



Queensland

# South-East Queensland Water (Distribution and Retail Restructuring) Regulation 2021

## Subordinate Legislation 2021 No. 88

made under the

*South-East Queensland Water (Distribution and Retail  
Restructuring) Act 2009*

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## Part 1 Preliminary

### 1 Short title

This regulation may be cited as the *South-East Queensland Water (Distribution and Retail Restructuring) Regulation 2021*.

### 2 Main purposes of regulation

The main purposes of this regulation are to do the following—

- (a) provide, in relation to distributor-retailers, boards, officers or employees of distributor-retailers, for particular matters that the Corporations Act provides for corporations;
- (b) provide for a right to compensation for a contravention of a matter provided for under paragraph (a).

### 3 Definitions

In this regulation—

***board member***, of a distributor-retailer, means a member of the board of the distributor-retailer.

***compensation order*** see section 22(1).

***declaration of contravention*** see section 20(1).

***officer***, of a distributor-retailer, means—

- (a) a person who is appointed as an officer of the distributor-retailer; and
- (b) anyone else who—
  - (i) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the distributor-retailer; or
  - (ii) has the capacity to affect significantly the distributor-retailer's financial standing.

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#### **4 References to Corporations Act**

- (1) In this regulation, the information included in square brackets after a section heading is a reference to a similar section of the Corporations Act.
- (2) The brackets and information do not form part of this regulation.

## **Part 2 Board members and officers**

### **Division 1 General duties**

#### **5 Care and diligence—civil obligation only [CA, s 180]**

- (1) A board member or an officer of a distributor-retailer must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they—
  - (a) were a board member or an officer of a distributor-retailer in the distributor-retailer's circumstances; and
  - (b) occupied the office held by, and had the same responsibilities within the distributor-retailer as, the board member or officer.
- (2) In deciding the degree of care and diligence required under subsection (1), regard must be had to—
  - (a) the distributor-retailer's geographic area functions; and
  - (b) the distributor-retailer's other functions under the Act; and
  - (c) the distributor-retailer's other functions under another Act including, for example, the *Financial Accountability Act 2009*, *Statutory Bodies Financial Arrangements Act 1982*, *Water Act* and *Water Supply Act*; and

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- (d) any requirement under the distributor-retailer's participation agreement; and
  - (e) any relevant local government direction given to the distributor-retailer.
- (3) A board member or an officer of a distributor-retailer who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they—
- (a) make the judgment in good faith for a proper purpose, taking into account any relevant matters mentioned in subsection (2); and
  - (b) do not have a material personal interest in the subject matter of the judgment; and
  - (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
  - (d) rationally believe the judgment is in the distributor-retailer's best interests.
- (4) For subsection (3)(d), the board member's or the officer's belief that the judgment is in the distributor-retailer's best interests is a rational one unless the belief is one that no reasonable person in their position would hold.
- (5) In this section—

*business judgment* means any decision to take or not take action about a matter relevant to the business operations of the distributor-retailer.

*functions* includes powers.

## 6 Good faith—civil obligations [CA, s 181]

A board member or an officer of a distributor-retailer must exercise their powers and discharge their duties—

- (a) in good faith in the distributor-retailer's best interests; and

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- (b) for a proper purpose.

## **7 Use of position—civil obligations [CA, s 182]**

A board member or an officer of a distributor-retailer must not improperly use their position to—

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the distributor-retailer.

## **8 Use of information—civil obligations [CA, s 183]**

A board member or an officer of a distributor-retailer must not use information, obtained because they are or have been a board member or an officer, to improperly—

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the distributor-retailer.

## **9 Good faith, use of position and use of information—criminal offences [CA, s 184]**

- (1) A board member or officer of a distributor-retailer commits an offence if they—
  - (a) are reckless or are intentionally dishonest; and
  - (b) fail to exercise their powers and discharge their duties—
    - (i) in good faith in the best interests of the distributor-retailer; or
    - (ii) for a proper purpose.

Maximum penalty—20 penalty units.

- (2) A board member or officer of a distributor-retailer commits an offence if they use their position—
  - (a) dishonestly with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the distributor-retailer; or

- (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the distributor-retailer.

Maximum penalty—20 penalty units.

- (3) A person who obtains information because they are, or have been, a board member or officer of a distributor-retailer commits an offence if they use the information—
  - (a) dishonestly with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the distributor-retailer; or
  - (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the distributor-retailer.

Maximum penalty—20 penalty units.

## **10 Interaction of ss 6–10 with other laws etc. [CA, s 185]**

- (1) Sections 6 to 10—
  - (a) have effect in addition to, and not in derogation of, any law relating to the duty or liability of a person because of their office or employment in relation to a distributor-retailer; and
  - (b) do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability mentioned in paragraph (a).
- (2) However, subsection (1) does not apply to section 6(3), (4) and (5) to the extent to which those subsections operate on the duties at common law and in equity that are equivalent to the requirements under section 6(1).

## **11 Duty of confidentiality**

A board member of a distributor-retailer owes a duty of confidentiality to the distributor-retailer to the same extent as

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if the distributor-retailer was a company registered under the Corporations Act and the board member was a director of the company.

## **12 Reliance on information or advice provided by others [CA, s 189]**

- (1) This section applies if—
  - (a) a board member of a distributor-retailer relies on information, or professional or expert advice, given or prepared by—
    - (i) an officer or an employee of the distributor-retailer whom the board member believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
    - (ii) a professional adviser or expert relating to matters the board member believes on reasonable grounds to be within the person's professional or expert competence; or
    - (iii) another board member relating to matters within the board member's authority; or
    - (iv) a committee of board members on which the board member did not serve relating to matters within the committee's authority; and
  - (b) the reliance was made—
    - (i) in good faith; and
    - (ii) after making an independent assessment of the information or advice, having regard to the board member's knowledge of the distributor-retailer and the complexity of the structure and operations of the distributor-retailer; and
  - (c) the reasonableness of the board member's reliance on the information or advice arises in proceedings brought to decide whether a board member has performed a duty under this part or an equivalent general law duty.



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- (2) The board member's reliance on the information or advice is taken to be reasonable unless the contrary is proved.

## **Division 2                      Restrictions on indemnities and insurance**

### **13                      Indemnification and exemption of board member or officer [CA, s 199A]**

- (1) A distributor-retailer must not exempt a person (whether directly or through an interposed entity) from a liability to the distributor-retailer incurred as a board member or an officer of the distributor-retailer.
- (2) A distributor-retailer must not indemnify a person against any of the following liabilities incurred as a board member or an officer of the distributor-retailer—
- (a) a liability owed to the distributor-retailer;
  - (b) a liability for a compensation order;
  - (c) a liability that is owed to someone, other than the distributor-retailer, that did not arise out of conduct in good faith.
- (3) Subsection (2) does not apply to a liability for legal costs.
- (4) A distributor-retailer must not indemnify a person against legal costs incurred in defending an action for a liability incurred as a board member or an officer of the distributor-retailer if the costs are incurred—
- (a) in defending or resisting proceedings in which the person is found to have a liability for which they could not be indemnified under subsection (2); or
  - (b) in defending or resisting criminal proceedings in which the person is found guilty.
- (5) For subsection (4), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

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(6) In this section—

*indemnify*, a person, includes—

- (a) indemnify the person by agreement; and
- (b) indemnify the person by making a payment to the person; and
- (c) directly indemnify the person; and
- (d) indirectly indemnify the person through an interposed entity.

#### **14 Insurance premiums for certain liabilities of board members [CA, s 199B]**

- (1) A distributor-retailer must not pay, or agree to pay, a premium for a contract insuring a person who is or has been a board member of the distributor-retailer against a liability (other than one for legal costs) arising out of—
  - (a) conduct involving a wilful breach of duty to the distributor-retailer; or
  - (b) a contravention of section 8 or 9.
- (2) This section applies to a premium whether it is paid directly or through an interposed entity.

#### **15 Effect of div 2 [CA, s 199C]**

- (1) This division does not authorise anything that would otherwise be unlawful.
- (2) Anything that purports to indemnify or insure a person against a liability, or exempt them from a liability, is void to the extent that it contravenes this division.

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## **Division 3                      Appointment of board members**

### **16            Effectiveness of acts by board members [CA, s 201M]**

- (1) An act done by a board member of a distributor-retailer is effective even if their appointment, or the continuance of their appointment, is invalid because the distributor-retailer or board member did not comply with a provision of the Act or a participation agreement.
- (2) However, an act done by a board member is not effective if, when the act is done, the members of the board know the board member's appointment, or the continuance of the board member's appointment, is invalid.
- (3) Subsection (1) does not deal with the question of whether an effective act by a board member—
  - (a) binds the distributor-retailer in its dealings with other people; or
  - (b) makes the distributor-retailer liable to another person.

## **Division 4                      Access to distributor-retailer's books and records**

### **17            Access to distributor-retailer's books and records**

A board member of a distributor-retailer has a right of access to all of the distributor-retailer's books and records, including financial records, at all reasonable times.

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## Part 3                      Assumptions people dealing with distributor-retailers are entitled to make

### 18            Entitlement to make assumptions [CA, ss 128 and 129]

- (1) A person is entitled to make the following assumptions (the *assumptions*) relating to dealings with a distributor-retailer—
  - (a) the distributor-retailer’s participation agreement and any provisions of the Act that apply to the distributor-retailer relating to the agreement have been complied with;
  - (b) that a person who appears, from information provided by the distributor-retailer that is available to the public, to be a board member or an officer of the distributor-retailer—
    - (i) has been duly appointed; and
    - (ii) has authority to perform the functions and exercise the powers of a board member or an officer, under the Act, relating to the distributor-retailer;
  - (c) that a person who is held out by the distributor-retailer to be an officer or agent of the distributor-retailer—
    - (i) has been duly appointed; and
    - (ii) has authority to perform the functions and exercise the powers customarily performed or exercised by that kind of officer or agent of a company conducting a business similar to that conducted by the distributor-retailer;
  - (d) that the board members and agents of the distributor-retailer properly perform their duties to the distributor-retailer;
  - (e) that a document has been duly executed by the distributor-retailer if the document appears to have been signed under section 52 of the Act;

- (f) that an officer or agent of the distributor-retailer who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy.
- (2) However, a person is not entitled to make an assumption if at the time of the dealings they knew or suspected that the assumption was incorrect.
- (3) The distributor-retailer is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
- (4) The assumptions may be made even if a board member or agent of the distributor-retailer acts fraudulently, or forges a document, in connection with the dealings.

## Part 4 Contravention and compensation

### 19 Declaration of contravention [CA, s 1317E]

- (1) Any of the following may apply to the Supreme Court for a declaration (a *declaration of contravention*) that a board member of a distributor-retailer has contravened section 6, 7, 8 or 9—
  - (a) a distributor-retailer;
  - (b) a participating local government;
  - (c) the State.
- (2) If the court is satisfied a board member of a distributor-retailer has contravened section 6, 7, 8 or 9, it must make a declaration of contravention.
- (3) A declaration of contravention must state the following—
  - (a) the board member who contravened section 6, 7, 8 or 9;
  - (b) the conduct that constituted the contravention;
  - (c) the provision that was contravened.

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**20 Declaration of contravention is conclusive evidence [CA, s 1317F]**

A declaration of contravention is conclusive evidence of the matters referred to in section 20(3).

**21 Compensation orders [CA, s 1317H]**

- (1) Any of the following may apply to the Supreme Court for an order (a *compensation order*) requiring a board member of a distributor-retailer to pay the applicant or another person an amount as compensation for damage suffered by the applicant or the other person because the board member has contravened section 6, 7, 8 or 9—
  - (a) the distributor-retailer;
  - (b) a participating local government;
  - (c) the State.
- (2) An application for a compensation order may be made whether or not a declaration of contravention has been made for the matter the subject of the application.
- (3) The court may order the board member to pay to the applicant or other person, as compensation, an amount, decided by the court, if the court is satisfied—
  - (a) the board member has contravened section 6, 7, 8 or 9; and
  - (b) the applicant or other person has suffered damage because of the contravention.
- (4) The order must state the amount of the compensation.
- (5) The court may relieve the board member either wholly or partly from paying the compensation if the court is satisfied—
  - (a) the board member acted honestly; and
  - (b) having regard to all the circumstances of the contravention, the board member ought fairly to be excused for the contravention.

- (6) A compensation order may be enforced as if it were a judgment of the court.

**22 Time limit for application for a declaration or order [CA, s 1317K]**

A proceeding for a declaration of contravention or a compensation order may be commenced no later than 6 years after the day of the contravention.

**23 Repeal**

The South-East Queensland Water (Distribution and Retail Restructuring) Regulation 2010, SL No. 141 is repealed.

ENDNOTES

- 1 Made by the Governor in Council on 29 June 2021.
- 2 Notified on the Queensland legislation website on 30 June 2021.
- 3 The administering agency is the Department of Regional Development, Manufacturing and Water.

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