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**COMPANIES AND SECURITIES ADVISORY COMMITTEE**

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**REPORT ON REFORM  
OF THE LAW GOVERNING  
CORPORATE FINANCIAL TRANSACTIONS**

**JULY 1991**

## **COMPANIES AND SECURITIES ADVISORY COMMITTEE**

The Companies and Securities Advisory Committee ("the Advisory Committee") is established under the Australian Securities Commission Act 1989.

Section 148 of this Act specifies the functions of the Committee:

"148(1) - The Advisory Committee's functions are, on its own initiative or when requested by the Minister, to advise the Minister, and to make to the Minister such recommendations as it thinks fit, about any matter connected with:

- (a) a proposal to make a national scheme law, or to make amendments of a national scheme law;
- (b) the operation or administration of a national scheme law;
- (c) law reform in relation to a national scheme law;
- (d) companies, securities or the futures industry; or
- (e) a proposal for improving the efficiency of the securities markets or futures markets."

The members of the Committee as at 30 June 1991 are:

Mark Burrows (Convenor)  
Don Argus  
Tim Besley  
Kevin Driscoll  
William Gurry  
Leigh Hall  
Tony Hartnell  
David Hoare  
Dick Lester  
Wayne Lonergan  
John McIntosh

The members of the Executive of the Committee involved in the preparation of this Report are:

John Kluver (Executive Director)  
Ian Ramsay

**REPORT ON REFORM  
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**The Functions of the Advisory Committee**

The functions of the Advisory Committee, as identified in the enabling legislation, include advising and making recommendations to the Federal Attorney-General on reforming the national scheme laws and improving the efficiency of financial markets. The Committee sees part of this mandate as determining whether these markets operate in compliance with the highest governing standards, and are supported by appropriate legislation. To achieve these goals, the Committee seeks to stimulate and lead the debate on standard enhancement and to propose suitable regulatory reform. This Report of the Committee is in furtherance of these functions.

**Corporate Abuses and Response**

Following the corporate collapses of the 1980s, it has become evident that some corporate controllers abused their positions of trust by arranging for the shifting of assets around and away from companies and corporate groups, and into their own hands. They achieved this by various means, including remuneration payments, asset transfers or loan arrangements, on terms highly advantageous to themselves but to the detriment of these companies. In other instances, substantial inter-corporate loans were entered into with the apparent purpose or effect of disguising the true financial position of individual companies within a group. This was made easier by the lack of any general statutory requirement that shareholders either consent to, or be informed of, these transactions. These abuses generally involved significant losses of corporate funds, with adverse effects on investor and creditor returns and confidence. They also brought into question the integrity of Australian financial markets, with detrimental consequences for the national economy.

Some of these abuses highlighted shortcomings in the existing law; others the inability to counter such misconduct short of complex and costly investigations and litigation after the event. An additional problem was the legal impediments facing shareholders and creditors in obtaining standing to enforce corporate

rights. Some of these abuses also involved possible breaches of the Australian Stock Exchange (ASX) Listing Rules. However doubts about the precise legal status and enforceability of these Listing Rules inhibited prompt and effective remedial action.

The introduction of the new national regulator, the Australian Securities Commission ("ASC"), richer in resources, integrated in administration, and with enhanced investigative and intervention powers, is alleviating the problems associated with enforcement of the law. Also, the rights of standing of private litigants are receiving greater recognition. Nevertheless, greater law enforcement will not overcome the serious deficiencies in the legislation made apparent by these various abuses.

The Advisory Committee has responded to this unfavourable regulatory environment by preparing a Bill for an Act entitled the Corporations Amendment Act (No3) 1991, ("the Bill") which is set out in Annexure A to this Report. This Bill contains detailed procedures to monitor and control those matters which are otherwise vulnerable to abuse by corporate controllers. These matters are:

- loans to directors;
- loans to related and linked companies;
- asset transfers between companies and their associates;
- directors' interests in corporate transactions;
- executive remuneration; and
- benefits arising from corporate asset transfers.

The purpose of the Bill is to ensure that, in regard to these matters, the legitimate interests of companies, their shareholders and creditors are preserved, and that the proper standards of the market are maintained.

The Bill employs three key regulatory mechanisms to overcome possible self-dealing by corporate controllers or the intrusion of other conflict of interest considerations:

- the prohibition of particular loan transactions;
- "arms-length" consent rules; and

- mandatory disclosure of various permitted transactions.

The Committee places particular importance on mandatory disclosure, given the lack of adequate disclosure in the past.<sup>1</sup>

### **Background to the Bill**

In response to growing public concern about these various corporate abuses, the Advisory Committee resolved in September 1989 to examine the current legislation on directors' loans and other transactions where elements of self interest may be involved, and to recommend proposals for reform where needed. In September 1990 the Advisory Committee released for public discussion a draft Corporations Amendment Bill ("the Public Exposure Draft"). The Public Exposure Draft contained proposals to widen extensively the existing provisions of the Corporations Law relating to aspects of corporate financial transactions involving:

- loans to directors and senior officers (currently s 234);
- loans to related and linked companies (currently s 205 in some instances);
- asset transfers between companies and associated persons (currently regulated by the Australian Stock Exchange ("ASX") Listing Rule 3J (3));
- directors' interests in company transactions (currently s 231); and
- executive remuneration (currently s 239).

The Advisory Committee sought, and received, written submissions on the matters raised in the Public Exposure Draft. A list of respondents is set out in Annexure "B" to this Report. In consequence of its further deliberations and consideration of submissions, the Committee prepared the Bill. This differs in various material respects from the earlier Public Exposure Draft.

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<sup>1</sup> I. Ramsay, "Corporate Disclosure of Loans to Directors: Report on an Empirical Study" (1991) 9 Company and Securities Law Journal 80.

The Bill is based on:

- a Report of the Companies and Securities Law Review Committee ("CSLRC"), which was established by the Ministerial Council for the Companies and Securities in 1983 to carry out research and advise on law reform in the area of companies and securities legislation. The Report: "Directors' Statutory Duty to Disclose Interests and Loans to Directors" (1989) ("the CSLRC Report") made recommendations dealing primarily with s 231 of the Corporations Law. These are now included in Division 3 of Part 3.2A of the Bill.
- proposals developed by the Advisory Committee since 1989. These proposed rules are now set out in the other Divisions of Part 3.2A of the Bill. These rules are designed to perform an independent yet complementary function to the existing common law and statutory obligations of directors and other relevant enforcement provisions, which may rely significantly on investigation and/or litigation or prosecution after the event to ensure compliance or redress. The Committee was also concerned that the lack of detailed procedural requirements in the current legislation dealing with loans to directors, and the lack of specific provisions regulating inter-corporate loans, could be interpreted as a statutory licence to make these loans, without sufficient consideration by directors of their legal duties. The proposals to regulate asset transfers are intended to put in statutory form this further incidence of related party transactions where elements of self-interest may be present. They cover various transactions coming within ASX Listing Rule 3J (3) but will apply to a greater number of companies than are subject to the Listing Rules, and will attract criminal and civil liability in the event of breach.

### **Overview of the Bill**

The object of the Bill is the promotion of higher standards in the management of companies. This is identified in s 243A which states that the Bill's purpose is to "give to investors in companies confidence that directors of companies will manage those companies, and the resources of those companies, honestly and diligently". To promote this object, the Bill, in Part 3.2A:

- limits the types of loans that may be given to directors and more closely regulates permitted loans by generally eliminating the rights of directors to vote themselves loans: Division 2 Subdivision A;
- requires the disclosure of loans to other senior officers: Division 2 Subdivision B;
- introduces for the first time specific legislative controls on inter-corporate loans between related or linked companies or asset transfers with associated persons: Division 2 Subdivisions C; D; E; F;
- extends the obligations on directors to disclose their interests in transactions with the company and prohibits them from voting on those transactions at meetings of directors, where they have a material interest: Division 3;
- overhauls the obligations of directors to disclose the benefits they receive from their companies, including those obtained indirectly through "service companies" or "consultancies": Division 4;
- incorporates that part of s 237 of the Corporations Law which provides that a person must not, in connection with the transfer of the whole or a part of the undertaking or property of a company, give a benefit to a person who is connected with the company, unless shareholder approval is obtained: Division 5; and
- contains general disclosure and liability provisions: Division 6, 7.

## **DIVISION 2: TRANSACTIONS WITH CERTAIN OFFICERS AND RELATED ENTITIES**

### **Deficiencies in the existing law**

#### Loans to Directors

These loans fall within s 234 of the Corporations Law. This provision is partly ineffective by virtue of its:

- incomplete coverage, given the limited definition of "loans";
- unsatisfactory categories of permitted loans, in particular the open ended nature of loans "for the purpose of enabling the person properly

to perform duties as an officer of the company" (s 234(3)(c)) and loans by a company "in the ordinary course of its ordinary business" (s 234(3)(f));

- possible circumvention, by arrangement for the recipient not to be a director (under the extended s 60 definition) at the time of making the loan;
- failure to guarantee that complete and accurate information will be provided to shareholders in those circumstances where their consent is required (s 234(3)(e); s 234(4)(a)). For instance under s 234(4)(a), only the "purpose and amount of the loan or the extent of the guarantee or security" need be disclosed. There is no requirement to disclose who are the interested parties; the financial impact of the loan, or whether its terms would be fair and reasonable to the lending company; and
- omission of any provision for the exclusion from voting of interested parties, either at the directors' or shareholders' meeting.

#### Inter-corporate loans:

- except for s 205 (company financing dealings in its own shares) this area lacks specific regulation. Some transactions could be used to the detriment of minority shareholders eg "upstream loans" to a controlling shareholder on the basis of inadequate security or other unfavourable terms to the lender. The interests of minority shareholders particularly may be at risk.

#### Asset transfers:

- apart from general fiduciary duties in s 232, there exists a legislative void. This creates the possibility of "skimming" or "dumping" whereby corporate controllers purchase corporate assets at an undervalue or sell their own assets to the company at an over-value. ASX Listing Rule 3J (3) applies only to listed public companies, and while enforceable under s 777 or s 1114, lacks direct criminal or civil liability for breach. Section 232(2)(6) may provide remedies, but often only after the event.



## **Outline of Division 2**

The major reforms in Division 2 will:

- broaden the class of regulated financial arrangements to include, in addition to loans,:
  - quasi-loans;
  - credit transactions;
  - purchases or options to buy redeemable preference shares in a body corporate, or partly paid shares that attract disproportionate rights; and
  - other arrangements amounting to disguised loans.
- subject to various exemptions, prohibit a company from entering into loans and similar transactions with its directors (and certain other persons linked with its directors) except for:
  - transactions between related bodies corporate;
  - transactions under approved housing assistance or executive share acquisition schemes.

The availability of these two exceptions is subject to a strict approval procedure (for transactions in the first instance, and schemes in the second instance), involving consent by a fully informed general meeting and, in some instances, the ASC.

- the exemptions from the above prohibition on directors' loans are:
  - transactions by exempt companies (including all exempt proprietary companies and other companies having not more than 15 members);
  - certain transactions by financial corporations, including loans not exceeding annual emoluments and loans by banks or life assurance companies on fully commercial terms;
  - transactions approved by 95% of members holding not less than 95% of voting shares in the company;
  - transactions not exceeding \$25,000 or such other prescribed amount; and
  - exceptional other transactions for which ASC approval is obtained.

- subject to various exemptions, prohibit a company from entering into loans and similar transactions with related or linked bodies corporate except in compliance with a strict members' approval structure, similar to that regulating directors loans', involving consent by a fully informed general meeting. Approval by the ASC is not required.
- the exemptions from the above prohibition on certain inter-corporate loans are:
  - transactions by exempt companies (including all exempt proprietary companies and other companies having not more than 15 members);
  - transactions in relation to group bodies corporate (holding companies and wholly owned or closely-held subsidiaries);
  - transactions not exceeding 5% of members funds;
  - transactions by banks and life assurance companies on fully commercial terms; and
  - joint venture transactions.
- subject to various exemptions, prohibit a company from entering into asset transfer transactions with associates, except in compliance with a strict members' approval structure, similar to inter-corporate loans.
- the exemptions from the above prohibition on asset transfers are:
  - transactions by exempt companies (including all exempt proprietary companies and other companies having not more than 15 members);
  - transactions in relation to group bodies corporate;
  - transactions not exceeding 5% of members funds; and
  - joint venture transactions.
- require the prompt disclosure to the ASC of all loans and asset transfers which require the approval of members, and all regulated financial transactions to senior officers (and certain other persons linked with these officers).

### **Main changes between Division 2 of the Bill and the Public Exposure Draft**

Various policy changes from the Public Exposure Draft have been introduced in response to the Committee's further review, and consideration of the submissions

received. These policy changes considerably extend the range of exemptions from Division 2; introduce some tightening up and clarification of the provisions; reform and streamline the approval procedures for those transactions regulated under this Division, and simplify the notification requirements.

The further exemptions from Division 2 introduced by these policy changes are:

- transactions by companies having not more than 15 members;
- transactions between 'group bodies corporate' involving 90% or more subsidiaries, as well as wholly-owned subsidiaries;
- genuine 'arms length' transactions, involving credit transactions entered into by a company in the course of its ordinary business and on ordinary commercial terms, and loans by banks and life assurance companies on similar commercial terms;
- small transactions up to \$25,000 (previously \$5000), taking into account outstanding amounts.

In addition, the criteria for exemption of joint ventures has been relaxed so that the ASC, in determining whether to grant an exemption, may have regard to, but is not restricted by, the criteria set out in the relevant section.

The terms of Division 2 are tightened up or clarified in the following ways:

- the definition of loans includes the amount unpaid on those partly-paid shares which contain rights disproportionate to their paid value;
- the value of any transaction of an indefinite amount, shall be deemed to exceed 5% of members funds (rather than \$100,000 as proposed in the Exposure Draft Bill, which could create avenues for avoidance);
- for companies not having a share capital eg limited by guarantee, the "members funds" shall be deemed as 20% of the value of the company's gross assets.

The procedural reforms for transactions and schemes coming within Division 2 include:

- the persons covered by permissible executive share schemes include part time as well as full-time employees, while the matters covered under housing assistance schemes are broadened to include various forms of indirect assistance. Members' approval will be required only for entry into the schemes; not for all subsequent transactions;
- persons may enter into contracts which are conditional upon compliance with the Division;
- directors required to make solvency declarations in explanatory statements for members may disregard contingent debts, and may determine "members' funds" (for the purpose of the 5% threshold) without an obligation to obtain an auditors certificate or statement;
- the waiting period before transactions may be entered into, following the passing of a members' resolution, has been reduced from 21 days to 10 business days;
- the grounds of criminal and civil liability on directors for non-compliance have been modified to place the onus on the prosecution or plaintiff to prove detriment to the company (the onus previously being reversed);
- relevant accounting standards are provided for; and
- the ASC is required to deal with all applications to it under this Division within a period of 30 days.

The disclosure and notification requirements in Division 2 have been reformed and simplified:

- introduction of privacy principles by exempting from mandatory disclosure, under housing assistance or executive share scheme loans, or loans to officers who are not directors, the names of individuals involved;

- the notification requirements to the ASC have been limited to those transactions or schemes requiring the approval of members, or involving loans to officers other than directors;
- the annual reporting obligations of directors have been streamlined to avoid duplication of loan details in the directors' reports and accounts, and to apply relevant accounting standards.

In addition the transitional requirements are limited to the disclosure of those schemes or transactions pre-dating commencement of the Act which, had they been later entered into, would have required the consent of members. The proposal in the Public Exposure Draft to require the early repayment of some loans has been omitted.

### **DIVISION 3: DISCLOSURE OF CONFLICTS OF INTEREST BY DIRECTORS**

#### **Deficiencies in the existing law**

Section 231 of the Corporations Law requires disclosure of interests in contracts by directors. This section has been the subject of a report by the CSLRC which reaffirmed the need for a provision of this nature and recommended a number of amendments to remedy deficiencies. The deficiencies in this section are:

- the section applies only to an interest that a director has in a contract or proposed contract with the company. Interests in other transactions are not included. The Bill will regulate not only contracts but also other arrangements;
- the CSLRC believed that there is room for a view that s 231 is concerned only with contracts that come before the Board, and that there could accordingly be a belief that interests in transactions to be entered into by company officers, without being brought before the Board, do not need to be disclosed. The CSLRC considered that the possibility of this view should be excluded by requiring that if a director knows that a transaction is being entered into by the company, and the director has an interest in that transaction, the director should be under

a duty to inform the Board of his or her interest. Division 3 will give effect to the CSLRC's recommendation by requiring a director to make disclosures of interests in any "matter with which the company is concerned". That term is defined so as to make it clear that it includes a matter which concerns the company, irrespective of whether or not the matter has been or is to be considered by the Board;

- section 231 does not provide that a director of a company is interested in a transaction if a benefit accrues to a relative of the director as a result of the transaction. This deficiency is remedied in the Bill;
- section 231 provides that where a director discloses a conflict of interest, the secretary of the company records this in the minutes of the meeting at which the disclosure was made. The Bill requires that a company must keep a register with respect to each director in which the material interests of the directors are recorded. The register may be inspected by any member or director of the company; and
- section 231 does not provide any guidance concerning the exclusion of directors from voting on matters in which they are interested. Listing Rule 3L(6) of the Australian Stock Exchange provides that a director cannot vote at a meeting of directors in regard to any contract or arrangement in which the director has a material interest. However, this provision applies only to listed companies. The Bill has specific rules concerning whether or not interested directors may vote in relation to a transaction.

### **Outline of Division 3**

The major reforms in Division 3 will:

- extend the obligation to give notice to the Board (which presently extends only to contracts in which the director has an interest) to include any transaction or arrangement in which the director has an interest;
- require the supply to the Board of greater information about the interests of directors;

- clarify that the "interest" of a director in a transaction or arrangement includes all benefits accruing to not only the director but also the directors' spouse and relatives of the director or spouse;
- widen the matters that need to be disclosed by removing the current exemptions in respect of guarantees and contracts with related companies. Subsection 231(3) of the Corporations Law exempts a director from disclosure of guarantees given in respect of loans made to the company, and of directorships in related companies with which the company is contracting. The CSLRC recommended that these two exemptions be abolished. In the case of guarantees given by directors, the CSLRC's view was that the other members of the Board should be made aware of guarantees (and indeed all forms of third party security) given by directors in respect of loans and other obligations entered into by the company. In the case of related companies, the CSLRC suggested that, even in the case of wholly-owned subsidiaries, there would not invariably be identity of interests with the parent, and a directorship in a related company could, in the circumstances of particular transactions, give rise to a conflict. The Division therefore makes no provision for the exemptions contained in subsection 231(3) of the Corporations Law;
- contain restrictions on voting by directors in relation to transactions in which they have a material interest. However, a company with not more than 15 members may have different rules in its memorandum or articles of association;
- where there are less than 2 directors without a material interest, require the relevant transaction or arrangement to be approved by the company in general meeting rather than by the Board;
- require companies to maintain a register of directors' interests in which material interests are recorded; and
- provide that a court may impose civil and criminal liability upon a director who does not disclose an interest in accordance with the requirements of the Division.

**Main changes between Division 3 of the Bill and the Public Exposure Draft**

- in the Public Exposure Draft options over unissued shares were not included for the purpose of determining whether a director had a relevant interest in shares in a company. The provision has been broadened so that it now includes options over unissued shares;
- the Public Exposure Draft required a director of a company who has an interest in a matter with which the company is concerned to notify the company of the interest "as soon as practicable". In order to provide certainty to directors, the Bill requires disclosure within 5 business day of the director becoming aware of the interest;
- the Bill places an obligation upon a director who becomes aware that another director has failed to disclose an interest to the company, to given written notice to the company setting out those facts. This type of provision, which was not found in the Public Exposure Draft, will ensure self-policing by other directors;
- the Public Exposure Draft required a secretary of a company who receives a notice from a director concerning that director's interest to give a copy of the notice to other directors and enter the details of the interest in the register within 3 days. The Bill has extended the time period to 5 business days;
- the Public Exposure Draft provided that a director has only a minor interest if that director has a relevant interest in shares that does not exceed 5% of the nominal value of the issued shares of that company. This may have created potential for abuse. For example, a company could issue low nominal value shares with disproportionate voting rights such that a person could actually control a company but yet hold only 5% of the nominal value of the shares. The Committee noted this criticism and broadened the test so that it includes 5% of either the nominal value of the shares, voting rights, dividend rights or distributions of capital;



- the Public Exposure Draft provided that a director of a company has an interest in a matter if, as a direct or indirect result of the matter, a benefit will, is likely to, "or may possibly" accrue to the director or a relative of the director. The words in quotations have been deleted in the Bill on the basis that they are too imprecise;
- the Public Exposure Draft contained a provision that any person may request access to the register of interests maintained by the company. The Bill now provides that the register is to be made available only to shareholders and directors and is not accessible to the public; and
- the Public Exposure Draft contained a requirement that all interests of directors be recorded in the register of interests. The Bill does not require minor interests to be included in the register.

#### **DIVISION 4: DISCLOSURE OF BENEFITS GIVEN TO DIRECTORS**

##### **Deficiencies in the existing law**

Section 239 of the Corporations Law concerns disclosure of directors' benefits. The deficiencies in this section are:

- it relies solely on shareholder initiative to request disclosure of the benefits. The section does not provide for continuous disclosure; and
- recent experience informs us that s 239 may be open to circumvention by the use of intermediaries such as management companies or consultancies.

##### **Outline of Division 4**

The major reforms in Division 4 will:

- apply to all companies other than exempt proprietary companies;

- require disclosure of all benefits given to a director of a company or a related company, to relatives of such a director, relatives of the spouse of such a director and to companies and trustees so associated with a director that the director might be the ultimate beneficiary of the payment;
- exempt from disclosure all salary or wages, and other benefits where the aggregate amount of those benefits received over a 12 month period does not exceed \$50,000;
- not require the disclosure of the names of individuals but only the number of individuals receiving benefits within bands of \$25,000. The banding requirement will be contained in the regulations; and
- subject to the above requirements, require disclosure to be made by lodgment with the ASC of prescribed particulars in relation to the determination or variation of a benefit within 10 business days of a resolution or decision to give or vary the benefit and inclusion of these particulars in the company's accounts (without naming the individuals receiving the benefits).

#### **Main changes between Division 4 of the Bill and the Public Exposure Draft**

- the Bill introduces a threshold for the disclosure of benefits to directors. The threshold is \$50,000. Therefore, benefits received by a director within a 12 month period which do not total \$50,000 will not require disclosure;
- the Public Exposure Draft provided that the provisions concerning disclosure of benefits applied to certain officers of the company. The Bill does not apply to officers who are not also directors. Disclosure of benefits to these officers is confined to the requirements contained in Schedule 5 of the Corporations Regulations;
- the Public Exposure Draft defined "benefit" to include salary or wages within the meaning of the Income Tax Assessment Act 1936. This has been excluded from the Bill on the basis that disclosure will be made

under Schedule 5 of the Corporations Regulations. Schedule 5 requires disclosure in the accounts of the company of remuneration of executive officers and directors classified in bands of \$10,000. In the case of executive officers, this requirement applies only to those officers whose income exceeds \$100,000;

- the Public Exposure Draft provided that prescribed particulars in relation to the determination or variation of a benefit must be lodged with the ASC within 5 business days of a resolution or decision to give or vary the benefit. The time period has been extended in the Bill to 10 business days;
- a provision is included in Division 1 to the effect that regulations prescribing the particulars of benefits that are to be given for the purposes of Division 4 must not require the naming of individuals;
- a provision is included in Division 1 to the effect that nothing in Division 4 relieves directors and other officers of a company from duties that are imposed upon them, whether by statute or by the common law. This makes clear that compliance with the disclosure requirements of Division 4 does not relieve directors and other officers of a company from their duty to act in the interests of the company; and
- section 239 of the Corporations Law allows shareholders who number at least 10% of the total number of shareholders or who together hold at least 5% in nominal value of the company's issued share capital to request information concerning the emoluments and other benefits received by directors of the company. This provision, with appropriate modifications to conform to Division 4, is now contained in s 243AN.

#### **DIVISION 5: PROHIBITION OF BENEFITS IN CONNECTION WITH TRANSFER OF COMPANY'S UNDERTAKING OR PROPERTY**

Section 237 of the Corporations Law, while titled "Benefits for loss of, or retirement from, office" contains within it a provision that a person must not, in connection with the transfer of the whole or part of the undertaking or property

of a company, give a benefit to a person who is in a defined relationship with the company unless shareholder approval is obtained.

Given that the Bill is designed to regulate the giving of benefits to directors of companies, the Advisory Committee believes that the part of s 237 dealing with the giving of benefits in connection with the transfer of a company's undertaking or property should be relocated in Part 3.2A. Division 5 of this Part does not fundamentally change the policy of s 237 except that, in the interests of uniformity of approach, the test of persons being "relevantly connected" with the company rather than "prescribed persons" is adopted, and the same principles governing the calling and holding of members' meetings apply as elsewhere in Part 3.2A where reference is made to "members' approving resolutions".

The policy of Division 5 is that a person must not, in connection with the transfer of the whole or a part of the undertaking or property of a company, give a benefit to a person who is relevantly connected with the company, except in accordance with a members' approving resolution. The Division will regulate the following situations where a company transfers its property or undertaking:

- a benefit given by the purchaser of a company's property to a person relevantly connected with the vendor company;
- a benefit given by the vendor company itself to a person relevantly connected with it; and
- a benefit given by a third party (and not the actual purchaser of the company's property) to a person relevantly connected with the vendor company.

Where the vendor company itself, in connection with the transfer of its property or undertaking, gives a benefit to a person who is relevantly connected with the company, a solvency declaration is also required.

## **DIVISION 6: DISCLOSURE TO COMMISSION**

## **DIVISION 7: MISCELLANEOUS**

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**CORPORATIONS AMENDMENT BILL 1991**  
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Section 234     Repeal the section

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Subsection 237(19): omit the definition of "relevant benefit"

Subsection 237(20): omit the subsection

Section 239     Repeal the section

**PART 3.2A - REGULATION OF FINANCIAL TRANSACTIONS AND  
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- 243KB Interest in matter
- 243KC Minor interests



**Subdivision B - Notification of interests**

- 243LA Notices of particular interests
- 243LB General notices
- 243LC How notices are to be given
- 243LD Directors may require further information

**Subdivision C - Registers of interests**

- 243MA Register to be kept and made available to directors and members

**Subdivision D - Restriction on voting by directors**

- 243NA Director not to vote or be present in certain circumstances

**Subdivision E - Miscellaneous**

- 243PA Civil liability resulting from contraventions of Division
- 243PB Transactions not invalid

**Division 4 - Disclosure of benefits given to directors**

- 243QA Company to disclose benefits
- 243QB Offences
- 243QC Validity of resolutions or decisions not affected

**Division 5 - Prohibition of benefits in connection with transfer of company's undertaking or property**

- 243RA Benefits not to be given
- 243RB Benefit permitted with approval of members
- 243RC Giving of lesser benefit
- 243RD Where failure to give benefit would constitute contravention of law
- 243RE Benefits not to be received
- 243RF Benefits taken to be received on trust
- 243RG Division additional to other laws

**Division 6 - Disclosure to Commission**

- 243SA Notices and statements to be lodged with Commission
- 243SB Notice of resolutions to be given to Commission
- 243SC Notification of particulars of transactions or schemes

**Division 7 - Miscellaneous**

- 243TA False or misleading statements
- 243TB Provisions relating to extension of periods

Section 291A Division subject to Part 3.2A

Section 300A Division subject to Part 3.2A

Paragraph 307(c)

Subsections 1318(1) and (2)

**Schedule 3**

Section 231	Omit
Section 234	Omit
Subsection 243BA(2)	Penalty
Subsection 243DA(5)	Penalty
Section 243EG	Penalty
Subsection 243GA(3)	Penalty
Subsection 243HA(4)	Penalty
Subsection 243JC(5)	Penalty
Section 243JE	Penalty
Section 243LA	Penalty
Subsection 243LD(2)	Penalty
Section 243QB	Penalty
Section 243RA	Penalty
Section 243RE	Penalty
Subsection 243SA(2)	Penalty
Section 243SB	Penalty
Subsection 243SC(6)	Penalty
Paragraph 243TA(3)(d)	Penalty

**AMENDMENTS TO THE CORPORATIONS LAW****Section 224**

An additional grounds for vacation of the office of director is where a person becomes a director in breach of the restrictions contained in s 243BI, which deal with companies making otherwise prohibited outstanding loans to persons just prior to their becoming directors.

**Subsection 230(1)**

This provides an additional ground for a court to disqualify a person from the management of companies. The court may act if satisfied that a person has committed an offence, or contravened a provision, under Part 3.2A.

**Section 231, 234, 239**

These sections are repealed and replaced with a new Part 3.2A, to follow s 243.

**Subsection 237(1)**

The purpose of this amendment is to relocate to Part 3.2A Division 5 the law dealing with benefits arising from the transfer of whole or part of the undertaking or property of the company. Division 5 will compliment other provisions in Part 3.2A, in particular Division 2 Subdivision E (transfers of assets between a company and associated persons) and Division 4 (disclosure of benefits given to directors).

**Subsections 237(5)(6)(9)(19)(20)**

The amendments are consequential upon the changes to subsection 237(1).

## **PART 3.2A - REGULATION OF FINANCIAL TRANSACTIONS AND DISCLOSURE OF OFFICERS' INTERESTS AND BENEFITS**

Part 3.2A comprises the following Divisions:

- Division 1 - Introductory
- Division 2 - Transactions with certain officers and related entities
- Division 3 - Disclosure of conflicts of interest of directors
- Division 4 - Disclosure of benefits given to directors.
- Division 5 - Prohibition of benefits in connection with transfer of company's undertaking or property
- Division 6 - Disclosure to Commission
- Division 7 - Miscellaneous

### **DIVISION 1 - INTRODUCTORY**

#### **Subdivision A - Object of Part**

The overall purpose of Part 3.2A is set out in s 243A - promotion of honest and diligent management of companies. The Bill seeks to achieve this objective, in the context of Division 2, by tightening the rules concerning the provision by a company of loans or like transactions, to its directors, senior officers, or related or linked bodies corporate and to introduce rules regulating asset transfers with associated persons. Division 3 is designed to reform and give greater certainty to the rules regulating directors' disclosures and voting at their meetings, while Division 4 provides for greater disclosure of various benefits that may be given to directors. Division 5 places restrictions on the giving of benefits in connection with corporate asset transfers.

Section 243A also provides that nothing in Part 3.2A shall be construed as relieving directors and other officers of any common law or statutory duty owed by them to the company or other persons. The full force of fiduciary duty obligations remain, subject to this Part.

## **Subdivision B - Interpretative and other general provisions**

### **Section 243AA - Definitions**

A number of definitions are inserted in this section (and under s 243AB - AW) for the purpose of the application of Part 3.2A.

Some key definitions occurring in s 243AA are as follows:

#### **"Benefit"**

"Benefit" is defined, for the purposes of Divisions 4 and 5, to include fringe benefits within the meaning of the Fringe Benefits Tax Assessment Act 1986, and also any contribution to a superannuation or retirement fund. Excluded are:

- expenses reasonably incurred or to be incurred in the course of a person's employment;
- benefits given under certain transactions to which Division 2 applies (disclosure is required under that Division); and
- benefits excluded by the regulations.

For the purposes of Division 4 only, the definition of benefit excludes salary or wages within the meaning of Division 2 of Part VI of the Income Tax Assessment Act 1936. The reason for the different definitions is that salary or wages within the meaning of the Income Tax Assessment Act 1936 is required to be disclosed under Schedule 5 of the Corporations Regulations. It is inappropriate to have this disclosure duplicated under Division 4. However, the definition of benefit in s 237 of the Corporations Law includes salary or wages. As stated previously, that part of s 237 dealing with the giving of benefits in connection with the transfer of a company's undertaking or property is relocated in the Bill. It is not considered appropriate to narrow the current definition. Moreover, policy dictates that the definition of benefit for the purposes of Division 5 include salary or wages because otherwise the Division could be avoided by disguising benefits given in connection with the transfer of a company undertaking or property as salary or wages.

**"Credit transaction"**

One of the types of transactions caught by Division 2 which would not necessarily come within s 234 of the Corporations Law is a "credit transaction". This is defined broadly to encompass a wide range of credit arrangements, which will be subject to the same consent and disclosure requirements as will apply to loans and other forms of financial assistance.

To avoid the Division having application to genuine "arms-length" financial arrangements, the definition excludes all transactions entered into by a company in the ordinary course of its ordinary business and on ordinary commercial terms, including those relating to interest rates, repayment of principal and interest, and the security to be provided.

**"Excepting provision"**

This terms provides a comprehensive list of those provisions which are permitted transactions for the purposes of Division 2.

In respect of Subdivision A of Division 2 (regulated financial transactions in relation to directors and their relatives and relatives of their spouses) they are:

- transactions permitted with related bodies corporate (s 243BB);
- transactions permitted under executive share acquisition or housing assistance schemes (s 243BC);
- transactions permitted by the Commission (s 243BE);
- certain transactions by financial corporations (s 243BF);
- transactions approved by 95% of the members and the holders 95% of voting shares (s 243BG);
- small transactions (s 243BH); and

- transaction between group bodies corporate (s 243DA).

Only the first and second transactions (those falling under s 243BB or 243BC) require the consent of members and, in some instances, the ASC: s 243BD, and the disclosure of details to the Commission under Division 6.

Subdivision B contains no excepting provision as it imposes disclosure obligations only.

In respect of Subdivision C (group bodies corporate) and Subdivision D (regulated financial transactions in relation to other related and linked bodies corporate) the permitted transactions:

- transactions between group bodies corporate (s 243DA);
- transactions referred to in the Corporations Law s 205(1) (s 243EB);
- transactions covered by Subdivision A (s 243EC);
- transactions not exceeding 5% of members' funds (s 243ED);
- transactions (exceeding 5% of members' funds) authorised by members (s 243EE);
- certain transactions by banks and life assurance companies (s 243EF);  
and
- joint ventures (s 243GA).

Only transactions falling within s 243EE require members' consent and the disclosure of details to the ASC under Division 6.

In the case of Subdivision E (transfers of assets between a company and associated persons) the permitted transactions are:

- transactions between group bodies corporate (s 243DA)

- transactions covered by Subdivision A or Subdivision D (s 243FC);
- transactions not exceeding 5% of members' funds (s 243FD);
- transactions (exceeding 5% of members' funds) authorised by members (s 243FE); and
- joint ventures (s 243GA).

Only transactions falling within s 243FE require members' consent and the disclosure of details to the ASC under Division 6.

**"Executive share acquisition scheme"**

This definition has application to s 243BC. It applies to all persons coming within a scheme whether employed on a full or part time basis.

**"Fair value"**

This defines fair value in respect of an asset or service. The definition is relevant, for instance, in determining the cost of acquisition of an asset, pursuant to s 243AD, or the value of a transaction under s 243AW.

**"Give"**

This definition is relevant to Division 4: Disclosure of benefits given to directors.

**"Housing assistance scheme"**

This definition is inserted for the purposes of s 243BC. A housing assistance scheme, as here defined, represents an extension of s 234(3)(d) of the Corporations Law which limits permitted housing loans to the purchase of a principal place of residence. The definition in s 243AA includes loans for constructing a principal place of residence; extending or improving that residence or repaying in whole or in part, money borrowed for any of these purposes. A



scheme also includes associated financial assistance for carrying out any of these purposes.

### **"Transaction"**

Wherever it appears in Part 3.2A, this the term includes a contract or arrangement or a relevant unilateral act.

### **Section 243AB - Associated persons**

This section has application to Division 2 Subdivision E, which deals with asset transfers between a company and associated persons. It follows, in most part, the definition used in ASX Listing Rule 3J(3). Subsection (2) applies the term to recent past associates of the company.

### **Section 243AC - Conditional contracts**

This section has the effect of allowing parties to enter into contracts conditional upon compliance with outstanding requirements under Part 3.2A eg members' approving resolutions and/or ASC approval.

### **Section 243AD - Cost of acquisition of asset**

This section defines the acquisition cost of an asset, including its fair value as, defined in s 243AA. The definition of cost in s 243AD has direct application to Division 2 Subdivision F, dealing with asset transfers between a company and associated persons.

### **Section 243AE - Exempt companies**

Part 3.2A has no application to an 'exempt company', meaning any company which does not have more than 15 members, or an "exempt proprietary company" (defined in s 69 of the Corporations Law) of any size. The term 'exempt company' is used in Division 2. In addition, the Commission may, either conditionally or unconditionally, exempt other proprietary companies from the application of all or any of the provisions of Division 2, where the transaction or class of transactions do not involve the public, and the restrictions otherwise imposed by Division 2 would be inappropriate. However, given the exemption for

companies not exceeding 15 members, it is anticipated that suitable applications for ASC exemption would be rare.

### **Section 243AF - Explanatory financial statement**

Various provisions in Division 2 (s 243BD; s 243BG; s 243BI (in some instances) s 243EE; s 243EG and s 243FE) and also Division 5 (s 243RB) require directors to prepare explanatory financial statements concerning relevant transactions. These statements are for the purpose of informing members entitled to vote on the merits of proposed schemes, transactions or benefits, and are to be distributed before the meeting. Section 243AF sets out the contents of such statements. Key requirements include:

- prescribed particulars of the transaction, scheme or benefit, subject to privacy principles in ss 243AM, 243AN and the requirements for Division 5 transactions in s 243AO;
- where appropriate, an explanation of how corporations are related or linked, or how companies and persons are associated;
- in the case of transactions to be approved by members, the names of any directors who voted against, who abstained from voting on, the directors' resolution and their reasons for doing so;
- a statement by the directors that the company will continue to be able to pay all its existing debts as in when they become due and payable. Directors are not required to take into account contingent debts eg under guarantees or indemnities which may never become due and payable or only at an indefinite future time;
- a statement as to the effect of the transaction or benefit on the financial position of the company and whether it is likely to prejudice materially the interest of members or creditors of the company; and
- a statement whether the transaction, scheme or benefit would be fair and reasonable to the company, and the grounds for that opinion.

The liabilities, and available grounds of defence, for directors who prepare false or misleading explanatory financial statements are set out in s 243TA.

The tests of solvency set out in s 243AF(8) are consistent with those elsewhere in the Corporations Law eg s 592. The Committee has some concern with the suitability of this solvency test and notes in this regard the recommendations in the Report on the General Insolvency Inquiry (Report No. 45, 1988) prepared by the Australian Law Reform Commission. However the Committee believes that a common definition of solvency should apply throughout the legislation, and that s 243AF(8) should be amended only if and when a reformulated test of solvency is applied in the Corporations Law.

#### **Section 243AG - Group bodies corporate**

Subdivision C of Division 2 exempts from the operation of that Division regulated financial transactions in relation to group bodies corporate. These bodies are defined under s 243AG to include holding companies and wholly owned subsidiaries or "closely-held" subsidiaries (ie where the beneficial entitlement of the holding body corporate, or one or more other closely held subsidiaries, either directly or through other subsidiaries, is not less than 90% of the voting power; dividend rights and distribution of capital rights of the subsidiary). Transactions between sister wholly owned or "closely-held" subsidiaries are also included.

#### **Section 243AH - Interest in transaction**

A director has an indirect interest in a transaction entered into with a body corporate if he is "substantial shareholder", as defined in Part 6.7 of the Corporations Law, in the body corporate. Otherwise, a shareholding by directors does not constitute an interest in the transaction.

In determining an indirect interest in a transaction, interposed bodies corporate, trusts or partnerships shall be disregarded.

Section 243AH is relevant to s 243AK (members' approving resolutions) which excludes the votes of members with a direct or indirect interest in a transaction, the subject of the resolution.

**Section 243AI - Linked bodies corporate**

Subdivision of Division 2 applies to regulated financial transactions between related and linked bodies corporate, other than group bodies corporate (as defined in s 243AG). Under s 243AI, two bodies corporate are "linked" if one has a "significant influence", within the meaning of any applicable accounting standard, over the other body corporate, or in other circumstances it has a "relevant interest" in not less than 20% of the shares in the other body corporate. The term "relevant interest" in shares is defined in Division 5 of Part 1.2 of the Corporations Law.

The definition has an extended application in sub-section (2) to companies which within the prior 6 months were linked. This is to avoid circumvention by arranging for companies not to be linked at the appropriate time. To avoid the application of the provision to circumstances which are genuinely arms-length, the Commission is given a discretion to grant exemptions. A similar relation back rule applies to "related bodies corporate" (as defined in s 243AR).

Transactions by companies that subsequently become linked bodies corporate are regulated under s 243EG.

**Section 243AJ - Loans**

This section deals with various aspects of the meaning of loans, though as indicated in subsection (5) it is not intended to displace the ordinary meaning of the term.

A credit transaction, as defined in s 243AA, does not constitute a loan (243AJ(4)), though it is a regulated financial transaction, as defined under s 243AQ.

This section also provides that in respect of partly paid shares, the amount unpaid shall be deemed to be a loan where the rights under the shares are disproportionate to their paid up capital, as determined by the formula in subsection (3). Variations of these rights are also taken into account by subsection (4).

### **S 243AK - Members' approving resolutions**

This term refers to a resolution passed by simple majority at the general meeting of the company approving a relevant transaction, scheme or benefit where the benefit is proposed to be given in connection with a transfer of the company's undertaking or property. The provision is relevant where the Bill requires or permits these approvals: s 243BD; s 243BI; s 243EE; s 243EG, s 243FE, and s 243RB. However "double 95%" resolutions (s 243BG) are not regulated under this provision but by general Corporations Law principles, given the requirement for an absolute majority of 95% (contrast s 243AK(2) which could have the effect of excluding more than 5% of members from voting on the resolution). Interested parties may vote on "double 95%" resolutions.

Where members' approving resolutions are required, the notice of the meeting must be accompanied by a copy of the explanatory financial statement (as defined in s 243AF). Members who have a direct or indirect interest in the transaction (as defined in 243AH) or the benefit are not entitled to vote: s 243AK(2).

Where the company is a subsidiary, the approval of the holding company may be required, as determined by s 243AK(1)(b)(c).

### **Section 243AL - Members' funds**

The capacity of companies to enter into transactions regulated by Division 2 of Part 3.2A is determined in many instances by whether the transaction involves or represents more than 5% of members' fund. This section sets out the method of calculating these funds.

The obligation to ascertain members' funds rests on the directors. For companies with a share capital, the directors are to calculate members' funds according to the sum of the company's paid up capital (disregarding any redeemable preference shares), and the company's reserves, as shown in the last audited accounts of the company, and adjusted for all material changes since that date. The directors may, but are not obliged to, obtain an auditor's certificate or statement. Subsection (3) deals with the circumstance where there are no previous audited accounts. In the case of a company without share capital eg a company limited by guarantee, the members' funds are deemed to be 20% of the

value of the company's gross assets as shown in the last audited accounts of the company, adjusted for any subsequent material changes.

Subsection (4) identifies the grounds for calculation by the auditor of the members' funds as at the end of each financial year. This calculation is required for the purposes of reporting on outstanding amounts, as required by s 243JE.

Section 243AL requires that the members' funds of the lender only be considered. This may have ramifications for corporate group (treasury) companies. The Advisory Committee does not support a corporate group financial consolidation in this context, as this could result in the lender providing all or a considerable proportion of its own members funds without suitable control. However transactions involving group bodies corporate, ie wholly owned and closely held subsidiaries, are, by operation of Subdivision C, exempt from Division 2. Also loans by companies having no more than 15 members are exempt from this Division.

**Section 243AM - Particulars of certain transactions and schemes to which Division 2 applies**

This section introduces privacy principles into share acquisition and housing assistance schemes coming within Subdivision A and regulated financial transactions affecting those officers coming within Subdivision B. The Committee believes that the object of promoting honest and diligent management of companies can be advanced under this Division without an obligation to name individual recipients. However a designated number of members may, at any time, requisition these details; compare s 239, which is now relocated in s 243AN.

**Section 243AN - Particulars of benefits to be disclosed under Division 4**

For reasons similar to s 243AM, regulations prescribing the particulars of benefits that are to be given for the purposes of Division 4 must not require the naming of individuals.

This section also provides that where at least 10% of the total number of members of a company or members who together hold not less than 5% in nominal value of the company's issued share capital require the emoluments and other benefits received by persons relevantly connected with the company to be

disclosed, this must be done by the company. This provision is based upon s 239 of the Corporations Law which is relocated in this section.

#### **Section 243AO - Particulars of proposed benefits to be disclosed under Division 5**

This section describes the particulars of a proposed benefit that are to be included in the explanatory financial statement sent to members for the purpose of any members' approving resolution required by Division 5.

#### **Section 243AP - Quasi loan**

The provisions in Subdivisions A and D of Division 2 dealing with regulated financial transactions include quasi-loans. This section defines a "quasi-loan" to mean a transaction whereby payments are made by a creditor on behalf of a borrower on terms that the borrow (or someone on his behalf) will ultimately reimburse the creditor, or in circumstances giving rise to a liability on the part of the borrower to reimburse a creditor. Section 243AP(3) extends the liabilities of a borrower to include those of any person who has agreed to reimburse the creditor on behalf of the borrower. This applies for the purposes of Part 3.2A Division 2 only, and does not seek to change the general law.

#### **Section 243AQ - Regulated financial transaction**

The various prohibitions and exemptions in Division 2 Subdivisions A to E apply to companies that enter into "regulated financial transactions". The format of this section indicates that these Subdivisions are intended to apply to companies making loans or otherwise providing financial assistance in any manner set out in this section ("lending companies"). Corporate or non-corporate borrowers or other recipients of financial assistance are not regulated under these Subdivisions (though they could be liable as accessories to breaches).

Section 243AQ broadens the prohibition on loans, guarantees and securities given in relation to loans in s 234 of the Corporations Law, by including other forms of financial accommodation such as some partly paid shares (s 243AJ(2)(3)(4)); "quasi-loans" (s 243AP), "credit transactions" (defined in s 243AA) and related transactions such as assignments or assumptions of liabilities. A "regulated financial transaction" will also include the purchase or subscription of, or an option to purchase or subscribe for, redeemable preference shares in a body

corporate, and any other transaction which is, in "substance or effect", a transaction of the kind covered by the other paragraphs in s 243AQ(1). Redeemable preference shares have been included as this form of equity may constitute an alternative or disguised form of loan.

Variations of earlier regulated financial transactions which materially increase any of the company's liabilities or materially reduce any of the company's rights are also covered: s 243AQ(1)(i).

The reference in the opening paragraph of s 243AQ to "either directly or indirectly through one or more interposed bodies corporate, trusts or partnerships or otherwise", as further defined in subsections (2) and (3), has been included to overcome possible circumvention through interposing nominees or other like entities between the lending company and the real borrower or beneficiary.

#### **Section 243AR - Related bodies corporate**

Division 2 has application to regulated financial transactions between "related" or "linked" (defined in s 243AI) bodies corporate. Under the Corporations Law s 50, bodies corporate are "related" if one is a subsidiary of the others, or if they are subsidiaries of the same holding company. Section 243AR extends this definition for the purposes of Division 2, to cover transactions with bodies corporate that were related within the prior 6 months. This provision is designed to overcome possible avoidance by arranging for the bodies corporate not to be related at the relevant time. To avoid the application of the provision to circumstances which are genuinely arms-length, the Commission is given a discretion to grant exemption. A similar relation- back rule applies to "linked bodies corporate" (as defined in s 243AI).

Transactions by companies that subsequently become related bodies corporate are regulated under s 243EG.

#### **Section 243AS - Relevant interest**

Section 243AS is drawn from s 234(2) of the Corporations Law.



### **Section 243AT - Relevant connection with company**

Subdivision A of Division 2 and Division 5 regulate, respectively, various financial transactions and benefits involving a person who is "relevantly connected" with the company.

A person relevantly connected with a company is defined to include:

- a director of the company or a related company;
- a relative of the director or a relative of the spouse of the director;
- persons who came within the above 2 categories within 6 months before the benefit is given (as explained further below);
- a trustee of certain trusts (as explained further below); and
- companies where any of the above persons has, or 2 or more such persons together have:
  - a relevant interest or relevant interests in shares in the company and
    - the nominal value of the shares is at least 10% of the nominal value of the issued shares capital of the company; or
    - any dividend rights entitle the holder to at least 10% of the dividends paid by the company; or
    - any rights to distributions of capital entitle the holder to at least 10% of such distributions; or
  - the power to control, either directly or indirectly, at least 10% of the voting power in the company.

A "relative" is defined in s 9 of the Corporations Law.

Section 243AT(1)(c) has an extended application to those circumstances where a director or relative might be the ultimate beneficiary of the transaction. The alternative tests of 10% of nominal value of issued shares, dividend rights, capital distribution rights or voting rights, are designed to avoid circumvention by holding shares with rights disproportionate to nominal value. The same reasoning applies to s 243AT(1)(d).

For the purposes of Division 5, there is an extended definition in s 243AT(2), which includes the principal executive officer of the company or a related

company and a relative of the officer or a relative of the spouse of the officer. This extended definition is taken from s 237 of the Corporations Law. As stated previously, that part of s 237 dealing with the giving of benefits in connection with the transfer of a company's undertaking or property is relocated in the Bill.

The definition of persons "relevantly connected" with the company also includes persons who are not relevantly connected with the company but who were so connected at a time within 6 months before that person received a benefit, a resolution was passed or decision made to give that person a benefit, or the company entered into a regulated financial transaction in relation to that person. This is designed to avoid circumvention by the relevantly connection person resigning just prior to entry into the transaction or benefit. To avoid over-regulation, the ASC has a discretion to determine that a person who would otherwise be relevantly connected with the company under this subsection is not so connected.

#### **Section 243AU - Rights deemed to be exercised**

For the purposes of determining the nominal value of shares in a company in which a person has a relevant interest, all options over shares and convertible notes in which that person has an interest shall be deemed to be issued or converted. This section is in recognition of the possible influence of holders of these securities, and overcomes circumvention by persons entering into regulated financial transactions or asset transfers prior to exercising their conversion rights.

#### **Section 243AV - Transactions before commencement of Part**

This section refers to transactions which, had they been entered into following commencement of the Act, would have been regulated by Division 2.

The principal effect of this provision is that for the purposes of calculating whether the 5% of members' funds threshold has been, or will be, exceeded for the purposes of Subdivision A and Subdivision D of Division 2, outstanding transactions entered into before the commencement of the Act are taken into account. Division 2 has no direct retrospective effect in regard to these past transactions, though in some instance further transactions under previously approved schemes may require a subsequent members' approving resolution: s 243BD(3) (see post).

### **Section 243AW - Value of, and amount outstanding under, transaction**

This section deals with the means of valuing transactions coming within Subdivisions A, C and D of Division 2. The method of valuation will vary depending upon the type of transaction involved. The test of "fair value" is set out in s 243AA.

Where the value of the transaction cannot be expressed as a specific sum of money, it shall be taken to exceed 5% of the members' funds of the company as calculated in accordance with s 243AL.

Section 243AW(8) deals with determining the amount outstanding under a transaction where the original value has been reduced by the forgiving of a debt, the release of a financial obligation, or otherwise.

The means of valuing transactions coming within Subdivision E of Division 2 are dealt with in s 243FA and s 243FD.

## **DIVISION 2 - TRANSACTIONS IN RELATION TO CERTAIN OFFICERS AND RELATED ENTITIES**

### **Subdivision A - Regulated financial transactions in relation to directors and their relatives and relatives of their spouses**

Subdivision A of Division 2 regulates the giving by companies, other than "exempt companies" (defined in s 243AE) of loans and other forms of financial assistance ("regulated financial transactions", as defined in s 243AQ) to directors and other "relevantly connected" persons (as defined in s 243AT).

The current main statutory provision dealing with these matters is s 234 of the Corporations Law. This section prohibits loans to directors of the lending company or a related body corporate, and the spouses and relatives of such directors. The prohibition also extends to loans made to a trustee on behalf of the director; to any body corporate which is interposed between the director and the trustee, and to payments to a body corporate in which the director has a substantial relevant interest. As well as prohibiting loans by companies, s 234 also

prohibits the giving of guarantees and the provision of security by companies in connection with loans granted by another to the persons mentioned above.

The prohibition in s 234 is subject to very broad exceptions, set out in s 234 (3). These exceptions relate to transactions:

- (a) entered into by an exempt proprietary company;
- (b) with related bodies corporate and authorised by a resolution of the directors of the lending company;
- (c) to provide a person with funds to meet expenditure incurred for the purposes of the company;
- (d) to provide a full time employee with funds for housing;
- (e) pursuant to a scheme approved by shareholders for the provision of financial assistance to full time employees; and
- (f) pursuant to which financial assistance is provided by a money lending company on ordinary commercial term.

In replacing s 234 of the Corporations Law, Subdivision A effects a number of reforms, including;

- the extension of the prohibition to a wide range of other forms of financial assistance, as defined in s 243AQ (regulated financial transactions). This contrast with s 234 which is limited to loans, guarantees and the provision of security;
- the redefining of the exceptions to the prohibition, including:
  - the extension of exception (a) above to include exempt companies (as defined in s 243AE);
  - the narrowing of exception (b) above to substitute approval by members for directors' consent (which the Advisory Committee considers particularly inappropriate, given the potential for considerations of self-interest to cloud the judgment of directors);
  - the elimination of exception (c) above (which the Advisory Committee is too open-ended);
  - the expansion of exception (d) above to provide for the costs of improvements and extensions to an employee's principal place of residence, as well as the acquisition of the residence or a repayment in whole or part of money previously borrowed;

- the confinement of exception (e) to executive share acquisition schemes;
- the confinement of exception (f) to non-preferential loans by banks, as defined in s (5) of the Banking Act 1959, or companies regulated under the Life Insurance Act 1945;
- the introduction of new exceptions relating to loans by certain financial corporations not in excess of gross emoluments; transactions approved by 95% of members holding not less than 95% of voting shares ("double 95% approvals"); small transactions (not exceeding \$25,000 or such other prescribed amounts) or exceptional transactions approved by the ASC.

The Subdivision contains a general prohibition (s 243BA) which is subject to seven exceptions (s 243BB, s 243BC, s 243BE, s 243BF(1); s 243BF(2); s 243BG; and s 243BH). The first two exceptions (transactions with related bodies corporate: s 243BB or executive share acquisition or housing assistance schemes: s 243BC) are only available where the company follows the approval procedures set out in s 243BD. In addition ASC consent is required where these financial transactions would exceed 5% of members' funds. The other exceptions follow their own terms. The requirements for notification to the ASC in Division 6 apply only to transactions coming within the first two exceptions (s 243BB and s 243BC).

Subdivision B concludes by addressing the position of persons who enter into transactions with a company at a time when they are not "relevantly connected" (defined in s243AT) with the company, but who subsequently contemplate becoming directors: s 243BI.

### **Section 243BA - Prohibition of regulated financial transactions**

This section provides that, other than for transactions permitted under this Subdivision, Subdivision C (group bodies corporate) or Subdivision F, (joint ventures) a lending company contravenes this section if it enters into a "regulated financial transaction" (defined in s 243AQ) with a person who is "relevantly connected" (defined in s 243AT) with the company. The prohibition applies to all companies except "exempt companies" (defined in s 243AE).

By virtue of s 243AT(3), if a person with whom the lending company enters into a regulated financial transaction is not relevantly connected with the company at that time, but had been so connected within 6 months before the transaction was entered into, Division 2 applies to that transaction, unless the Commission otherwise determines. Thus, the section applies, for example, to current and also to recent past directors. (s 243BI deals with persons who become relevantly connected with the company subsequent to the transaction).

Where transactions prohibited under this Subdivision the relevant directors are guilty of an offence and may face personal liability for any loss to the company.

Directors will not be subject to criminal or civil liability if at the directors' meeting they did not vote in favour of the transaction or, where the transaction was not authorised by a resolution of the directors, they believed on reasonable grounds that a competent and reliable person was charged with the duty of ensuring compliance with the legislation and was in a position to discharge that duty. This defence of belief ensures that directors are not subject to strict liability. However, the requirement that beliefs held by directors must be reasonable is to counter attempts by directors to circumvent their duties by neglecting their responsibilities.

The tests of liability for breach of Subdivision A are more imposing than for breach of Subdivisions D (s 243EA) or Subdivision E (s 243FB) of Division 2, both of the latter requiring proof of detriment to the company. The reasons for this distinction is that Subdivision A imposes an absolute prohibition on the granting of loans to directors and other relevantly connected persons, except for permitted loans, whereas Subdivision D and Subdivision E regulate the granting of inter-corporate loans and asset transfers but without any similar absolute prohibitions. This difference of approach reflects the concern of the Advisory Committee to limit the types of loans available to directors, where considerations of self-interest may be at their highest.

#### **Sections 243BB; 243BC; 243BE; 243BF; 243BG; 243BH - permitted transactions**

These sections set out exceptions to the s 243BA prohibition. These transactions are:

- with a "related" body corporate (defined in s 50 of the Corporations Law

to mean a holding company, a subsidiary or another subsidiary of the holding company) (s 243BB);

- under a "housing systems scheme" or an "executive share acquisition scheme" (each of these terms is defined in s 243AA) (s 243BC);
- permitted by the ASC (s 243BE);
- by way of loan by certain financial corporations not exceeding the cost to them of the emoluments paid to or received by employees (s 243BF(1));
- loans in the ordinary course of the ordinary business of banks and life assurance companies and which are on fully commercial terms (s 243BF(2));
- transactions approved by 95% of members holding not less than 95% of voting shares ("double 95% approvals") (s 243BG); and
- transactions with a value not exceeding \$25,000 or such other prescribed amount (s 243BH).

However, whereas certain permitted transactions under s 234 of the Corporations Law required the approval of the directors only (for example, with related bodies corporate), transactions under s 243BB and s 243BC will be subject to the shareholder approval procedures set out in s 243BD. The procedures for "double 95%" approvals are set out in s 243BG. Transactions by certain financial corporations (s 243BF) and the small transactions exception (s 243BH) will not require shareholder approval. Transactions permitted by the ASC under s 243BE will require shareholder approval if the conditions or directions of the ASC so provide.

#### **Section 243BB - Transactions permitted with related bodies corporate**

This exception will have application to regulated financial transactions between related bodies corporate which also involve "relevantly connected" persons (defined in s 243AT). The section covers loans between related companies where a director of the lender has a 10% or more relevant shareholding interest in the borrowing company.

Regulated financial transactions between related companies not involving "relevantly connected" persons are regulated under Subdivisions C; D and F.

**Section 243BC - Transactions permitted under executive share acquisition or housing assistance schemes**

The exception for executive share acquisition schemes applies to relevantly connected persons, whether in full time or part time employment with the company or a related company, while the exception for housing assistance schemes is confined to full time employees of the company or a related company. The Committee believes that the extended application of executive share acquisition schemes to part time employees is justified, given the role and functions of such schemes in encouraging better corporate governance.

"Executive share acquisition schemes" and "housing assistance schemes" are defined in s 243AA. "Related" companies are defined in s 50 of the Corporations Law.

**Section 243BD - Members' approval required for permitted transactions**

In order for a lending company to avail itself of the exceptions in s 243BB or s 243BC, following requirements must be met:

- the transaction or scheme is authorised by a resolution of directors (as regulated by Part 3.2A Division 3);
- an "explanatory financial statement" (defined in s 243AF) is prepared by or on behalf of the directors who voted in favour of the transaction;
- a "members' approving resolution" (defined in s 243AK) is passed;
- the ASC's consent is obtained for entry into the transaction or scheme if the sum of the value of the proposed transaction or scheme, and similar outstanding previous or proposed transactions, (taking into account s 243AU) exceeds 5% of the members' funds (as calculated by the directors in accordance with s 243AL); and
- a period of 10 business days lapses from the last of the members' meetings of which approval is given and entry into the transaction (that period being subject to extension by the court on application by the ASC).

Notices, statements, and transactions or schemes authorised under this section, must be disclosed to the ASC pursuant to the requirements of Division 6.



The purpose of s 243BD(2) is to require approval only of the executive share acquisitions scheme or housing assistance scheme. It is not necessary that each transactions under an approved scheme require a members' approving resolution. Section 243BD(3) provides that where an executive share acquisition scheme or housing assistance scheme was approved prior to the commencement of the Act, transactions may be entered into under those schemes after commencement of the Act, where the value of the transaction(s) and outstanding transactions do not exceed 5% of the members' fund. Lending companies wishing to enter into transactions that exceed the 5% limit would need to have the relevant scheme again approved, pursuant to the terms of s 243BD.

The Committee sees s 243BD as central to promoting the goals of honest and diligent management of companies, as identified in s 243A. The requirement for members' approval will introduce significant protections for transactions or schemes otherwise prone to self-interest considerations by directors, while the ASC will act as a independent check on the suitability of larger permissible loans.

#### **Section 243BE - Commission may permit transactions**

There may be exceptional circumstances where regulated financial transactions might be justified even where they do not fall within any of the exceptions in Subdivision A. The ASC will have a residual discretion to permit these transactions, for whatever purpose or amount, subject to any conditions it may require or directions it may give. This section does not attempt to indicate the conditions or directions that the ASC might impose, but they could, for instance, include compliance with the equivalent of s 243BD (members' approval) and Division 6 (disclosure of transactions).

#### **Section 243BF - Exceptions for certain transactions by financial corporations**

The Advisory Committee has expressed concern that s 243(3)(f) of the Corporations Law was open to abuse; for instance a corporation establishing a money-lending subsidiary for the ultimate purpose of making loans to directors, without recourse to members' approval. However the Committee recognises that there needs to be some exemptions for genuine financial corporations, given that they are often involved in making loans to their directors and other "relevantly connected" persons on fully arms-length non-preferential commercial terms.

In recognition of this situation, s 243BF contains two exemptions. Subsection (1) allows for limited lending by financial corporations, as defined under s 243BF (1) (a), to directors and other relevantly connected persons on preferential terms, ie, where the transaction, combined with any other outstanding amounts to the recipient, does not exceed the cost to the company of the emoluments paid to or received by that person in the past immediate financial year. Transactions falling within that category are exempt from any specific consent procedure, and are not required to be disclosed to the Commission.

Subsection (2) provides that a company which is a bank as defined under s 5(1) of the Banking Act 1959, or is registered under the Life Insurance Act 1945, may make any loan, of whatever size or purpose, to a director or other relevantly connected person, provided that the loan is in the ordinary course of its business and on ordinary commercial terms, as further stipulated in the subsection. Banks and life assurance companies may make these loans without any requisite members' consent procedure, or any obligation of disclosure to the ASC. The Committee sees s 243BF(2) as an important exception to ensure the workability of the new provisions, but given its width, it may require review should any instances of abuse arise.

#### **Section 243BG - Exception for certain transactions approved by 95% of members and the holders of 95% of voting shares**

This exception allows companies to enter into regulated financial transactions of whatever type, purpose or amount, if the following procedures are met:

- the transaction is authorised by resolution of directors (as regulated by Part 3.2A Division 3);
- an "explanatory financial statement" (defined in s 243AF) is prepared by or on behalf of the directors who voted in favour of the transaction;
- a resolution approving that transaction is passed by at least 95% of the number of members of the company who hold between them at least 95% of the voting shares in the company;
- a period of 10 days lapses from the last of the members' meetings of which approval is given, and entry into the transactions (that period being subject to extension by the court on application by the ASC).

Resolutions under this section are not "members' approving resolutions" (defined in s 243AK), thus allowing interested members to vote (contrast s 243AK(2)(b)).

The Committee sees this section as having its principal application to closely-held companies with limited membership. In many instances smaller companies will be exempt from the operation of Division 2 by virtue of s 243AE (a company not having more than 15 members). However s 243BG was retained, given the possibility of companies with an excess of 15 members, but still sufficiently closely held to enable a "double 95%" resolution to be passed. The section is not intended to have application to listed companies or larger unlisted public or proprietary companies, given the size of their membership.

#### **Section 243BH - Exception for small transactions**

A lending company will not contravene s 243BA if it enters into a regulated financial transaction with a relevantly connected person where the transaction's value, taking into account any outstanding amounts to that borrower, or associates of that person, does not exceed \$25,000 or any other prescribed amount. The Committee favours prescription, rather than automatic indexation which may create uncertainty. Transactions falling within s 243BH are free from the consent or disclosure procedures in the Bill.

#### **Section 243BI - Transactions by company with persons who subsequently become relevantly connected with it**

If a lending company enters into a transaction with a person which would have been prohibited had that person then been relevantly connected with the company, this section prohibits that person subsequently from becoming a director of the company (as defined in s 60 of the Corporations Law) whilst any amount remains outstanding under that transaction. This is designed to avoid circumvention of Subdivision A of Division 2 by a company providing a loan prior to the borrower becoming a director. This provision is reinforced by s 224(8) which automatically vacates from the office of director, a person who is in breach of s 243BI.

To counter possible inequitable consequences, subsection (4) provides for relief, either by the ASC or by members' approving resolutions, in relation to the transactions. Notices of these resolutions must be provided to the ASC pursuant to s 243SA and s 243SB. In other circumstances, intending directors could satisfy this provision by repayment of the loan or its re-financing from an independent source, provided the latter was not itself a 'regulated financial transaction' (as defined in s 243AQ).

**Subdivision B - Regulated financial transactions in relation to other officers and their relatives and relatives of their spouses**

Subdivision B deals with financial assistance provided by a company to its senior officers, other than its directors or other "relevantly connected" persons. The rules governing these transactions are considerably less onerous than those under Subdivision A, since here there is not such a potential for considerations of self-interest to influence the decision making process. The emphasis in Subdivision B is on disclosure of relevant transactions.

**Section 243CA - Disclosure of regulated financial transactions**

This section will require a lending company (other than an exempt company as defined in s 243AE) to notify the Commission if it enters into a "regulated financial transaction" (defined in s 243AQ) with a prescribed officer of the company, a relative of that officer, or a relative of the spouse of that officer, by furnishing details as required by s 243SC. The section does not apply to officers who are "relevantly connected" with the company (eg a director), since transactions in relation to those persons are regulated by Subdivision A. Similarly 243CA does not apply to transactions coming within any other Subdivision of Division 2.

It is intended that only officers who receive remuneration above the threshold level prescribed in Schedule 5 of the Corporations Regulation will be prescribed for the purposes of this section. The Committee proposes that the reporting threshold be \$100,000 indexed yearly for CPI movements rounded to the nearest \$5,000 and with \$25,000 disclosure bands above that threshold. The details to be disclosed, pursuant to the regulations, will not include the identity of those persons who have entered into a regulated financial transaction, through this information could be sought by requisition of shareholders: s 243AM.

**Subdivisions C; D; and F - Regulated financial transactions in relation to group bodies corporate and other related and linked bodies corporate, including joint ventures.**

Inter-corporate loans and other forms of financial assistance are a common and usually legitimate feature of commerce. At the same time, they can be used to the detriment of members, especially when money is lent on inadequate security or excessively generous terms. Likewise inter-corporate loans may be employed to disguise the true financial position of individual companies within a group.

Currently there is no specific regulation of those financial assistance transactions which fall outside s 234 of the Corporations Law, except where they are used for the purpose of, or in connection with, the acquisition of shares of the lending corporation (s 205 of the Corporations Law). There are provisions in the Listing Rules of the Australian Stock Exchange which apply to certain of these transactions. However, these Listing Rules apply only to a limited number of companies and do not carry the same civil and criminal consequences for breach that arise under legislation. The Advisory Committee has been concerned to explore ways in which shareholders can be better protected independently of the existing common law and statutory duties of directors, but without imposing unnecessary costs in relation to the vast majority of inter-corporate loans which have a sound and appropriate basis. The Advisory Committee has identified for separate treatment in the Bill, in view of their particular circumstances, regulated financial transactions involving holding and wholly-owned or closely-held subsidiary companies or sister subsidiaries, and joint venture entities. These transactions are, by virtue of Subdivision C and Subdivision F respectively, exempted from Division 2. Regulated financial transactions in relation to other related and linked bodies corporate are regulated under Subdivision D. This Subdivision follows the structure of Option B in the Public Exposure Draft.

**Subdivision C - Group bodies corporate**

**Section 243DA - Transactions between group bodies corporate**

This section, in effect, exempts from Division 2 all regulated financial transactions and asset transfers between a company and a "group body corporate" (as defined

in s 243AG). There is no prescribed consent procedure for transactions permitted under s 243DA, nor must they be disclosed to the Commission.

The only restriction in this section is that where amounts are still outstanding under regulated financial transactions (as defined in 243AQ) between group bodies corporate, subsection (3) prohibits the issue or disposal of shares resulting in a relevant body corporate ceasing to be a group body corporate, (as defined in s 2434AG). The Committee believes that without this prohibition, the policy of Subdivision D could be circumvented by a company lending money to, or borrowing money from, a group body corporate, in advance of selling off part of its shareholding interest in that body corporate. However sales of shares by a liquidator or receiver/manager are exempt from that restriction.

The rationale of s 243DA is that transactions involving group bodies corporate affect either none (wholly owned subsidiaries) or only a small number of shareholders (closely-held subsidiaries) and that an exemption from Division 2 is required in the interests of commercial practice. However the Committee notes that minority shareholders are given remedies under s 260 of the Corporations Law, and may also benefit from proposals to introduce statutory derivative actions. Creditors of group bodies corporate may protect themselves through suitable asset securities, or by virtue of s 592 of the Corporations Law.

#### **Subdivision D - Regulated financial transactions in relation to other related and linked bodies corporate**

##### **Section 243EA - Liability of officers**

This section serves two functions. It defines which transactions will come within Subdivision D; namely regulated financial transactions which a lending company (other than an "exempt company" as defined in s 243AE) enters into with a body corporate to which it is, or, by virtue of s 243AI(2) or s 243AR, has within 6 months been, related or linked, except for regulated financial transactions coming within Subdivision C (group bodies corporate) or Subdivision F (joint ventures). Regulated financial transaction by a lending company with a body corporate that subsequently becomes related or linked are regulated under s 243EG.

This section also has effect where a lending company, without members' consent, enters into regulated financial transactions with a related or linked company,

which, taking into account outstanding relevant transactions including those pre-dating the Act (s 243AV), exceed 5% of members' funds. Where that transaction is detrimental to the company, any director or officer who is in any way directly or indirectly knowingly concerned in or party to the transaction is deemed (unless the contrary is proven) to have made improper use of his or her position so as to cause detriment to the company. This provision adopts the wording of s 232(6) of the Corporations Law, thus attracting the criminal and civil liability set out in that section, which deals with the general duties of company officers.

**Section 243 EB - Exception for transactions referred to in subsection 205(1)**

A company that provides a loan or other form of financial assistance to a related or linked body corporate for the purpose of, or in connection with, the acquisition of shares in the lender, is subject to s 205 of the Corporations Law. To avoid double consent procedures, this section excludes from Subdivision D any transaction complying with s 205(10) of the Corporations Law, which requires a special resolution of shareholders.

**Section 243EC - Exception for transactions with relevantly connected persons**

Subdivision D does not apply to transactions regulated under Subdivision A.

**Section 243ED - Exception for transactions not exceeding 5% of members' funds**

The effect of this section is to exempt regulated financial transactions not exceeding 5% of members' funds of the lender. Details of these transactions will not have to be disclosed to the Commission.

**Section 243EE - Exception for transactions authorised by members**

This section sets out the requirements for authorisation by members of the lending company, of those regulated financial transactions which, taking into account relevant outstanding transactions including those pre-dating the Act (s 243AV), are in excess of 5% of the members' funds, and do not fall within any of the other exceptions in Subdivisions A, C, D or F of Division 2. To obtain authorisation, the following requirements must be met:

- the proposed transaction is authorised by resolution of directors (as regulated by Part 3.2A Division 3);
- the "explanatory financial statement" (defined in s 243AF) is prepared and put before the members;
- the "members' approving resolutions" (defined in s 243AK) are passed; and
- a minimum period of 10 days lapses between the passage of the last resolution and entry into the transaction (that period being subject to extension by the court on application by the ASC).

Notices, statements, and transactions authorised under this section must be disclosed to the ASC, pursuant to the requirements of Division 6.

**Section 243EF - Exceptions for certain transactions by banks and life assurance companies**

Transactions entered into by banks or life assurance companies in the ordinary course of their business and on ordinary commercial terms are exempt from the operation of this Subdivision. The Committee has included this exemption in the interests of making the legislation workable. However the ambit of this exemption may require review should it appear that abuses are taking place.

**Section 243EG - Transactions by company with bodies corporate that subsequently become related to or linked with it**

Where a lending company enters a regulated financial transaction with a body corporate and the two subsequently, within 6 months, become related or linked, and at that time any amount outstanding under the transaction exceeds 5% of the members' funds of the lender, the section requires:

- full disclosure to the ASC of the prescribed particulars of the transaction within 5 business days;

and subject to repayment of all amounts outstanding under the transaction or exemption by the Commission;

- preparation of a full explanatory financial statement within 1 month so as to allow for;



- the convening of a general meeting of the company, and some holding companies, within 3 months, at which members may vote on whether to approve the transaction. Notices of, and resolutions passed at, the meeting, must be provided to the ASC pursuant to s 243SA and s 243SB.

Subject to the passing of the members approving resolution(s) (defined in s 243AK), or the granting of an exemption or extension of time by the ASC, all outstanding amounts under the transactions are deemed to become due and payable 6 months after the bodies become related or linked, and the lending company must take such reasonable steps as are necessary to recover the amount.

The purpose of this section is to overcome the possibility of avoidance by lending companies entering into regulated financial transactions just prior to becoming related or linked with the borrower.

#### **Subdivision E - Transfer of assets between company and associated persons**

Subdivision E is included to ensure that transfers of assets between a company and "associated persons" (defined in s 243AB) are regulated in a similar way to loans and other financial assistance transactions covered in the preceding Subdivisions. This will close off any avenue or avoidance of those Subdivisions; for instance, by substituting asset transfers on favourable terms for loans, and also curb other possible abuses with these asset transfers. The provisions included in Subdivision E are modelled closely on those found in Subdivision D.

Where two companies are the parties to an asset transfer, the terms of Subdivision E require that each company be considered independently in determining whether the Subdivision applies (ie whether the respective other company is an "associated person") and if so, what percentage of the company's members' funds are involved (relevant to s 243FD and s 243FE). Depending upon the circumstances, Subdivision E may apply to one or both of these companies. This contrast with Subdivision D which applies only to one (the lending) company.

Subdivision E applies to various asset transfers also coming within Australian Stock Exchange (ASX) Listing Rule 3J(3) ("the Listing Rule") with these main similarities and differences:

- Companies covered. The Listing Rule applies to listed companies and their "satellites". Subdivision E applies to all companies, other than "exempt companies" (defined in s 243AE) and some other companies exempted by specific provisions under Subdivision E;
- Associated persons. The Listing Rule and Subdivision E regulate asset transfers between companies and associated persons. Both employ similar tests of association, except that the Listing Rule includes "satellites" while Subdivision E applies to related or "linked" bodies corporate (as defined under s 243AI). Subdivision E has no equivalent of the discretionary power of the ASX under the Listing Rule to deem an association: Rule 3J(3)(a)(iv); (b)(iv);
- Asset transfers. The Listing Rule and Subdivision E apply to corporate asset acquisitions and disposals with associated persons, including put and call options over assets (s 243FA). However, unlike the Listing Rule, allotments or issues of shares are not treated under Subdivision E as disposals of assets. It is not intended that Subdivision E regulate corporate share allotments or issues to associated persons, as this also raises quite separate matters concerning the "proper purpose" for the exercise of share issue powers, beyond the ambit of this Bill.
- Members' funds. Both Subdivision E and the Listing Rule apply to relevant asset transfers in excess of 5% of members' funds. The Listing Rule determines these funds "as at the date to which the last audited accounts were made up". A different test is set out in s 243AL, which requires directors to take into account any material changes since the last audited accounts. Also, unlike the Listing Rule, s 243AL makes no reference to the disregarding of minority interest.
- Consideration paid or received. Under s 243FD, the value of an acquisition will be the consideration paid; the value of disposal will be the market value of those assets. There is no equivalent in Subdivision E of the discretionary power of the ASX under the Listing Rule to deem a consideration. The consideration for options, under s 243FA(5)(6), and

the Listing Rule, include the issue and exercise price of the option, whether or not the option is exercised.

- Shareholder consent. Both the Listing Rule and Subdivision E require the prior informed approval of non-involved members to asset transfers in excess of 5% of members' funds. The Listing Rule requires an independent expert's report, with a proposal not being permitted to go to non-involved shareholders if the report indicates that the transfer would not be fair and reasonable to them. Section 243FE requires the preparation of an "explanatory financial statement" (defined in s 243AF) indicating whether the transfer would be fair and reasonable to the company. However, whatever the conclusion on fair and reasonable, members may vote on the proposal.
- Remedies for breach. The Listing Rule may be enforced and remedies sought pursuant principally to s 777 and s 1114 of the Corporations Law. Breaches of Subdivision E may result in criminal and civil liability (s 243FB; s 243TA) and other consequences may follow (eg s 230(1)(e); as provided for in this Bill) subject to relief under s 1318(1)(2), as amended in this Bill. In other instances, liabilities may also arise under Part 9.4 Division 1 of the Corporations Law.

### **Section 243FA - Acquisition and disposal of assets**

This section identifies an acquisition or disposal of assets ("assets transfer") for the purposes of this Subdivision. The section focuses on changes in the beneficial ownership of assets, disregarding a changes in the legal ownership only. An acquisition of shares, but not their allotment or issue, by a body corporate, comes within the section. Also, the entry into a put or call option over assets is caught; the consideration payable in this case, for the purposes of determining the 5% members' funds threshold, being the issue and exercise price of the option.

Where a company enters into a transaction, but subsequently varies its terms or conditions, the original and varied transaction are deemed to constitute a single transaction for the purposes of the Subdivision. This deeming provision addresses the possibility of circumvention by a company entering into a transaction for an amount apparently less than the 5% threshold, but subsequently adjusted upwards of that figure.

**Section 243FB - Liability of officers**

This section imposes criminal and civil liability on officers for transactions entered into by companies in excess of 5% of members' funds and not authorised under s 243FE, or otherwise exempt under Subdivision C, Subdivision F or any exemption in Subdivision E. Where a transaction is detrimental to the company, each officer who was in any way, directly or indirectly, knowingly concerned in or party to the transaction shall, for the purposes of s 232(6), be deemed to have made improper use of his or her position as an officer to cause detriment to the company, subject to proof that the officer did not behave improperly. These grounds of liability are in similar terms to s 243EA which divides the onus of proof between the prosecution or plaintiff (detriment to the company) and the defendant (lack of improper behaviour).

**Section 243FC - Exception for transactions covered by the other provisions**

Subdivision E does not apply to transactions regulated under other Subdivisions of Division 2.

**Section 243FD - Exception for transactions not exceeding 5% members' funds**

This section provides the company with an exemption for asset transfers, and recent and proposed transfers, with associated persons, not exceeding 5% of its own members' funds.

Where a company acquires assets, the value of the transaction to the company is measured by the cost of the acquisition. In addition, for the purposes of determining the 5% threshold, the cost of any proposed transactions, or any transactions during the prior 6 months, must be taken into account. Where a company disposes of its assets, the value of the transaction to the company is the market value of those assets. In addition, proposed disposals and disposals within the prior 6 months, to that associated person must be taken into account.

The market value test of disposals is designed to counter the possibility of a company selling its assets at a materially reduced price, with the purpose or effect of the transaction improperly falling below the 5% threshold (s 243FA(7)-(9) is

similarly designed). The result is that the transfer value, for the purpose of this Subdivision, may vary considerably between the transferor and the transferee.

Details of exempt transactions will not have to be disclosed to the Commission.

### **Section 243FE - Exception for transactions authorised by members**

This section allows for authorisation by members of asset transfers with associated persons. It will have its principal application to asset transfers by companies with associated persons exceeding 5% of its own members' funds, (subject to the exemptions for companies within group bodies corporate: Subdivision C; joint ventures: Subdivision F or transactions regulated under Subdivision A or Subdivision D (s 243FC)).

To comply, the following requirements must be met:

- the proposed transaction is authorised by a resolution of directors (as regulated by Part 3.2A Division 3);
- the "explanatory financial statement" (defined in s 243AF) is prepared and put before members
- the "members' approving resolutions" (defined in s 243AK) are passed; and
- a minimum period of 10 business day lapses between the passage of the last resolution and entry into the transaction (that period being subject to extension by the court on application by the ASC).

Notices, statements, and transactions authorised under this section, must be disclosed to the ASC, pursuant to the requirements of Division 6.

### **Subdivision F - Joint ventures**

#### **Section 243GA; Commission may exempt transactions in connection with joint venture**

The Advisory Committee believes that internal transactions within joint venture structures, otherwise falling within the terms of the Bill, should be exempt. However the Committee is also conscious of the potential avenues for

circumvention that an unrestricted exemption for joint ventures could create, and believes that the best protection is to give the ASC a monitoring role. In light of the different forms that genuine joint ventures may take, s 243GA(2) requires the Commission to have regard to any matters that it considers relevant, including, but not confined to, or necessarily limited by, those matters set out in subsection (2). The Commission may grant an exemption, subject to any conditions it considers appropriate.

A joint venture company may choose not to apply for exemption under s 243GA and instead comply with the relevant provision in Subdivision D or E. This may be a more attractive alternative if the amount of the regulated financial transaction does not exceed 5% of the members' funds of the lender (Subdivision D) or the associated parties (Subdivision E).

### **Subdivision G - Transitional**

#### **Section 243HA: Amounts outstanding under past regulated financial transactions**

This section requires the disclosure of all regulated financial transactions pre-dating the commencement of the Act which, had they been entered into after that date, would have been subject to disclosure under section 243SC. In these circumstances the company must lodge the prescribed particulars of the transaction within 6 months from the commencement of this Division, or within such further period as the Commission allows and, subject to s 243JF (reporting obligations and accounting standards) the directors must include these particulars in the company's accounts and directors' reports.

The purpose of this provision is to provide more complete details on the ASC database of past outstanding transactions, as well as current transactions required to be reported.

### **Subdivision H - Miscellaneous**

This Subdivision contains provisions of general application to Division 2. They include:

- a maximum period for the ASC to deal with applications;

- court powers to declare some regulated financial transactions not in the best interests of the company;
- duties, obligations and liabilities of directors;
- enforcement rights for prohibited transactions.

### **Section 243JA - Maximum period for Commission to deal with request**

Where in Division 2 consent by the ASC to entry into certain transactions is obligatory (eg executive share acquisition schemes or housing assistance schemes in excess of 5% of members' funds: s 243BD), or the ASC has a discretionary dispensing power (eg ss 243BE; 243BI(4); 243CA(2); 243EA(2); 243EG(8)(9); 243GA) the Commission is subject to a time limit in reaching its decision. Under this provision, if the Commission has not, within the period of 30 business day of receiving a written request containing prescribed particulars, notified the applicant whether it consents to the proposed transaction or scheme, the Commission shall be deemed to have consented to the proposed transaction, or scheme, at the end of that period. This provision will place an obligation on the ASC to act on complete applications with reasonable expedition.

### **Section 243JB - Court made declare transaction not to be in interest of company**

The court, on the application of the ASC, may declare a proposed or existing transactions under Division 2 not to be in the best interest of the company. The exceptions to this declaration power are loans by financial corporations on ordinary commercial terms (s 2443BF(2)); small transactions (s 243BH); transactions between group bodies corporate (Subdivision C); transactions referred to in subsection 205(1) (s 243EB); and all other transactions expressly permitted by the ASC (eg s 243BE; Subdivision F).

The effect of a declaration is twofold. It would preclude the entry into a proposed transaction, given the court finding that this would not be in the interests of the company. In regard to transactions previously entered into, the effect of subsection (4) is to make the declaration subject to s 243JC. This preserves those transactions where the other party has acted in good faith.

Liability for the making of false or misleading statements in purported compliance with the requisite approval procedures in Subdivision A, as opposed to outright non-compliance, is set out in s 243TA (false or misleading statements).

#### **Section 243JC: Enforceability of prohibited transactions**

The CSLRC Report noted that in the absence of suitable legislative provision, a transaction tainted with illegality may not be enforceable. This could act to the detriment of innocent persons, such as members of the lending company. The section provides that a transaction entered into in contravention of Division 2 is enforceable by the company or by any bona fide party for value to the transaction. In addition, third parties may be protected by the Certification procedure provided for in this section.

#### **Section 243JD - Obligations of dissenting or abstaining directors**

Where the directors who voted at a meeting of directors in favour of a transaction are required or permitted to set out in a statement why another director voted against or abstained from voting on the transaction, the dissenting or abstaining director must provide those details in sufficient time for them to be included in the statement. The obligation on dissenting or abstaining directors to set out their reasons arises under s 243AF(6).

#### **Section 243JE - Reporting on outstanding amounts**

This section sets out the obligations of directors to ensure that the financial details of regulated financial transactions under Subdivisions A and D of Division 2 are included in the company's accounts for each financial year. These details are to be checked by the auditor and, if necessary, adjustments made in the auditor's report. The auditor's report must also indicate whether the outstanding regulated financial transactions have exceeded 5% of members' funds.

#### **Section 243JF- Reporting obligations and accounting standards**

This section is designed to overcome possible duplication between applicable accounting standards and the requirements of Division 2. It provides that any relevant requirement under this Division applies only to the extent that directors



are not already required, by virtue of an applicable accounting standard, to ensure that the matter is disclosed in the accounts or the directors' report.

### **Section 243JG- Provisions of Division to be paramount**

The terms of Division 2 cannot be excluded in whole or part by provisions in other legislation or by private contract or under the constitution of any company or other body corporate.

## **DIVISION 3: DISCLOSURE OF CONFLICTS OF INTEREST BY DIRECTORS**

### **Subdivision A - Interpretation**

#### **Section 243KA - Matters with which company is concerned**

Section 231 relates only to contracts or proposed contracts. The CSLRC noted that s 231 does not cover dispositions of property unrelated to a contract, such as a trust, and recommended that the wording be broadened. Section 243KA therefore uses the broader term "transaction", which is defined in Division 1 to include a contract or arrangement.

Section 243LA(1) requires a director to make disclosure of interests in any "matter with which the company is concerned". Section 243KA defines that term so as to make it clear that it includes a matter which concerns the company, irrespective of whether or not the matter has been or is to be considered by the Board.

#### **Section 243KB - Interest in matter**

Section 231 of the Corporations Law contains no definition of "interest". Section 243KB contains a broad definition of that concept, so as to make it clear that it includes all benefits (whether financial or otherwise) accruing to the director, the director's spouse or a relative of the director or spouse. This will ensure that the Board is aware of all factors concerning a particular director's interest in a matter which concerns the company. What is meant by benefit is intended to be broader than the definition of benefit which applies to Divisions 4 and 5.

### **Section 243KC - Minor interests**

The Bill does not contemplate a complete definition of "material interest". The CSLRC noted in its report that there are difficulties in framing a test of materiality appropriate to the needs of s 231. Essentially, the question of materiality is one for the commercial judgment of the Board as a whole. In order, however, to avoid the issue having to be addressed in the case of obviously immaterial interests, s 2434KC makes mention of certain matters which are deemed, unless the Board resolves otherwise, to constitute a minor (and therefore immaterial) interest. The matters excluded in this way are:

- holding the position of officer in the other contracting company where the other contracting company is a related company;
- the director having a relevant interest in shares in the other contracting company where:
  - the nominal value of those shares does not exceed 5% of the nominal value of all the issued shares in the company; and
  - the shares do not entitle the director to receive more than 5% of the dividends or 5% of any capital distributions;
- situations where the director does not control, either directly or indirectly, more than 5% of the voting power in the other contracting company.

### **Subdivision B - Notification of interests**

#### **Section 2434LA - Notices of particular interests**

This section provides that a director who has an "interest" (see s 243KB) in a "matter with which the company is concerned" (see s 243KA) must, within 5 business days after the director becomes aware of the relevant facts, give written notice to the company of the "particulars of the interest".

Subsection 243LA(2) sets out the "particulars of the interest" which a director must disclose to the company. The central requirement is that the director disclose "particulars of the nature and extent of the interest" and such other information as is reasonably necessary to enable the other directors to decide what action should be taken in the interests of the company in relation to the

matter. The current legislation sets no standards for disclosure, requiring only that the director "declare the nature of the interest".

There is also a requirement for a director to notify the company where the director has ceased to have an interest or where there has been a change in the nature or extent of the interest.

Subsection (4) requires directors of a company, where they have become aware that another director has failed to disclose an interest, to notify the company.

Section 236 of the Corporations Law provides that directors must supply to their companies such information as is necessary to enable the companies to maintain registers of directors' shareholdings as required by s 235. Subsection 243LA (5) has the effect that, where information has been supplied under s 236, it will not be necessary to supply the same information under s 243LA. This avoids unnecessary duplication of disclosure of information.

#### **Section 243LB - General notices**

Under this section, a director of a company who is also a director or other officer or member of a specified company or a member of a specified firm may give to the company a general notice to that effect. That notice is sufficient compliance with the requirements of s 243LA in respect of all transactions which the company enters into with that company or firm during the following 12 months provided that the extent of the director's interest in the company or firm has not increased in the interim. This provision changes s 231(5) of the Corporations Law by limiting to 12 months the indefinite notice period for which that subsection allows.

#### **Section 243LC - How notices are to be given**

Where a director is required to disclose an interest or a change of interest under s 243LA, the notice must be given to a secretary of the company. The secretary must then, within 5 business days after receipt of the notice, give a copy of the notice to the other directors of the company and enter the particulars of the interest in the register of interests.

**Section 243LD - Directors may require further information**

This section enables the Board to obtain further information from a director about his or her interest in order for the Board to form an opinion as to whether the interest is material or to make a decision in relation to the matter in the interests of the company.

**Subdivision C - Registers of interests**

**Section 243MA - Register to be kept and made available to directors and members**

The keeping of a register of company directors' interests is a new requirement, having no equivalent in the current legislation. Minor interests of directors are not required to be recorded in the register and neither are interests which must be recorded in another register kept by the company under the Corporations Law (s 243MA (1)). The register is to be open for inspection by any member or director of the company but no member of the public is permitted to inspect the register (s 243MA(2)). A member or director of the company will be able to seek a copy of the register or part of the register (s 243MA(3)). The register is also to be available during the annual general meetings of the company for perusal by members (s 243MA(4)).

**Subdivision D - Restriction on voting by directors**

**Section 243NA - Director not to vote or be present in certain circumstances**

This section contains restrictions on the voting by directors in relation to matters in which they have a material interest. A company with not more than 15 members may have provisions in its memorandum or articles of association which are different to these restrictions.

The section provides that a director who has a minor interest in a matter is entitled to vote at a meeting of directors on that matter unless the other directors have resolved that the interest is a material interest (s 243NA(2)). A director who has an interest in a matter which is not a minor interest is not entitled to be present during the consideration of, or to vote on, any motion relating to the

matter unless the other directors have resolved that the interest is not a material interest (s 243NA (3)).

Subsection 243NA(5) requires there to be a quorum of at least two directors who are qualified to vote, present for the discussion of each matter at a directors' meeting. A director who holds a material interest in a matter is not so qualified, and thus would not count in determining the presence of a quorum. The quorum requirement is not applicable to a resolution by the Board to convene a general meeting of members to consider a matter that the Board itself cannot consider because of the quorum requirement (s 243 NA(6)).

#### **Subdivision E - Miscellaneous**

#### **Section 243PA - Civil liability resulting from contraventions of Division**

Where the company or any person incurs a loss because of a contravention of the disclosure requirements of the Division, the director or directors who contravened the disclosure requirements are liable for the loss.

#### **Section 243PB - Transactions not invalid**

This section makes it clear that no transaction entered into or other act done by a company is invalid because of a contravention of the Division. This ensures adequate protection for third parties dealing with the company in a case where, for instance, a director has failed to disclose a relevant interest. In order to provide appropriate protection to the company, it is also provided that nothing in the section derogates from any powers that a court would have in relation to the transaction including the power to declare the transaction void.

### **DIVISION 4: DISCLOSURE OF BENEFITS GIVEN TO DIRECTORS**

Division 4 will apply to all companies other than exempt proprietary companies (defined in s 69 of the Corporations Law) and will require disclosure of benefits given to all persons "relevantly connected" with the company.

Disclosure bands of \$25,000 will apply (this requirement will be contained in the regulations) and disclosure will be required only where the aggregate amount of

benefits received over a 12 month period exceeds \$50,000. Salary or wages are excluded from the category of benefits required to be disclosed.

The important definitions of "benefit" (which excludes salary or wages), "give" and "Relevant connection with company" are contained in Division 1. The intention is that devices such as the interposition of "service companies", "consultancies" or other entities between the company and the director are not to be allowed to frustrate the objective of comprehensive disclosure, if the reality of the matter is that a benefit is ultimately received by the director or relative.

#### **Section 243QA - Company to disclose benefits**

Disclosure of benefits will entail lodgment with the ASC of prescribed particulars in relation to the determination or variation of a benefit within 10 business day of a resolution or decision to give the benefit, and inclusion of such particulars in the company's accounts. Lodgment of this information will not be required, however, where disclosure has already been made under Division 2 or under an applicable accounting standard. This avoids the possibility of having to make double disclosure where the benefit takes the form of a loan or other type of financial assistance regulated under that Division.

The "prescribed particulars" are to be defined in the regulations. The regulations must not require the particulars to name the persons to whom the benefits were given. However, this is subject to a provision (currently s 239 but it is relocated in the Bill) that permits members who satisfy certain requirements to obtain further details of the benefits (see s 243AN).

#### **Section 243QB - Offences**

Contravention of the disclosure requirements may render directors and other officers involved in the contravention guilty of an offence.

#### **Section 243QC - Validity of resolutions or decisions not affected**

This section provides that no resolution or decision to give a benefit is invalid because of the operation of Division 4 or a contravention by any person of that Division. In order to provide appropriate protection to the company, it is also provided that nothing in the section derogates from any power that a court would

have in relation to the resolution or decision including the power to declare the resolution or decision to be void.

## **DIVISION 5: PROHIBITION OF BENEFITS IN CONNECTION WITH TRANSFER OF COMPANY'S UNDERTAKING OR PROPERTY**

### **Section 243RA - Benefits not to be given**

This section imposes a prohibition on a person, in connection with the transfer of the whole or a part of the undertaking or property of a company, giving a benefit to a person who is relevantly connected with the company unless there is compliance with s 243RB. The important terms "benefit" and "relevantly connected with the company" are defined in Division 1.

### **Section 243RB - Benefit permitted with approval of members**

The prohibition in s 243RA does not apply if, before the benefit is given, the directors of the company have prepared and signed, an explanatory financial statement in relation to the proposed benefit and a members' approving resolution is passed. The terms "explanatory financial statement" and "members' approving resolution" are defined in Division 1.

### **Section 243RC - Giving of lesser benefit**

This section makes clear that where the giving of a benefit has been approved in accordance with s 243RB, it is permissible to give a lesser benefit in value than that actually approved.

### **Section 243RD - Where failure to give benefit would constitute contravention of law**

The prohibition does not apply where the failure to give the benefit would constitute a contravention of law.

### **Section 243RE - Benefits not to be received**

A person who is relevantly connected with a company must not receive a benefit if the giving of the benefit contravenes s 243RA.

**Section 243RF - Benefits taken to be received on trust**

Where the giving of a benefit contravenes s 243RA, the benefit is taken to be received by the person in trust for the company concerned.

**Section 243RG - Division additional to other laws**

This section makes clear that Division 5 is in addition to any other legal provision that requires disclosure to be made with respect to the giving or receipt of a benefit.

**DIVISION 6: DISCLOSURE TO COMMISSION****Section 243SA: Notices and statements to be lodged with Commission**

Where a general meeting is convened pursuant to s 243BD; s 243BI(4)(b); s 243EE; s 243EG s 243FE or s 243RB, a copy of the notice of meeting and each relevant accompanying statement must be lodged with the ASC not later than 5 business day after the notices and statements were first sent to the members. The ASC may extend the period of lodgment.

**Section 243SB- Notice of resolutions to be given to Commission**

The directors are required to lodge with the ASC a copy of any resolution passed at a meeting of directors or members held pursuant to s 243BD; s 243BI(4)(b); s 243CA, s 243EE; s 243EG, s 243FE or 243RB, within 5 business days of the resolution being passed.

**Section 243SC- Notification of particulars of transactions or schemes**

This requires prescribed particulars certain transactions or schemes, coming within Division 2, to be notified to the ASC within 5 business days, of their occurring, or such extended period as may be granted by the Commission. The transactions or schemes required to be notified under this section are:

- regulated financial transactions permitted with related bodies corporate: s 243BB;



- permitted executive share acquisition or housing assistance schemes: s 243BC;
- regulated financial transactions in relation to senior officers other than directors: s 243CA;
- regulated financial transactions in relation to related and linked bodies corporate (other than group bodies corporate or joint ventures) in excess of 5% of members' funds: s 243EE; and
- asset transfers between companies and associated persons in excess of 5% of members' funds: s 243FE.

It is envisaged that the prescribed particulars shall be included on the ASC database. Relevant details must also be included in the annual accounts and directors' report, subject to compliance with relevant accounting standards.

Where these notification requirements are contravened, involved persons are jointly and severally liable for any direct or indirect consequential loss.

Subsection (5) imposes a separate obligation to notify the discharge of these transactions within one month of this occurring. Partial discharges need not be notified.

## **DIVISION 7: MISCELLANEOUS**

### **Section 243TA - False or misleading statements**

This section provides that a director who signs any false or misleading statement prepared for any purpose of Part 3.2A is personally liable for any resultant loss suffered by the company, unless, at that time, the director believed, on reasonable grounds, that the statement was true and not misleading. The terms of this defence are intended to impose a "due diligence" obligation on directors.

In addition, a director who signs a statement which he or she subsequently discovers to be false or misleading, must notify this fact to all other directors, and

take all reasonable steps to prevent the company from entering into or operating, or to secure the termination of, the relevant transaction, and to minimise any consequential loss to the company. A director who fails to do this, without a reasonable excuse, shall be deemed to have failed to act with a reasonable degree of care and diligence, for the purposes of s 232 of the Corporations Law.

Under subsection (5) copies of statements and relevant minutes of directors' meetings are admissible in evidence.

An obligation rests on the company to promptly notify the ASC of the false or misleading particulars, with liability on the directors in the event of failure.

#### **Section 243TB - Provisions relating to extension of periods**

The ASC may exercise any of its powers to extend a period (other than under s 243EG(9) - transactions by company with bodies corporate that subsequently become related to or linked with it) even though the period may have ended.

### **OTHER AMENDMENTS**

#### **Section 291A**

The requirements of Part 3.6 Division 4: Financial statements, are subject to compliance with Part 3.2A.

#### **Section 300A**

The requirements of Part 3.6 Division 5: Directors' statements, are subject to compliance with Part 3.2A.

#### **Paragraph 307(c)**

A consequent amendment is made to s 307(c) to ensure that particulars coming with Division 3 of Part 3.2A are included in the directors' report.

**Sub-sections 1318(1) and (2)**

The effect of these sub-sections is to extend the power of the court to grant relief from civil liability, to contraventions of Part 3.2A.

**Schedule 3**

The maximum penalties for breach of relevant sections of Part 3.2A are set out.

**ANNEXURE A**

**1990-91**

**A BILL**

**for**

**An Act to amend the Corporations Law set out in section 82 of the *Corporations Act 1989***

The Parliament of Australia enacts:

**Short title**

1. This Act may be cited as the *Corporations Amendment Act (No. 3) 1991*.

**Corporations Law**

2. In this Act, "Corporations Law" means the Corporations Law set out in section 82 of the *Corporations Act 1989*.<sup>1</sup>

**Commencement**

3. (1) Sections 1, 2 and 3 commence on the day on which this Act receives the Royal Assent.

(2) Subject to subsection (3), section 4 commences on a day to be fixed by Proclamation.

(3) If section 4 does not commence under subsection (2) within the period of 6 months beginning on the day on which this Act receives the Royal Assent, that section commences on the first day after the end of that period.

**Amendments**

4. The Corporations Law is amended as set out in the Schedule.

**SCHEDULE**

Section 4

**AMENDMENTS OF THE CORPORATIONS LAW**

**Section 224:**

Add at the end:

"(8) A further provision relating to the vacation of the office of director of a company is included in section 243BI."

**Paragraphs 230(1)(a), (b) and (d):**

Add at the end of each paragraph "or"

**Subsection 230(1):**

Add at the end:

- "(e) 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 the body corporate:
  - (i) the body corporate contravened a provision of Part 3.2A and, as a result of the contravention, the relevant person committed an offence against a provision of that Part; or
  - (ii) the relevant person contravened a provision of Part 3.2A;"

**Section 231:**

Repeal the section.

**Section 234:**

Repeal the section.

**Subsection 237(1):**

Omit the subsection, substitute:

- "(1) Subject to this section:
  - (a) a company; or
  - (b) an associate of a company (other than a body corporate that is related to the company and is itself a company); or
  - (c) a prescribed superannuation fund in relation to a company;

must not give a prescribed benefit to a person in connection with the retirement of a person from a prescribed office in relation to the company."

**Subsections 237(5), (6) and (9):**

Omit "Paragraph (1)(a)", substitute "Subsection (1)".

**Subsection 237(19) (definition of "relevant benefit"):**

Omit the definition.

**Subsection 237(20):**

Omit the subsection.

**Section 239:**

Repeal the section.

**After Part 3.2:**

Insert:

**"PART 3.2A - REGULATION OF CERTAIN FINANCIAL TRANSACTIONS AND  
BENEFITS AND DISCLOSURE OF OFFICERS' INTERESTS AND BENEFITS**

**"Division 1 - Introductory**

*"Subdivision A - Object of Part*

**Promotion of honest and diligent management of companies**

"243A. (1) It is the opinion of the Parliament that:

- (a) the existence of certain relationships involving a company, any of its officers or any other person may expose the company to risks, and provide opportunities, that would not have existed in the absence of those relationships; and
- (b) the relationships may therefore have a material effect on the performance, financial position, and financing and investing of the company; and
- (c) members of a company need to be informed of any such relationships and of transactions or proposed transactions involving the company, any of its officers or any other person.

"(2) Having regard to the opinion expressed in subsection (1), the object of this Part is to enact provisions that will seek to give to investors in companies confidence that officers of companies will manage those companies, and the resources of those companies, honestly and diligently.

"(3) To promote the object referred to in subsection (2):

- (a) Division 2 regulates certain transactions and proposed transactions by a company in relation to officers and related entities; and
- (b) Division 3 requires the disclosure by directors of a company of material interests they have in matters with which the company is concerned and restricts the rights of directors who have such interests to participate in decisions relating to those matters; and
- (c) Division 4 requires a company to disclose certain kinds of benefits given to directors; and

- (d) Division 5 regulates the giving of certain benefits in connection with the transfer of the whole or a part of a company's undertaking or property; and
- (e) Division 6 provides for disclosure to the Commission.

"(4) The passing in accordance with this Part of a resolution approving a transaction, proposed transaction, executive share acquisition scheme, housing assistance scheme or proposed benefit by a company at a meeting of the members of the company or of a holding company of the company does not relieve the directors of the company of any duty to the company or to any other person, whether of a fiduciary nature or otherwise, imposed on them by any Act or the law of this or any other jurisdiction (including any rule of the common law or of equity) in connection with the transaction, proposed transaction, scheme or proposed benefit.

"(5) Nothing in this Part relieves the officers of a company of any duty to the company or to any other person, whether of a fiduciary nature or otherwise, imposed on them by any Act or the law of this or any other jurisdiction (including any rule of the common law or of equity).

*"Subdivision B- Interpretative and other general provisions*

**Definitions**

"243AA. In this Part, unless the contrary intention appears:

'accounts' means accounts made out under sections 292 and 293;

'associated', in relation to a company, has the meaning given by section 243AB:

'benefit', in Divisions 4 and 5 and in this Division as it has effect for the purposes of either of those Divisions, means money, any other consideration or any other benefit (whether or not having a monetary value), and includes:

- (a) any fringe benefit within the meaning of the *Fringe Benefits Tax Assessment Act 1986*; and
- (b) any contribution to a superannuation or retirement fund;

but does not include:

- (c) a payment in respect of expenses that are reasonably to be incurred, or a reimbursement of expenses that have reasonably been incurred, by a person in the course of the person's employment; or
- (d) a benefit given under a transaction entered into by a company if section 243SC applies to the company in relation to the transaction; or
- (e) a benefit, or a benefit included in a class of benefits, declared by the regulations to be a benefit or class of benefits to which Division 4 or 5, as the case may be, does not apply;

and, in Division 4 and in this Division as it has effect for the purposes of Division 4, also does not include salary or wages within the meaning of Division 2 of Part VI of the *Income Tax Assessment Act 1936*;

'**cost**', in relation to the acquisition of an asset by a company, has the meaning given by section 243AD;

'**credit transaction**' means a transaction under which a company:

- (a) sells any land or supplies any goods or other property under a hire-purchase or other form of credit agreement or arrangement; or
- (b) leases any land, or leases or hires any goods or other property, in return for periodical payments; or
- (c) otherwise disposes of land, or supplies goods or other property or services, on the understanding that payment (whether in a lump sum or instalments or by way of periodical payments or otherwise) is to be deferred;

but does not include such a transaction that is entered into by a company:

- (d) in the ordinary course of its ordinary business; and
- (e) on ordinary commercial terms, including terms relating to the rate of interest payable, the repayment of principal and payment of interest and the security to be provided;

'**excepting provision**' means:

- (a) in relation to a transaction or proposed transaction referred to in section 243BA - section 243BB, 243BC, 243BE, 243BF, 243BG, 243BH or 243DA; or
- (b) in relation to a transaction or proposed transaction referred to in section 243EA - section 243DA, 243EB, 243EC, 243ED, 243EE, 243EF or 243GA; or
- (c) in relation to a transaction or proposed transaction referred to in section 243FB - section 243DA, 243FC, 243FD, 243FE or 243GA;

'**executive share acquisition scheme**', in relation to a company, means a scheme that confers rights on persons to acquire shares (whether wholly or partly paid) in the company or in a body corporate that is related to the company, being rights that arise by virtue of the employment of persons by the company or by such a body corporate;

'**exempt company**' has the meaning given by subsection 243AE(1);

'**explanatory financial statement**' has the meaning given by section 243AF;

'**fair value**' means:



- (a) in the case of an asset - the amount for which the asset could be sold by a knowledgeable, willing seller to a knowledgeable willing buyer in an arm's length transaction; or
- (b) in the case of a service - the amount for which the service could be supplied by a knowledgeable, willing supplier to a knowledgeable willing acquirer in an arm's length transaction;

**'give'**, in relation to a benefit, means provide directly or indirectly either as a gift or pursuant to a requirement under a contract, and includes:

- (a) in the case of a benefit involving the payment of money - vary the rate or amount, or the date, of the payment in a manner favourable to the person to whom the benefit is provided; or
- (b) in the case of a benefit (other than money) that has a monetary value - do any act that results in an increase in the value of the benefit;

**'group body corporate'** has the meaning given by section 243AG;

**'housing assistance scheme'**, in relation to a company, means a scheme to provide persons employed by the company or by a body corporate that is related to the company, or the spouses of such persons, with funds, guarantees or other forms of financial assistance for any one or more of the following purposes:

- (a) purchasing or otherwise acquiring, or constructing, premises to be used as a principal place of residence of the person to whom the financial assistance is provided;
- (b) extending or improving premises that are, or are to be, used as a principal place of residence of the person to whom the financial assistance is provided;
- (c) repaying in whole or in part money borrowed for a purpose referred to in paragraph (a) or (b);

and includes such a scheme that also provides funds, guarantees or other forms of assistance for the purpose of paying any fees, expenses, taxes or other duties, or other costs, incidental to or arising in connection with the carrying out of any purpose referred to in paragraph (a), (b) or (c);

**'interest'**, in relation to a transaction, has a meaning affected by section 243AH;

**'linked'**, in relation to bodies corporate, has the meaning given by section 243AI;

**'listed company'** means a company that is included in the official list of a stock exchange in Australia or an external Territory;

**'loan'** has a meaning affected by section 243AJ;

**'members' approving resolutions'** has the meaning given by section 243AK;

'members' funds' has the meaning given by section 243AL;

'particulars', in relation to a transaction, scheme or benefit, has a meaning affected by section 243AM, 243AN or 243AO, as the case requires;

'quasi-loan' has the meaning given by section 243AP;

'regulated financial transaction' has the meaning given by section 243AQ;

'related', in relation to bodies corporate, has a meaning affected by section 243AR;

'relevant interest', has a meaning affected by section 243AS;

'relevantly connected', in relation to a company, has the meaning given by section 243AT;

'transaction' includes a contract or arrangement and also includes a unilateral act.

### **Associated persons**

"243AB. (1) For the purposes of this Part, the following persons are associated with a company at the time when the company enters into a transaction:

- (a) a person who at that time is an officer of the company or of a body corporate that is related to or linked with the company;
- (b) a person who at that time is a substantial shareholder for the purposes of Part 6.7 in the company or in a body corporate that is related to or linked with the company;
- (c) any other person who at that time is an associate of the company.

"(2) If a company enters into a transaction with a person who is not associated with the company but was associated with the company at any time within 6 months before the transaction is entered into, this Part has effect, unless the Commission otherwise determines, as if the person is associated with the company when the transaction is entered into.

### **Conditional contracts**

"243AC. Where a person enters into a contract that does not have effect unless a specified condition is fulfilled:

- (a) Division 2 or 5 does not apply to the person in relation to the contract, or a benefit under the contract, as the case may be, unless the condition is fulfilled; and
- (b) if the condition is fulfilled, the person is taken for the purposes of this Part to enter into the contract, or provide a benefit under the contract, as the case may be, when the condition is fulfilled.

### **Cost of acquisition of asset**

"243AD. For the purposes of this Part, the cost to a company of the acquisition of an asset is the sum of:

- (a) the amount (if any) paid by the company in respect of the acquisition; and
- (b) the fair value of any asset given or service provided by the company in exchange for the asset acquired; and
- (c) any cost incidental to the acquisition.

### **Exempt companies**

"243AE. (1) A company is an exempt company for the purposes of the application of a provision of this Part in which the expression 'exempt company' appears in relation to a transaction by the company if, when the transaction is entered into:

- (a) the company does not have more than 15 members; or
- (b) the company is an exempt proprietary company; or
- (c) the company is a proprietary company that is exempt under subsection (2) from the application of that provision in relation to the transaction.

"(2) The Commission may, by writing, exempt a proprietary company (other than an exempt proprietary company) from the application of all or any of the provisions of Division 2 in relation to a transaction or class of transactions, either unconditionally or subject to conditions specified in the instrument of exemption.

"(3) The Commission must not exempt a company in relation to a transaction or class of transactions unless it is satisfied that:

- (a) the transaction or class of transactions will not involve the public; and
- (b) having regard to all the circumstances it is not appropriate for the provisions or provision to which the exemption will relate to apply in relation to the transaction or class of transactions.

"(4) Without affecting the obligations of the Commission under subsection (3) to satisfy itself as to the matters referred to in that subsection, an exemption granted by the Commission under subsection (2) to a company in relation to a transaction or class of transactions is conclusive evidence that the Commission had properly satisfied itself as to those matters for the purpose of granting the exemption.

"(5) A company that has been exempted by the Commission, subject to a condition, from the application of all or any of the provisions of Division 2 in relation to a transaction or class of transactions must not contravene the condition.

### **Explanatory financial statement**

"243AF. (1) A reference in this Part to the explanatory financial statement in relation to:

- (a) a transaction by a company; or
- (b) a proposed transaction by a company; or
- (c) an executive share acquisition scheme proposed to be operated by a company; or
- (d) a housing assistance scheme proposed to be operated by a company; or
- (e) a benefit proposed to be given in connection with a transfer of the whole or a part of the undertaking or property of a company;

is a reference to a statement that complies with the requirements of this section.

"(2) The statement must identify the day on which the statement was first signed by a director of the company.

"(3) The statement must set out the prescribed particulars of the transaction, proposed transaction, executive share acquisition scheme, housing assistance scheme or proposed benefit, as the case requires.

"(4) If the statement concerns a transaction or proposed transaction in relation to a body corporate that is related to or linked with the company, the statement must explain how the company and the body corporate are related or linked.

"(5) If the statement concerns a transaction or proposed transaction in relation to a person who is relevantly connected or associated with the company, the statement must explain how the company and the person are relevantly connected or associated.

"(6) If the statement:

- (a) is to accompany notices of a general meeting of the company or of another body corporate; and
- (b) relates to a matter that was authorised by a resolution of the directors of the company;

the statement must set out the name of any director who voted against, or abstained from voting on, that resolution and must give the reasons why that director so voted or abstained.

"(7) Subsections (8), (9), and (10) apply only to:

- (a) a statement that relates to a matter referred to in paragraph (1)(a), (b), (c) or (d); or
- (b) a statement that relates to a benefit referred to in paragraph (1)(e) where the benefit is proposed to be given in whole or in part by the company referred to in that paragraph.

"(8) The statement must state that it is the opinion of the directors who signed the statement that:

- (a) in the case of a proposed transaction or benefit - if the transaction were entered into or the benefit were given; or
- (b) in the case of an executive share acquisition scheme or a housing assistance scheme - if transactions were entered into under or for the purposes of the scheme;

the company would be able to pay all its debts as and when they become due and payable.

"(9) The statement must state:

- (a) the effect that the transaction has had, or the effect that the proposed transaction, the transactions proposed to be entered into under the executive share acquisition scheme or the housing assistance scheme or the proposed benefit would have, on the financial position of the company; and
- (b) whether the transaction has prejudiced materially or is likely to prejudice materially, or whether the proposed transaction, the transactions proposed to be entered into under the executive share acquisition scheme or the housing assistance scheme or the proposed benefit would be likely to prejudice materially, the interests of members or creditors of the company.

"(10) The statement must state whether the directors who signed the statement are of the opinion (having regard to any guidelines issued by the Commission) that the transaction was, or that the proposed transaction, the executive share acquisition scheme or the housing assistance scheme or the proposed benefit would be, fair and reasonable to the company.

"(11) Where the statement expresses an opinion, the statement must set out the grounds on which that opinion was based.

"(12) In this section, '**debts**' does not include contingent debts.

### **Group bodies corporate**

"243AG. (1) For the purposes of this Part, a body corporate is taken to be a group body corporate in relation to another body corporate if:

- (a) the other body corporate is a closely-held subsidiary of the first-mentioned body corporate; or
- (b) the first-mentioned body corporate is a closely-held subsidiary of the other body corporate; or
- (c) each of the bodies corporate is a closely-held subsidiary of the same body corporate.

"(2) For the purposes of this Part, a body corporate is a closely-held subsidiary of another body corporate (in this subsection called the '**holding body corporate**') if shares in the first-mentioned body corporate to which are attached between them:

- (a) the right to exercise not less than 90% of the voting power in the first-mentioned body corporate; and
- (b) the right to receive not less than 90% of any dividend that may be paid by the first-mentioned body corporate; and
- (c) the right to receive not less than 90% of any distribution of the capital of the first-mentioned body corporate;

are beneficially owned by:

- (d) the holding body corporate; or
- (e) a body corporate that is, or 2 or more bodies corporate each of which is, a closely-held subsidiary of the holding body corporate; or
- (f) the holding body corporate and a body corporate that is, or 2 or more bodies corporate each of which is, a closely-held subsidiary of the holding body corporate.

"(3) For the purposes of this Part, where a body corporate is a closely-held subsidiary of another body corporate (including a body corporate that is such a closely-held subsidiary by virtue of any other application or applications of this subsection), every body corporate that is a closely-held subsidiary of the first-mentioned body corporate is taken to be a closely-held subsidiary of that other body corporate.

### **Interest in transaction**

"243AH. (1) Where a company has entered into or proposes to enter into a transaction in relation to a body corporate:

- (a) a director of the company who is a substantial shareholder in the body corporate for the purposes of Part 6.7 has an indirect interest in the transaction for the purposes of this Part; but
- (b) except as provided by paragraph (a), a director of the company does not have a direct or indirect interest in the transaction for the purposes of this Part merely because the director holds or has an interest in any shares in the body corporate.

"(2) A reference in this Part to a person having an indirect interest in a transaction or proposed transaction includes a reference to a person having an interest through the interposition of one or more bodies corporate, trusts or partnerships.

### **Linked bodies corporate**

"243AI. (1) For the purposes of this Part, 2 bodies corporate are linked with each other at a particular time if at that time one of the bodies corporate, although not a holding company of the other body corporate:

- (a) has a significant influence, within the meaning of any applicable accounting standard, over the other body corporate; or

- (b) does not have such an influence but has a relevant interest in not less than 20% of the shares in the other body corporate.

"(2) If a company enters into a regulated financial transaction in relation to a body corporate that is not linked with the company but had been linked with the company at a time within 6 months before the day on which the transaction is entered into, this Part has effect, unless the Commission otherwise determines, as if the body corporate is linked with the company when the transaction is entered into.

### Loans

"243AJ. (1) A reference in this Part to a loan does not include a reference to a transaction of a kind described in paragraph (a), (b) or (c) of the definition of 'credit transaction' in section 243AA.

(2) Subject to subsection (3), the allotment by a company of partly paid shares constitutes for the purposes of this Part a loan of the unpaid amount made by the company to the person to whom the shares are allotted.

"(3) Subsection (2) does not apply to an allotment of partly paid shares if, when the shares are allotted, any rights of a particular kind that are attached to the shares do not exceed the rights calculated under the formula:

$$\text{Total rights} \times \frac{\text{Amount paid in respect of the shares}}{\text{Total of the amounts paid or payable in respect of the shares}}$$

where:

'Total rights' means the rights of that kind that would be attached to the shares if they were fully paid.

"(4) If, at a time after an allotment of partly paid shares and before the shares are fully paid, any rights of a particular kind that are attached to the shares are varied so as to exceed the rights calculated under the formula specified in subsection (3), the company is taken, for the purposes of this Part, to have made a loan at that time to the holder of the shares of the unpaid amount.

"(5) Except as provided by subsections (1) to (4), the word 'loan' and other parts of speech and grammatical forms of that word have in this Part the respective meanings that they would have if this section had not been enacted.

### **Members' approving resolutions**

"243AK. (1) Subject to subsection (2), a reference in this Part to the members' approving resolutions in relation to a transaction or proposed transaction by a company, an executive share acquisition scheme or housing assistance scheme operated by a company or a benefit proposed to be given in connection with a transfer of the whole or a part of the undertaking or property of a company is a reference to:

- (a) a resolution approving the transaction, proposed transaction, scheme or proposed benefit passed at a general meeting of the company by a majority of the votes cast by such members of the company as, being entitled to do so, voted in person or, where proxies are allowed, by proxy; and
- (b) if the company is not a listed company but is a subsidiary of a listed company or listed companies - a resolution approving the transaction, proposed transaction, scheme or proposed benefit passed at a general meeting of the listed company or at general meetings of each of the listed companies by a majority of the votes cast by such of the members of the listed company as, being entitled to do so, voted in person or, where proxies are allowed, by proxy; and
- (c) if the company is not a listed company or a subsidiary of a listed company but is a subsidiary whose ultimate holding company is incorporated in Australia or an external Territory - a resolution approving the transaction, proposed transaction, scheme or proposed benefit passed at a general meeting of the ultimate holding company by a majority of the votes cast by such of the members of the ultimate holding company as, being entitled to do so, voted in person or, where proxies are allowed, by proxy.

"(2) In paragraph (1)(a), (b) or (c):

- (a) a reference to a general meeting of a company is a reference to a general meeting the notice of which given to members was accompanied by a copy of the explanatory financial statement in relation to the transaction, proposed transaction, scheme or proposed benefit; and
- (b) a reference to votes cast by members in respect of a resolution in relation to a transaction, proposed transaction, scheme or proposed benefit at a general meeting of a company other than a company that is a wholly-owned subsidiary of another body corporate) does not include a reference to votes cast by members who:
  - (i) in the case of a transaction, proposed transaction or proposed benefit - had or have a direct or indirect interest in the transaction, proposed transaction or proposed benefit; or
  - (ii) in the case of a scheme - have a direct or indirect interest in the scheme or are eligible for the grant, or to be considered for the grant, of benefits under the scheme.



## Members' funds

"243AL. (1) Where it is necessary for the purposes of this Part for the directors of a company to calculate the members' funds of the company as at a particular time, the directors are to calculate the amount of those funds as at that time in accordance with this section.

"(2) Subject to subsection (3), a calculation by the directors of the members' funds of a company as at a particular time (in this subsection and subsection (3) called the '**calculation time**') is to be made on the basis that those funds are:

- (a) in the case of a company that has a share capital - the sum of:
  - (i) the company's paid up capital (disregarding any redeemable preference shares); and
  - (ii) the company's reserves;

as shown in the last audited accounts of the company for a financial year of the company, increased by any accumulated profits of the company or reduced by any accumulated losses of the company, as the case may require, as shown in those accounts; or

- (b) in the case of a company that does not have a share capital - 20% of the value of the company's gross assets as shown in the last audited accounts of the company for a financial year of the company;

adjusted to have regard to any material changes in any amount taken into account in applying paragraph (a) or (b), as the case requires, that occurred between the end of that financial year and the calculation time.

"(3) If there are no audited accounts of a company for any financial year of the company, the calculation by the directors of the members' funds is to be made on the basis that those funds are:

- (a) in the case of a company that has a share capital - the company's paid up capital (disregarding any redeemable preference shares) as at the calculation time reduced, if the directors consider that any of that capital has been lost, by such amount as the directors consider appropriate to take into account the amount of the loss; or
- (b) in the case of a company that does not have a share capital - 20% of the value of the company's gross assets as at the calculation time as calculated in accordance with applicable accounting standards.

"(4) For the purposes of subsection 243JE(2), the auditor of a company is to calculate the members' funds of the company as at the end of a financial year on the basis that those funds are:

- (a) in the case of a company that has a share capital - the sum of:
  - (i) the company's paid up capital (disregarding any redeemable preference shares); and

- (ii) the company's reserves;

as shown in the audited accounts of the company for that financial year, increased by any accumulated profits of the company or reduced by any accumulated losses of the company, as the case may require, as shown in those accounts; or

- (b) in the case of a company that does not have a share capital - 20% of the value of the company's gross assets as shown in the audited accounts of the company for that financial year.

### **Particulars of certain transactions and schemes to which Division 2 applies**

"243AM. (1) Regulations prescribing the particulars of transactions referred to in section 243BA or 243CA that are to be given for any purpose of this Part must not require the particulars to name the persons in relation to whom the transactions were entered into.

"(2) Regulations prescribing the particulars of executive share acquisition schemes or housing assistance schemes that are to be given for any purpose of this Part must not require the particulars to name the persons who have received, or are eligible to receive, benefits under the schemes.

"(3) If a company is served with a notice sent by or on behalf of:

- (a) at least 10% of the total number of members; or
- (b) members who together hold at least 5% in nominal value of the company's issued share capital;

requiring the disclosure of such particulars of a transaction referred to in section 243BA or 243CA, or of an executive share acquisition scheme or housing assistance scheme operated by the company, as are referred to in the notice, the company must as soon as practicable send a statement setting out those particulars to each person entitled to receive notice of general meetings of the company.

"(4) The particulars that may be required to be disclosed by a notice served under subsection (3) may include particulars naming the persons in relation to whom the transaction was entered into or the persons who have received, or are eligible to receive, benefits under the scheme, as the case requires.

### **Particulars of benefits to be disclosed under Division 4**

"243AN. (1) Regulations prescribing the particulars of benefits that are to be given for the purposes of Division 4 must not require the particulars to name the persons to whom the benefits were given.

"(2) Despite subsection (1), if a company is served with a notice sent by or on behalf of:

- (a) at least 10% of the total number of members; or
- (b) members who together hold not less than 5% in nominal value of the company's issued share capital;

requiring the emoluments and other benefits received by persons relevantly connected with the company to be disclosed, the company must:

- (c) as soon as practicable prepare and cause to be audited a statement setting out the total amount of emoluments and other benefits paid to or received by each of the persons relevantly connected with the company, including any amount paid by way of salary, for the 12 months that ended immediately before the service of the notice; and
- (d) as soon as practicable after the statement has been audited, send a copy of the statement to each person entitled to receive notice of general meetings of the company; and
- (e) lay the statement before the next general meeting of the company held after the statement is audited.

#### **Particulars of proposed benefits to be disclosed under Division 5**

"243AO. The particulars of a proposed benefit referred to in section 243RA that are to be set out in a statement as mentioned in subsection 243AF(3) include:

- (a) if the proposed benefit is a payment:
  - (i) the amount of the payment; or
  - (ii) if that amount cannot be ascertained at the time of the disclosure - the manner in which that amount is to be calculated and any matter, event or circumstance that will, or is likely to, affect the calculation of that amount; and
- (b) otherwise:
  - (i) the monetary value of the proposed benefit; or
  - (ii) if that value cannot be ascertained at the time of the disclosure - the manner in which that value is to be calculated and any matter, event or circumstance that will, or is likely to, affect the calculation of that value.

#### **Quasi-loan**

"243AP. (1) A reference in this Part to a quasi-loan is a reference to a transaction under which one person (in this section called the '**creditor**') agrees to pay, or pays otherwise than under an agreement, a sum for a second person (in this section called the '**borrower**') or agrees to reimburse, or reimburses otherwise than under an agreement, expenditure incurred by a second person for a third person (in this section also called the '**borrower**'):

- (a) on terms that the borrower (or a person on behalf of the borrower) will reimburse the creditor; or

- (b) in circumstances giving rise to a liability on the borrower to reimburse the creditor.

"(2) A reference in this Part to the person to whom a quasi-loan is made is a reference to the borrower.

"(3) For the purposes of this Part, the liabilities of a borrower under a quasi-loan include the liabilities of any person who has agreed to reimburse the creditor on behalf of the borrower.

### **Regulated financial transaction**

"243AQ. (1) For the purposes of this Part, a company enters into a regulated financial transaction in relation to a person if the company, either directly, or indirectly through one or more interposed bodies corporate, trusts or partnerships or otherwise:

- (a) makes a loan to the person; or
- (b) makes a quasi-loan to the person; or
- (c) enters into a credit transaction with the person; or
- (d) enters into a guarantee or indemnity, or provides a security, in connection with:
  - (i) a loan or quasi-loan made, or to be made, to the person; or
  - (ii) a credit transaction entered into, or to be entered into, with the person; or
- (e) arranges for the assignment to it, or the assumption by it, of any rights, obligations or liabilities under:
  - (i) a loan made to the person; or
  - (ii) a quasi-loan made to the person; or
  - (iii) a credit transaction entered into with the person; or
  - (iv) a guarantee or indemnity entered into, or a security provided, in connection with such a loan, quasi-loan or credit transaction; or
- (f) forgives the whole or a part of a debt owed by the person or releases the person from the whole or a part of some other financial obligation owed by the person; or
- (g) where the person is a body corporate having a share capital - subscribes for or buys, or acquires an option to subscribe for or buy, redeemable preference shares in the body corporate; or
- (h) enters into any other transaction in relation to the person that (whatever its terms or form may be) is in substance or effect a transaction referred to in a preceding paragraph; or

- (i) enters into a transaction that materially increases any of the company's liabilities, or materially reduces any of the company's rights, under a transaction referred to in a preceding paragraph that was previously entered into by the company.

"(2) For the purposes of the reference in subsection (1) to a company entering into a transaction in relation to a person indirectly through one or more interposed bodies corporate, trusts or partnerships, any transaction entered into by such a body corporate, the trustee of such a trust or such a partnership is taken to have been entered into by the company.

"(3) Where a company or other body corporate, trustee or partnership makes a contract or arrangement for the doing of any act or thing referred to in a paragraph of subsection (1), the company or other body corporate, trustee or partnership is taken for the purposes of this Part to have done that act or thing when the contract or arrangement was made.

### **Related bodies corporate**

"243AR. If a company enters into a regulated financial transaction in relation to a body corporate that is not related to the company but had been related to the company at a time within 6 months before the day on which the transaction is entered into, this Part (other than Subdivision C of Division 2) has effect, unless the Commission otherwise determines, as if the body corporate is related to the company when the transaction is entered into.

### **Relevant interest**

"243AS. For the purposes of this Part, where:

- (a) a company:
  - (i) enters into a regulated financial transaction in relation to a body corporate; or
  - (ii) gives a benefit to a body corporate, or to a trustee of a trust under which a body corporate may benefit; and
- (b) the company has a relevant interest or relevant interests in shares in the body corporate; and
- (c) a person has, or 2 or more persons together have, a relevant interest or relevant interests in shares in the company;

the matters referred to in paragraphs (b) and (c) are to be disregarded for the purpose of determining whether the person has, or the persons together have, as the case may be, a relevant interest or relevant interests in the shares referred to in paragraph (b).

### **Relevant connection with company**

"243AT. (1) A person is relevantly connected with a company at a particular time for the purposes of this Part if at that time the person is:

- (a) a director of the company or of a body corporate that is related to the company, a relative of such a director, or a relative of the spouse of such a director; or

- (b) a trustee of a trust under which a person referred to in paragraph (a) may benefit where the relevant transaction was entered into in relation to, or the relevant benefit was given to, the trustee in the capacity as trustee; or
- (c) a trustee of a trust under which a body corporate may benefit where the relevant transaction was entered into in relation to, or the relevant benefit was given to, the trustee in the capacity as trustee and:
  - (i) a person referred to in paragraph (a) has, or 2 or more such persons together have, a relevant interest or relevant interests in shares in that body corporate and:
    - (A) the nominal value of those shares is not less than 10% of the nominal value of all the issued shares in that body corporate; or
    - (B) if there are attached to any of those shares rights to receive dividends that may be paid by that body corporate - those rights entitle the holder of those shares to receive, or the holders of those shares to receive between them, not less than 10% of any such dividends; or
    - (C) if there are attached to any of those shares rights to receive distributions of the capital of that body corporate - those rights entitle the holder of those shares to receive, or the holders of those shares to receive between them, not less than 10% of any such distribution; or
  - (ii) a person referred to in paragraph (a) is, or 2 or more such persons together are, in a position to control, either directly or indirectly, not less than 10% of the voting power in that body corporate; or
- (d) a body corporate, where:
  - (i) a person referred to in paragraph (a) has, or 2 or more such persons together have, a relevant interest or relevant interests in shares in that body corporate and:
    - (A) the nominal value of those shares is not less than 10% of the nominal value of all the issued shares in that body corporate; or
    - (B) if there are attached to any of those shares rights to receive dividends that may be paid by that body corporate - those rights entitle the holder of those shares to receive, or the holders of those shares to receive between them, not less than 10% of any such dividends; or
    - (C) if there are attached to any of those shares rights to receive distributions of the capital of that body corporate - those rights entitle the holder of those shares to receive, or the holders of those

shares to receive between them, not less than 10% of any such distribution; or

- (ii) a person referred to in paragraph (a) is, or 2 or more such persons together are, in a position to control, either directly or indirectly, not less than 10% of the voting power in that body corporate.

"(2) In addition to the persons who are relevantly connected with a company by virtue of subsection (1), a person is relevantly connected with a company at a particular time for the purposes of Division 5, and for the purposes of this Division as it has effect for the purposes of Division 5, if at that time the person is:

- (a) the principal executive officer of the company or of a body corporate that is related to the company; or
- (b) a relative of a person referred to in paragraph (a); or
- (c) a relative of the spouse of a person referred to in paragraph (a).

"(3) If:

- (a) a company enters into a regulated financial transaction in relation to a person who is not relevantly connected with the company; or
- (b) a resolution is passed by the directors, or a decision is made by an officer, of a company a purpose or effect of which is to give a benefit to a person who is not relevantly connected with the company; or
- (c) a benefit is given to a person who is not relevantly connected with a company;

but the person had been relevantly connected with the company at a time within 6 months before the day on which the transaction is entered into, the resolution is passed, the decision is made or the benefit is given, as the case may be, this Part has effect, unless the Commission otherwise determines, as if the person is relevantly connected with the company on that day.

### **Rights deemed to be exercised**

"243AU. In determining for the purposes of this Part the percentage or nominal value of the shares in a body corporate in which a person has a relevant interest, it is to be assumed that:

- (a) any option or right to subscribe for shares in the body corporate in which the person has an interest has been exercised (whether or not the option or right is presently exercisable), the shares have been issued and the person has a relevant interest in those shares; and
- (b) any option or right to buy shares in the body corporate under an option contract in which the person has a relevant interest has been exercised (whether or not the option or right is presently exercisable) and the person has a relevant interest in those shares; and

- (c) without limiting the generality of paragraph (a), any convertible note issued by the body corporate in which the person has a relevant interest has been converted into shares (whether or not the note is presently convertible into shares) and the person has a relevant interest in those shares.

### **Transactions before commencement of Part**

"243AV. (1) A reference in this Part to a transaction to which section 243BA applied, or but for an excepting provision would have applied, that was entered into by a company includes a reference to a transaction that was entered into by the company before the commencement of this Part to which that section would, or would but for an excepting provision, have applied if this Part had been in force when the transaction was entered into.

"(2) A reference in this Part to a transaction to which section 243EA applied, or but for an excepting provision would have applied, that was entered into by a company includes a reference to a transaction that was entered into by the company before the commencement of this Part to which that section would, or would but for an excepting provision, have applied if this Part had been in force when the transaction was entered into.

### **Value of, and amount outstanding under, transaction**

"243AW. (1) The following provisions have effect for the purposes of this Part.

"(2) The value of a loan is the amount of its principal.

"(3) The value of a quasi-loan is the amount, or the maximum amount, that the person to whom the quasi-loan is made is liable to reimburse the creditor.

(4) The value of a guarantee, indemnity or security is the amount guaranteed, indemnified or secured.

"(5) The value of a transaction, being the forgiving of, or of a part of, a debt or the release of, or of a part of, another financial obligation, is:

- (a) in the case of the forgiving of the whole of the debt or the release of the whole of the other financial obligation - the amount of the debt or other financial obligation; or
- (b) in the case of the forgiving of a part of the debt or the release of a part of the other financial obligation - that part of the amount of the debt or other financial obligation that was forgiven or released.

(6) The value of a transaction not falling within subsections (2) to (5) is the fair value of the land, goods or other property sold or services supplied.

"(7) The value of a transaction that is not capable of being expressed as a specific sum of money (because the amount of any liability arising under the transaction is unascertainable, or for any other reason), whether or not any liability under the transaction has been reduced, is taken to exceed 5% of the members' funds of the company as calculated by the directors in accordance with section 243AL as at any relevant time.



"(8) The amount outstanding under a transaction is:

- (a) in the case of a transaction being the forgiving of, or of a part of, a debt or the release of, or of a part of, another financial obligation - nil; or
- (b) in any other case - the value of the transaction less any amount by which that value has been reduced and disregarding any liability under the transaction that is contingent only.

**"Division 2 - Transactions in relation to certain officers and related entities**

*"Subdivision A - Regulated financial transactions in relation to directors and their relatives and relatives of their spouses*

**Prohibition of regulated financial transactions**

"243BA. (1) Subject to this Subdivision and Subdivisions C and F, if a company other than an exempt company enters into a regulated financial transaction in relation to a person who is relevantly connected with the company, the company contravenes this section.

"(2) Where a company enters into a transaction in contravention of this section, the company is not guilty of an offence but:

- (a) if the transaction was not authorised by a resolution of the directors of the company - each person who was a director when the transaction was entered into is, subject to subsection (4), guilty of an offence; or
- (b) if the transaction was authorised by a resolution of the directors of the company - each director who voted in favour of the resolution is guilty of an offence.

"(3) Where as a direct or indirect result of a company entering into a transaction in contravention of this section, the company or any other person incurs a loss:

- (a) if the transaction was not authorised by a resolution of the directors of the company - the persons who were the directors when the transaction was entered into are, subject to subsection (4), jointly and severally liable to the company or other person for the loss; or
- (b) if the transaction was authorised by a resolution of the directors of the company - the directors who voted in favour of the resolution are jointly and severally liable to the company or other person for the loss.

"(4) It is a defence to a prosecution for an offence against paragraph (2)(a) or to a proceeding instituted in respect of a liability under paragraph (3)(a) if the defendant proves that he or she had reasonable grounds to believe, and did believe, that a competent and reliable person was:

- (a) charged with the duty of ensuring that the company complied with this Subdivision; and

- (b) was in a position to discharge that duty.

#### **Transactions permitted with related bodies corporate**

"243BB. Subject to subsection 243BD(1) and section 243JB, a company does not contravene section 243BA by entering into a transaction in relation to a body corporate that is related to the company.

#### **Transactions permitted under executive share acquisition or housing assistance schemes**

"243BC. Subject to subsection 243BD(2) and section 243JB, a company does not contravene section 243BA:

- (a) by entering into a transaction, in relation to a person who is engaged in the full-time or part-time employment of the company or of a body corporate that is related to the company, in relation to a relative of such a person, or in relation to a relative of the spouse of such a person, under or for the purposes of an executive share acquisition scheme operated by the company; or
- (b) by entering into a transaction, in relation to a person who is engaged in the full-time employment of the company or of a body corporate that is related to the company, or in relation to the spouse of such a person, under or for the purposes of a housing assistance scheme operated by the company.

#### **Members' approval required for permitted transactions**

"243BD. (1) Section 243BB applies to a company in relation to a transaction entered into by the company only if:

- (a) the proposed transaction was authorised by a resolution of the directors of the company; and
- (b) before the transaction was entered into, the directors who voted in favour of the resolution caused to be prepared, and personally signed, the explanatory financial statement in relation to the proposed transaction; and
- (c) before the transaction was entered into, the members' approving resolutions in relation to the proposed transaction were passed, being resolutions each of which related to one proposed transaction only; and
- (d) where, at the commencement of the day on which the meeting, or the first of the meetings, convened to consider any of the members' approving resolutions in relation to the proposed transaction was held, the sum of:
  - (i) the value of the proposed transaction; and
  - (ii) the value of any other transaction, or the total of the values of any other transactions, proposed to be entered into by the company, being a transaction or transactions to which section 243BA would apply, or but for an excepting provision would apply; and

- (iii) the amount outstanding, or the total of the amounts outstanding, under a transaction or transactions that was or were previously entered into by the company, being a transaction or transactions to which section 243BA applied, or but for an excepting provision would have applied;

exceeded 5% of the members' funds of the company as calculated by the directors in accordance with section 243AL as at a time within 7 days before the day on which notices convening the meeting, or the first of the meetings, were sent, or first sent - the Commission consented to the proposed transaction before it was entered into; and

- (e) the period of 10 business days after the day on which the meeting, or the last meeting, convened to consider any of the members' approving resolutions was held ended before the transaction was entered into; and
- (f) where the Court, on application made by the Commission, has directed that the period referred to in paragraph (e) be extended for a further period or periods - the extended period ended before the transaction was entered into.

"(2) Subject to subsection (3), section 243BC applies to a company in relation to a transaction entered into by the company under or for the purposes of an executive share acquisition scheme or a housing assistance scheme only if:

- (a) the scheme was authorised by a resolution of the directors of the company; and
- (b) before the scheme was authorised, the directors who voted in favour of the resolution caused to be prepared, and personally signed, the explanatory financial statement in relation to the scheme; and
- (c) before the scheme was authorised, the members' approving resolutions in relation to the scheme were passed; and
- (d) where, at the commencement of the day on which the meeting, or the first of the meetings, convened to consider any of the members' approving resolutions in relation to the scheme was held, the amount estimated by the directors to be the maximum amount that would at any time be outstanding under transactions entered into by the company under or for the purposes of the scheme would exceed 5% of the members' funds of the company as calculated by the directors in accordance with section 243AL as at a time within 7 days before the day on which notices convening the meeting, or the first of the meetings, were sent, or first sent - the Commission consented to the scheme before the transaction was entered into; and
- (e) the period of 10 business days after the day on which the meeting, or the last meeting, convened to consider any of the members' approving resolutions was held ended before the transaction was entered into; and
- (f) where the Court, on application made by the Commission, has directed that the period referred to in paragraph (e) be extended for a further period or periods - the extended period ended before the transaction was entered into.

"(3) Subsection (2) does not prevent the application of section 243BC in relation to a transaction entered into by a company under or for the purposes of an executive share acquisition scheme or a housing assistance scheme if:

- (a) a resolution approving the scheme had been passed before the commencement of this Division at a general meeting of the company or of a holding company of the company; and
- (b) the sum of:
  - (i) the value of the transaction; and
  - (ii) the amount estimated by the directors of the company at the time immediately before the transaction was entered into to be the amount outstanding under transactions entered into by the company under or for the purposes of the scheme;

did not exceed 5% of the members' funds of the company as at that time as calculated by the directors in accordance with section 243AL.

#### **Commission may permit transactions**

"243BE. A company does not contravene section 243BA by:

- (a) entering into a transaction with the consent of the Commission; or
- (b) entering into a transaction that is included in a class of transactions in relation to which the Commission has exempted the company from the application of that section;

and complying with any conditions required or directions given by the Commission in relation to the transaction concerned or in relation to that class of transactions, as the case may be.

#### **Exceptions for certain transactions by financial corporations**

"243BF. (1) Subject to section 243JB, where:

- (a) a company that is:
  - (i) a bank as defined in subsection 5(1) of the *Banking Act 1959*; or
  - (ii) registered under the *Life Insurance Act 1945*; or
  - (iii) a corporation registered under the *Financial Corporations Act 1974*;

enters into a transaction in relation to a person in the full-time employment of the company or of a body corporate that is related to the company; and

- (b) when the transaction is entered into, the sum of:
  - (i) the value of the transaction; and

- (ii) the total of the amounts outstanding under any previous regulated financial transactions between the company, or any body corporate that is related to the company, and the person (whether entered into before or after the commencement of this Division);

does not exceed the cost to the company of the emoluments paid to or received by the person (including any amount paid by way of salary) for the financial year immediately preceding the financial year in which the transaction was entered into;

the company does not contravene section 243BA by entering into the transaction.

"(2) A company referred to in subparagraph (1)(a)(i) or (ii) does not contravene section 243BA by entering into a transaction:

- (a) in the ordinary course of its ordinary business; and
- (b) on ordinary commercial terms, including terms relating to the rate of interest payable, the repayment of principal and payment of interest and the security to be provided.

**Exception for certain transactions approved by 95% of members and the holders of 95% of voting shares**

"243BG. (1) Subject to section 243JB, a company does not contravene section 243BA by entering into a transaction if:

- (a) the proposed transaction was authorised by a resolution of the directors of the company; and
- (b) before the transaction was entered into, the directors who voted in favour of the resolution caused to be prepared, and personally signed, the explanatory financial statement in relation to the proposed transaction; and
- (c) subject to subsection (2), before the transaction was entered into a resolution approving the proposed transaction was passed at a general meeting of the company and the members who cast votes in favour of the resolution, either in person or, where proxies are allowed, by proxy:
  - (i) constituted at least 95% of the number of members of the company; and
  - (ii) in the case of a company that has a share capital - held between them at least 95% of the voting shares in the company; and
- (d) the period of 10 business days after the day on which the meeting convened to consider the resolution referred to in paragraph (c) was held ended before the transaction was entered into; and

- (e) where the Court, on application made by the Commission, has directed that the period referred to in paragraph (d) be extended for a further period or periods - the extended period ended before the transaction was entered into.

"(2) A resolution referred to in paragraph (1)(c) is not valid for the purposes of subsection (1) unless:

- (a) it relates to one proposed transaction only; and
- (b) notice of the meeting at which the resolution was passed that was given to members of the company was accompanied by a copy of the explanatory financial statement in relation to the proposed transaction.

### **Exception for small transactions**

"243BH. (1) A company does not contravene section 243BA by entering into a transaction in relation to a person (in this section called the '**borrower**') where, when the transaction is entered into, the sum of:

- (a) the value of the transaction; and
- (b) the amount outstanding, or the total of the amounts outstanding, under a transaction or transactions:
  - (i) that was or were previously entered into by the company in relation to any person included in an associated group of persons in relation to the company in which the borrower is included; and
  - (ii) to which section 243BA did not apply because of the operation of this section;

does not exceed \$25,000 or, if another amount is prescribed for the purposes of this section, that other amount.

"(2) For the purposes of subsection (1), a person who is a director of a company or of a body corporate that is related to a company and every other person who is relevantly connected with the company because the first-mentioned person is such a director together constitute an associated group of persons in relation to the company.

### **Transactions by company with persons who subsequently become relevantly connected with it**

"243BI. (1) Where:

- (a) a company enters into a transaction in relation to a person who is not relevantly connected with the company; and
- (b) had the person been relevantly connected with the company, the company would have contravened section 243BA by entering into the transaction;

the following provisions have effect.

"(2) Subject to subsection (4), the person is incapable of being validly appointed to occupy, or of being duly authorised to act in, the position of a director of the company, or of a body corporate that is related to the company, while an amount is outstanding under the transaction.

"(3) Subject to subsection (4), if the person was, immediately before the transaction was entered into, validly occupying, or duly authorised to act in, the position of a director of the company or of a body corporate that is related to the company, the person is taken to have resigned from the position or to have had the authorisation revoked, as the case may be, when the transaction was entered into.

"(4) Neither subsection (2) nor (3) applies if:

- (a) the Commission has exempted the company from the operation of this section in relation to the transaction; or
- (b) both the following subparagraphs have been complied with:
  - (i) the directors of the company caused to be prepared, and personally signed, the explanatory financial statement in relation to the transaction;
  - (ii) the members' approving resolutions have been passed in relation to the transaction.

*"Subdivision B - Regulated financial transactions in relation to other officers and their relatives and relatives of their spouses*

### **Disclosure of regulated financial transactions**

"243CA. (1) Subject to subsection (3), if a company other than an exempt company enters into a regulated financial transaction in relation to a person who is an officer of the company included in a prescribed class of officers of the company, a relative of such an officer, or a relative of the spouse of such an officer, but is not a person who is relevantly connected with the company, section 243SC applies to the company in relation to the transaction.

"(2) Subject to subsection (3), if:

- (a) a company other than an exempt company enters into a regulated financial transaction in relation to a person who is not a person referred to in subsection (1); and
- (b) the person becomes a person referred to in subsection (1) within 6 months after the transaction was entered into;

section 243SC applies to the company in relation to the transaction and so applies as if the transaction had been entered into when the person became a person referred to in subsection (1).

"(3) Section 243SC does not apply by virtue of subsection (1) or (2) of this section to a company in relation to a transaction if section 243BA, 243EA or 243FB applies, or but for an excepting provision would apply, to the company in relation to the transaction.

*"Subdivision C - Group bodies corporate*

**Transactions between group bodies corporate**

"243DA. (1) Where a company other than an exempt company enters into a transaction in relation to a body corporate that is a group body corporate in relation to the company, the following provisions have effect.

"(2) Subdivisions A, D and E do not apply to the company in relation to the transaction.

"(3) Where the transaction is a regulated financial transaction, a body corporate must not, so long as any amount is outstanding under the transaction, issue shares, or dispose of, or of any interest in, any shares in another body corporate, if, as a result of the issue or disposal, the body corporate referred to in subsection (1) would cease to be a group body corporate in relation to the company.

"(4) Subsection (3) does not apply in relation to a disposal by a liquidator, a receiver or a receiver and manager.

"(5) Where a body corporate contravenes subsection (3), the body corporate is not guilty of an offence but every person who is involved in the contravention is guilty of an offence.

*"Subdivision D - Regulated financial transactions in relation to other related and linked bodies corporate*

**Liability of officers**

"243EA. (1) Subject to this Subdivision and Subdivisions C and F, this section applies to a company other than an exempt company in relation to a regulated financial transaction that:

(a) is entered into by the company in relation to a body corporate that is related to or linked with the company; and

(b) is detrimental to the company.

"(2) Where this section applies to a company in relation to a transaction, each officer of the company who was in any way, directly or indirectly, knowingly concerned in, or party to, the entering into of the transaction is taken for the purposes of subsection 232(6) to have, by being so concerned in, or party to, the entering into of the transaction, made improper use of his or her position as such an officer to cause detriment to the company.



"(3) In any criminal or civil proceeding against an officer of a company for or in respect of a contravention of subsection 232(6) as that subsection has effect by virtue of subsection (2) of this section, it is a defence if it is proved that the officer did not in fact behave improperly in respect of the entering into of the transaction.

**Exception for transactions referred to in subsection 205(1)**

"243EB. Section 243EA does not apply to a company in relation to a transaction if subsection 205(1) applies to the company in relation to the transaction or if that subsection does not so apply because subsection 205(10) has been complied with.

**Exception for transactions with relevantly connected persons**

"243EC. Section 243EA does not apply to a company in relation to a transaction if section 243BA applies, or but for an excepting provision would apply, to the company in relation to the transaction.

**Exception for transactions not exceeding 5% of members' funds**

"243ED. Subject to section 243JB, section 243EA does not apply to a company in relation to a transaction where, when the transaction was entered into, the sum of:

- (a) the value of the transaction; and
- (b) the value of any other transaction, or the total of the values of any other transactions, proposed to be entered into by the company, being a transaction or transactions to which section 243EA would, or would but for this section, apply; and
- (c) the amount outstanding, or the total of the amounts outstanding, under a transaction or transactions previously entered into by the company, being a transaction or transactions to which section 243EA applied or would but for this section have applied;

did not exceed 5% of the members' funds of the company as calculated by the directors in accordance with section 243AL as at a time within 7 days before the day on which the transaction was entered into.

**Exception for transactions authorised by members**

"243EE. Subject to section 243JB, section 243EA does not apply to a company in relation to a transaction where:

- (a) the proposed transaction was authorised by a resolution of the directors of the company; and
- (b) before the transaction was entered into, the directors who voted in favour of the resolution caused to be prepared, and personally signed, the explanatory financial statement in relation to the proposed transaction; and

- (c) before the transaction was entered into, the members' approving resolutions in relation to the proposed transaction were passed; and
- (d) the period of 10 business days after the day on which the meeting, or the last meeting, convened to consider any of the members' approving resolutions was held ended before the transaction was entered into; and
- (e) if the Court, on application made by the Commission, has directed that the period referred to in paragraph (d) be extended for a further period or periods - the extended period ended before the transaction was entered into.

### **Exceptions for certain transactions by banks and life assurance companies**

"243EF. Section 243EA does not apply to a company that is:

- (a) a bank as defined in subsection 5(1) of the *Banking Act 1959*; or
- (b) registered under the *Life Insurance Act 1945*;

in relation to a transaction entered into by the company:

- (c) in the ordinary course of its ordinary business; and
- (d) on ordinary commercial terms, including terms relating to the rate of interest payable, the repayment of principal and payment of interest and the security to be provided.

### **Transactions by company with bodies corporate that subsequently become related to or linked with it**

"243EG. (1) If:

- (a) a company other than an exempt company enters into a regulated financial transaction in relation to a body corporate that is not then related to or linked with the company; and
- (b) the body corporate becomes related to or linked with the company at a time (in this section called the '**relevant time**') within 6 months after the day on which the transaction was entered into; and
- (c) at the relevant time an amount is outstanding under the transaction; and
- (d) the amount outstanding exceeded 5% of the members' funds of the company as calculated by the directors in accordance with section 243AL as at a time within 7 days before the relevant time;

the following provisions apply.

"(2) The company must lodge the prescribed particulars of the transaction within 5 business days after the relevant time.

"(3) The directors of the company must cause to be prepared, and personally sign, the explanatory financial statement in relation to the transaction within one month after the relevant time.

"(4) The directors of the company must convene a general meeting of the company within 3 months after the relevant time for the purpose of approving the transaction.

"(5) If the company is not a listed company but is a subsidiary of a listed company or listed companies, the directors of the listed company or of each of the listed companies must convene a general meeting of the listed company within 3 months after the relevant time for the purpose of approving the transaction.

"(6) If the company is not a listed company or a subsidiary of a listed company but is a subsidiary whose ultimate holding company is incorporated in Australia or an external Territory, the directors of the ultimate holding company must convene a general meeting of the ultimate holding company within 3 months after the relevant time for the purpose of approving the transaction.

"(7) The directors of a body corporate who convene a general meeting of the body corporate under subsection (4), (5) or (6) must ensure that notice of the meeting that is given to members is accompanied by a copy of the statement referred to in subsection (3).

"(8) Subsection (2), (3), (4), (5) or (6) does not apply in relation to a transaction if, before the end of the period specified in that subsection:

- (a) there is no longer an amount outstanding under the transaction; or
- (b) the Commission exempts the company from the application of this section in relation to the transaction.

"(9) If, at the end of 6 months after the relevant time:

- (a) an amount is still outstanding under the transaction; and
- (b) the Commission has not exempted the company from the application of this section in relation to the transaction; and
- (c) any of the members' approving resolutions has not been passed in relation to the transaction;

the following provisions have effect:

- (d) the amount outstanding under the transaction is due and payable to the company by the body corporate in relation to which the company entered into the transaction;
- (e) the company must as soon as practicable take such reasonable steps as are necessary to secure payment of that amount to the company by that body corporate.

"(10) The Commission may extend any period referred to in subsection (2), (3), (4), (5), (6) or (9) for a further period or further periods and, if it does so, the reference in that subsection to the first-mentioned period is taken to be a reference to the extended period.

*"Subdivision E - Transfers of assets between  
company and associated persons*

**Acquisition and disposal of assets**

"243FA. (1) In this Subdivision:

'asset' means any form of real or personal property, including a debt, a chose in action, any other right, goodwill and any other form of incorporeal property, but, subject to this section, does not include an option.

"(2) Subject to this section, for the purposes of this Subdivision, where a change occurs in the beneficial ownership of an asset (whether or not a change also occurred in the legal ownership of the asset), the change is taken to effect:

- (a) a disposal of the asset by the person who beneficially owned it immediately before the change to the person who beneficially owned it immediately after the change; and
- (b) an acquisition of the asset by the person who beneficially owned it immediately after the change from the person who beneficially owned it immediately before the change.

"(3) A change in the legal ownership of an asset that does not result in a change in the beneficial ownership of the asset is to be disregarded for the purposes of this Subdivision.

"(4) An allotment or issue of shares in a body corporate does not constitute for the purposes of this Subdivision a disposal of the shares by the body corporate but constitutes for those purposes an acquisition of the shares by the person to whom they were allotted or issued.

"(5) The grant of an option that binds the grantor to dispose of an asset constitutes for the purposes of this Subdivision:

- (a) the disposal of the asset by the grantor to the grantee; and
- (b) the acquisition of the asset by the grantee from the grantor;

at the time of the grant of the option and for a consideration equal to the sum of the consideration in respect of the acquisition of the option and the consideration in respect of the exercise of the option, whether or not the option is exercised.

"(6) The grant of an option that binds the grantor to acquire an asset constitutes for the purposes of this Subdivision:

- (a) the acquisition of the asset by the grantor from the grantee; and
- (b) the disposal of the asset by the grantee to the grantor;

at the time of the grant of the option and for a consideration equal to the sum of the consideration in respect of the acquisition of the option and the consideration in respect of the exercise of the option, whether or not the option is exercised.

"(7) Where:

- (a) a company enters into a transaction under which the company acquires an asset from, or disposes of an asset to, an associated person; and
- (b) at a later time the company enters into a second transaction that varies any of the terms or conditions of the first transaction;

the first transaction and the second transaction are taken, subject to subsections (8) and (9), to constitute for the purposes of this Subdivision a single transaction entered into by the company with the associated person at the later time.

"(8) The reference in paragraph (7)(a) to a transaction includes a reference to 2 or more transactions that are taken to constitute a single transaction by a previous application or previous applications of subsection (7).

"(9) Subsections (7) and (8) apply in addition to, and do not derogate from, any application that this Subdivision may have in relation to a transaction apart from those subsections.

### **Liability of officers**

"243FB. (1) Subject to Subdivisions C and F and the following provisions of this Subdivision, this section applies to a company other than an exempt company in relation to a transaction entered into after the commencement of this Subdivision by the company with an associated person:

- (a) under which the company acquires an asset from, or disposes of an asset to, that person; and
- (b) which is detrimental to the company.

"(2) Where this section applies to a company in relation to a transaction, each officer of the company who was in any way, directly or indirectly, knowingly concerned in, or party to, the entering into of the transaction is taken for the purposes of subsection 232(6) to have, by so being concerned in, or party to, the entering into of the transaction, made improper use of his or her position as such an officer to cause detriment to the company.

"(3) In any criminal or civil proceeding against an officer of a company for or in respect of a contravention of subsection 232(6) as that subsection has effect by virtue of subsection (2) of this section, it is a defence if it is proved that the officer did not in fact behave improperly in respect of the entering into of the transaction.

**Exception for transactions covered by other provisions**

"243FC. Section 243FB does not apply to a company in relation to a transaction if section 243BA or 243EA applies, or but for an excepting provision would apply, to the company in relation to the transaction.

**Exception for transactions not exceeding 5% of members' funds**

"243FD. Subject to section 243JB, section 243FB does not apply to a company in relation to a transaction where the sum of:

- (a) in the case of a transaction under which the company acquired an asset from an associated person:
  - (i) the cost to the company of the acquisition of the asset; and
  - (ii) the cost to the company of the acquisition of any other assets that, at the time of the transaction, the company proposed to acquire from any associated person; and
  - (iii) the cost to the company of the acquisition by the company of any other assets from any associated person during the 6 months immediately preceding the day on which the transaction was entered into; or
- (b) in the case of a transaction under which the company disposed of an asset to an associated person:
  - (i) the market value of the asset at the time of the transaction; and
  - (ii) the market value, or the total of the market values, of any other asset or assets that, at the time of the transaction, the company proposed to dispose of to any associated person; and
  - (iii) the market value, or the total of the market values, of any other asset or assets that were disposed of by the company to any associated person during the 6 months immediately preceding the day on which the transaction was entered into;

did not exceed 5% of the members' funds of the company as calculated by the directors in accordance with section 243AL as at a time within 7 days before the day on which the transaction was entered into.

**Exception for transactions authorised by members**

"243FE. Subject to section 243JB, section 243FB does not apply to a company in relation to a transaction where:

- (a) the proposed transaction was authorised by a resolution of the directors of the company;

- (b) before the transaction was entered into, the directors who voted in favour of the resolution caused to be prepared, and personally signed, the explanatory financial statement in relation to the proposed transaction; and
- (c) before the transaction was entered into, the members' approving resolutions in relation to the proposed transaction were passed; and
- (d) the period of 10 business days after the day on which the meeting, or the last meeting, convened to consider any of the members' approving resolutions was held ended before the transaction was entered into; and
- (e) if the Court, on application made by the Commission, has directed that the period referred to in paragraph (d) be extended for a further period or periods - the extended period ended before the transaction was entered into.

*"Subdivision F - Joint ventures*

**Commission may exempt transactions in connection with joint venture**

"243GA. (1) Where:

- (a) a company that participates in a business undertaking or other commercial joint venture with another person (in this section called the '**other joint venturer**') or other persons (in this section called the '**other joint venturers**') is considering whether to enter into a transaction or transactions of a particular kind connected with the business undertaking; and
- (b) Subdivision D or E would, but for this section, apply to the company in relation to the transaction or any of the transactions;

the Commission may, on application by the company, by writing exempt the company from the application of Subdivision D or E, as the case may be, in relation to that transaction or transactions of that kind, either unconditionally or subject to conditions.

"(2) In deciding whether to exempt a company in relation to a transaction or kind of transactions, the Commission may have regard to any matters that it considers relevant, including any one or more of the following matters:

- (a) whether the company is related to or linked with the other joint venturer or any of the other joint venturers;
- (b) whether the company and the other joint venturer or each of the other joint venturers entered into the business undertaking or other joint venture at arm's length;
- (c) whether the company would be entering into the transaction or transactions for genuine commercial reasons;

- (d) whether the other joint venturer or any of the other joint venturers is proposing to enter into a similar transaction or similar transactions connected with the business undertaking or other joint venture;
- (e) if the other joint venturer or any of the other joint venturers is proposing to enter into a similar transaction or similar transactions, whether the respective values of the transaction or transactions and any similar transaction or transactions would be in proportion to the respective financial contributions by the company and the other joint venturer to the business undertaking or other joint venture;
- (f) whether the members of the company have approved the transaction or transactions or whether it is appropriate, having regard to all the circumstances, to require the company to seek the approval of its members to the transaction or transactions.

"(3) Where a company has been exempted by the Commission, subject to a condition, from the application of Subdivision D or E in relation to a transaction or transactions, the company must not contravene the condition.

*"Subdivision G - Transitional*

**Amounts outstanding under past regulated financial transactions**

"243HA. (1) Subject to subsection (2), where an amount is outstanding at the commencement of this Part under a regulated financial transaction that was entered into by a company other than an exempt company before that commencement in relation to:

- (a) a person who, if this Part had been in force at the time when the transaction was entered into, would have been relevantly connected with the company at that time; or
- (b) a person who, if this Part had been in force at that time, would have been at that time a person referred to in subsection 243CA(1); or
- (c) a body corporate that was related to the company; or
- (d) a body corporate that, if this Part had been in force at the time when the transaction was entered into, would have been linked with the company at that time;

this section applies to the company in relation to the transaction.

"(2) This section does not apply to a company in relation to a transaction where, if the transaction had been entered into after the commencement of this Part, section 243SC would not have applied to the company in relation to the transaction.

"(3) Where this section applies to a company in relation to a transaction:



- (a) the company must lodge the prescribed particulars of the transaction within 6 months after the commencement of this Part, or within such further period as the Commission allows;
- (b) subject to section 243JF, the directors of the company must ensure that those particulars are included in a note to:
  - (i) the company's accounts for the financial year in which the transaction was entered into; or
  - (ii) if those accounts have already been made out for that financial year - the company's accounts for the next financial year; and
- (c) subject to section 243JF, the directors of the company must draw attention, in the first report made out by them under Division 6 of Part 3.6 after the commencement of this Part, to the note to the company's accounts in which those particulars have been included.

"(4) Where a company contravenes paragraph (3)(a), the company is not guilty of an offence but every person who is involved in the contravention is guilty of an offence.

*"Subdivision H - Miscellaneous*

**Maximum period for Commission to deal with requests**

"243JA. (1) Where:

- (a) a company requests the Commission in writing to consent to a proposed transaction or an executive share acquisition scheme or a housing assistance scheme and gives to the Commission in writing the prescribed particulars of the proposed transaction or of the scheme; and
- (b) the Commission has not, within the period of 30 business days after:
  - (i) the day on which the request was made; or
  - (ii) if those particulars or any of them were given after that day -the day on which those particulars or the last of those particulars were or was given;

told the company that the Commission consents, or does not consent, as the case may be, to the proposed transaction or to the scheme;

the Commission is taken for the purposes of this Division to have consented to the proposed transaction, or to the scheme, at the end of that period.

"(2) Where:

- (a) a company requests the Commission in writing to exempt the company from a provision of this Division in relation to a transaction or transactions and gives to

the Commission in writing the prescribed particulars of the transaction or transactions; and

- (b) the Commission has not, within the period of 30 business days after:
  - (i) the day on which the request was made; or
  - (ii) if those particulars or any of them were given after that day - the day on which those particulars or the last of those particulars were or was given;

told the company that the Commission exempts, or does not exempt, as the case may be, the company from the provision in relation to the transaction or transactions;

the Commission is taken for the purposes of this Division to have exempted the company unconditionally from the provision in respect of the transaction or transactions at the end of that period.

#### **Court may declare transaction not to be in interest of company**

"243JB. (1) Subject to subsection (2), this section applies to a company in relation to a transaction or proposed transaction to which section 243BB or 243BC, subsection 243BF(1) or section 243BG, 243ED, 243EE, 243FD or 243FE applied or, but for this section, would have applied.

"(2) This section does not apply to a company in relation to a transaction or proposed transaction:

- (a) in relation to a body corporate that is a group body corporate in relation to the company or;
- (b) entered into, or proposed to be entered into, as the case may be, with the consent of, or pursuant to an exemption granted by, the Commission.

"(3) Where:

- (a) this section applies to a company in relation to a transaction or proposed transaction; and
- (b) the Court, on application made by the Commission, is of the opinion that the transaction was not, or the proposed transaction would not be, as the case may be, in the interests of the company;

the Court may make a declaration to that effect.

"(4) Where a declaration is made under subsection (3) in relation to a transaction, the transaction is taken for the purposes of section 243JC to have been entered into by the company in contravention of this Division.

"(5) Where a declaration is made under subsection (3) in relation to a proposed transaction, the section referred to in subsection (1) that, but for this section, would have applied to the proposed transaction does not apply to the proposed transaction.

### **Enforceability of prohibited transactions**

"243JC. (1) If a company enters into a transaction in contravention of this Division, the following provisions have effect despite the contravention but nothing in this section affects any criminal or civil liability of any person resulting from the contravention.

"(2) The transaction is enforceable by the company.

"(3) The transaction is enforceable by any other person who was a party to the transaction if, and only if:

- (a) the person entered into the transaction for value and in good faith without actual notice of the contravention; or
- (b) where the company is a proprietary company - a certificate signed by a director and a secretary of the company certifying that the company was an exempt company was given to the person before the transaction was entered into; or
- (c) in any case - a certificate signed by a director and a secretary of the company certifying that the company was not prohibited by this Division from entering into the transaction was given to the person before the transaction was entered into;

and, in a case to which paragraph (b) or (c) applies, the person did not know, and had no reason to believe, that the certificate was incorrect.

"(4) The transaction is enforceable by a person who was not a party to the transaction but acquired rights under the transaction if, and only if, the person acquired those rights for value and in good faith without actual notice of the contravention.

"(5) A director or secretary of a company must not give to a person a certificate referred to in subsection (3) that is false.

### **Obligations of dissenting or abstaining directors**

"243JD. Where the directors of a company who, at a meeting of directors of the company, voted in favour of a resolution are required or permitted by a provision of this Division to set out in a statement prepared for the purposes of this Division the reasons why another director voted against, or abstained from voting on, the resolution, that other director must give to the directors who voted in favour of the resolution written particulars of those reasons in sufficient time to enable those reasons to be set out in that statement.

### **Reporting on outstanding amounts**

"243JE. (1) Subject to section 243JF, the directors of a company must ensure that a note is included in the company's accounts for each financial year of the company specifying:

- (a) the total of the amounts outstanding as at the end of that year pursuant to transactions entered into by the company before the end of that year to which section 243BA applied, or but for an excepting provision would have applied; and
- (b) the total of the amounts outstanding as at the end of that year pursuant to transactions entered into by the company before the end of that year to which section 243EA applied, or but for an excepting provision would have applied.

"(2) An auditor of a company who makes a report to the members on the accounts of the company for a financial year of the company must:

- (a) in a case where the directors have failed to comply with paragraph (1)(a) or (b) or a corresponding requirement of an applicable accounting standard in respect of those accounts or the auditor considers that the amount specified in a note to the company's accounts in accordance with paragraph (1)(a) or (b) or a corresponding requirement of an applicable accounting standard is incorrect - specify in the report the amount calculated by the auditor to be the total of the amounts outstanding as at the end of that year pursuant to the transactions concerned; and
- (b) in any case - state in the report:
  - (i) whether, as at the end of that year, the total of the amounts outstanding pursuant to transactions that were entered into by the company before the end of that year to which section 243BA applied, or but for an excepting provision would have applied, exceeded 5% of the members' funds of the company as calculated by the auditor in accordance with subsection 243AL(4) as at the end of that year; and
  - (ii) whether, as at the end of that year, the total of the amounts outstanding pursuant to transactions that were entered into by the company before the end of that year to which section 243EA applied, or but for an excepting provision would have applied, exceeded 5% of the members' funds of the company as calculated by the auditor in accordance with subsection 243AL(4) as at the end of that year.

### **Reporting obligations and accounting standards**

"243JF. Where a provision of this Division requires the directors of a company to ensure that a matter is included in a note to the company's accounts for a financial year or to draw attention to that note in a report made out by them, the requirement applies only to the extent (if any) to which the directors are not required by virtue of an applicable accounting standard to ensure that that matter is included in a note to those accounts or to draw attention to that note in that report, as the case may be.

### **Provisions of Division to be paramount**

"243JG. The provisions of this Division have effect despite the provisions of any other law of this jurisdiction and despite anything contained in any contract or in the constitution of any company or other body corporate.

### **"Division 3 - Disclosure of conflicts of interest by directors**

#### *"Subdivision A - Interpretation*

#### **Matters with which company is concerned**

"243KA. In this Division, a reference to a matter with which a company is concerned includes a reference to any act that the company has done, or is proposing to do, including a transaction that the company has entered into, or is proposing to enter into, and extends to any matter whether or not the matter has been, or is to be, considered by the directors of the company.

#### **Interest in matter**

"243KB. (1) Without limiting by implication what, apart from this subsection, constitutes for the purposes of this Division an interest by a director of a company in a matter with which the company is concerned:

- (a) a director of the company has for those purposes an interest in such a matter if, as a direct or indirect result of the matter, a benefit (whether financial or otherwise) will, or is likely to, accrue to the director, a relative of the director or a relative of the director's spouse; and
- (b) if such a matter involves another body corporate - the director does not have for those purposes an interest in the matter merely because the director is an employee of that other body corporate.

"(2) The reference in subsection (1) to a benefit accruing to a person includes a reference to a benefit accruing indirectly through one or more interposed bodies corporate, trusts or partnerships.

#### **Minor interests**

"243KC. (1) Without limiting for the purposes of this Division the meaning that the expression 'minor interest' has apart from this subsection, each of the following interests by a director of a company in a matter with which the company is concerned that involves another body corporate is a minor interest for the purposes of this Division:

- (a) in the case where the other body corporate is related to the company - the director also being an officer of that body corporate;
- (b) in any case:

- (i) the director having a relevant interest in shares in that body corporate where:
  - (A) the nominal value of those shares does not exceed 5% of the nominal value of all the issued shares in that body corporate; and
  - (B) if there are attached to any of those shares rights to receive dividends that may be paid by the body corporate - those rights do not entitle the holder of those shares to receive, or the holders of those shares to receive between them, more than 5% of any such dividends; and
  - (C) if there are attached to any of those shares rights to receive distributions of the capital of the body corporate - those rights do not entitle the holder of those shares to receive, or the holders of those shares to receive between them, more than 5% of any such distribution; or
- (ii) the director being in a position to control, either directly or indirectly, not more than 5% of the voting power in that body corporate.

"(2) For the purposes of a notice given under subsection 243LA(1) of an interest that, in the opinion of the director giving the notice, is a minor interest because of the operation of subparagraph (1)(b)(i) or (ii) of this section, it is a sufficient compliance with subsection 243LA(1) or paragraph 243LB(1)(b) to state that the interest is a minor interest because of the operation of subparagraph (1)(b)(i) or (ii), as the case may be, of this section, but nothing in this subsection affects the powers of the directors of the company under section 243LD.

*"Subdivision B - Notification of interests*

**Notices of particular interests**

"243LA. (1) Subject to this section, a director of a company who has an interest in a matter with which the company is concerned must:

- (a) within 5 business days after the director became aware of the relevant facts; or
- (b) if the director became aware of those facts before the commencement of this Division, within 5 business days after that commencement;

give written notice to the company setting out the particulars of the interest.

"(2) Subject to the provisions of section 243KC relating to minor interests, the particulars of an interest that are to be included in a notice under subsection (1) are:

- (a) particulars of the nature and extent of the interest and, if the director is of the opinion that the interest is a minor interest or is for any other reason not a material

interest, a statement that the director is of that opinion and giving the reasons for that opinion; and

- (b) such other particulars (if any) of the interest as are reasonably necessary to enable the other directors to decide, having regard to all the circumstances relating to the interest, what action in relation to the matter should be taken in the interests of the company.

"(3) Where:

- (a) a director of a company has given a notice under subsection (1) to the company setting out particulars of an interest that the director has in a matter; and
- (b) after the notice was given the director ceases to have the interest or there is a change in the nature or extent of the interest;

the director must, within 5 business days after the director becomes aware of the relevant facts give written notice to the company:

- (c) if the director has ceased to have the interest - stating that fact; or
- (d) if there has been a change in the nature or extent of the interest - setting out particulars of the change.

"(4) If a director of a company becomes aware that another director of the company has failed to give a notice to the company that the other director is required by this section to give, the first-mentioned director must, within 5 business days after becoming aware of the relevant facts, give written notice to the company setting out those facts.

"(5) Where a director of a company has given written notice of a matter to the company in accordance with section 236, a notice of the matter that is required to be given by the director to the company under subsection (1) or (3) of this section need not contain any particulars that were contained in the first-mentioned notice.

### **General notices**

"243LB. (1) Where:

- (a) a director of a company gives a general notice to the company to the effect that the director:
  - (i) is a director or other officer, or a member, of a specified body corporate or a member of a specified firm; and
  - (ii) is to be regarded as interested in any matter occurring after the notice is given that involves that body corporate or firm; and
- (b) subject to subsection 243KC(2), the notice states the nature and extent of the director's interest in the body corporate or firm;

then, subject to subsection (2), that notice is taken for the purposes of this section to be a notice duly given by the director to the company under subsection 243LA(1) of the director's interest in any such matter that occurs within 12 months after the notice is given.

"(2) Subsection (1) does not apply in relation to a matter unless, when the matter is first being considered, the extent of the director's interest in the body corporate or firm is not greater than was stated in the notice given under that subsection.

### **How notices are to be given**

"243LC. (1) Notice to a company under section 243LA is to be given to a secretary of the company.

"(2) Where a secretary of a company receives under subsection (1) a notice by a director of the company, the secretary must, within 5 business days after the notice is received:

- (a) give a copy of the notice to each other director; and
- (b) enter in the register kept under section 243MA, in relation to the director to whose interest the notice relates:
  - (i) in the case of a notice given under subsection 243LA(1) - the particulars of the director's interest set out in the notice; or
  - (ii) in the case of a notice given under subsection 243LA(3) -
    - (A) if the notice states that the director has ceased to have a particular interest - a statement to that effect; or
    - (B) if the notice sets out particulars of a change in the nature or extent of an interest - those particulars; or
  - (iii) in the case of a notice given under subsection 243LA(4) - the relevant facts.

### **Directors may require further information**

"243LD. (1) If the directors of a company to which a notice has been given under this Division in respect of a director's interest in a matter reasonably consider that the information contained in the notice is insufficient to enable them, having regard to all the circumstances relating to the interest:

- (a) to form an opinion as to whether the interest is a material interest; or
- (b) to make a decision as to the action in relation to the matter that should be taken in the interests of the company;

they may require the director to give, within a specified period, further written particulars or answers to questions, or both further written particulars and answers to questions, that are reasonably necessary to enable them so to form an opinion or make a decision.



"(2) A director of whom a requirement is made under subsection (1) must not, without reasonable excuse, fail to comply with the requirement.

*"Subdivision C - Registers of interests*

**Register to be kept and made available to directors and members**

"243MA. (1) A company must keep a register showing with respect to each director of the company particulars of all interests of that director that are known to the company because of notices given to the company under this Division other than minor interests or interests particulars of which are shown in another register kept by the company under this Law.

"(2) A company must ensure:

- (a) that the register is open for inspection by any director or member of the company without charge; and
- (b) that no member of the public is permitted to inspect that register.

"(3) A director or member of a company may request the company to give to the director or member a copy of the register, or any part of the register, and, where such a request is made, the company must send the copy:

- (a) if the company requires payment of an amount not exceeding the prescribed amount - within 21 days after the day on which payment of the amount is received by the company or within such longer period as the Commission approves; or
- (b) otherwise - within 21 days after the day on which the request is received by the company or within such longer period as the Commission approves.

"(4) A company must produce the register at the start of each annual general meeting of the company and keep it open and accessible during the meeting to all directors and members attending the meeting.

*"Subdivision D - Restriction on voting by directors*

**Director not to vote or be present in certain circumstances**

"243NA. (1) Where:

- (a) a matter is being considered at a meeting of the directors of a company; and
- (b) a director (in this section called the '**relevant director**') has an interest in that matter;

then, despite any rule of the common law or of equity but, in the case of a company that does not have more than 15 members, subject to the constitution of the company, the following provisions have effect.

"(2) If the interest is a minor interest, the relevant director is not entitled to be present during the consideration of, or to vote on, any motion (in this subsection called the '**relevant motion**') moved at that meeting in relation to the matter if at that meeting, or at a previous meeting of the directors, a resolution was passed by a majority of the votes cast by the directors present (excluding any votes cast by the relevant director or by any other director who is not entitled to vote on the relevant motion by virtue of this section) to the effect that the interest is a material interest.

"(3) If the interest is not a minor interest, the relevant director is not entitled to be present during the consideration of, or to vote on, any motion (in this subsection called the '**relevant motion**') moved at that meeting in relation to the matter unless at that meeting, or at a previous meeting of the directors, a resolution was passed by a majority of the votes cast by the directors present (excluding any votes cast by the relevant director or by any other director who is not entitled to vote on the relevant motion by virtue of this section) to the effect that the interest is not a material interest.

"(4) The directors of a company who are present at a meeting at which a resolution referred to in subsection (2) or (3) is passed must ensure that the minutes of that meeting record:

- (a) the passing of the resolution; and
- (b) the names of the directors who cast votes in favour of the resolution; and
- (c) if any of the directors cast votes against the resolution, the names of those directors.

"(5) A quorum is not present during the consideration of a matter at a meeting of directors of a company unless at least 2 directors are present who are entitled to vote on any motion that may be moved at that meeting in relation to that matter.

"(6) Subsection (5) does not apply for the purpose of determining whether a quorum is present during the consideration at a meeting of directors of a company of a proposed resolution, and the voting on such a resolution, authorising the convening of a general meeting of the company to deal with a matter that cannot be considered at that meeting of directors because of the operation of that subsection.

#### *"Subdivision E - Miscellaneous*

#### **Civil liability resulting from contraventions of Division**

"243PA. Where as a direct or indirect result of a contravention or contraventions of section 243LA by a director or directors of a company, the company or any other person incurs a loss, the director who contravened the section is, or the directors who contravened the section are jointly and severally, liable to the company or other person for the loss.

#### **Transactions not invalid**

"243PB. (1) Subject to subsection (2), no transaction entered into or other act done by a company is invalid because of the operation of this Division or a contravention by any person of this Division.

"(2) Subsection (1) does not derogate from any powers that a court would, apart from this Division, have in relation to the transaction, including the power to declare the transaction to be void and, if the court thinks fit, to have been void from the beginning.

#### **"Division 4 - Disclosure of benefits given to directors**

##### **Company to disclose benefits**

"243QA. (1) Subject to subsection (2), where:

- (a) a resolution is passed by the directors, or a decision is made by an officer, of a company other than an exempt proprietary company a purpose or effect of which is to give a benefit to a person who is relevantly connected with the company; and
- (b) except in the case of a benefit that has no monetary value, the sum of:
  - (i) the amount or value of the benefit; and
  - (ii) the amounts or values of any benefits given to that person within the 12 months immediately preceding the resolution or decision, being benefits:
    - (A) that resulted from a resolution passed by the directors. or a decision made by an officer, of the company; and
    - (B) to which this section (other than this paragraph) applied or, in the case of benefits given before the commencement of this Division, would have applied if this Division had been in force when those benefits were given;

exceeds \$50,000;

the following paragraphs have effect:

- (c) the company must lodge the prescribed particulars of the benefit within 10 business days after the resolution was passed or the decision was made or within such further period as the Commission allows; and
- (d) the directors of the company must ensure that those particulars are included in a note to the company's accounts for the financial year in which the resolution was passed or the decision was made; and
- (e) the directors must draw attention in the report made out by them under Division 6 of Part 3.6 in respect of that financial year to the note to the company's accounts in which those particulars have been included.

"(2) Subsection (1) does not require the doing of any act or thing in relation to a benefit if that act or thing is required to be done under a provision of Division 2 or under an applicable accounting standard.

**Offences**

"243QB. Where a company contravenes paragraph 243QA(1)(c) in relation to the giving of a benefit, the company is not guilty of an offence but:

- (a) if the giving of the benefit resulted from a resolution by the directors - each director who voted in favour of the resolution is guilty of an offence; or
- (b) if the giving of the benefit resulted from a decision by an officer - each person involved in the contravention is guilty of an offence.

**Validity of resolutions or decisions not affected**

"243QC. (1) Subject to section (2), no resolution or decision to give a benefit is invalid because of the operation of this Division or a contravention by any person of this Division.

"(2) Subsection (1) does not derogate from any powers that a court would, apart from this Division, have in relation to a resolution or decision, including the power to declare the resolution or decision to be void and, if the court thinks fit, to have been void from the beginning.

**"Division 5 - Prohibition of benefits in connection with transfer of company's undertaking or property**

**Benefits not to be given**

"243RA. Subject to this Division, a person must not, in connection with the transfer of the whole or a part of the undertaking or property of a company, give a benefit to a person who is relevantly connected with the company.

**Benefit permitted with approval of members**

"243RB. Section 243RC does not apply in respect of a benefit if, before the benefit is given:

- (a) the directors of the company caused to be prepared, and personally signed, the explanatory financial statement in relation to the proposed benefit; and
- (b) the members' approving resolutions in relation to the proposed benefit were passed.

**Giving of lesser benefit**

"243RC. Where, because of section 243RB, section 243RA does not prohibit the giving of a proposed benefit to a person, that last-mentioned section does not prohibit the giving to that person, instead of the proposed benefit, of a benefit the amount or monetary value of which is less than the amount or monetary value of the proposed benefit.

### **Where failure to give benefit would constitute contravention of law**

"243RD. Section 243RA does not apply in relation to the giving of a benefit by a person to another person if failure by the first-mentioned person to give the benefit to the other person would constitute, otherwise than because of breach of contract or breach of trust, a contravention of a law in force in Australia or elsewhere.

### **Benefits not to be received**

"243RE. A person who is relevantly connected with a company must not receive a benefit if the giving of the benefit contravenes section 243RA.

### **Benefits taken to be received on trust**

"243RF. (1) Where the giving of a benefit to a person contravenes section 243RA:

- (a) if the benefit is a payment - the amount of the payment; or
- (b) otherwise - the monetary value of the benefit;

is taken to be received by the person in trust for the company concerned.

"(2) Subsection (1) applies in relation to the whole of the amount of a payment or of the monetary value of a benefit even though, if that amount or value had been less, the giving of the benefit would not have contravened section 243RA.

### **Division additional to other laws**

"243RG. This Division is in addition to, and not in derogation of, any other provision of this law or a provision of any other law that requires disclosure to be made with respect to the giving or receipt of a benefit.

## **"Division 6 - Disclosure to Commission**

### **Notices and statements to be lodged with Commission**

"243SA. (1) Where:

- (a) section 243SC applies to a company in relation to a transaction, an executive share acquisition scheme or a housing assistance scheme and a general meeting of a body corporate is convened in connection with the transaction or scheme; or
- (b) a general meeting of a body corporate is convened in connection with a transaction for the purposes of paragraph 243BI(4)(b) or section 243EG or 243RB;

the body corporate contravenes this section unless a copy of notice of the meeting and a copy of each statement required to accompany that notice were lodged not later than 5 business days after the day on which copies of the notice and statements were first sent to members of the body corporate or within such further period as the Commission allows.

"(2) Where a body corporate contravenes this section, the body corporate is not guilty of an offence but every officer of the body corporate who was involved in the contravention is guilty of an offence.

### **Notice of resolutions to be given to Commission**

"243SB. Where:

- (a) section 243SC applies to a company in relation to a transaction, an executive share acquisition scheme or a housing assistance scheme and a resolution relating to the transaction or scheme is passed at a meeting of directors, or at a general meeting, of a body corporate held for the purposes of Division 2; or
- (b) a resolution relating to a transaction is passed at a general meeting of a body corporate held for the purposes of paragraph 243BI(4)(b) or section 243EG or 243RB;

the directors of the body corporate must lodge, within 5 business days after the resolution was passed or within such further period as the Commission allows, written notice of the passing of the resolution and of the terms of the resolution.

### **Notification of particulars of transactions or schemes**

"243SC. (1) This section applies to a company in relation to a transaction to which section 243BB, 243EE or 243FE applied.

"(2) This section also applies to a company in relation to a transaction in the circumstances specified in section 243CA.

"(3) This section also applies to a company in relation to an executive share acquisition scheme or housing assistance scheme referred to in section 243BC.

"(4) Where this section applies to a company in relation to a transaction or scheme:

- (a) the company must lodge the prescribed particulars of the transaction or scheme:
  - (i) in the case of a transaction to which section 243CA applied - within 5 business days after the transaction was entered into or within such further period as the Commission allows; or
  - (ii) in the case of a transaction to which section 243BB, 243EE or 243FE applied or a scheme to which section 243BC applied - within 5 business days after the day referred to in paragraph 243BD(1)(e), 243EE(d), 243FE(d) or 243BD(2)(e), as the case may be, or within such further period as the Commission allows; and
- (b) subject to section 243JF, the directors of the company must ensure that the prescribed particulars of the transaction or scheme are included in a note to the company's accounts for the financial year in which:
  - (i) in the case of a transaction - the transaction was entered into; or

- (ii) in the case of a scheme - the first transaction under the scheme was entered into or, in the case of a scheme that was in force before the commencement of this Part, the first transaction was entered into under the scheme after that commencement; and
  - (c) subject to section 243JF, the directors of the company must draw attention, in the report made out by them under Division 6 of Part 3.6 in respect of that financial year, to the note to the company's accounts in which those particulars have been included under paragraph (b) or a corresponding requirement of an applicable accounting standard.
- "(5) Where:
- (a) a company is required by paragraph 4(a) to lodge the prescribed particulars of a transaction; and
  - (b) after the requirement arose a time occurs when no amount is outstanding under the transaction;

the company must, within one month after that time, lodge a notice stating that no amount is outstanding under the transaction.

"(6) Where a company contravenes paragraph (4)(a) or subsection (5), the company is not guilty of an offence but every person who is involved in the contravention is guilty of an offence.

"(7) If a company or any other person incurs any loss as a direct or indirect result of a transaction in respect of which subsection (4) was contravened, the persons who were involved in the contravention are jointly and severally liable to the company or other person for the loss.

## **"Division 7 - Miscellaneous**

### **False or misleading statements**

"243TA. (1) If a statement prepared for the purposes of this Part by any of the directors of a company was false or misleading in a material particular, the directors who signed the statement are jointly and severally liable to the company or any other person for any loss incurred by the company or other person as a direct or indirect result of the transaction or scheme to which the statement relates.

"(2) A person is not liable under subsection (1) in respect of a statement if it is proved that the person, after making such enquiries (if any) as were reasonable, had reasonable grounds to believe, and did, until the statement was signed by the person, believe, that the statement was true and not misleading.

"(3) If a director of a company who has signed a statement for the purposes of this Part finds out, after the statement was signed by him or her, that the statement was, or has become, false or misleading in a material particular, the following provisions have effect:

- (a) the director must, as soon as practicable, notify all the other directors of the false or misleading particular;

- (b) the director must take all reasonable steps to prevent the company from entering into or operating, or to secure the termination of, the transaction or scheme to which the statement relates and to minimise any loss that the company may suffer if the transaction or scheme is entered into or operated or as a result of the transaction or scheme having been entered into or operated, as the case requires;
- (c) the company contravenes this subsection if notice of the false or misleading particular is not lodged within 5 business days after:
  - (i) the day on which the director notified the other directors of the false or misleading particular; or
  - (ii) if the other directors were notified on different days - the last day on which any of those directors was notified;
- (d) where a company contravenes this subsection, the company is not guilty of an offence but every director is guilty of an offence.

"(4) A director of a company who, without reasonable excuse, contravenes paragraph (3)(a) or (b) is taken by virtue of the contravention, for the purposes of subsection 232(4), to have failed to exercise a reasonable degree of care and diligence in the exercise of his or her powers and the discharge of his or her duties.

"(5) In a proceeding against a person in respect of any loss for which the person is liable under subsection (1):

- (a) if a copy of the statement referred to in that subsection accompanied a notice of a meeting of members of the company - any such copy is admissible in evidence as if it were the original statement; or
- (b) if the minutes of a meeting of directors of the company refer to the terms of the statement - those minutes are admissible in evidence as proof that a statement in those terms was presented to the meeting.

"(6) A document purporting to be a copy of a statement referred to in subsection (1) is taken to be such a copy unless the contrary is established.

### **Provisions relating to extension of periods**

"243TB. Any power of the Commission under this Part to extend a period (other than the power to extend the period referred to in subsection 243EG(9)) may be exercised even though the period has ended."

### **Before section 292:**

Insert in Division 4 of Part 3.6:



**Division subject to Part 3.2A**

"291A. This Division is subject to Part 3.2A."

**Before section 301:**

Insert in Division 5 of Part 3.6:

**Division subject to Part 3.2A**

"300A. This Division is subject Part 3.2A."

**Paragraph 307(c):**

Omit the paragraph, substitute:

- "(c) particulars of any interest of the director in a matter with which the company is concerned, being an interest particulars of which have been set out in a written notice to the company given by the directors:
  - (i) in accordance with Division 3 of Part 3.2A or a corresponding previous law; and
  - (ii) since the date of the last report made out in relation to the company under this Division or a corresponding previous law."

**Subsections 1318(1) and (2):**

Omit the subsections, substitute:

"(1) If, in any civil proceeding against a person to whom this section applies in a capacity as such a person for negligence, default, breach of trust or breach of duty, or in respect of a liability as a result of a contravention of Part 3.2A, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach, or as a result of the contravention, but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, or from liability as a result of the contravention, the court may relieve the person, either wholly or partly, from liability on such terms as the court thinks fit.

"(2) Where a person to whom this section applies has reason to apprehend that any claim will or might be made against the person in a capacity as such a person in respect of any negligence, default, breach of trust or breach of duty, or as a result of a contravention of Part 3.2A, the person may apply to the Court for relief, and the Court has the same power to grant relief to the person as it would have had under subsection (1) if it had been a court before which proceedings against the person for negligence, default, breach of trust or breach of duty, or as a result of a contravention of Part 3.2A, had been brought."

**Schedule 3:**

- (a) Omit

"Section 231:

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

(b) Omit:

"Section 234:

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

(c) Insert before "Section 245:"

**"Subsection 243BA(2):**

Penalty:

**Subsection 243DA(5):**

Penalty:

**Section 243EG:**

Penalty:

**Subsection 243GA(3):**

Penalty:

**Subsection 243HA(4):**

Penalty:

**Subsection 243JC(5):**

Penalty:

**Section 243JE:**

Penalty:

**Section 243LA:**

Penalty:

**Subsection 243LD(2):**

Penalty:

**Section 243QB:**

Penalty:

**Section 243RA:**

Penalty:

**Section 243RE:**

Penalty:

**Subsection 243SA(2):**

Penalty:

**Section 243SB:**

Penalty:

**Subsection 243SC(6):**

Penalty:

**Paragraph 243TA(3)(d):**

Penalty:           ".

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NOTE

1. No. 109, 1989, as amended. For previous amendments, see No. 110, 1990 and Nos. ### and ###, 1991.

## **ANNEXURE B**

### **List of Respondents**

Accounting Standards Review Board  
Ampcor Limited  
AMP Society  
Arthur Robinson & Hedderwicks, Solicitors  
Australian Accounting Research Foundation  
Australian Bankers' Association  
Australian Merchant Bankers' Association  
BHP  
Brambles Industries Ltd  
Clayton Utz, Solicitors  
Coles Myer Ltd  
Coopers and Lybrand, Chartered Accountants  
CSR Limited  
Deloitte Ross Tohmatsu  
Dunhill Madden Butler, Solicitors  
Freehill Hollingdale & Page, Solicitors  
Group of 100  
Institute of Corporate Managers, Secretaries and Administrators Limited  
Law Institute of Victoria  
Mayne Nickless Limited  
Minter Ellison, Solicitors  
National Australia Bank  
National Mutual  
Northmore Hale Davy & Leake, Solicitors  
Pacific Dunlop Limited  
Perpetual Trustees  
Pioneer International Limited  
Price Waterhouse  
QPSX Communications Limited  
R & I Bank of Western Australia Ltd  
The Securities Institute of Australia  
Western Mining Corporation Ltd  
Westpac Banking Corporation