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Update Summary

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UPDATE 50

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ROBSON'S ANNOTATED CORPORATIONS LEGISLATION

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General Editor

Highlights

- **New** definitions commentary has been created for s 9.
- **Updated** annotations issued for Chs 1, 2A and 2B of the *Corporations Act 2001* (Cth).
- **Cross references** have been added and updated throughout the *Corporations Act 2001* (Cth).
- **Table of Cases** has been updated and reissued.

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COMMENTARY

Updated annotations have been inserted into Chs 1, 2A and 2B of the *Corporations Act 2001* (Cth) by the author Michael Phillips. Some of the key additions include:

[9.10] – [9.550] Section 9 Commentary

Section 9 has been enhanced with a new dictionary definitions section. The author has defined key terms within s 9 and has added relevant cases to assist the reader.

[12.25] Concepts: Scheme of arrangement not a relevant agreement, purpose – s 12(2)(b)

The appealed case of *Perpetual Custodians Ltd v IOOF Investment Management Ltd* [2013] NSWCA 231; (2013) 278 FLR 49; 31 ACLC 13-034 strongly doubted that a scheme can constitute a “relevant agreement” giving rise to an association for the purposes for s 12(2)(b).

[15.10] Concepts: Acting in concert and association – s 15(1)

It is not voting in common with other members which gives rise to an association, but some prior conduct extraneous to the voting which indicates the members are acting in concert: *Perpetual Custodians Ltd v IOOF Investment Management Ltd* [2013] NSWCA 231; (2013) 278 FLR 49; 31 ACLC 13-034.

[16.20] Practice and procedure: Professional advice – s 16(1)(a)

The “startling conclusion” in *Heine Management Ltd v ASC* (1994) ACLC 138; 12 ACSR 578 was doubted and criticised as permitting ready avoidance of the act in *Everest Capital Ltd as Trustee of the EBI Income Fund v Trust Company Ltd* [2010] NSWSC 231.

[57.10] Concepts: Classes of shares – s 57(1)

A number of tax cases in which the concept of a class of shares have been considered. “The expression ‘class of shares’ has no special meaning in s 16(2) of the code”: *Clements Marshall Consolidated Ltd v ENT Ltd* [1988] Tas R (NC) N1; (1988) 13 ACLR 90. The recent case of *Stewart v Federal Commissioner of Taxation* [2013] AATA 845 has also been discussed.

[88B.10] Practice and procedure: “Qualified Accountant” – s 88B(2)

The qualified Accountants declared by ASIC in ASIC CO 01/1256 have been listed in this paragraph.

[95A.20] Concepts: Able to pay – s 95A(1)

A loan repayable on demand need not always be treated as a debt which is soon to be due for payment: *International Cat Manufacturing (in liq) v Rodrick* [2013] QCA 372.

[109X.30] Concepts: Service by leaving or posting to – s 109X(1)(a) and s 109X(2)

The analysis in *Scope Data Systems Pty Ltd v Goman* (2007) 70 NSWLR 176; 210 FLR 261; 25 ACLC 721; [2007] NSWSC 278, to prove time of delivery, has been applied in *Formosa House Pty Ltd v Ming Chien Chang* [2010] VSC 474; *Renegade Rigging Pty Ltd v Hanlon Nominees Pty Ltd* [2010] VSC 385 and *Steel Building Systems Pty Ltd v Beks Constructions (NSW) Pty Ltd* [2010] NSWSC 1405.

[109X.50] Concepts: “registered office” – s 109X(1)(a)

Serving a document on a company by leaving it at, or posting it to, the company’s registered office has been discussed in the cases of *Jin Xin Investment & Trade (Aust) Pty Ltd v ISC Property Pty Ltd* (2006) 196 FLR 350; 24 ACLC 281; 56 ACSR 376; [2006] NSWSC 7; *Career Training on Line Pty Ltd v B E S Training Solutions Pty Ltd* [2010] NSWSC 460 and *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd* [2007] NSWSC 1143; (2007) 214 FLR 393; 25 ACLC 1,392; [2009] ALMD 2501.

[109X.130] Practice and procedure: Effect of private appointment of receiver

No part of s 109X makes any provision for service on a receiver, even where the receiver takes control of some or all of the company’s business.

[124.50] Concepts: Knowledge and intention of companies

Liability for industrial manslaughter is a subject of some debate and some jurisdictions have reformed their law to impose criminal liability on employers, including corporations.

[124.55] Concepts: Criminal liability of companies under Commonwealth Law

Corporate liability for offences under Commonwealth Law is now regulated by Pt 2.5 of the *Criminal Code 1995*.

[125.35] Concepts: Objects clauses and the abolition of the ultra vires rule s 125(2)

The result of s 125 and its predecessor sections is that the “ultra vires doctrine no longer exists”, relevant case law has been discussed.

[126.20] Concepts: Actual or apparent authority

Actual or apparent authority has been discussed in this paragraph, including the recent case of *Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd* [2013] NSWCA 459.

[127.15] Practice and procedure: Sole director companies where director is also the secretary – s 127(1)(c) and s 129(5)

This new paragraph looks at the case of *BYN Trust Company of Australia Ltd v Banksia Finance and Leasing Co Pty Ltd* [2013] NSWSC 1776 and in order to enliven the presumption in s 129(5) it is enough that the execution complies with s 127(1)(c).

[128.10] Outline

Sections 128 and 129 together contain a modified version of the indoor management rule. The rule cannot be used by the company to overcome a procedural effect, it can only be used against the company. In a criminal context it has been said that the purposes of ss 128 and 129 is not to empower a purported director.

[129.20] Concepts: Constitution and rules complied with – s 129(1)

The presumption in s 129(1) precludes a party from contesting the validity of appointment of a director for non-compliance with the constitution of the company, even as to costs: *Correa v Whittingham (No 2)* [2013] NSWCA 471.

[136.15] Practice and procedure: Limits on minority expropriation through amendment of the constitution – s 136(2)

The limits on minority expropriation through amendment of the constitution and the relevant cases have been discussed in this new paragraph.

LEGISLATION

Corporations Act 2001 (Cth)

ASIC has introduced New Class Orders and Regulatory Guides, and revoked others. Consequently cross references to these Guides and Class Orders in the *Corporations Act 2001* (Cth) have been updated.

TABLES

The Table of Cases has been revised and updated.

