

CHAPTER 2M – FINANCIAL REPORTS AND AUDIT

Part 2M.1 – Overview

285 Overview of obligations under this Chapter

Obligations under this Chapter

(1) Under this Chapter, all companies, registered schemes and disclosing entities must keep financial records (see sections 286–291)—and some must prepare financial reports (see sections 292–323D). All those that have to prepare financial reports have to prepare them annually; disclosing entities have to prepare half-year financial reports as well. The following table sets out what is involved in annual financial reporting.

Annual financial reporting		
steps	sections	comments
1 prepare financial report	s. 295	The financial report includes: <ul style="list-style-type: none"> financial statements disclosures and notes directors' declaration.
2 prepare directors' report	s. 298	Unless the report relates to a company limited by guarantee, it has a general component (sections 299 and 299A), a specific component (section 300) and a special component for listed companies (section 300A). See section 285A for an overview of the obligations of companies limited by guarantee.
3 have the financial report audited and obtain auditor's report	s. 301, 307, 308	A small proprietary company preparing a financial report in response to a shareholder direction under s. 293 only has to have an audit if the direction asks for it. There are similar rules for companies limited by guarantee (see section 285A for an overview). Under s. 312, officers must assist the auditor in the conduct of the audit. ASIC may use its exemption powers under s. 340 and 341 to relieve large proprietary companies from the audit requirements in appropriate cases (s. 342(2) and (3)).
4 provide the financial report, directors' report and auditor's report to members	s. 314	Unless the report relates to a company limited by guarantee, a concise financial report may be provided to members instead of the full financial statements (subsections 314(1) and (2)). For deadline, see subsections 315(1) to (4). See section 285A for an overview of the obligations of companies limited by guarantee.
5 lodge the financial report, directors' report and auditor's report with ASIC	s. 319	For deadline see s. 319(3). Companies that have the benefit of grandfathering in the relevant Part 10 transitionals do not have to lodge.
6 [public companies only] lay financial report, directors' report and auditor's report before AGM	s. 317	For the AGM deadline see s. 250N.

[Subs (1) am Act 66 of 2010, s 3 and Sch 1 items 11–13, with effect from 28 Jun 2010; Act 101 of 2007, s 3 and Sch 1 items 22 and 23, with effect from 28 Jun 2007; Act 103 of 2004, Sch 2 item 3, with effect from 1 Jul 2004]

Application to disclosing entities

(2) This Chapter covers all disclosing entities:

- incorporated or formed in Australia; and
- whether or not they are companies or registered schemes.

[Subs (2) am Act 103 of 2004, s 3 and Sch 11 item 8, with effect from 1 Jul 2004]

Application to registered schemes

(3) For the purposes of applying this Chapter to a registered scheme:

- the scheme's responsible entity is responsible for the performance of obligations in respect of the scheme; and
- the directors and officers of the responsible entity are taken to be the directors and officers of the scheme; and

[267.50]

(c) the debts incurred in operating the scheme are taken to be the debts of the scheme. [S 285 am Act 66 of 2010; Act 101 of 2007; Act 103 of 2004]

Cross-references: ASIC:

- Form 1001 (ASCOT 7051): Notification of half yearly reports;
- RG 28: Relief from dual lodgment of financial reports;
- RG 68: New financial reporting and procedural requirements.]

285A Overview of obligations of companies limited by guarantee

The following table sets out what is involved in annual financial reporting for companies limited by guarantee:

Item	Nature of company	Obligations	Sections
1	Small company limited by guarantee.	No obligation to do any of the following unless required to do so under a member direction or ASIC direction: <ul style="list-style-type: none"> prepare a financial report; prepare a directors' report; have financial report audited; notify members of reports. 	Sections 292, 301 and 316A
2	Company limited by guarantee with annual revenue or, if part of a consolidated entity, annual consolidated revenue of less than \$1 million.	Must prepare a financial report. Must prepare a directors' report, although less detailed than that required of other companies. Need not have financial report audited unless a Commonwealth company, or a subsidiary of a Commonwealth company or Commonwealth authority. If the company does not have financial report audited, it must have financial report reviewed. Must give reports to any member who elects to receive them.	Sections 292, 298, 300B, 301, 316A
3	Company limited by guarantee with annual revenue or, if part of a consolidated entity, annual consolidated revenue of \$1 million or more.	Must prepare a financial report. Must prepare a directors' report, although less detailed than that required of other companies. Must have financial report audited. Must give reports to any member who elects to receive them.	Sections 292, 298, 300B, 301, 316A

[S 285A Insrt Act 66 of 2010, s 3 and Sch 1 item 14, with effect from 28 Jun 2010]

Part 2M.2 – Financial records

[Cross-references: ASIC:

- CO 98/98: Small proprietary companies which are controlled by a foreign company but which are not part of a large group;
- CO 98/106: Financial reports of superannuation funds, approved deposit funds and pooled superannuation trusts;
- RG 28: Relief from dual lodgment of financial reports;
- RG 43: Financial reports and audit relief;
- RG 109: Assetless Administration Fund: Funding criteria and guidelines.]

286 Obligation to keep financial records

(1) [Financial records must be kept] A company, registered scheme or disclosing entity must keep written financial records that:

- correctly record and explain its transactions and financial position and performance; and
- would enable true and fair financial statements to be prepared and audited.

The obligation to keep financial records of transactions extends to transactions undertaken as trustee.

Note: Section 9 defines *financial records*.

Period for which records must be retained

(2) The financial records must be retained for 7 years after the transactions covered by the records are completed.

Strict liability offences

(3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

[Subs (3) insrt Act 117 of 2001, s 3 and Sch 1 item 91, with effect from 15 Dec 2001]

[S 286 am Act 117 of 2001]

Cross-references: ASIC:

- Form 1001 (ASCOT 7051): Notification of half yearly reports;
- RG 16: External administrators: Reporting and lodging;
- RG 109: Assetless Administration Fund: Funding criteria and guidelines.]

287 Language requirements

(1) [Language] The financial records may be kept in any language.

(2) [Availability of English translation] An English translation of financial records not kept in English must be made available within a reasonable time to a person who:

- (a) is entitled to inspect the records; and
- (b) asks for the English translation.

(3) [Strict liability for s 287(2) offence] An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

[Subs (3) insrt Act 117 of 2001, s 3 and Sch 1 item 92, with effect from 15 Dec 2001]

[S 287 am Act 117 of 2001]

Cross-references: ASIC: RG 95: Disclosing entity provisions relief.]

288 Physical format

(1) [Records to be available in hard copy] If financial records are kept in electronic form, they must be convertible into hard copy. Hard copy must be made available within a reasonable time to a person who is entitled to inspect the records.

(2) [Strict liability for s 288(1) offence] An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

[Subs (2) insrt Act 117 of 2001, s 3 and Sch 1 item 93, with effect from 15 Dec 2001]

[S 288 am Act 117 of 2001]

289 Place where records are kept

(1) [Discretionary location] A company, registered scheme or disclosing entity may decide where to keep the financial records.

Records kept outside this jurisdiction

(2) If financial records about particular matters are kept outside this jurisdiction, sufficient written information about those matters must be kept in this jurisdiction to enable true and fair financial statements to be prepared. The company, registered scheme or disclosing entity must give ASIC written notice in the prescribed form of the place where the information is kept.

(2A) [Strict liability for s 289(2) offence] An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

[Subs (2A) insrt Act 117 of 2001, s 3 and Sch 1 item 94, with effect from 15 Dec 2001]

(3) [ASIC may direct disclosure] ASIC may direct a company, registered scheme or disclosing entity to produce specified financial records that are kept outside this jurisdiction.

(4) [Form of ASIC direction] The direction must:

- (a) be in writing; and
- (b) specify a place in this jurisdiction where the records are to be produced (the place must be reasonable in the circumstances); and
- (c) specify a day (at least 14 days after the direction is given) by which the records are to be produced.

[S 289 am Act 117 of 2001]

Cross-references: ASIC: Form 313: Notification of address in Australia of information relating to financial records kept outside Australia.]

290 Director access**Personal access**

(1) A director of a company, registered scheme or disclosing entity has a right of access to the financial records at all reasonable times.

Court order for inspection on director's behalf

(2) On application by a director, the Court may authorise a person to inspect the financial records on the director's behalf.

(3) [Copies may be made] A person authorised to inspect records may make copies of the records unless the Court orders otherwise.

(4) [Court may make orders] The Court may make any other orders it consider appropriate, including either or both of the following:

- (a) an order limiting the use that a person who inspects the records may make of information obtained during the inspection;
- (b) an order limiting the right of a person who inspects the records to make copies in accordance with subsection (3).

291 Signposts to other relevant provisions

The following table sets out other provisions that are relevant to access to financial records.

Other provisions relevant to access to financial records		
		members
1	section 247A	A member may apply to the Court for an order to inspect the records.
		auditor
2	section 310	The auditor has a right of access to the records.
		controllers
3	section 431	A controller of a corporation's property (for example, a receiver or receiver and manager) has a right of access to the records.
		ASIC
4	sections 28 to 39 of the ASIC Act	ASIC has power to inspect the records. It also has power under subsection 289(3) of this Act to call for the production of financial records kept outside this jurisdiction.

Part 2M.3 – Financial reporting

Cross-references: ASIC:

- CO 98/98: Small proprietary companies which are controlled by a foreign company but which are not part of a large group;
- CO 98/106: Financial reports of superannuation funds, approved deposit funds and pooled superannuation trusts;
- CO 02/968: Interim relief from financial reporting obligations for companies in external administration;
- CO 03/392: Externally administered companies: Financial reporting relief;
- CO 10/654: Inclusion of parent entity financial statements in financial reports;
- RG 23: Updating and correcting prospectuses and application forms;
- RG 28: Relief from dual lodgment of financial reports;
- RG 43: Financial reports and audit relief;
- RG 68: New financial reporting and procedural requirements;
- RG 109: Assetless Administration Fund: Funding criteria and guidelines;
- RG 174: Externally administered companies: Financial reporting and AGMs.]

DIVISION 1 – ANNUAL FINANCIAL REPORTS AND DIRECTORS' REPORTS**292 Who has to prepare annual financial reports and directors' reports**

(1) [Who must prepare report] A financial report and a directors' report must be prepared for each financial year by:

- (a) all disclosing entities; and
- (b) all public companies; and
- (c) all large proprietary companies; and
- (d) all registered schemes.

Note: This Chapter only applies to disclosing entities incorporated or formed in Australia (see subsection 285(2)).

Small proprietary companies

- (2) A small proprietary company has to prepare the financial report and directors' report only if:
 - (a) it is directed to do so under section 293 or 294; or
 - (b) it was controlled by a foreign company for all or part of the year and it is not consolidated for that period in financial statements for that year lodged with ASIC by:
 - (i) a registered foreign company; or
 - (ii) a company, registered scheme or disclosing entity.

The rest of this Part does not apply to any other small proprietary company.

[Subs (2) am Act 66 of 2010, s 3 and Sch 1 item 15, with effect from 28 Jun 2010]

Small companies limited by guarantee

(3) Despite subsection (1), a small company limited by guarantee has to prepare the financial report and directors' report only if it is directed to do so under section 294A or 294B. The rest of this Part does not apply to any other small company limited by guarantee.

[Subs (3) insrt Act 66 of 2010, s 3 and Sch 1 item 15, with effect from 28 Jun 2010]

[S 292 am Act 66 of 2010]

Cross-references: ASIC:

- CO 98/98: Small proprietary companies which are controlled by a foreign company but which are not part of a large group;
- CO 98/1418: Wholly-owned entities;
- CO 02/968: Interim relief from financial reporting obligations for companies in external administration;
- CO 05/639: Application of accounting standards by non-reporting entities;
- CO 05/642: Combining financial reports of stapled security issuers;
- CO 05/644: Disclosing post balance date acquisitions and disposals;
- CO 06/441: Including different registered scheme financial reports in a single document;
- CO 10/654: Inclusion of parent entity financial statements in financial reports;
- Form 384: Resolution by directors of a small proprietary company controlled by a foreign company which is not part of a "large group";
- Form 394: Notice of cessation of reliance on Class Order 98/98;
- RG 58: Reporting requirements: Registered foreign companies and Australian companies;
- RG 180: Auditor registration.]

[292.10] Scope

Section 292 specifies the entities required to prepare annual financial reports and directors' reports. Pursuant to subs (1), all disclosing entities, public companies, large proprietary companies and registered schemes must do so.

Under subs (2), a small proprietary company is required to prepare a financial report and directors' report only if it is directed to do so under s 293 or s 294, or if it was controlled by a foreign company for all or part of the relevant year and is not consolidated in financial statements lodged with ASIC by a registered foreign company or a company, scheme or disclosing entity.

Subsection (3) relates to small companies limited by guarantee. This provision was introduced, along with a number of other amendments, by the *Corporations Amendment (Corporate Reporting Reform) Act 2010* (Cth). Under this provision, a small company limited by guarantee is required to prepare a financial report and directors' report only if directed to do so under s 294A or s 294B.

As explained in the Explanatory Memorandum to the Corporations Amendment (Corporate Reporting Reform) Bill 2010 (Cth), the company limited by guarantee structure is used predominantly by not-for-profit entities, and the vast majority of them are relatively small. The reforms, including those affecting s 292, aim to "reduce the regulatory burden on these entities while ensuring that appropriate levels of financial transparency and governance are maintained" (Explanatory Memorandum, para 1.10).

The effect of the various amendments is to introduce, for companies limited by guarantee, what the Explanatory Memorandum characterises as a "three tiered differential reporting framework". The key features of this framework are helpfully summarised in s 285A.

[292.20] Concepts

Company limited by guarantee: This term is defined in s 9 to mean "a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up".

Small company limited by guarantee: This term is defined in s 45B.

Small proprietary company: This term is defined in s 45A(2).

293 Small proprietary company—shareholder direction

(1) **[Shareholders direction to prepare report]** Shareholders with at least 5% of the votes in a small proprietary company may give the company a direction to:

- (a) prepare a financial report and directors' report for a financial year; and
- (b) send them to all shareholders.

(2) **[Form of direction]** The direction must be:

- (a) signed by the shareholders giving the direction; and
- (b) made no later than 12 months after the end of the financial year concerned.

(3) **[Terms of direction]** The direction may specify all or any of the following:

- (a) that the financial report does not have to comply with some or all of the accounting standards;
- (b) that a directors' report or a part of that report need not be prepared;
- (c) that the financial report is to be audited.

[Cross-references: ASIC; RG 180: Auditor registration.]

294 Small proprietary company—ASIC direction

(1) **[ASIC may direct company to comply]** ASIC may give a small proprietary company a direction to comply with requirements of this Division and Divisions 3, 4, 5 and 6 for a financial year.

(1A) **[Strict liability for s 294(1) offence]** An offence based on subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

[Subs (1A) insrt Act 117 of 2001, s 3 and Sch 1 item 95, with effect from 15 Dec 2001]

(2) **[General or specific direction]** The direction may be general or may specify the particular requirements that the company is to comply with.

(3) **[Direction must specify date]** The direction must specify the date by which the documents have to be prepared, sent or lodged. The date must be a reasonable one in view of the nature of the direction.

(4) **[Form of direction]** The direction must:

- (a) be made in writing; and
- (b) specify the financial year concerned; and
- (c) be made no later than 6 years after the end of that financial year.

[S 294 am Act 117 of 2001]

Cross-references: ASIC:

- Form 388: Copy of financial statements and reports;
- RG 58: Reporting requirements: Registered foreign companies and Australian companies;
- RG 180: Auditor registration.]

294A Small company limited by guarantee—member direction

(1) **[Members direction to prepare report]** Members with at least 5% of the votes in a small company limited by guarantee may give the company a direction to:

- (a) prepare a financial report and directors' report for a financial year; and
- (b) send them to members who have elected to receive them under section 316A.

(2) **[Form of direction]** The direction must be:

- (a) signed by the members giving the direction; and
- (b) made no later than 12 months after the end of the financial year concerned.

(3) **[Terms of direction]** The direction may specify all or any of the following:

- (a) that the financial report does not have to comply with some or all of the accounting standards;
- (b) that a directors' report or a part of that report need not be prepared;
- (c) that the financial report is to be audited or reviewed.

[S 294A insrt Act 66 of 2010, s 3 and Sch 1 item 16, with effect from 28 Jun 2010]

294B Small company limited by guarantee—ASIC direction

(1) **[ASIC may direct small company to comply]** ASIC may give a small company limited by guarantee a direction to comply with the requirements of this Division and Divisions 3, 4, 5 and 6 for a financial year.

(2) **[Strict liability for s 294B(1) offence]** An offence based on subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

(3) **[General or specific direction]** The direction may be general or may specify the particular requirements that the company is to comply with.

(4) **[Direction must specify date]** The direction must specify the date by which the documents have to be prepared, sent or lodged. The date must be a reasonable one in view of the nature of the direction.

(5) **[Form of direction]** The direction must:

- (a) be made in writing; and
- (b) specify the financial year concerned; and
- (c) be made no later than 6 years after the end of that financial year.

(6) **[Direction not a legislative instrument]** A direction given under subsection (1) is not a legislative instrument.

[S 294B insrt Act 66 of 2010, s 3 and Sch 1 item 16, with effect from 28 Jun 2010]

Cross-references: ASIC: Form 388: Copy of financial statements and reports.]

295 Contents of annual financial report

Basic contents

- (1) The financial report for a financial year consists of:
- (a) the financial statements for the year; and
 - (b) the notes to the financial statements; and
 - (c) the directors' declaration about the statements and notes.

(b) the bidder disposes of the securities after the offer is made or the consideration is improved.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2), see subsection 13.3(3) of the *Criminal Code*.

[Subs (2) am Act 117 of 2001, s 3 and Sch 1 item 228, with effect from 15 Dec 2001]

[S 654A am Act 117 of 2001]

Cross-references: ASIC: RG 59: Announcing and withdrawing takeover bids (s 653 and s 746).]

654B Disclosures about substantial shareholdings in listed companies

During the bid period, substantial shareholding notices that need to be lodged under section 671B must be lodged by 9.30 am the next business day (rather than the usual 2 business days).

[**Cross-references:** ASIC: RG 159: Takeovers, compulsory acquisitions and substantial holding notices.]

654C Disclosures about substantial shareholdings in unlisted companies

(1) [Where bidder must give notice] A bidder making a bid for securities of an unlisted company must give the target a notice stating the bidder's voting power in the target if, at a particular time during the bid period, the bidder's voting power in the target rises from below a percentage in the following list to that percentage or higher:

- (a) 25%;
- (b) 50%;
- (c) 75%;
- (d) 90%.

(2) [Timing of notice] The notice must be given as soon as practicable, and in any event within 2 business days, after the rise in voting power occurred.

(3) [Notice requirements of target] The target must:

- (a) make the notice available at its registered office for inspection without charge by any holder of bid class securities during the bid period; and
- (b) lodge the notice with ASIC.

(4) [Strict liability for s 654C offences] An offence based on subsection (1) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

[Subs (4) insrt Act 117 of 2001, s 3 and Sch 1 item 229, with effect from 15 Dec 2001]

[S 654C am Act 117 of 2001]

Editor's Note: There is no s 655 in this Act.

Cross-references: ASIC: Form CF09: Documents relating to takeovers; RG 159: Takeovers, compulsory acquisitions and substantial holding notices.]

Part 6.10 – Review and intervention

[**Cross-references:** ASIC: RG 86: Tracing beneficial ownership. Takeovers Panel: GN 15: Trust scheme mergers..]

DIVISION 1 – ASIC'S POWER TO EXEMPT AND MODIFY

655A ASIC's power to exempt and modify

(1) [ASIC may vary application] ASIC may:

- (a) exempt a person from a provision of this Chapter; or
- (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Note: Under section 656A, the Panel has power to review the exercise by ASIC of its powers under this section.

(2) [Consideration of s 602] In deciding whether to give the exemption or declaration, ASIC must consider the purposes of this Chapter set out in section 602.

(3) [How declaration may apply] The exemption or declaration may:

- (a) apply to all or specified provisions of this Chapter; and
- (b) apply to all persons, specified persons, or a specified class of persons; and
- (c) relate to all securities, specified securities or a specified class of securities; and
- (d) relate to any other matter generally or as specified.

(4) [Declaration may be conditional or unconditional] An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

(5) [Gazettal of declaration] The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

(b) [Provisions of this chapter defined] For the purposes of this section, the *provisions of this Chapter*

include:

- (a) regulations made for the purposes of this Chapter; and
- (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
- (c) the old Division 12 of Part 11.2 transitionals.

[**Cross-references:** ASIC:

- Form CF03: Applications for relief – mergers & acquisitions;
- RG 6: Variation of takeover offers;
- RG 31: Acquisitions by a broker acting as principal for client facilitation purposes;
- RG 51: Applications for relief;
- RG 57: Notification of rights of review;
- RG 59: Announcing and withdrawing takeover bids (s 653 and s 746);
- RG 71: Downstream acquisitions;
- RG 88: Trustee and nominee companies;
- RG 102: Tender offers by vendor shareholders;
- RG 128: Collective action by institutional investors;
- RG 145: Collateral benefits – Takeovers funding and pre-bid purchases;
- RG 159: Takeovers, compulsory acquisitions and substantial holdings;
- RG 163: Takeovers: minimum bid price principle – s 621;
- RG 199: Broadening the rights issue and dividend reinvestment plan exceptions for takeovers.]

[655A.10] Scope

This section provides the takeover provisions with flexibility by giving ASIC the power to exempt persons from compliance with Ch 6 or to modify the application of Ch 6 through declaration.

[655A.20] Key cases

In Re Anand Investment Co of Australia Ltd (2003) 49 ACSR 147; 22 ACLC 407; [2003] ATP 36 at [67]. The Takeovers Panel said:

Whether any particular decision under s 655A would engender uncertainty and undermine the integrity of the market is, of course, a relevant consideration whenever ASIC exercises its discretion whether to grant a modification.

See *Australian Securities & Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321; 74 ALJR 524; 33 ACSR 447; 18 ACLC 166; [2000] HCA 7 at [47] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ;

There is no warrant for giving the words of the section a meaning other than their literal meaning.

The power of modification is expressed in wide terms and there is no implied limit that the power be used sparingly. *Oter Gold Mines Ltd v Australian Securities Commission* (1997) 26 AAR 99; 25 ACSR 382; 15 ACLC 1,732. In the same case, Merkel J said (at 388 (ACSR)):

Informed participants in the market can be taken to be aware of the broad discretions under the Act but are entitled to expect that [ASIC] will not lightly depart from its published policy in exercising those discretions.

Magellan Petroleum Australia Ltd v Australian Securities Commission (1993) 30 ALD 214; 18 AAR 292; 11 ACSR 306; 11 ACLC 811 at [59] per the Tribunal:

The task of [ASIC] is not to ensure that what is offered to a shareholder is a fair price, a good price, or the best price. [ASIC's] task is to ensure that in accordance with the Eggleston principles, all shareholders are treated equally.

ASIC should grant all parties whose rights are affected the opportunity to be heard before making the declaration, although this will not necessarily affect the validity of the declaration: *Hawker de Havilland Ltd v Australian Securities Commission* (1991) 25 ALD 49; 15 AAR 18; 6 ACSR 579; 10 ACLC 34.

[655A.30] Practice points

A declaration may be made after the expiration of a takeover offer: *Brierley v Dextran Pty Ltd* (1990) 3 ACSR 455; 9 ACLC 30.

As to the review of ASIC's decision under s 655A, see *Re Rinker Group Ltd* (2006) 61 ACSR 1; [2006] ATP 35.

See also the following ASIC documents:

- ASIC Regulatory Guide RG 51 (formerly PS 51) *Applications for relief*; and
- ASIC Regulatory Guide RG 159 (formerly PS 159) *Takeovers, compulsory acquisitions and substantial holdings*.

Reference should also be made to *Takeovers Panel Guidance Note 2: Reviewing Decisions*.

[655A.40] Further reading

The following journal articles may be of assistance on this topic:

- Bednall T and Ngoma V, "ASIC and the Takeovers Panel" (2011) 29 C&SLJ 355.
- Dyer B, "A Revitalised Panel?" (1998) 16 C&SLJ 261.
- Todd F, "Stepping Into the Australian Securities Commission's Shoes: Not as Easy as It Sounds" (1997) 15 C&SLJ 278.

655B Notice of decision and review rights

(1) **[Notice to all interested persons]** Subject to subsection (2), ASIC must take such steps as are reasonable in the circumstances to give to each person whose interests are affected by a decision under section 655A a notice, in writing or otherwise:

(a) of the making of the decision; and

(b) of the person's right to have the decision reviewed by the Panel under section 656A.

(2) **[Where ASIC not required to give notice]** Subsection (1) does not require ASIC to give notice to a person affected by the decision or to the persons in a class of persons affected by the decision, if ASIC determines that giving notice to the person or persons is not warranted, having regard to:

(a) the cost of giving notice to the person or persons; and

(b) the way in which the interests of the person or persons are affected by the decision.

(3) **[Effect of contravention]** A failure to comply with this section does not affect the validity of the decision.

[Editor's Note: There is no s 656 in this Act.

Cross-references: ASIC: RG 57; Notification of rights of review.]

DIVISION 2 – THE TAKEOVERS PANEL

[Div 2 heading subst Act 122 of 2001, s 3 Sch 3 item 23, with effect from 27 Sep 2001]

SUBDIVISION A – REVIEW OF ASIC'S EXERCISE OF ITS EXEMPTION OR MODIFICATION POWERS**656A Review of exercise of exemption or modification powers**

(1) **[What Panel may review]** The Panel may review:

(a) a decision of ASIC under section 655A; or

(b) a decision of ASIC under section 673 in relation to securities of the target of a takeover bid during the bid period.

For these purposes, *decision* has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

(2) **[By whom application may be made]** An application to the Panel for review of the decision may be made by any person whose interests are affected by the decision.

(3) **[Powers of Panel]** For the purpose of reviewing the decision, the Panel may exercise all the powers and discretions conferred on ASIC by this Chapter or Chapter 6C. The Panel must make a decision:

(a) affirming the decision; or

(b) varying the decision; or

(c) setting aside the decision and:

(i) making a decision in substitution for the decision under review; or

(ii) remitting the matter for reconsideration by ASIC in accordance with any directions or recommendations of the Panel.

(4) **[Gazettal of decision]** The decision must be in writing and published in the *Gazette*.

(5) **[Where Panel varies ASIC decision]** If the Panel varies an ASIC decision, or makes a decision in substitution for an ASIC decision:

(a) the ASIC decision as varied, or the substituted decision, is taken for all purposes (other than the purposes of applications to the Panel for review in accordance with this section) to be a decision of ASIC under section 655A; and

(b) when the Panel's determination on the review comes into operation, the ASIC decision as varied, or the substituted decision, has effect, or is taken to have had effect, on and from the day on which the ASIC decision has or had effect.

Paragraph (b) applies unless the Panel otherwise orders.

[Cross-references: ASIC:

• RG 57; Notification of rights of review.

Takeovers Panel:

• GN 2: Reviewing Decisions;

• GN 4: Remedies General.]

656B Operation and implementation of a decision that is subject to review

(1) **[Effect of appeal of ASIC decision]** Subject to this section, applying to the Panel under section 656A for review of an ASIC decision does not:

(a) affect the operation of the decision; or

(b) prevent the taking of action to implement the decision.

(2) **[Orders Panel may make]** On application by a party to the proceedings before the Panel, the Panel may:

(a) make an order staying, or otherwise affecting the operation or implementation of, the whole or a part of the decision if the Panel considers that:

(i) it is desirable to make the order after taking into account the interests of any person who may be affected by the review; and

(ii) the order is appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review; or

(b) make an order varying or revoking an order made under paragraph (a) (including an order that has previously been varied on one or more occasions under this paragraph).

(3) **[Panel actions prohibited]** Subject to subsection (4), the Panel must not:

(a) make an order under paragraph (2)(a) unless ASIC has been given a reasonable opportunity to make a submission to the Panel in relation to the matter; or

(b) make an order under paragraph (2)(b) unless:

(i) ASIC and

(ii) the person who requested the making of the order under paragraph (2)(a); and

(iii) if the order under paragraph (2)(a) has previously been varied by an order or orders under paragraph (2)(b)—the person or persons who applied for the last-mentioned order or orders; have been given a reasonable opportunity to make submissions to the Panel in relation to the matter.

(4) **[Exception to prohibited actions]** Subsection (3) does not prohibit the Panel from making an order under paragraph (2)(a) without giving to a person referred to in that subsection a reasonable opportunity to make a submission to the Panel in relation to a matter if the Panel is satisfied that, by reason of the urgency of the case or otherwise, it is not practicable to give that person such an opportunity. If an order is so made without giving such an opportunity to ASIC, the order does not come into operation until a notice setting out the terms of the order is served on ASIC.

(5) **[Effect and conditions of order]** An order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)):

(a) is subject to the conditions that are specified in the order; and

(b) has effect until:

(i) if a period for the operation of the order is specified in the order—the end of that period or, if the application for review is decided by the Panel before the end of that period, the decision of the Panel on the application for review comes into operation; or

(ii) if a period for the operation of the order is not specified in the order—the decision of the Panel on the application for review comes into operation.

[Editor's Note: There is no s 657 in this Act.

Cross-references: Takeovers Panel: GN 2: Reviewing Decisions.]

SUBDIVISION B – UNACCEPTABLE CIRCUMSTANCES

[Cross-references: ASIC: RG 71: Downstream acquisitions; RG 86: Tracing beneficial ownership.]

657A Declaration of unacceptable circumstances

(1) **[How circumstances determined unacceptable]** The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.

Note: Sections 659B and 659C deal with court proceedings during and after a takeover bid.

(2) **[Where Panel may make declaration]** The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

(a) are unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

(i) the control, or potential control, of the company or another company; or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or

- (b) are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the company or another company or in relation to securities of the company or another company) having regard to the purposes of this Chapter set out in section 602; or
- (c) are unacceptable because they:

- (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or
- (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any other considerations that the Panel considers relevant.

[Subs (2) am Act 64 of 2007, s 3 and Sch 1 items 3 and 4, with effect from 13 May 2007]

- (3) **[Manner in which Panel may exercise power]** In exercising its powers under this section, the Panel must have regard to:

- (a) must have regard to:
- (i) the purposes of this Chapter set out in section 602; and
- (ii) the other provisions of this Chapter; and
- (iii) the rules made under section 658C; and
- (iv) the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the ASIC Act; and

- (b) may have regard to any other matters it considers relevant.

In having regard to the purpose set out in paragraph 602(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).

- (4) **[From whom submissions must be invited]** The Panel must give an opportunity to make submissions in relation to the matter to:

- (a) each person to whom a proposed declaration relates; and
- (b) each party to the proceedings; and
- (c) ASIC.

- (5) **[Gazettal of determination]** The declaration must be in writing and published in the *Gazette*.

- (6) **[Panel must give copy to affected people]** As soon as practicable, the Panel must give each person to whom the declaration relates:

- (a) a copy of the declaration; and
- (b) a written statement of the Panel's reasons for making the declaration.

- (7) **[No requirement for Panel to perform function]** This section does not require the Panel to perform a function, or exercise a power, in a particular way in a particular case.

[S 657A am Act 64 of 2007]

Cross-references: Corps Regs:

- reg 1.0.18 prescribes s 657A for the purposes of s 53.

ASIC:

- RG 6: Variation of takeover offers;
- RG 9: Relevant interests in shares;
- RG 10: Classes of shares;
- RG 25: Takeovers: false and misleading statements;
- RG 37: Takeovers – financing arrangements;
- RG 71: Downstream acquisitions;
- RG 102: Tender offers by vendor shareholders;
- RG 128: Collective action by institutional investors;
- RG 145: Collateral benefits – Takeovers funding and pre-bid purchases;
- RG 159: Takeovers, compulsory acquisitions and substantial holding notices;
- RG 163: Takeovers: minimum bid price principle – s 621;
- RG 171: Anomalies and issues in the takeover provisions.

Takeovers Panel:

- GN 1: Unacceptable Circumstances;
- GN 2: Reviewing Decisions;
- GN 4: Remedies General;
- GN 7: Lock-up devices;
- GN 12: Frustrating action;
- GN 15: Trust scheme mergers;
- GN 18: Takeover documents.

[657A.20]

[657A.10] Scope

This section gives the Panel the power to prevent transactions with improper outcomes by declaring that certain situations give rise to unacceptable circumstances. The range of orders that the Panel may make in such unacceptable circumstances is provided in s 657D.

It should be noted that the *Corporations Amendment (Takeovers) Act 2007* (Cth) made several changes to this section to address issues raised in the *Glencore* litigation (discussed below).

In *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1; 82 ALJR 382; 26 ACLC 1; [2008] HCA 2, the High Court confirmed the constitutionality of the Panel's power to make declarations of unacceptable circumstances, when taking into account any breaches of the Corporations Act.

Reference should also be made to the annotations at [411.10]ff.

[657A.15] Concepts

Affairs of a company: See the definition in s 53 and the decision in *Lionsgate Australia Pty Ltd v Macquarie Private Portfolio Management Ltd* (2007) 210 FLR 106; 240 ALR 385; 62 ACSR 178; 25 ACLC 426; [2007] NSWSC 318.

Control: See the definition in s 50AA, and also *Re Bowen Energy Ltd* [2007] ATP 22.

Substantial interest in the company: A substantial interest in a company refers to an interest in voting shares in a company which are sufficient to be "a step on the path of control of the company, in the sense of having a say in the decision making processes of the company": *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77; 56 ACSR 753; 24 ACLC 360; [2006] FCA 274 at [83] per Emmett J. See also the new definition in s 602A inserted by the 2007 amendments.

[657A.20] Key cases**Constitutional validity**

The ability of the Takeovers Panel to make declarations under the previous s 657A(2)(b) (see now s 657A(2)(c)) was held not to be an exercise of federal judicial power by the High Court in *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1; 82 ALJR 382; 26 ACLC 1; [2008] HCA 2. This decision was based on the following grounds:

- The Panel makes decisions based on matters of general policy and expediency (per Gleeson CJ at [4], per Kirby J at [40], per Hayne J at [88]–[90], per Crennan and Kiefel JJ at [153], [167]–[169]).
- The limitation on court proceedings is not absolute or unlimited (per Kirby J at [41], per Hayne J at [100]).
- The Panel's powers create new rights (per Kirby J at [42], per Hayne J at [93]–[99]), even where it is considering whether a breach of the Act has occurred (per Kirby J at [43]).
- The Panel does not enforce its own orders (per Kirby J at [44], per Crennan and Kiefel JJ at [175]).

Of course this does not mean that the Panel's decisions are no longer open to challenge by judicial review.

Making a declaration

The *Glencore* litigation (particularly the two Federal Court decisions) represents the leading cases on this issue. In *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495; 54 ACSR 708; 23 ACLC 1781; [2005] FCA 1290, Glencore applied to the courts for review of the Panel's declaration and orders on several grounds including jurisdictional error, unreasonableness and constitutional invalidity. Emmett J found in favour of Glencore on the jurisdictional error point (see [38]–[53]), because the failure of the Panel to make a determination as to the effect of the circumstances in s 657A(2)(a), prior to making a determination that the circumstances were unacceptable, represented a jurisdictional error. His Honour found that the Panel does not need to attribute responsibility to any particular person for the unacceptable circumstances.

The matter was remitted to the Panel, which once again made a declaration of unacceptable circumstances: *Re Austral Coal Ltd 02 (RR)* (2005) 23 ACLC 1,797; [2005] ATP 20. Glencore then successfully applied for review once again to the Federal Court on the grounds, inter alia, that the Panel did not base its declaration upon proper findings of fact or judicial inference: *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77; 56 ACSR 753; 24 ACLC 360; [2006] FCA 274.

See also *Re Tower Software Engineering Pty Ltd; Pendant Software Pty Ltd v Harwood* (2006) 154 FCR 150; 57 ACSR 653; [2006] FCA 717. It is not inappropriate to make findings using phrases such as would likely have an effect on the control or potential control for the purposes of s 657A(2)(a): *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158; 60 ACSR 245; 24 ACLC 1,207; [2006] FCA 1378. In that case, Emmett J stated (at [148]) that it was acceptable for the Panel to engage in speculation about how conduct might affect market behaviour and control of a company.

Note: Under section 350 of the Act, a document that the Act requires to be lodged with ASIC in a prescribed form must:

- if a form for the document is prescribed in these Regulations, be in that prescribed form; and
- if a form for the document is not prescribed in these Regulations but ASIC has approved a form for the document, be in that approved form.

On 23 December 2004, a form for the document mentioned in subregulation (2) is not prescribed in these Regulations. [Subreg (2) am SR 399 of 2004, reg 3 and Sch 1 items 10 and 11, with effect from 23 Dec 2004]

(3) A statement under subregulation (2) is evidence that the notice was sent to a person on the list at the address shown for that person, in the absence of evidence to the contrary. [Reg 5.6.59 am SLI 325 of 2007; SR 399 of 2004]

Cross-references: ASIC: Form 540: Statement in writing of posting of notices of appointment to settle list or supplementary list of contributories.]

5.6.60 Settlement of list of contributories

- Before settling the list of contributories, the liquidator must hear and determine any objection by a person to being included in the list.
- The liquidator must settle the list of contributories and certify it, in accordance with Form 541, at the time and place specified in the notice given under regulation 5.6.59.

5.6.61 Supplementary list

- The liquidator may at any time vary or add to the list of contributories by:
 - making out a provisional supplementary list of contributories in accordance with Form 542; and
 - settling and certifying that list in accordance with Form 543.
- Regulation 5.6.59 and subregulation 5.6.60(1) apply to making out, or settling and certifying, a supplementary list by the liquidator.

5.6.62 Notice to contributories

- Within 14 days after the settlement of the list, or supplementary list, of contributories, the liquidator must:
 - notify each person included in the list, or supplementary list, of his or her inclusion; and
 - at the same time give each person notice that he or she may appeal to the Court against his or her inclusion within:
 - 21 days after service of the notice; or
 - if the Court allows — any further period.

Note: The effect of regulation 5.6.11A is that if a recipient has, in accordance with that provision, nominated electronic means to receive notices, the notifier may give or send the notice mentioned in this subregulation by the nominated electronic means.

[Subreg (1) am SLI 325 of 2007, reg 3 and Sch 1 item 42, with effect from 31 Dec 2007]

- A person may appeal against his or her inclusion in the list, or supplementary list, of contributories, within:
 - 21 days after service on the person of the notice under subregulation (1); or
 - if the Court allows — any further period.
- The Court may extend the time for filing an appeal under subregulation (2), even if the period of 21 days specified in subregulation (1) has expired.
- A notice for subregulation (1) must be in accordance with Form 544.
- The liquidator, or a person acting on the liquidator's behalf, must lodge a statement in writing in the prescribed form that notice under subregulation (1) was given to each person placed on the list, or supplementary list, of contributories.

Note: Under section 350 of the Act, a document that the Act requires to be lodged with ASIC in a prescribed form must:

- if a form for the document is prescribed in these Regulations, be in that prescribed form; and
- if a form for the document is not prescribed in these Regulations but ASIC has approved a form for the document, be in that approved form.

On 23 December 2004, a form for the document mentioned in subregulation (5) is not prescribed in these Regulations. [Subreg (5) am SR 399 of 2004, reg 3 and Sch 1 items 12 and 13, with effect from 23 Dec 2004]

(6) A statement under subregulation (5) is sufficient evidence that the notice was sent to a person on the list at the address shown for that person, in the absence of evidence to the contrary. [Reg 5.6.62 am SLI 325 of 2007; SR 399 of 2004]

Cross-references: ASIC: Form 545: Statement in writing of giving notice to persons placed on the list or supplementary list of contributories; RG 16: External administrators: Reporting and lodging.]

5.6.63 Dividend payable only on admission of a debt or claim

A dividend in the winding up of the affairs of a company may be paid only to a creditor whose debt or claim has been admitted by the liquidator at the date of the distribution of dividends.

5.6.64 Application of regulations 5.6.37 to 5.6.57

For regulations 5.6.64 to 5.6.71, regulations 5.6.37 to 5.6.57 apply:

- to the formal proof of a debt or claim; and
- to the rejection and to an appeal against the rejection of all or part of a formal proof of a debt or claim.

Liquidator to give notice of intention to declare a dividend

The liquidator must give notice of his or her intention to declare a dividend not more than 2 months after the intended date:

- by lodging a notice with ASIC in accordance with subregulation 5.6.75(4); and
- in writing, in accordance with Form 547 or, for a final dividend, in accordance with Form 548, to any person whose debt or claim has not been admitted and who:
 - for a winding up by the Court — is shown as a creditor in the report on the affairs of the company under subsection 475(1) of the Act; or
 - for a members' voluntary winding up — appears in the company's records to be a creditor; or
 - for a creditors' voluntary winding up — is shown as a creditor in the list of creditors prepared in accordance with subparagraph 497(2)(b)(ii) of the Act; or
 - to the knowledge of the liquidator claims to be, or might claim to be, a creditor of the company.

Note: The effect of regulation 5.6.11A is that if a recipient has, in accordance with that provision, nominated electronic means to receive notices, the notifier may give or send the notice mentioned in this paragraph by the nominated electronic means.

[Subreg (1) am SLI 114 of 2012, reg 3 and Sch 1 item 13, with effect from 1 Jul 2012; SLI 325 of 2007, reg 3 and Sch 1 item 43, with effect from 31 Dec 2007]

(2) A notice in accordance with subregulation (1) must specify a date, not less than 21 days after the date of the notice, on or before which formal proof, in accordance with Form 535 or 536, of a debt or claim must be submitted to participate in the distribution.

Also, the notice must state at least the following information:

- the name of the company;
 - any trading name of the company;
 - the ACN of the company.
- [Subreg (2A) insrt SLI 114 of 2012, reg 3 and Sch 1 item 14, with effect from 1 Jul 2012]

(3) Subject to regulation 5.6.68, a person:

- who claims to be a creditor; and
- who does not submit a formal proof of a debt or claim on or before the date specified in the notice given under subregulation (1);

is excluded from participating in the distribution to which that notice relates.

[Reg 5.6.65 am SLI 114 of 2012; SLI 325 of 2007]

5.6.66 Time allowed for dealing with formal proof of debt or claim

- If the liquidator has given notice in accordance with subregulation 5.6.65(1), the liquidator must:
 - within 14 days after the date shown in the notice; or
 - within such further period as ASIC allows;

in writing:

- before the end of that period:
 - admit a formal proof of debt or claim received by the liquidator; or
 - reject it; or
 - admit part of it and reject part of it; or
 - require further evidence in support of it; and
- give notice of the liquidator's decision to the creditor who submitted the proof.

Note: The effect of regulation 5.6.11A is that if a recipient has, in accordance with that provision, nominated electronic means to receive notices, the notifier may give or send the notice mentioned in this paragraph by the nominated electronic means.

[Subreg (1) am SLI 325 of 2007, reg 3 and Sch 1 item 44, with effect from 31 Dec 2007]

(2) If, within whichever period is applicable under paragraph (1)(a) or (b) or subregulation (3), the liquidator does not, in writing, deal with a formal proof of debt or claim in accordance with paragraphs (1)(c) and (d), the creditor who submitted the proof may apply to the Court for a decision on it.

(3) If the liquidator gives notice to a creditor that further evidence is required in relation to a formal proof of debt or claim submitted by the creditor:

- the liquidator must, in writing, deal with the formal proof of debt or claim in accordance with paragraphs (1)(c) and (d), within whichever period mentioned in paragraph (1)(a) or (b) is applicable; and

Note: The effect of regulation 5.6.11A is that if a recipient has, in accordance with that provision, nominated

electronic means to receive notices, the notifier may give or send the notice mentioned in this paragraph by the nominated electronic means.

- (b) that period must be taken not to have begun to run until the day on which the liquidator receives a sufficient written answer to his or her request.

[Subreg (3) am SLI 325 of 2007, reg 3 and Sch 1 item 45, with effect from 31 Dec 2007]

[Reg 5.6.66 am SLI 325 of 2007]

5.6.67 Declaration and distribution of dividend

- (1) The liquidator must, as soon as practicable, declare and distribute a dividend among the creditors whose debts or claims have been admitted.
- (2) The liquidator must distribute as dividend all money in hand except enough:
 - (a) to meet the costs of administration; or
 - (b) to give effect to the provisions of the Act.
- (3) If the liquidator declares a dividend, he or she must send a notice of that declaration, in accordance with Form 549, to every person entitled to receive payment of the dividend.

5.6.68 Rights of creditor who has not proved debt before declaration of dividend

- (1) If:
 - (a) a creditor's debt or claim has not been admitted before the declaration of a dividend; and
 - (b) the debt or claim is admitted;
 the creditor is entitled to be paid dividends that the creditor has failed to receive, out of any available money for the time being in the hands of the liquidator, before that money is applied to the payment of a further dividend.
- (2) A creditor is not entitled to disturb the distribution of a dividend declared before the creditor's debt or claim was admitted.

5.6.69 Postponement of declaration

If the liquidator postpones the declaration of a dividend past the date shown for that purpose in the notice lodged with ASIC in accordance with subregulation 5.6.75(4), the liquidator must lodge another notice with ASIC for publication on the publication website of the liquidator's intention to declare a dividend.

[Reg 5.6.69 am SLI 114 of 2012, reg 3 and Sch 1 item 15, with effect from 1 Jul 2012]

5.6.70 Payment of dividend to a person named

If a person to whom a dividend is payable lodges an authority in accordance with Form 250 with the liquidator, the liquidator must pay the dividend to the person to whom payment is directed by that authority.

5.6.70A Prescribed rate of interest on debts and claims from relevant date to date of payment

For section 563B of the Act, the prescribed rate of interest on the amount paid in respect of an admitted debt or claim for the period starting on the relevant date and ending on the day on which the payment is made is 8% a year.

5.6.70B Notice of disclaimer

- (1) This regulation is made for subsection 568A(2) of the Act.
- (2) The information about a disclaimer that is to be set out in a notice is at least the following information:
 - (a) the name of the company;
 - (b) any trading name of the company;
 - (c) the ACN of the company;
 - (d) the paragraph of subsection 568(1) of the Act under which the property is disclaimed;
 - (e) a description of the property;
 - (f) if the property is a contract (other than an unprofitable contract or a lease of land)—the date on which the Court granted leave under subsection 568(1A) of the Act;
 - (g) the name and contact details of the liquidator.

[Reg 5.6.70B insrt SLI 114 of 2012, reg 3 and Sch 1 item 16, with effect from 1 Jul 2012]

5.6.71 Distribution of surplus in a winding up by the Court

- (1) An order in a winding up by the Court authorising the liquidator to distribute any surplus to a person entitled to it must, unless the Court otherwise directs, have annexed to it a schedule in accordance with Form 551.
- (2) The liquidator must send to each person to whom any surplus is distributed a notice in accordance with Form 552.

5.6.72 Distribution of surplus as directed

If a person who receives a notice of distribution of surplus in accordance with subregulation 5.6.71(2) lodges with the liquidator an authority in accordance with Form 553, the liquidator must distribute that surplus to the person to whom payment is directed by that authority.

Eligible unsecured creditor

For paragraph 579Q(1)(b) of the Act, the following creditors are specified:

- (a) a creditor to which either of the following applies as a result of a modification of the Act made under paragraph 571(1)(d) of the Act:
 - (i) a debt payable by a company or companies in a group to any other company or companies in the group is not extinguished;
 - (ii) a claim that a company or companies in a group has against any other company or companies in the group is not extinguished;
- (b) a creditor that is determined by a Court to be an eligible unsecured creditor.

For paragraph 579Q(2) of the Act, a creditor that is determined by a Court not to be an eligible unsecured creditor is specified.

[Reg 5.6.73 insrt SLI 325 of 2007, reg 3 and Sch 1 item 46, with effect from 31 Dec 2007]

5.6.74 Interpretation: prescribed countries

For the definition of *prescribed country* in section 580 of the Act, the following countries are prescribed:

- (a) the Bailiwick of Jersey;
- (b) Canada;
- (c) the Independent State of Papua New Guinea;
- (d) Malaysia;
- (e) New Zealand;
- (f) the Republic of Singapore;
- (g) Switzerland;
- (h) the United Kingdom;
- (i) the United States of America.

5.6.75 Publication in the prescribed manner

- (1) ASIC must establish and maintain a website (the *publication website*) on which it publishes notices that have to be:
 - (a) published in the prescribed manner under Part 5.1, 5.3A, 5.4, 5.4B, 5.4C, 5.5, 5.6, 5.8 or 5A.1 of the Act; or
 - (b) lodged in accordance with this section.
- (2) ASIC is taken to have complied with a requirement to publish a notice, or a copy of a notice, in the prescribed manner if ASIC publishes the notice on the publication website.
- (3) A person (other than ASIC) is taken to have complied with a requirement to publish a notice, or a copy of a notice, in the prescribed manner if the person electronically lodges the notice with ASIC for publication by ASIC.
- (4) A person electronically lodges a notice, or a copy of a notice, with ASIC if:
 - (a) the person:
 - (i) pays the fee prescribed under the *Corporations (Fees) Regulations 2001*; and
 - (ii) sends the notice in an electronic communication to the portal for ASIC's publication website, in the format required by ASIC; and
 - (iii) receives an electronic communication from ASIC that confirms the fee has been paid and the notice has been lodged; or
 - (b) the notice, or a copy of the notice, appears on the publication website.
- (5) If a person lodges a notice, or a copy of a notice, in accordance with subsection (4), ASIC must publish the notice or copy of the notice on the publication website.
- (6) In this regulation:
 - *electronic communication* has the meaning given by subsection 5(1) of the *Electronic Transactions Act 1999*.

Note: This regulation is made for section 1367A of the Act.

[Reg 5.6.75 insrt SLI 114 of 2012, reg 3 and Sch 1 item 17, with effect from 1 Jul 2012]

Editor's Note: There is no Ch 5A in these regulations.

CHAPTER 5B – BODIES CORPORATE REGISTERED AS COMPANIES, AND REGISTRABLE BODIES

[Editor's Note: There is no Pt 5B.1 in these regulations.]

Part 5B.2 – Registrable bodies

5B.2.01 Certified copies of certificates of incorporation etc

For paragraphs 601CB(a) and 601CE(a) of the Act, a certified copy of a current certificate of the incorporation or registration in its place of origin, or a document of similar effect, of:

- a registrable Australian body; or
- a foreign company; or
- that is lodged with an application for registration under Division 1 or 2 of Part 5B.2 of the Act, must be a copy that:
 - within the 3 months immediately before the day on which it is lodged; or
 - if ASIC permits—within a longer period;
- who has the custody of the original document under a law in force in the place of origin of the corporation or company; and
- who exercises under that law functions similar to those exercised by ASIC.

5B.2.02 Manner of certifying constituent documents

For paragraphs 601CB(b) and 601CE(b) of the Act, a certified copy of a constitution of:

- a registrable Australian body; or
- a foreign company; or
- must be a copy that:
 - within the period of 3 months immediately preceding the day on which it is lodged; or
 - if ASIC permits—a longer period;
- has been certified to be a true copy:
 - by a person:
 - to whom the custody of the original document is committed under a law in force in the place of origin of the corporation or company; and
 - who exercises under that law functions similar to those exercised by ASIC; or
 - by a notary public; or
 - by a director or secretary of the body:
 - if the body is a registrable Australian body—by a statement in writing; or
 - if the body is a foreign company—by affidavit.

5B.2.03 Manner of sending letters (Act ss 601CC(2) and 601CL(3))

For subsections 601CC(2) and 601CL(3) of the Act, a letter must be sent by post.

5B.2.04 Manner of sending notices (Act ss 601CC(3) and 601CL(4))

For subsections 601CC(3) and 601CL(4) of the Act, a notice must be sent by prepaid certified mail.

5B.2.05 Prescribed countries (Act s 601CDA(a))

For paragraph 601CDA(a) of the Act, a country mentioned in the following table is prescribed:

Item	Country
1	New Zealand

[Reg 5B.2.05 insrt SLI 199 of 2007, reg 3 and Sch 1 item 1, with effect from 1 Sep 2007]

5B.2.06 Notices (Act s 601CV(1))

(1) A notice in writing of a change in a constitution or other document, in accordance with paragraph 601CV(1)(b) of the Act, must be accompanied by a copy of the instrument effecting the change or a copy of the document as changed, being a copy that is certified to be a true copy of that instrument or document by a person mentioned in paragraph 5B.2.02(e), (f) or (g).

(2) A notice in writing of a change in director's powers, in accordance with subparagraph 601CV(1)(d)(ii) of the Act, must be accompanied by a memorandum in writing executed by or on behalf of the foreign company after a change in those powers stating the powers of its directors as changed.

Part 5B.3 – Names of registrable Australian bodies and foreign companies

Availability of names (Act s 601DC)

For paragraphs 601DC(1)(a) and (b) of the Act, the rules for ascertaining whether a name is identical to another name are the rules set out in Part 1 of Schedule 6.

For paragraph 601DC(1)(c) of the Act, a name is unacceptable for registration under the regulations if it is unacceptable under the rules set out in Part 2 of Schedule 6.

Consents required for use of certain letters, words and expressions

This regulation applies to a name if:

- the name:
 - is the subject of an application for registration of a name under section 601BC, 601CB or 601CE of the Act; or
 - is the subject of an application for reservation of a name under section 601DA of that Act; or
 - for a notice of change of name under section 601DH of the Act—is the name to which the previous name is to be changed; and
 - the name is, uses or includes:
 - letters, or a word or expression, specified in column 2 of an item in Part 4 or 5 of Schedule 6; or
 - other letters, or another word or expression (whether or not in English), that is of like import to the letters, word or expression specified in the item.
- (1)(b), a reference to letters, a word or an expression being used includes a reference to the letters, word or expression being used:
- as part of another word or expression; or
 - in combination with other words or letters, or other symbols.
- However, this regulation does not apply to use of the letters ADI as part of another word.

Example: The letters *adi* appear in the word *traditional*. This regulation does not apply to use of the word *traditional*.

(4) If an item in Part 4 of Schedule 6 applies in relation to the name, the application or notice must be accompanied by the written consent of the Minister who is specified in the item.

(5) If an item in Part 5 of Schedule 6 applies in relation to the name, the application or notice must be accompanied by the written consent of the public authority, instrumentality or agency that is specified in the item.

5B.3.03 Exemptions from requirement to set out ARBN etc. on certain documents (Act s 601DG)

For section 601DG of the Act, the exemptions provided for in Schedule 7 apply in relation to the requirements of paragraphs 601DE(1)(b), (c) and (d) of the Act.

5B.3.04 Notices (Act s 601DH(1))

(1) A notice in writing of a change of name in accordance with subsection 601DH(1) of the Act, must have attached to it:

- a copy of the certificate of incorporation or registration of the registered body, or a document of similar effect, being a certificate or document evidencing the change; or
- if no certificate or document of that kind exists—a copy of the instrument effecting the change; or
- being a copy that is certified by a person mentioned in paragraph 5B.2.02(e), (f) or (g) to be a true copy of that certificate, document or instrument.

Subreg (1) am SR 319 of 2001, reg 3 and Sch 1 item 11, with effect from 11 Mar 2002]

Reg 5B.3.04 am SR 319 of 2001

[Editor's Note: There is no 5B.3.04(2) in these regulations.]

CHAPTER 5C – MANAGED INVESTMENT SCHEMES

Part 5C.1 – Registration of managed investment schemes

5C.1.01 Applying for registration

- (1) An application under section 601EA of the Act to register a managed investment scheme must be in the approved form.
- (2) The form must state the name of the managed investment scheme.
- (3) The stated name must not be the same as the name of:
 - (a) another managed investment scheme that is the subject of an application for registration that is lodged but not yet determined; or
 - (b) a registered scheme.
- (4) A statement made for paragraph 601EA(4)(c) of the Act must be in the approved form.

5C.1.02 Change of name of registered schemes

- (1) To change the name of a registered scheme, the responsible entity of the scheme must lodge a notice in the approved form stating the proposed name of the scheme.
- (2) The stated name must not be the same as the name of:
 - (a) another managed investment scheme that is the subject of an application for registration under section 601EB of the Act that is lodged but not yet determined; or
 - (b) a registered scheme.
- (3) On application in accordance with this regulation, ASIC must amend the record of the registration of the scheme to include the name of the scheme as proposed to be amended.
[Cross-references: ASIC: Form 5140: Notification of proposed change of name of registered scheme.]

5C.1.03 Modification (Act s 601QB)

- (1) For section 601QB of the Act, the operation of Chapter 5C of the Act is modified in accordance with this regulation.
- (2) If:
 - (a) a managed investment scheme is registered under section 601EB of the Act; and
 - (b) the managed investment scheme is also registered on the Australian Business Register; and
 - (c) the last 9 digits of the ABN of the registered scheme are the same, and in the same order, as the last 9 digits of its ARSN; and
 - (d) a document relating to the scheme is lodged with ASIC, and displays that ABN;
 section 601EC of the Act does not apply to the document.

Part 5C.2 – The responsible entity

5C.2.01 Duty of responsible entities' agents – surveillance checks

The agent of a responsible entity must take all reasonable steps to assist the entity and ASIC when ASIC is conducting a check whether the entity is complying with the constitution and compliance plan of a registered scheme and with the Act.

5C.2.02 Appointment of temporary responsible entities

ASIC, or a member of a registered scheme, may apply to the Court for the appointment of a temporary responsible entity of the scheme if ASIC or member reasonably believes that the appointment is necessary to protect scheme property or the interests of members of the scheme.

5C.2.03 Form of notices (Act ss 601FL(2) and 601FM(2))

A notice to be lodged under subsection 601FL(2) or 601FM(2) of the Act must be in the approved form.

5C.2.04 Notice of appointment of temporary responsible entities

As soon as practicable after the Court appoints a temporary responsible entity for a registered scheme on application by a member of the scheme under section 601FN of the Act, the member must lodge a notice in the approved form that tells ASIC of the appointment.

5C.2.05 Form of notices (Act s 601FP(3))

A notice to be lodged under subsection 601FP(3) of the Act must be in the approved form.
[Editor's Note: There is no Pt 5C.3 in these regulations.]

Cross-references: ASIC: Form 5108: Notification of appointment of temporary responsible entity.]

Part 5C.4 – The compliance plan

5C.4.01 Agents' authorities to be lodged

If a compliance plan, or modification of a plan, lodged with ASIC under section 601HC or subsection 601HE(3) of the Act is signed by an agent of the directors of the responsible entity of the registered scheme to which the plan relates, the authority to do so, or a copy of the authority verified by a director of the entity, must be attached to the plan or modification.
[Cross-references: ASIC: Form 5100: Application for registration of a managed investment scheme.]

Agents to assist auditors of compliance plans

- (1) The agent of the responsible entity of a registered scheme, and an officer of the agent, must:
 - (a) allow the auditor of the scheme's compliance plan to have access to the books of the scheme; and
 - (b) if the auditor requires the agent or entity to give the auditor information or an explanation for the audit—give the information or explanation to the auditor; and
 - (c) otherwise assist the conduct of the audit.

Part 5C.5 – The compliance committee

5C.5.01 Responsible entities etc to assist compliance committees

- (1) This regulation applies to a person who is the responsible entity of a registered scheme, an officer of the entity, an agent of the entity or an officer of the agent.
 - (2) The person must:
 - (a) allow the compliance committee to have access to the books of the scheme; and
 - (b) if the committee requires the person to give the committee information or an explanation about the scheme—give the information or explanation to the committee; and
 - (c) otherwise assist the committee in the performance of its functions.
- [Editor's Note: There are no Pts 5C.6–5C.8 in these regulations.]

Part 5C.9 – Winding up

5C.9.01 Notice of commencement of winding up

- (1) The responsible entity of a registered scheme must lodge a notice in the approved form telling ASIC that winding up of the scheme has commenced, or been completed, within 14 days of the commencement or completion of winding up of a registered scheme.
- (2) There is no Pt 5C.10 in these regulations.
[Cross-references: ASIC: Form 5138: Notification of commencement or completion of winding up of a registered scheme.]

Part 5C.11 – Exemptions and modifications

DIVISION 1 – EXEMPTIONS

5C.11.01 Certain funds not managed investment funds

For paragraph (n) of the definition of *managed investment scheme* in section 9 of the Act, an approved benefit fund within the meaning of section 16B of the *Life Insurance Act 1995* is not a managed investment scheme.
Reg 5C.11.01 future subst SLI 172 of 2012, reg 3 and Sch 1 item 1 (subst SLI 308 of 2012), with effect from 12 Jul 2013.]

[5C.11.01.5] Editor's note: future commencements

Regulation 5C.11.01 is to be substituted by *Corporations Amendment Regulation 2012 (No 6)* (Cth) reg 3 and Sch 1 item 1 as amended by *Corporations Amendment Regulation 2012 (No 6) Amendment Regulation 2012 (No 1)* (Cth) reg 3 and Sch 1 item 2. The substitution will commence on 12 July 2013.

[1] Regulation 5C.11.01

substitute

5C.11.01 Certain schemes not managed investment schemes

- (1) For paragraph (n) of the definition of *managed investment scheme* in section 9 of the Act, each of the following schemes is declared not to be a managed investment scheme:
 - (a) an approved benefit fund within the meaning given by section 16B(1) of the *Life Insurance Act 1995*;
 - (b) a scheme (a *litigation funding scheme*) that has all of the following features:
 - (i) the dominant purpose of the scheme is for each of its general members to seek remedies to which the general member may be legally entitled;
 - (ii) the possible entitlement of each of its general members to remedies arises out of:
 - (A) the same, similar or related transactions or circumstances that give rise to a common issue of law or fact; or
 - (B) different transactions or circumstances but the claims of the general members can be appropriately dealt with together;