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# Update Summary

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

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## Update 11, 2024 – Robson’s Annotated Corporations Legislation

### December 2024 update summary

#### Revisions to annotations on Chapter 1, by Timothy Smartt

##### **Definition: Controller – s 9**

Section 9 defines many terms used in the Corporations Act, including “controller”. The defining characteristic is having possession or control which is sufficient to remove the property from the control of the corporation so that it might be sold or otherwise dealt with: *Bolwell v NWC Finance Pty Ltd* [2024] VSC 30. See [9.115].

##### **Definition: Managed investment scheme – s 9**

It is legitimate to consider potential difficulties in applying the regulatory regime regarding managed investment schemes in deciding whether the definition of “managed investment scheme” is satisfied: *ASIC v Web3 Ventures Pty Ltd* [2024] FCA 64. See [9.350].

#### Revisions to annotations on Chapter 2B, by Amy Reid

##### **XXX – s 124**

Section 124 provides a non-exhaustive list of specific powers and attributes of a registered company as a separate legal entity. A company is a legal fiction and a legal person that is separate from its members. It has the characteristics of a natural person with legal capacity and can only exist by operation of the corporations legislation that governs its formation and continuing existence: *Frigger v Professional Services of Australia Pty Ltd (No 5)* [2024] FCA 420. See [124.10].

##### **Outline – s 127**

Section 127 sets out how a company may execute documents. An agreement may be duly executed by a company where a director, who is also a party to the agreement in his personal capacity, signs the agreement in one place only (alongside his own name), and not also above the line in his capacity as director: *Access Training Group Ltd v Jane* [2023] NSWSC 1416. See [127.10].

##### **Concepts: “Knew or suspected that the assumption was incorrect” – s 128(4)**

Section 128 provides that a person is entitled to make assumptions set out in s 129 when dealing with a company. Section 128(4) does not incorporate the doctrine of being “put on inquiry” and actual knowledge or actual suspicion that the assumption is incorrect is required, constructive knowledge being insufficient; *City Garden Australia Pty Ltd (in admin) v Dai* [2024] NSWCA 238. See [128.60].

##### **Concepts: Officer or agent – s 129(3)**

Section 129 sets out assumptions that a person may make in dealing with a company under s 128. The company’s circumstances are also relevant in determining whether the company has made a relevant representation as to authority. For example, where the nature of an agreement is within a company’s normal course of activities, an

agreement signed by a director may be considered to bind it: *Oliveri Legal Pty Ltd (t/as Oliveri Lawyers) v Cassegrain Tea Tree Oil Pty Ltd* [2024] NSWCA 74. See [129.40].

### **Practice and procedure: Approach to construction of statutory contract – s 140(1)**

Section 140 sets down the contractual basis of relationships between a company, its directors and its members. The rules of construction of contracts also generally apply to the construction of a company's constitution, including presumptions that specific provisions prevail over inconsistent general provisions, that terms expressly agreed by the parties prevail over incorporated terms, and that clauses are not inconsistent merely because one qualifies or modifies the effect of the other: *Carabetta v Carlingford Bowling, Sports & Recreation Club* [2023] NSWSC 1442. See [140.15].

### **Revisions to annotations on Part 5.1 of Chapter 5, by Eugene Chan**

#### **Concepts: "Scheme" – s 411**

Section 411 provides a flexible procedure to allow companies to reorganise share capital or debt repayments with creditors. One application can be made to the court relating to multiple schemes in respect of different entities. This is not an impediment to the convening of meetings in respect of the multiple schemes: *Re Kwinana Wte Pty Ltd* [2024] FCA 48. See [411.20].

#### **Concepts: "Classes" of members and/or creditors – s 411**

Any issue about classes of members is usually determined at the first hearing, so that costs and court time are not wasted, which would occur if this was left to the second hearing: *Re K2Fly Ltd; Ex parte K2Fly Ltd* [2024] WASC 297. See [411.40].

#### **Practice and procedure: Evidence required for a court hearing – s 411**

The practice notes of the Federal Court and the State Supreme Courts (see [Pt5.1.10]) set out matters concerning the form of affidavits and the matters to be addressed in evidence at the first hearing. The Notes acknowledge that recent case law has not required foreign law evidence of enforceability of a deed poll in a foreign jurisdiction: *Re Thorn Group Ltd* [2023] NSWSC 1299; *Re Cenntro Electric Group Ltd* [2023] NSWSC 1644. See [411.85].

#### **Practice and procedure - Approval of the explanatory statement – s 411**

There may be circumstances in which court approval (or direction) would be appropriate if the intended communication is inconsistent with or qualifies the explanatory statement the court has approved although a supplementary explanatory statement is not considered necessary or appropriate in the circumstances: *Re A-Cap Energy Ltd (No 2)* [2023] FCA 1356. See [411.95].

#### **Practice and procedure – Phone call scripts: – s 411**

Court approval is not required for the script, but the court's attention ought to be drawn to the script: *Re Damstra Holdings Ltd* [2024] NSWSC 284; *Re Millennium Services Group Ltd* [2024] NSWSC 307. See [411.97].

#### **Practice and procedure: Court's powers to amend scheme before approving it – s 411**

A relevant factor is whether the proposed variation is so novel or substantial as to take the varied scheme of arrangement beyond the reasonable contemplation of

shareholders at the time they agreed to it: *Re Healthia Ltd (No 2)* [2023] NSWSC 1519. However, the power is not limited to alterations which are immaterial, insubstantial or insignificant: *Re Newcrest Mining Ltd (No 2)* [2023] FCA 1251. See [411.210].

#### **Practice and procedure: Second court hearing – court's role in approving schemes – s 411**

Courts must ensure that the approval of the scheme complies with the law, including the relevant procedural and other requirements prescribed by the Act, the *Corporations Regulations 2001* (Cth) and the *Federal Court (Corporations) Rules 2000* (Cth) (and other statutory analogues), and that the requirements for a valid resolution of the shareholders have been satisfied: *Re Suncoast Cabs Ltd* [2024] FCA 56. Although voter turnout has no statutory basis, it is taken into account as a matter of practice and may have a bearing on discretionary considerations such as if there is reason to consider that, due to low turnout, the statutory majorities are not truly representative of the views of the scheme class members: *Re A-Cap Energy Ltd (No 2)* [2023] FCA 1356. See [411.260].

#### **Practice and procedure: Court's powers at second court hearing – s 411**

Irregularities that may be cured under s 1322 include the late dispatch of documents (*Re Cenntro Electric Group Ltd* [2024] NSWSC 180) and the failure to send scheme documents to returned mail shareholders: *Re Damstra Holdings Ltd* [2024] NSWSC 425. See [411.290].

### **Revisions to annotations on Part 5.4B of Chapter 5, by Anthony Kaufmann**

#### **Practice and procedure: Appointment of provisional liquidator – s 472(2)**

Section 472 enables the court to appoint a liquidator, including after the filing of a winding up application. As a discretionary provision, the power under s 472(2) must be judicially by reference to relevant considerations: *Boyd Industries Pty Ltd v 1297 KRL McMillans Pty Ltd* [2024] FCA 229. The principles were summarised in *Davis-Jacenko v Roxy's Bootcamp Pty Ltd* [2024] NSWSC 702. See [472.20].

#### **Concepts: "Property" – s 477(2)(c)**

Section 477 provides court-appointed liquidators with specific powers. Some statutory based claims are not assignable property of the company by the liquidator, as the statutory provision confers a right personal to the person who suffered damage, such that it is not a right of action conferred on the liquidator: *Lottah Mining Pty Ltd (in liq) v Summers* [2024] VSC 47. See [477.50].

#### **Practice and procedure: Extension of time for approval under s 477(2B)**

Where retrospective approval is sought to enter into an agreement on behalf of a company, and no adequate explanation is provided as to why it was not sought before entering into the agreement, the liquidators may be required to bear their own costs of the application to obtain approval retrospectively: *Re Greatcell Solar Ltd (in liq); Ex parte Krejci* [2024] FCA 1121. See [477.305].

#### **Concepts: Grounds for stay or termination – s 482**

Section 482 enables the court to stay or terminate a winding-up at any time. In terminating a winding up order, the court may require satisfaction that all of the creditors

have been paid out and the liquidators' costs and expenses are covered: *Re Catalina Genetics Pty Ltd* [2024] NSWSC 759. See [482.30].

### **Concepts: "Special leave" – s 488(2)**

Section 488(2) enables a liquidator to distribute surplus assets after a winding-up. Special leave may be granted to distribute surplus assets where a liquidator of a trustee company is appointed receiver of the trust property by the court: *Re Second ICO Pty Ltd (in liq)* [2020] FCA 608. See [488.20].

## **Revised annotations on Part 5.5 of Chapter 5, by Vicki Bell**

### **Outline – s 490**

Section 490(1)(a) states that a company cannot be wound up voluntarily when an application has already been filed to wind it up in insolvency. The principles relevant to the application of s 490(1) were summarised in *Re Resicomm Electrical Pty Ltd* [2024] NSWSC 811. See [490.10].

### **Practice and procedure: Appointment of liquidators upon termination of a deed of company arrangement – s499(2D)**

Section 499 concerns the appointment of liquidators to companies in a voluntary liquidation. It is not appropriate for an application to be made on appeal without the benefit of evidence as to the costs and relative advantages and disadvantages as between the two nominated liquidators: *Sino Group International Ltd v Toddler Kindy Gymparoo Pty Ltd (in liq)* [2023] FCAFC 119. See [499.15].

### **Practice and procedure: Commencement of other action etc against company – s 500(2)**

While s 500 does not specify how to determine an application for leave to allow civil proceedings against a company in liquidation, case law presents some guidance. It may be relevant to consider the merits of the proceeding in some detail in order to properly inform the exercise of the discretion under s 500(2) to allow a proceeding to continue or commence: *Huber v CellOS Software Ltd (in liq) (No 2)* [2023] FCA 459. Fair Work Commission proceedings are considered civil proceedings for the purposes of s 500(2): *Hargreaves v Youth Development Australia* [2024] FWC 680; *Taouk v Civil Labour Hire Pty Ltd* [2024] FWC 682. The Federal Circuit and Family Court of Australia has jurisdiction to grant leave under s 500(2): *Donnola v Silverleaf Constructions Co Pty Ltd (No 2)*. Leave may be granted on the basis of the public interest in protecting and promoting compliance with the *National Disability Insurance Scheme Act 2013* (Cth) and deterring contravening conduct: *Commissioner of the NDIS Quality and Safeguards Commission v Aurora Community Care Pty Ltd (in liq)* [2024] FCA 679. See [500.20].

