becomes unprofitable while the traditional advantages of a limited liability company structure become completely nullified. Secondly, the interest of creditors who deserve some measure of protection from unscrupulous and negligent company directors and managers.

1.15 Following its examination of the law relating to directors and managers of insolvent corporations in the overseas jurisdictions mentioned above, the Committee has found that of the recommendations made in the First Report, only those relating to sections 599 and 600 of the *Corporations Law* require amendment. More specific recommendations based on a study of United Kingdom and New Zealand legislation can now be formulated in relation to these matters. Recommendation 3 and Recommendation 4 of this Second Report seek to achieve this. In relation to the remaining recommendations of the First Report, many of the matters raised have been legislated for in at least one of the selected overseas jurisdictions. These are indicated where relevant in the chapters that follow this introduction.

Conclusions

1.16 Accordingly, the Committee is of the opinion that, other than Recommendation 2 and Recommendation 3 of the First Report, the recommendations it made in the First Report should be confirmed without amendment and that other recommendations as discussed later in this Report should be added.

Recommendation 1

The Committee recommends that Recommendation 3 and Recommendation 4 of this report be substituted respectively for Recommendation 3 and Recommendation 2 of the First Report. Otherwise the Recommendations made in the First Report are confirmed.

UNITED KINGDOM

2.1 There are two significant pieces of legislation in the United Kingdom which deal with or have provisions for dealing with directors of companies which trade whilst insolvent. These are the *Company Directors Disqualification Act 1986* and the *Insolvency Act 1986*. It was in response to the Cork Report⁶ that the *Company Directors Disqualification Act* and the *Insolvency Act 1985* (subsequently consolidated into the *Insolvency Act 1986*) were enacted.

2.2 The Cork Report commenced by echoing the view of the Greene Report,⁷ the Cohen Report⁸ and the Jenkins Report⁹ concerning the undesirability of imposing restrictions which would hamper the activities of honest people and place further fetters on business enterprise. However, it acknowledged at the same time the general public dissatisfaction with the manner in which the law dealt with directors of insolvent companies.

The Company Directors Disqualification Act

2.3 The relevant provisions of the *Company Directors Disqualification Act* are contained in Appendix D to this Report. The Act identifies two major categories of conduct which may, and in some circumstances must, lead the court to disqualify certain persons from being involved or concerned in the management of companies.

2.4 The first category of conduct, 'disqualification for general misconduct in connection with companies', consists of—

- (a) disqualification on conviction of an indictable offence in connection with the management etc. of a company (section 2);
- (b) persistent breaches of companies legislation (section 3);
- (c) fraud etc. in connection with winding up (section 4); and
- (d) summary conviction under companies legislation after previous defaults etc. (section 5).

2.5 The second category concerns 'disqualification for unfitness'. This covers—

⁶ United Kingdom, Insolvency Law Review Committee, *Report on Insolvency Law and Practice*, Her Majesty's Stationery Office, London, 1982.

⁷ United Kingdom, Board of Trade, Committee on Company Law Amendment, *Report*, Her Majesty's Stationery Office, London, 1926, Cmd 2697.

⁸ United Kingdom, Board of Trade, Committee on Company Law Amendment, *Report*, Her Majesty's Stationery Office, London, 1945, Cmd 6659.

⁹ United Kingdom, Company Law Committee, *Report*, Her Majesty's Stationery Office, London, 1962, Cmnd 1749.

- (a) disqualification of directors of companies which have become insolvent who are found by the court to be unfit to be directors (section 6); and
- (b) disqualification after investigation of a company under Pt. XIV of the *Companies Act 1985* and section 83 of the *Companies Act 1989* (section 8).

2.6 There are certain other cases for disqualification set out in the Act including –

- (a) participation in wrongful trading (section 10);
- (b) undischarged bankrupts acting as directors (section 11); and
- (c) failure to pay under a county court administration order (section 12).

2.7 Section 6 deals with disqualification of directors of companies which have become insolvent and who are found by the court to be unfit to be directors, and provides that the court shall make a disqualification order against a person in any case where, on an application under that section, it is satisfied that –

- (a) he is or has been a director of a company which has at any time become insolvent, whether while he was a director or subsequently; and
- (b) his conduct as a director of that company, either taken alone or taken together with his conduct as a director of any other company or companies, makes him unfit to be concerned in the management of a company.

2.8 For the purposes of sections 6 and 7, the latter dealing with applications to court under section 6 and reporting provisions, a company becomes insolvent if, amongst other things, the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up. Under section 6 the minimum period of disqualification is two years and the maximum period is fifteen years.

2.9 Section 10 deals with participation in wrongful trading and provides that where the court makes a declaration under section 213 (fraudulent trading) or 214 (wrongful trading) of the *Insolvency Act* that a person is liable to make a contribution to a company's assets, then, whether or not an application for such an order is made by any person, the court may, if it thinks fit, also make a disqualification order against the person to whom the declaration relates.

2.10 Section 11 deals with undischarged bankrupts acting as directors and states that it is an offence for a person who is an undischarged bankrupt to act as director of, or directly or indirectly to take part in or be concerned in the promotion, formation or management of a company, except with leave of the court. Under paragraph (a) of subsection 15(1) a person is personally responsible for all the relevant debts of a company if at any time in contravention of a disqualification order or of section 11 of this Act he is involved in the management of the company. It should be noted that section 15 also prevents an undischarged bankrupt from using a 'front man' to run a company for him. Personal responsibility for all debts and other liabilities extends to any person who acts or is willing to act in the management of a company on instructions given, without leave of the court, by a person whom he knows at that time to be the subject of a disqualification order or to be an undischarged bankrupt.

2.11 Under section 18 dealing with the register of disqualification orders, the Secretary of State may make regulations requiring officers of courts to furnish him/her with such particulars as the regulations may specify of cases in which –

- (a) a disqualification order is made;
- (b) any action is taken by a court in consequence of which such an order is varied or ceases to be in force; or
- (c) leave is granted by a court for a person subject to such an order to do any thing which otherwise the order prohibits him from doing.

2.12 Further discussion of the *Company Directors Disqualification Act* is deferred until chapter three where its provisions are compared with certain sections of the *Australian Corporations Law*.

The Insolvency Act

2.13 The relevant provisions of the *Insolvency Act 1986* are included in Appendix E to this Report. Part IV, chapter X of the Act deals with malpractice before and during a liquidation, penalisation of companies and company officers, investigations and prosecutions. Sections 206, 208, 210 and 211 stipulate certain criminal offences by past or present officers in relation to both compulsory and voluntary liquidations. The term 'officers' is defined by section 744 of the *Companies Act 1985* (UK), to include directors, managers or secretaries; including shadow directors. These offences include, during the course of the liquidation, where the officer does not deliver up to the liquidator, or as he/she directs, all books and papers in his/her custody belonging to the company and which he/she is required by law to deliver up. Section 206, among other things, deals with fraud in anticipation of winding up. Section 207 relates to misconduct in the course of a winding up, and section 211 concerns false representation to creditors. Under section 207, in a compulsory or voluntary winding up a person is deemed to have committed a criminal offence if he/she, being at the time an officer of the company –

- (a) has made or caused to be made any gift or transfer of, or charge on, or caused or connived at the levying of any execution against, the company's property; or
- (b) has concealed or removed any part of the company's property since, or within two months before, the date of any unsatisfied judgment or order for the payment of money obtained against the company.

2.14 The above wording places the burden of proof on the accused to disprove that he/she committed the acts mentioned, since he/she is 'deemed' to have committed the offence.

2.15 Unlike its predecessor - section 625 of the *Companies Act 1985* (UK) - the party no longer must have done the acts complained of with the intent to defraud creditors. Instead, a person is not guilty of the offence:

- (a) if the conduct occurred more than five years before the winding up commenced; or
- (b) if **he/she** proves that at the time of the conduct consisting of the offence **he/she had no intent to defraud** the company's creditors (emphasis added).

2.16 A person guilty of an offence under this provision is liable on conviction on indictment to two years imprisonment and/or a fine. On summary conviction the maximum penalty is six months imprisonment and/or a fine.

2.17 Penalisation of directors and officers is dealt with in sections 212 to 217. Section 212 provides a summary remedy against delinquent directors and others, while section 213 deals with fraudulent trading. Section 214 contains provisions concerned with wrongful trading and section 215 relates to proceedings under sections 213 and 214. Section 216 contains a restriction on the re-use of company names and section 217 deals with personal liability for debts following a contravention of section 216.

2.18 Section 213 which deals with fraudulent trading states that, if in the course of the winding up of a company it appears that any business of the company has been carried on with the intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect: the court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned above are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

2.19 The section is derived from subsections 63(1) and (2) of the *Companies Act 1985*, as amended by Schedule 6, paragraph 6(1) of the *Insolvency Act 1985*. Subsection (1) is unchanged. Subsection (2) has been amended so as to permit only the liquidator to make the application. Previously the subsections referred also to the official receiver or any creditor or contributory. The subsection has also been amended to bring the form of declaration into line with that applicable in subsection 214(1). Under the new form of declaration the person is merely 'liable to make such contributions (if any) to the company's assets as the court thinks proper', and is not made directly liable for any of the company's debts.

2.20 Because of the difficulty of establishing intent to defraud a new, but similar, remedy encompassing negligent trading was introduced by section 214 in the concept of wrongful trading.

2.21 Section 214 applies to a person if –

- (a) the company has gone into insolvent liquidation;
- (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and
- (c) that person was a director of the company at that time.

In any of those circumstances, subject to subsection (3), if that person is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

2.22 When compared with section 213, section 214 is narrower in two respects. Section 214 only applies to directors, whereas, section 213 applies to 'any persons who were knowingly parties';

and section 214 only refers to insolvent liquidations, whereas, section 213 uses the expression: 'in the course of winding up'.

2.23 Section 216 deals with restriction on re-use of company names and applies to a person where a company has gone into insolvent liquidation on or after the appointed day and he/she was a director or shadow director of the company at any time in the period of twelve months ending with the day before it went into liquidation. A name is a prohibited name in relation to such a person if –

- (a) it is a name by which the liquidated company was known at any time in that period of twelve months; or
- (b) it is a name which is so similar to a name falling within paragraph (a) as to suggest an association with that company.

2.24 The restriction is that, except with leave of the court or in such circumstances as may be prescribed, a person to whom this section applies shall not at any time in the period of five years beginning with the day on which the liquidated company went into liquidation –

- (a) be a director of any other company that is known by a prohibited name;
- (b) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such company; or
- (c) in any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on (otherwise than by a company) under a prohibited name.

2.25 Section 217 deals with contraventions of section 216 and provides that a person is personally responsible for all the relevant debts of a company if at any time, in contravention of section 216, he/she is involved in the management of the company, or as a person who is involved in the management of the company, he/she acts or is willing to act on instructions given (without leave of the court) by a person whom he/she knows at that time to be in contravention in relation to the company of section 216. Dispensation from section 216 prohibition may be granted by leave of the court, or 'in such circumstances as may be prescribed' [sec 216(3)]. Three exceptions have been prescribed in the *Insolvency Rules 1986* (see Appendix F to this Report). These are –

- (a) where the company ('the successor company') acquires the whole, or substantially the whole, of the business of an insolvent company, under arrangements made by an insolvency practitioner acting as its liquidator, administrator or administrative receiver, or as a supervisor of a voluntary arrangement under Part I of the Act, the successor company may for the purpose of section 216 give notice under this Rule to the insolvent company's creditors;
- (b) Where a person to whom section 216 applies as having been a director or shadow director of the liquidating company applies for leave of the court under that section not later than seven days from the date on which the company went into liquidation, he/she may, during a specified period act in ways mentioned in section

216(3), notwithstanding that he/she does not have leave of the court under that section; and

- (c) the court's leave under section 216(3) is not required where the company there referred to, though known by a prohibited name within the meaning of the section—
 - (i) has been known by that name for the whole of the period twelve months ending with the day before the liquidating company went into liquidation; and
 - (ii) has not at any time in those twelve months been dormant within the meaning of section 252(5) of the *Companies Act*.

2.26 A comparative analysis of certain provisions of the *Insolvency Act* with the relevant sections of the Australian *Corporations Law* appears in chapter three of this Report.

NEW ZEALAND

2.27 There are two significant pieces of legislation in New Zealand which deal with or have provisions for dealing with directors of companies which trade whilst insolvent. These are the *Companies Act 1993* and the *Corporations (Investigation and Management) Act 1989*.

Companies Act 1993

2.28 In 1989 the New Zealand Law Commission recommended substantial changes to the companies legislation including a special regime applying to defaulting company officers.¹⁰ The Commission proposed a basic law governing the creation, operation and termination of all companies. It recommended a draft *Companies Act* which, with two associated measures, would replace the 1955 Act and have substantially the same scope.

2.29 After public consultation, the initial proposals were modified and a supplementary report was published.¹¹ These modifications involved 'fine tuning' the draft legislation contained in the earlier report and the production of four further pieces of legislation which were necessary for the replacement of the *Companies Act 1955*.

2.30 The resultant *Companies Bill 1990* did not embrace many of the Commissions recommendations. The Bill drew criticism and the revised Bill passed through Parliament during 1993 as the *Companies Act 1993*, which Act came into force on 1 July 1994. Selected provisions of the *Companies Act 1993* are contained in Appendix G to this Report.

2.31 Two of the stated purposes of this Act are to define the relationships between companies and their directors, shareholders, and creditors; and to encourage efficient and responsible management of companies by allowing directors a wide discretion in matters of business

¹⁰ New Zealand Law Commission, *Company Law Reform and Restatement*, Report No. 9, Law Commission, Wellington, 1989.

¹¹ New Zealand Law Commission, *Company Law Reform: Transition and Revision*, Report No. 16, Law Commission, Wellington, 1990.

judgement while at the same time providing protection for shareholders and creditors against the abuse of management power.

2.32 Part VIII of the Act concerns directors, their powers and duties. Section 151 deals with qualification of directors, while subsection 151(2) lists those who are disqualified from being appointed or holding office as a director of a company.¹²

2.33 Part XXI of the Act provides for offences and penalties. Section 382 deals with persons prohibited from managing companies.¹³ Section 383 provides for the court to disqualify directors; while section 385 provides for the registrar to prohibit persons from managing companies.¹⁴ These provisions are comparable with sections 229 and 230 of the *Australian Corporations Law*.

2.34 The penalties that can be imposed in the New Zealand legislation are dealt with in section 373. Subsection 373(4) states that a person convicted of an offence against, amongst other subsections, 382(4), 383(5) and 385(9) is liable to imprisonment for a term not exceeding five years or to a fine not exceeding \$200,000.

2.35 The Act in section 384 deals with liability for contravening sections 382 and 383. In section 386, the Act imposes liability for contravening section 385. Both penalty sections provide that a person who acts as a director of a company in contravention of any of the forgoing sections is personally liable to –

- (a) a liquidator of the company for every unpaid debt incurred by the company; and
- (b) a creditor of the company for a debt to that creditor incurred by the company while that person was so acting.

2.36 The penalties imposed for breaches of sections 229 and 230 of the *Australian Corporations Law* are a monetary penalty of \$5,000 or imprisonment for one year or both.¹⁵

2.37 Under subsection 323(3) of the *Corporations Law* an officer of a corporation who has failed to act honestly in the exercise of his or her powers and the discharge of the duties of his or her office, where the contravention was committed with intent to deceive or defraud the body corporate, members or creditors of the body corporate, or creditors of any other person, or for any other fraudulent purpose, is liable to a fine of \$20,000 or imprisonment for five years, or both.

2.38 Section 592 of the *Corporations Law* deals with offences relating to incurring of debts or fraudulent conduct and section 593 concerns the powers of the court. For a breach of subsection 592(1) a penalty of \$5,000 or imprisonment for one year or both may be imposed. Where the conduct was fraudulent, the monetary penalty is increased to \$10,000. Under both sections 592 and 593, personal liability for the debt may be imposed.

2.39 Selected provisions of the New Zealand *Companies Act* are compared with the *Australian Corporations Law* in chapter three of this Report.

¹² cf *Corporations Law*, ss. 228 & 229.

¹³ cf *Corporations Law*, ss. 229 & 230.

¹⁴ cf *Corporations Law*, s. 243 & *Company Directors Disqualification Act 1986* (UK) (hereafter CDDA), s. 18. See, First Report, para. 3.1.14.

¹⁵ *Corporations Law*, op. cit., Sch. 3 “Penalties”.

Corporations (Investigation and Management) Act 1989

2.40 New Zealand has also enacted legislation called the *Corporations (Investigation and Management) Act 1989*. Selected provisions of this Act are included in Appendix H to this Report. Pursuant to section 4, the Act applies to any corporation –

- (a) that is, or may be, operating fraudulently or recklessly; or
- (b) to which it is desirable that this Act should apply –
 - (i) for the purpose of preserving the interests of the corporation's members or creditors; or
 - (ii) for the purpose of protecting any beneficiary under any trust administered by the corporation; or
 - (iii) for any other reason in the public interest;if those members or creditors or beneficiaries or the public interest cannot be adequately protected under the *Companies Act 1993* or in any lawful way.

2.41 The general objects of the Act are set out in section 5 and include limiting or preventing the risk of further deterioration of the financial affairs of that corporation. A corporation is operating fraudulently or recklessly if it contracts debts which the officers of the corporation did not, at the time the debts were contracted, honestly believe on reasonable grounds the corporation would be able to pay when they fell due for payment as well as all its other debts, including future and contingent debts; or it carries on any business or operates in a reckless manner; or it carries on any business or operates with intent to defraud its creditors or members or the creditors or members or any other person; or for any other fraudulent purpose.¹⁶

2.42 Part I of the *Corporations (Investigation and Management) Act 1989* deals with the supply of information by, and investigation of affairs of, corporations. Under subsection 9(1) the Registrar of Companies may, by notice in writing to any corporation or associated person of a corporation, require that corporation or associated person to supply the Registrar such information relating to the business, operation, or management of that corporation for such periods and in such form as may be specified in the notice. Where the Registrar is satisfied that the information supplied by the corporation pursuant to the notice is false or misleading, or the corporation or an associated person has failed to comply with section 9, the Registrar may give a further notice or appoint a person to enter and search any premises.¹⁷ Pursuant to section 19, the Registrar may appoint any person to carry out an investigation of the affairs of that corporation.

2.43 Part II of the *Corporations (Investigation and Management) Act 1989* deals with corporations at risk. Under section 30, where the Registrar has reasonable grounds to believe that any corporation is, or may be, a corporation to which this Act applies, the Registrar may give written notice to the corporation that it is considered to be a corporation at risk. Where a notice is given under that section the Registrar may give advice and or assistance.¹⁸ The Registrar, under section

¹⁶ *Corporations (Investigation and Management) Act 1989* (NZ), s. 7.

¹⁷ *id.*, sec 17.

¹⁸ *id.*, sec 32.

33, also has power to give directions to a corporation declared to be at risk. Those directions may require the corporation –

- (a) not to remove from New Zealand, transfer, charge, or otherwise deal with any of its property or funds except with the prior approval of the registrar and subject to such terms and conditions as the Registrar may specify;
- (b) to place in a trust account any money received for investment; and
- (c) to take such other action as is specified in the notice to preserve the interest of the corporation's members and creditors.

Conclusions

2.44 In the Committee's opinion, the New Zealand *Corporations (Investigation and Management) Act 1989* is a concise code designed to protect the public from corporations which there is reason to believe may be operating fraudulently or recklessly. It provides a mechanism for a regulatory authority to compulsorily obtain information concerning the financial affairs and operating activities of such corporations. The regulatory authority is empowered to act to prevent the risk of further deterioration of the financial affairs of such corporations and to preserve the interests of members, creditors, beneficiaries and the general public.

2.45 The Committee is of the view that, of the overseas jurisdictions studied the New Zealand legislation in this area was the most comprehensive, and that it is a model which ought to be adopted in Australia.

Recommendation 2

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* by the inclusion of provisions similar to those contained in the New Zealand *Corporations (Investigation and Management) Act 1989* which apply to corporations considered to be at risk of financial failure and which seeks to prevent further deterioration in the financial affairs of those corporations and to protect the public interest.

CANADA

2.46 Of all the jurisdictions examined, the constitutional structure of Canada is the most closely similar to that of Australia. It combines a Westminster system of responsible government with both federal and provincial legislatures and judicial systems.

2.47 The federal and provincial governments both have legislative jurisdiction in connection with the incorporation of companies by virtue of the *British North America Act*. The federal government derives its power to legislate with respect to companies not only by means of a residuary power not assigned exclusively to the provinces, but also pursuant to its competence to legislate for peace order and good government, and with respect to trade and commerce.

2.48 At a federal level, there are two pieces of legislation which contain provisions dealing with corporate and personal insolvency. These are the *Canada Business Corporations Act 1867* and the *Bankruptcy and Insolvency Act 1985*.

2.49 There are surprisingly few provisions in Canadian federal legislation dealing with corporations which provide assistance to the Committee in its present inquiry. Under subsection 102(1) of the *Canada Business Corporations Act*, the function of the board of directors is to manage the business and affairs of the corporation. The qualification of directors is dealt with under subsection 105(1). Amongst other things, that subsection prohibits a person who has the status of a bankrupt from being involved in the management of a corporation.

2.50 The liabilities of directors and officers are dealt with under sections 118 and 119. Section 119 imposes a joint and several liability upon directors for all debts, not merely salary, payable to employees for services performed for the corporation during the incumbency of the directors. The limit of the liability to any employee is an amount equal to six months wages. The directors are only liable in the event that recovery against the corporation itself is impossible or improbable.

2.51 So far as provincial corporate law is concerned, under subsection 92(11) of the *British North America Act* the provinces are granted exclusive authority 'in relation to the incorporation of companies with provincial objects'. The phrase 'with provincial objects' means that a province can only grant powers and rights which are exercisable in the province. Accordingly, in addition to the federal *Canada Business Corporations Act*, each of the provinces of Canada has enacted general companies legislation under which companies may be incorporated in that province.

2.52 The method of incorporation under the general provincial companies legislation varies as between each jurisdiction. While a provincially incorporated company may carry on business within its province as a matter of right, it cannot do so beyond the boundaries of the province without the grant of appropriate rights and powers by the extra-provincial jurisdiction concerned. A federally incorporated company may carry on business in all the provinces as of right, but if it in fact carries on business in only one province, this does not affect its status as a federally incorporated company.

2.53 So far as the phoenix company phenomenon is concerned, none of the provincial legislation studied by the committee takes the matter further than does the federal legislation previously discussed.

2.54 Turning from corporate law to the insolvency jurisdiction, there is a similar dearth of material. Chapter 3, subsection 91(21) of the *Canada Business Corporations Act* empowers the Canadian Federal Parliament to enact laws in relation to matters coming within the subject-matter of 'bankruptcy and insolvency'. In 1869 the Federal Parliament passed an Act dealing with

bankruptcy which remained in force until a new Act was passed in 1875. The 1875 Act was repealed in 1880 and there was no federal bankruptcy legislation in Canada until the *Bankruptcy Act* of 1919. That Act had numerous amendments until the *Bankruptcy and Insolvency Act 1985* was passed. The *Bankruptcy and Insolvency Act 1985* is a federal statute which is administered by the courts of the various provinces. It contains no provisions applicable to corporate insolvencies, or the protection of creditors rights other than in cases of personal bankruptcy.

Conclusions

2.55 The Committee gained no assistance from its study of the Canadian federal and provincial legislation. Furthermore, it found nothing to indicate that any law reform proposals regarding the phoenix company phenomenon were contemplated. Up to its dissolution in 1992 the Law Reform Commission of Canada had not considered the problem. Nor, it appears, has any provincial law reform agency.

MALAYSIA & SINGAPORE

2.56 Both Malaysia and Singapore have passed corporate legislation which deal with directors of companies which trade whilst insolvent.

2.57 In Malaysia, company law is governed mainly by the provisions of the *Companies Act 1965* and, in a few areas, the common law. The *Companies Act 1965* was modelled on the United Kingdom *Companies Act 1948* and the Australian *Uniform Companies Act 1961*.

2.58 In Singapore, company law is governed by the *Companies Act* and, to a certain extent, the common law. The Singaporean *Companies Act* was modelled on the Malaysian *Companies Act 1965*.

2.59 The detail of company legislation in Malaysia and Singapore now differs in many areas from company legislation in Australia and the United Kingdom. Nevertheless, they share a common ancestry and there is a close similarity between the general principles underlying company law in all these jurisdictions. This has resulted in the Malaysian and Singaporean provisions dealing with the liability of company directors being similar to those provisions found in the Australian *Corporations Law*.

2.60 Both jurisdictions have dealt with fraudulent trading. Their legislation provides that if in the course of a winding up, it appears that the business of a company has been carried on with intent to defraud creditors or for any fraudulent purpose the court, on the application of the liquidator, may declare that any persons who were knowingly parties to the fraud are liable to make such contributions (if any) to the company's assets as the court thinks proper.¹⁹

2.61 Another provision in each jurisdiction provides that if in the course of a winding up, it appears that an officer of the company who was a party to the contracting of a debt had no reasonable expectation that the company would be able to pay that debt, the court may declare that the officer is liable for the payment of the whole or part of the debt.²⁰

¹⁹ s. 304 (1) (M'sia); s. 340 (1) (S'pore).

²⁰ s. 304 (2) (M'sia); s. 340 (2) (S'pore).

2.62 Except with the leave of the court, a person who is an undischarged bankrupt may not—

- (a) act as a director; or
- (b) be in any way (whether directly or indirectly) concerned or take part in the management of a corporation.²¹

2.63 A director, or for that matter any officer, is bound to stop the company trading once he or she has reasonable cause to expect that the company cannot pay its debts as they fall due. Otherwise, the officer will be guilty of an offence and personally liable for any such debt incurred with his or her authority.²²

Conclusions

2.64 Owing to the close similarity between the comparable provisions of the Australian *Corporations Law* and the Malaysian and Singaporean companies legislation, the Committee gained little assistance from its examination of the law in these jurisdictions.

GERMANY

2.65 In Germany the law concerning the different types of companies is codified either as part of the *Commercial Code* (HGB), as part of the *Civil Code* (BGB) or in the form of special laws such as the *Limited Liability Companies Act* (GmbHG) of 20 April 1982 (as last amended on 15 May 1986) or the *Stock Corporation Act* (AktG) of 6 September 1965.

2.66 The limited liability company (GmbH) is particularly popular in Germany because of the flexibility provided under German law. This is due to the fact that the shareholders obtain a status of limited liability, and because the setting up of a GmbH is simple. Its statutes can be specifically tailored to the requirements of shareholders.

2.67 The limited liability company acts through its executive body, that is, one or several managing directors. Without managing directors the company is incapable of acting. In the case of insolvency or over indebtedness section 64 of the GmbHG obliges the managing directors of a GmbH to file a petition in bankruptcy without delay. Section 64 is considered to be a provision intended for the protection of creditors.

2.68 The prevailing view had been that creditors who suffer damage because the managing directors of a bankrupt company fail to file a petition in bankruptcy without delay, are entitled to damages restricted to the difference between the recovery they actually receive and the recovery they would have received if the managing directors had complied with their obligations pursuant to section 64. However, the Federal Court of Justice (BGH) established in two 1993 decisions, that those creditors who were existing creditors when the insolvency or over indebtedness occurred, are restricted to damages computed by the difference between the two sums referred to above. On the other hand, those creditors who became creditors after the insolvency or over indebtedness occurred, are entitled to unrestricted damages.²³ Thus, so far as

²¹ s. 125 (1) (M'sia); s. 148 (1) (S'pore).

²² s. 303 (3) (M'sia); s. 339 (3) (S'pore).

²³ BGH decision 1 March 1993, GmbHR 1993, 420; BGH decision 20 September 1993, GmbHR 1993, 733.

liability to new creditors of an already bankrupt GmbH is concerned, the managing directors are fully liable for all the damages suffered. For old creditors the liability will still be restricted to the difference between the actual recovery and the recovery which would have been possible if the managing directors had filed a petition in bankruptcy in time. Furthermore, the pre-existing creditors are only entitled to claim compensation payable to the receiver in bankruptcy in order to achieve the recovery which would have been possible if the managing directors complied with their obligations pursuant to section 64.

2.69 Some violations of the responsibilities of managing directors provided for by the *Limited Liability Companies Act* may result in criminal liability. These responsibilities include failing to declare bankruptcy without delay after insolvency or over indebtedness.

Conclusions

2.70 Although German corporations law contains some interesting features, the Committee is of the view that the better models for further comparative analysis are those provided by the New Zealand and the United Kingdom legislation discussed above. The translation of legislation from a jurisdiction based on Roman civil law into a common law jurisdiction may be attended by unforeseen complications. This comparative analysis forms the basis of chapter three.

CHAPTER 3

A COMPARISON BETWEEN AUSTRALIA AND SELECTED OVERSEAS JURISDICTIONS

INTRODUCTION

3.1 The Committee's Terms of Reference were specifically addressed in chapters 3 to 5 of the First Report²⁴. Paragraphs 3.1.2 to 3.3.12 dealt with the adequacy of existing disqualification procedures, penalties and supervisory and enforcement arrangements. Paragraphs 4.1.3 to 4.4.26 concerned themselves with the appropriateness of remedies for creditors where a company is insolvent and the appropriate forum for such actions. While paragraphs 5.1.1 to 5.1.24 discussed the means by which Victoria might implement any of the recommendations arising out of the inquiry.

3.2 This chapter contains a comparison of the most relevant legislation previously discussed in chapter 2 with the comparable Australian provisions. Each item of the Terms of Reference is dealt with in turn.

3.3 It is apparent from chapter 2 that the jurisdictions which have done the most in an attempt to combat the phoenix company phenomenon are the United Kingdom and New Zealand. Their legislation will form the basis of the ensuing discussion.

THE ADEQUACY OF EXISTING DISQUALIFICATIONS PROCEDURES²⁵

3.4 The First Report discussed the following provisions of the *Australian Corporations Law* in considering the adequacy of existing disqualification procedures—

1. section 230 – Court may order persons not to manage certain bodies corporate;
2. section 599 – Court may order persons not to manage certain corporations;
3. section 600 – Commission may order persons not to manage corporations;
4. Part 9.4B and those sections dealing with the civil penalty provisions, in particular sections 1317DA and 1317EA and the sections defined to be 'civil penalty provisions';
5. section 229 – Certain persons not to manage corporations; and
6. section 243 – Register of disqualified company directors and other officers.

²⁴ Parliament of Victoria (Australia), Law Reform Committee, *Curbing the Phoenix Company*, First Report, L.V. North Government Printer, Melbourne, 1994, p. x (hereafter cited 'First Report').

²⁵ *id.*, pp. 13–19.

Section 230—Court may order persons not to manage certain bodies corporate

3.5 **United Kingdom**—Section 230 of the Australian *Corporations Law* is similar to that of section 3 of the United Kingdom *Company Directors Disqualification Act 1986* which deals with persistent breaches of companies legislation. Subsection 3(2) of that Act contains a conclusive evidence clause which provides that:

On an application to the court for an order to be made under this section, the fact that a person has been persistently in default in relation to such provisions as are mentioned above may (without prejudice to its proof in any other manner) be conclusively proved by showing that in the 5 years ending with the date of the application he has been adjudged guilty (whether or not on the same occasion) of three or more defaults in relation to those provisions.

3.6 The United Kingdom section is similar to the 'deemed breach' provision contained in subsection 230(5) of the *Corporations Law* which provides that two or more breaches constitutes a repeated breaching of the relevant legislation. In the Committee's opinion this difference is not significant.

3.7 **New Zealand**—The comparable New Zealand provision to section 230 of the *Corporations Law* is section 383 of the *Companies Act 1993* which deals with the disqualification of company directors by the Supreme Court. That section does not require that there be a previous default (either resulting in a conviction or otherwise) before it can be applied.

Section 599—Court may order persons not to manage certain corporations

3.8 **United Kingdom**—Section 599 of the *Corporations Law*²⁶ is similar to section 6 of the *Company Directors Disqualification Act*. Subsection 599(2) provides for a prohibition not exceeding five years before a person against whom an order under the section is made can manage a corporation. The comparable provision in the United Kingdom, subsection 6(4) of the *Company Directors Disqualification Act*, provides for a two year minimum disqualification period and a maximum period of fifteen years.

3.9 Subsection 599(3)²⁷ of the *Corporations Law* deals with preconditions before section 599 applies. One of these preconditions is that the section will only apply if the person was a director of, or was concerned or took part in the management of, two or more relevant bodies to which the section applies. However, there is no requirement in section 6 of the *Company Directors Disqualification Act* that there be a prior occasion before the section applies.

3.10 Another precondition in subsection 599(3) is that the Court has to be satisfied that the way those companies were managed was wholly or partly responsible for their being wound up or placed under another form of external administration. Under subsection 6(1) of the *Company Directors Disqualification Act*, the court has to be satisfied only that—

[The person's] conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company.

²⁶ id., paras. 3.1.3 & 3.1.4.

²⁷ ibid.

3.11 The provisions contained in section 6 of the *Company Directors Disqualification Act* may not overcome the problems raised by Mr Ron Trevethan in relation to section 599. He said that section 599 was never used and explained that –

it is a waste of time and resources. Where we have to use those circumstances to have a director disqualified we must prove a contravention of the law, which means proving it beyond a reasonable doubt. Then we may as well prosecute under the provision he has contravened and [if convicted] the person will be automatically disqualified [under s. 229] from carrying on as a director. [Section 599] has not worked.²⁸

Under section 6 the United Kingdom authorities are faced with a similar problem– they must prove beyond a reasonable doubt that the person's conduct makes him or her unfit to be concerned in the management of a company. However, in practice this may be easier to prove than that the manner in which a particular company was managed was wholly or partly responsible for it being wound up or placed under another form of external administration.

3.12 **New Zealand** – Section 383 of the New Zealand *Companies Act 1993* which deals with the power of courts to disqualify directors appears to be far more robust than the provisions contained in section 599 of the *Corporations Law*, in that the circumstances contained in subsection 599(1) before the section can be applied, as well as the preconditions found in subsection 599(3), are not found in section 383 of the New Zealand legislation. For instance, the court may make an order under that section where a director has 'acted in a reckless or incompetent manner in the performance of his or her duties as director' and whether or not he or she has been convicted of an offence. Likewise, persistent failure to comply with the provisions of the companies legislation is a sufficient ground for disqualification, whether or not he or she has been convicted of an offence arising from such failure.²⁹ The person to be affected by such an order is given notice of the application. He or she may appear and give evidence. There must however, be many circumstances where the application is not defended.

Conclusions

3.13 Section 383 of the New Zealand *Companies Act 1993* appears to contain sufficient disqualifying acts and omissions within its ambit to pick-up the United Kingdom test of unfitness to be concerned in the management of a company. The New Zealand provision is preferable to its United Kingdom counterpart in that it contains additional disqualifying criteria and these are set out in greater detail. Owing to the difficulties encountered in practice with the application of section 599 of the *Corporations Law*, the Committee is of the opinion that it should be replaced by a section similar to the New Zealand provision.

Recommendation 3

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* by the inclusion of a provision which deals with the duty of a court to disqualify a person from acting as a company director where that person has been a director of an insolvent corporation and his or her conduct as a director makes him or her unfit to continue acting in the management of any corporation. Such

²⁸ id., para. 3.1.17.

²⁹ *Companies Act 1993* (NZ), s 383 (1) (c) (i).

a provision should be in substitution for section 599 of the *Corporations Law* and should be modelled on section 383 of the *New Zealand Companies Act 1993*.

Section 600—Commission may order persons not to manage corporations

3.14 **United Kingdom**—Section 600 of the Australian *Corporations Law* applies to a relevant body if and only if, within the previous seven years, a liquidator of a body has under subsection 533(1) reported a matter relating to the ability of the body to pay its unsecured creditors and if the person was a director of a body at any time within twelve months prior to the beginning of the winding up.³⁰ Section 600 of the *Corporations Law*³¹ does not have an equivalent in United Kingdom legislation.

3.15 **New Zealand**—Section 385 of the *New Zealand Companies Act 1993*, which empowers the Registrar of Companies to prohibit certain persons from managing companies, applies not only to a company that has been put into liquidation but, inter alia, also to a company that has ceased to carry on business because of its inability to pay its debts as and when they become due³² and that has entered into a compromise or arrangement with its creditors.

3.16 Paragraph 3.1.19 of the First Report pointed out a problem that the existing disqualification procedures assume that formal steps are taken to wind up a failed company, as opposed to the situation where the directors simply cease trading under the company name and then recommence business under a new company name without attending to the liabilities of the former company. Sections 385 of the *New Zealand Companies Act 1993* appears to go a significant way in addressing this problem. Under that section the Registrar of Companies is given power to prohibit persons from managing companies, and it applies not only where the company has gone into liquidation because of its inability to pay its debts as and when they become due, but also in the following circumstances—

- when a company has ceased to carry on business because of its inability to pay its debts as and when they become due;
- in respect of which execution is returned unsatisfied in whole or in part;
- in respect of the property of which a receiver, or a receiver and manager, has been appointed by a court, or pursuant to the powers contained in an instrument, whether or not the appointment has been terminated;
- in respect of which, or the property of which, a person has been appointed as a receiver and manager or judicial manager, or a statutory manager, or as a manager, or to exercise control, under or pursuant to an enactment, whether or not the appointment has been terminated; and
- that has entered into a compromise or arrangement with its creditors.

The section empowers the Registrar to serve notice on any person to show cause why they should not be prohibited from managing a company.

³⁰ s. 533 [reports by liquidator] deals with the situation of a company which is in the course of being wound up.

³¹ *id.*, at para. 3.1.6.

³² *Companies Act 1993 (NZ)*, s 385 (1) (b).

Conclusions

3.17 In the First Report's conclusion on the adequacy of existing qualification procedures, the Committee posed the following questions –

1. What proportion of those who ought to be disqualified are disqualified?
2. Are any disqualified who ought not to be?
3. Even if the answers to the first two questions are '100%' and 'none', does it follow that the numbers of instances of companies failing to pay their creditors will be significantly reduced?

3.18 Assuming that the answer to the first question is few and the answer to the second question even fewer, it follows that the deterrent effect of the existing disqualification provisions of the *Corporations Law* is minimal, even though they purport to cover a wide range of circumstances where persons ought to be disqualified, and provide for significant penalties. As was stated in the First Report, the principal defect in the Australian provisions is that it is possible for directors to have a failed company struck off without going through the formal liquidation procedure, and thereby avoid the liquidator's report which might lead to their being disqualified.³³

3.19 In Recommendation 1 of the First Report the Committee recommended that the *Corporations Law* be changed so that a failed company which is struck off without a formal liquidation and which pays less than fifty cents in the dollar of its liabilities be subject to the same sanction as if there had been a formal liquidation and an adverse liquidators report. Even this wording may be too narrow.

3.20 After reviewing the legislation in the selected overseas jurisdictions the Committee is of the view that a section which is similar to section 385 of the New Zealand *Companies Act 1993* should be substituted for section 600 in the Australian *Corporations Law*.

3.21 It was stated in paragraph 1835 of the Cork Committee Report that –

we do not think it an undue burden to impose on any director of a failed company that, simply by virtue of his association with the failure, he must either ensure that the company with which he next becomes involved is adequately capitalised or must go through a summary Court procedure to put his personal wealth at risk in the second adventure – if only in part and if only for a time.

If a similar provision to section 385 of the New Zealand *Companies Act* were adopted, it would, however, be of little use if the authority the power is vested in is not properly funded.

Recommendation 4

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* by replacing section 600 of the *Corporations Law* with a provision similar to that contained in section 385 of the New Zealand *Companies Act 1993* which deals with the exclusion by the regulatory authority of

³³ id., para. 3.1.25.

certain persons from the management of companies. However, the Committee recommends that, in lieu of the New Zealand provision's requirement that a person may be prohibited by the regulatory authority from being a director or promoter of a company if he/she has taken part in the management of two or more failed companies, there should be a two tiered approach: where a corporation is liquidated and pays less than fifty cents in the dollar of its liabilities the ASC should have a discretion to require a director to show cause why he or she should not be disqualified; and when a person is involved as a director or manager in two such insolvencies the disqualification should be automatic unless the person can satisfy the ASC otherwise.

3.22 Recommendation 4 is essentially to the same effect as Recommendation 2 of the First Report; except, that it models the substituted provision for section 600 of the *Corporations Law* on section 385 of the *New Zealand Companies Act*.

3.23 Recommendation 3 of the First Report required that the standard of proof under section 599 of the *Corporations Law* should be the civil standard. If a provision similar to section 385 of the *New Zealand Companies Act 1993* were adopted, it in effect puts the onus on a person to show cause why the section should not apply to him/her. In those circumstances it scarcely needs argument that the degree of proof required of that person be the civil standard rather than the criminal burden.

Part 9.4B—Civil penalty provisions

3.24 **United Kingdom**—Part 9.4B of the Australian *Corporations Law* deals with the civil and criminal consequences of contravening the civil penalty provisions. Section 1317DA specifies the provisions which are defined to be civil penalty provisions. These are set out in paragraph 3.1.11 of the First Report. There are no civil penalty provisions in the *Company Directors Disqualification Act* or the *Insolvency Act*. However, the criminal consequences under the *Company Directors Disqualification Act* and the *Insolvency Act* are very similar to the criminal provisions found in the Australian *Corporations Law*.

3.25 **New Zealand**—The New Zealand provisions are similar to the United Kingdom provisions in that the breaches are dealt with on a criminal basis rather than on a civil basis.

Conclusions

3.26 The Committee is of the view that by empowering the Court under section 1317EA of the *Corporations Law* to make a civil penalty order where it is satisfied that a person has contravened a civil penalty provision, the Australian provisions relating to civil penalties for breaches of certain provisions of the *Corporations Law* are better than those in the overseas jurisdictions examined.

Section 229—Certain persons not to manage corporations

3.27 **United Kingdom**—Section 229 of the *Corporations Law* provides that on conviction for certain offences (including the civil penalty provision contained in section 232), the person convicted shall be disqualified from managing any corporation. The maximum period of disqualification is five years. Breaches of similar provisions under the United Kingdom *Company Directors Disqualification Act* provide for a minimum disqualification period of two years and a maximum period of fifteen years.

Conclusions

3.28 The Committee is of the view that the maximum period of disqualification provided for in Section 229 of the *Corporations Law* is insufficient for some cases, especially those involving repeated offences, and that this penalty should conform with that provided for under the United Kingdom *Company Directors Disqualification Act*. In recommending a period which is the same as that in the United Kingdom, the Committee notes that the international reputation of Australian business suffered in the 1980's. The Committee believes that provisions relating to the punishment of serious corporate offences should, in general, be in line with Australia's major trading partners. The Committee further considers that the sanctions provided for breaches of the *Corporations Law* should reflect the seriousness with which corporate misbehaviour is generally viewed in the Australian community. To provide a minimum disqualification period of two years is considered to be not unduly harsh. The conduct specified in section 229 is, on the whole, of a most serious kind. In those cases involving technical or trifling breaches of the *Corporations Law*, the court imposing the sentence for the primary offence, will no doubt take into account the effect of section 229 and its impact on the defendant, and will, in appropriate cases, impose a penalty which avoids recording a conviction and, therefore, the operation of section 229.

Recommendation 5

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for an amendment to section 229 of the *Corporations Law*, which currently provides that on conviction for certain specified offences a person is disqualified from managing a corporation for a period of five years. The Committee recommends that there should be a minimum disqualification period of two years and an increased maximum disqualification period of fifteen years.

Section 243 —register of disqualified company directors and other officers

3.29 **United Kingdom**—Section 243 of the *Corporations Law* requires the Australian Securities Commission (ASC) to keep a publicly available Register of Disqualified Company Directors.³⁴ This is equivalent to section 18 *Company Directors Disqualification Act*.

3.30 The Committee endorses Recommendation 7 of the First Report wherein it sought to secure a wider and more regular dissemination, and increased usage of this register.

³⁴ First Report, op. cit., para. 3.1.14.

THE ADEQUACY OF PENALTIES WHERE DISQUALIFIED PERSONS ACT IN THE MANAGEMENT OF COMPANIES³⁵

3.31 The First Report discussed the adequacy of penalties in provisions of the *Corporations Law* where disqualified persons act in the management of companies as follows –

1. section 229 – certain persons not to manage corporations;
2. section 230 – Court may order person not to manage corporation;
3. section 599 – Court may order persons not to manage certain corporations;
4. Part 9.4B – civil and criminal consequences of contravening civil penalty provisions;
and
5. Schedule 3.

3.32 **United Kingdom** – The criminal penalties that can be imposed under the United Kingdom and New Zealand legislation are not significantly different from those that can be imposed under the *Corporations Law*. There is however a difference in regards to the civil penalty provisions in Part 9.4B. This Part was introduced following the recommendations of the Senate Legal and Constitutional Affairs Committee in its November 1989 Report on *Company Directors' Duties*. The Report dealt with the social and fiduciary duties and obligations of company directors, and recommended that –

- (a) criminal liability under the *Corporations Law* not apply in the absence of criminality;
- (b) section 232(4) be amended to confine criminal liability under that section to conduct that is genuinely criminal; and
- (c) provision be made for civil penalties for contraventions not involving criminality and that persons suffering loss be able to bring damages claims in the penalty proceedings.

Conclusions

3.33 Save for the civil penalty provisions, the penalties that are provided for in the *Corporations Law* are within the range of other jurisdictions. It would appear however, that in all jurisdictions the deterrent increases as the probability of being detected increases.

³⁵ id., pp. 20–24.

3.34 Recommendation 4 in the First Report was that the Victorian Government should seek a review of resources devoted to detecting and prosecuting persons who involve themselves in the management of companies while disqualified. Recommendation 5 was that the Victorian Government should take steps to change the public and judicial attitudes to culpable mismanagement of corporations and abuse of the corporate form, so that persons who manage companies when disqualified, or whose culpable management leads to serious losses to creditors, are as likely to go to prison as those who deprive others of their money by theft. The Committee endorses those recommendations.

THE ADEQUACY OF EXISTING SUPERVISORY AND ENFORCEMENT ARRANGEMENTS IN RELATION TO DISQUALIFIED PERSONS³⁶

3.35 Under this topic the First Report considered section 243 of the *Corporations Law* which provides for the establishment of a register of disqualified company directors and other officers. The First Report did not otherwise discuss the substantive provisions of the *Corporations Law*. The Committee's views were based on submissions and evidence given to the before it. The Committee has been unable so far to establish the existence or otherwise of supervisory and enforcement arrangements in relation to disqualified persons in overseas jurisdictions other than those legislative provisions discussed in chapter 2 of this Report.

3.36 Paragraphs 2.1 to 2.4 of the Terms of Reference deal with the appropriateness of the remedies for creditors when a company is insolvent, particularly the possibility of bringing proceedings to seize the personal assets of the directors and managers. This aspect of the Terms of Reference was examined in chapter 4 of the First Report where the Committee also made the observation that it is not only creditors in the sense commonly understood, but also employees with claims for pay, accrued leave and long service leave, and retrenchment entitlements, whose rights against such persons must be safeguarded. Overseas jurisdictions are also aware that employees need protection.

REMEDIES AGAINST DIRECTORS AND EXECUTION AGAINST DIRECTORS' ASSETS WHERE THOSE DIRECTORS HAVE BEEN INVOLVED IN THE MANAGEMENT OF LIMITED COMPANIES³⁷

3.37 The First Report looked at the following provisions of the *Corporations Law* –

1. section 232 – duty and liability of officer of corporation;
2. section 592 – incurring of certain debts: fraudulent conduct;
3. section 593 – powers of court; and
4. Part 5.7B – recovering property or compensation for the benefit of creditors of insolvent company.

3.38 Other than these statutory remedies the Committee in its First Report also noted that there are also important non-statutory causes of action at common law and in equity for breaches of

³⁶ id., pp. 25–27.

³⁷ id., pp. 31–41.

directors duties. These causes of actions are also present in the common law overseas jurisdictions that were examined.

3.39 Section 232 of the *Corporations Law* requires an officer of a corporation to act honestly at all times in the exercise of the officer's powers and in the discharge of the officer's duties. It is not surprising that each of the jurisdictions examined has a similar requirement.

3.40 In relation to sections 592 and 593 of the *Corporations Law*, the Australian Law Reform Commission (ALRC) in its *General Insolvency Inquiry Report*³⁸ criticised the wording of these sections. The sections may be briefly summarised as follows—

1. Section 592 makes directors and managers liable for company debts incurred in circumstances where there are reasonable grounds to expect that the company will not be able to pay all its debts as and when they become due, giving rise to both civil and criminal liability; and
2. Under subsection 593(1), where the Court convicts a person of an offence under subsection 592(1), it may on application of the ASC or an affected creditor, declare that person to be liable personally for the whole or part of the debt. A similar declaratory power exists in subsection 593(2) for declaring persons to be responsible for the payment of company debts.

3.41 The ALRC's criticism was that—

- (a) the provisions caused inequity among unsecured creditors as they can only be utilised by individual creditors;
- (b) the defence of not authorising the incurring of the debt allowed directors to escape liability through lack of due diligence; and
- (c) proving insolvency at the relevant time was fraught with difficulties.

3.42 The *Corporations Law* was subsequently amended and the new provision for the recovery of compensation for the benefit of creditors of insolvent companies was introduced in Part 5.7B of the *Corporations Law*. This provision provides for—

- (a) certain transactions by the company to be voidable, as against the liquidator—sections 588FA–588FJ;
- (b) directors' duties to prevent insolvent trading and their liability to compensate the company—sections 588G–588U and 588Y; and
- (c) the liability of holding companies for insolvent trading by subsidiary companies—sections 588V–588X.

3.43 The sections of particular relevance are obviously those set out in paragraph (b) above and of those sections, sections 588R–588U deal with an individual creditor's right to sue for

³⁸ Australia, Law Reform Commission, Report No 45, *General Insolvency Inquiry*, Australian Government Publishing Service, Canberra, 1988 ALRC 45) (Harmer Report).

compensation. What is interesting about these provisions is that the creditor is first required to seek the consent of the liquidator.

3.44 The way that the *Corporation Law* has been framed is different from that of the other jurisdictions examined. As the Committee recognised in its First Report, until a more substantial body of case law develops the 'appropriate remedies against directors and the effective execution against directors personal assets' cannot be adequately compared with overseas jurisdictions.

3.45 The Committee in its conclusion to its discussion of remedies against directors made three recommendations –

Recommendation 8

The Committee recommends that when a liquidator takes a *bona fide* action against directors or managers of a corporation to recover property of the corporation or to secure compensation for the corporation the Court should not be able to make an order for costs or an undertaking as to damages against the liquidator personally, and the inability of the corporation to provide security for costs or damages should not be a bar to the action proceeding; but that such an action should be subject to the leave of the Court; and that in these circumstances the costs and damages of a successful defendant should normally have priority over all claims on the corporation's assets.

Recommendation 9

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* to create a statutory process analogous to a Mareva injunction to enable the courts to freeze assets of a director or manager which are prima facie assets on which the corporation has a just claim.

Recommendation 10

The Committee recommends that the enforcement of money judgments be made the subject of a separate inquiry.

Following its review of the law in the selected overseas jurisdictions, the Committee endorses each of those recommendations.

WHETHER THE CORPORATIONS LAW PROVIDES APPROPRIATE MEANS OF TRACING, FOR THE BENEFIT OF CREDITORS, ASSETS DIVESTED BY COMPANY DIRECTORS³⁹

3.46 The Committee stated in its First Report that the *Corporations Law* does not specifically provide for the tracing of divested company assets. The tracing of divested company assets into the hands of third parties, and the recovery of those assets by a liquidator or creditor is dealt with by the doctrine of tracing at common law and in equity. This position has been taken also in overseas jurisdictions.

3.47 The Committee stated also in its First Report that there are a number of provisions in the *Corporations Law* designed to assist liquidators, regulators and enforcers in obtaining information relevant to the practical exercise of tracing and identifying divested company assets. Similar provisions are found in the overseas jurisdictions examined; for example, Schedule 4 of the United Kingdom *Insolvency Act*. As the Committee noted in its conclusion to this section of its

³⁹ id., pp. 42–45.

First Report: 'the *Corporations Law* now probably makes adequate provision for the examination of persons, the protection of property against removal, and the voiding of transactions'. The Committee continues to hold this view.

JURISDICTION OF THE SUPREME COURT AND FEDERAL COURT AS FORUMS FOR CIVIL ACTIONS AGAINST DIRECTORS⁴⁰

3.48 In its conclusion to the discussion of this Term of Reference in the First Report, the Committee said that in light of the decision of the Ministerial Council to proceed by the Corporations Legislation Amendment Bill 1994 with the extension (or restoration) of jurisdiction to the lower courts, it did not need to make any further recommendation. The Committee's examination of the law in other jurisdictions raises no ground to form any different view.

OTHER SAFEGUARDS FOR THE PROTECTION OF CREDITORS⁴¹

3.49 The Committee in its First Report referred to a number of matters that may increase the protection of creditors. These included –

- 1 restriction of the use of similar names;
- 2 funding for liquidators;
- 3 education of directors and others;
- 4 role of licensing boards; and
- 5 publicity.

3.50 In relation to the restriction on the use of similar names, the Committee in Recommendation 11 recommended that Victoria legislate in a similar manner to sections 216 and 217 of the United Kingdom *Insolvency Act 1986*. These sections place restrictions on the re-use by the former directors and managers of a failed corporation, except with the leave of the court, of business or company names similar to those of the former company. Following its review of overseas legislation, the Committee is of the opinion that there is no better model and, therefore, endorses that recommendation.

3.51 In relation to the funding of liquidators, it is interesting to note that the New Zealand Law Commission also suggested the establishment of an assetless companies fund.⁴² The New Zealand Law Commission referred to the Australian Law Reform Commission's recommendation for the establishment of an assetless companies fund, and proceeded –

[T]his was a matter of debate within the Law Commission, but there is a recognised problem in a few cases of directors leaving a company so completely assetless that there are no funds for a liquidator to investigate and, if appropriate, pursue claims against the directors. A modest fund available for such cases is contemplated. It is also envisaged that applications to the fund be determined by experienced professionals. The funds should come from a small flat-rate levy on company annual returns.

⁴⁰ id., pp. 46–48.

⁴¹ id., pp. 49–55.

⁴² New Zealand Law Commission, Report No. 9, op. cit., p. 152, para. 647.

The New Zealand Law Commission continued that the proposals were self explanatory but that there were two noteworthy features –

The first is that the main source of funding is a levy placed on annual returns fees. Secondly, the fund is to be used to pursue matters that may result in benefit to creditors or shareholders. In this latter respect the proposed fund would differ from the Australian proposals, in that the fund under those proposals is also to be used for paying the liquidator for carrying out the preliminary steps of liquidation and reporting to creditors. ... It is envisaged that the liquidator would be required to seek funding for each step of any process, and report on how the money has been spent.⁴³

3.52 It is interesting to note further that the New Zealand Law Commission thought that directors leaving companies completely assetless occurred in a 'few cases', whilst the submission as reported in the First Report was that 'it is common'.

Conclusions

3.53 In the light of the Australian Law Reform Commission's recommendation that an assetless companies fund be established, and the New Zealand Law Commission's support for this initiative, the Committee supports the establishment of such a fund.

Recommendation 6

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for the establishment of an Assetless Companies Fund as recommended by the Australian Law Reform Commission in its Report No. 45, *General Insolvency Inquiry* (1988) to provide a fund from which payments could be made so as to enable the winding up of and investigations into insolvent assetless companies.

⁴³ id., p. 165. paras. 710-711.

4.1 Without exception, legislators and regulators in the jurisdictions the Committee has studied are aware of the phoenix company phenomenon. All have either examined the problem, or are in the process of doing so. It would be surprising if the common law jurisdictions have not already examined each other's legislation. No doubt this has led to the great similarity between jurisdictions, as evidenced by the discussion in chapter 3 of this paper. It is apparent that no jurisdiction has found the definitive answer to the problem.

4.2 The existence of the phenomenon raises problems which are difficult to solve. The interests of creditors have to be balanced against the burdens that the legislation introduces. It is possible, for instance, to make the burden of being a company officer so onerous that the people who should be in those positions no longer choose to take part. The New Zealand Law Commission in 1990 observed that whilst the Commission was of the view that the topic of directors' duties is central to company law, there is a need '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 directorship's'.⁴⁴ The Commission said that they were aware that there was already a trend for professionals to refuse to accept directorships.

4.3 There is also the additional cost which such legislation introduces. The cost may become so prohibitive as to make a venture uneconomic. The Committee's Chairman in his forward to the First Report said:

The problem will never totally disappear, since the law, the courts, and law enforcement agencies cannot give absolute priority to the prevention of loss over the encouragement of enterprise and the need to limit compliance and enforcement costs.⁴⁵

4.4 Cost is always going to be a material consideration. The provisions of the New Zealand *Corporations (Investigation and Management) Act 1989* are discussed in chapters 2 and 3. There is much that can be said in favour of the enactment of similar legislation in Australia.

4.5 Acknowledging that funding will always be difficult to obtain, cheaper options for change are those contained in Recommendations 3 and Recommendation 4 of this Report.

4.6 A relatively simple expedient which would assist in informing company directors (as well as the public) of their duties, would be to group all of the provisions of the *Corporations Law* which deal with directors duties, obligations and penalties within a single part of the *Corporations Law*, rather than, as at present, scattering them throughout the Act. Whilst ignorance of a particular provision provides no legal excuse for failing to comply with it, its deterrent effect is greatly diminished if its existence is not widely known. This is a matter that could be corrected as

⁴⁴ New Zealand Law Commission, Report No. 16, op. cit., p. xxii.

⁴⁵ First Report., p. xi.

part of the Commonwealth Attorney-General's Department, Corporation Law Simplification Task Force's review of the directors' disqualification provisions in the *Corporations Law*.⁴⁶

Recommendation 7

The Committee recommends that the Victorian Government should seek the support of the Ministerial Council for a change to the *Corporations Law* which would ensure that all provisions dealing with directors duties, obligations, liabilities, disqualification and associated offences and penalties are contained within the one part of the *Corporations Law*.

4.7 There is little point in legislation which is intended to have a deterrent effect if its provisions are not widely known. This problem can be overcome by increasing general public awareness of the risks of dealing with limited liability companies through education and advertising programs. These could be designed and conducted by Small Business Victoria and the Office of Fair Trading and Business Affairs, and the programs should be targeted to reach those who are most at risk.

Recommendation 8

The Committee recommends that the Victorian Government should fund Small Business Victoria and the Office of Fair Trading and Business Affairs to design and conduct education and advertising programs targeted at those most at risk, and aimed at increasing general public awareness of the risks that may be inherent when dealing with limited liability companies.

4.8 One of the most cost effective ways of protecting creditors' rights would be to educate the public about the risks faced when dealing with a corporation, especially if the company is insolvent. Part of this educative process would be to make it widely known that a potential creditor's future position in the event of the company becoming insolvent, is greatly improved if the company's account is personally guaranteed by its directors. Nowadays many middle and large scale enterprises routinely require such guarantees before opening an account in the name of a company. Unfortunately, it is often those who can least afford to lose money who are unaware of this protective mechanism. If a personal guarantee is refused then at least the potential creditor is in a better position to determine whether or not to trade with that corporation.

Recommendation 9

The Committee recommends that the Victorian Government should take steps to increase the general public awareness of the use that can be made by persons dealing with limited liability companies, of guarantees which are designed to protect those persons' financial position. The preparation and distribution of a standard form of guarantee, to be given by company directors to secure their company's financial liabilities, would be a cost effective means of improving the situation of creditors, especially those likely to be confronted by the phoenix company phenomenon.

⁴⁶ See para. 1.8 above.

4.9 In the end the effort which should be put into curbing the phoenix company phenomenon depends upon an assessment of the costs of making business unprofitable and risk taking too hazardous, against the costs to creditors and confidence of an excessively laissez faire approach to the misuse of the limited liability company. The problem of the phoenix company is common and perhaps endemic. It should not be ignored. Attempts to find remedies and to strike the right balance between competing considerations cannot be expected to result in a once and for all solution and should be kept under review.

COMMITTEE ROOM

15 May 1995

APPENDIX A

LIST OF SUBMISSIONS

INITIAL SUBMISSIONS—Tabled with Interim Report

<i>N^o</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
1	January 1993	Geoffrey Crowder	John Crowder & Sons Pty Ltd
2	25 January 1993	Mrs Jane Peacock	Citizen
3	9 February 1993	R G Mansell	Partner, Duesburys
4	25 February 1993	Eaglehawk & Long Gully Community Health Centre	
5	15 March 1993	Jack Dickinson	Citizen
6	17 March 1993	Cornwall Stodart	
7	24 March 1993	D McKee	Acting Commissioner, ACT Revenue Office
8	7 April 1993	Australian Securities Commission	
9	8 April 1993	Graham Sherry	Managing Partner, Baker & McKenzie
10	22 April 1993	Terry Taylor	National Development Partner, Ferrier Hodgson
11	28 April 1993	Greg Hodson	Partner, Coopers & Lybrand
12	29 April 1993	Anne Moroney	Australian Securities Commission, Regional Office, South Australia
13	4 May 1993	Ron Trevethan	Regional Commissioner for Victoria, Australian Securities Commission
14	7 May 1993	R G Mansell	Partner, Duesburys

Nº	Date of Submission	Name	Affiliation
15	10 May 1993	The Honourable Chief Justice Phillips	Victorian Supreme Court
16	18 May 1993	Chief Judge Waldron	County Court of Victoria
17	12 July 1993	Law Council of Australia	
18	26 November and 21 December 1993	Arthur B Ranken	Citizen
19	4 March 1994	Brendan Soraghan	National Industrial Officer, Textile Clothing & Footwear Union of Australia
20	11 March 1994	Louise Connor	Joint Secretary, Media Entertainment & Arts Alliance
21	5 April 1994	Hon Jeffrey Kennett	Premier, Victorian Government

SUBMISSIONS RESPONDING TO FIRST REPORT

Nº	Date of Submission	Name	Affiliation
1	12 September 1994	P E J Jollie, President	The Institute of Chartered Accountants in Australia
2	12 September 1994	R J C Jeffery, National President	Australian Society of Certified Practising Accountants
3	14 September 1994	Confidential	
4	14 September 1994	Stephen Walsh, QC, President	The Law Society of South Australia
5	30 September 1994	Chris MacLeod	Citizen

<i>Nº</i>	<i>Date of Submission</i>	<i>Name</i>	<i>Affiliation</i>
6	3 October 1994	Mark Hillebrand, Director	BIZCOM
7	5 October 1994	David Edwards, Chief Executive Officer	Victorian Employers' Chamber of Commerce and Industry (VECCI)
8	26 October 1994	Neil A Wood, President, Victorian Division	Institute of Mercantile Agents Ltd.
9	16 December 1994	Peter Levy, Secretary General	Law Council of Australia
10	9 January 1995	David Blackwell, National Secretary	Insolvency Practitioners Association of Australia
11	9 January 1995	H R Hulme	Citizen
12	25 January 1995	Dominic Bowden	Citizen
13	2 February 1995	Bruce Bargon, Chief Executive Officer	Credit Reference Association of Aust. Ltd.
14	4 April 1995	S Whittaker	Australian Credit Forum
15	5 April 1995	G Cleary	Citizen

APPENDIX B

EVIDENCE

<i>Date</i>	<i>Witness</i>	<i>Affiliation</i>
25 February 1993	Mr Derek White and Mr Terry Weerappa	State Revenue Office
5 March 1993	Professor John Farrar	University of Melbourne
5 March 1993	Mr Brett Mathieson	Ernst and Young
22 March 1993	Mr Greg Reinhardt	University of Melbourne
1 June 1993	Mr Ranald McDonald	3LO
2 June 1993	Mr Ian Pyman, Mr Ted Woodward and Professor Bob Baxt	Arthur Robinson and Hedderwicks
2 June 1993	Mr Don Cooper Senior Partner	Sly and Weigall
23 June 1993	Mr Don Cooper Senior Partner	Sly and Weigall
23 June 1993	Mr Ron Trevethan Regional Commissioner Mr Pat Whitehouse Executive Director, Investigations	Australian Securities Commission

Directors

60 (1) ["director"] Subject to subsection (2), a reference to a director, in relation to a body, includes a reference to:

- (a) a person occupying or acting in the position of director of the body, by whatever name called and whether or not validly appointed to occupy, or duly authorised to act in, the position;
- (b) a person in accordance with whose directions or instructions the directors of the body are accustomed to act;
- (c) in the case of a body incorporated or formed outside Australia:
 - (i) a member of the body's board;
 - (ii) a person occupying or acting in the position of member of the body's board, by whatever name called and whether or not validly appointed to occupy, or duly authorised to act in, the position; and
 - (iii) a person in accordance with whose directions or instructions the members of the body's board are accustomed to act.

60 (2) [Professional capacity or business relationship] A person shall not be regarded as a person in accordance with whose directions or instructions:

- (a) a body's directors; or
- (b) the members of the board of a body incorporated or formed outside Australia;

are accustomed to act merely because the directors or members act on advice given by the person in the proper performance of the functions attaching to the person's professional capacity or to the person's business relationship with the directors or the members of the board, or with the body.

60 (3) ["position of director" in s 60(1)(a)] For the purposes of subsection (1), if there are no positions of director (by whatever name called) in relation to a body, the reference in paragraph (1)(a) to a position of director of the body is a reference to a position the holder of which has control, or shares control, over the general conduct of the affairs of the body.

Receivers and managers

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

Effect of such a prohibition, order, notice or disqualification

91A (1) [Effect of section] This section has effect for the purposes of sections 229, 230, 588z, 599, 600, 1317EA and 1317EF.

91A (2) [Management of local corporation] A person manages a local corporation if the person, in this jurisdiction or elsewhere, is a director or promoter of, or is in any way (whether directly or indirectly) concerned in or takes part in the management of, the corporation.

91A (3) [Management of corporation] A person manages a corporation (other than a local corporation) if the person:

- (a) in this jurisdiction, does an act as a director or promoter of, or is in any way (whether directly or indirectly) concerned in or takes part in the management of, the corporation; or
- (b) in this jurisdiction or elsewhere, does an act as a director or promoter of, or is in any way (whether directly or indirectly) concerned in or takes part in the management of, the corporation in connection with:
 - (i) the corporation carrying on business in this jurisdiction; or
 - (ii) an act that the corporation does, or proposes to do, in this jurisdiction; or
 - (iii) a decision by the corporation whether or not to do, or to refrain from doing, an act in this jurisdiction.

91A (4) [Operation of section] Except as provided in this section, a person is not taken to manage a corporation.

Certain persons not to manage corporations

229 (1) [Insolvent person] An insolvent under administration: must not, without the leave of the Court, manage a corporation.

229 (2) repealed

229 (3) [Convicted person—waiting period] A person who has, whether before or after the commencement of this Part, been convicted:

- (a) on indictment of an offence against an Australian law, or any other law, in connection with the promotion, formation or management of a body corporate or corporation; or
- (b) of serious fraud; or
- (c) of any offence for a contravention of section 232, 590, 591, 592, 595, 996 or 1307, of Part 6.6, of Division 2 of Part 7.11, or of a previous law corresponding to any of those provisions; or
- (d) of an offence of which the person is guilty because of subsection 1317FA(1);

shall not, within 5 years after the conviction or, if the person was sentenced to imprisonment, after release from prison, without the leave of the Court, manage a corporation.

229 (3A) [Managing a corporation] Section 91A defines what, for the purposes of this section, constitutes managing a corporation.

229 (4) [Certificate of release - prima facie evidence] In any proceeding for a contravention of subsection (3), a certificate by a prescribed authority stating that a person was released from prison on a specified date is prima facie evidence that that person was released from prison on that date.

229 (5) [Court may grant conditional leave] When granting leave under this section, the Court may impose such conditions or restrictions as it thinks fit and a person shall not contravene any such condition or restriction.

229 (6) [Notice of intention to apply for leave] A person intending to apply for leave of the Court under this section shall give to the Commission not less than 21 days notice of the person's intention so to apply.

229 (7) [Revocation of leave] The Court may at any time, on the application of the Commission, revoke leave granted by the court under this section.

229 (8) [Leave granted under prior legislation] Any leave granted by a court under a corresponding previous law of this jurisdiction before the commencement of this Part has effect for the purposes of this section as if it had been granted by the Court under this section.

Court may order person not to manage corporation

230 (1) [When Court may make order] Where, on application by the Commission or a person who is a prescribed person in relation to the body corporate concerned, or any of the bodies corporate concerned, the Court is satisfied:

- (a) that:
 - (i) a body corporate has, during a period in which a person (in this subsection called the "relevant person") was a relevant officer of the body corporate repeatedly breached relevant legislation; and
 - (ii) the relevant person failed to take reasonable steps to prevent the body corporate so breaching relevant legislation; or
- (b) that:
 - (i) each of 2 or more bodies corporate has, at a time when a person (in this subsection also called the "relevant person") was a relevant officer of the body corporate, breached relevant legislation; and
 - (ii) in each case the relevant person failed to take relevant steps to prevent the body corporate from breaching relevant legislation; or
- (c) that:
 - (i) a person (in this subsection also called the "relevant person") has repeatedly breached relevant legislation; and
 - (ii) on 2 or more of the occasions when the relevant person breached relevant legislation, the relevant person was a relevant officer of a body corporate (whether or not the relevant person was a relevant officer of the same body corporate on each of those occasions); or
- (d) that, at any time during a period in which a person (in this subsection also called the relevant person") has been or was a relevant officer of a body corporate (other than a corporation), the relevant person did an act, or made an omission, that would have constituted a contravention of subsection 232(2) or (4) in relation to the body if the body had been a corporation at that time;

the Court may by order prohibit the relevant person, for such period as is specified in the order, from managing a corporation.

230 (2) [Lodge copy of order] Where an order has been made under subsection (1) on the application of a person other than the Commission, the person shall, within 7 days after the making of the order, lodge an office copy of the order.

230 (3) [Effect of order] A person who is subject to a section 230 order (whether made before or after the commencement of this section) must not manage a corporation.

230 (3A) [Managing a corporation] Section 91A defines what, for the purposes of this section, constitutes managing a corporation.

230 (4) [Reference to period before commencement of Part] In this section, a reference to a period in which a person has been or was a relevant officer of a body corporate includes a reference to such a period that elapsed, or part of which elapsed, before the commencement of this Part.

230 (5) [Breach of relevant legislation] For the purposes of this section:

- (a) a body corporate or other person shall be taken to have breached relevant legislation if the body corporate or other person has contravened a provision of a relevant enactment; and
- (b) a body corporate or another person may be taken to have repeatedly breached relevant legislation if the body corporate or the other person has:
 - (i) on 2 or more occasions, contravened a particular provision of a relevant enactment;
 - (ii) contravened 2 or more provisions of a relevant enactment; or
 - (iii) contravened provisions of 2 or more relevant enactments.

230 (6) [Definitions] In this section:

"**body corporate**" includes an unincorporated registrable body;

"**prescribed person**", in relation to a body corporate, means:

- (a) a liquidator or provisional liquidator of the body corporate;
- (ba) an administrator of the body corporate;
- (bb) an administrator of a deed of company arrangement executed by the body corporate;
- (b) a member of the body corporate;
- (c) a creditor of the body corporate; or
- (d) a person who is authorised by the Commission to make applications under this section, or to make an application under this section in relation to the body corporate;

"**relevant enactment**" means this Law or a previous law corresponding to provisions of this Law;

"**relevant officer**", in relation to a body corporate, means a director, secretary or executive officer of the body corporate.

Duty and liability of officer of corporation

232 (1) [Definitions] In this section:

"**officer**", in relation to a corporation, means:

- (a) a director, secretary or executive officer of the corporation;
- (b) a receiver, or receiver and manager, of property of the corporation, or any other authorised person who enters into possession or assumes control of property of the corporation for the purpose of enforcing any charge;
- (c) an administrator of the corporation;
- (ca) an administrator of a deed of company arrangement executed by the corporation;
- (d) a liquidator of the corporation; and
- (e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons.

232 (2) [Act honestly] An officer of a corporation shall at all times act honestly in the exercise of his or her powers and the discharge of the duties of his or her office.

232 (3) repealed

232 (4) [Care and diligence] In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a

reasonable person in a like position in a corporation would exercise in the corporation's circumstances.

232 (4A) [Place where duties or powers exercised] A reference in subsection (2) or (4) to the exercise of powers, or the discharge of duties, of an officer of a corporation is a reference to the exercise of those powers, or the discharge of those duties:

- (a) in any case – in this jurisdiction; or
- (b) if the body is a local corporation – outside this jurisdiction; or
- (c) otherwise – outside this jurisdiction but in connection with:
 - (i) the corporation carrying on business in this jurisdiction; or
 - (ii) an act that the corporation does, or proposes to do, in this jurisdiction; or
 - (iii) a decision by the corporation whether or not to do, or to refrain from doing, an act in this jurisdiction.

232 (5) [Improper use of information] An officer or employee of a corporation, or a former officer or employee of a corporation, must not, in relevant circumstances, make improper use of information acquired by virtue of his or her position as such an officer or employee to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.

232 (6) [Improper use of position] An officer or employee of a corporation must not, in relevant circumstances, make improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.

232 (6A) [Place in which act is done] A reference in subsection (5) or (6), in relation to a corporation, to doing an act in relevant circumstances is a reference to doing the act:

- (a) if the body is a local corporation – in this jurisdiction or elsewhere; or
- (b) otherwise – in this jurisdiction.

232 (6B) [Civil penalty provisions] Subsections (2), (4), (5) and (6) are civil penalty provisions as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening any of them, or of being involved in a contravention of any of them.

232 (7) repealed

232 (8) repealed

232 (9) repealed

232 (10) repealed

232 (11) [Effect of section – in addition to other law] This section has effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person by reason of the person's office or employment in relation to a corporation and does not prevent the institution of any civil proceedings in respect of a breach of such a duty or in respect of such a liability.

Register of disqualified company directors and other officers 238A

243 (1) [Commission to keep register, contents] The Commission shall cause to be kept for the purposes of this Law a Register of Disqualified Company Directors and Other Officers consisting of:

- (a) a copy of each order made under subsection 230(1) or 599(2) or paragraph 1317EA(3)(a), and
- (b) a copy of each notice served under subsection 600(3).

243 (2) [Copies of orders or notices] Where:

- (a) an order has been made under a previous law that corresponds with subsection 230(1) or 599(2); or
- (b) a notice has been served under a previous law that corresponds with subsection 600(3); the Commission may include a copy of the order or notice in the Register of Disqualified Company Directors and Other Officers.

243 (3) [Inspection and copying of register] A person may inspect and make copies of, or take extracts from, the Register of Disqualified Company Directors and Other Officers.

Consequences of giving financial benefit when not permitted

243ZE (1) [Application of section] This section applies if:

- (a) a related party of a public company receives a financial benefit from the public company, or from a child entity of the public company; and
- (b) the public company contravenes subsection 243H(1), or the child entity contravenes subsection 243H(2), by giving the benefit.

243ZE (2) [Contravention by related party] The related party contravenes this subsection.

243ZE (3) [Persons involved or concerned in contravention] Subject to subsection (4), a person contravenes this subsection if the person:

- (a) is involved (as defined in section 79) in; or
- (b) is, by act or omission, directly or indirectly, recklessly concerned in, or party to the contravention of subsection 243H(1) or (2), or the contravention of subsection (2) of this section.

243ZE (4) [Public company, child entity involved or concerned in contravention] Neither the public company nor the child entity:

- (a) is guilty of an offence because of the contravention of subsection 243H(1) or (2), or
- (b) is taken to be involved in, or concerned in or party to:
 - (i) a contravention of subsection (2) of this section by the related party or by any of the persons constituting the related party; or
 - (ii) a contravention of subsection (3) of this section by a person.

243ZE (5) [Civil penalty provisions] Subsections (2) and (3) are civil penalty provisions as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening, or of being involved in a contravention of, either of them.

243ZE (6) [Defence] In a proceeding against a person for:

- (a) a contravention of subsection (2) or
- (b) a contravention of subsection (2) because of section 243ZG, 1317DB, 1317DC or 1317DD;

it is a defence if it is proved that the person was unaware of a fact or circumstance essential to the contravention of subsection 243H(1) or (2), as the case requires.

Accounting records

289 (1) [Duty to keep accurate accounting records] A company shall:

- (a) keep such accounting records as correctly record and explain its transactions (including any transactions as trustee) and financial position; and
- (b) so keep its accounting records that:
 - (i) true and fair accounts of the company can be prepared from time to time; and
 - (ii) its accounts can be conveniently and properly audited or reviewed in accordance with this Law.

289 (2) [Retention for 7 years] A company shall retain the accounting records kept by it under this section, or under a corresponding previous law, for 7 years after the completion of the transactions to which they relate.

289 (3) [Places in which records may be kept] A company shall keep its accounting records at such place or places as its directors think fit.

289 (4) [Commission may require production] The Commission may by writing require a company to produce:

- (a) at a specified place within Australia that is reasonable in the circumstances; and
- (b) within a specified period of at least 14 days;

specified accounting records of the company that are kept outside Australia.

289 (5) [Details retained in Australia of records kept outside Australia] Where accounting records of a company are kept outside Australia, the company shall keep at a place within Australia determined by the directors such statements and records with respect to the matters dealt with in the records kept outside Australia as would enable true and fair accounts, and any documents required by this Law to be attached to the accounts, to be prepared.

289 (6) [Notification of place where details retained] A company shall lodge written notice of the place in Australia where statements and records kept under subsection (5) are kept, unless the statements and records are kept at the registered office of the company.

289 (7) [Records to be kept in English] A company shall keep its accounting records in writing in the English language or so as to enable them to be readily accessible and readily convertible into writing in the English language.

289 (8) [Inspection by auditor acting for director] The Court may, on application by a director of a company, make an order authorising a registered company auditor acting for the director to inspect the accounting records of the company.

289 (9) [Inspection by directors] A company shall make its accounting records available in writing in the English language at all reasonable times for inspection without charge by any director of the company and by any other person authorised or permitted by or under this Law to inspect them.

289 (10) [Disclosure by auditor] Where a registered company auditor inspects the accounting records pursuant to an order of the Court under subsection (8), he or she shall not disclose to a person other than the director on whose application the order was made any information acquired by him or her in the course of his or her inspection.

289 (11) repealed

289 (12) repealed

Contravention of Part 276

318 (1) [Contravention] Subject to this section, if a director of a company fails to take all reasonable steps to comply with, or to secure compliance with, or has knowingly been the cause of any default under, any of the provisions of this Part (including any of those provisions as applying by virtue of section 1058) other than Divisions 1 and 2 and section 317 the director contravenes this subsection.

318 (2) [Civil penalty provision] Subsection (1) is a civil penalty provision as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening it, or of being involved in a contravention of it.

318 (3) [Defence] In any proceedings against a person for failure to take all reasonable steps to comply with, or to secure compliance with, the provisions of this Part relating to the form and content of the accounts or consolidated accounts of a company by reason of an omission from the accounts or consolidated accounts (including any of those provisions as applying by virtue of section 1058), it is a defence if it is proved that the information omitted was immaterial and did not affect the giving of a true and fair view of the matters required by Division 4 or 4A to be dealt with in the accounts or consolidated accounts, as the case may be.

318 (4) repealed.

318 (5) [Production of documents] After the end of the period within which Division 4, 4A, 5 or 6 requires a company's directors to cause a document to be made out, the Commission may require the company's directors to produce the document on a specified day, at a specified place, to a specified person.

318 (6) [Request in writing] A request under subsection (5) must be made by writing given to each of the company's directors.

318 (7) [Prima facie evidence] In a proceeding for a contravention of Division 4, 4A, 5 or 6, proof of contravention of a requirement made under subsection (5) is prima facie evidence that the document was not made out within the period referred to in that subsection.

Custody and vesting of company's property

474 (1) [Liquidator or Court to take property] If a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company has been appointed, the liquidator or provisional liquidator shall take into his or her custody or under his or her control all the property to which the company is or appears to be entitled, and, if there is no liquidator, all the property of the company shall be in the custody of the Court.

474 (2) [Order that property vests in liquidator] The Court may, on the application of the liquidator, by order direct that all or any part of the property of the company shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity (if any) as the Court directs, bring, or may defend, any action or other legal proceeding that relates to that property or that it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

474 (3) [Lodgement of copy of order] Where an order is made under this section, the liquidator of the company to which the order relates shall, within 14 days after the making of the order, lodge with the Commission an office copy of the order.

Powers of liquidator

477 (1) [Powers-general] Subject to this section, a liquidator of a company may:

- (a) carry on the business of the company so far as is necessary for the beneficial disposal or winding up of that business

- (b) subject to the provisions of section 556, pay any class of creditors in full;
- (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging that they have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or whereby the company may be rendered liable, and
- (d) compromise any calls, liabilities to calls, debts, liabilities capable of resulting in debts and any claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the property or the winding up of the company, on such terms as are agreed, and take any security for the discharge of, and give a complete discharge in respect of, any such call, debt, liability or claim.

477 (2) [Powers particular] Subject to this section, a liquidator of a company may:

- (a) bring or defend any legal proceeding in the name and on behalf of the company;
- (b) appoint a solicitor to assist him or her in his or her duties;
- (c) sell or otherwise dispose of, in any manner, all or any part of the property of the company;
- (ca) exercise the Court's powers under subsection 483(3) (except paragraph 483(3)(b)) in relation to calls on contributories;
- (d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's common or official seal;
- (e) subject to the Bankruptcy Act 1966, prove in the bankruptcy of any contributory or debtor of the company or under any deed executed under that Act;
- (f) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
- (g) obtain credit, whether on the security of the property of the company or otherwise;
- (h) take out letters of administration of the estate of a deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor, or his or her estate, that cannot be conveniently done in the name of the company;
- (k) appoint an agent to do any business that the liquidator is unable to do, or that it is unreasonable to expect the liquidator to do, in person; and
- (m) do all such other things as are necessary for winding up the affairs of the company and distributing its property.

477 (2A) [Debts liquidator must not compromise] Except with the approval of the Court of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not compromise a debt to the company if the amount claimed by the company is more than:

- (a) if an amount greater than \$20,000 is prescribed – the prescribed amount- or
- (b) otherwise – \$20,000.

477 (2B) [Limitation on agreements] Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf (for example, but without limitation, a lease or a charge) if:

- (a) without limiting paragraph (b), the term of the agreement may end; or
- (b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance

more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.

477 (3) [Power to inspect books; offence] A liquidator of a company is entitled to inspect at any reasonable time any books of the company and a person who refuses or fails to allow the liquidator to inspect such books at such a time is guilty of an offence.

477 (4) repealed

477 (5) [Money deemed due to liquidator] For the purpose of enabling the liquidator to take out letters of administration or recover money as mentioned in paragraph (2)(h), the money due shall be deemed to be due to the liquidator.

477 (6) [Court to control exercise of powers] The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and any creditor or contributory, or the Commission, may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

Delivery of property to liquidator

483 (1) [Court may require delivery] The Court may require a person who is a contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator, as soon as practicable or within a specified period, any money, property or books in the person's hands to which the company is prima facie entitled.

483 (2) [Power to direct contributory to pay money due; allowances] The Court may make an order directing any contributory for the time being on the list of contributories to pay to the company in the manner directed by the order any money due from the contributory or from the estate of the person whom the contributory represents, exclusive of any money payable by the contributory or the estate by virtue of any call pursuant to this Law, and may:

- (a) in the case of an unlimited company – allow to the contributory by way of set-off any money due to the contributory or to the estate that the contributory represents from the company on any independent dealing or contract but not any money due to the contributory as a member of the company in respect of any dividend or profit; and
- (b) in the case of a limited company – make to any director whose liability is unlimited or to such a director's estate the like allowance;

and, in the case of any company whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him, her or it by way of set-off against any subsequent call.

483 (3) [Power to make and order calls] The Court may, either before or after it has ascertained the sufficiency of the property of the company:

- (a) make calls on all or any of the contributories for the time being on the list of contributories, to the extent of their liability, for payment of any money that the Court considers necessary to satisfy the debts and liabilities of the company and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves; and
- (b) make an order for payment of any calls made by the Court or the company's liquidator;

and, in making a call, may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

483 (4) [Amount may be ordered to be paid into account of liquidator] The Court may order any contributory, purchaser or other person from whom money is due to the company to

pay the amount due into a bank named in the order to the account of the liquidator instead of to the liquidator, and any such order may be enforced in the same manner as if it had directed payment to the liquidator.

483 (5) [Moneys paid are subject to order of Court] All money and securities paid or delivered into any bank under this Division are subject in all respects to orders of the Court.

483 (6) [Order conclusive evidence that money due] An order made by the Court under this section is, subject to any right of appeal, conclusive evidence that the money (if any) thereby appearing to be due or ordered to be paid is due, and all other pertinent matters stated in the order shall be taken to be truly stated as against all persons and in all proceedings.

Court may make order to prevent officer or related entity from avoiding liability to company

486A (1) [Court's power to make order] On the application of a liquidator or provisional liquidator of a company, the Court may make one or more of the following:

- (a) an order prohibiting, either absolutely or subject to conditions, an officer or related entity of the company from taking or sending out of this jurisdiction or out of Australia money or other property of the company or of the officer or related entity;
- (b) an order appointing:
 - (i) a receiver or trustee, with specified powers, of property of an officer of the company, or of property of a related entity of the company that is a natural person; or
 - (ii) a receiver, or a receiver and manager, with specified powers, of property of a related entity of the company that is not a natural person;
- (c) an order requiring an officer of the company, or a related entity of the company that is a natural person, to surrender to the Court his or her passport and any other specified documents;
- (d) an order prohibiting an officer of the company, or a related entity of the company that is a natural person, from leaving Australia without the Court's consent.

486A (2) [Restrictions on court's power] The Court may only make an order under subsection (1) if:

- (a) the company is being wound up in insolvency or by the Court, or an application has been made for the company to be so wound up; and
- (b) the Court is satisfied that there is at least a prima facie case that the officer or related entity is or will become liable:
 - (i) to pay money to the company, whether in respect of a debt, by way of damages or compensation or otherwise; or
 - (ii) to account for property of the company; and
- (c) the Court is also satisfied that there is substantial evidence that the officer or related entity:
 - (i) has concealed or removed money or other property, has tried to do so, or intends to do so; or
 - (ii) has tried to leave Australia, or intends to do so; in order to avoid that liability or its consequences; and
- (d) the Court thinks it necessary or desirable to make the order in order to protect the company's rights against the officer or related entity.

486A (3) [Court's duty to consider s 1323 application] On hearing an application under subsection (1), the Court must have regard to any relevant application under section 1323.

486A (4) [Power to grant interim order] Before considering an application under subsection (1), the Court may, if in the Court's opinion it is desirable to do so, grant an interim order of the kind applied for that is expressed to have effect until the application is determined.

486A (5) [Interim order not conditional on damages undertaking] The Court must not require an applicant under subsection (1) or any other person, as a condition of granting an Interim order under subsection (4), to give an undertaking as to damages.

486A (6) [Variation or discharge of order] On the application of a person who applied for, or is affected by, an order under this section, the Court may make a further order discharging or verifying the first-mentioned order.

486A (7) [Operation of subs (1) order] An order under subsection (1) may be expressed to operate for a specified period or until it is discharged by a further order.

486A (8) [Contravention] A person must not contravene an order under this section that is applicable to the person.

486A (9) [Effect of section] This section has effect subject to the Bankruptcy Act 1966.

486A (10) [Other powers of court not affected] Nothing in this section affects any other powers of the Court.

Warrant to arrest person who is absconding, or who has dealt with property or books, in order to avoid obligations in connection with winding up

486B (1) [Court's power to issue warrant] The Court may issue a warrant for a person to be arrested and brought before the Court if:

- (a) a company is being wound up in insolvency or by the Court, or an application has been made for a company to be so wound up; and
- (b) the Court is satisfied that the person:
 - (i) is about to leave Australia in order to avoid:
 - (A) paying money payable to the company; or
 - (B) being examined about the company's affairs; or
 - (C) complying with an order of the Court, or some other obligation, under this Chapter in connection with the winding up; or
 - (ii) has concealed or removed property of the company in order to prevent or delay the taking of the property into the liquidator's custody or control; or
 - (iii) has destroyed, concealed or removed books of the company or is about to do so.

486B (2) [Warrant to seize and deliver property etc] A warrant under subsection (1) may also provide for property or books of the company in the person's possession to be seized and delivered into the custody of a specified person.

486B (3) [Who may apply for warrant] A warrant under subsection (1) may only be issued on the application of:

- (a) a liquidator or provisional liquidator of the company; or
- (b) the Commission.

Power to arrest absconding contributory

487 The Court, at any time before or after making a winding up order, on proof of probable cause for believing that a contributory is about to leave Australia or otherwise to abscond or to remove or conceal any of his or her property for the purpose of evading payment of calls or of

avoiding examination respecting affairs of the company, may cause the contributory to be arrested and held in custody and the books and movable personal property of the contributory to be seized and safely kept until such time as the Court orders.

Delegation to liquidator of certain powers of Court

488 (1) [Delegation of powers by rules or regulations] Provision may be made by rules or regulations for enabling or requiring all or any of the powers and duties conferred and imposed on the Court by this Part in respect of:

- (a) the holding and conducting of meetings to ascertain the wishes of creditors and contributories;
- (b) the paying, delivery, conveyance, surrender or transfer of money, property or books to the liquidator;
- (c) the adjusting of the rights of contributories among themselves and the distribution of any surplus among the persons entitled to it; and
- (d) the fixing of a time within which debts and claims must be proved; to be exercised or performed by the liquidator as an officer of the Court and subject to the control of the Court.

488 (2) [Limitations on delegation] Despite anything in rules or regulations made for the purposes of subsection (1) a liquidator may distribute a surplus only with the Court's special leave.

Officers to help liquidator

530A (1) [Duties of officers – books relating to company] As soon as practicable after the Court orders that a company be wound up or appoints a provisional liquidator of a company, or a company resolves that it be wound up, each officer of the company must:

- (a) deliver to the liquidator appointed for the purposes of the winding up, or to the provisional liquidator, as the case may be, all books in the officer's possession that relate to the company, other than books possession of which the officer is entitled, as against the company and the liquidator or provisional liquidator, to retain; and
- (b) if the officer knows where other books relating to the company are – tell the liquidator or provisional liquidator where those books are.

530A (2) [Duties of officers during winding up etc] Where a company is being wound up, or a provisional liquidator of a company is acting, an officer of the company must:

- (a) attend on the liquidator or provisional liquidator at such times; and
- (b) give the liquidator or provisional liquidator such information about the company's business, property, affairs and financial circumstances; and
- (c) attend such meetings of the company's creditors or members; as the liquidator or provisional liquidator reasonably requires.

530A (3) [Compliance with reasonable requirements of liquidator] An officer of a company that is being wound up must do whatever the liquidator reasonably requires the officer to do to help in the winding up.

530A (4) [Compliance with reasonable requirements of provisional liquidator] An officer of a company must do whatever a provisional liquidator of the company reasonably requires the officer to do to help in the performance or exercise of any of the provisional liquidator's functions and powers.

530A (5) [Power to require officer's address] The liquidator or provisional liquidator of a company may require an officer of the company:

- (a) to tell the liquidator the officer's residential address and work or business address; or
- (b) to keep the liquidator informed of any change in either of those addresses that happens during the winding up.

530A (6) [Compliance] A person must not, without reasonable excuse, fail to comply with subsection (1), (2), (3) or (4), or with a requirement under subsection (5).

530A (7) ["officer"] In this section:

"officer", in relation to a company, means a person who is, or has been but is no longer, an officer (as defined by section 82A) of the company.

530A (8) [Employee not necessarily officer] However, a person is not an officer of a company for the purposes of this section merely because he or she is or has been an employee of the company.

530A (9) [Effect of section] Nothing in this section limits the generality of anything else in it.

Liquidator's rights to company's books

530B (1) [Entitlement as against liquidator] A person is not entitled, as against the liquidator of a company:

- (a) to retain possession of books of the company; or
- (b) to claim or enforce a lien on such books; but such a lien is not otherwise prejudiced.

Warrant to search for, and seize, company's property or books

530C (1) [When court may issue warrant] The Court may issue a warrant under subsection (2) if:

- (a) a company is being wound up or a provisional liquidator of a company is acting; and
- (b) on application by the liquidator or provisional liquidator, as the case may be, by the Commission, the Court is satisfied that a person:
 - (i) has concealed or removed property of the company with the result that the taking of the property into the custody or control of the liquidator or provisional liquidator will be prevented or delayed; or
 - (ii) has concealed, destroyed or removed books of the company or is about to do so.

530C (2) [Authorisation by warrant] The warrant may authorise a specified person, with such help as is reasonably necessary:

- (a) to search for and seize property or books of the company in the possession of the person referred to in subsection (1); and
- (b) to deliver, as specified in the warrant, property or books seized under it.

530C (3) [Power to effect-warrant] In order to seize property or books under the warrant, the specified person may break open a building, room or receptacle where the property is or the books are, or where the person reasonably believes the property or books to be.

530C (4) [Duty to retain, property or book] A person who has custody of property or a book because of the execution of the warrant must retain it until the Court makes an order for its disposal.

Prosecution by liquidator of delinquent officers and members

534 (1) [Prosecution by liquidator] Where:

- (a) a report has been lodged under section 533; and
- (b) it appears to the Commission that the matter is not one in respect of which a prosecution ought to be begun;

it shall inform the liquidator accordingly, and the liquidator may begin a prosecution for any offence referred to in the report.

534 (2) [Costs of liquidator may be paid out of Commission's money] The Commission may direct that the whole or a specified part of the costs and expenses properly incurred by a liquidator in proceedings under this section shall be paid out of money of the Commission.

534 (3) [Costs and expenses otherwise to be part of costs of winding up] Subject to a direction under subsection (2), to any charges on the property of the company and to any debts to which this Law gives priority, all such costs and expenses are payable out of that property as part of the costs of the winding up.

When liquidator has qualified privilege

535 (1) [Circumstances] A liquidator has qualified privilege in respect of a statement that he or she makes, whether orally or in writing, in the course of his or her duties as liquidator.

535 (2) ["liquidator"] In this section:

"liquidator" includes a provisional liquidator.

Power of Court to make orders in favour of certain creditors

564 Where in any winding up:

- (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of moneys or the giving of indemnity by creditors; or
- (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

Presumptions to be made in recovery proceedings

588E (1) ["recovery proceeding"] In this section:

"recovery proceeding", in relation to a company, means:

- (a) an application under section 588FF by the company's liquidator; or
- (b) proceedings begun under subsection 588FH(2) by the company's liquidator; or
- (c) proceedings, in so far as they relate to the question whether a charge created by the company is void to any extent, as against the company's liquidator, because of subsection 588FJ(2); or
- (d) proceedings begun under subsection 588FJ(6) by the company's liquidator; or
- (e) proceedings for a contravention of section 588G in relation to the incurring of a debt by the company (including proceedings under section 588M in relation to the incurring of the debt but not including proceedings for an offence); or
- (f) proceedings under section 588W in relation to the incurring of a debt by the company.

588E (2) [Effect of subss (3) to (9)] Subsections (3) to (9), inclusive, have effect for the purposes of a recovery proceeding in relation to a company.

588E (3) [Presumption] If:

- (a) the company is being wound up; and
- (b) it is proved, or because of subsection (4) or (8) it must be presumed, that the company was insolvent at a particular time during the 12 months ending on the relation-back day; it must be presumed that the company was insolvent throughout the period beginning at that time and ending on that day.

588E (4) [Presumption of insolvency where contravention of s 281(1), (2)] Subject to subsections (5), (6) and (7), if it is proved that the company:

- (a) has contravened subsection 289(1) by failing to keep accounting records that correctly record and explain:
 - (i) its transactions (including any transactions as trustee) during a particular period ("the relevant period"); and
 - (ii) its financial position during the relevant period;or by failing to keep such accounting records in the manner required by paragraph 289(1)(b); or
- (b) has contravened subsection 289(2) by failing to retain such accounting records for the period required by that subsection;

it must be presumed that the company was insolvent throughout the relevant period.

588E (5) [Minor or technical contravention] Paragraph (4)(a) does not apply in relation to a contravention of subsection 289(1) that is only minor or technical.

588E (6) [Where subs (4) has no effect] Subsection (4) does not have effect, in so far as it would prejudice a right or interest of a person for the company to be presumed insolvent because of a contravention of subsection 289(2), if it is proved that:

- (a) the contravention was due solely to someone destroying, concealing or removing accounting records of the company; and
- (b) none of those accounting records was destroyed, concealed or removed by the firstmentioned person; and
- (c) the person was not in any way, by act or omission, directly or indirectly, knowingly or recklessly, concerned in, or party to, destroying, concealing or removing any of those accounting records.

588E (7) [Effect of subs (4) where s 588FF application] If the recovery proceeding is an application under section 588FF, subsection (4) of this section does not have effect for the purposes of proving, for the purposes of the application, that an unfair preference given by the company to a creditor of the company is an insolvent transaction, unless it is proved, for the purposes of the application, that a related entity of the company was a party to the unfair preference.

588E (8) [Matters proved in another recovery proceeding] If, for the purposes of another recovery proceeding in relation to the company, there has been proved:

- (a) if the other proceeding is of the kind referred to in paragraph (1)(a) of this section – a matter of the kind referred to in a paragraph of section 588FC or of subsection 588FG(2); or

- (b) if the other proceeding is of the kind referred to in paragraph (1)(b) of this section – a matter of the kind referred to in a paragraph of section 588FC or of subsection 588FG(2) or 588FH(1)X or a defence under subsection 588FH(3); or
- (c) if the other proceeding is of the kind referred to in paragraph (1)(c) or (d) of this section – a matter of the kind referred to in subsection 588FJ(3); or
- (d) if the other proceeding is of the kind referred to in paragraph (1)(e) of this section – a matter of the kind referred to in a paragraph of section 588G, or a defence under section 588H; or
- (e) if the other proceeding is of the kind referred to in paragraph (1)(f) of this section – a matter of the kind referred to in a paragraph of subsection 588v(1), or a defence under section 588x;

it must be presumed that that matter was the case, or that the matters constituting that defence were the case.

588E (9) [Operation of presumption] A presumption for which this section provides operates except so far as the contrary is proved for the purposes of the proceeding concerned.

Unfair preferences

588FA (1) ["unfair preference"] A transaction is an unfair preference given by a company to a creditor of the company if, and only if:

- (a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
- (b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company; even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

588FA (1A) [Unsecured debt] For the purposes of subsection (1), a secured debt is taken to be unsecured to the extent of so much of it (if any) as is not reflected in the value of the security.

588FA (2) [Transaction part of continuing business relationship] Where:

- (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including such a relationship to which other persons are parties); and
- (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;

then:

- (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
- (d) the transaction referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor if, because of subsection (1) as applying because of paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.

Uncommercial transactions

588FB (1) ["uncommercial transaction"] A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:

- (a) the benefits (if any) to the company of entering into the transaction; and
- (b) the detriment to the company of entering into the transaction; and
- (c) the respective benefits to other parties to the transaction of entering into it; and
- (d) any other relevant matter.

588FB (2) [Matters not affecting characterisation of transaction] A transaction may be an uncommercial transaction of a company because of subsection (1):

- (a) whether or not a creditor of the company is a party to the transaction; and
- (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

Insolvent transactions

588FC A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and:

- (a) any of the following happens at a time when the company is insolvent:
 - (i) the transaction is entered into;
 - (ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction; or
- (b) the company becomes insolvent because of, or because of matters including:
 - (i) entering into the transaction; or
 - (ii) a person doing an act, or making an omission, for the purpose of giving effect to the transaction.

Unfair loans to a company

588FD (1) ["unfair" loan] A loan to a company is unfair if, and only if:

- (a) the interest on the loan was extortionate when the loan was made, or has since become extortionate because of a variation; or
- (b) the charges in relation to the loan were extortionate when the loan was made, or have since become extortionate because of a variation;

even if the interest is, or the charges are, no longer extortionate.

588FD (2) [Determining whether interest or charges extortionate] In determining:

- (a) whether interest on a loan was or became extortionate at a particular time as mentioned in paragraph (1)(a); or
- (b) whether charges in relation to a loan were or became extortionate at a particular time as mentioned in paragraph (1) (b);

regard is to be had to the following matters as at that time:

- (c) the risk to which the lender was exposed; and
- (d) the value of any security in respect of the loan; and
- (e) the term of the loan; and

- (f) the schedule for payments of interest and charges and for repayments of principal;
- (g) the amount of the loan; and
- (h) any other relevant matter.

Voidable transactions

588FE (1) [Which transactions voidable] Where a company is being wound up, a transaction of the company that was entered into at or after the commencement of this Part may be voidable because of any one or more of the following subsections.

588FE (2) [Insolvent transaction; time scale] The transaction is voidable if:

- (a) it is an insolvent transaction of the company; and
- (b) it was entered into, or an act was done for the purpose of giving effect to it:
 - (i) during the 6 months ending on the relation-back day; or
 - (ii) after that day but on or before the day when the winding up began.

588FE (3) [Insolvent and uncommercial transaction; time scale] The transaction is voidable if:

- (a) it is an insolvent transaction, and also an uncommercial transaction, of the company; and
- (b) it was entered into, or an act was done for the purpose of giving effect to it, during the 2 years ending on the relation-back day.

588FE (4) [Insolvent transaction; related entity party; time scale] The transaction is voidable if:

- (a) it is an insolvent transaction of the company; and
- (b) a related entity of the company is a party to it; and
- (c) it was entered into, or an act was done for the purpose of giving effect to it, during the 4 years ending on the relation-back day.

588FE (5) [Insolvent transaction; purpose; time scale] The transaction is voidable if:

- (a) it is an insolvent transaction of the company; and
- (b) the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and
- (c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.

588FE (6) [Unfair loan] The transaction is voidable if it is an unfair loan to the company made at any time on or before the day when the winding up began.

588FE (7) [Interpretation] A reference in this section to doing an act includes a reference to making an omission.

Court may make orders about voidable transactions

588FF (1) [Orders court empowered to make] Where, on the application of a company's liquidator, the Court is satisfied that a transaction of the company is voidable because of section 588FE, the Court may make one or more of the following orders:

- (a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;
- (b) an order directing a person to transfer to the company property that the company has transferred under the transaction;

- (c) an order requiring a person to pay to the company an amount that, in the Court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction;
- (d) an order requiring a person to transfer to the company property that, in the Court's opinion, fairly represents the application of either or both of the following:
 - (i) money that the company has paid under the transaction;
 - (ii) proceeds of property that the company has transferred under the transaction
- (e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;
- (f) if the transaction is an unfair loan and such a debt, security or guarantee has been assigned – an order directing a person to indemnify the company in respect of some or all of its liability to the assignee;
- (g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;
- (h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;
- (i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time;
- (j) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable.

588FF (2) [Generality not limited] Nothing in subsection (1) limits the generality of anything else in it.

588FF (3) [Time limit on application under subs (1)] An application under sub-section (1) may only be made:

- (a) within 3 years after the relation-back day; or
- (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator within those 3 years.

Transaction not voidable as against certain persons

588FG (1) [Person other than party to transaction] The Court is not to make under section 588FF an order materially prejudicing a right or interest of a person other than a party to the transaction if it is proved that:

- (a) the person received no benefit because of the transaction; or
- (b) in relation to each benefit that the person received because of the transaction:
 - (i) the person received the benefit in good faith; and
 - (ii) at the time when the person received the benefit:
 - (A) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and
 - (B) a reasonable person in the person's circumstances would have had no such grounds for so suspecting.

588FG (2) [Transaction not an unfair loan] The Court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company and it is proved that:

- (a) the person became a party to the transaction in good faith; and
- (b) at the time when the person became such a party:
 - (i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph;
 - (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and
- (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.

588FG (3) [Discharge of tax liabilities] For the purposes of paragraph (2)(c), if an amount has been paid or applied towards discharging to a particular extent a liability to pay tax, the discharge is valuable consideration provided:

- (a) by the person to whom the tax is payable; and
- (b) under any transaction that consists of, or involves, the payment or application.

588FG (4) [Definition] In subsection (3):

"tax" means tax (however described) payable under a law of the Commonwealth or of a State or Territory, and includes, for example, a levy, a charge, and municipal or other rates.

588FG (5) [Liabilities to Commonwealth or Commissioner of Taxation] For the purposes of paragraph (2)(c), if an amount has been paid or applied towards discharging to a particular extent a liability to the Commonwealth, or to the Commissioner of Taxation, that arose under or because of an Act of which the Commissioner has the general administration, the discharge is valuable consideration provided by the Commonwealth, or by the Commissioner, as the case requires, under any transaction that consists of, or involves, the payment or application .

588FG (6) [Extent of subss (3) and (5)] Subsections (3) and (5):

- (a) are to avoid doubt and are not intended to limit the cases where a person may be taken to have provided valuable consideration under a transaction; and
- (b) apply to an amount even if it was paid or applied before the commencement of this subsection.

Directors to indemnify Commissioner of Taxation if certain payments set aside

588FGA (1) [Court orders] This section applies if the Court makes an order under section 588FF against the Commissioner of Taxation because of the payment of an amount in respect of a liability under any of the following provisions of the Income Tax Assessment Act

- (a) section 221F (except subsection 221F(12)), section 221G (except subsection 221G(4A)) or section 221P;
- (b) subsection 221YHDC(2);
- (c) subsection 221YHZD(1) or (1A);
- (d) subsection 221YN(1);
- (e) section 222AHA.

588FGA (2) [indemnity from directors] Each person who was a director of the company when the payment was made is liable to indemnify the Commissioner in respect of any loss or damage resulting from the order.

588FGA (3) [Debt due to Commonwealth] An amount payable to the Commissioner under subsection (2):

- (a) is a debt due to the Commonwealth and payable to the Commissioner; and
- (b) may be recovered in a court of competent jurisdiction by the Commissioner, or a Deputy Commissioner of Taxation, suing in his or her official name.

588FGA (4) [Orders against directors] The Court may, in the proceedings in which it made the order against the Commissioner, order a person to pay to the Commissioner an amount payable by the person under subsection (2).

588FGA (5) [Directors' rights of recovery] A person who pays an amount under subsection (2) has the same rights:

- (a) whether by way of indemnity, subrogation, contribution or otherwise; and
- (b) against the company or anyone else;

as if the payment had been made under a guarantee:

- (c) of the liability referred to in subsection (1); and
- (d) under which the person and every other person who was a director of the company as mentioned in subsection (2) were jointly and severally liable as guarantors.

Defences in proceedings under section 588FGA

588FGB (1) [Application] This section has effect for the purposes of:

- (a) proceedings to recover from a person an amount payable under subsection 588FGA(2); and
- (b) proceedings under subsection 588FGA(5) against a person of the kind referred to in paragraph 588FGA(5)(d).

588FGB (2) ["payment time"] The time when the payment referred to in subsection 588FGA(1) was made is called the payment time.

588FGB (3) [Expectation of solvency] It is a defence if it is proved that, at the payment time, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it made the payment.

588FGB (4) [Reliance on other person] Without limiting the generality of subsection (3), it is a defence if it is proved that, at the payment time, the person:

- (a) had reasonable grounds to believe, and did believe:
 - (i) that a competent and reliable person ("the other person") was responsible for providing to the first-mentioned person adequate information about whether the company was solvent; and
 - (ii) that the other person was fulfilling that responsibility; and
- (b) expected, on the basis of information provided to the first-mentioned person by the other person, that the company was solvent at that time and would remain solvent even if it made the payment.

588FGB (5) [Illness etc] It is a defence if it is proved that, because of illness or for some other good reason, the person did not take part in the management of the company at the payment time.

588FGB (6) [All steps taken] It is a defence if it proved that:

- (a) the person took all reasonable steps to prevent the company from making the payment; or

- (b) there were no such steps the person could have taken.

588FGB (7) [Appointment of administrator] In determining whether a defence under subsection (6) has been proved, the matters to which regard is to be had include, but are not limited to:

- (a) any action the person took with a view to appointing an administrator of the company; and
- (b) when the action was taken; and
- (c) the results of that action.

Liquidator may recover from related entity benefit resulting from insolvent transaction

588FH (1) [Application of section] This section applies where a company is being wound up and a transaction of the company:

- (a) is an insolvent transaction of the company; and
- (b) is voidable under section 588FE; and
- (c) has had the effect of discharging, to the extent of a particular amount, a liability (whether under a guarantee or otherwise and whether contingent or otherwise) of a related entity of the company.

588FH (2) [Recovery from related entity] The company's liquidator may, by proceedings in a court of competent jurisdiction, recover from the related entity, as a debt due to the company, an amount equal to the amount referred to in paragraph (1)(c).

588FH (3) [Order under s 588FF] In deciding what orders (if any) to make under section 588FF on an application relating to the transaction, the Court must take into account any amount recovered under subsection (2) of this section.

588FH (4) [Rights of related entity] If the liquidator recovers an amount under subsection (2) from the related entity, the related entity has the same rights:

- (a) whether by way of indemnity, subrogation, contribution or otherwise; and
- (b) against the company or anyone else;

as if the related entity had paid the amount in discharging, to the extent of that amount, the liability referred to in paragraph (1)(c).

Creditor who gives up benefit of unfair preference may prove for preferred debt

588FI (1) [Application of section] This section applies where:

- (a) a transaction is an unfair preference given by a company to a creditor of the company after the commencement of this Part; and
- (b) at the request of the company's liquidator, because of an order under section 588FF or for any other reason, the creditor has put the company in the same position as if the transaction had not been entered into.

588FI (2) [Order not to prejudice creditor's right or interest] The Court must not make under section 588FF, on an application relating to the transaction, an order prejudicing a right or interest of the creditor.

588FI (3) [Creditor's right to prove] The creditor may prove in the winding up as if the transaction had not been entered into.

Floating charge created within 6 months before relation-back day

588FJ (1) [Application of section] This section applies if:

- (a) a company is being wound up in insolvency; and
- (b) the company created a floating charge on property of the company at a particular time that is at or after the commencement of this Part and:
 - (i) during the 6 months ending on the relation-back day; or
 - (ii) after that day but on or before the day when the winding up began.

588FJ (2) [Charge void against liquidator] The charge is void, as against the company's liquidator, except so far as it secures:

- (a) an advance paid to the company, or at its direction, at or after that time and as consideration for the charge; or
- (b) interest on such an advance; or
- (c) the amount of a liability under a guarantee or other obligation undertaken at or after that time on behalf of, or for the benefit of, the company; or
- (d) an amount payable for property or services supplied to the company at or after that time; or
- (e) interest on an amount so payable.

588FJ (3) [Application of subs (2)] Subsection (2) does not apply if it is proved that the company was solvent immediately after that time.

588FJ (4) [Where paras (2)(a) and (b) not to apply] Paragraphs (2)(a) and (b) do not apply in relation to an advance so far as it was applied to discharge, directly or indirectly, an unsecured debt, whether contingent or otherwise, that the company owed to:

- (a) the chargee; or
- (b) if the chargee was a body corporate – a related entity of the body.

588FJ (5) [Where paras (2)(d) and (e) not to apply] Paragraphs (2)(d) and (e) do not apply in relation to an amount payable as mentioned in paragraph (2)(d) in so far as the amount exceeds the market value of the property or services when supplied to the company.

588FJ (6) [Liquidator's power to recover where debt discharged] If, during the 6 months ending on the relation-back day, or after that day but on or before the day when the winding up began, a debt secured by the charge was discharged, out of the company's money or property, to the extent of a particular amount (in this subsection called the "realised amount"), the liquidator may, by proceedings in a court of competent jurisdiction, recover from the chargee, as a debt due to the company, the amount worked out in accordance with the formula:

Unsecured amount – Realisation costs

Where:

"Unsecured amount" means so much of the realised amount as does not exceed so much of the debt as would, if the debt had not been so discharged, have been unsecured, as against the liquidator, because of subsection (2);

"Realisation costs" means so much (if any) of the costs and expenses of enforcing the charge as is attributable to realising the realised amount.

Director's duty to prevent insolvent trading by company

588G (1) [Application of section] This section applies if:

- (a) a person is a director of a company at the time when the company incurs a debt; and

- (b) the company is insolvent at that time, or becomes insolvent by incurring that debt or by incurring at that time debts including that debt; and
- (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
- (d) that time is at or after the commencement of this Part.

588G (2) [Contravention] By failing to prevent the company from incurring the debt, the person contravenes this section if:

- (a) the person is aware at that time that there are such grounds for so suspecting; or
- (b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

588G (3) [Civil penalty provision] This section is a civil penalty provision as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening it or of being involved in a contravention of it.

588G (4) [Provisions of Div 4 additional to Pt 9.4B] The provisions of Division 4 of this Part are additional to, and do not derogate from, Part 9.4B as it applies in relation to a contravention of this section.

Defences

588H (1) [Effect of section] This section has effect for the purposes of proceedings for a contravention of section 588G in relation to the incurring of a debt (including proceedings under section 588M in relation to the incurring of the debt).

588H (2) [Reasonable grounds to expect company solvent] It is a defence if it is proved that, at the time when the debt was incurred, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.

588H (3) [Information as to solvency from other person] Without limiting the generality of subsection (2), it is a defence if it is proved that, at the time when the debt was incurred, the person:

- (a) had reasonable grounds to believe, and did believe:
 - (i) that a competent and reliable person ("the other person") was responsible for providing to the first-mentioned person adequate information about whether the company was solvent; and
 - (ii) that the other person was fulfilling that responsibility; and
- (b) expected, on the basis of information provided to the first-mentioned person by the other person, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.

588H (4) [Director did not take part in management of company] If the person was a director of the company at the time when the debt was incurred, it is a defence if it is proved that, because of illness or for some other good reason, he or she did not take part at that time in the management of the company.

588H (5) [Reasonable steps taken to prevent incurring of debt] It is a defence if it is proved that the person took all reasonable steps to prevent the company from incurring the debt.

588H (6) [Proof of defence under subs (5)] In determining whether a defence under subsection (5) has been proved, the matters to which regard is to be had include, but are not limited to:

- (a) any action the person took with a view to appointing an administrator of the company; and
- (b) when that action was taken; and
- (c) the results of that action.

On application for civil penalty order, Court may order compensation

588J (1) [Court's power to order compensation] Where, on an application for a civil penalty order against a person in relation to a contravention of section 588G, the Court is satisfied that:

- (a) the person committed the contravention in relation to the incurring of a debt by a company; and
- (b) the debt is wholly or partly unsecured; and
- (c) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency the Court may (whether or not it makes an order under subsection 1317EA(3)) order the first-mentioned person to pay to the company compensation equal to the amount of that loss or damage.

588J (2) [Intervention by liquidator] A company's liquidator may intervene in an application for a civil penalty order against a person in relation to a contravention of section 588G, unless the application was made under Division 4 of Part 9.4B.

588J (3) [Liquidator's entitlement to be heard] A company's liquidator who so intervenes is entitled to be heard:

- (a) only if the Court is satisfied that the person committed the contravention in relation to the incurring of a debt by that company; and
- (b) only on the question whether the Court should order the person to pay compensation to the company.

Criminal court may order compensation

588K (1) [Order where person guilty of offence by contravention of s 588G] If:

- (a) a court finds a person guilty of an offence constituted by a contravention of section 588G in relation to the incurring of a debt by a company; and
- (b) the court is satisfied that:
 - (i) the debt is wholly or partly unsecured; and
 - (ii) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency

the court may (whether or not it imposes a penalty) order the first-mentioned person to pay to the company compensation equal to the amount of that loss or damage.

588K (2) [Order where declaration of contravention under Pt 9.4B Div 4] If

- (a) a court declares under Division 4 of Part 9.4B that a person has, by failing to prevent a company from incurring a debt, contravened section 588G in relation to the company; and
- (b) the court is satisfied that:
 - (i) the debt is wholly or partly unsecured; and
 - (ii) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency;

the court may (whether or not it makes an order under subsection 1317EA(3)) order the firstmentioned person to pay to the company compensation equal to the amount of that loss or damage.

Enforcement of order under section 588J or 588K

588L An order to pay compensation that a court makes under section 588J or 588K may be enforced as if it were a judgment of the court.

Recovery of compensation for loss resulting from insolvent trading

588M (1) [Application of section] This section applies where:

- (a) a person (in this section called the "director") has contravened section 588G in relation to the incurring of a debt by a company; and
- (b) the person (in this section called the "creditor") to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and
- (c) the debt was wholly or partly unsecured when the loss or damage was suffered; and
- (d) the company is being wound up;

whether or not:

- (e) the director has been convicted of an offence in relation to the contravention; or
- (f) a civil penalty order has been made against the director in relation to the contravention.

588M (2) [Liquidator may recover from director] The company's liquidator may, by proceedings in a court of competent jurisdiction, recover from the director, as a debt due to the company, an amount equal to the amount of the loss or damage.

588M (3) [Creditor may recover from director] The creditor may, as provided in Subdivision B but not otherwise, by proceedings in a court of competent jurisdiction, recover from the director, as a debt due to the creditor, an amount equal to the amount of the loss or damage.

588M (4) [Limitation period] Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

Avoiding double recovery

588N An amount recovered in proceedings under section 588M in relation to the incurring of a debt by a company is to be taken into account in working out the amount (if any) recoverable in any other proceedings under that section in relation to the incurring of the debt.

Effect of sections 588J, 588K and 588M

588P Sections 588J, 588K and 588M:

- (a) have effect in addition to, and not in derogation of, any rule of law about the duty or liability of a person because of the person's office or employment in relation to a company; and
- (b) do not prevent proceedings from being instituted in respect of a breach of such a duty or in respect of such a liability.

Certificates evidencing contravention

588Q For the purposes of this Part, a certificate that:

- (a) purports to be signed by the Registrar or other proper officer of an Australian court; and
- (b) states:
 - (i) that that court has declared that a specified person has, by failing to prevent a specified company from incurring a specified debt, contravened section 588G in relation to the company; or
 - (ii) that a specified person was convicted by that court for an offence constituted by a contravention of section 588G in relation to the incurring of a specified debt by a specified company; or
 - (iii) that a specified person charged before that court with such an offence was found in that court to have committed the offence but that the court did not proceed to convict the person of the offence;

is, unless it is proved that the declaration, conviction or finding was set aside, quashed or reversed, conclusive evidence:

- (c) that the declaration was made, that the person was convicted of the offence, or that the person was so found, as the case may be; and
- (d) that the person committed the contravention.

Creditor may sue for compensation with liquidator's consent

588R (1) [Proceedings under s 588M] A creditor of a company that is being wound up may, with the written consent of the company's liquidator, begin proceedings under section 588M in relation to the incurring by the company of a debt that is owed to the creditor.

588R (2) [Effect of subs (1)] Subsection (1) has effect despite section 588T, but subject to section 588U.

Creditor may give liquidator notice of intention to sue for compensation

588S After the end of 6 months beginning when a company begins to be wound up, a creditor of the company may give to the company's liquidator a written notice:

- (a) stating that the creditor intends to begin proceedings under section 588M in relation to the incurring by the company of a specified debt that is owed to the creditor; and
- (b) asking the liquidator to give to the creditor, within 3 months after receiving the notice:
 - (i) a written consent to the creditor beginning the proceedings; or
 - (ii) a written statement of the reasons why the liquidator thinks that proceedings under section 588M in relation to the incurring of that debt should not be begun.

When creditor may sue for compensation without liquidator's consent

588T (1) [Application of section] This section applies where a notice is given under section 588S.

588T (2) [Creditor may sue after 3 months notice, with leave of court] The creditor may begin proceedings in a court under section 588M in relation to the incurring by the company of the debt specified in the notice if:

- (a) as at the end of 3 months after the liquidator receives the notice, he or she has not consented to the creditor beginning such proceedings; and
- (b) on an application made after those 3 months, the court has given leave for the proceedings to begin.

588T (3) [Leave application where liquidator's statement of reasons] If:

- (a) during those 3 months, the liquidator gives to the creditor a written statement of the reasons why the liquidator thinks that such proceedings should not be begun; and
- (b) the creditor applies for leave under paragraph (2)(b);

then:

- (c) the creditor must file the statement with the court when so applying; and
- (d) in determining the application, the court is to have regard to the reasons set out in the statement.

Events preventing creditor from suing

588U (1) [Events] A creditor of a company that is being wound up cannot begin proceedings under section 588M in relation to the incurring of a debt by the company if:

- (a) the company's liquidator has applied under section 588FF in relation to the debt, or in relation to a transaction under which the debt was incurred; or
- (b) the company's liquidator has begun proceedings under section 588M in relation to the incurring of the debt; or
- (c) the company's liquidator has intervened in an application for a civil penalty order against a person in relation to a contravention of section 588G in relation to the incurring of the debt.

588U (2) [Effect of subs (1)] Subsection (1) has effect despite sections 588R and 588T.

When holding company liable

588V (1) [Contravention] A corporation contravenes this section if:

- (a) the corporation is the holding company of a company at the time when the company incurs a debt; and
- (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
- (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
- (d) one or both of the following subparagraphs applies:
 - (i) the corporation, or one or more of its directors, is or are aware at that time that there are such grounds for so suspecting;
 - (ii) having regard to the nature and extent of the corporation's control over the company's affairs and to any other relevant circumstances, it is reasonable to expect that:
 - (A) a holding company in the corporation's circumstances would be so aware; or
 - (B) one or more of such a holding company's directors would be so aware; and
- (e) that time is at or after the commencement of this Part.

588V (2) [Contravention not offence] A corporation that contravenes this section is not guilty of an offence.

Recovery of compensation for loss resulting from insolvent trading

588W (1) [Compensation where contravention of s 588V] Where:

- (a) a corporation has contravened section 588V in relation to the incurring of a debt by a company; and

- (b) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and
- (c) the debt was wholly or partly unsecured when the loss or damage was suffered; and
- (d) the company is being wound up; the company's liquidator may, by proceedings in a court of competent jurisdiction, recover from the corporation, as a debt due to the company, an amount equal to the amount of the loss or damage.

588W (2) [Limitation period] Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

Defences

588X (1) [Effect of section] This section has effect for the purposes of proceedings under section 588W.

588X (2) [Reasonable grounds to expect company solvent] It is a defence if it is proved that at the time when the debt was incurred, the corporation, and each relevant director (if any), had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.

588X (3) [Information as to solvency from other person] Without limiting the generality of subsection (2), it is a defence if it is proved that, at the time when the debt was incurred, the corporation, and each relevant director (if any):

- (a) had reasonable grounds to believe, and did believe:
 - (i) that a competent and reliable person was responsible for providing to the corporation adequate information about whether the company was solvent; and
 - (ii) that the person was fulfilling that responsibility; and
- (b) expected, on the basis of the information provided to the corporation by the person, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.

588X (4) [Director did not take part in management of company] If it is proved that, because of illness or for some other good reason, a particular relevant director did not take part in the management of the corporation at the time when the company incurred the debt the fact that the director was aware as mentioned in subparagraph 588V(1)(d)(i) is to be disregarded.

588X (5) [Reasonable steps taken to prevent incurring of debt] It is a defence if it is proved that the corporation took all reasonable steps to prevent the company from incurring the debt.

588X (6) ["relevant director"] In subsections (2), (3) and (4):

"relevant director" means a director of the corporation who was aware as mentioned in subparagraph 588V(1)(d)(i).

Application of amount paid as compensation

588Y (1) [Priority of unsecured over secured debts] An amount paid to a company under section 588J, 588K, 588M or 588W is not available to pay a secured debt of the company unless all the company's unsecured debts have been paid in full.

588Y (2) [Priority of unsecured debts where knowledge of insolvency] Where:

- (a) under section 588J or 588K, or in proceedings under section 588M or 588W, a court orders a person to pay to the company compensation, or an amount, equal to the amount of loss or damage suffered by a person in relation to a debt because of the company's insolvency; and

- (b) the court is satisfied that, at the time when the company incurred the debt, the person who suffered the loss or damage knew that the company was insolvent at that time or would become insolvent by incurring the debt, or by incurring at that time debts including the debt, as the case requires;

the court may order that the compensation or amount paid to the company is not available to pay that debt unless all the company's unsecured debts (other than debts to which orders under this subsection relate) have been paid in full.

588Y (3) [Application of subs (2)] Subsection (2) does not apply in relation to proceedings under section 588M in relation to the incurring of a debt by a company if the proceedings are begun by a creditor of the company (as provided for in Subdivision B of Division 4).

588Y (4) [Extent of subs (2)] Subsection (2) does not apply in relation to a liability that is taken to be a debt because of section 588F.

Court may make order imposing liability

588Z Where:

- (a) a company is being wound up; and
 - (b) at or after the commencement of this Part and within 4 years before the relation-back day, a person contravened:
 - (i) section 229, 230, 599, 600 or 1317EF; or
 - (ii) a previous law corresponding to a section referred to in subparagraph (i);
- by managing the company (as defined by section 91A);

the Court may, on the application of the company's liquidator, order that the person is personally liable for so much of the company's debts and liabilities as does not exceed an amount specified in the order.

Interpretation and application

589 (1) [Application to certain companies] Sections 590 to 593 (inclusive) apply to a company:

- (a) that has been wound up or is in the course of being wound up;
- (b) that has been in the course of being wound up, where the winding up has been stayed or terminated by an order under section 482;
- (ba) of which a provisional liquidator has been appointed;
- (c) that is or has been under administration;
- (ca) that has executed a deed of company arrangement, even if the deed has since terminated;
- (d) affairs of which are or have been under investigation;
- (e) in respect of property of which a receiver, or a receiver and manager, has at any time been appointed, whether by the Court or under a power contained in an instrument, whether or not the appointment has been terminated;
- (f) that has ceased to carry on business or is unable to pay its debts; or
- (g) that has entered into a compromise or arrangement with its creditors.

589 (2) ["under investigation"] For the purposes of this Part, affairs of a company are or have been under investigation if, and only if:

- (a) the Commission is investigating, or has at any time investigated, under Division 1 of Part 3 of the ASC Law:
 - (i) matters being, or connected with, affairs of the company; or
 - (ii) matters including such matters; or
- (b) affairs of the company have at any time been under investigation under Part VII of the Companies Act 1981 or the provisions of a previous law of this or any other jurisdiction that correspond to that Part.

589 (3) ["ceased to carry on business"] For the purposes of this Part, a company shall be deemed to have ceased to carry on business if, and only if, the Commission has:

- (a) sent to the company by post a letter under subsection 572(1) and has not, within the next succeeding period of one month from the date of the letter, received an answer to the effect that the company is carrying on business; or
- (b) published a notice under subsection 572(3).

589 (4) ["unable to pay debts"] For the purposes of this Part, a company shall be deemed to be unable to pay its debts if, and only if, execution or other process issued on a judgment decree or order of a court (whether or not an Australian court) in favour of a creditor of the company is returned unsatisfied in whole or in part.

589 (5) [Definitions] In this Part:

"appropriate officer" means:

- (a) in relation to a company that has been, has been being or is being wound up— the liquidator;
- (aa) in relation to a company of which a provisional liquidator has been appointed— the provisional liquidator;
- (b) in relation to a company that is or has been under administration — the administrator;
- (ba) in relation to a company that has executed a deed of company arrangement— the deed's administrator;
- (c) in relation to a company affairs of which are or have been under investigation the Commission or the NCSC, as the case requires;
- (d) in relation to a company in respect of property of which a receiver, or a receiver and manager, has been appointed — the receiver or the receiver and manager;
- (e) in relation to a company that has ceased to carry on business or is unable to pay its debts - the Commission or the NCSC, as the case requires; and
- (f) in relation to a company that has entered into a compromise or arrangement with its creditors — the person appointed by the Court to administer the compromise or arrangement;

"relevant day" means the day on which:

- (a) in relation to a company that has been wound up, has been in the course of being wound up, or is being wound up:
 - (i) if, because of Division 1A of Part 5.6, the winding up is taken to have begun on the day when an order that the company be wound up was made —the application for the order was filed; or
 - (ii) otherwise— the winding up is taken because of Division 1A of Part 5.6 to have begun;
- (aa) in relation to a company of which a provisional liquidator has been appointed— the provisional liquidator was appointed;

- (b) in relation to a company that is or has been under administration – the administration began;
- (ba) in relation to a company that has executed a deed of company arrangement – the deed was executed;
- (c) in relation to a company affairs of which are or have been under investigation:
 - (i) if paragraph (2)(a) applies – the investigation began; or
 - (ii) if paragraph (2)(b) applies – a direction was given to the NCSC to arrange for the investigation;
- (d) in relation to a company in respect of property of which a receiver, or a receiver and manager, has been appointed – the receiver, or the receiver and manager, was appointed;
- (e) in relation to a company that is unable to pay its debts – the execution or other process was returned unsatisfied in whole or in part;
- (f) in relation to a company that has ceased to carry on business – a letter was first sent to the company, or a notice was first published in relation to the company as the case may be, under section 572; or
- (g) in relation to a company that has entered into a compromise or arrangement with its creditors – the compromise or arrangement was approved by the Court.

589 (6) [Application of Part to Div 2, 3, or 4 companies] This Part applies in relation to a Division 2, 3 or 4 company:

- (a) as if, in this Part (other than section 595) as so applying:
 - (i) a reference to the company included a reference to the company as it existed at a time before its registration day (including a time before the commencement of this subsection);
 - (ii) a reference to a provision of this Law included a reference to a previous law corresponding to that provision; and
 - (iii) a reference, in relation to a provision of this Law, to the Commission included a reference to the NCSC; and
- (b) with such other modifications as the circumstances require.

Incurring of certain debts; fraudulent conduct

592 (1) [Management jointly and severally liable] Where:

- (a) a company has incurred a debt before the commencement of Part 5.7B;
- (b) immediately before the time when the debt was incurred:
 - (i) there were reasonable grounds to expect that the company will not be able to pay all its debts as and when they become due; or
 - (ii) there were reasonable grounds to expect that, if the company incurs the debt, it will not be able to pay all its debts as and when they become due; and
- (c) the company was, at the time when the debt was incurred, or becomes at a later time, a company to which this section applies;

any person who was a director of the company, or took part in the management of the company, at the time when the debt was incurred contravenes this subsection and the company and that person or, if there are 2 or more such persons, those persons are jointly and severally liable for the payment of the debt.

592 (2) [Defence] In any proceedings against a person under subsection (1), it is a defence if it is proved:

- (a) that the debt was incurred without the person's express or implied authority or consent; or
- (b) that at the time when the debt was incurred, the person did not have reasonable cause to expect:
 - (i) that the company would not be able to pay all its debts as and when they became due; or
 - (ii) that, if the company incurred that debt, it would not be able to pay all its debts as and when they became due.

592 (3) [Proceedings for recovery of debt] Proceedings may be brought under subsection (1) for the recovery of a debt whether or not the person against whom the proceedings are brought, or any other person, has been convicted of an offence under subsection (1) in respect of the incurring of that debt.

592 (4) [Standard of proof] In proceedings brought under subsection (1) for the recovery of a debt, the liability of a person under that subsection in respect of the debt may be established on the balance of probabilities.

592 (5) [Liability of company] Where subsection (1) renders a person or persons liable to pay a debt incurred by a company, the payment by that person or either or any of those persons of the whole or any part of that debt does not render the company liable to the person concerned in respect of the amount so paid.

592 (6) [Liability of persons concerned in fraudulent act] Where:

- (a) a company has done an act (including the making of a contract or the entering into of a transaction) with intent to defraud creditors of the company or of any other person or for any other fraudulent purpose; and
- (b) the company was at the time when it does the act, or becomes at a later time, a company to which this section applies;

any person who was knowingly concerned in the doing of the act with that intent or for that purpose contravenes this subsection.

592 (7) [Certificates of conviction] A certificate issued by the proper officer of an Australian court stating that a person specified in the certificate:

- (a) was convicted of an offence under subsection (1) in relation to a debt specified in the certificate incurred by a company so specified; or
- (b) was convicted of an offence under subsection (6) in relation to a company specified in the certificate;

is, in any proceedings, *prima facie* evidence of the matters stated in the certificate.

592 (8) [Deemed certificate under s 592(7)] A document purporting to be a certificate issued under subsection (7) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly issued.

Powers of Court

593 (1) [Court to determine personal liability] Where a person has been convicted of an offence under subsection 592(1) in respect of the incurring of a debt, the Court, on the application of the Commission or the person to whom the debt is payable, may, if it thinks it proper to do so, declare that the first-mentioned person shall be personally responsible without any limitation of

liability for the payment to the person to whom the debt is payable of an amount equal to the whole of the debt or such part of it as the Court thinks proper.

593 (2) [Court to determine liability to company] Where a person has been convicted of an offence under subsection 592(6), the Court, on the application of the Commission or of a prescribed person, may, if it thinks it proper to do so, declare that the first-mentioned person shall be personally responsible without any limitation of liability for the payment to the company of the amount required to satisfy so much of the debts of the company as the Court thinks proper.

593 (3) ["prescribed person"] In relation to a company in respect of which a conviction referred to in subsection (2) relates:

- (a) the appropriate officer;
- (b) a creditor or contributory of the company authorised by the Commission to make an application under that subsection; and
- (c) if the company was a company to which section 592 applied by reason of paragraph 589(1)(c)- a member of the company;

are prescribed persons for the purposes of that subsection.

593 (4) [Power to make further directions] Where the Court makes a declaration under subsection (1) in relation to a person, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.

593 (5) [May order charge on property] In particular, the Court may order that the liability of the person under the declaration shall be a charge:

- (a) on a debt or obligation due from the company to the person; or
- (b) on a right or interest under a charge on any property of the company held by or vested in the person or a person on the person's behalf, or a person claiming as assignee from or through the person liable or a person acting on the person's behalf.

593 (6) [May make orders enforcing charge] The Court may, from time to time, make such further order as it thinks proper for the purpose of enforcing a charge imposed under subsection (5).

593 (7) ["assignee"] For the purpose of subsection (5), "assignee" includes a person to whom or in whose favour, by the directions of the person liable, the debt, obligation or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without actual knowledge of any of the matters upon which the conviction or declaration was made.

593 (8) [Evidence, calling of witnesses] On the hearing of an application under subsection (1) or (2), the appropriate officer or other applicant may give evidence or call witnesses.

Mandatory examination

596A The Court is to summon a person for examination about a corporation's examinable affairs if:

- (a) an eligible applicant applies for the summons; and
- (b) the Court is satisfied that the person is an examinable officer of the corporation or was such an officer during or after the 2 years ending:
 - (i) if the corporation is under administration — on the section 513c day in relation to the administration; or

- (ii) if the corporation has executed a deed of company arrangement that has not yet terminated – on the section 513c day in relation to the administration that ended when the deed was executed; or
- (iii) if the corporation is being, or has been, wound up – when the winding up began; or
- (iv) otherwise – when the application is made.

Conduct of examination

597 (1) repealed

597 (2) repealed

597 (3) repealed

597 (4) [Examination to be held in public] An examination is to be held in public except to such extent (if any) as the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private.

597 (5) repealed

597 (5A) [Participants and representation] Any of the following may take part in an examination:

- (a) the Commission;
- (b) any other eligible applicant in relation to the corporation; and for that purpose may be represented by a lawyer or by an agent authorised in writing for the purpose.

597 (5B) [Questions to examinee] The Court may put, or allow to be put, to a person being examined such questions about the corporation or any of its examinable affairs as the Court thinks appropriate.

597 (6) [Failure to attend proceedings] A person who is summoned under section 596A or 596B to attend before the Court shall not, without reasonable excuse:

- (a) fail to attend as required by the summons; or
- (b) fail to attend from day to day until the conclusion of the examination.

597 (7) [Obligations of examinee] A person who attends before the Court for examination must not:

- (a) without reasonable excuse, refuse or fail to take an oath or make an affirmation; or
- (b) without reasonable excuse, refuse or fail to answer a question that the Court directs him or her to answer; or
- (c) make a statement that is false or misleading in a material particular; or
- (d) without reasonable excuse, refuse or fail to produce books that the summons requires him or her to produce.

597 (8) repealed

597 (9) [Direction to produce relevant books] The Court may direct a person to produce, at an examination of that or any other person, books that are in the first-mentioned person's possession and are relevant to matters to which the examination relates or will relate.

597 (9A) [Compliance with direction] A person may comply with a direction under subsection (9) by causing the books to be produced at the examination.

597 (10) [Production of books under lien] Where a Court so directs a person to produce any books and the person has a lien on the books, the production of the books does not prejudice the lien.

597 (10A) [Failure to comply with direction] A person must not, without reasonable excuse, refuse or fail to comply with a direction under subsection (9).

597 (11) repealed

597 (12) [Self-incrimination] A person is not excused from answering a question put to the person at an examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty.

597 (12A) [Use of self-incriminating evidence] Where:

- (a) before answering a question put to a person (other than a body corporate) at an examination, the person claims that the answer might tend to incriminate the person or make the person liable to a penalty; and
- (b) the answer might in fact tend to incriminate the person or make the person so liable;

the answer is not admissible in evidence against the person in:

- (c) a criminal proceeding; or
- (d) a proceeding for the imposition of a penalty; other than a proceeding under this section, or any other proceeding in respect of the falsity of the answer.

597 (13) [Written record of testimony] The Court may order the questions put to a person and the answers given by him or her at an examination to be recorded in writing and may require him or her to sign that written record.

597 (14) [Admissibility of record in other proceedings] Subject to subsection (12A), any written record of an examination so signed by a persons or any transcript of an examination of a person that is authenticated as provided by the rules, may be used in evidence in any legal proceedings against the person.

597 (14A) [Written record to be open for inspection] A written record made under subsection (13):

- (a) is to be open for inspection, without fee, by:
 - (i) the person who applied for the examination, or
 - (ii) an officer of the corporation, or
 - (iii) a creditor of the corporation, and
- (b) is to be open for inspection by anyone else on paying the prescribed fee.

597 (15) [Examination before another court] An examination under this Division may, if the Court so directs and subject to the rules, be held before such other court as is specified by the Court and the powers of the Court under this Division may be exercised by that other court.

597 (16) [Representation at examination] A person ordered to attend before the Court or another court for examination under this Division may, at his or her own expense, employ a solicitor, or a solicitor and counsel, and the solicitor or counsel, as the case may be, may put to the person such questions as the Court, or the other court, as the case may be, considers just for the purpose of enabling the person to explain or qualify any answers or evidence given by the person.

597 (17) [Adjournments] The Court or another court before which an examination under this Division takes place may, if it thinks fit, adjourn the examination from time to time.

597 (18) repealed

Order against person concerned with corporation

598 (1) repealed

598 (2) [Court may make certain orders] Subject to subsection (3), where, on application by an eligible applicant, the Court is satisfied that:

- (a) a person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation to a corporation; and
- (b) the corporation has suffered, or is likely to suffer, loss or damage as a result of the fraud, negligence, default, breach of trust or breach of duty;

the Court may make such order or orders as it thinks appropriate against or in relation to the person (including either or both of the orders specified in subsection (4)) and may so make an order against or in relation to a person even though the person may have committed an offence in respect of the matter to which the order relates.

598 (3) [Requirements before order may be made] The Court shall not make an order against a person under subsection (2) unless the Court has given the person the opportunity:

- (a) to give evidence;
- (b) to call witnesses to give evidence;
- (c) to bring other evidence in relation to the matters to which the application relates; and
- (d) to employ, at the person's own expense, a solicitor, or a solicitor and counsel, to put to the person, or to any other witness, such questions as the Court considers just for the purpose of enabling the person to explain or qualify any answers or evidence given by the person.

598 (4) [Orders under s598(2)] The orders that may be made under subsection (2) against a person include:

- (a) an order directing the person to pay money or transfer property to the corporation; and
- (b) an order directing the person to pay to the corporation the amount of the loss or damage.

598 (5) [Institution of other proceedings] Nothing in this section prevents any person from instituting any other proceedings in relation to matters in respect of which an application may be made under this section.

Court may order persons not to manage certain corporations

599 (1) [Application] This section applies to a relevant body:

- (a) that has been wound up, or is in the course of being wound up, because of inability to pay its debts as and when they became due;
- (b) that has been in the course of being wound up because of inability to pay its debts as and when they became due, where the winding up has been stayed or terminated by an order under section 482;
- (c) that has been or is under administration;
- (ca) that has executed a deed of company arrangement, even if the deed has terminated;
- (d) that has ceased to carry on business because it was unable to pay its debts as and when they became due;

- (e) in respect of which a levy of execution was not satisfied;
- (f) in respect of property of which a receiver, or a receiver and manager, has been appointed, whether by a court or pursuant to the powers contained in an instrument, whether or not the appointment has been terminated; or
- (g) that has entered into a compromise or arrangement with its creditors.

599 (2) [Power to disqualify] Unless cause to the contrary is shown, the Court may, on an application by the Commission and on being satisfied as to the matters referred to in subsection (3), make an order prohibiting a person specified in the order from managing a corporation during such period not exceeding 5 years after the date of the order as is specified in the order.

599 (3) [Requirements for disqualification] The Court shall not make an order under subsection (2) unless it is satisfied:

- (a) that the person to whom the application for an order relates was given notice of the application;
- (b) that, within the period of 7 years before notice of the application was given to the person referred to in paragraph (a), whether that period commenced before or after the commencement of this section, that person was a director of, or was concerned or took part in the management of, 2 or more relevant bodies to which this section applies; and
- (c) that:
 - (i) in the case of each of those 2 relevant bodies; or
 - (ii) where the person was a director of, or was concerned or took part in the management of, more than 2 relevant bodies to which this section applies – in the case of each of 2 or more of those bodies;

the manner in which affairs of the body had been managed was wholly or partly responsible for the body being wound up, being under administration, having executed a deed of company arrangement, ceasing to carry on business, being unable to satisfy a levy of execution, being subject to the appointment of a receiver, or a receiver and manager, or entering into a compromise or arrangement with its creditors.

599 (4) [Effect of s 599 order] A person who is subject to a section 599 order (whether made before or after the commencement of this section) must not manage a corporation.

599 (5) [Managing a corporation] Section 91A defines what, for the purposes of this section, constitutes managing a corporation.

Commission may order persons not to manage corporations

600 (1) [Interpretation] For the purposes of this section:

- (b) a relevant body is a section 600 body at a particular time if, and only if, within the period of 7 years ending at that time, a liquidator of the body has, under:
 - (i) subsection 533(1); or
 - (ii) a previous law corresponding to subsection 533(1); reported, or lodged a report with respect to, a matter relating to the ability of the body to pay its unsecured creditors; and
- (c) a person shall be taken to be a relevant person in relation to a relevant body that is or was a section 600 body if, and only if, the person was a director of the body at any time during the period of 12 months ending on the day of the beginning of the winding up of the body.

600 (2) [Service of notice to show cause] The Commission may give to a person who is a relevant person in relation to 2 or more relevant bodies that are, at the time of service section 600 bodies a notice in writing requiring the person to show cause why the Commission should not serve on the person a notice under subsection (3).

600 (3) [Notice prohibiting involvement in management] Where the Commission:

- (a) has served on a person a notice under subsection (2); and
- (b) has given the person an opportunity of being heard in relation to the matter; the Commission shall, unless it is satisfied that it is not appropriate to do so, serve on the person a notice in writing prohibiting the person, for such period not exceeding 5 years as is specified in the notice, from managing a corporation.

600 (4) [Related companies] Where:

- (a) the Commission has served a notice under subsection (2) on a person who is a relevant person in relation to 2 or more relevant bodies that were, at the time of service, section 600 bodies; and
- (b) those 2 bodies have at any time been related to each other, or any of those bodies has at any time been related to any other of those bodies, as the case may be;

the Commission shall have regard to that fact in considering whether or not it is appropriate to serve on the person a notice under subsection (3).

600 (5) [Effect of notice] A person who is subject to a section 600 notice (whether served before or after the commencement of this section) must not, without the leave of the Court, manage a corporation.

600 (6) [Manages a corporation] Section 91A defines what, for the purposes of this section, constitutes managing a corporation.

General penalty provisions

1311 (1) [Offence] A person who:

- (a) does an act or thing that the person is forbidden to do by or under a provision of this Law;
- (b) does not do an act or thing that the person is required or directed to do by or under a provision of this Law; or
- (c) otherwise contravenes a provision of this Law; is guilty of an offence by virtue of this subsection, unless that or another provision of this Law provides that the person:
- (d) is guilty of an offence; or
- (e) is not guilty of an offence.

1311 (2) [Penalty] Subject to section 1312, a person who is guilty of an offence against this Law, whether by virtue of subsection (1) or otherwise, is punishable, on conviction, by a penalty not exceeding the penalty applicable to the offence.

1311 (3) [Amount of penalty] Where:

- (a) subsection (1) operates in relation to a provision of this Law so as to make a person guilty of an offence; or
- (b) a provision of this Law (other than this section) provides that a person is, in circumstances referred to in the provision, guilty of an offence and a penalty, pecuniary or otherwise, is set out in Schedule 3 immediately under a heading referring to that provision, or to a provision or provisions in which that provision is included the penalty applicable to the offence is the penalty so set out.

1311 (3A) [Transitional effect of Sch 3] Where, because of Part 9.11, provisions of this Law, as in force at a particular time, continue to apply:

- (a) in relation to someone or something; or
- (b) for particular purposes; then, for the purposes of those provisions as so applying;
- (c) Schedule 3 as in force at that time continues to have effect; and
- (d) Schedule 3 as in force at a later time does not have effect;

except so far as the contrary intention appears in this Law.

1311 (4) [Specified penalty] Where a provision of this Law (other than this section) provides that the penalty applicable to a contravention of a particular provision of this Law is a specified penalty, pecuniary or otherwise, the penalty applicable to an offence constituted by a contravention of the particular provision is the specified penalty.

1311 (5) [Fine] Except as provided in subsection (3) or (4) or in a provision of this Law (other than this section), the penalty applicable to the offence is a fine of \$500.

Part 9.4B – Civil and Criminal Consequences of Contravening Civil Penalty Provisions

Civil penalty provisions

1317DA Each of the following provisions of the Corporations Law of this jurisdiction is a civil penalty provision:

- Subsections 232(2), (4), (5) and (6);
- Subsections 243ZE(2) and (3);
- Subsection 318(1); Section 588G.

Court may make civil penalty orders

1317EA (1) [Application of section] This section applies if the Court is satisfied that a person has contravened a civil penalty provision, whether or not the contravention also constitutes an offence because of section 1317FA.

1317EA (2) [Declaration of contravention] The Court is to declare that the person has, by a specified act or omission, contravened that provision in relation to a specified corporation, but need not so declare if such a declaration is already in force under Division 4.

1317EA (3) [Orders in relation to contravention] The Court may also make against the person either or both of the following orders in relation to the contravention:

- (a) an order prohibiting the person, for such period as is specified in the order, from managing a corporation;
- (b) an order that the person pay to the Commonwealth a pecuniary penalty of an amount so specified that does not exceed \$200,000.

1317EA (4) [No order where "fit and proper person"] The Court is not to make an order under paragraph (3)(a) if it is satisfied that, despite the contravention, the person is a fit and proper person to manage a corporation.

1317EA (5) [Contravention must be serious] The Court is not to make an order under paragraph (3)(b) unless it is satisfied that the contravention is a serious one.

1317EA (6) [No order where punitive damages paid] The Court is not to make an order under paragraph (3)(b) if it is satisfied that an Australian court has ordered the person to pay

damages in the nature of punitive damages because of the act or omission constituting the contravention.

13I7EA (7) [Managing a corporation] Section 91A defines what, for the purposes of this section, constitutes managing a corporation.

Who may apply for civil penalty order

13I7EB (1) [Persons who may apply] An application for a civil penalty order may be made by:

- (a) the Commission; or
- (b) a Commission delegate; or
- (c) some other person authorised in writing by the Minister, under this paragraph, to make the application.

13I7EB (2) [Commission delegation or authorisation] A delegation for the purposes of paragraph (1)(b), or an authorisation for the purposes of paragraph (1)(c), may relate to applications in relation to specified contraventions, or all contraventions, of civil penalty provisions.

13I7EB (3) [Effect on Director of Public Prosecutions Act] Nothing in this section affects the operation of the Director of Public Prosecutions Act 1983 or of that Act as applying as a law of this jurisdiction.

Person must comply with order not to manage corporation

13I7EF (1) [Disqualification except where leave given] A person who is subject to a civil penalty disqualification must not manage a corporation except with the leave of the court.

13I7EF (2) [Managing a corporation] Section 91A defines what, for the purposes of this section, constitutes managing a corporation.

13I7EF (3) [Leave may be conditional] When granting leave under subsection (1), the court may impose such conditions or restrictions as it thinks appropriate.

13I7EF (4) [Person not to contravene conditions] A person must not contravene a condition or restriction imposed under subsection (3).

13I7EF (5) [Application for leave] A person may only apply for leave under subsection (1) if he or she has given the Commission at least 21 days notice of the application.

13I7EF (6) [Revocation of leave] On the application of the Commission, the Court may revoke leave granted under subsection (1).

When contravention of civil penalty provision is an offence

13I7FA (1) [Where contravention an offence] A person is guilty of an offence if the person contravenes a civil penalty provision:

- (a) knowingly, intentionally or recklessly; and
- (b) either:
 - (i) dishonestly and intending to gain, whether directly or indirectly, an advantage for that or any other person; or
 - (ii) intending to deceive or defraud someone.

1317FA (2) [Contravention not an offence] A person who contravenes a civil penalty provision is not guilty of an offence except as provided by subsection (1).

Application for civil penalty order precludes later criminal proceedings

1317FB Criminal proceedings for an offence constituted by a contravention of a civil penalty provision cannot be begun if a person has already applied for a civil penalty order in relation to the same contravention, even if the application has been finally determined or otherwise disposed of.

On application for civil penalty order, Court may order compensation

1317HA (1) [Order for compensation] Where, on an application for a civil penalty order against a person in relation to a contravention, the Court is satisfied that:

- (a) the person committed the contravention; and
- (b) the corporation in relation to which the contravention was committed has suffered loss or damage as a result of the act or omission constituting the contravention; the Court may (whether or not it makes an order under subsection 1317EA(3)) order the person to pay to the corporation compensation of such amount as the order specifies.

1317HA (2) [Corporation may intervene] A corporation may intervene in an application for a civil penalty order against a person in relation to a contravention, unless the application was made under Division 4.

1317HA (3) [Entitlement of corporation to be heard] A corporation that so intervenes is entitled to be heard:

- (a) only if the Court is satisfied that the person committed the contravention in relation to that corporation; and
- (b) only on the question whether the Court should order the person to pay compensation to the corporation because of the contravention

Criminal court may order compensation

1317HB (1) [Compensation where offence] If:

- (a) a court finds a person guilty of an offence constituted by a contravention of a civil penalty provision in relation to a corporation; and
- (b) the court is satisfied that the corporation has suffered loss or damage as a result of the act or omission constituting the contravention; the court may (whether or not it imposes a penalty) order the person to pay to the corporation compensation of such amount as the order specifies.

1317HB (2) [Compensation where contravention] If:

- (a) a court declares under division 4 that a person has, by an act or omission, contravened a civil penalty provision in relation to a corporation; and
- (b) the court is satisfied that the corporation has suffered loss or damage as a result of that act or omission; the court may (whether or not it makes an order under subsection 1317EA(3)) order the person to pay to the corporation compensation of such amount as the order specifies.

Recovery of profits, and compensation for loss, resulting from contravention

1317HD (1) [Amount recoverable] Where a person contravenes a civil penalty provision in relation to a corporation, the corporation may, by proceedings in a court of competent jurisdiction, recover from the person, as a debt due to the corporation:

- (a) if that or another person has made a profit because of the act or omission constituting the contravention – an amount equal to the amount of that profit; and
- (b) if the corporation has suffered loss or damage as a result of that act or omission – an amount equal to the amount of that loss or damage;

whether or not:

- (c) the first-mentioned person has been convicted of an offence in relation to the contravention; or
- (d) a civil penalty order has been made against the first-mentioned person in relation to the contravention.

1317HD (2) [Limitation on action] Proceedings under this section may only be begun within 6 years after the contravention.

Part does not limit power to award punitive damages

1317JC Nothing in this Part limits a court's power to order someone to pay damages in the nature of punitive damages because of an act or omission constituting a contravention of a civil penalty provision.

(1986 Chapter 46)

ARRANGEMENT OF SECTIONS

SECTION

Preliminary

1. Disqualification orders: general

*Disqualification for general misconduct
in connection with companies*

2. Disqualification on conviction of indictable offence
3. Disqualification for persistent breaches of companies legislation
4. Disqualification for fraud, etc., in winding-up
5. Disqualification on summary conviction

Disqualification for unfitness

6. Duty of court to disqualify unfit directors of insolvent companies
7. Applications to court under sec. 6; reporting provisions
8. Disqualification after investigation of company
9. Matters for determining unfitness of directors

Other cases of disqualification

10. Participation in wrongful trading
11. Undischarged bankrupts
12. Failure to pay under county court administration order

Consequences of contravention

13. Criminal penalties
14. Offences by body corporate
15. Personal liability for company's debts where person acts while disqualified

Supplementary provisions

16. Application for disqualification order
17. Application for leave under an order
18. Register of disqualification orders
19. Special savings from repealed enactments

Miscellaneous and general

20. Admissibility in evidence of statements
21. Interaction with Insolvency Act
22. Interpretation
- 22A. Application of Act to building societies
- 22B. Application of Act to incorporated friendly societies
23. Transitional provisions, savings, repeals
24. Extent
25. Commencement
26. Citation

SCHEDULES

SCHEDULE

1. Matters for determining unfitness of directors
2. Savings from Companies Act 1981 ss. 93, 94 and Insolvency Act 1985 Schedule 9
3. Transitional provisions and savings
4. Repeals

**COMPANY DIRECTORS
DISQUALIFICATION ACT 1986**
(1986 Chapter 46)

An Act to consolidate certain enactments relating to the disqualification of persons from being directors of companies, and from being otherwise concerned with a company's affairs.

[25th July 1986]

PRELIMINARY

SEC. 1 Disqualification orders: general

1(1) [Disqualification order] In the circumstances specified below in this Act a court may, and under section 6 shall, make against a person a disqualification order, that is to say an order that he shall not, without leave of the court—

- (a) be a director of a company, or
- (b) be a liquidator or administrator of a company, or
- (c) be a receiver or manager of a company's property, or
- (d) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, for a specified period beginning with the date of the order.

1(2) [Maximum, minimum periods] In each section of this Act which give to a court power or, as the case may be, imposes on it the duty to make a disqualification order there is specified the maximum (and, in section 6, the minimum) period of disqualification which may or (as the case may be) must be imposed by means of the order.

1(3) [Where two orders] Where a disqualification order is made against a person who is already subject to such an order, the periods specified in those orders shall run concurrently.

1(4) [Criminal grounds] A disqualification order may be made on grounds which are or include matters other than criminal convictions, notwithstanding that the person in respect of whom it is to be made may be criminally liable in respect of those matters.

DISQUALIFICATION FOR GENERAL MISCONDUCT
IN CONNECTION WITH COMPANIES

SEC. 2 Disqualification on conviction of indictable offence

2(1) [Court's power] The court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management or liquidation of a company, or with the receivership or management of a company's property.

2(2) ["The court"] "The court" for this purpose means—

- (a) any court having jurisdiction to wind up the company in relation to which the offence was committed, or

- (b) the court by or before which the person is convicted of the offence, or
- (c) in the case of a summary conviction in England and Wales, any other magistrates' court acting for the same petty sessions area;

and for the purposes of this section the definition of “**indictable offence**” in Schedule 1 to the Interpretation Act 1978 applies for Scotland as it does for England and Wales.

2(3) [Maximum period] The maximum period of disqualification under this section is –

- (a) where the disqualification order is made by a court of summary jurisdiction, 5 years, and
- (b) in any other case, 15 years.

SEC. 3 Disqualification for persistent breaches of companies legislation

3(1) [Court's power] The court may make a disqualification order against a person where it appears to it that he has been persistently in default in relation to provisions of the companies legislation requiring any return, account or other document to be filed with, delivered or sent, or notice of any matter to be given, to the registrar of companies.

3(2) [Conclusive proof of default] On an application to the court for an order to be made under this section, the fact that a person has been persistently in default in relation to such provisions as are mentioned above may (without prejudice to its proof in any other manner) be conclusively proved by showing that in the 5 years ending with the date of the application he has been adjudged guilty (whether or not on the same occasion) of three or more defaults in relation to those provisions.

3(3) [Guilty of default under sec. 3(2)] A person is to be treated under subsection (2) as being adjudged guilty of a default in relation to any provision of that legislation if –

- (a) he is convicted (whether on indictment or summarily) of an offence consisting in a contravention of or failure to comply with that provision (whether on his own part or on the part of any company), or
- (b) a default order is made against him, that is to say an order under any of the following provisions –
 - (i) section 242(4) of the Companies Act (order requiring delivery of company accounts),
 - (ia) section 245B of that Act (order requiring preparation of revised accounts),
 - (ii) section 713 of that Act (enforcement of company's duty to make returns), or
 - (iii) section 41 of the Insolvency Act (enforcement of receiver's or manager's duty to make returns), or
 - (iv) section 170 of that Act (corresponding provision for liquidator in winding up),in respect of any such contravention of or failure to comply with that provision (whether on his own part or on the part of any company).

3(4) [“The court”] In this section “**the court**” means any court having jurisdiction to wind up any of the companies in relation to which the offence or other default has been or is alleged to have been committed.

3(5) [Maximum period] The maximum period of disqualification under this section is 5 years.

SEC. 4 Disqualification for fraud, etc., in winding up

4(1) [Court's power] The court may make a disqualification order against a person if, in the course of the winding up of a company, it appears that he –

- (a) has been guilty of an offence for which he is liable (whether he has been convicted or not) under section 458 of the Companies Act (fraudulent trading), or
- (b) has otherwise been guilty, while an officer or liquidator of the company or receiver or manager of its property, of any fraud in relation to the company or of any breach of his duty as such officer, liquidator, receiver or manager.

4(2) [Definitions] In this section “**the court**” means any court having jurisdiction to wind up any of the companies in relation to which the offence or other default has been or is alleged to have been committed; and “**officer**” includes a shadow director.

4(3) [Maximum Period] The maximum period of disqualification under this section is 15 years.

SEC. 5 Disqualification on summary conviction

5(1) [Relevant offences] An offence counting for the purposes of this section is one of which a person is convicted (either on indictment or summarily) in consequence of a contravention of, or failure to comply with, any provision of the companies legislation requiring a return, account or other document to be filed with, delivered or sent, or notice of any matter to be given, to the registrar of companies (whether the contravention or failure is on the person's own part or on the part of any company).

5(2) [Court's power] Where a person is convicted of a summary offence counting for those purposes, the court by which he is convicted (or, in England and Wales, any other magistrates' court acting for the same petty sessions area) may make a disqualification order against him if the circumstances specified in the next subsection are present.

5(3) [Circumstances in sec. 5(2)] Those circumstances are that, during the 5 years ending with the date of the conviction, the person has had made against him, or has been convicted of, in total not less than 3 default orders and offences counting for the purposes of this section; and those offences may include that of which he is convicted as mentioned in subsection (2) and any other offence of which he is convicted on the same occasion.

5(4) [Definitions] For the purposes of this section –

- (a) the definition of “**summary offence**” in Schedule 1 to the Interpretation Act 1978 applies for Scotland as for England and Wales, and
- (b) “**default order**” means the same as in section 3(3)(b).

5(5) [Maximum period] The maximum period of disqualification under this section is 5 years.

DISQUALIFICATION FOR UNFITNESS

SEC. 6 Duty of court to disqualify unfit directors of insolvent companies

6(1) [Court's duty] The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied –

- (a) that he is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently), and
- (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company.

6(2) [Interpretation] For the purposes of this section and the next, a company becomes insolvent if –

- (a) the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up,
- (b) an administration order is made in relation to the company, or
- (c) an administrative receiver of the company is appointed;

and references to a person's conduct as a director of any company or companies include, where that company or any of those has become insolvent, that person's conduct in relation to any matter connected with or arising out of the insolvency of that company.

6(3) [Definitions] In this section and the next "**the court**" means –

- (a) in the case of a person who is or has been a director of a company which is being wound up by the court, the court by which the company is being wound up,
- (b) in the case of a person who is or has been a director of a company which is being wound up voluntarily, any court having jurisdiction to wind up the company,
- (c) in the case of a person who is or has been a director of a company in relation to which an administration order is in force, the court by which that order was made, and
- (d) in any other case, the High Court or, in Scotland, the Court of Session;

and in both sections "**director**" includes a shadow director.

6(4) [Minimum, maximum periods] Under this section the minimum period of disqualification is 2 years, and the maximum period is 15 years.

SEC. 7 Applications to court under sec. 6; reporting provisions

7(1) [Application by Secretary of State, official receiver] If it appears to the Secretary of State that it is expedient in the public interest that a disqualification order under section 6 should be made against any person, an application for the making of such an order against that person may be made –

- (a) by the Secretary of State, or
- (b) if the Secretary of State so directs in the case of a person who is or has been a director of a company which is being wound up by the court in England and Wales, by the official receiver.

7(2) [Time for application] Except with the leave of the court, an application for the making under that section of a disqualification order against any person shall not be made after the end of the period of 2 years beginning with the day on which the company of which that person is or has been a director became insolvent.

7(3) [Report to the Secretary of State] If it appears to the office-holder responsible under this section, that is to say –

- (a) in the case of a company which is being wound up by the court in England and Wales, the official receiver,
- (b) in the case of a company which is being wound up otherwise, the liquidator,
- (c) in the case of a company in relation to which an administration order is in force, the administrator, or
- (d) in the case of a company of which there is an administrative receiver, that receiver,

that the conditions mentioned in section 6(1) are satisfied as respects a person who is or has been a director of that company, the office-holder shall forthwith report the matter to the Secretary of State.

7(4) [Extra information etc.] The Secretary of State or the official receiver may require the liquidator, administrator or administrative receiver of a company, or the former liquidator, administrator or administrative receiver of a company –

- (a) to furnish him with such information with respect to any person's conduct as a director of the company, and
- (b) to produce and permit inspection of such books, papers and other records relevant to that person's conduct as such a director,

as the Secretary of State or the official receiver may reasonably require for the purpose of determining whether to exercise, or of exercising, any function of his under this section.

SEC. 8 Disqualification after investigation of company

8(1) [Application by Secretary of State] If it appears to the Secretary of State from a report made by inspectors under section 437 of the Companies Act or section 94 or 177 of the Financial Services Act 1986, or from information or documents obtained under section 447 or 448 of the Companies Act or section 105 of the Financial Services Act 1986 or section 2 of the Criminal Justice Act 1987 or section 52 of the Criminal Justice (Scotland) Act 1987 or section 83 of the Companies Act 1989, that it is expedient in the public interest that a disqualification order should be made against any person who is or has been a director or shadow director of any company, he may apply to the court for such an order to be made against that person.

8(2) [Court's power] The court may make a disqualification order against a person where, on an application under this section, it is satisfied that his conduct in relation to the company makes him unfit to be concerned in the management of a company.

8(3) ["The court"] In this section "**the court**" means the High Court or, in Scotland, the Court of Session.

8(4) [Maximum period] The maximum period of disqualification under this section is 15 years.

SEC. 9 Matters for determining unfitness of directors

9(1) [Matters in Sch. 1] Where it falls to a court to determine whether a person's conduct as a director or shadow director of any particular company or companies makes him unfit to be concerned in the management of a company, the court shall, as respects his conduct as a director of that company or, as the case may be, each of those companies, have regard in particular –

- (a) to the matters mentioned in Part I of Schedule 1 to this Act, and
- (b) where the company has become insolvent, to the matters mentioned in Part II of that Schedule;

and references in that Schedule to the director and the company are to be read accordingly.

9(2) [Application of sec. 6(2)] Section 6(2) applies for the purposes of this section and Schedule 1 as it applies for the purposes of sections 6 and 7.

9(3) [Interpretation of Sch. 1] Subject to the next subsection, any reference in Schedule 1 to an enactment contained in the Companies Act or the Insolvency Act includes, in relation to any time before the coming into force of that enactment, the corresponding enactment in force at that time.

9(4) [Modification of Sch. 1] The Secretary of State may by order modify any of the provisions of Schedule 1; and such an order may contain such transitional provisions as may appear to the Secretary of State necessary or expedient.

9(5) [Power exercisable by statutory instrument etc.] The power to make orders under this section is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

OTHER CASES OF DISQUALIFICATION

SEC. 10 Participation in wrongful trading

10(1) [Court's power] Where the court makes a declaration under section 213 or 214 of the Insolvency Act that a person is liable to make a contribution to a company's assets, then, whether or not an application for such an order is made by any person, the court may, if it thinks fit, also make a disqualification order against the person to whom the declaration relates.

10(2) [Maximum period] The maximum period of disqualification under this section is 15 years.

SEC. 11 Undischarged bankrupts

11(1) [Offence] It is an offence for a person who is an undischarged bankrupt to act as director of, or directly or indirectly to take part in or be concerned in the promotion, formation or management of, a company, except with the leave of the court.

11(2) ["The court"] "The Court" for this purpose is the court by which the person was adjudged bankrupt or, in Scotland, sequestration of his estates was awarded.

11(3) [Requirements for leave of court] In England and Wales, the leave of the court shall not be given unless notice of intention to apply for it has been served on the official receiver; and it is the latter's duty, if he is of opinion that it is contrary to the public interest that the application should be granted, to attend on the hearing of the application and oppose it.

SEC. 12 Failure to pay under county court administration order

12(1) [Effect of sec. 12(2)] The following has effect where a court under section 429 of the Insolvency Act revokes an administration order under Part VI of the County Courts Act 1984.

12(2) [Restriction on person] A person to whom that section applies by virtue of the order under section 429(2)(b) shall not, except with the leave of the court which made the order, act as director or liquidator of, or indirectly take part of be concerned in the promotion, formation or management of, a company.

CONSEQUENCES OF CONTRAVENTION

SEC. 13 Criminal penalties

13 If a person acts in contravention of a disqualification order or of section 12(2), or is guilty of an offence under section 11, he is liable –

- (a) on conviction on indictment, to imprisonment for not more than 2 years or a fine or both; and
- (b) on summary conviction, to imprisonment for not more than 6 months or a fine not exceeding the statutory maximum, or both.

SEC. 14 Offences by body corporate

14(1) [Offence re officer] Where a body corporate is guilty of an offence of acting in contravention of a disqualification order, and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.

14(2) [Where managers are members] Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

SEC. 15 Personal liability for company's debts where person acts while disqualified

15(1) [Personal liability] A person is personally responsible for all the relevant debts of a company if at any time –

- (a) in contravention of a disqualification order or of section 11 of this Act he is involved in the management of the company, or
- (b) as a person who is involved in the management of the company, he acts or is willing to act on instructions given without the leave of the court by a person whom he knows at the time to be the subject of a disqualification order or to be an undischarged bankrupt.

15(2) [Joint and several liability] Where a person is personally responsible under this section for the relevant debts of a company, he is jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is also liable.

15(3) [Relevant debts of the company] For the purposes of this section the relevant debts of a company are –

- (a) in relation to a person who is personally responsible under paragraph (a) of subsection (1), such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company, and
- (b) in relation to a person who is personally responsible under paragraph (b) of that subsection, such debts and other liabilities of the company as are incurred at a time when that person was acting or was willing to act on instructions given as mentioned in that paragraph.

15(4) [Person involved in management] For the purposes of this section, a person is involved in the management of a company if he is a director of the company or if he is concerned, whether directly or indirectly, or takes part, in the management of the company.

15(5) [Interpretation] For the purposes of this section a person who, as a person involved in the management of a company, has at any time acted on instructions given without the leave of the court by a person whom he knew at that time to be the subject of a disqualification order or to be an undischarged bankrupt is presumed, unless the contrary is shown, to have been willing at any time thereafter to act on any instructions given by that person.

SUPPLEMENTARY PROVISIONS

SEC. 16 Application for disqualification order

16(1) [Notice, appearance, etc.] A person intending to apply for the making of a disqualification order by the court having jurisdiction to wind up a company shall give not less than 10 days notice of his intention to the person against whom the order is sought; and on the hearing of the application the last-mentioned person may appear and himself give evidence or call witnesses.

16(2) [Applicants] An application to a court with jurisdiction to wind up companies for the making against any person of a disqualification order under any of sections 2 to 5 may be

made by the Secretary of State or the official receiver, or by the liquidator or any past or present member or creditor of any company in relation to which that person has committed or is alleged to have committed an offence or other default.

16(3) [Appearance, etc. of applicant] On the hearing of any application under this Act made by the Secretary of State or the official receiver or the liquidator the applicant shall appear and call the attention of the court to any matters which seem to him to be relevant, and may himself give evidence or call witnesses.

SEC. 17 Application for leave under an order

17(1) [Court] As regards the court to which application must be made for leave under a disqualification order, the following applies—

- (a) where the application is for leave to promote or form a company, it is any court with the jurisdiction to wind up companies, and
- (b) where the application is for leave to be a liquidator, administrator or director of, or otherwise to take part in the management of a company, or to be a receiver or manager of a company's property, it is any court having jurisdiction to wind up that company.

17(2) [Appearance, etc. of Secretary of State et al.] On the hearing of an application for leave made by a person against whom a disqualification order has been made on the application of the Secretary of State, the official receiver or the liquidator, the Secretary of State, official receiver or liquidator shall appear and call the attention of the court to any matters which seem to him to be relevant, and may himself give evidence or call witnesses.

SEC. 18 Register of disqualification orders

18(1) [Regulations re furnishing information] The Secretary of State may make regulations requiring officers of courts to furnish him with such particulars as the regulations may specify of cases in which—

- (a) a disqualification order is made, or
- (b) any action is taken by a court in consequence of which such an order is varied or ceases to be in force, or
- (c) leave is granted by a court for a person subject to such an order to do any thing which otherwise the order prohibits from doing;

and the regulations may specify the time within which, and the form and manner in which, such particulars are to be furnished.

18(2) [Register of orders] The Secretary of State shall, from the particulars so furnished, continue to maintain the register of orders, and of cases in which leave has been granted as mentioned in subsection (1)(c), which was set up by him under section 29 of the Companies Act 1976 and continued under section 301 of the Companies Act 1985.

18(3) [Deletion of orders no longer in force] When an order of which entry is made in the register ceases to be in force, the Secretary of State shall delete this entry from the register and all particulars relating to it which have been furnished to him under this section or any previous corresponding provision.

18(4) [Inspection of register] The register shall be open to inspection on payment of such fee as may be specified by the Secretary of State in regulations.

18(5) [Regulations by statutory instrument etc.] Regulations under this section shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

SEC. 19 Special savings from repeal enactments

19 Schedule 2 to this Act has effect –

- (a) in connection with certain transitional cases arising under sections 93 and 94 of the Companies Act 1981, so as to limit the power to make a disqualification order, or to restrict the duration of an order, by reference to events occurring or things done before those sections came into force,
- (b) to preserve orders made under section 28 of the Companies Act 1976 (repealed by Act of 1981), and
- (c) to preclude any applications for a disqualification order under section 6 or 8, where the relevant company went into liquidation before 28th April 1986.

MISCELLANEOUS AND GENERAL

SEC. 20 Admissibility in evidence of statements

20 In any proceedings (whether or not under this Act), any statement made in pursuance of a requirement imposed by or under sections 6 to 10, 15 or 19(c) of, or Schedule 1 to, this Act, or by or under rules made for the purposes of this Act under the Insolvency Act, may be used in evidence against any person making or concurring in making the statement.

SEC. 21 Interaction with Insolvency Act

21(1) [Reference to official receiver] References in this Act to the official receiver, in relation to the winding up of a company or the bankruptcy of an individual, are to any person who, by virtue of section 399 of the Insolvency Act, is authorised to act as the official receiver in relation to that winding up or bankruptcy; and, in accordance with section 401(2) of that Act, references to an official receiver includes a person appointed as his deputy.

21(2) [Pt. I to VII of IA] Sections 6 to 10, 15, 19(c) and 20 of, and Schedule 1 to, this Act are deemed included in Parts I to VII of the Insolvency Act for the purposes of the following sections of that Act –

section 411 (power to make insolvency rules);

section 414 (fees orders);

section 420 (orders extending provisions about insolvent companies to insolvent partnerships);

section 422 (modification of such provisions in their application to recognised banks).

21(3) [Application of IA, sec. 434] Section 434 of that Act (Crown application) applies to sections 6 to 10, 15, 19(c) and 20 of, and Schedule 1 to, this Act as it does to the provisions of that Act which are there mentioned.

21(4) [Summary of proceedings in Scotland] For the purposes of summary proceedings in Scotland, section 431 of that Act applies to summary proceedings for an offence under section 11 or 13 of this Act as it applies to summary proceedings for an offence under Parts I to VII of that Act.

SEC. 22 Interpretation

22(1) [Effect] This section has effect with respect to the meaning of expressions used in this Act, and applies unless the context otherwise requires.

22(2) ["Company"] The expression "**company**" –

- (a) in section 11, includes an unregistered company and a company incorporated outside Great Britain which has an established place of business in Great Britain, and
- (b) elsewhere, includes any company which may be wound up under Part V of the Insolvency Act.

22(3) [Application of IA, sec. 247, 251] Section 247 in Part VII of the Insolvency Act (interpretation of the first Group of Parts of that Act) applies as regards references to a company's insolvency and to its going into liquidation; and "**administrative receiver**" has the meaning given by section 251 of that Act.

22(4) ["Director"] "**Director**" includes any person occupying the position of director, by whatever name called, and in sections 6 to 9 includes a shadow director.

22(5) ["Shadow director"] "**Shadow director**", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act (but so that a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity).

22(6) [Application of CA, sec. 740, 744] Section 740 of the Companies Act applies as regards the meaning of "**body corporate**"; and "**officer**" has the meaning given by section 744 of that Act.

22(7) [References to legislation] In references to legislation other than this Act –

- "**the Companies Act**" means the Companies Act 1985;
- "**the Companies Acts**" has the meaning given by section 744 of that Act;
- "**the Insolvency Act**" means the Insolvency Act 1986;

and in sections 3(1) and 5(1) of this Act "**the companies legislation**" means the Companies Acts (except the Insider Dealing Act), Parts I to VII of the Insolvency Act and, in Part XV of that Act, sections 411, 413, 414, 416 and 417.

22(8) [References to former legislation] Any reference to provisions, or a particular provision, of the Companies Acts or the Insolvency Act includes the corresponding provisions or

provision of the former Companies Act (as defined by section 735(1)(c) of the Companies Act, but including also that Act itself) or, as the case may be, the Insolvency Act 1985.

22(9) [Application of CA, Pt. XXVI] Any expression for whose interpretation provision is made by Part XXVI of the Companies Act (and not by subsections (3) to (8) above) is to be construed in accordance with that provision.

SEC. 22A Application of Act to building societies

22A(1) [To building societies as to companies] This Act applies to building societies as it applies to companies.

22A(2) [Interpretation] References in this Act to a company, or to a director or an officer of a company include, respectively, references to a building society within the meaning of the Building Societies Act 1986 or to a director or officer, within the meaning of that Act, of a building society.

22A(3) ["Shadow director"] In relation to a building society the definition of "shadow director" in section 22(5) applies with the substitution of "building society" for "company".

22A(4) [Sch. 1] In the application of Schedule 1 to the directors of a building society, references to provisions of the Insolvency Act or the Companies Act include references to the corresponding provisions of the Building Societies Act 1986.

SEC. 22B Application of Act to incorporated friendly societies

22B(1) [Application as to companies] This Act applies to incorporated friendly societies as it applies to companies.

22B(2) [Interpretation] References in this Act to a company, or to a director or an officer of a company include, respectively, references to an incorporated friendly society within the meaning of the Friendly Societies Act 1992 or to a member of the committee of management or officer, within the meaning of that Act, of an incorporated friendly society.

22B(3) [Shadow directors] In relation to an incorporated friendly society every reference to a shadow director shall be omitted.

22B(4) [Sch. 1] In the application of Schedule 1 to the member of the committee of management of an incorporated friendly society, references to provisions of the Insolvency Act or the Companies Act include references to the corresponding provisions of the Friendly Societies Act 1992.

SEC. 23 Transitional provisions, savings, repeals

23(1) [Sch. 3] The transitional provisions and savings in Schedule 3 to this Act have effect, and are without prejudice to anything in the Interpretation Act 1978 with regard to the effect of repeals.

23(2) [Sch. 4] The enactments specified in the second column of Schedule 4 to this Act are repealed to the extent specified in the third column on that Schedule.

SEC. 24 Extent

24(1) [England, Wales, Scotland] This Act extends to England and Wales and to Scotland.

24(2) [Northern Ireland] Nothing in this Act extends to Northern Ireland.

SEC. 25 Commencement

25 This Act comes into force simultaneously with the Insolvency Act 1986.

SEC. 26 Citation

26 This Act may be cited as the Company Directors Disqualification Act 1986.

SCHEDULES

Schedule 1 – Matters for Determining Unfitness of Directors

Section 9

Part I – Matters Applicable in all Cases

- 1 Any misfeasance or breach of any fiduciary or other duty by the director in relation to the company.
- 2 Any misapplication or retention by the director of, or any conduct by the director giving rise to an obligation to account for, any money or other property of the company.
- 3 The extent of the director's responsibility for the company entering into any transaction liable to be set aside under Part XVI of the Insolvency Act (provisions against debt avoidance).
- 4 The extent of the director's responsibility for any failure by the company to comply with any of the following provisions of the Companies Act, namely –
 - (a) section 221 (companies to keep accounting records);
 - (b) section 222 (where and for how long records to be kept);
 - (c) section 288 (register of directors and secretaries);
 - (d) section 352 (obligation to keep and enter up register of members);
 - (e) section 353 (location of register of members);
 - (f) section 363 (duty of company to make annual returns); and
 - (g) sections 399 and 415 (company's duty to register charges it creates).
- 5 The extent of the director's responsibility for any failure by the directors of the company with –
 - (a) section 226 or 227 of the Companies Act (duty to prepare annual accounts), or
 - (b) section 233 of that Act (approval and signature of accounts).

Part II – Matters Applicable Where Company Has Become Insolvent

- 6 The extent of the director's responsibility for the causes of the company becoming insolvent.
- 7 The extent of the director's responsibility for any failure by the company to supply any goods or services which have been paid for (in whole or in part).
- 8 The extent of the director's responsibility for the company entering into any transaction or giving any preference, being a transaction or preference –
 - (a) liable to be set aside under section 127 or sections 238 to 240 of the Insolvency Act, or
 - (b) challengeable under section 242 or 243 of that Act or under any rule of law in Scotland.

9 The extent of the director's responsibility for any failure by the directors of the company to comply with section 98 of the Insolvency Act (duty to call creditors' meeting in creditors' voluntary winding up).

10 Any failure by the director to comply with any obligation imposed on him by or under any of the following provisions of the Insolvency Act –

- (a) section 22 (company's statement of affairs in administration);
- (b) section 47 (statement of affairs to administrative receiver);
- (c) section 66 (statement of affairs in Scottish receivership);
- (d) section 99 (directors' duty to attend meeting; statement of affairs in creditors' voluntary winding up);
- (e) section 131 (statement of affairs in winding up by the court);
- (f) section 234 (duty of any one with company property to deliver it up);
- (g) section 235 (duty to co-operate with liquidator, etc.).

Schedule 2 – Savings from Companies Act 1981 sec. 93, 94, and Insolvency Act 1985 Schedule 9

Section 19

1 Sections 2 and 4(1)(b) do not apply in relation to anything done before 15th June 1982 by a person in his capacity as liquidator of a company or as receiver or manager of a company's property.

2 Subject to paragraph 1 –

- (a) section 2 applies in a case where a person is convicted on indictment of an offence which he committed (and, in the case of a continuing offence, has ceased to commit) before 15th June 1982; but in such a case a disqualification order under that section shall not be made for a period in excess of 5 years;
- (b) that section does not apply in a case where a person is convicted summarily –
 - (i) in England or Wales, if he had consented so to be tried before that date, or
 - (ii) in Scotland, if the summary proceedings commenced before that date.

3 Subject to paragraph 1, section 4 applies in relation to an offence committed or other thing done before 15th June 1982; but a disqualification order made on the grounds of such an offence or other thing done shall not be made for a period in excess of 5 years.

4 The powers of a court under section 5 are not exercisable in a case where a person is convicted on an offence which he committed (and, in the case of a continuing offence, had ceased to commit) before 15th June 1982.

5 For the purposes of section 3(1) and section 5, no account is to be taken of any offence which was committed, or any default order which was made, before 1st June 1977.

6 An order made under section 28 of the Companies Act 1976 has effect as if made under section 3 of this Act; and an application made before 15th June 1982 for such an order is to be treated as an application for an order under the section last mentioned.

- 7 Where –
- (a) an application is made for a disqualification order under section 6 of this Act by virtue of paragraph (a) of subsection (2) of that section, and
 - (b) the company in question went into liquidation before 28th April 1986 (the coming into force of the provision replaced by section 6).

the court shall not make an order under that section unless it could have made a disqualification order under section 300 of the Companies Act as it had effect immediately before the date specified in sub-paragraph (b) above.

8 An application shall not be made under section 8 of this Act in relation to a report made or information or documents obtained before 28th April 1986.

Schedule 3 – Transitional Provisions and Savings

Section 23(1)

1 In this Schedule, “**the former enactments**” means so much of the Companies Act, and so much of the Insolvency Act, as is repealed and replaced by this Act; and “**the appointed day**” means the day on which this Act comes into force.

2 So far as anything done or treated as done under or for the purposes of any provision of the former enactments could have been done under or for the purposes of the corresponding provision of this Act, it is not invalidated by the repeal of that provision but has effect as if done under or for the purposes of the corresponding provision; and any order, regulation, rule or other instrument made or having effect under any provision of the former enactments shall, insofar as its effect is preserved by this paragraph, be treated for all purposes as made and having effect under the corresponding provision.

3 Where any period of time specified in a provision of the former enactments is current immediately before the appointed day, this Act has effect as if the corresponding provision had been in force when the period began to run; and (without prejudice to the foregoing) any period of time so specified and current is deemed for the purposes of the Act –

- (a) to run from the date or event from which it was running immediately before the appointed day, and
- (b) to expire (subject to any provision of this Act for its extension) whenever it would have expired if this Act had not been passed;

and any rights, priorities, liabilities, reliefs, obligations, requirements, powers, duties or exemptions dependent of the beginning, duration or end of such a period as above mentioned shall under this Act as they were or would have been under the former enactments.

4 Where in any provision of this Act there is a reference to another such provision, and the first-mentioned provision operates, or is capable of operating, in relation to things done or omitted, or events occurring or not occurring, in the past (including in particular past acts of compliance with any enactment, failures of compliance, contraventions, offences and convictions of offences) the reference to the other is to be read as including a reference to the corresponding provision of the former enactments.

5 Offences committed before the appointed day under any provision of the former enactments may, notwithstanding any repeal by this Act, be prosecuted and punished after that day as if this Act had not been passed.

6 A reference in any enactment, instrument or document (whether express or implied, and in whatever phraseology) to a provision of the former enactments (including the corresponding provision of any yet earlier enactment) is to be read, where necessary to retain for the enactment, instrument or document the same force and effect as it would have had put for the passing of this Act, as, or as including, a reference to the corresponding provision by which it is replaced by this Act.

Schedule 4 – Repeals

Section 23(2)

Chapter	Short Title	Extent of Repeal
1985 c. 6.	The Companies Act 1985	Sections 295 to 299 Section 301 Section 302 Schedule 12 In Schedule 24, the entries relating to sections 295(7) and 302(1)
1985 c. 65.	The Insolvency Act 1985	Sections 12 to 14 Section 16 Section 18 Section 108(2) Schedule 2 In Schedule 6, paragraphs 1, 2, 7 and 14 In Schedule 9, paragraphs 2 and 3

TABLE OF DERIVATIONS

Note: The following abbreviations are used in this Table –

“CA” = The Companies Act 1985 (c. 6).

“IA” = The Insolvency Act 1985 (c. 65).

Provision	Derivation
1	CA sec. 295(1), (2), (4); IA Sch. 6 para. 1(1)-(3)
2	CA ss. 295(2), 296
3	CA ss. 295(2), 297
4	CA ss. 295(2), 298
5	CA ss. 295(2), 299
6	CA sec. 295(2); IA ss. 12(1), (2), (7)-(9), 108(2)
7	IA sec. 12(3)-(6)
8	CA sec. 295(2); IA ss. 12(9), 13, 108(2)
9	IA ss. 12(9), 14
10	CA sec. 295(2); IA ss. 16, 108(2)
11	CA sec. 302
12	IA sec. 221(2)
13	CA ss. 295(7), 302(1), Sch. 24
14	CA sec. 733(1)-(3); IA Sch. 6 para. 7
15	IA sec. 18(1) (part), (2)-(6)
16	CA sec. 295(6) (part), Sch. 12 paras. 1-3; IA sec. 108(2), Sch. 6 para. 1(4)
17	CA sec. 295(6) (part), Sch. 12 paras. 4, 5; IA sec. 108(2), Sch. 6 paras. 1(4), 14
18	CA sec. 301; IA sec. 108(2), Sch. 6 para. 2
19	CA sec. 295(6); and see Sch. 2
20	IA sec. 231 (part)
21	IA ss. 106, 107, 108(1), (2), 222(1), 224(2), 227, 229, 234
22	IA sec. 108(1)-(4)
23	—
24	IA sec. 236(4)(a)
25	—
26	—
Sch. 1	IA Sch. 2
Sch. 2	CA Sch. 12 Pt. III; IA Sch. 9 paras. 2, 3
Sch. 3	—
Sch. 4	—

**Chapter X – Malpractice before and during Liquidation;
Penalisation of Companies and Company Officers;
Investigations and Prosecutions.**

OFFENCES OF FRAUD, DECEPTION, ETC...

SEC. 206 Fraud, etc. in anticipation of winding up

206(1) [Offences by officers] When a company is ordered to be wound up by the court, or passes a resolution for voluntary winding up, any person, being a past or present officer of the company, is deemed to have committed an offence if, within the 12 months immediately preceding the commencement of the winding up, he has-

- (a) concealed any part of the company's property to the value of £500 or more, or concealed any debt due to or from the company or;
- (b) fraudulently removed any part of the company's property to the value of £500 or more, or;
- (c) concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the company's property or affairs. or;
- (d) made any false entry in any book or paper affecting or relating to the company's property or affairs, or;
- (e) fraudulently parted with, altered or made any omission in any document affecting or relating to the company's property or affairs, or;
- (f) pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the company's business).

206(2) [Further offences] Such a person is deemed to have committed an offence if within the period above mentioned he has been privy to the doing by others of any of the things mentioned in paragraphs (c), (d) and (e) of subsection (1); and he commits an offence if, at any time after the commencement of the winding up, he does any of the things mentioned in paragraphs (a) to (f) of that subsection, or is privy to the doing by others of any of the things mentioned in paragraphs (c) to (e) of it.

206(3) ["Officer"] For purposes of this section, "**officer**" includes a shadow director.

206(4) [Defences] It is a defence –

- (a) for a person charged under paragraph (a) or (f) of subsection (1) (or under subsection (2) in respect of the things mentioned in either of those two paragraphs) to prove that he had no intent to defraud, and

- (b) for a person charged under paragraph (c) or (d) of subsection (1) (or under subsection (2) in respect of the things mentioned in either of those two paragraphs) to prove that he had no intent to conceal the state of affairs of the company or to defeat the law.

206(5) [Offence re person pawning property etc. as in sec. 206(1)(f)] Where a person pawns, pledges or disposes of any property in circumstances which amount to an offence under subsection (1)(f), every person who takes in pawn or pledge, or otherwise receives, the property knowing it to be pawned, pledged or disposed of in such circumstances, is guilty of an offence.

206(6) [Penalty] A person guilty of an offence under this section is liable to imprisonment or a fine, or both.

206(7) [Increase, reduction of sums in sec. 206(1)(a),(b)] The money sums specified in paragraphs (a) and (b) of subsection (1) are subject to increase or reduction by order under section 416 in Part XV.

SEC. 207 Transactions in fraud of creditors

207(1) [Offences by officers] When a company is ordered to be wound up by the court or passes a resolution for voluntary winding up, a person is deemed to have committed an offence if he, being at the time an officer of the company –

- (a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the company's property, or
- (b) has concealed or removed any part of the company's property since, or within 2 months before, the date of any unsatisfied judgment or order for the payment of money obtained against the company.

207(2) [Exception] A person is not guilty of an offence under this section –

- (a) by reason of conduct constituting an offence under subsection (1)(a) which occurred more than 5 years before the commencement of the winding up, or
- (b) if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors.

207(3) [Penalty] A person guilty of an offence under this section is liable to imprisonment or a fine, or both.

SEC. 208 Misconduct in course of winding up

208(1) [Offences by officers] When a company is being wound up, whether by the court or voluntarily, any person, being a past or present officer of the company, commits an offence if he –

- (a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the company's property, and how and to whom and for what consideration and when the company disposed of any part of that property (except such part as has been disposed of in ordinary way of the company's business), or
- (b) does not deliver up to the liquidator (or as he directs) all such part of the company's property as in his custody or under his control, and which he is required by law to deliver up, or

- (c) does not deliver up to the liquidator (or as he directs) all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up, or
- (d) knowing or believing that a false debt has been proved by any person in the winding up, fails to inform the liquidator as soon as practicable, or
- (e) after the commencement of the winding up, prevents the production of any book or paper affecting or relating to the company's property or affairs.

208(2) [Further offences] Such a person commits an offence if after the commencement of the winding up he attempts to account for any part of the company's property by fictitious losses or expenses; and he is deemed to have committed that offence if he has so attempted at any meeting of the company's creditors within the 12 months immediately preceding the commencement of the winding up.

208(3) ["Officer"] For purposes of this section, "officer" includes a shadow director.

208(4) [Defences] It is a defence –

- (a) for a person charged under paragraph (a) (b) or (c) of subsection (1) to prove that he had no intent to defraud, and
- (b) for a person charged under paragraph (e) of that subsection to prove that he had no intent to conceal the state of affairs of the company or to defeat the law.

208(5) [Penalty] A person guilty of an offence under this section is liable to imprisonment or a fine, or both.

SEC. 209 Falsification of company's books

209(1) [Offences by officer or contributory] When a company is being wound up, an officer or contributory of the company, commits an offence if he destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud or deceive any person.

209(2) [Penalty] A person guilty of an offence under this section is liable to imprisonment or a fine, or both.

SEC. 210 Material omissions from statement relating to company's affairs

210(1) [Offences by past or present officer] When a company is being wound up, whether by the court or voluntarily, any person, being a past or present officer of the company, commits an offence if he makes any material omission in any statement relating to the company's affairs.

210(2) [Offence prior to winding up] When a company has been ordered to be wound up by the court, or has passed a resolution for voluntary winding up, any such person is deemed to have committed that offence if, prior to the winding up, he has made any material omission in any such statement.

210(3) ["Officer"] For purposes of this section, "officer" includes a shadow director.

210(4) [Defence] It is a defence for a person charged under this section to prove that he had no intent to defraud.

210(5) [Penalty] A person guilty of an offence under this section is liable to imprisonment or a fine, or both.

SEC. 211 False representations to creditors

211(1) [Offences by past or present officer] When a company is being wound up, whether by the court or voluntarily, any person, being a past or present officer of the company –

- (a) commits an offence if he makes any false representation or commits any other fraud for the purpose of obtaining the consent of the company's creditors or any of them to an agreement with reference to the company's affairs or to the winding up, and
- (b) is deemed to have committed that offence if, prior to the winding up, he has made any false representation, or committed any other fraud, for that purpose.

211(2) ["Officer"] For purposes of this section, "officer" includes a shadow director.

211(3) [Penalty] A person guilty of an offence under this section is liable to imprisonment or a fine, or both.

PENALISATION OF DIRECTORS AND OFFICERS

SEC. 212 Summary remedy against delinquent directors, liquidators, etc..

212(1) [Application] This section applies if in the course of the winding up of a company it appears that a person who –

- (a) is or has been an officer of the company,
- (b) has acted as liquidator, administrator or administrative receiver of the company or,
- (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company,

has misapplied or retained, or become accountable for any money or other property of the company, or has been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.

212(2) [Interpretation] The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator or administrator of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator or administrator of the company.

212(3) [Examination, orders] The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him –

- (a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
- (b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.

212(4) [Limit on sec. 212(3) application] The power to make an application under subsection (3) in relation to a person who has acted as liquidator or administrator of the company is not exercisable, except with the leave of the court, after that person has had his release.

212(5) [Exercise of sec. 212(3) power] The power of a contributory to make an application under subsection (3) is not exercisable except with the leave of the court, but is exercisable notwithstanding that he will not benefit from any order the court may make on the application.

SEC. 213 Fraudulent trading

213(1) [Application] If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

213(2) [Court may hold persons liable] The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

SEC. 214 Wrongful trading

214(1) [Declaration by court, on application] Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that the person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

214(2) [Application] This subsection applies in relation to a person if —

- (a) the company has gone into insolvent liquidation,
- (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and
- (c) that person was a director of the company at that time;

but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.

214(3) [Limit on declaration] The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken.

214(4) [Interpretation of sec. 214(2), (3)] For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both —

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and
- (b) the general knowledge, skill and experience that that director has.

214(5) [Interpretation of sec. 214(4)] The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.

214(6) [Interpretation re insolvent liquidation] For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

214(7) ["Director"] In this section "**director**" includes a shadow director.

214(8) [Sec. 213] This section is without prejudice to section 213.

SEC. 215 Proceedings under sec. 213, 214

215(1) [Evidence by liquidator] On the hearing of an application under section 213 or 214, the liquidator may himself give evidence or call witnesses.

215(2) [Further court directions] Where under either section the court makes a declaration, it may give such further directions as it thinks proper for giving effect to the declaration; and in particular, the court may –

- (a) provide for the liability of any person under the declaration to be a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf, and
- (b) from time to time make such further order as may be necessary for enforcing any charge imposed under this subsection.

215(3) ["Assignee"] For the purposes of subsection (2), "**assignee**" –

- (a) includes a person to whom or in whose favour, by the directions of the person made liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but
- (b) does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

215(4) [Directions re priority of debts] Where the court makes a declaration under either section in relation to a person who is a creditor of the company, it may direct that the whole or any part of any debt owed by the company to that person and any interest thereon shall rank in priority after all other debts owed by the company and after any interest on those debts.

215(5) [Sec. 213, 214] Sections 213 and 214 have effect notwithstanding that the person concerned may be criminally liable in respect of matters on the ground of which the declaration under the section is to be made.

SEC. 216 Restriction on re-use of company names

216(1) [Application] This section applies to a person where a company ("the liquidating company") has gone into insolvent liquidation on or after the appointed day and he was a director or shadow director of the company at any time in the period of 12 months ending with the day before it went into liquidation.

216(2) [Prohibited name] For the purposes of this section, a name is a prohibited name in relation to such a person if –

- (a) it is a name by which the liquidating company was known at any time in that period of 12 months, or
- (b) it is a name which is so similar to a name falling within paragraph (a) as to suggest an association with that company.

216(3) [Restriction] Except with leave of the court or in such circumstances as may be prescribed, a person to whom this section applies shall not at any time in the period of 5 years beginning with the day on which the liquidating company went into liquidation –

- (a) be a director of any other company that is known by a prohibited name, or
- (b) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such company, or
- (c) in any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on (otherwise than by a company) under as prohibited name.

216(4) [Penalty] A person guilty of an offence under this section is liable to imprisonment or a fine, or both.

216(5) ["The court"] In subsection (3) "**the court**" means any court having jurisdiction to wind up companies; and on application for leave under that subsection, the Secretary of State or the official receiver may appear and call the attention of the court to any matters which seem to him to be relevant.

216(6) [Interpretation re name] References in this section, in relation to any time, to a name by which a company is known are to the name of the company at that time or to any name under which the company carries on business at that time.

216(7) [Interpretation re insolvent liquidation] For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of winding up.

216(8) ["Company"] In this section "**company**" includes a company which may be wound up under Part V of this Act.

SEC. 217 Personal liability for debts, following contravention of sec. 216

217(1) [Personal liability] A person is personally responsible for all the relevant debts of a company if at any time –

- (a) in a contravention of section 216, he is involved in the management of the company, or

- (b) as a person who is involved in the management of the company, he acts or is willing to act on instructions given (without the leave of the court) by a person whom he knows at that time to be in contravention in relation to the company of section 216.

217(2) [Joint and several liability] Where a person is personally responsible under this section for the relevant debts of a company, he is jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is so liable.

217(3) [Relevant debts of company] For purposes of this section the relevant debts of a company are –

- (a) in relation to a person who is personally responsible under paragraph (a) of subsection (1), such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company, and
- (b) in relation to a person who is personally responsible under paragraph (b) of that subsection, such debts and other liabilities of the company as are incurred at a time when that person was acting or was willing to act on instructions given as mentioned in that paragraph.

217(4) [Person involved in management] For the purposes of this section, a person is involved in the management of a company if he is a director of the company or if he is concerned, whether directly or indirectly, or takes part, in the management of the company.

217(5) [Interpretation] For the purposes of this section a person who, as a person involved in the management of a company, has at any time acted on instructions given (without the leave of the court) by a person whom he knew at that time to be in contravention in relation to the company of section 216 is presumed, unless the contrary is shown, to have been willing at any time thereafter to act on any instructions given by that person.

217(6) ["Company"] In this section "company" includes a company which may be wound up under Part V.

SEC. 218 Prosecution of delinquent officers and members of company

218(1) [Court may direct matter to be referred for prosecution] If it appears to the court in the course of a winding up by the court that any past or present officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, the court may (either on the application of a person interested in the winding up or of its own motion) direct the liquidator to refer the matter to the prosecuting authority.

218(2) ["The prosecuting authority"] "The prosecuting authority" means –

- (a) in the case of a winding up in England and Wales, the Director of Public Prosecutions, and
- (b) in the case of a winding up in Scotland, the Lord Advocate.

218(3) [Report – winding up by court] If in the case of a winding up by the court in England and Wales it appears to the liquidator, not being the official receiver, that any past or present officer of the company, or any member of it, has been guilty of an offence in relation to

the company for which he is criminally liable, the liquidator shall report the matter to the official receiver.

218(4) [Report – voluntary winding up] If it appears to the liquidator in the course of a voluntary winding up that any past or present officer of the company, or any member of it, has been guilty of an offence in relation to the company for which he is criminally liable, he shall –

- (a) forthwith report the matter to the prosecuting authority, and
- (b) furnish to that authority such information and give to him such access to and facilities for inspecting and taking copies of documents (being information or documents in the possession or under the control of the liquidator and relating to the matter in question) as the authority requires.

218(5) [Reference to Secretary of State] Where a report is made to him under subsection (4), the prosecuting authority may, if he thinks fit, refer the matter to the Secretary of State for further inquiry; and the Secretary of State –

- (a) shall thereupon investigate the matter reported to him and such other matters relating to the affairs of the company as appear to him to require investigation, and
- (b) for the purpose of his investigation may exercise any of the powers which are exercisable by inspectors appointed under section 431 or 432 of the Companies Act to investigate a company's affairs.

218(6) [Court may direct liquidator to make report] If it appears to the court in the course of a voluntary winding up that –

- (a) any past or present officer of the company, or any member of it, has been guilty as above-mentioned, and
- (b) no report with respect to the matter has been made by the liquidator to the prosecuting authority under subsection (4),

the court may (on the application of any person interested in the winding up or of its own motion) direct the liquidator to make such a report.

On a report being made accordingly, this section has effect as though the report had been made in pursuance of subsection (4).

SEC. 219 Obligations arising under sec. 218

219(1) [Assistance to investigation by Secretary of State] For purposes of an investigation by the Secretary of State under section 218(5), any obligation imposed on a person by any provision of the Companies Act to produce documents or give information to, or otherwise to assist, inspectors appointed as mentioned in that subsection is to be regarded as an obligation similarly to assist the Secretary of State in his investigation.

219(2) [Answer may be used as evidence] An answer given by a person to a question put to him in exercise of the powers conferred by section 218(5) may be used in evidence against him.

219(3) [Liquidator and officer to assist, where criminal proceedings instituted] Where criminal proceedings are instituted by the prosecuting authority or the Secretary of State following any report or reference under section 218, it is the duty of the liquidator and every officer and agent of the company past and present (other than the defendant or defender) to give to that authority or the Secretary of State (as the case may be) all assistance in connection with the prosecution which he is reasonably able to give.

For this purpose "**agent**" includes any banker or solicitor of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.

219(4) [Direction by court re assistance] If a person fails or neglects to give assistance in the manner required by subsection (3), the court may, on the application of the prosecuting authority or the Secretary of State (as the case may be) direct the person to comply with that subsection; and if the application is made with respect to a liquidator, the court may (unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him to do so) direct that the costs shall be borne by the liquidator personally.

Chapter 22 – Leave to Act as Director, etc., of Company with prohibited Name (Section 216 of the Act)**Rule 4.226 Preliminary**

4.226 The Rules in this Chapter –

- (a) relate to the leave required under section 216 (restriction on re-use of name of company in insolvent liquidation) for a person to act as mentioned in section 216(3) in relation to a company with a prohibited name,
- (b) prescribe the cases excepted from that provision, that is to say, those in which a person to whom the section applies may so act without that leave, and
- (c) apply to all windings up to which section 216 applies, whether or not the winding up commenced before the coming into force of the Rules.

Rule 4.227 Application for leave under sec. 216(3)

4.227 When considering an application for leave under section 216, the court may call on the liquidator, or any former liquidator, of the liquidating company for a report of the circumstances in which that company became insolvent, and the extent (if any) of the applicant's apparent responsibility for its doing so.

Rule 4.228 First excepted case

4.228(1) [Notice to creditors] Where a company ("the successor company") acquires the whole, or substantially the whole, of the business of an insolvent company, under arrangements made by an insolvency practitioner acting as its liquidator, administrator or administrative receiver, or as supervisor of a voluntary arrangement under Part I of the Act, the successor company may for the purposes of section 216 give notice under this Rule to the insolvent company's creditors.

4.228(2) [Time for notice and contents] To be effective, the notice must be given within 28 days from the completion of the arrangements, to all creditors of the insolvent company of whose address the successor company is aware in that period: and it must specify –

- (a) the name and registered number of the insolvent company and the circumstances in which its business has been acquired by the successor company,
- (b) the name which the successor company has assumed, or proposes to assume for the purpose of carrying on the business, if that name is or will be a prohibited name under section 216, and

- (c) any change of name which it has made, or proposes to make, for that purpose under section 28 of the Companies Act.

4.228(3) [Notice may name director etc.] The notice may name a person to whom section 216 may apply as having been a director or shadow director of the insolvent company, and give particulars as to the nature and duration of that directorship, with a view to his being a director of the successor company or being otherwise associated with its management.

4.228(4) [Effect of notice] Where a person to whom section 216 applies as having been a director or shadow director of the liquidating company applies for leave of the court under that section not later than 7 days from the date on which the company went into liquidation, he may, during the period specified in paragraph (2) below, act in any of the ways mentioned in section 216(3), notwithstanding that he has not the leave of the court under that section.

Rule 4.229 Second excepted case

4.229(1) [Where director applies for leave] Where a person to whom section 216 applies as having been a director or shadow director of the liquidating company applies for leave of the court under that section not later than 7 days from the date on which the company went into liquidation, he may, during the period specified in paragraph (2) below, act in any of the ways mentioned in section 216(3), notwithstanding that he has not the leave of the court under that section.

4.229(2) [Period in r. 4.229(1)] The period referred to in paragraph (1) begins with the day on which the company goes into liquidation and ends either on the day falling six weeks after that date or on the day on which the court disposes of the application for leave under section 216, whichever of those days occurs first.

Rule 4.230 Third excepted case

4.230 The court's leave under section 216(3) is not required where the company there referred to, though known by a prohibited name within the meaning of the section –

- (a) has been known by that name for the whole of the period of 12 months ending with the day before the liquidating company went into liquidation, and
- (b) has not at any time in those 12 months been dormant within the meaning of section 252(5) of the Companies Act.

PART XXI – Offences and Penalties

SECTION 373 PENALTY FOR FAILURE TO COMPLY WITH ACT

373(1) [\$5,000 fine] A person convicted of an offence against any of the following sections is liable to a fine not exceeding \$5,000:

- (1) Section 25(5)(a) (which relates to the use of a company name):
- (2) Section 47(7) (which relates to the consideration for which shares are issued):
- (3) Section 49(5) (which relates to the consideration for which convertible securities, options, and shares are issued):
- (4) Section 52(5) (which relates to distributions to shareholders):
- (5) Section 60(7) (which relates to offers to shareholders to acquire shares):
- (6) Section 612(9) (which relates to the procedure for making a certain type of offer to shareholders):
- (7) Section 61(10)(a) (which relates to the procedure for making a certain type of offer to shareholders):
- (8) Section 63(9) (which relates to stock exchange acquisitions of a company's own shares subject to prior notice to shareholders):
- (9) Section 65(3)(a) (which relates to stock exchange acquisitions of a company's own shares without prior notice to shareholders):
- (10) Section 69(6) (which relates to the redemption of shares at the option of a company):
- (11) Section 70(4) (which relates to the requirement for a company to satisfy the solvency test on the redemption of shares):
- (12) Section 71(8) (which relates to special redemptions of shares):
- (13) Section 71(9)(a) (which relates to special redemptions of shares):
- (14) Section 76(7) (which relates to offers of financial assistance to acquire shares):
- (15) Section 77(4) (which relates to the requirement to satisfy the solvency test):
- (16) Section 78(8) (which relates to offers of financial assistance in certain cases):
- (17) Section 78(9)(a) (which relates to offers of financial assistance in certain cases):
- (18) Section 80(2)(a) (which relates to the provision of financial assistance not exceeding 5 percent of shareholders' funds):
- (19) Section 83(5)(a) (which relates to statements of shareholder rights):
- (20) Section 84(6)(a) (which relates to the transfer of shares):
- (21) Section 85(2)(a) (which relates to the transfer of shares under an approved system):
- (22) Section 95(7)(a) (which relates to share certificates):

- (23) Section 108(6) (which relates to the requirement to satisfy the solvency test):
- (24) Section 122(7)(a) (which relates to resolutions in lieu of meetings):
- (25) Section 218(2)(a) (which relates to the obligation to provide copies of documents):
- (26) Section 221(6) (which relates to approval of an amalgamation proposal):
- (27) Section 222(6) (which relates to short form amalgamations):
- (28) Section 243(10) (which relates to the duty of a liquidator to summon meetings of creditors).

373(2) [\$10,000 fine] A person convicted of an offence against any of the following sections of this Act is liable to a fine not exceeding \$10,000:

- (a) Section 34(3) (which relates to an alteration to the constitution of a company by the Court):
- (b) Section 87(4)(a) (which relates to the obligation to keep a share register):
- (c) Section 88(5)(a) (which relates to the place where the share register must be kept):
- (d) Section 90(2) (which relates to the duties of directors in relation to the share register):
- (e) Section 140(4) (which relates to the disclosure of directors' interests):
- (f) Section 179(8) (which relates to disclosure and use of information obtained in the course of an investigation):
- (g) Section 189(5)(a) (which relates to company records):
- (h) Section 195(3)(a) (which relates to the place where accounting records must be kept):
- (i) Section 196(7)(a) (which relates to the appointment of an auditor):
- (j) Section 206(4) (which relates to access to information by auditors):
- (k) Section 215(2)(a) (which relates to public inspection of company records):
- (l) Section 216(2)(a) (which relates to inspection of company records by shareholders):
- (m) Section 250(7) (which relates to the termination of the liquidation of a company):
- (n) Section 280(3) (which relates to the qualifications of liquidators):
- (o) Section 333(5)(a) (which relates to name reservation by overseas companies):
- (p) Section 334(6)(a) (which relates to the registration of overseas companies):
- (q) Section 339(20)(a) (which relates to changes in the constitution of an overseas company):
- (r) Section 340(6)(a) (which relates to the filing of annual returns by overseas companies):
- (s) Section 365(5) (which relates to the Registrar's powers of inspection):
- (t) Section 366(4) (which relates to the disclosure of information and reports obtained during an investigation):
- (u) Section 381 (which relates to improper use of the word "Limited").

373(3) [\$50,000 fine or two years in prison] A person convicted of an offence against any of the following sections of this Act is liable to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 2 years:

- (a) Section 273(2) (which relates to certain prohibited conduct):
- (b) Section 274(2) (which relates to the duty to identify and deliver property).

373(4) [Five years in prison or \$200,000 fine] A person convicted of an offence against any of the following sections of this Act is liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$200,000:

- (a) Section 304(6) (which relates to false claims by unsecured creditors in liquidations):
- (b) Section 305(11)(which relates to false claims by secured creditors in liquidations):
- (c) Section 377(which relates to false statements):
- (d) Section 378(which relates to the fraudulent use of destruction of property):
- (e) Section 379 (which relates to falsifying records):
- (f) Section 380 (which relates to carrying on business fraudulently):
- (g) Section 382(4) (which relates to persons prohibited from managing companies):
- (h) Section 383(5) (which relates to acting as a director of a company while prohibited by the Court):
- (i) Section 385(9) (which relates to acting as a director of a company or taking part in the management of a company while prohibited by the Registrar).

SECTION 374 PENALTIES THAT MAY BE IMPOSED ON DIRECTORS IN CASES OF FAILURE BY BOARD OR COMPANY TO COMPLY WITH ACT

374(1) [\$5,000 Fine] A director of a company who is convicted of an offence against any of the following sections of this Act is liable to a fine not exceeding \$5,000:

- (a) Section 25(5)(b) (which relates to the use of a company name):
- (b) Section 61(10)(b) (which relates to the procedure for making a certain type of offer to shareholders):
- (c) Section 63(10) (which relates to stock exchange acquisitions of a company's own shares subject to prior notice to shareholders):
- (d) Section 65(3)(b) (which relates to stock exchange acquisitions of a company's own shares without prior notice to shareholders):
- (e) Section 71(9)(b) (which relates to special redemptions of shares):
- (f) Section 78(9)(b) (which relates to offers of financial assistance in certain cases):
- (g) Section 80(2)(b) (which relates to the provision of financial assistance not exceeding 5 percent of shareholders' funds):
- (h) Section 83(5)(b) (which relates to statements of shareholders' rights):
- (i) Section 84(6)(b) (which relates to the transfer of shares):
- (j) Section 85(2)(b) (which relates to the transfer of shares under an approved system):
- (k) Section 95(7)(b) (which relates to share certificates):
- (l) Section 107(8) (which relates to unanimous assent to certain types of action):
- (m) Section 122(7)(b) (which relates to resolutions in lieu of meetings):
- (n) Section 188(6) (which relates to a requirement to change a company's registered office):
- (o) Section 218(2)(b) (which relates to the obligation to provide copies of documents).

374(2) [\$10,000 fine] A director of a company who is convicted of an offence against any of the following sections is liable to a fine not exceeding \$10,000:

- (1) (repealed)
- (2) Section 32(4) (which relates to the adoption and alteration of a constitution):
- (3) Section 33(6) (which relates to a new form of constitution):
- (4) Section 43(2) (which relates to the obligation of the board to deliver a notice of the issue of shares):
- (5) Section 44(5) (which relates to the issue of shares with the approval of shareholders):
- (6) Section 47(9) (which relates to the consideration for which shares are issued):
- (7) Section 49(6) (which relates to the consideration for which convertible securities, options, and shares are issued):
- (8) Section 58(4) (which relates to the acquisition by a company of its own shares):
- (9) Section 87(4)(b) (which relates to the obligation to keep a share register):
- (10) Section 88(5)(b) (which relates to the place where the share register must be kept):
- (11) Section 159(3) (which relates to the obligation to give notice of a change of directors):
- (12) Section 176(4) (which relates to alterations to the constitution of a company by the Court):
- (13) Section 189(5)(b) (which relates to company records):
- (14) Section 190(3) (which relates to the form in which company records are kept):
- (15) Section 194(4) (which relates to the keeping of accounting records):
- (16) Section 195(3)(b) (which relates to the place where accounting records must be kept):
- (17) Section 196(7)(b) (which relates to the appointment of an auditor):
- (18) Section 206(3) (which relates to access to information by auditors):
- (19) Section 207(2) (which relates to the attendance of auditors at meetings of shareholders):
- (20) Section 208(2) (which relates to the duty to prepare an annual report):
- (21) Section 209(3) (which relates to the duty to send an annual report to shareholders):
- (22) Section 210(2) (which relates to the duty to send financial statements to shareholders who elect not to receive an annual report):
- (23) Section 214(10) (which relates to the obligation to file an annual return):
- (24) Section 215(2)(b) (which relates to public inspection of company records):
- (25) Section 216(2)(b) (which relates to inspection of company records by shareholders):
- (26) Section 236(5) (which relates to the approval of arrangements, amalgamations, and compromises by the Court):
- (27) Section 237(3) (which relates to the power of the Court to make additional orders in connection with the approval of an arrangement or amalgamation or compromise):
- (28) Section 333(5)(b) (which relates to name reservation by overseas companies):
- (29) Section 334(6)(b) (which relates to the registration of overseas companies):
- (30) Section 339(2)(b) (which relates to changes in the constitution of an overseas company):
- (31) Section 340(6)(b) (which relates to the filing of annual returns by overseas companies).

SECTION 375 PROCEEDINGS FOR OFFENCES

375(1) [Triable summarily] The offences specified in—

- (a) Subsections(1), (2), and(3) of section 373 of this Act; and
- (b) Section 374 of this Act—

are triable summarily.

375(2) [Triable on indictment] The offences specified in subsection(4) of section 373 of this Act are triable on indictment.

375(3) [Time limit] Notwithstanding anything to the contrary in the Summary Proceedings Act 1957, any information for an offence referred to in subsection(1) of this section may be laid at any time within 3 years after the date of the offence.

375(4) [Other liability unaffected, but no double conviction] Nothing in sections 377 to 380 of this Act affects the liability of any person under any other Act, but no person shall be convicted of an offence against any of those sections and a provision of any other Act in respect of the same conduct.

SECTION 376 DEFENCES

376(1) [Defences relating to board's duty] It is a defence to a director charged with an offence in relation to a duty imposed on the board of a company if the director proves that—

- (a) The board took all reasonable and proper steps to ensure that the requirements of this Act would be complied with; or
- (b) He or she took all reasonable and proper steps to ensure that the board complied with the requirements of this Act; or
- (c) In the circumstances he or she could not reasonably have been expected to take steps to ensure that the board complied with the requirements of this Act.

376(2) [Defences relating to company's duty] It is a defence to a director charged with an offence in relation to a duty imposed on the company if the director proves that—

- (a) The company took all reasonable and proper steps to ensure that the requirements of this Act would be complied with; or
- (b) He or she took all reasonable steps to ensure that the company complied with the requirements of this Act; or
- (c) In the circumstances he or she could not reasonably have been expected to take steps to ensure that the company complied with the requirements of this Act.

SECTION 377 FALSE STATEMENTS

377(1) [Statements with respect to documents] 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 in it that is false or misleading in a material particular knowing it to be false or misleading; or
- (b) Omits, or authorises the omission from it of, any matter knowing that the omission makes the document false or misleading in a material particular—

commits an offence, and is liable on conviction to the penalties set out in section 373(4) of this Act.

377(2) [Statements relating to company affairs] 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, liquidation committee, or receiver or manager of property of the company; or
- (c) If the company is a subsidiary, a director, employee, or auditor of its holding company; or
- (d) A stock exchange or an officer of a stock exchange,—

knowing it to be false or misleading, commits an offence, and is liable on conviction to the penalties set out in section 373(4) of this Act.

377(3) [Interpretation] For the purposes of this section, a person who voted in favour of the making of a statement at a meeting is deemed to have authorised the making of the statement.

SECTION 378 FRAUDULENT USE OR DESTRUCTION OF PROPERTY

378 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 a use or purpose other than the use or purpose of the company; or
- (b) Fraudulently conceals or destroys property of the company—

commits an offence, and is liable on conviction to the penalties set out in section 373(4) of this Act.

SECTION 379 FALSIFICATION OF RECORDS

379(1) [Offences in relation to documents] Every director, employee, or shareholder of a company who, with intent to defraud or deceive a person,—

- (a) Destroys, parts with, mutilates, alters, or falsifies, or is a party to the destruction, mutilation, alternation, or falsification of any register, accounting records, book, paper, or other document belonging or relating to the company; or
- (b) Makes, or is a 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 the penalties set out in section 373(4) of this Act.

379(2) [Offences in relation to devices for keeping, etc, documents] Every person who, in relation to a mechanical, electronic, or other device 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,—

- (a) Records or stores in the device, or makes available to a person from the device, 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 matter recorded or stored in the device, or fails or omits to record or store any matter in the device—

commits an offence, and is liable on conviction to the penalties set out in section 373(4) of this Act.

SECTION 380 CARRYING ON BUSINESS FRAUDULENTLY

380(1) [Carrying on business fraudulently] Every person who is knowingly a party to a company carrying on business with intent to defraud creditors of the company or any other person or for a fraudulent purpose commits an offence and is liable on conviction to the penalties set out in section 373(4) of this Act.

380(2) [Inducing giving credit; certain dealings with property] Every director of a company who, —

- (a) By false pretences or other fraud induces a person to give credit to the company; or
- (b) With intent to defraud creditors of the company, —
 - (i) Gives, transfers, or causes a charge to be given on, property of the company to any person; or
 - (ii) Causes property to be given or transferred to any person; or
 - (iii) Caused or was a party to execution being levied against property of the company —

commits an offence and is liable on conviction to the penalties set out in section 373(4) of this Act.

SECTION 381 IMPROPER USE OF "LIMITED"

381 Any person who, not being incorporated with limited liability, whether alone or with other persons, carries on business under a name or title of which "Limited" or a contraction or imitation of that word is the last word, commits an offence and is liable on conviction to the penalty set out in section 373(2) of this Act.

SECTION 382 PERSONS PROHIBITED FROM MANAGING COMPANIES

382(1) [Persons prohibited] Where —

- (a) A person has been convicted on indictment of any offence connected with the promotion, formation, or management of a company; or
- (b) A person has been convicted of an offence under any of sections 377 to 380 of this Act or of any crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961; or
- (c) A judgment has been obtained in an action under Part I of the Securities Amendment Act 1988 against a person as an insider (within the meaning of that Part of that Act), —

that person shall not, during the period of 5 years after the conviction or the judgment, be a director or promoter of, or in any way whether directly or indirectly be concerned or take part in the management of, a company, unless that person first obtains the leave of the Court which may be given on such terms and conditions as the Court thinks fit.

382(2) [Applicant's duty to notify Registrar] A person intending to apply for the leave of the Court under this section shall give to the Registrar not less than 10 days' notice of that person's intention to apply.

382(3) [Registrar, etc, may attend hearing] The Registrar, and such other persons as the Court thinks fit, may attend and be heard at the hearing of any application under this section.

382(4) [Offence] A person who acts in contravention of this section, or of any order made under this section, commits an offence and is liable on conviction to the penalty set out in section 373(4) of this Act.

382(5) ["Company"] In this section, the term "company" includes an overseas company that carries on business in New Zealand.

SECTION 383 COURT MAY DISQUALIFY DIRECTORS

383(1) [Exclusion from management of company] Where –

- (a) A person has been convicted on indictment of an offence in connection with the promotion, formation, or management of a company, or has been convicted of a crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961; or
- (b) A person has committed an offence for which the person is liable (whether convicted or not) under this Part of this Act; or
- (c) 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, where the company has failed to so comply, persistently failed to take all reasonable steps to obtain such compliance; or
 - (ii) Been guilty of fraud in relation to the company or of a breach of duty to the company, or a shareholder; or
 - (iii) Acted in a reckless or incompetent manner in the performance of his or her duties as director; or
- (d) A judgment has been obtained in an action under Part I of the Securities Amendment Act 1988 against a person as an insider (within the meaning of that Part of that Act); or
- (e) A person has become of unsound mind, –

the Court may make an order that the person must not, without the leave of the Court, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company for such period not exceeding 10 years as may be specified in the order.

383(2) [Notice of application] 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.

383(3) [Applications, persons entitled to apply, procedure] 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 a person who is, or has been, a shareholder or creditor of the company; and on the hearing of –

- (a) An application for an order under this section by the Registrar or the Official Assignee or the liquidator; or
- (b) An 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 must appear and call the attention of the Court to any matters which seem to him or her to be relevant, and may give evidence or call witnesses.

383(4) [Order] An order may be made under this section even though the person concerned may be criminally liable in respect of the matters on the ground of which the order is to be made.

383(5) [Notice] The Registrar of the Court must, as soon as practicable after the making of an order under this section, give notice to the Registrar that the order has been made and the Registrar must give notice in the *Gazette* of the name of the person against whom the order is made.

383(6) [Offence] Every person who acts in contravention of an order under this section commits an offence and is liable on conviction to the penalties set out in section 373(4) of this Act.

383(7) [Overseas companies included] In this section, "company" includes an overseas company.

SECTION 384 LIABILITY FOR CONTRAVENING SECTIONS 382 AND 383

384 A person who acts as a director of a company in contravention of section 382 of this Act or an order made under section 383 of this Act is personally liable to –

- (a) A liquidator of the company for every unpaid debt incurred by the company; and
 - (b) A creditor of the company for a debt to that creditor incurred by the company –
- while that person was so acting.

SECTION 385 REGISTRAR MAY PROHIBIT CERTAIN PERSONS FROM MANAGING COMPANIES

385(1) [Application] This section applies in relation to a company –

- (a) That has been put into liquidation because of its inability to pay its debts as and when they became due:
- (b) That has ceased to carry on business because of its inability to pay its debts as and when they became due:
- (c) In respect of which execution is returned unsatisfied in whole or in part:
- (d) In respect of the property of which a receiver, or a receiver and manager, has been appointed by a court or pursuant to the powers contained in an instrument, whether or not the appointment has been terminated:
- (e) In respect of which, or the property of which, a person has been appointed as a receiver and manager, or a judicial manager, or a statutory manager, or as a manager,

or to exercise control, under or pursuant to any enactment, whether or not the appointment has been terminated:

- (f) That has entered into a compromise or arrangement with its creditors.

385(2) [Application where company liquidated] This section also applies in relation to a company the liquidation of which has been completed whether or not the company has been removed from the New Zealand register.

385(3) [Prohibition by written notice] The Registrar may, by notice in writing given to a person, prohibit that person from being a director or promoter of a company, or being concerned in, or taking part, whether directly or indirectly, in the management of, a company during such period not exceeding 5 years after the date of the notice as is specified in the notice. Every notice shall be published in the *Gazette*.

385(4) [Who may be prohibited] The power conferred by subsection (3) of this section may be exercised in relation to –

- (a) Any person who the Registrar is satisfied was, within a period of 5 years before a notice was given to that person under subsection (5) of this section (whether that period commenced before or after the commencement of this section), a director of, or concerned in, or a person who took part in, the management of, a company in relation to which this section applies if the Registrar is also satisfied that the manner in which the affairs of it were managed was wholly or partly responsible for the company being a company in relation to which this section applies; or
- (b) Any person who the Registrar is satisfied was, within a period of 5 years before a notice was given to that person under subsection (5) of this section (whether that period commenced before or after the commencement of this section), a director of, or concerned in, or a person who took part in, the management of, 2 or more companies to which this section applies, unless that person satisfies the Registrar –
 - (i) That the manner in which the affairs of all, or all but one, of those companies were managed was not wholly or partly responsible for them being companies in relation to which this section applies; or
 - (ii) That it would not be just or equitable for the power to be exercised.

385(5) [Prior notice and Commission's authorisation] The Registrar must not exercise the power conferred by subsection (3) of this section unless –

- (a) Not less than 10 working days' notice of the fact that the Registrar intends to consider the exercise of it is given to the person and the Registrar considers any representations made by the person; and
- (b) The Securities Commission, after considering the information in the Registrar's possession, any representations made by the person concerned to the Registrar, and if the Commission thinks fit, any representations made by that person to the Commission, authorises the Registrar to exercise the power.

385(6) [Prohibition] No person to whom a notice under subsection (3) of this section applies shall be a director or promoter of a company, or be concerned or take part (whether directly or indirectly) in the management of a company.

385(7) [Effect of appeal, etc, on notice] Where a person to whom the Registrar has issued a notice under subsection (3) of this section appeals against the issue of the notice under this Act or otherwise seeks judicial review of the notice, the notice remains in full force and effect pending the determination of the appeal or review, as the case may be.

385(8) [Power to revoke or exempt] The Registrar may, by notice in writing to a person to whom a notice under subsection (3) of this section has been given, —

- (a) Revoke that notice; or
- (b) Exempt that person from the notice in relation to a specified company or companies.

Every such notice shall be published in the *Gazette*.

385(9) [Offence] Every person to whom a notice under subsection (3) of this section is given who fails to comply with the notice commits an offence and is liable on conviction to the penalties set out in section 373(4) of this Act.

385(10) ["Company"] In this section, "company" includes an overseas company that carries on business in New Zealand.

SECTION 386 LIABILITY FOR CONTRAVENING SECTION 385

386 A person who acts in contravention of a notice under section 385 of this Act is personally liable to —

- (a) A liquidator of the company for every unpaid debt incurred by the company; and
- (b) A creditor of the company for a debt to that creditor incurred by the company —

while that person was so acting.

1989, No 11

An Act to enable the Registrar of Companies to determine whether corporations are at risk, to enable action to be taken in relation to such corporations in appropriate cases, and to repeal the Companies Special Investigations Act 1958
[22 March 1989]

BE IT ENACTED by the Parliament of New Zealand as follows:

SECTION 1 SHORT TITLE

1 This Act may be cited as the Corporations (Investigation and Management) Act 1989.

SECTION 2 INTERPRETATION

2(1) **[Definitions]** In this Act, unless the context otherwise requires, —

"**Corporation**" means a body of persons, whether incorporated or not, and whether incorporated or established in New Zealand or elsewhere:

"**Court**" means the High Court:

"**Document**" means a document in any form whether signed or initialled or otherwise authenticated by its maker or not; and includes —

- (a) Any writing on any material:
- (b) Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored:
- (c) Any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means:
- (d) Any book, map, plan, graph, or drawing:
- (e) 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 some other equipment) of being reproduced:

"**Information**" includes data, documents, and forecasts:

"**Minister**" means the Minister of Justice:

"**Person**" includes a body of persons whether incorporated or not:

"**Registrar**" means the Registrar of Companies and includes a Deputy Registrar:

"**Subsidiary**" means, in relating to a corporation that is a company registered under the Companies Act 1955, a subsidiary within the meaning of sections 158 and 158A of

that Act, and in all other cases, a subsidiary within the meaning of sections 5 and 6 of the Companies Act 1993.

2(2) [Associated person] For the purposes of this Act, a person is an "associated person" of a corporation if –

- (a) That person directly or indirectly controls the management of the corporation; or
- (b) That person owns directly or indirectly, –
 - (i) In the case of a corporation that is a company registered under the Companies Act 1955, 20 percent or more in normal value of the equity share capital (as defined in section 158 of that Act) of the corporation; or
 - (ii) In all other cases, 20 percent of the issued shares of the corporation, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital:
- (c) The corporation directly or indirectly controls that person; or
- (d) The corporation owns directly or indirectly, –
 - (i) In the case of a person that is a company registered under the Companies Act 1955, 20 percent or more of the equity share capital (as defined in section 158 of the Companies Act 1955) of that person; or
 - (ii) In all other cases, 20 percent or more of the issued shares of that person, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital.

2(3) [Associated person] For the purposes of Part I of this Act an "associated person" of a corporation also includes a person who is substantially indebted to the corporation.

2(4) [Application of Act where business or assets in New Zealand] Where a body corporate incorporated outside New Zealand or, as the case may be, any unincorporated body having its head office or principal place of business outside New Zealand, carries on business or has assets in New Zealand, the provisions of this Act shall apply in respect of that business or those assets as if the business were carried on, or the assets were held, by a separate person.

SECTION 3 ACT TO BIND THE CROWN

3 This Act shall bind the Crown.

SECTION 4 APPLICATION OF ACT

4 This Act applies to any corporation –

- (a) That is, or may be, operating fraudulently or recklessly; or
- (b) To which it is desirable that this Act should apply –
 - (i) For the purpose of preserving the interests of the corporation's members or creditors; or
 - (ii) For the purpose of protecting any beneficiary under any trust administered by the corporation; or
 - (iii) For any other reason in the public interest, –

if those members or creditors or beneficiaries or the public interest cannot be adequately protected under the Companies Act 1955 or the Companies Act 1993 or in any other lawful way.

SECTION 5 GENERAL OBJECTS OF ACT

5(1) [General objects] The general objects of this act are—

- (a) To confer powers on the Registrar of Companies to obtain information concerning, and to investigate the affairs of, corporations to which this Act applies:
- (b) In the case of a corporation that is, or may be, operating fraudulently or recklessly, to limit or prevent—
 - (i) The risk of further deterioration of the financial affairs of that corporation; and
 - (ii) The carrying out, or the effects of, any fraudulent act or activity:
- (c) In the case of a corporation referred to in section 4(b) of this Act, to preserve the interests of its members or creditors or beneficiaries of the public interest:
- (d) To provide for the affairs of corporations to which this Act applies to be dealt with in a more orderly and expeditious way.

5(2) [Exercise of powers in accordance with general objects] The powers conferred on the Governor-General, the Minister, the Securities Commission, and the Registrar shall be exercised in accordance with the general objects of this Act.

SECTION 6 MEANING OF "OPERATING FRAUDULENTLY OR RECKLESSLY"

- 6** For the purposes of this Act, a corporation is operating fraudulently or recklessly if—
- (a) It contracts debts which the officers of the corporation did not, at the time the debts were contracted, honestly believe on reasonable grounds the corporation would be able to pay when they fell due for payment as well as all its other debts (including future and contingent debts); or
 - (b) It carries on any business or operates in a reckless manner; or
 - (c) It carries on any business or operates with intent to defraud its creditors or members or the creditors or members of any other person, or for any other fraudulent purposes.

SECTION 7 NO OBLIGATION ON REGISTRAR TO SUPERVISE

7 Nothing in this Act shall be regarded as imposing on the Registrar, or any other person, any duty or obligation—

- (a) To supervise the affairs of any corporation; or
- (b) To apply or operate any system of supervision of any class of corporations or of corporations generally; or
- (c) To exercise any power conferred by this Act in respect of any particular corporation.

SECTION 8 CONSULTATION WITH RESERVE BANK

8(1) [Definitions] For the purposes of this section –

"**Registered bank**" means a registered bank within the meaning of section 2 of the Reserve Bank of New Zealand Act 1989:

"**Specified institution**" means a person that continues to be subject to Part VC of the Reserve Bank of New Zealand Act 1964 by virtue of section 190 of the Reserve Bank of New Zealand Act 1989.

8(2) [Registrar to consult with Reserve Bank] The Registrar shall consult with the Reserve Bank before –

- (a) Giving a written notice requiring any registered bank or specified institution to supply any information under section 9 of this Act:
- (b) Appointing any person to carry out an investigation of the affairs of any registered bank or specified institution under section 19 of the Act:
- (c) Giving a written notice to any registered bank or specified institution that it is considered to be a corporation at risk.

8(3) [Securities Commission to consult with Reserve Bank] The Securities Commission shall consult with the Reserve Bank before making a recommendation to the Minister under section 38 of this Act in respect of any registered bank or specified institution.

PART 1 – SUPPLY OF INFORMATION BY, AND INVESTIGATION OF AFFAIRS OF, CORPORATIONS

Power to request information

SECTION 9 REGISTRAR OF COMPANIES MAY REQUIRE CORPORATION OR ASSOCIATED PERSON TO SUPPLY INFORMATION

9(1) [Written notice to supply information] The Registrar may, by notice in writing to any corporation or any associated person of a corporation, require that corporation or associated person to supply to the Registrar such information relating to the business, operation, or management of that corporation for such periods and in such form as may be specified in the notice.

9(2) [Offence] Every corporation and every associated person commits an offence against this Act if, without lawful justification or excuse, it—

- (a) Fails to comply in any respect with any of the provisions of this section, or with any of the requirements of the Registrar under this section or section 10 of this Act; or
- (b) Supplies any information which it is required to supply under this section which is false or misleading in a material particular.

SECTION 10 REQUIREMENT THAT INFORMATION BE AUDITED

10 The Registrar may, by notice in writing to a corporation or an associated person of a corporation, require any information which that corporation or associated person is required to supply pursuant to section 9 of this Act to be audited by an auditor approved by the Registrar.

SECTION 11 DISCLOSURE OF INFORMATION TO REGISTRAR BY TRUSTEES OR STATUTORY SUPERVISORS

11 Every person who holds, or at any time has held, office under the Securities Act 1978 as a trustee or statutory supervisor for the holders of any securities issued by a corporation shall disclose to the Registrar information relating to the affairs of that corporation obtained in the course of holding that office if, in the opinion of that person,—

- (a) The corporation is insolvent or is likely to become insolvent or is in serious financial difficulties; or
- (b) The corporation has breached, or is likely to breach, in a significant respect,—
 - (i) The terms of the trust deed or deed of participation; or
 - (ii) The terms of the offer of the securities; or
 - (iii) The disclosure of the information is likely to assist, or be relevant to, the exercise of powers under this Act.

SECTION 12 TRUSTEE OR STATUTORY SUPERVISOR TO INFORM CORPORATION OF INTENTION TO DISCLOSE

12 Every trustee or statutory supervisor shall, before disclosing any information to the Registrar under section 11 of this Act, take reasonable steps to inform the corporation of the intention to disclose information and the nature of that information.

SECTION 13 DISCLOSURE OF INFORMATION TO REGISTRAR BY AUDITORS

13 Every person who holds, or at any time has held, office as auditor of a corporation, or of an associated person of a corporation, pursuant to any enactment shall disclose to the Registrar, if requested to do so by the Registrar by notice in writing, information relating to the affairs of that corporation obtained in the course of holding that office, in such form as may be specified in the notice.

SECTION 14 REGISTRAR TO INFORM CORPORATION OF INTENTION TO REQUEST INFORMATION FROM AUDITOR

14 The Registrar shall, before requesting an auditor to disclose information pursuant to section 13 of this Act, take reasonable steps to inform the corporation of the Registrar's intention to do so and the nature of the information sought.

SECTION 15 PROTECTION OF TRUSTEES, STATUTORY SUPERVISORS, AND AUDITORS

15(1) [No civil, criminal or disciplinary proceedings] No civil, criminal, or disciplinary proceedings shall lie against any trustee, statutory supervisor, or auditor arising from the disclosure in good faith of information to the Registrar pursuant to section 11 or section 13 of this Act.

15(2) [No professional misconduct order] No tribunal, body, or authority, having jurisdiction in respect of the professional conduct of any trustee, statutory supervisor, or auditor shall make any order against, or do any fact in relation to, that person in respect of the fact of such disclosure.

15(3) [Information not admissible in proceedings against] No information received by the Registrar pursuant to section 12 or section 13 of this Act shall be admissible as evidence in any proceedings against the trustee, statutory supervisor, or auditor concerned.

15(4) [Admissibility of other information not limited] Nothing in subsection (3) of this section shall limit the admissibility of any information obtained in any other way.

SECTION 16 TERMS OF NOTICES

16(1) [Information to be supplied at specified time and place] Information required to be supplied, pursuant to section 9 or section 13 of this Act, by a corporation or an associated person

or an auditor shall be supplied to the Registrar at such time and at such place as may be specified in the notice.

16(2) [Revocation, variation or amendment] A notice given pursuant to section 9 or section 13 of this Act may, by a subsequent notice, be revoked, varied, or amended by the Registrar.

Powers to obtain information and documents

SECTION 17 POWERS TO OBTAIN INFORMATION AND DOCUMENTS

17(1) [Entry and search powers] Where the Registrar is satisfied –

- (a) That any information supplied to the Registrar by a corporation or an associated person pursuant to this Part of this Act is false or misleading in a material particular; or
- (b) That a corporation or an associated person has failed to comply with any requirements to supply information pursuant to section 9 of this Act –

the Registrar may, –

- (c) By notice in writing to that corporation or associated person, require that corporation or associated person to supply to the Registrar, within the time specified in the notice, such information relating to the business, operation, and management of that corporation as may be specified in the notice; or
- (d) Appoint in writing any person to enter upon and search any premises and inspect, remove, and take copies of any documents, or extracts from documents, relating to the business, operation, and management of that corporation in the possession of, or under the control of, any person and, where necessary, require the reproduction in usable form of any information recorded or stored in those documents.

17(2) [Offence] Every person commits an offence against this Act who, without lawful justification or excuse, hinders, obstructs, or delays, in the conduct of any inspection pursuant to this section, any person duly authorised to make the inspection.

17(3) [Offence] A corporation or an associated person commits an offence against this Act if, without lawful justification or excuse, –

- (a) It fails to comply with any requirement of the Registrar under subsection (1)(c) of this section; or
- (b) It supplies any information required to be supplied pursuant to subsection (1)(c) of this section that is false or misleading in a material particular.

SECTION 18 REQUIREMENTS ON ENTERING AND SEARCHING PREMISES

18(1) [Consent or warrant required] No person pursuant to section 17(1)(d) of this Act shall enter upon and search any premises, or inspect, remove, or take copies of any documents, or extracts from documents, in the possession of, or under the control of, any person, or require the reproduction in usable form of any information recorded or stored in any documents, unless –

- (a) The occupier of the premises or the person who has possession of the documents agrees; or
- (b) That person obtains a warrant under section 24 of this Act.

18(2) [Evidence of authority and identity] Every person authorised to enter upon and search any premises pursuant to a warrant obtained under section 24 of this Act shall, on first entering those premises, and, if requested, at any subsequent time, produce—

- (a) Evidence of that person's authority to enter the premises; and
- (b) Evidence of that person's identity.

Investigations

SECTION 19 INVESTIGATION OF AFFAIRS OF CORPORATION

19 Where it is necessary or desirable for the purpose of determining whether to exercise the powers conferred under Part II or Part III of this Act that an investigation of the affairs of any corporation should be carried out, the Registrar may appoint in writing any person to carry out an investigation of the affairs of that corporation.

SECTION 20 OFFENCE TO HINDER INVESTIGATION, ETC

20(1) [Offence] Every person commits an offence against this Act who, without lawful justification or excuse,—

- (a) Hinders, obstructs, or delays in the conduct of an investigation, any person appointed under section 19 of this Act to carry out an investigation; or
- (b) Refuses to answer any question put to him or her by any person; or
- (c) Supplies any information required to be supplied pursuant to section 21(1) of this Act which is false or misleading in a material particular.

20(2) [Offence] A corporation commits an offence against this Act if, without lawful justification or excuse,—

- (a) It fails to comply with any requirement of a person appointed under section 19 of this Act to carry out an investigation; or
- (b) It supplies any information required to be supplied pursuant to section 21(1) of this Act which is false or misleading in a material particular.

20(3) [Statement not admissible in criminal proceedings] A statement made by any person in answer to any question put by a person appointed under section 19 of this Act to carry out an investigation of the affairs of a corporation shall not be admissible in criminal proceedings against the maker of the statement.

SECTION 21 POWERS OF PERSON APPOINTED TO CARRY OUT INVESTIGATION

21(1) [Investigation may require information, etc] Any person appointed under section 19 of this Act may, for the purposes of carrying out an investigation of the affairs of a corporation,—

- (a) By notice in writing, require that corporation or any officer or employee of that corporation or any associated person or any other person to—
 - (i) Supply any information relating to the business, operation, and management of the corporation:
 - (ii) Produce for inspection any documents of, or relating to, the business, operation, and management of that corporation in the custody, or under the control, of that corporation, officer, employee, or person:
 - (iii) Where necessary, reproduce in usable form any information recorded or stored in such documents:
- (b) Take copies of any documents produced for inspection under paragraph (a) of this subsection:
- (c) Require any officer or employee of that corporation, or any associated person, or any other person, to answer any question relating to the business, operation, and management of that corporation.

21(2) [Entry and search] Subject to section 22 of this Act, any person appointed under section 19 of this Act may, for the purposes of carrying out an investigation of the affairs of the corporation, at any time,—

- (a) Enter upon and search any premises:
- (b) Inspect, remove, and take copies of any documents, or extracts from documents, relating to the business, operation, and management of that corporation in the possession, or under the control, of any person, and where necessary, require the reproduction in usable form of any information recorded or stored in such documents.

SECTION 22 REQUIREMENTS TO BE COMPLIED WITH BY PERSON CARRYING OUT INVESTIGATION

22(1) [Production of instrument of appointment] Any person who exercises any powers conferred by section 21(1) of this Act shall, if requested, produce the instrument of that person's appointment under section 19 of this Act.

22(2) [Consent or warrant before search] No person who exercises any powers conferred by section 21(2) of this Act shall enter upon and search any premises, or inspect, remove, and take copies of any documents or extracts from documents, or require the reproduction in usable form of any information recorded or stored in documents, unless—

- (a) The occupier of the premises or the person who has possession of the documents agrees; or
- (b) That person obtains a warrant under section 24 of this Act.

22(3) [Evidence of authority and identity] Every person authorised to enter upon and search any premises pursuant to a warrant obtained under section 24 of this Act shall on first entering those premises and, if requested, at any subsequent time, produce—

- (a) Evidence of that person's authority to enter the premises; and
- (b) Evidence of that person's identity.

Miscellaneous

SECTION 23 CONFIDENTIALITY OF INFORMATION

23(1) [Application] This section applies to—

- (a) Information supplied or disclosed to, or obtained by,—
 - (i) The Registrar under, or for the purposes of, or in connection with the exercise of powers conferred by, this Part of this Act:
 - (ii) A person authorised by the Registrar under section 17 or section 19 of this Act:
- (b) Information derived from, or based upon, information referred to in paragraph (a) of this subsection:
- (c) Information relating to the exercise, or possible exercise, of the powers conferred by this Part of this Act.

23(2) [Restrictions on disclosure of information] Neither the Registrar, nor any person authorised by the Registrar under section 17 or section 19 of this Act, shall publish or disclose any information to which this section applies except—

- (a) With the consent of the person to whom the information relates:
- (b) To the extent that the information is available to the public under any Act other than the Official Information Act 1982, or in a public document:
- (c) For the purposes of this Act or in connection with the exercise of powers conferred under this Act:
- (d) In connection with any proceedings for an offence against this Act:
- (e) To any person who the Registrar is satisfied has a proper interest in receiving such information.

23(3) [Disclosure subject to provision for confidentiality] No information to which this section applies shall be published or disclosed pursuant to paragraph (e) of subsection (2) of this section unless the Registrar is satisfied that satisfactory provision exists to protect the confidentiality of the information published or disclosed.

23(4) [Restrictions on disclosure of disclosed information] No person to whom any information to which this section applies is published or disclosed pursuant to paragraph (c) of subsection (2) of this section shall publish, disclose, or use such information except—

- (a) For the purposes of this Act or in connection with the exercise of powers conferred by this Act; and
- (b) In accordance with such conditions as may be specified by the Registrar.

23(5) [Restrictions on disclosure of disclosed information] No person to whom any information to which this section applies is published or disclosed pursuant to paragraph (a) or

paragraph (e) of subsection (2) of this section, shall publish, disclose, or use such information unless the publication, disclosure, or use is –

- (a) Authorised by the Registrar; or
- (b) Necessary or desirable in connection with the exercise of any function or power conferred by any enactment.

23(6) [Offence] Every person who contravenes this section commits an offence against this Act.

23(7) [Official Information Act not to apply] Nothing in the Official Information Act 1982 or any other Act, other than this Act, applies to information to which this section applies whether or not such information has been published or disclosed to any person pursuant to this section.

SECTION 24 PROCEDURE FOR OBTAINING WARRANTS

24(1) [Where information false, misleading or not supplied] Where a Judge of the High Court is satisfied, on application in writing made on oath, that there are reasonable grounds for believing –

- (a) That any information supplied to the Registrar by a corporation or an associated person pursuant to this Part of this Act is false or misleading in a material particular; or
- (b) That a corporation or an associated person has failed to comply with any requirement to supply information pursuant to section 9 of this Act –

the Judge may issue a warrant, in terms of section 25 of this Act, to a person appointed pursuant to section 17(1)(d) of this Act.

24(2) [Where investigation necessary] Where a Judge of the High Court is satisfied, on application in writing made on oath, that there are reasonable grounds for believing that it is necessary for the purpose of determining whether to exercise the powers conferred under Part II or Part III of this Act that an investigation of the affairs of a corporation should be carried out, that Judge may issue a warrant, in terms of section 25 of this Act, to a person appointed under section 19 of this Act.

24(3) [Warrant to state paragraph issued under] Every warrant issued under subsection (1) of this section shall state whether it is issued under paragraph (a) or paragraph (b) of that subsection.

SECTION 25 EFFECT OF WARRANT

25(1) [Warrant authorises entry and search] Every warrant issued under section 24 of this Act shall authorise the person named in the warrant, at any time, by force if necessary, to enter upon and search the premises specified in the warrant and inspect, remove, and take copies of any documents, or extracts from documents, relating to the business, operation, and management of that corporation in the possession of, or under the control of, any person and, where necessary, require the reproduction in usable form of any information recorded or stored in such documents.

Part 1 - Supply of information

25(2) [Period in force] Every such warrant shall continue in force for a period of 1 month or until the purpose for which it was granted has been satisfied, whichever is the lesser.

SECTION 26 EFFECT OF PROCEEDINGS

26(1) [Powers and duties continue until final decision] Where any person commences any proceedings in any court in respect of -

- (a) The exercise of any powers conferred by this Part of this Act; or
- (b) The discharge of any duty imposed by this Part of this Act, -

until a final decision in relation to those proceedings is given, the powers or duty may be, or may continue to be, exercised or discharged as if no such proceedings had been commenced, and no person shall be excused or discharged as if no such proceedings had been commenced, and no person shall be excused from fulfilling any obligation under this Part by reason of those proceedings.

26(2) [Application of section] This section shall apply notwithstanding any other provision of any Act or any rule of law.

SECTION 27 EFFECT OF FINAL DECISION THAT EXERCISE OF POWERS UNDER SECTION 17 UNLAWFUL

27 In any case where it is declared, in a final decision given in any proceedings in respect of the exercise of any powers conferred by section 17 of the Act that the exercise of any powers conferred by that section is unlawful, to the extent to which the exercise of those powers is declared unlawful, -

- (a) The Registrar shall ensure that forthwith after the decision of the court is given -
 - (i) Any information supplied by the corporation or an associated person pursuant to section 17(1)(c) of this Act, and any record of such information, is destroyed:
 - (ii) Any documents, or extracts from documents, obtained pursuant to an inspection made under section 17(1)(d) of this Act are returned to the person previously having possession of those documents, or previously having them under his or her control, and any copies of such documents or extracts are destroyed:
 - (iii) Any information derived from or based upon such information, documents, or extracts is destroyed:

- (b) No information supplied by the corporation or an associated person pursuant to section 17(1)(c) of this Act, and no documents, or extracts from documents, obtained pursuant to an inspection made under section 17(1)(d) of this Act, and no record of any such information or documents, shall be -
 - (i) Admissible in evidence in any proceedings:
 - (ii) Used in connection with the exercise of any power conferred by Part II or Part III of this Act.

SECTION 28 EFFECT OF FINAL DECISION THAT EXERCISE OF POWERS UNDER SECTIONS 19 TO 21 UNLAWFUL

28 In any case where it is declared, in a final decision given in any proceedings in respect of the exercise of any powers conferred by sections 19 to 21 of this Act, that the exercise of any powers conferred by those sections is unlawful, to the extent to which the exercise of those powers is declared unlawful; –

- (a) The Registrar shall ensure that forthwith after the decision of the court is given
 - (i) Any information obtained pursuant to section 21(a) of this Act, and any record of such information, is destroyed:
 - (ii) Any documents, produced for inspection pursuant to section 21(a) of this Act are returned to the person previously having possession of those documents, or previously having the documents under his or her control, and any copies of such documents or extracts from such documents are destroyed:
 - (iii) Any documents, or extracts from documents, obtained pursuant to an investigation made under section 21(2) of this Act are returned to the person previously having possession of those documents, or previously having them under his or her control, and any copies of such documents or extracts are destroyed:
 - (iv) Any information derived from or based upon such information, documents, or extracts is destroyed:
- (b) No information obtained or documents produced for inspection pursuant to section 21(a) of this Act, and no documents, or extracts from documents, obtained pursuant to an investigation made under section 21(2) of this Act, and no record of any such information or documents, shall be –
 - (i) Admissible in evidence in any proceedings:
 - (ii) Used in connection with the exercise of any power conferred by Part II or Part III of this Act.

SECTION 29 SAVING FOR PRIVILEGED COMMUNICATIONS

29 Nothing in this Part of this Act shall be taken to require any person who has acted as a solicitor or a barrister for any person to disclose any privileged communication made to him or her in that capacity.

PART II – CORPORATIONS AT RISK

SECTION 30 REGISTRAR MAY DECLARE CORPORATION TO BE AT RISK

30(1) [Notification that corporation at risk] Where the Registrar has reasonable grounds to believe that any corporation is, or may be a, corporation to which this Act applies, the

Registrar may give written notice to the corporation that it is considered to be a corporation at risk.

30(2) [Notice must state grounds] Every notice given under subsection (1) of this section shall state the grounds on which it is given.

SECTION 31 OBLIGATION TO CONSULT WITH REGISTRAR

31(1) [Corporation must consult with Registrar] Every corporation to whom a notice is given under section 30 of this Act shall forthwith consult with the Registrar -

- (a) As to the circumstances of that corporation; and
- (b) As to the methods of resolving the difficulties of that corporation.

31(2) [Associated person must consult with Registrar] Every associated person of a corporation to whom a notice is given under section 30 of this Act and any officer or employee of any such corporation or associated person, shall, when required to do so by the Registrar by notice in writing to that person, forthwith consult with the Registrar -

- (a) As to the circumstances of that corporation; and
- (b) As to the methods of resolving the difficulties of that corporation.

SECTION 32 POWER OF REGISTRAR TO GIVE ADVICE AND ASSISTANCE

32 Where the Registrar gives notice to a corporation under section 30 of this Act, or gives a notice to an associated person under section 31(2) of this Act, the Registrar may, from time to time, -

- (a) Give advice to the corporation or associated person concerning its affairs;
- (b) Give advice and assistance in connection with the negotiation of any sale or other disposition of the whole or any part of the capital or business undertaking of that corporation or associated person;
- (c) Give advice and assistance in connection with any scheme for resolving the difficulties of that corporation or associated person.

SECTION 33 POWER OF REGISTRAR TO GIVE DIRECTIONS TO CORPORATION DECLARED TO BE AT RISK

33(1) [Directions] The Registrar may, from time to time, with the prior consent of the Securities Commission, give a direction in writing to any corporation to whom a notice has been given under section 30 of this Act requiring it -

- (a) Not to remove from New Zealand, transfer, charge, or otherwise deal with any of its property or funds except with the prior approval of the Registrar and subject to such terms and conditions as the Registrar may specify;
- (b) To place in a trust account any money received for investment;
- (c) To take such other action as is specified in the notice to preserve the interests of the corporation's members and creditors.

33(2) [Amendment of directions] The Registrar may, from time to time, with the prior consent of the Securities Commission, amend any direction.

SECTION 34 PERIOD FOR WHICH DIRECTIONS MAY APPLY

34(1) [Maximum period of 21 days] Every direction under section 33 of this Act shall be expressed to apply for a period not exceeding 21 days.

34(2) [Revocation] A direction may be revoked at any time by the Registrar.

34(3) [Application of trust account money] Any money in a trust account pursuant to section 33(b) of this Act may, after it has ceased to be subject to a direction, be applied for the purposes for which it was received.

34(4) [Application of subsection (3)] Subsection (3) of this section shall not apply if the corporation has been declared to be subject to statutory management.

SECTION 35 OFFENCE TO CONTRAVENE DIRECTIONS, ETC.

35(1) [Offence] Every corporation that acts in contravention of, or fails to comply with, a direction under section 33 of this Act commits an offence against this Act.

35(2) [Offence] Every Officer or employee of a corporation who obstructs, hinders, or prevents that corporation giving effect to any direction commits an offence against this Act.

SECTION 36 OFFENCE TO DISCLOSE THAT CORPORATION DECLARED TO BE AT RISK, ETC.

36(1) [Offence] Subject to subsection (2) of this section, every person who discloses that a notice has been given under section 30 or section 31(2) of this Act commits an offence against this Act.

36(2) [Disclosure permitted in certain circumstances] Nothing in sub-section (1) of this section applies to the disclosure or publication of the fact that a notice has been so given where the disclosure or publication is made –

- (a) To any professional or financial adviser of the corporation or associated person to which the notice relates:
- (b) With the written consent of the Registrar, for the purposes of the sale or other disposition, or the possible sale or other disposition, of the whole or any part of the capital or business undertaking of the corporation or associated person:
- (c) With the written consent of the Registrar, to any person who has a proper interest in knowing that the notice has been given.

SECTION 37 MISCELLANEOUS PROVISIONS RELATING TO NOTICES

37(1) [Notice deemed given on delivery] A notice given under section 30 of this Act to a corporation, or a notice given under section 31(2) of this Act to an associated person, shall be

deemed to have been given upon delivery to the head office, registered office, or principal place of business in New Zealand of the corporation or associated person, as the case may be.

37(2) [Revocation] A notice given under section 30 or section 31(2) of this Act may at any time be revoked by the Registrar.

SECTION 70 PENALTIES FOR OFFENCES

70 Every person who commits an offence against this Act for which no penalty is provided elsewhere than in this section is liable on conviction on indictment, —

- (a) In the case of an individual, to imprisonment for a term not exceeding 12 months, or a fine not exceeding \$10,000:
- (b) In the case of a corporation, to a fine not exceeding \$25,000.