



*ONE STOP UPDATE RE-RUN*

*Transactions between Companies  
and their Directors and  
Shareholders*

By

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**TRANSACTIONS BETWEEN COMPANIES  
AND THEIR DIRECTORS AND SHAREHOLDERS**

**(Remunerations, dividends, Solvency Certificates,  
Certificates of Fair Value, Major Transactions, etc etc etc .....)**

*Prepared and presented by Marsden B. Robinson FCA, Auckland*

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## INTRODUCTION

Application of some of the provisions of the Companies Act 1993, in particular those relating to solvency issues, is creating difficulties for Chartered Accountants in their endeavours to advise corporate clients.

These guidelines, developed by practitioners (with assistance from members with legal and academic backgrounds), are issued to provide some assistance on this complex subject. Particular thanks are due to Mike Whale of Phillips Fox (Auckland) whose guidance has been invaluable

These are guidelines; they have not been tested in Court; they are considered "best practice" at the time of writing. Expert advice should be sought if doubt exists.

Some procedures (eg treating remunerations to shareholder/directors as both shareholder remuneration and also as director remuneration) are dictated by considerations of prudence where the Act and case law leave room for doubt as to the minimum requirement.

## OBJECTIVES

The objectives of these notes are:

- 1 To ensure that Practitioners give correct advice to clients, to comply with the Companies Act 1993.
- 2 To create links between Companies and their Directors, Shareholders, (and family members and associated entities who are neither Directors nor Shareholders), so that they are better able to withstand attack from:
  - a) Receivers and Liquidators, over salaries, management fees, drawings, and overdrawn current accounts, etc
  - b) The IRD over the deductibility of salaries, management fees etc.
- 3 To protect Practitioners from disgruntled clients (whose companies have failed and who have had to refund salaries, dividends etc), and who subsequently complain "You didn't tell me I was exposed to that risk" or, worse still, "You never told me what documentation I should have put in place to protect myself. You were negligent. I'm going to sue you".

## EXAMPLES

In the examples using Bloggs Pharmacy Ltd:

	Director	Shareholder	Employee	Contractor	Director's entity	Shareholder's entity
William Bloggs	X	X	X			
Jane Doe	X	X				
Jane Doe Ltd				X	X	X
Mary Bloggs		X	X			
John Smith		X				
John Smith Ltd				X		X
Johnny Bloggs			X			

Jane Doe Ltd is a Company owned by Jane Doe, which is taking a management fee for Jane Doe's services to the Company.

John Smith Ltd is a Company owned by John Smith which is taking a management fee for John Smith's services to the Company.

Johnny Bloggs is the son of William and Mary, who will become an employee during the year ending 31 March 1999.

### Disclaimer

*Neither the author nor the Institute of Chartered Accountants of New Zealand, accept any liability to any person relying on this information.*

## DEFINITIONS (The Companies Act 1993)

### DISTRIBUTION - Section 2 (1) Defines A Distribution As:

*“Distribution”, in relation to a distribution by a company to a shareholder, means -*

(a) *The direct or indirect transfer of money or property, other than the company's own shares, to or for the benefit of the shareholder;*

or (b) *The incurring of a debt to or for the benefit of the shareholder*

*- in relation to shares held by that shareholder, and whether by means of a purchase of property, the redemption or other acquisition of shares, a distribution of indebtedness, or by some other means.*

### SOLVENCY - Section 4 (1) (a) & (b) Defines The Solvency Test As:-

*..... a company satisfies the solvency test if -*

(a) *The company is able to pay its debts as they become due in the normal course of business;*

and (b) *The value of the company's assets is greater than the value of its liabilities including contingent liabilities.*

“In the **ordinary** course of business” has been interpreted in Insolvency Case law to mean the company must be in a position to meet its maturing debt obligations. Payment is considered due on the agreed contract date or such later date as may have been negotiated between the debtors company and each creditor. A practical test is probably “Can the company pay its debts on a basis that (at worst) leaves none of its creditors more than mildly unhappy i.e with none actually threatening to initiate recovery proceedings or to cut off credit”.

### REMUNERATION AND OTHER BENEFITS (Summary) - Section 161 (To Directors, not to Shareholders)

(1) *The Board ..... may, subject to ..... the Constitution, authorise -*

(a) *..... remuneration ..... to a director*

(b) *..... loans ..... to a director.*

*if the Board is satisfied that to do so is fair to the company*

(2) *..... particulars ..... are entered in the Interests Register*

(4) *Directors who vote in favour ..... must sign a Certificate stating that, in their opinion, the ..... is fair to the company, and the grounds for that opinion.*

(5) *Where a payment is made ..... and either*

(a) *The provisions of (1) and (4) have not been complied with*

or (b) *Reasonable grounds did not exist for the opinion given under subsection (4)*

*..... the director ..... to whom the payment is made ..... is personally liable to the company for the amount of the payment ..... except to the extent to which he or she proves the payment ..... was fair to the company .....*

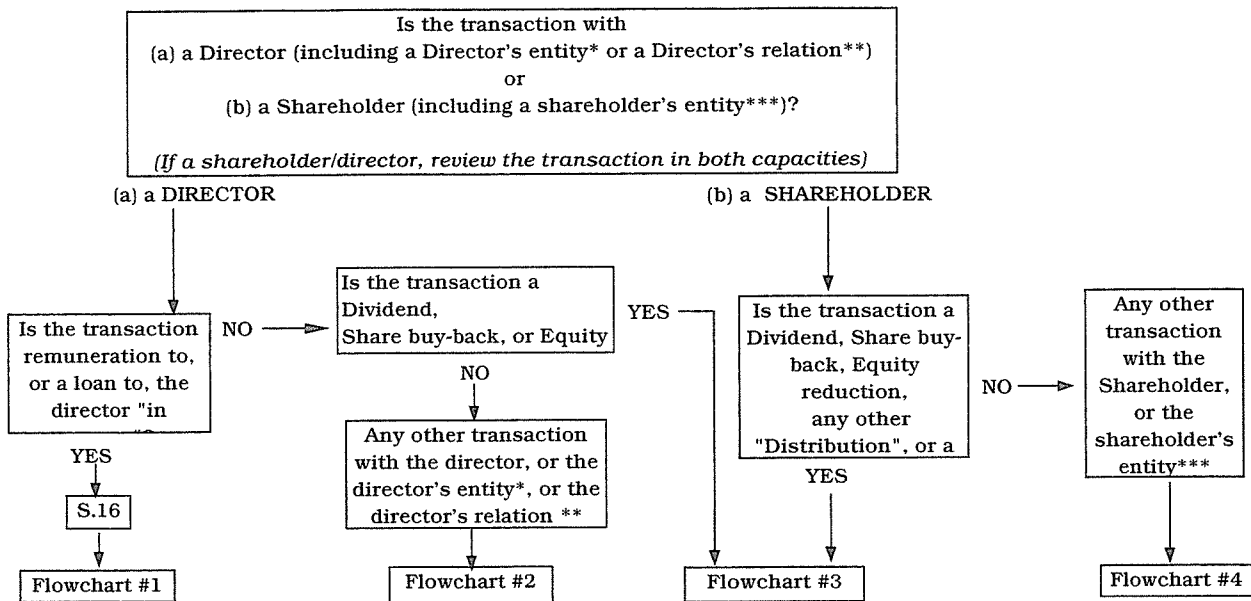
(6) *Where a loan is made under subsection (1) .....*

and (a) *The provisions of (1) and (4) have not been complied with*

or (b) *Reasonable grounds did not exist for the opinion given under subsection (4)*

*the loan become immediately repayable ..... notwithstanding the terms of any agreement*

# FLOWCHART SELECTOR



\* Director's Entity: Company, Trust, Partnership etc in which the director has an interest or connection

\*\* Director's relation: Director's parent, child, or spouse, or a Company, Trust, Partnership etc in which they have an interest or connection

\*\*\*Shareholder's Entity: Company, Trust, Partnership etc in which the shareholder has an interest.

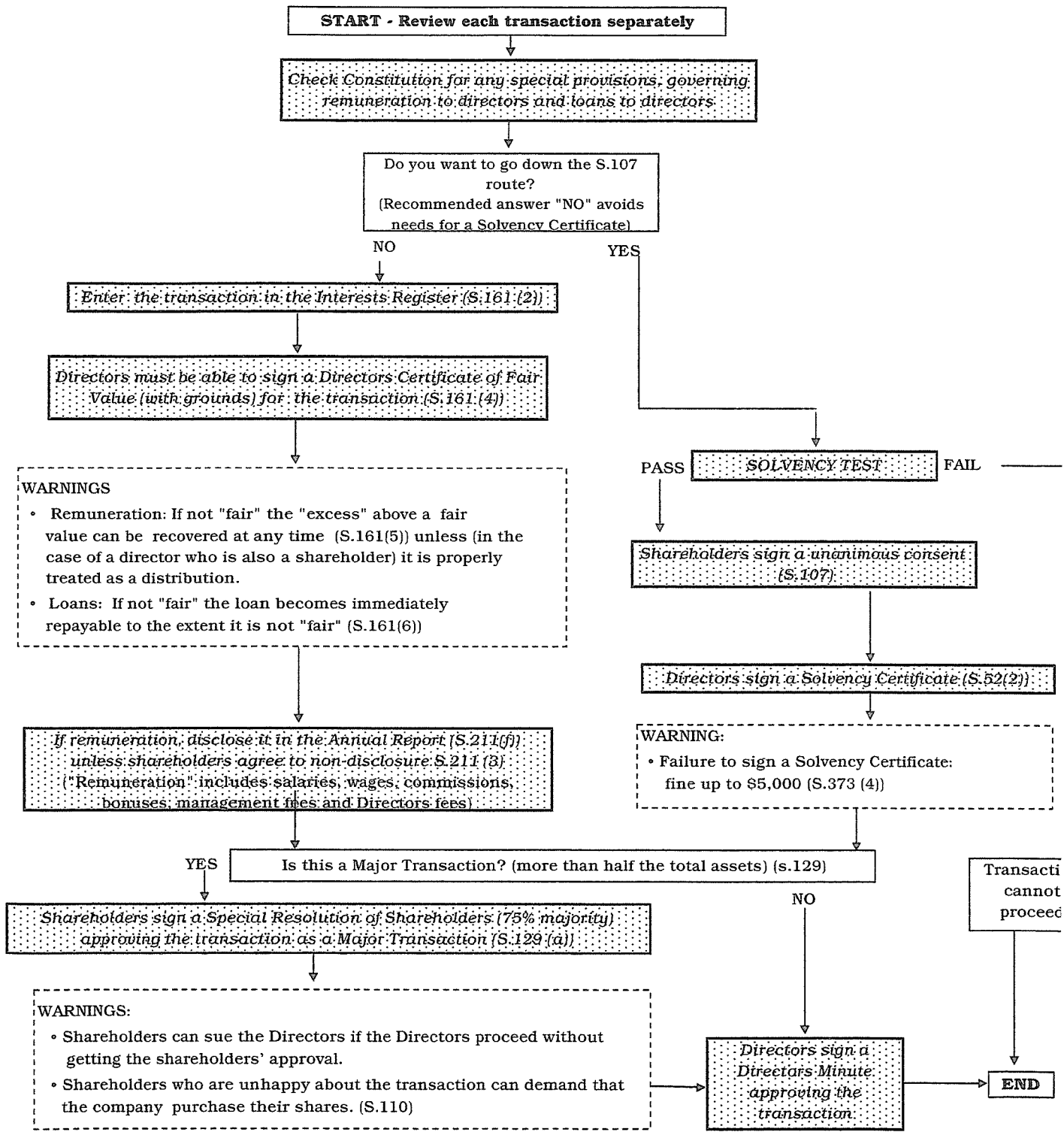
TRANSACTION	TRANSACTION WITH						
	A	B	C	D	E	F	G
	Shareholder (individual) who is not a Director	Entity that is itself a shareholder	Entity in which a Shareholder (who is not a Director) has an interest	Shareholder (individual) who is also a Director	Entity in which a shareholder/director is "interested"	Director (individual) who is not a Shareholder	Entity in which a Director is "interested" or relation* of a Director
Amalgamation with another Co.	N/A	4	4	N/A	2 and 4	N/A	2
Asset purchased from	4	4	4	2 and 4	2 and 4	2	2
Asset sold to	4	4	4	2 and 4	2 and 4	2	2
Bonus (remuneration) paid to (individual)	4	N/A	N/A	1 and 4	N/A	1	N/A
Borrowing from, with/without interest	4	4	4	2 and 4	2 and 4	2	2
Buy-back of shares	3	3	N/A	2	2 and 3	N/A	2
Commission paid to	4	4	4	1 and 4	2 and 4	1	2
Compensation / loss of office (Dir.indvd.)	N/A	N/A	N/A	1	N/A	1	N/A
Director's fees paid to (individual)	N/A	N/A	N/A	1	N/A	1	N/A
Dividend paid to	3	3	N/A	3	3	N/A	3
Equity reduction	3	3	N/A	2	2 and 3	N/A	2
Fees paid to	4	4	4	1 and 4	2 and 4	1	2
Guarantee of outside debt	3	3	3	1 and 3	2 and 3	1	2
Loan to, with/without interest	4	4	4	1 and 4	2 and 4	1	2
Management fees paid to	4	4	4	1 and 4	2 and 4	1	2
Outside debt, guarantee of	3	3	3	1 and 3	2 and 3	1	2
Remuneration paid to (individual)	4	N/A	N/A	1 and 4	N/A	1	N/A
Salary paid to (individual)	4	N/A	N/A	1 and 4	N/A	1	N/A
Service bought from (not remuneration)	4	4	4	2 and 4	2 and 4	2	2
Service supplied to	4	4	4	2 and 4	2 and 4	2	2
Subvention payment to another Co.	N/A	3	3	N/A	2 and 3	N/A	2
Wages paid to (individual)	4	N/A	N/A	1 and 4	N/A	1	N/A

**DIRECTORS (regardless of shareholding) S.161**

#1

**REMUNERATION, LOANS AND GUARANTEES OF LIABILITIES**

(received in person, ie not paid to entities in which directors have an interest)



**NOTE:** (1) If a person is a director and also a shareholder, each transaction must be reviewed in both capacities. (2) For tax purposes a director who is not a shareholder cannot get a N/D salary. 63 day rule applies.

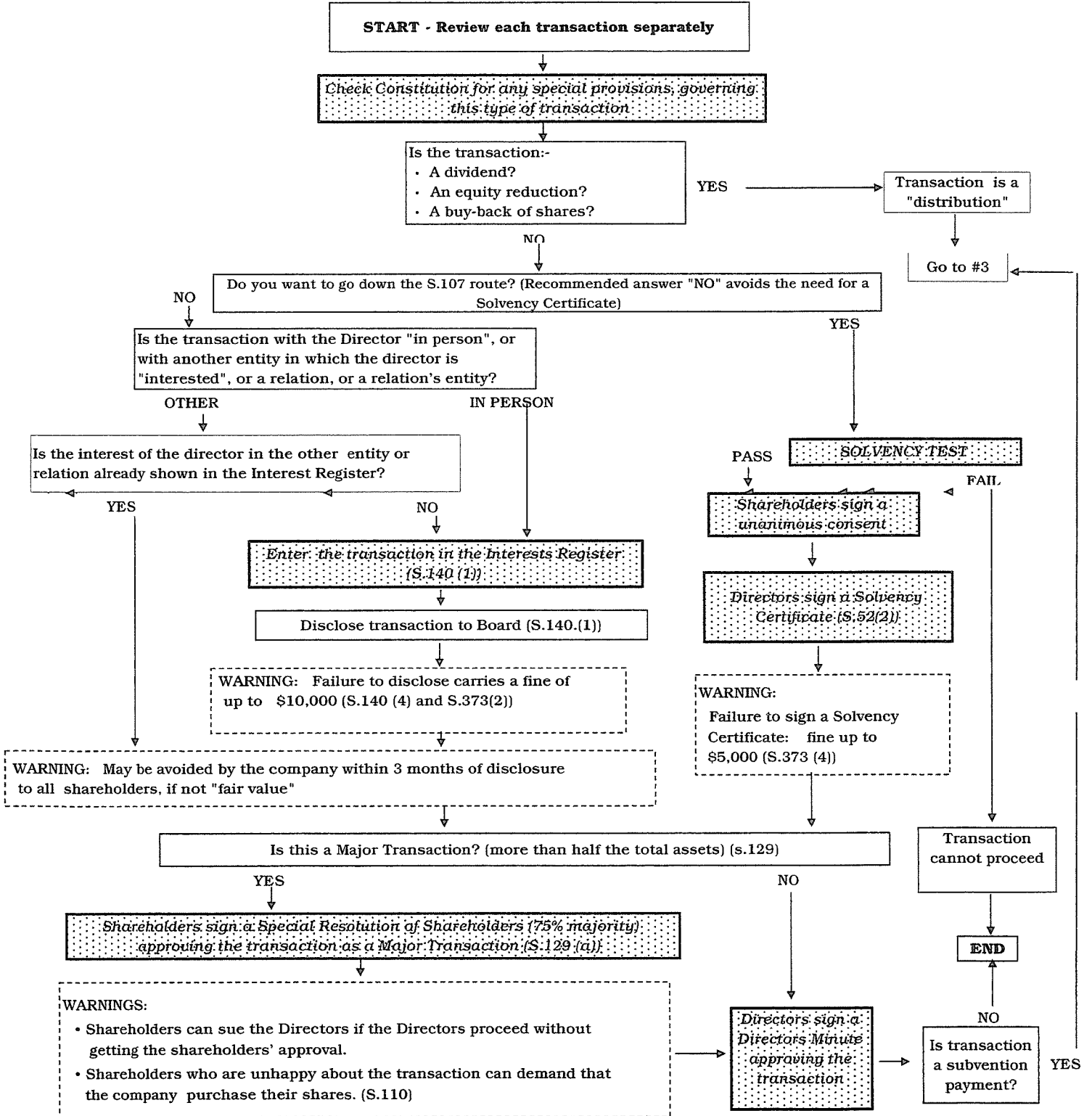
**DIRECTORS (regardless of shareholding) -**

#2

1. Transactions (other than remunerations or loans) with directors "in person"
2. Transactions with entities in which the director is "interested"
3. Relations of Directors.
4. Transactions in which a director is otherwise directly or indirectly materially interested.

S.139 covers transactions a director

- (a) Is a party to or will derive material financial benefit from.
- (b) Has a material financial interest in the other party, or in a person who may derive material financial benefit from.
- (c) Is a director, officer, or trustee of the other party.
- (d) Is the parent, child, or spouse of the other party, or of a person who may derive material financial benefit from..

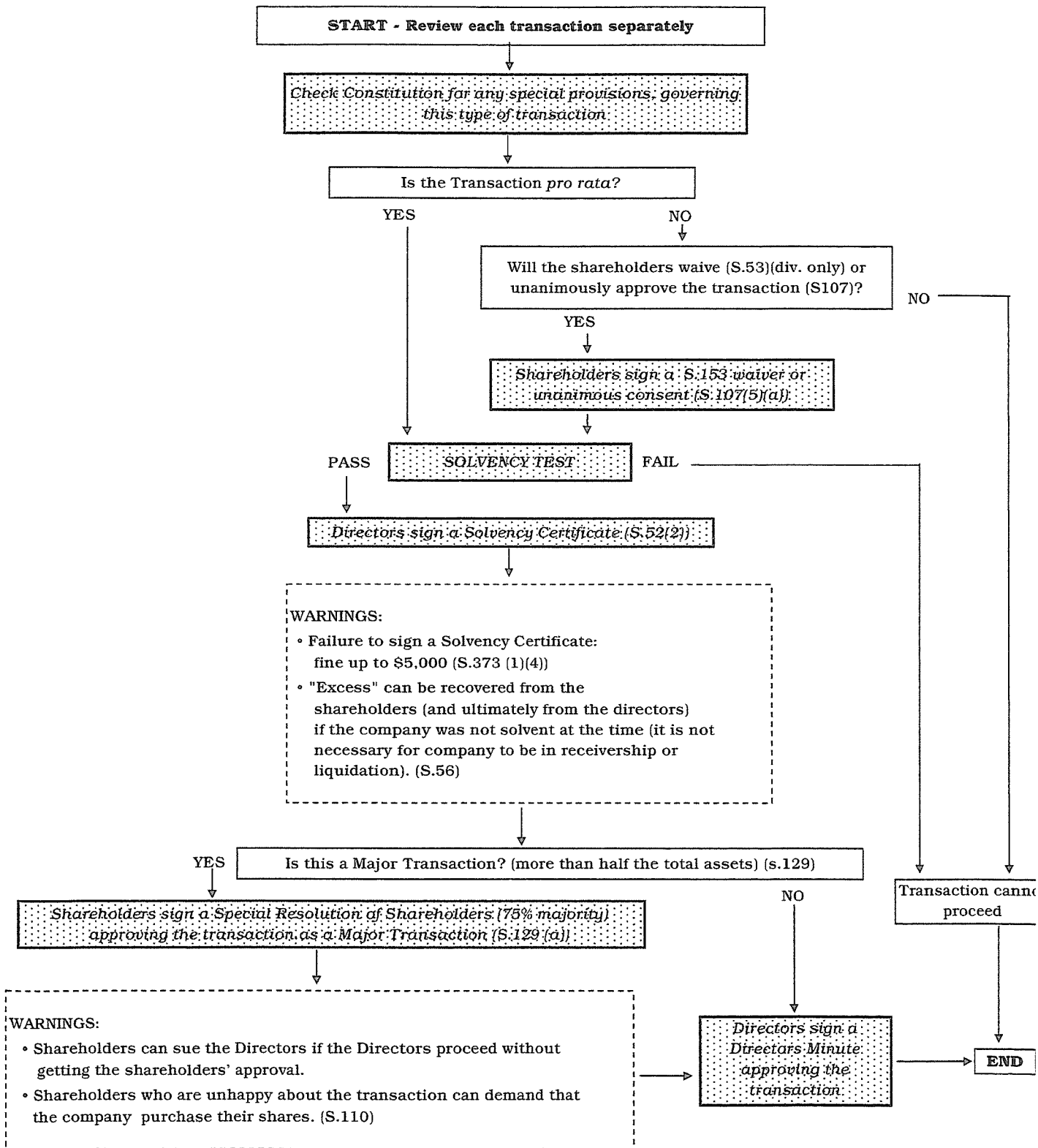


**NOTE: If a person is a director and also a shareholder, each transaction must be reviewed in both capacities.**

**DISTRIBUTIONS**

#3

Dividends, share Buy-backs, Equity reductions, Subvention Payments, Forgiveness of a shareholder's debt to the company, payment or guarantee by the company of a shareholder's outside debt, other distributions.



## SHARE BUY-BACK or EQUITY REDUCTION?

### **GIVEN:**

A company has an Equity consisting of 1,000 fully paid shares

The *revalued* net assets are \$250,000, and therefore the Equity (at this time) is deemed to be \$250,000

The shares therefore have a value of \$250 each ( $\$250,000 \div 1,000$ ), at this time, for buy-back or further issue purposes.

The company has \$50,000 of surplus cash that it wishes to pay to the shareholders.

### ***The company has two options:***

#### **(a) BUY-BACK**

Buy-back 200 shares at \$250 each. (total cost \$50,000)

This leaves the company with an Equity of 800 shares worth \$250 each, ie \$200,000, matching the net asset position of \$200,000.

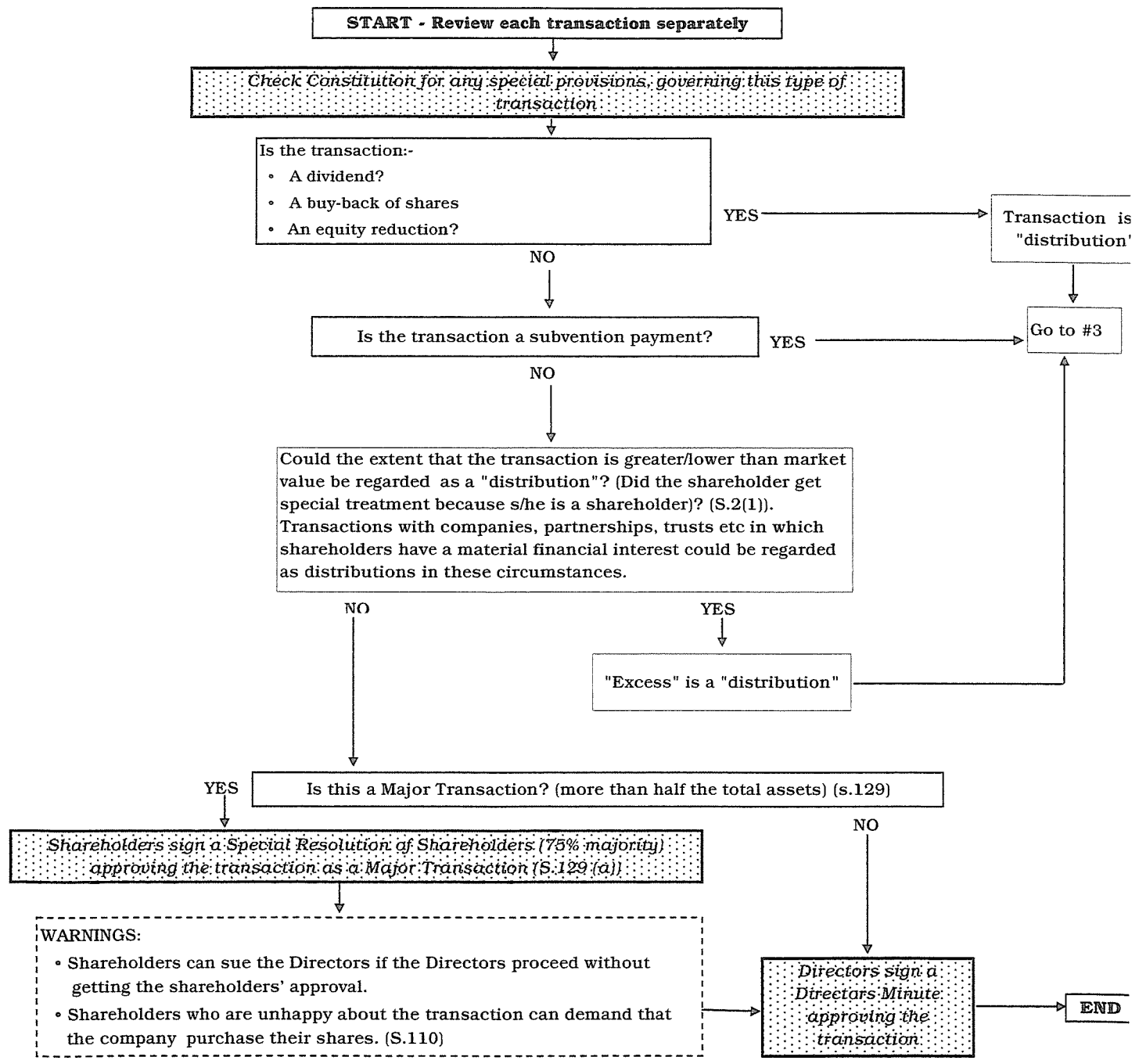
#### **(b) EQUITY REDUCTION**

Repay \$50 per share on 1,000 shares. (total cost \$50,000)

This leaves the company with an Equity of 1,000 shares worth \$200 each, ie \$200,000, matching the net asset position of \$200,000.

#4

**SHAREHOLDERS (regardless of Directorship) - REMUNERATIONS, AND OTHER TRANSACTIONS  
LOANS, BORROWINGS, SALE OR PURCHASE OF ASSETS, PAYMENT OR CHARGING OF INTEREST ETC**



**NOTE:** If a person is a director and also a shareholder, each transaction must be reviewed in both capacities.

Use this letter to cover salaries to Directors, whether or not they are also shareholders. Its purposes are:

- \* To ensure that the client is fully informed of the requirements of the Act, and the potential consequences.
- \* To provide the Accountants with an acknowledgment of the advice given.

The Director/s and Shareholder/s  
 BLOGG'S PHARMACY LIMITED  
 P O Box 12-345  
 Sixville

18 June 1998

**RE: DIRECTORS REMUNERATIONS**

With this letter we are handing you a [proposed] / [draft] Annual Report for your company, for the year ending 31 March 1998. Our suggestion, subject to the considerations set out below, is that the following remunerations be credited to the working Directors (and to their associated companies etc, if applicable):

William E Bloggs	\$62,500
Jane Doe Ltd	\$75,000

In the past, under the 1955 Companies Act, you could simply be credited with these remunerations, with no more formality than a Directors' Minute.

The Companies Act 1993 requires that if remunerations are paid to working Directors (whether or not they are Shareholders), the Directors have to sign a certificate that the remunerations are "fair to the company", and their grounds for making that decision. It is up to you, as directors of your company, to satisfy yourselves that these remunerations are "fair to the company". It is an offence under the act not to sign the Certificate.

If the company should go into receivership or liquidation at some time in the future, and if the Liquidator or Receiver came to the conclusion that these remunerations were not "fair value to the company" for the services supplied by the Directors, he might have legally valid grounds to demand a refund of any part considered to be excessive. Your own shareholders have the same right at any time, not just when the company is in trouble.

Some other provisions of the Act are unclear; their precise meaning might not be determined until there have been some test Court cases, which may take several years.

If you wish these remunerations to be credited to the Directors, as set out above, please have all directors sign the instruction below. You will need to sign a Certificate of Directors as to Fair Value, which we will prepare for you.

We trust the matters set out above are clear and we urge you to consider them carefully. Should you or any director wish to discuss any aspect further with us, please do not hesitate to do so.

Yours faithfully

.....

*If/We have read and considered the contents of this letter. Having done so, we are of the opinion that the remunerations suggested above are fair to the company and instruct you to proceed with the crediting of them remunerations set out above to the Current Accounts of the Directors. If/We understand that if the company should go into receivership or liquidation, this could result in a claim for their refund, if they were held not to be "fair to the company" for the services supplied by the Directors.*

Dated \_\_\_\_\_

DIRECTOR/S ..... William E. Bloggs  
 ..... Jane Doe

**BLOGG'S PHARMACY LIMITED**

**CERTIFICATE OF DIRECTORS AS TO FAIRNESS**

CERTIFIED: That all remunerations paid or payable to the Directors of the company, as set out in the Resolution of Directors dated \_\_\_\_\_ are fair to the company.

The grounds for this opinion are that the amount/s is/are commensurate with the experience, time, effort, knowledge, skills, dedication, responsibilities, connections, [*past inadequate remuneration*] expertise, stress, risks, leadership, and lack of tenure, provided to the company by the recipient/s.

CERTIFIED: That any advances made by the company to the director/s, shown in the Annual Report for the year ended 31st March 1998 and any advances made during the subsequent financial years are fair to the company; the grounds for this opinion are that such advances carry interest at a rate that is fair value to the company being not less than the rate specified by the Inland Revenue Department for Fringe Benefit Tax purposes.

Signed this \_\_\_\_\_ day of \_\_\_\_\_

**DIRECTORS**

..... William E. Bloggs

..... Jane Doe

*To be signed by all directors*

Use this letter for remunerations paid to working shareholders whether or not they are Directors. Its purposes are

- \* To ensure that the client is fully informed of the requirements of the Act, and the consequences of breaching them.
- \* To provide the Accountants with an acknowledgment from the client of the advice given.

The Director/s and Shareholder/s  
BLOGG'S PHARMACY LIMITED  
P O Box 12-345  
Sixville

18 June 1998

**RE: SHAREHOLDERS' REMUNERATIONS**

With this letter we are handing you a [proposed] / [draft] Annual Report for your company, for the year ending 31 March 1998. Our suggestion, subject to the considerations set out below, is that the following remunerations be credited to the working Shareholders (and to their associated companies etc, if applicable):

William E Bloggs	\$62,500
Jane Doe Ltd	\$75,000
Mary Bloggs	\$38,000
John Smith Ltd	\$49,000

In the past, under the 1955 Companies Act, you could simply be credited with these remunerations, with no more formality than a Minute.

Some provisions of The Companies Act 1993 are unclear; their precise meaning might not be determined until there have been some test Court cases, which may take several years.

One of the areas of uncertainty is whether remunerations taken by shareholders (whether or not they are Directors) who work for a company, constitute a "Distribution" in terms of the Act. At this stage, most Solicitors and Accountants are taking the view that they probably do, but only to the extent that they exceed reasonable remuneration that would be paid to an arm's-length employee doing the same job. (This even applies to shareholder employees who are paid a regular salary from which PAYE has been deducted).

As an example, if a reasonable remuneration (taking into account hours worked, skills, experience etc) is \$40,000, and a shareholder is paid \$60,000, the additional \$20,000 is almost certainly a Distribution.

The question which you have to consider is whether the above remunerations may in part be "Distributions" in terms of The Companies Act 1993. If you are confident that they are not excessive then the Distribution/Solvency Certificate issue does not arise, and you can ignore the second page of this letter; please have all directors sign the instruction below:

*I/We have read and considered the contents of this letter. Having done so we are of the opinion that the remunerations set out above are not excessive, and instruct you to credit them to the current accounts of the Shareholders.*

**DIRECTOR/S** ..... William E. Bloggs  
..... Jane Doe

Dated \_\_\_\_\_

If you feel that part of the above salaries may be excessive, and might therefore be a Distribution please read the notes on the next page.

*continued.....*

continuation from Page 1

**DISTRIBUTIONS AND SOLVENCY CERTIFICATES**

The Act provides that before a “Distribution” is made, the Directors must sign a certificate (known as a “Solvency Certificate”) which certifies that in their opinion the company:

- (a) Is solvent (ie it can pay its debts as they arise in the normal course of business),
- and
- (b) Will be in a position, after making the Distribution, of having the value of its assets exceed its liabilities (including contingent liabilities).

The Directors must have reasonable grounds for their opinions.

It is an offence under the Act if the Directors do not sign a Solvency Certificate in circumstances when they should. Note that the tests apply at the time the distribution is made, not at the previous Balance Date.

If the company makes a Distribution without the directors signing a Solvency Certificate, or with the Directors signing a Solvency Certificate when the company does not meet both limbs of the Solvency Test, then, if the company goes into liquidation, the Liquidator can demand a refund of the Distributions from the shareholders who received them, and, in some circumstances, from the Directors themselves.

If you wish these remunerations to be credited to the Shareholders as set out on the previous page, your Directors must sign a Solvency Certificate. To do this, they should satisfy themselves that (a) and (b) above apply to the company.

Whether your company meets test (a) is a decision for your directors.

For test (b), if you wish, we will help you to compile the assets and liabilities of your company; to do this, you will need to supply us with details of creditors, debtors, stocks, the market values of fixed assets and investments, whether there are any contingent liabilities etc.

We trust the matters set out above are clear and we urge you to consider them carefully. Should you or any director wish to discuss any aspect further with us, please do not hesitate to do so.

Yours faithfully

.....  
Chartered Accountants

**REMUNERATIONS (salaries etc) TO DIRECTORS AND SHAREHOLDERS****ABRIDGED CHECKLIST****RECIPIENT** (*Review each remuneration individually*)**SHAREHOLDER/DIRECTOR**

Follow *both* of the procedures set out below.

**DIRECTOR** (Regardless of whether or not s/he is a shareholder)

1. Write to client advising consequences of paying/crediting “unfair” remuneration (P.9).
2. Assuming directors are happy that remunerations are fair:
  - (a) Enter in Interests Register
  - (b) Disclose in Annual Report (unless shareholders have unanimously resolved not to)
  - (c) Prepare Directors Certificate of Fair Value (P.10)
  - (d) If remuneration greater than 50% of company’s assets, prepare a Special Resolution of Shareholders, to approve as a Major Transaction.
  - (e) Approve by Directors Minute
3. If not fair, proceed via S.107 shareholders unanimous approval (if possible) and Solvency Test

**SHAREHOLDER** (Regardless of whether or not s/he is a Director)

1. Write to client advising consequences of paying/crediting “excessive” remuneration (P.11).
2. Assuming directors are happy that remunerations are not excessive.
  - (a) If remuneration greater than 50% of company’s assets, prepare a Special Resolution of Shareholders, to approve as a Major Transaction.
  - (b) Include in annual Directors Minute
3. If “excessive” run Solvency Test and prepare Solvency Certificate.

## DIVIDENDS, BUY-BACK OF SHARES, EQUITY REDUCTIONS

### ABRIDGED CHECKLIST

1. Check Constitution for any special provisions.
2. Carry out Solvency Test. (B)
3. Directors sign Declaration of Solvency. (P.21)
4. Shareholders sign a Special Resolution if transaction more than 50% of the company's assets. (P19)
5. Directors sign a resolution.

Note:

- If not *pro rata*, the unanimous consent of shareholders is needed.
- Watch the tax implications.
- A share buy-back must be specifically permitted by the Constitution or approved by a unanimous resolution of shareholders.

**BLOGG'S PHARMACY LIMITED**

**RESOLUTION OF DIRECTOR/S**

Resolved that:

1. The Annual Report of the company for the year ended 31st March 1998 dated 11 June 1998 be approved and adopted, and that a copy be forwarded to every shareholder.
2. The amount/s set out below, which is/are shown as an expense in the Annual Report, being remuneration paid or to be paid or to be credited to the person or persons or entities named below for their services to the company during the period covered by the Annual Report, pursuant to a resolution of the directors dated 29 May 1997, be confirmed. Any variation between these amounts and those set out in the said resolution of directors is hereby approved.

William E Bloggs	\$62,500
Jane Doe Ltd	\$75,000
Mary Bloggs	\$38,000
John Smith Ltd	\$49,000

For the purposes of this resolution and other resolutions in this minute 'remuneration' includes but is not limited to directors fees, salaries, wages, bonuses, commissions, management fees, and the like.

3. The appointment of the following as employees of the company or contractors to it for the years ending 31st March 1999 and 31 March 2000, is approved and confirmed: William E. Bloggs, Jane Doe Ltd, Mary Bloggs, John Smith Ltd, Johnny Bloggs Jnr.
4. The total remuneration to be paid and/or credited to the person(s) and entity/s set out in Resolution 3 and any other working director or shareholder as remuneration for their services (while such services continue) to the company for the year ended 31st March 1999 shall be precisely quantified when the Financial Performance of the company for the year ending 31st March 1999 has been determined. However that total remuneration shall not be less than the greater of:

- (a) The net profit of the company (before deducting the directors and shareholders and entities remuneration)
- or (b) The total of the amounts shown in resolution 2

plus in each case all drawings taken by each person during the year ended 31st March 1999 and any amounts owing to the company by those persons and entities at 31st March 1998, unless that/those person(s) or entities shall in their absolute discretion agree to accept lesser sums. Amounts paid to and drawings taken by each person and entity during the year ended 31st March 1999 are part payment of their remuneration. This resolution also applies to the year ended 31st March 2000 unless changed by a subsequent resolution of the Board.

5. The Director/s certify/s that in his/her/their opinion the above remuneration/s paid or payable to those persons who are directors is /are fair to the company on grounds that it/they are commensurate with the experience, time, effort, knowledge, skills, dedication, responsibilities, connections [*past inadequate remuneration*] and lack of tenure provided to the company by the recipient/s, and the stress to which they are subjected..
6. The company acknowledges the provision / continuation of a guarantee to its bankers and / or financiers by the following persons and/or entities during the year ended 31 March 1998 and, in consideration of such guarantee/s, a guarantee fee/s be approved for the said year as follows:-

William E Bloods	\$2,000
Jane Doe	\$2,000

and for the years following, in consideration of their continuation of such guarantee/s, the above person/s continue to be paid guarantee fee/s at the same rate as above, accruing daily, until amended by the company.

7. A dividend of \$25,000 be paid or credited on 15 June 1998, fully imputed.
8. If there are amounts owing by the company to any director or shareholder or entity during the years ended 31st March 1999 or 31st March 2000, for advances or loans by them to the company, for credit balances in current accounts, for undrawn remuneration or for any other reason whatsoever, the company pay interest on those amounts at a rate that in the opinion of the Director/s, is fair to the company and also reflects the risk to the lender/s, unless the lender/s at their discretion, agree to accept a lesser or zero rate for any one year. The interest rate so determined shall not exceed the company's bank overdraft rate at the time the interest is paid, plus 10%.
9. Any advances made by the company to any director or shareholder or entity as shown in the 1998 Annual Report, and any further advances made during the years ending 31 March 1999 and 31st March 2000 are approved. The company must charge interest on those advances at a rate determined by the director(s) which is fair value to the company, being not less than the rate specified by the Inland Revenue Department for Fringe Benefit Tax purposes.
10. If these resolutions are passed at a meeting, any irregularities in calling the meeting are waived.

Dated \_\_\_\_\_

**DIRECTOR/S** ..... William E. Bloggs

..... Jane Doe

**EMPLOYEES/CONTRACTORS** We accept the provisions dealing with remuneration

.....  
 William E. Bloggs (employee)                      Mary Bloggs (employee)                      John Smith Ltd (contractor)

.....  
 Jane Doe Ltd (contractor)                      Johnny Bloggs Jnr (employee)

**COMMENTARY ON RESOLUTION OF DIRECTORS (on Page 15)**

**NOTE:**

- (a) If the company has a Constitution, changes may be required to some resolutions to ensure compliance with the provisions of that Constitution.
- (b) If any of the transactions referred to in the resolutions are major transactions, a special resolution of shareholders will also be required.

Clause 1:

Formal adoption of the Annual Reports, identified by date to distinguish the version actually adopted from various prior drafts.

Clause 2:

Approval of remuneration paid to directors, shareholders, family members and associated entities, tied back to the previous year's minutes which set the formula. There is also a broad definition of "remuneration".

Note the inclusion of Jane Doe Limited and John Smith Ltd, associate companies to which management fees are paid.

Clause 3:

Confirmation that directors, shareholders, family members and associate entities are continuing as employees or contractors. Note the inclusion of the family member (Johnny Bloggs Jnr) who is neither a director nor a shareholder, and did not receive remuneration for the previous year, but to whom remuneration may be paid in the current financial year. The intention is to confirm their status for tax-deductibility purposes, and to create a "contract" between them and the company to protect both against a Receiver or a Liquidator. This is the purpose of having these persons and entities sign the Minute at the end.

Clause 4:

To reinforce clause 3, this clause sets out a flexible formula for the remuneration to be paid to each person or entity for the current year. Broadly, this can be the greater of all of the profits made by the company, or the amount they received last year (plus drawings and overdrawn current accounts in both cases) unless they agree to accept lesser amounts.

It also provides the same formula, in the meantime, for the subsequent financial year.

In practice, the intention is to protect the individuals and associate companies, if the company should go into Receivership or Liquidation before the passing of equivalent Resolution of Directors approximately 1 year later. While providing that protection, during that period, it still allows the amount to be paid to be reduced, if that turns out to be desirable for taxation or other reasons.

This clause provides flexibility as the intention is that the directors will allocate the total remunerations, once precisely quantified, among the various persons entitled to it. The trade-off for this flexibility may be that the clause does not in fact protect those people if the company goes into receivership or liquidation - however the better view is that it will.

Clause 5:

This is to comply with Section 161 of The Companies Act requiring the directors to certify that their remunerations are fair value.

Clause 6:

Provides a mechanism for payment of guarantee fees (as distinct from remuneration) so that, if the guarantors are called on to pay the companies debts, the cost should be tax-deductible to them at least to the extent of the cumulative guarantee fees paid.

Clause 7:

Used if a dividend is to be declared.

Clause 8:

Provides a mechanism enabling interest to be paid, again to protect the interests of the individuals and associate companies against the predations of Liquidators and Receivers.

Clause 9:

This provides a mechanism for the company to charge interest on overdrawn current accounts and advances.

Clause 10:

Waives irregularities, if the Minutes confirm a physical meeting.

**BLOGG'S PHARMACY LIMITED**

*To be signed when the Annual Report is provided to the shareholders. This is not the Annual Meeting. The reason for using a separate minute is that S.120 sets out a "window" for the holding of the Annual Meeting; in practice the Annual Report is very often not produced within that time-frame.*

**RESOLUTION OF SHAREHOLDERS**

RESOLVED: That if these resolutions are passed at a meeting, any irregularities in calling the meeting are waived. If these resolutions are not passed at a meeting, they are signed pursuant to Section 122 of The Companies Act 1993.

RESOLVED: That the Annual Report of the company for the year ended 31st March 1998 dated 11 June 1998, a copy of which is attached, be, and is hereby, adopted, and that any failure of the Annual Report to comply with the provisions of The Companies Act, 1993, as permitted by S.211 of that Act, 1993, or any other Statute is hereby approved.

RESOLVED: (as a Special Resolution): That any transactions shown in the Annual Report which are "Major Transactions" pursuant to Section 129 of The Companies Act 1993 are hereby ratified and approved.

Dated \_\_\_\_\_

..... William E. Bloggs

..... Jane Doe

..... Mary A. Bloggs

..... John Smith

**BLOGG’S PHARMACY LIMITED**

*This is signed every year, between the 1st of July and the 30th September, (regardless of when the Annual Report is produced) to comply with the “once each calendar year, not more than 6 months after Balance Date, not more than 15 months after the previous Annual Meeting” specified in S.120.*

**MINUTES OF ANNUAL MEETING**

(Pursuant to Section 120 of The Companies Act, 1993)

**RESOLUTION OF SHAREHOLDERS**

**RESOLVED:** That if these resolutions are passed at a meeting, any irregularities in calling the meeting are waived. If these resolutions are not passed at a meeting, they are signed pursuant to Section 122 of The Companies Act 1993.

**RESOLVED:** That no Auditor be appointed for the current year, pursuant to S196 (2) of The Companies Act, 1993.

Dated \_\_\_\_\_

**SHAREHOLDERS:**

..... William E. Bloggs

..... Jane Doe

..... Mary A. Bloggs

..... John Smith

**BLOGG'S PHARMACY LIMITED**

*This resolution must be approved by a majority of 75% of the votes of those shareholders entitled to vote and actually voting (S.2)*

**SPECIAL RESOLUTION OF SHAREHOLDERS**

**RESOLVED:** That if this resolution is passed at a meeting, any irregularities in calling the meeting are waived. If this resolution is not passed at a meeting, it is signed pursuant to Section 122 of The Companies Act 1993.

**RESOLVED:** That the following transaction/s be approved as a Major Transaction pursuant to S129 of The Companies Act, 1993:

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Dated \_\_\_\_\_

**SHAREHOLDERS**

..... William E. Bloggs

..... Jane Doe

..... Mary A. Bloggs

..... John Smith

COMPANY NAME: \_\_\_\_\_

Prepared By: \_\_\_\_\_

Date: \_\_\_\_\_

**SUPPORTING WORKPAPER FOR SOLVENCY TEST**

Column Balance Sheet at:(Date)	A	B	C	D	E	F
	Actual Book Value	Estimated Book Value	Revalued	Proposed	Proposed	After _____ and _____
Fixed Assets						
Intangible Assets						
Investments						
Stock						
Debtors						
Current Assets						
Other Current Assets						
Bank						
GST Clearing A/c						
Shareholders' Current A/cs						
IRD Tax (owing)/refund						
Current Liabilities(incl wages & PAYE)						
Term Liabilities						
Contingent Liabilities						
Net Assets	\$ _____	\$ _____	\$ _____			\$ _____
Equity	\$ _____	\$ _____	\$ _____			\$ _____

**COLUMN FUNCTION**

- A** Latest Annual or Interim Financial Accounts (used as a guide for preparing Column B)
- B** Estimated Book Values at date of proposed distributions.
- C** Column B adjusted for valuations and knowledge supplied by directors, including any contingent liabilities, and consequential changes to the taxation liability (attach details, calculations, valuations, reasons etc) at date of proposed distributions.
- D** Journal Entry for proposed "Distribution".
- E** Journal Entry for proposed "Distribution".
- F** Balance Sheet after making Distributions (Columns C + D + E = F)

**NOTE:**

1. In columns B, C and F the "Equity" figure is entered as the Net Assets figure immediately above in that column
2. If the Solvency Certificate is being prepared to support the company's providing assistance to purchase its own shares, the amount advanced must be excluded from assets.
3. Where a shareholder has a loan to the company, subordination or subrogation of the loan, to other creditors, does not have any effect on the solvency as the debt still exists.
4. Where a loan is has been made to a shareholder, it must be adjusted down realistically to what the shareholder is capable of repaying.
5. Adjustment must be made for consequential changes in the taxation liability arising from changes in columns B, C, D and E.

*We confirm that we have supplied the figures and information shown in column A, B and C above.  
We are not aware of any other issues that are likely to have a significant impact on the above.*

Dated \_\_\_\_\_

\_\_\_\_\_  
Director  
\_\_\_\_\_  
Director

NAME OF COMPANY: \_\_\_\_\_

**DIRECTOR'S SOLVENCY CERTIFICATE  
(Companies Act 1993, Section 52/Section 108)**

The undersigned Directors, all of whom have voted in favour of the Board Resolution dated the \_\_\_\_ day of \_\_\_\_\_ 199\_\_ concerning \_\_\_\_\_.

**CERTIFY**

1. **THAT** in their opinion, the Company will, immediately after \_\_\_\_\_ referred to in the said Board Resolution, satisfy the Solvency Test, as defined in Section 4(1) of the Companies Act 1993; and
2. **THAT** the grounds upon which the Directors have formed their opinion are:  
*(Delete those not applicable)*
  - Having made reference to the Company's financial position, as disclosed by the last financial statements prepared in compliance with the Financial Reporting Act 1993, prepared as at the Company's last balance date, dated \_\_\_\_\_.
  - Having made reference to the Company's last management accounts, prepared in respect of the period up to \_\_\_\_\_.
  - Having made reference to the Company's cashflow forecast for the period to \_\_\_\_\_.
  - Having made reference to the Company's current trading position and expected future performance.
  - Having taken into consideration all factors known to the Directors, which may affect the value of the Company's assets and the value of the Company's liabilities including any contingent liabilities;
  - Having relied on the most recent external valuations of the Company's land and buildings;
  - Having relied on management's estimates of the Company's net working capital position;
  - Having taken into consideration the likelihood of contingent liabilities occurring;
  - Having sought and received advice from \_\_\_\_\_ in relation to \_\_\_\_\_.
  - Having considered such other matters \_\_\_\_\_.

It is reasonable to believe that:

- i) The company is able to pay its debts as they become due in the normal course of business; and
- ii) The value of the company's assets is greater than the value of its liabilities, including contingent liabilities.

**DATED:** \_\_\_\_\_

**SIGNED:** \_\_\_\_\_ - Director  
 \_\_\_\_\_ - Director  
 \_\_\_\_\_ - Director

Use this letter when the company is insolvent. Its purposes are:

- \* To ensure that the client is fully informed of the requirements of the Act, and the potential consequences of trading while insolvent.
- \* To provide the Accountants with an acknowledgment of the advice given.

The Director/s and Shareholder/s  
 BLOGG'S PHARMACY LIMITED  
 P O Box 12-345  
 Sixville

18 June 1998

Dear Client

In preparing the Financial Accounts for your company for the year ended 31 March 1998 we note that the liabilities for the company exceeded its assets at that date.

Technically, your company was, at that date, insolvent.

If it continues to trade while it is insolvent, your Directors and the company will be in breach of The Companies Act, and they could be prosecuted; further, if your company were to go into liquidation without paying its creditors in full, your Directors might be held to be *personally* liable for part or all of the shortfall to the unpaid creditors.

We draw your attention to the following provisions of The Companies Act 1993:

Section 135: A Director must not allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors.

Section 136: A Director must not agree to the company incurring an obligation unless the director believes at that time, on reasonable grounds, that the company will be able to perform the obligation.

Additionally, your company cannot (while it remains insolvent) issue a "Solvency Certificate" which is a necessary prerequisite to a number of matters such as making a "Distribution" (eg paying a dividend), reducing its equity, and - in some circumstances - paying salaries or drawings to working shareholders.

Please give careful thought to this letter - it is important that you appreciate the possible consequences of your company's position.

Yours faithfully

.....  
 Chartered Accountants

*I/We have read the contents of this letter.*

Dated \_\_\_\_\_

**DIRECTOR/S** ..... William E. Bloggs  
 ..... Jane Doe

## SUMMARY

### CERTIFICATE OF FAIR VALUE

Salaries (and other remunerations) and loans to Directors, and the value at which new shares are issued, must be supported by a Certificate of Fair Value, signed by the Directors. This must state that the Directors consider the transaction is fair to the Company, and the grounds for that opinion.

### DIRECTORS RESOLUTIONS

All transactions between the Company and its Shareholders, Directors, and Shareholder/Directors (and their entities and relations) should be confirmed by a Minute of Directors. They should not be approved by Shareholders' Resolutions (unless they are Major Transactions) as Shareholders who act as if they are Directors can be deemed to be Directors.

### DIRECTORS TRANSACTIONS WITH THEIR COMPANIES

ANY "transactions" between the Company and its Directors (or entities in which the directors and their relations have an interest) require:

- Entry in the Interests Register (below) of the actual transaction or the general interest of the Director.
- A Directors Certificate of Fair Value (see below) for remuneration and loans
- Disclosure in the Annual Report (if remuneration)

If any "transaction" between a Director and the Company is subsequently held to be unfair, it must be refunded. The Company does not have to be in receivership or liquidation for this to happen.

"Transactions" include salaries, interest paid to or charged to a Director, goods and services supplied to or bought from a Director etc, even if they are at market value.

The above apply whether or not the Director is also a Shareholder.

### INTERESTS REGISTER

Any transaction between the company and its Directors, and details of Directors' shareholdings, must be entered in the Interests Register. It must also show the director's (or the director's relation's) "interest" in other entities (companies, trusts etc) with which the company has financial dealings.

### MAJOR TRANSACTION

Any single transaction which amounts to more than 50% of the Company's total assets must be approved by a Special Resolution of Shareholders (75% majority). This applies to distributions, salaries, purchases of assets etc, and covers all transactions, including those with Directors and Shareholders.

## SUMMARY (Continued from P23)

### SHAREHOLDER/DIRECTORS

If a person is both a Director and a Shareholder, each transaction with the Company must be dealt with in each capacity. For example, if a salary is paid to a Director who is also a Shareholder, there will need to be a Certificate of Fair Value, and also consideration will need to be given to the necessity of issuing a Solvency Certificate.

### SHAREHOLDERS TRANSACTIONS WITH THEIR COMPANIES

The Directors must prepare and sign a Solvency Certificate (see below) for any “distributions” made to Shareholders.

“Distributions” include:

- (a) Dividends.
- (b) Buy-back of shares or reduction of Equity
- (c) Anything the Shareholder receives only because s/he is a Shareholder eg salaries greater than would be paid to an arm’s-length employee, low-interest loans from the Company, assets supplied to the Company at above market value, undercharged Company services to the Shareholder etc.
- (d) Payment or guarantee of Shareholder’s outside debt.
- (e) Forgiveness of a Shareholder’s debt.

Anything in (c) which is at market value, and most other transactions between the company and its Shareholders, do not need a Solvency Certificate.

The above apply whether or not the Shareholder is also a Director. “Shareholder” includes companies, trusts etc in which shareholders have an interest.

### SOLVENCY CERTIFICATE (for need for a Solvency Certificate, see above)

To satisfy the Solvency Test (so that a Solvency Certificate can be signed):

- (a) The Company must be able to pay its debts as they become due in the normal course of business

and

- (b) The value of the Company’s assets must be greater than the value of its liabilities (including contingent liabilities) after the distribution is made.

A liberal interpretation of (a) is that debts are paid before creditors become threatening.

To calculate (b) it is necessary to revalue all of the Company’s assets and liabilities, looking ahead to after the distribution has been made, to ensure that the assets will still exceed the liabilities.

If it is subsequently proved that the Company was not solvent at the time the distribution was made, it can be recovered from the Shareholders, and, if they do not pay, from the Directors themselves.

## ISSUING NEW SHARES

### CHECKLIST

1. Check the Constitution for any special provisions relating to issuing new shares.
2. Either (a) The Directors decide the price per share, terms, and conditions, and sign a Minute (under S.47 (1) (c)) that the consideration and terms are fair and reasonable to the Company, and also to the Shareholders,  
  
Or (b) The Shareholders approve the price, terms, and conditions under S.107 (2).
3. The Directors sign a Certificate stating the consideration, terms and conditions.
4. File with the Registrar of Companies:
  - (a) A copy of the Directors' Certificate, within 10 working days of the date on the Certificate.
  - (b) A Form 7 *Notice of Issue of Shares*, within 10 working days of the date of issue of the shares.

*(Issue of shares by Directors at fair value and terms, not using S107 Shareholders' approval)*

NAME OF COMPANY \_\_\_\_\_

**DIRECTOR'S RESOLUTION AS TO ISSUE OF SHARES**

Dated \_\_\_\_\_

**RESOLVED THAT:**

1. The Company issue \_\_\_\_\_ (number) Ordinary Shares for a consideration of \$ \_\_\_\_\_ per share.

2.\* The terms on which the said shares be issued be \_\_\_\_\_  
\_\_\_\_\_

**OR**

2.\* The consideration payable for the shares will be credited as fully paid by capitalising advances made by \_\_\_\_\_ to the Company to the extent of \$ \_\_\_\_\_

3. The shares be issued to the following person(s) who shall be recorded in the Share Register of the Company as the holder(s) of those shares:

<u>Name</u>	<u>No. of shares</u>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

4. The consideration for the shares and terms of issue set out above are fair and reasonable to the company and to all existing shareholders.

**SIGNED**

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\* Delete as appropriate

*(Issue of shares by Directors at fair value and terms, not using S107 Shareholders' approval)*

NAME OF COMPANY \_\_\_\_\_

**DIRECTOR'S CERTIFICATE AS TO ISSUE OF SHARES**

Dated \_\_\_\_\_

**CERTIFIED THAT:**

1. The Company issue \_\_\_\_\_ (number) Ordinary Shares for a consideration of \$ \_\_\_\_\_ per share.

2.\* The terms on which the said shares be issued be \_\_\_\_\_

\_\_\_\_\_

**OR**

2\* The consideration payable for the shares will be credited as fully paid by capitalising advances made by \_\_\_\_\_ to the Company to the extent of \$ \_\_\_\_\_

3. In the opinion of the Directors the consideration for and terms of issue are fair and reasonable to the company and to all existing shareholders.

**SIGNED**

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\* Delete as appropriate.

(Issue of shares using S107 Shareholders' approval)

NAME OF COMPANY \_\_\_\_\_

**DIRECTOR'S RESOLUTION AS TO ISSUE OF SHARES**

Dated \_\_\_\_\_

**RESOLVED THAT:**

1. The Company issue \_\_\_\_\_ (number) Ordinary Shares for a consideration of \$ \_\_\_\_\_ per share.

2.\* The terms on which the said shares be issued be \_\_\_\_\_  
\_\_\_\_\_

**OR**

2\* The consideration payable for the shares will be credited as fully paid by capitalising advances made by \_\_\_\_\_ to the Company to the extent of \$ \_\_\_\_\_

3. The shares be issued to the following person(s) who shall be recorded in the Share Register of the Company as the holder(s) of those shares:

<u>Name</u>	<u>No. of shares</u>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

4. The consideration for the shares and the terms of issue set out above have been unanimously approved by the shareholders pursuant to Section 107 of The Companies Act 1993.

**SIGNED**

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\* Delete as appropriate

*(Issue of shares using S107 Shareholders' approval)*

NAME OF COMPANY \_\_\_\_\_

**DIRECTOR'S CERTIFICATE AS TO ISSUE OF SHARES**

Dated \_\_\_\_\_

**CERTIFIED THAT:**

1. The Company issue \_\_\_\_\_ (number) Ordinary Shares for a consideration of \$ \_\_\_\_\_ per share.

2.\* The terms on which the said shares be issued be \_\_\_\_\_  
\_\_\_\_\_

**OR**

2\* The consideration payable for the shares will be credited as fully paid by capitalising advances made by \_\_\_\_\_ to the Company to the extent of \$ \_\_\_\_\_

3. The consideration for the shares and terms of issue set out above have been unanimously approved by the shareholders pursuant to Section 107 of The Companies Act 1993.

**SIGNED**

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\_\_\_\_\_ Director

\* Delete as appropriate.

*(For issue of shares subject to shareholder's approval under S107)*

**NAME OF COMPANY** \_\_\_\_\_

**UNANIMOUS CONSENT OF ENTITLED PERSON(S)**  
(Pursuant to Section 107 of The Companies Act 1993)

**DATED** \_\_\_\_\_

We, the undersigned, being all the shareholders in the Company, hereby concur in the issue of shares to the person(s) named in the annexed Resolution of Directors for the consideration and on the terms as set out in that Resolution.

\_\_\_\_\_ Shareholder

\_\_\_\_\_ Shareholder

\_\_\_\_\_ Shareholder

\_\_\_\_\_ Shareholder

\_\_\_\_\_ Shareholder

\_\_\_\_\_ Shareholder

\_\_\_\_\_ Shareholder

\_\_\_\_\_ Shareholder

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