

BETWEEN:

AMIRAM DAVID WEINSTOCK
First Appellant

HELEN WEINSTOCK
Second Appellant

and

TAMAR RIVQA BECK
First Respondent

L W FURNITURE CONSOLIDATED (AUST) PTY LIMITED
Second Respondent



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APPELLANTS' SUBMISSIONS

PART I: PUBLICATION

- 20 1. The appellants certify that this submission is in a form suitable for publication on the internet.

PART II: ISSUE ON THE APPEAL

2. The issue on the appeal is whether the views of the majority in the Court of Appeal unduly narrow the ambit of the power conferred by s 1322(4) of the *Corporations Act 2001* (Cth) (the **Corporations Act**).

PART III: JUDICIARY ACT 1903, SECTION 78B

3. The appellants have considered whether any notice should be given pursuant to s 78B

Filed on behalf of the Appellants

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of the *Judiciary Act 1903* and are of the view that no such notice is required.

PART IV: REPORTS

4. The reasons for judgment of the primary judge, Barrett J, are not reported. The internet citation is *Beck v L W Furniture Consolidated (Aust) Pty Limited* [2011] NSWSC 235. His Honour also delivered short reasons at the time of making orders. Those reasons are also not reported. The internet citation is *Beck v L W Furniture Consolidated (Aust) Pty Limited* [2011] NSWSC 405.
5. The reasons for judgment of the Court of Appeal (Campbell and Young JJA, Sackville AJA) are not reported in any authorised reports but are reported at (2012) 87 ACSR 672. The internet citation is *Beck v LW Furniture Consolidated (Aust) Pty Ltd* [2012] NSWCA 76.

PART V: FACTS

6. The first appellant (**Ami**) and the first respondent (**Tami**) are brother and sister. The second appellant (**Helen**) is Ami's wife. The second respondent (the **Company**) is a family company incorporated on 30 April 1971 by their late parents, Leo and Hedy Weinstock. Leo and Hedy were the founding directors of the Company.

Share capital of the Company

7. Upon incorporation, the Company issued 5 A class shares to (or for the benefit of) Leo: J[14], AB9.¹ On about 1 April 1972 the Company issued a total of three C class redeemable preference shares, one to each of Hedy, Ami and Tami: J[14(a)], AB9.
8. The A class shares were non-voting shares: Article 3(2)(a) of the Articles of Association²: J[22], AB11. However, Article 3(2)(e) provided that they could be converted to voting shares during the life of Leo, although they were not: AB180. The C class shares are non-voting shares.³ Further C and D class shares have been issued in the intervening years, all of which are non-voting shares: J[20], AB11. None of the issued shares confers a right to participate in a surplus on winding up.
9. Pursuant to Article 4 (AB187), the directors have power to allot or otherwise dispose of the unissued shares of the Company, including ordinary voting shares.
10. The Company is solvent.

¹ "AB" references are to the application book prepared for the special leave application. The application book stands in place of an appeal book: Order 2 of the Abridged Directions made on 7 September 2012; [2012] HCATrans 218 at lines 422-424.

² The relevant Articles may be found in the appendix to the decision of Campbell JA in the Court below. That appendix commences at AB179.

³ The C shares owned by Hedy were purportedly redeemed following her death. That purported redemption is the subject of the related appeal in proceedings S56 of 2012.

Directors of the Company

11. Article 66 (AB189) provided that “each director shall retire from office and be eligible for re-election. Retiring directors shall act as directors throughout the meeting at which they retire.” Article 67 (AB189) provided that the Company “at the meeting at which a director so retires may fill the vacated office by electing a person thereto, and in default the retiring director shall if offering himself for re-election ... be deemed to have been re-elected...”
- 10 12. Article 69 (AB190) made allowance for the appointment of casual or additional directors. That Article provided that “any director so appointed shall hold office only until the next following annual general meeting and shall then be eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at that meeting.”
13. Article 87 (AB192) dealt with the circumstance that the number of directors might fall below the quorum necessary for the conduct of business of the Company. In that event, Article 87 provided that the continuing director “may act for the purpose of increasing the number of directors to [the quorum] but for no other purpose.”

Appointment of the appellants

- 20 14. Ami and Tami were appointed directors of the Company pursuant to Article 69 by a resolution of Hedy and Leo on 29 June 1973.⁴ As such, their appointment was “until the next following annual general meeting.” There was an annual general meeting of the Company on 31 December 1973. Ami was present. The minutes of that meeting record a resolution that “any director retiring in accordance with the provisions of the Company’s Articles of Association be re-appointed”: J[44], AB16. Resolutions in the same or substantially similar terms were passed at meetings purporting to be annual general meetings in subsequent years: J[46]-[47], AB16.
- 30 15. Leo died on 29 July 2003. Hedy, by that stage, had advanced Alzheimer’s disease, by reason of which she had also ceased to be a director. On the following day, Ami purported to appoint his wife Helen as an additional director of the Company pursuant to Article 87. The terms of the resolution are set out at CA[43], AB93-94; see also J[49], AB17.
16. Hedy died on 6 July 2004: J[14], AB9.

Winding up proceedings

17. On 30 September 2010, Tami brought proceedings for an order that the Company be wound up pursuant to s 461(1)(k) of the Corporations Act on the basis that neither Ami nor his wife Helen were validly appointed directors, such that there were no

⁴ Tami resigned as a director on 8 January 1982: J[111], AB35.

validly appointed directors in office; and that none of the members had a right to vote at general meetings and so could not appoint any directors. As a result, there was said to be a “constitutional and administrative vacuum” making it just and equitable that the Company be wound up: J[5], AB6.

- 10 18. Ami and Helen brought an application in the nature of a cross-claim for declarations that they were validly appointed. They also sought orders under s 1322(4) of the Corporations Act declaring that the various acts and omissions upon which the plaintiff relied to establish the invalidity of their appointments were, in turn, “not invalid by reason of any contravention of any provision of [the Corporations Act] or the constitution of the [Company]”: CA[179], AB159.
- 20 19. The trial judge found that Ami and Tami were validly appointed as directors of the Company on 29 June 1973 pursuant to Article 69, namely “only until the next following annual general meeting ...”: J[68]-[69], AB23; AB190. As such, they were only directors until the *start* of the meeting and they were not directors retiring *at* the meeting. His Honour therefore held that neither Ami nor Tami was “re-elected” by force of Article 67 at the annual general meeting of 31 December 1973: J[89]-[104], AB29-33. It followed that Ami was not a director validly in office at the time he purported to appoint Helen a director on 30 July 2003: J[110], AB35. Her appointment was therefore held to be ineffective. His Honour’s conclusions in relation to these issues are at J[113]-[122], AB36-37.
- 20 20. However, his Honour concluded at J[149]-[157] (AB47-49) that the Court had power under s 1322(4)(a) to make a declaration in relation to the purported appointment of Helen by Ami on 30 July 2003. His Honour identified the utility in making such an order at J[173]-[176](AB54), namely it would provide a mechanism whereby a second director could validly be appointed and voting shares issued, thus restoring administrative order to the Company. Accordingly, on 11 May 2011 his Honour made a declaration pursuant to s 1332(4) in relation to Ami’s appointment of Helen: AB68.
21. His Honour also found that both Ami and Helen were *de facto* directors of the Company and had been so at all material times: J[122], AB37.
- 30 22. Tami appealed against the making of the s 1322(4) declaration. The present appellants, together with the Company, cross-appealed against the trial judge’s decision in relation to the validity of their respective appointments⁵, namely whether Article 67 had the effect that Ami was “re-elected” at the annual general meeting of 31 December 1973 and in subsequent years; and whether, in turn, Helen had been validly appointed by Ami.
23. The Court of Appeal by majority (Young JA and Sackville AJA, Campbell JA dissenting) allowed the appeal and unanimously dismissed the cross-appeal.

⁵ The appellants have not pursued the other grounds of cross-appeal or the grounds of contention.

24. Their Honours were in agreement that Article 67 did not have the effect that Ami was “re-elected” at the annual general meeting of 31 December 1973 and in subsequent years: per Campbell JA at CA[68], AB108; Young JA agreeing at CA[215], AB193; Sackville AJA agreeing at CA[229], AB195-196. That is why the cross-appeal was dismissed.
25. On the correctness of the s 1322(4) declaration, however, the Court was divided. Campbell JA agreed with the trial judge that the Court did have power to make such an order in the circumstances of the case. His Honour’s conclusions may be seen particularly at CA[139]-[141], AB141-142. Sackville AJA delivered separate reasons, with which Young JA agreed, for holding that the Court had no power to make an order under s 1322(4) in the circumstances because the purported appointment of a director by a *de facto* director was not an “act ... purporting to have been done ... in relation to a corporation [that was] invalid by reason of any contravention of a provision” of the Articles of the Company or the Corporations Act: CA[233], AB199.
26. In the result, Campbell JA was of the view that the Court did have power to make the s 1322(4) declaration but would have allowed the appeal and remitted the proceeding for further hearing to accommodate a specific procedural unfairness which arose at trial: CA[203]-[205], AB173-174.⁶ The orders proposed by his Honour may be seen at CA[214], AB178. Young JA and Sackville AJA, being of the view that the Court could not make the s 1322(4) declaration, simply allowed the appeal but remitted the proceeding to determine whether the Company should now be wound up. The orders made by the Court of Appeal appear at AB207.

PART VI: ARGUMENT

27. Section 1322(4)(a) of the Corporations Act confers on a court a power to make an order declaring that any “act, matter or thing purporting to have been done” either under the Corporations Act, or “in relation to a corporation” is not invalid by reason of any “contravention of a provision of this Act or a provision of the constitution of a corporation.”
28. It is clear, it is submitted, that the purported appointment of Helen as a director of the Company was an “act” or “matter” or “thing” purporting to have been done in relation to the Company. This was accepted by the Court of Appeal: CA[220], AB194. It was a purported appointment of her as a director of the Company by a person purporting to act as a director of the Company (who was found to be acting as a *de facto* director of the Company) and purporting to exercise a power under the constitution of the Company, namely Article 87. As Campbell JA said at CA[150], AB145:

“...even though Ami did not validly hold office as a director at the time of the Purported Appointment, he was no stranger to the affairs of the Company. He

⁶ The specific unfairness was that, although orders under s 1322(4) had been sought in respect of a range of matters, the particular order ultimately made was one that had not sufficiently been agitated.

had ceased to hold office on 31 December 1973, but by the time of the Purported Appointment he had been acting as a director over the entire time from his initial appointment on 29 June 1973, ie, a period of over thirty years. During that time, there had been no objection to his acting as though he were a director. It is not suggested that he did not honestly believe that he had the power that he purported to exercise. Indeed, after the Purported Appointment there was no objection for some years to Ami continuing to act as a director, nor to Helen acting as though she were entitled to the office to which Ami had purported to appoint her.”

- 10 29. The reason why the purported appointment of Helen as a director was ineffective was because she was not appointed as such by a person entitled to do so in accordance with the constitution of the Company. That invalidity was, in terms of s 1322(4)(a), by reason of a contravention of a provision of the constitution of the Company.

Section 1322(4)

30. Section 1322(4) contains a grant of power to a court and is remedial in nature. As such, it is necessary to approach its construction having regard to two overlapping principles. The first, identified by Campbell JA at CA[131] (AB137), is that it should not be read subject to any limitations not found in the express words of the grant: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J; *Patton v Buchanan Borehole Collieries Pty Ltd* (1992) 178 CLR 14 at 17.5 per Mason CJ, Deane and Dawson JJ and at 23.5 per Gaudron J.
- 20
31. Gummow J approached the construction of s 1322(4) in precisely that way in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 275-276. In doing so, his Honour referred to *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.
32. The principle that a grant of power to a court should not be read subject to a limitation not found in the terms of the grant has been applied on numerous occasions both in this court and in intermediate appellate courts. Campbell JA collected many of the authorities at CA[131], AB137-138.
- 30 33. The second broad principle, identified by Campbell JA at CA[130] (AB137) is that the section should be “applied with liberality” because it is a remedial provision. In *Patton*, Mason CJ, Deane and Dawson JJ saw this factor as being an “added reason” for giving s 79A of the *District Court Act 1973* (NSW), which was under consideration in that case, “the full scope which the natural and ordinary meaning of its words supports.”⁷
34. In applying that principle it is important to identify the particular circumstance which the section is intended to remedy against. Here, that circumstance is the invalidity of acts or things purporting to have been done in relation to a company. The section gives

⁷ (1992) 178 CLR 14 at 17.

the court power to declare such things to be “not invalid.” It is those acts or things which are the proper subject matter of the grant of power.

The errors in the majority approach

35. The approach taken by the majority in the Court of Appeal to the concept of “contravention” in s 1322(4)(a) is, with respect, too narrow. Young JA at CA[223] (AB194) took the view that:

10 “...the impugned action must be able to be achieved under the Act or constitution. If this is the case, then, where the action is performed in a different and invalid way, it may be validated under the section. However, if it is not possible to attain the result under the Act or constitution, the section cannot assist.”

36. To similar effect is the reasoning of Sackville AJA at CA[239], AB201:

20 “If, for example, the appointment of a person as director was invalid because the meeting which resolved to make the appointment was not properly convened, a fresh appointment could be made at a duly convened meeting and the acts of the de facto director ratified. But where a person has never been appointed a director (at least after his or her original term expired) and cannot be validly appointed, the purported act of that person, even if performed when he or she was a de facto director, cannot in my view be described as invalid by reason of a contravention of the articles or of the *Corporations Act*. Nor can it be said that the de facto director's purported acts are invalid by reason of a failure to take advantage of a provision of the constitution of the corporation or of the *Corporations Act*.”

37. The application of this approach has the consequence of limiting, without a persuasive reason therefore, the ambit of s 1322(4)(a). It also fails to look sufficiently at the conduct sought to be validated. The true description of the conduct in this case is that it was a purported appointment of a director of the Company, ineffective because not made in the manner provided for by the constitution of the Company.

- 30 38. The conclusion of the majority was that a court has no power under s 1322(4) unless the act or thing being declared “not invalid” is something that could otherwise have been done validly under the constitution or the *Corporations Act*. This conclusion incorrectly imposes a constraint on the grant of the court’s power to make declarations of validity by reference to a limitation not found in the statutory grant and which cannot be inferred from its context.

39. It is impossible to discern from the legislation as a whole, or from s 1322(4) in particular, an intention that the court’s power to remedy the consequences of a contravention of the Act or a company’s constitution is limited to those acts which were directed to things which, if done differently at the time, could have been

achieved effectively: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

40. It is also relevant to have regard to the balance of s 1322(4) and, in particular, paragraph (c). That paragraph grants power to relieve a person from civil liability “in respect of a contravention or failure of a kind referred to in paragraph (a).” Two things are to be noted about paragraph (c). The first is that, although paragraph (a) does not expressly refer to a “failure” to comply with the Corporations Act or the constitution of a corporation, paragraph (c) contemplates that a “failure” to comply with or take advantage of the Act or a constitution is within the scope of paragraph (a). Paragraph (c) operates on the basis of a wider construction of paragraph (a) than that found by the majority in the Court of Appeal.
41. The second is that the majority construction of paragraph (a) unreasonably restricts the scope of paragraph (c), since the scope of the latter depends upon the former. Paragraph (c) is concerned with civil liability arising “in respect of” contraventions of the kind dealt with in paragraph (a). Taken alone, that provision would appear to be directed to civil liability arising in respect of acts, matters, things or proceedings purporting to have been done in relation to a company irrespective of whether the particular act, matter, thing or proceeding could have been done or taken in a way that did not otherwise give rise to liability. On the majority construction, however, paragraph (c) is restricted in that way.
42. The majority construction also brings about unsatisfactory and inconsistent results, depending on the circumstances of each case. So, for example, if (as in this case) a *de facto* director purported to appoint a new director but (unlike this case) there happened already to be another validly appointed director who could have made the same appointment, the reasoning of the majority of the court below would suggest that such an irregularity could be cured by s 1322(4) because the impugned appointment was otherwise “...able to be achieved...”. The appellants submit that the power should be available regardless of the existence of that other director. It should be available to cure the invalidity flowing from what happened.
- 30 43. The construction adopted by Young JA and Sackville AJA, but rejected by Campbell JA and Barrett J, is also inconsistent with the evident remedial purpose of the section. Here, it was accepted that the act appointing Helen a director was a thing done “in relation to the company”: CA[220], AB194. The decisive consideration for their Honours was that it was an appointment made by a long-standing *de facto* director of the Company whose office had ceased in 1973 by reason of a procedural technicality first raised decades later. It was ultimately for that reason that they did not regard the remedy provided by s 1322(4) to be available. Their construction thus entrenches the very kind of procedural distinction (here, the difference between a “retiring” director and a “rotating” director) which the section seems, clearly enough, designed to overcome.
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44. The fact that the decision was novel should not have contributed to the conclusion reached: c.f. *Young JA* at [221], AB194; *Sackville AJA* at CA[241], AB202. As French CJ noted in another context in *Momcilovic v The Queen* [2011] HCA 34; (2011) 280 ALR 221; (2011) 85 ALJR 957 at [84], “[n]ovelty is no objection to the characterisation of a statutory power conferred upon a court as judicial.”

The minority approach

45. It is submitted that the conclusion reached by Barrett J and by Campbell JA on this issue was correct.
- 10 46. The trial judge’s conclusion was in accordance with authority. His Honour addressed the scope of the word “contravention” in s 1322(4)(a) at J[143], AB45. His Honour held that the purported appointment of Helen was “a case of positive action” in relation to the Company and that there was a contravention of the constitution “in that the person who purported to make the appointment allowed by the constitution did not formally and regularly occupy the position of director necessary to make the appointment a valid appointment” J[149]-[150], AB47. His Honour referred to the decision of *Nece Pty Ltd v Ritek Incorporation* (1997) 24 ACSR 38 where Lehane J held that the doing of a thing without authority may be regarded as a “contravention” of the articles for these purposes.
- 20 47. His Honour observed at J[154](AB48) that the “case of nullity is clearly covered”, for which his Honour cited *Jordan v Avram* (1997) 25 ACSR 153. That observation by his Honour correctly identified the proper subject matter of the power, namely the act, matter, thing or proceeding which is “invalid” (or a “nullity”).
48. Campbell JA reached the same conclusion. Like Barrett J, he regarded *Nece v Ritek* as authority for the proposition that acts taken without authority were within the scope of the section: CA[132], AB138. Also like Barrett J, his Honour was careful to identify the act, matter, thing or proceeding as the true subject matter of the section: CA[139], AB141. His Honour had proper regard to the purpose of the provision and of the Corporations Act as a whole in reaching that conclusion: CA[140]-[141], AB141-142.
- 30 49. The appellants submit that the approach of Barrett J and Campbell JA is to be preferred and that the decision of the majority in the Court of Appeal was in error.

PART VII: LEGISLATION

50. *Corporations Act 2001* (Cth), section 9 (definition of “director”), Part 9.5.

PART VIII: ORDERS SOUGHT

51. The appellants submit that the orders of the Court should be:
- (a) Appeal allowed with costs.

- (b) Set aside orders 3 and 5 in the court below and, in lieu thereof, order that:
- (i) the matter be remitted to the primary judge, or such other judge as the Chief Judge in Equity might decide, to determine whether an order should be made under s 1322(4)(a) of the Corporations Act validating the purported appointment of Helen Weinstock as a director of the Company by Ami Weinstock on 30 July 2003, and whether the Company should be wound up; and
- (ii) Tamar Rivqa Beck pay the costs of the appeal to the Court of Appeal.

PART IX: ORAL ARGUMENT

- 10 52. The appellants estimate that they will require 2 hours for their oral argument in this appeal. The appellants suggest that argument in this appeal should take place before the argument in proceedings S56 of 2012.

Dated: 21 SEPTEMBER 2012


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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S266 of 2012

ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

BETWEEN:

AMIRAM DAVID WEINSTOCK

First Appellant

HELEN WEINSTOCK

Second Appellant

and

TAMAR RIVQA BECK

First Respondent

L W FURNITURE CONSOLIDATED (AUST) PTY LIMITED

Second Respondent

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ANNEXURE "A" TO APPELLANTS' SUBMISSIONS

This is Annexure A to the Appellants' submissions filed 21 September 2012.

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<i>Corporations Act (2001)</i> (Cth) s 9 (definition of "director")	2
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CORPORATIONS ACT 2001 (CTH), SECTION 9 (DEFINITION OF "DIRECTOR")

The *Corporations Act 2001* (Cth) (**the Act**) is the current law.

Section 9 of the Act as in force on 30 July 2003 is set out below. There has been no change to the definition of director in s 9 of the Act in the period since 30 July 2003.

Section 9 Dictionary

director of a company or other body means:

- 10
- (a) a person who:
 - (i) is appointed to the position of a director; or
 - (ii) is appointed to the position of an alternate director and is acting in that capacity;
 regardless of the name that is given to their position; and
 - (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
 - (i) they act in the position of a director; or
 - (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.
- 20

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

- Note: Paragraph (b) --Contrary intention-- Examples of provisions for which a person referred to in paragraph (b) would not be included in the term "director" are:
- section 249C (power to call meetings of a company's members)
 - subsection 251A(3) (signing minutes of meetings)
 - section 205B (notice to ASIC of change of address).

CORPORATIONS ACT 2001 (CTH), PART 9.5 – AS IN FORCE ON 30 JULY 2003

Part 9.5 of the Act as in force on 30 July 2003 is set out below. Part 9.5 has been amended in various ways since that date. Amended provisions of Part 9.5 are set out below, commencing at page 14.

Part 9.5 - Powers of Courts

Section 1318 Power to grant relief

- 10 (1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.
- (2) Where a person to whom this section applies has reason to apprehend that any claim will or might be made against the person in respect of any negligence, default, breach of trust or breach of duty in a capacity as such a person, the person may apply to the Court for relief, and the Court has the same power to relieve the person as it would have had under subsection (1) if it had been a court before which proceedings against the person for negligence, default, breach of trust or breach of duty had been brought.
- 20 (3) Where a case to which subsection (1) applies is being tried by a judge with a jury, the judge after hearing the evidence may, if he or she is satisfied that the defendant ought pursuant to that subsection to be relieved either wholly or partly from the liability sought to be enforced against the person, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge thinks proper.
- (4) This section applies to a person who is:
- 30 (a) an officer of a corporation; or
- (b) an auditor of a corporation, whether or not the person is an officer of the corporation; or
- (c) an expert in relation to a matter:
- (i) relating to a corporation; and
- (ii) in relation to which the civil proceeding has been taken or the claim will or might arise; or
- (d) a receiver, receiver and manager, liquidator or other person appointed or directed by the Court to carry out any duty under this Act in relation to a corporation.
- (5) For the purposes of this section, officer in relation to a corporation, means:
- 40 (a) a director, secretary, executive officer or employee of the corporation; and
- (b) a receiver, or receiver and manager, of property of the corporation; and
- (c) an administrator of the corporation; and
- (d) a liquidator of the corporation; and
- (e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons.

Section 1319 Power of Court to give directions with respect to meetings ordered by the Court

Where, under this Act, the Court orders a meeting to be convened, the Court may, subject to his Act, give such directions with respect to the convening, holding or conduct of the meeting, and such ancillary or consequential directions in relation to the meeting, as it thinks fit.

Section 1321 Appeals from decision of receivers, liquidators etc.

A person aggrieved by any act, omission or decision of:

- (a) a person administering a compromise, arrangement or scheme referred to in Part 5.1; or
- 10 (b) a receiver, or a receiver and manager, of property of a corporation; or
- (c) an administrator of a company; or
- (d) an administrator of a deed of company arrangement executed by a company; or
- (e) a liquidator or provisional liquidator of a company;

may appeal to the Court in respect of the act, omission or decision and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit.

Section 1322 Irregularities

- (1) In this section, unless the contrary intention appears:
 - 20 (a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and
 - (b) a reference to a procedural irregularity includes a reference to:
 - (i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and
 - (ii) a defect, irregularity or deficiency of notice or time.
- (2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause
 - 30 substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.
- (3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.
- 40 (3A) If a member does not have a reasonable opportunity to participate in a meeting of members, or part of a meeting of members, held at 2 or more venues, the meeting will only be invalid on that ground if:
 - (a) the Court is of the opinion that:
 - (i) a substantial injustice has been caused or may be caused; and
 - (ii) the injustice cannot be remedied by any order of the Court; and
 - (b) the Court declares the meeting or proceeding (or that part of it) invalid.

(3B) If voting rights are exercised in contravention of subsection 259D(3) (company controlling entity that holds shares in it), the meeting or the resolution on which the voting rights were exercised will only be invalid on that ground if:

- (a) the court is of the opinion that:
 - (i) a substantial injustice has been caused or may be caused; and
 - (ii) the injustice cannot be remedied by any order of the court; and
- (b) the court declares the meeting or resolution invalid.

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(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

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- (a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;
- (b) an order directing the rectification of any register kept by ASIC under this Act;
- (c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
- (d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit.

(5) An order may be made under paragraph (4)(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.

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(6) The Court must not make an order under this section unless it is satisfied:

- (a) in the case of an order referred to in paragraph (4)(a):
 - (i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
 - (ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or
 - (iii) that it is just and equitable that the order be made; and
- (b) in the case of an order referred to in paragraph (4)(c)--that the person subject to the civil liability concerned acted honestly; and
- (c) in every case--that no substantial injustice has been or is likely to be caused to any person.

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Section 1323 Power of Court to prohibit payment or transfer of money, financial products or other property

(1) Where:

- (a) an investigation is being carried out under the ASIC Act or this Act in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of this Act; or
- (b) a prosecution has been begun against a person for a contravention of this Act; or
- (c) a civil proceeding has been begun against a person under this Act;

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and the Court considers it necessary or desirable to do so for the purpose of protecting the interests of a person (in this section called an **aggrieved person**) to whom the person referred to in paragraph (a), (b) or (c), as the case may be, (in this section called the **relevant person**), is liable, or may be or become liable, to pay money, whether in

respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property, the Court may, on application by ASIC or by an aggrieved person, make one or more of the following orders:

- (d) an order prohibiting a person who is indebted to the relevant person or to an associate of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed;
- (e) an order prohibiting a person holding money, financial products or other property, on behalf of the relevant person, or on behalf of an associate of the relevant person, from paying all or any of the money, or transferring, or otherwise parting with possession of, the financial products or other property, to, or to another person at the direction or request of, the person on whose behalf the money, financial products or other property, is or are held;
- (f) an order prohibiting the taking or sending out of this jurisdiction, or out of Australia, by a person of money of the relevant person or of an associate of the relevant person;
- (g) an order prohibiting the taking, sending or transfer by a person of financial products or other property of the relevant person, or of an associate of the relevant person:
 - (i) from a place in this jurisdiction to a place outside this jurisdiction (including the transfer of financial products from a register in this jurisdiction to a register outside this jurisdiction); or
 - (ii) from a place in Australia to a place outside Australia (including the transfer of financial products from a register in Australia to a register outside Australia);
- (h) an order appointing:
 - (i) if the relevant person is a natural person--a receiver or trustee, having such powers as the Court orders, of the property or of part of the property of that person; or
 - (ii) if the relevant person is a body corporate--a receiver or receiver and manager, having such powers as the Court orders, of the property or of part of the property of that person;
- (i) if the relevant person is a natural person--an order requiring that person to deliver up to the Court his or her passport and such other documents as the Court thinks fit;
- (j) if the relevant person is a natural person--an order prohibiting that person from leaving this jurisdiction, or Australia, without the consent of the Court.

- (2A) A reference in paragraph (l)(g) or (h) to property of a person includes a reference to property that the person holds otherwise than as sole beneficial owner, for example:
 - (a) as trustee for, as nominee for, or otherwise on behalf of or on account of, another person; or
 - (b) in a fiduciary capacity.

- (2B) Subsection (2A) is to avoid doubt, is not to limit the generality of anything in subsection (1) and is not to affect by implication the interpretation of any other provision of this Act.

- (2) An order under subsection (1) prohibiting conduct may prohibit the conduct either absolutely or subject to conditions.

- (3) Where an application is made to the Court for an order under subsection (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.

- (4) On an application under subsection (1), the Court must not require the applicant or any other person, as a condition of granting an interim order under subsection (3), to give an undertaking as to damages.
- (5) Where the Court has made an order under this section on a person's application, the Court may, on application by that person or by any person affected by the order, make a further order discharging or varying the first-mentioned order.
- 10 (6) An order made under subsection (1) or (2) may be expressed to operate for a specified period or until the order is discharged by a further order under this section.
- (7) Nothing in this section affects the powers that the Court has apart from this section.
- (8) This section has effect subject to the Bankruptcy Act 1966.
- (9) A person must not contravene an order by the Court under this section that is applicable to the person.
- 20 (10) An offence based on subsection (9) is an offence of strict liability.

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

Section 1324 Injunctions

- (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
- (a) contravention of this Act; or
 - (b) attempting to contravene this Act; or
 - (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
 - (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
 - 30 (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
 - (f) conspiring with others to contravene this Act;
- the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the firstmentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.
- 40 (1A) For the purposes of subsection (1):
- (a) a contravention of this Act affects the interests of a creditor or member of a company if the insolvency of the company is an element of the contravention; and
 - (b) a company's contravention of:
 - (i) paragraph 257A(1)(a) (share buy-back not to prejudice ability to pay creditors); or
 - (ia) paragraph 256B(1)(b) (share capital reduction not to prejudice ability to pay creditors); or
 - (ii) paragraph 260A(1)(a) (financial assistance for share acquisition not to prejudice company or shareholders or ability to pay creditors); affects the interests of a creditor or member of the company; and
 - 50 (c) a company's contravention of paragraph 256B(1)(a) (fair and reasonable test for share capital reduction) affects the interests of a member of the company.
- This subsection does not limit subsection (1) in any way.

- (1B) If the ground relied on in an application for an injunction is conduct or proposed conduct of a company or other person that it is alleged constitutes, or would constitute:
- (a) a contravention of paragraph 256B(1)(a) or (b), section 257A or paragraph 260A(1)(a); or
 - (b) a contravention of a provision of this Act involving the insolvency of the company because of:
 - (i) the company making a reduction of its share capital to which Division 1 of Part 2J.1 applies; or
 - (ii) the company buying back its shares; or
 - (iii) the company giving financial assistance to which Part 2J.3 applies;the Court must assume that the conduct constitutes, or would constitute, a contravention of that paragraph, section or provision unless the company or person proves otherwise.
- (2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by this Act to do, the Court may, on the application of:
- (a) ASIC; or
 - (b) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing;
- grant an injunction, on such terms as the Court thinks appropriate, requiring the first-mentioned person to do that act or thing.
- (3) Where an application for an injunction under subsection (1) or (2) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that that subsection applies.
- (4) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (5) The Court may discharge or vary an injunction granted under subsection (1), (2) or (4).
- (6) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (7) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
 - (b) whether or not the person has previously refused or failed to do that act or thing; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (8) Where ASIC applies to the Court for the grant of an injunction under this section, the Court must not require the applicant or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages.

- (9) In proceedings under this section against a person the Court may make an order under section 1323 in respect of the person.
- (10) Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.

Section 1324A Provisions relating to prosecutions

10 In the prosecution of a person for an offence in respect of a contravention of a provision of Chapter 5C, 6CA or 6D or Part 7.10, the Court may do either or both of the following:

- (a) grant an injunction under section 1324 against the person in relation to:
- (i) the conduct that constitutes, or is alleged to constitute, the offence; or
 - (ii) other conduct of that kind
- (b) make an order under section 1324B in respect of the person.

Section 1324B Order to disclose information or publish advertisements

Without limiting section 1324, if, on the application of ASIC, the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Chapter 5C, 6CA or 6D or Part 7.10, the Court may make either or both of the following orders against that person or a person involved in the contravention:

- 20 (a) an order requiring the person to whom it is directed to disclose, in the manner specified in the order, to:
- (i) the public; or
 - (ii) a particular person; or
 - (iii) a particular class of persons;
- the information, or information of a kind, that is specified in the order and is in the person's possession or to which the person has access;
- (b) an order requiring the person to whom it is directed to publish, at the person's own expense, in the manner and at times specified in the order, advertisements whose terms are specified in, or are to be determined in accordance with, the order.

30 Section 1325 Other orders

- (1) Where, in a proceeding instituted under, or for a contravention of, Chapter 5C, 6CA or 6D or Part 7.10, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, 6CA or 6D or Part 7.10, the Court may, whether or not it grants an injunction, or makes an order, under any other provision of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.
- 40 (2) The Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, 6CA or 6D or Part 7.10, or on the application of ASIC in accordance with subsection (3) on behalf of such a person or 2 or more such persons, make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or

any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

- 10
- (3) Where, in a proceeding instituted for a contravention of Chapter 5C, 6CA or 6D or Part 7.10 or instituted by ASIC under section 1324, a person is found to have engaged in conduct in contravention of Chapter 5C, 6CA or 6D or Part 7.10, ASIC may make an application under subsection (2) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct, but ASIC must not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.
- (4) An application under subsection (2) may be made within 6 years after the day on which the cause of action arose.
- (5) The orders referred to in subsections (1) and (2) are:
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- (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void ab initio or at all times on and after a specified day before the order is made; and
- (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after a specified day before the order is made; and
- (c) an order refusing to enforce any or all of the provisions of such a contract; and
- 30
- (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage; and
- (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage; and
- (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the person's own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage.
- 40
- (6) Where an application is made for an order under this section against a person, the Court may make an order under section 1323 in respect of the person.

Section 1325A Orders if contravention of Chapter 6, 6A, 6B or 6C

- (1) The Court may make any order or orders (including a remedial order) that it considers appropriate if a person:
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- (a) contravenes a provision of Chapter 6, 6A, 6B or 6C; or
- (b) contravenes a condition on a consent given by ASIC under section 652B; or
- (c) states in a notice under section 672B about securities that they do not know particular information about:
- (i) the securities; or
- (ii) someone who has a relevant interest in, or has given instructions in relation to, the securities.

Note 1: Section 9 defines remedial order.

Note 2: Sections 659B and 659C deal with court proceedings during and after a takeover bid.

- (2) The Court may make any order or orders (including a remedial order) that it considers appropriate if:
- (a) the consideration offered under a takeover bid is or includes securities; and
 - (b) the offers under the bid or the bidder's statement states or implies that the securities will be able to be traded on a financial market (whether in Australia or elsewhere) and:
 - (i) an application for admission to quotation is not made within 7 days after the start of the bid period; or
 - (ii) permission for admission to quotation is not granted within 7 days after the end of the bid period.

Note: Section 9 defines **remedial order**.

- (3) An order under this section may be made on application by the following:
- (a) ASIC;
 - (b) the company, or the responsible entity of the registered scheme, whose securities are involved in the contravention;
 - (c) a member or former member of that company or scheme;
 - (d) a person from whom the relevant interest in the securities were acquired;
 - (e) a person whose interests are affected by the contravention.

Section 1325B Court may order bidder to make offers

- (1) If a bidder making a takeover bid for a class of securities contravenes section 631 by failing to make offers under the bid within time and ASIC applies for an order under this section, the Court may:
- (a) order the bidder to send, to each holder of securities in that class, an offer to which the bidder's statement relates within a specified time; and
 - (b) make any ancillary orders it thinks appropriate including orders that the bidder:
 - (i) send notices setting out specified information with the offer; and
 - (ii) send copies of the notice within a specified period to the target and, if the target is listed, to the relevant market operator; and
 - (iii) lodge a copy of the notice with ASIC within a specified period.
- (2) Offers sent in accordance with an order under this section are taken to be made under a takeover bid.

Section 1325C Unfair or unconscionable agreements, payments or benefits

- (1) The Court may make orders under subsection (2) if:
- (a) a body corporate gives, or enters into an agreement to give, a director or secretary of the body corporate or a related body corporate a benefit (including a payment or an agreement to employ them, or engage their services, for a fixed period); and
 - (b) the agreement is entered into or the benefit is given:
 - (i) within 12 months after the start of the bid period for a takeover bid for the securities of the body corporate or a related body corporate; or
 - (ii) at a time when the directors of the body corporate have reason to believe that a takeover bid is to be made in respect of securities of the body corporate or a related body corporate; and
 - (c) the Court is satisfied that the agreement or benefit was unfair or unconscionable having regard to the interests of the body corporate.
- (2) The Court may:
- (a) declare the agreement, or any part of it, to be void or to have always been void; or
 - (b) direct a person to whom a benefit is given, or another specified person, to:

- (i) make a payment or transfer property to the body corporate; or
 - (ii) do any other act for the benefit of the body corporate; or
 - (c) make any other order it considers appropriate.
- (3) This section does not apply to an agreement or benefit that has been approved by an ordinary resolution of the body corporate (whether before or after the agreement was entered into or the benefit given) with no vote being cast by the person who is to receive the benefit or their associates.
- 10 (4) An order under this section may be made on application by:
- (a) the body corporate; or
 - (b) ASIC; or
 - (c) members who together hold shares carrying at least 10% of the votes attached to voting shares in the body corporate or a related body corporate; within 12 months, or any longer period that the Court thinks appropriate in the circumstances, after the agreement is entered into or the benefit given.

Section 1325D Contravention due to inadvertence etc

- (1) The Court may declare that any act, document or matter:
- (a) is not invalid merely because a person has contravened a provision of Chapter 6, 6A, 6B or 6C; and
 - (b) has had effect at all times as if there had been no contravention; if the Court is satisfied that the contravention ought to be excused in all the circumstances.
- (2) An application for an order under subsection (1) may be made by any interested person.
- (3) If the Court is satisfied that in all the circumstances a contravention of a provision of Chapter 6, 6A, 6B or 6C ought to be excused, the Court must not make an order under section 1325A, 1325B or 1325C other than:
- (a) an order restraining the exercise of voting or other rights attached to securities; or
 - (b) an order that an exercise of voting or other rights attached to securities be disregarded.
- (4) In determining whether or not a contravention of a provision by a person ought to be excused, have regard to the contravention being caused by any of the following:
- (a) the person's inadvertence or mistake;
 - (b) the person not having been aware of a relevant fact or occurrence;
 - (c) circumstances beyond the control of the person.
- 40 (5) This section applies notwithstanding anything contained in any other provision of this Chapter.

Section 1325E Orders to secure compliance

In order to secure compliance with an order under section 1325A, 1325B or 1325C, the Court may direct a person to:

- (a) do a specified act; or
- (b) refrain from doing a specified act.

Section 1326 Effect of sections 1323, 1324 and 1325

Nothing in any of sections 1323, 1324, 1324A, 1324B, and 1325 limits the generality of anything else in any of those sections.

Section 1327 Power of Court to punish for contempt of Court

Nothing in a provision of this Act that provides:

- (a) that a person must not contravene an order of the Court; or
- (b) that a person who contravenes an order of the Court contravenes a provision of this Act or is guilty of an offence;

affects the powers of the Court in relation to the punishment of contempts of the Court.

CORPORATIONS ACT 2001 (CTH) PART 9.5 - AMENDMENTS

Section 1318 was amended by Act No 103 of 2004, s 3 (Sch. 9(86)) with effect from 1 July 2004. The section was amended by the insertion of "or employee" after "officer" in sub-sections (4(a)) and (4(b)) and sub-section (5) was repealed. Section 1318 was again amended by Act No 126 of 2006, s 3 (Sch. 1(32)) with effect from 1 July 2007 which inserted the current sub-section (5). Section 1318 as currently in force appears below.

1318 Power to grant relief

- 10 (1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.
- 20 (2) Where a person to whom this section applies has reason to apprehend that any claim will or might be made against the person in respect of any negligence, default, breach of trust or breach of duty in a capacity as such a person, the person may apply to the Court for relief, and the Court has the same power to relieve the person as it would have had under subsection (1) if it had been a court before which proceedings against the person for negligence, default, breach of trust or breach of duty had been brought.
- (3) Where a case to which subsection (1) applies is being tried by a judge with a jury, the judge after hearing the evidence may, if he or she is satisfied that the defendant ought pursuant to that subsection to be relieved either wholly or partly from the liability sought to be enforced against the person, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge thinks proper.
- 30 (4) This section applies to a person who is:
- (a) an officer or employee of a corporation; or
 - (b) an auditor of a corporation, whether or not the person is an officer or employee of the corporation; or
 - (c) an expert in relation to a matter:
 - (i) relating to a corporation; and
 - (ii) in relation to which the civil proceeding has been taken or the claim will or might arise; or
 - (d) a receiver, receiver and manager, liquidator or other person appointed or directed by the Court to carry out any duty under this Act in relation to a corporation.
- 40 (5) This section does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note: Similar provision is made in relation to Aboriginal and Torres Strait Islander corporations under section 576-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Section 1321 was amended by Act No 126 of 2006, s 3 (Sch. 1(33)) with effect from 1 July 2007 which inserted sub-section (2) and the Note. Section 1321 as currently in force appears below.

1321 Appeals from decisions of receivers, liquidators etc.

- (1) A person aggrieved by any act, omission or decision of:
- (a) a person administering a compromise, arrangement or scheme referred to in Part 5.1; or
 - (b) a receiver, or a receiver and manager, of property of a corporation; or
 - (c) an administrator of a company; or
 - (ca) an administrator of a deed of company arrangement executed by a company; or
 - (d) a liquidator or provisional liquidator of a company;
- may appeal to the Court in respect of the act, omission or decision and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit.
- (2) Paragraph (1)(b) does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.

Note: Similar provision is made in relation to Aboriginal and Torres Strait Islander corporations under section 576-10 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Section 1322 was amended by Act No 103 of 2004, s 3, (Sch. 8(17)) with effect from 1 July 2004. The section was amended by the insertion of paragraph (3AA). Section 1322 has not been amended since that date. The section as currently in force appears below.

1322 Irregularities

- (1) In this section, unless the contrary intention appears:
- (a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and
 - (b) a reference to a procedural irregularity includes a reference to:
 - (i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and
 - (ii) a defect, irregularity or deficiency of notice or time.
- (2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.
- (3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.
- (3AA) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the inability of a person to access the notice of meeting,

unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.

Note: Under paragraph 249J(3)(cb), a company may, in certain circumstances, give a member notice of a meeting by notifying the member that the notice of meeting is available and how the member may access the notice of meeting.

- 10 (3A) If a member does not have a reasonable opportunity to participate in a meeting of members, or part of a meeting of members, held at 2 or more venues, the meeting will only be invalid on that ground if:
- (a) the Court is of the opinion that:
 - (i) a substantial injustice has been caused or may be caused; and
 - (ii) the injustice cannot be remedied by any order of the Court; and
 - (b) the Court declares the meeting or proceeding (or that part of it) invalid.
- (3B) If voting rights are exercised in contravention of subsection 259D(3) (company controlling entity that holds shares in it), the meeting or the resolution on which the voting rights were exercised will only be invalid on that ground if:
- (a) the court is of the opinion that:
 - (i) a substantial injustice has been caused or may be caused; and
 - (ii) the injustice cannot be remedied by any order of the court; and
 - (b) the court declares the meeting or resolution invalid.
- 20 (4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
- (a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;
 - (b) an order directing the rectification of any register kept by ASIC under this Act;
 - 30 (c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
 - (d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;
- and may make such consequential or ancillary orders as the Court thinks fit.
- (5) An order may be made under paragraph (4)(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.
- 40 (6) The Court must not make an order under this section unless it is satisfied:
- (a) in the case of an order referred to in paragraph (4)(a):
 - (i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
 - (ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or
 - (iii) that it is just and equitable that the order be made; and
 - (b) in the case of an order referred to in paragraph (4)(c)—that the person subject to the civil liability concerned acted honestly; and

- (c) in every case—that no substantial injustice has been or is likely to be caused to any person.

Section 1324B was amended by Act No 26 of 2010, s 3 (Sch. 1(30)) with effect from 1 August 2010. The Section was amended by the insertion of ", subsection 798H(1)" after "6D". Section 1324B as currently in force appears below.

1324B Order to disclose information or publish advertisements

Without limiting section 1324, if, on the application of ASIC, the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, the Court may make either or both of the following orders against that person or a person involved in the contravention:

- (a) an order requiring the person to whom it is directed to disclose, in the manner specified in the order, to:
- (i) the public; or
 - (ii) a particular person; or
 - (iii) a particular class of persons;
- the information, or information of a kind, that is specified in the order and is in the person's possession or to which the person has access;
- (b) an order requiring the person to whom it is directed to publish, at the person's own expense, in the manner and at times specified in the order, advertisements whose terms are specified in, or are to be determined in accordance with, the order.

Section 1325 was amended by Act No 118 of 2004, s 2 (Sch. 1(8)) with effect from 13 July 2004 which inserted sub-section (5A) and the Note. The section was amended again by Act No 26 of 2010, s 3 (Sch. 1(31), (32), (33)) with effect from 1 August 2010 which inserted ", subsection 798H(1)" after "6D" wherever it occurred. The section was further amended by Act No 42 of 2011, s 3 (Sch. 1(31)) with effect from 1 July 2011 which inserted "subsection 201P(1)" before "Chapter" wherever it occurred. The section as currently in force appears below.

1325 Other orders

- (1) Where, in a proceeding instituted under, or for a contravention of, subsection 201P(1), Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of subsection 201P(1), Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, the Court may, whether or not it grants an injunction, or makes an order, under any other provision of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.
- (2) The Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of subsection 201P(1), Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, or on the application of ASIC in accordance with subsection (3) on behalf of such a person or 2 or more such persons, make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in

part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

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- (3) Where, in a proceeding instituted for a contravention of subsection 201P(1), Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10 or instituted by ASIC under section 1324, a person is found to have engaged in conduct in contravention of subsection 201P(1), Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, ASIC may make an application under subsection (2) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct, but ASIC must not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.
- (4) An application under subsection (2) may be made within 6 years after the day on which the cause of action arose.
- (5) The orders referred to in subsections (1) and (2) are:
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- (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after a specified day before the order is made; and
- (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after a specified day before the order is made; and
- (c) an order refusing to enforce any or all of the provisions of such a contract; and
- (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage; and
- (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage; and
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- (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the person's own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage.

(5A) Subsections (1) and (2) have effect subject to section 1044B.

Note: Section 1044B may limit the liability, under an order under subsection (1) or (2) of this section, of a person for his or her contravention of section 1041H (Misleading or deceptive conduct) or involvement in such a contravention.

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- (6) Where an application is made for an order under this section against a person, the Court may make an order under section 1323 in respect of the person.