

## CHAPTER 9: OFFICERS, SENIOR MANAGERS AND EMPLOYEES

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### Overview

560. Recommendation 2 of the HIHRC identified some anomalies in the Corporations Act and the ASIC Act which has led to doubt about the application of provisions as they affect certain persons. The aim of Schedule 9 of the Bill is to ensure clear and consistent use of various terms by:

- correcting current anomalies in relation to the definition of 'officer';
- removing the definition of 'executive officer' and replace it with 'senior manager';
- removing the definition of 'examinable officer'; and
- clarifying the types of persons subject to obligations and duties under particular provisions.

561. The desired result is to clearly delineate classes of personnel who have duties and obligations under the Act (that is, officers, senior managers, and employees). The new class 'senior manager' will be a subset of 'officer' as its definition reflects limb (b) of the section 9 definition of 'officer'.

### The definition of 'officer'

562. Currently there are two definitions of the term 'officer' found in sections 9 and 82A of the Corporations Act respectively. The Bill will remove unnecessary overlap and potentially confusing operation of these provisions by repealing the section 82A definition of 'officer' (see item 8).

563. This will leave the section 9 definition as the sole definition of 'officer', and more importantly clarify exactly who is an 'officer' for the purposes of both the Corporations Act and the ASIC Act. Further, the proposed amendments clarify the intention that the Corporations Act is to state separately where 'employees' are subject to duties or obligations in particular provisions, and to not include 'employee' in the concept of an 'officer'. Where

particular provisions of the Corporations Act are intended to apply to 'employees', this will be explicitly stated.

564. Item 38 removes an explicit reference to section 82A from section 530A of the Corporations Act (which relates to officers helping liquidators).

#### **Issue 9.1**

The section 9 definition of 'officer' applies to 'corporations' (which includes 'bodies corporate' — see section 57A). The section 82A definition of 'officer' applies to 'bodies corporate' and 'entities'. Removing the section 82A definition of 'officer' will mean that the 'officer' definition will not apply to entities.

Section 64A defines the term 'entity' to include bodies corporate, partnerships, individuals, trustee/s.

Are there provisions in the Corporations Act where it is desirable to regulate 'officers of entities (other than bodies corporate)', such that they will need to be addressed if section 82A is to be removed?

565. Due to the amendments made to the definitions, a number of consequential amendments have been made in Schedule 9 of the Bill to ensure that the range of persons to whom the particular provisions apply is maintained.

### **'Employees'**

566. The 82A definition of 'officer' included an 'employee'. However, an 'employee' of a corporation will not have a role in corporate governance unless they can influence the decision-making process already codified in the section 9 'officer' definition. Consequently, it is undesirable to include an 'employee' in the definition of 'officer' and the section 9 definition reflects this notion.

567. There are a number of provisions however, where it is now necessary to expressly state that they apply to 'employees'. The aim of the following items is to add the term 'employee' for this purpose:

- Items 3 to 5; 10 to 18; 20 to 27; 29 to 37; 39 to 44; 47 to 50; 54; 61 to 71; and 73 to 79.

## 'Executive officer' and 'senior manager'

568. The need for the term 'executive officer' was based on the section 82A definition of 'officer', which included 'employees'. 'Executive officer' distinguished between officers who took part in management of the company and ordinary employees. The need for this distinction will no longer be necessary.

569. The term has been interpreted by courts<sup>1</sup> to cover a wide range of activities relating to management, where there is involvement in some kind of decision-making process. That wide approach has been narrowed in subsequent cases, but the general thrust of the court judgements was codified as part of the section 9 definition of 'officer'<sup>2</sup>.

570. The term 'executive officer' is unnecessary as a result of the amendments proposed above. It is already sufficiently encapsulated by subsection 9(b) definition of 'officer', and section 82A is to be removed so there is no need for such a distinction. Further the concept of being 'concerned in management...' as described by the definition of 'executive officer' is not easily definable, and subsequent reliance on judicial interpretation is unwelcome. Item 7 removes the definition of this term.

571. However, there are some uses of the term 'executive officer' that when exchanged for 'officer' may lead to an undesirable result. This is due to section 9 paragraphs (c) to (e) which identify certain persons such as receivers and liquidators as 'officers'.

572. Item 78 of Schedule 1, Part 3 of the Bill will define a new sub-class of 'officer' called a 'senior manager'. It is envisaged that the sections that currently rely on 'executive officer' are better served by the new term 'senior manager'.

573. The term 'senior manager' is also utilised in Schedule 1, Part 3 (*Auditor appointment, registration, independence and rotation requirements*) and Schedule 5 (*Remuneration of directors and executives*) of the Bill. The construction of 'senior manager' allows the definition to be applied in relation to partnerships, trusts and joint ventures (as well as corporations) for the purposes of applying the proposed section 300A to related entities of corporations. Amendments to the proposed section 300A are discussed further in Chapter 5 of this commentary.

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1 *CCA (Vic) v Bracht* (1988) 14 ACLR 728; Later cases such as *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474, took a more narrow view, and were followed by *Sycotex Pty Ltd v Baseler* (1994) 122 ALR 531 & *Standard Chartered Bank v Antico* (1995) 131 ALR 1.

2 The section 9 definition of 'officer' formed part of the CLERP amendments that came into effect in March 2000.

574. The following items replace the term 'executive officer' with 'senior manager':

- Items 2; 45; 46; 52; 53; and 55 to 60.

### **'Examinable officer'**

575. The term 'examinable officer' as defined in section 9 is sufficiently covered by the section 9 'officer', so separately defining this term will be unnecessary. In the interests of simplification and clarity, item 6 removes the definition of 'examinable officer' and item 51 removes the only instance of the term 'examinable officer', found in section 596A, by amending it to refer to 'officer'.

### **The ASIC Act**

576. Section 5 of the ASIC Act also contains a definition of 'officer', which has elements of both the section 9 and section 82A definition contained in the Corporations Act. This is inconsistent with the amendments proposed above and is to be amended to achieve consistency with the Corporations Act.

577. Item 1 repeals the definition of 'officer' in the ASIC Act. In light of paragraph 5(2)(b) of the ASIC Act, which provides that 'an expression that is used but not defined in this Act and... is used in the Corporations Act has the same meaning in this Act as the Corporations Act', the ASIC Act will be interpreted using the definitions of 'officer' and 'senior manager' in the Corporations Act.

578. Items 2-5 reflect the consequential amendments concerning 'employees' and 'executive officers' required to achieve consistency with the amendments set out above.

#### **Issue 9.2**

Item 4 adds 'employee' to the scope of subsection 59(7) of the ASIC Act. Are there any problems with including the concept of an 'employee' with respect to unincorporated associations?

### **Transitional arrangements**

579. There are no special transitional provisions proposed in relation to this Schedule.