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# Update Summary

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## **ROBSON'S ANNOTATED CORPORATIONS LEGISLATION**

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## Update 9, 2024 – Robson’s Annotated Corporations Legislation

### October 2024 update summary

#### Revisions to annotations on Part 5.3B of Chapter 5, by Dr Colin Anderson and Dr David Morrison

##### Outline – s 453L

Section 453L limits the transactions and dealings that can be entered into by a company or its officers while it undergoes a small business restructure. The question of whether to allow the restructuring to continue or grant an application to have the company wound up is closely to the financial benefit to be obtained from a restructuring as opposed to a winding up, although the creditors’ other interests should also be borne in mind: *Re Redback Engineering & Sales Pty Ltd* [2024] NSWSC 1108. See [453L.10].

#### Revisions to annotations on Chapter 6D, by Professor Juliette Overland

##### Outline – s 700

Section 700 defines “securities” for the purposes of the fundraising rules. If there is no obligation to repay moneys “deposited or lent” as a debt, a cryptocurrency cannot be characterised as a debenture within the meaning of s 9; its operator is therefore not required to prepare a disclosure document: *ASIC v Finder Wallet Pty Ltd* [2024] FCA 228. See [700.10].

#### Practice and procedure: Disclosure exemption for non-traditional rights issues – s 708AA

Section 708AA provides an exemption from the need to disclose information to investors about rights issues. An entity must “become aware” that a cleansing notice issued under s 708AA(10) is defective before the obligation to correct arises: *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 5)* [2024] FCA 477. See [708AA.10].

#### Practice and procedure: relief for failure to lodge or late lodgment of a cleansing notice under s 1322(4) – s 708A

Section 708A provides an exemption from the need to disclose information to investors about quoted securities. Relief confirming that a cleansing notice was not invalid may be granted where a company issued a cleansing notice confirming that it had satisfied its obligations under Chapter 2M but subsequently became aware that it had in fact technically failed to comply with Ch 2M as a result of its appointment of a new auditor not being put to shareholders for approval at the next AGM: *Re Kalamazoo Resources Ltd; Ex parte Kalamazoo Resources Ltd* [2024] WASC 83, and *Re Omni Bridgeway Ltd; Ex parte Omni Bridgeway Ltd* [2024] WASC 133. Relief may also be granted to validate trading in securities issued without a valid cleansing notice where there has been no flagrant or blatant disregard of obligations: *Re Enova Mining Ltd; Ex parte Enova Mining Ltd* [2023] WASC 492; *Re Nanoveu Ltd; Ex parte Nanoveu Ltd* [2024] WASC 329; *Re Haranga Resources Ltd; Ex parte Haranga Resources Ltd* [2024] WASC 105 See [708A.70].

#### Revisions to annotations on Parts 7.7A, 7.10 and 7.10A of Chapter 7, by Grant Holley

Grant Holley has added annotations for ss 963J and 1043L.

#### **Outline– s 961B**

Section 961B requires a provider of financial advice to act in the best interests of a client. **Although s 961B(2)** provides a “safe harbour” for providers if they prove they have followed all the steps, it does not follow that a failure to prove one or more of the matters set out means that a breach of the section has been established: *ASIC v DOD Bookkeeping Pty Ltd (in liq)* [2023] FCA 1622. See [961B.10].

#### **Concepts: “could reasonably be expected to influence” – s 963A**

Section 963A defines “conflicted remuneration” for the purposes of Div 4 of Pt 7.7A. The expression “could reasonably be expected to influence” posits an objective test concerning the likelihood of benefit affecting a future choice of financial product recommended or financial product advice given to a retail client: *ASIC v DOD Bookkeeping Pty Ltd (in liq)* [2023] FCA 1622. See [963A.22].

#### **Concepts – “for work carried out ... by the licensee or representative – s 963J**

Section 963J prohibits an employer or representative of a financial services licensee from giving employees conflicted remuneration. The word “for” in the phrase “for work carried out, or to be carried out” suggests a connection between the remuneration and the work performed or to be performed by the adviser: *ASIC v DOD Bookkeeping Pty Ltd (in liq)* [2023] FCA 1622. See [963J.30].

#### **Practice and procedure: Civil penalty – s 1041B(1)(b)**

Section 1041B prohibits a person from conduct that creates or is likely to create, a false or misleading appearance with respect to the market for, or the price for trading in, financial products on a financial market. For the purpose of determining penalty where there are a number of contraventions, the “course of conduct” principle applies, where the facts and elements of the contraventions are the same: *ASIC v Blumenthal* [2024] FCA 384. See [1041B.95].

#### **Practice and procedure: Information made known in a manner that would ... bring it to the attention of persons who commonly invest – s 1042C(1)(b)**

Section 1042C defines “generally available” for the purposes of the insider trading provisions. It is not concerned with the mode of communication save that it would, or would be likely to, bring information to the attention of the relevant persons: *Forge Group Ltd (in liq) (re cs and mgrs apptd) v Clough Ltd (No 2)* [2024] WASC 192. See [1042C.30].

#### **Practice and procedure: Compensation – s 1043L(5)(b)(ii)**

Section 1043L provides for the calculation of damages where compensation is sought for breaches of civil penalty provisions about financial services. The hypothetical disposal of shares tainted by insider information does not, on the face of the provision, refer to the identity of the putative acquirer: *Forge Group Ltd (in liq) (re cs and mgrs apptd) v Clough Ltd (No 2)* [2024] WASC 192. See [1043L.20].

#### **Concepts: Decision – s 1055**

Section 1055(6) enables AFCA to vary a superannuation fund trustee’s decision where it has been subject to a complaint. However, AFCA’s task is not simply to supplant the trustee’s decision with its own. The actions available to it only become available if it

positively decides that the decision made by the trustee was, in its operation in relation to the complainants, unfair, unreasonable or both: *Muffet v Qantas Superannuation Ltd* [2024] FCA 39. See [1055.20].

**Concepts: Contrary to law – s 1055(7)**

Section 1055(7) prevents AFCA from making a determination about a superannuation complaint that would be contrary to law. It does not impose a positive obligation on AFCA to make a determination consistent with any legal or equitable principles: *Connor v Australian Financial Complaints Authority* [2024] FCA 711. See [1055.50].

**Revisions to annotations on Chapter 9, by Vicki Bell**

**Practice and procedure: Rectification of register – s 1274**

Section 1274 requires ASIC to maintain registers of companies. It empowers the court to remove a company from the register provided that a statutory provision or circumstance mandates or requires termination or extinguishment of the company as a separate legal person. However, the removal will not retrospectively deprive the company of the corporate existence conferred upon registration: *Frigger v Professional Services of Australia Pty Ltd (No 5)* [2024] FCA 420. See [1274.80].

**Concepts: Failure to carry out, etc audit duties – s 1292(1)(d)**

On application by ASIC or APRA, s 1292 enables the Companies Auditors Disciplinary Board to cancel or suspend the registration of a company auditor in certain circumstances. There must be a duty or function that is required by an Australian law to be carried out by a registered company auditor. The second step is for the Board to consider whether that duty or function has been adequately and properly carried out or performed. During that second stage, a broader inquiry into professional standards and guidelines is permitted: *CMW23 v Companies Auditors Disciplinary Board* [2024] FCA 407. See [1292.20].

**Concepts: “reasonable steps” – s 1309(2)(f), (g)**

Section 1309(2) provides that a person commits an offence when they release information to a market operator without taking reasonable steps to ensure its veracity. Reliance on legal advice to satisfy s 1309(2)(f) may not suffice if the advice did not involve a fact-checking or due diligence exercise to ascertain the accuracy of matters disclosed. Even then, the document may be misleading even if everything in it remains literally correct: *ASIC v iSignthis Ltd* [2024] FCA 669. See [1309.30].

**Outline – s 1317AE**

Section 1317AE sets out the types of compensation and other remedies a court may order to redress detriment suffered as a result of whistleblowing. Section 44 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) precludes claims for compensation to the extent that the compensation claimed is for damages for an injury sustained during the course of employment: *Mishra v NBN Co Ltd* [2024] VSC 146. See [1317AE.10].

**Concepts: “A Court may order a person to pay the Commonwealth a pecuniary penalty” – s 1317G(1)**

Section 1317G confers on the court a discretion to make a civil penalty order. The parity principle is of limited assistance in cases concerning pecuniary penalties: *ASIC v Mercer Financial Advice (Australia) Pty Ltd* [2023] FCA 1453. See [1317G.10].

**Practice and procedure: Corporation/scheme penalties**

The totality sentencing principle requires the Court to review the “aggregate” penalty to ensure that it is just and appropriate, and not out of proportion to the contravening conduct considered “as a whole” or the “totality of the relevant contravening conduct”: *ASIC v American Express Australia Ltd* [2024] FCA 784. See [1317G.20].

**Concepts: “ought fairly to be excused” – s 1317S(2)**

Section 1317S enables the Court to excuse a contravener from liability resulting from orders after a finding of contravention. The Court may consider the procurement of legal advice from a leading firm where there is uncertainty about the application of the law, the absence of loss or damage, the lack of previous similar conduct by a defendant and the likelihood of job losses in the event of the imposition of a significant penalty: *ASIC v Web3 Ventures Pty Ltd* [2024] FCA 578. See [1317S.10].

**Concept: “procedural irregularity” – s 1322(1)(b)(i), (2)**

Section 1322 confers remedial powers upon the court to cure procedural irregularities. However, a failure to give the majority shareholder notice of a meeting may be considered substantive rather than procedural: *Windsor Family Assets Pty Ltd v Green Day Energy Pty Ltd (admins apptd)* [2023] FCA 1651. See [1322.30].

**Practice and procedure: Order for rectification of register – s 1322(4)(b)**

It is irrelevant whether incorrect information was supplied accidentally or intentionally: *Cappelleri v Cappelleri* [2024] VSCA 173. See [1322.90].

**Practice and procedure: Order relieving person from liability – s 1322(4)(c)**

Relief may be granted where the plaintiff inadvertently failed to notify ASIC of a resignation of a director within the 28-day period specified in s 205B and of a share issue within the 28-day period stipulated in s 254X: *Re Deterra Royalties Ltd* [2024] FCA 891. See [1322.100].

**Practice and procedure: Order for extending period for doing act, etc – s 1322(4)(d)**

The period for a share consolidation to take effect and for lodgment with ASIC of a related share consolidation under s 254H may be extended: *Re Cenntro Electric Group Ltd* [2024] NSWSC 1644. See [1322.110].

**Outline: s 1323**

Section 1323 confers broad powers on the Court to prevent persons who may have breached the Corporations Act from dealing with money or property concerned with the contravention. Ex parte applications are not the ordinary course, but a risk of dissipation of assets may justify such a course: *ASIC v NGS Crypto Pty Ltd* [2024] FCA 373. Freezing orders over cryptocurrency may be varied to allow a defendant to withdraw living expenses and to settle a property transaction: *ASIC v NGS Crypto Pty Ltd (No 2)* [2024] FCA 521. See [1323.10].

### **Practice and procedure: Order prohibiting person from leaving Australia – s 1323(1)(k)**

Although the right to travel freely is an important private right which ought not be lightly interfered with, it may be outweighed by the public interest in ASIC being able to pursue investigations and to protect aggrieved persons' interests: *ASIC v Guo* [2024] FCA 125. In determining whether to extend or vary an order, the Court performs a balancing exercise, weighing the benefit and detriment to the particular defendant against those of the aggrieved persons. Relevant factors include: the length of time that the respondent has been subject to the order; the risk that the respondent might leave the jurisdiction and not return; the respondent's legitimate interest in being allowed to travel and the length of time for which the matter has been ongoing: *ASIC v Guo (No 2)* [2024] FCA 251. See [1323.110].

### **Concepts: threshold requirement of "credible testimony" – s 1335(1)**

Section 1335 enables the court to make costs orders about proceedings under the Corporations Act. As a matter of practicality, the court's assessment of the plaintiff's financial position will be a preliminary one, based on limited materials: *TMCM Enterprises Pty Ltd (in liq) v Owners – Strata Plan No 78894* [2023] NSWSC 1637. See [1335.15].

### **Practice and procedure: Form of security – s 1335**

An after-the-event insurance policy may be considered to provide inadequate security because the insurer, acting legitimately in good faith and in its own interests, may contend that it is not obliged to meet the full amount of the costs order: *APFC No 7 Corporation v Insurance Australia Ltd* [2024] NSWSC 534. See [1335.27].

### **Outline – s 1337H**

Section 1337H governs the transfer of proceedings in corporations matters by the Federal Court and the State and Territory Supreme Courts. The fact that the Supreme Court had made a group costs order in a group proceeding may be a relevant consideration to determine a transfer application pursuant to s 1337H(1): *Bogan v Smedley* (2023) 72 VR 394; [2023] VSCA 256. See [1337H.10].

## **Revisions to annotations on Schedule 2, by Dr Colin Anderson and Dr David Morrison**

### **Introduction – Sch 2, s 60-5**

Section 60-5 provides an entitlement to an external administrator to receive remuneration if it was for "necessary work properly performed". Where a court is to determine the remuneration of an external administrator the ultimate question is whether the remuneration claimed is reasonable: *Re Bayview Eatery Pty Ltd (t/as La Boca Trattoria)* [2024] VSC 382. The section does not create a right to be paid out of property held on trust by the company if the trust property cannot be brought within the term company property: *Re PBS Building (Qld) Pty Ltd* [2024] QSC 108. See [60-5.10].

### **Introduction – Sch 2, s 60-10**

Section 60-10 empowers creditors to resolve to approve an external administrator's remuneration. It does not extend to disbursements (*ASIC v Marco (No 15)* [2024] FCA 347) or to receivers: *Re Martar Pty Ltd (in liq)* [2024] VSC 239. If the determination

specifies that the external administrator is entitled to receive remuneration worked out wholly or partly on a time-cost basis, the determination must cap the amount of remuneration worked out on that basis. More than one determination may be made in relation to a particular external administrator of a company and a particular external administration of a company: *ASIC v Kaur (No 2)* [2024] FCA 760. See [60-10.10].

### **Other remuneration issues – Sch 2, s 60-12**

Section 60-12 sets out matters that the Court must consider when making or reviewing remuneration determinations. Disbursements are not determined by the Court but they may be challenged: *ASIC v Marco (No 15)* [2024] FCA 347; *Hassan v Image Nominees Pty Ltd (in liq)* [2024] FCA 487. See [60-12.70].

### **Introduction – Sch 2, s 90-15**

Section 90-15 enables the court to make such orders as it thinks fit in relation to a company's external administration. While s 90-15(4) lists factors that the court may take into account, there is no requirement to take account of any of the factors: *Re Windsor Development Co Pty Ltd (in liq) (No 2)* [2024] VSC 297. The powers available to the court are not limited to situations where the only interest that is served is the public interest: *Re Qenos Pty Ltd* [2024] FCA 461. See [90-15.10].

### **Court orders – Examples – Sch 2, s 90-15**

In certain circumstances, a court may allow the administrator may execute a deed that is different in certain respects from that which was approved at the meeting of creditors declare that the deed was not invalid as a result: *Re Pacquola Group Pty Ltd* [2024] FCA 393. See [90-15.15].

### **Directions – overview – Sch 2, s 90-15**

Directions may be given that the liquidator would be justified in treating the funds of one company in the group as those of another company in the same group (*Re Nat Logistics Australia Pty Ltd (In liq)* [2024] FCA 676) or in relation to a proposed set-off arrangement: *Re Fynfan Pty Ltd (in liq)* [2024] NSWSC 594. See [90-15.30].

