26 March 2008

CAMAC
GPO Box 3967
SYDNEY NSW 2001

By facsimile: 9911 2955

Dear Sir/Madam

Submission regarding review on external administrations

"Issues in external administration"

I refer to the discussion paper "Issues in external administration" dated 7 February 2008 and wish to make an initial brief submission on two subjects.

The first subject is that of phoenix companies. I know that the scope of your review may not cover the concept of phoenix companies however, I wish to place the subject matter squarely on the agenda.

In my opinion, there is a deficiency in the Australian laws. The New Zealand government has not only passed legislation specifically in this area, but done so in a fair and balanced manner.

I **attach** an extract from an article written by partners of this firm which appeared in Lawyers Weekly newspaper, regarding this matter. The contents are self explanatory.

I also refer to the recent article in the International Insolvency Bulletin about the subject of Phoenix companies.

In short, I feel strongly that the concept and subject of phoenix companies must be defined and then addressed in legislation.

The existence of strong "phoenix company" legislation will induce directors to properly use the insolvency laws to maximize the return to creditors (in "fear" or appreciation of the contra legal consequences).

The second issue which I wish to cover is the issue of electronic notice to creditors. It is a subject covered by your discussion paper.

You have correctly identified that, for example, an Administrator is entitled to give notice of a meeting by electronic means pursuant to section 600G of the Corporations Act. However, this section only applies if the recipient of the notice (e.g. a creditor) has already provided an indication that they are prepared to receive the notice in that electronic form.

This is somewhat unworkable.

This requirement means that there must be, arguably on each and every appointment, an initial written notification given to the creditors and then a response before there is the ability to use the electronic form of Notice.

It would be interesting to ascertain whether or not a creditor can give an en global, once-off, notification to an insolvency practitioner, thereafter allowing that practitioner's firm to forward reports electronically on each and every appointment. That could facilitate very effective communications with organizations that have constant dealings with liquidators and trustees (e.g. banks, financial institutions and the tax department, utilities suppliers, and the like).

However, it is far from clear that this general permission can be given and a restrictive reading of the legislation suggests that the creditor must, after receiving written notification of a particular appointment from the administrator, then give permission to receive electronic communications on that appointment thereafter.

One of the reasons why I say that the present legislation is unworkable is because the task of notifying all creditors of a company about a meeting becomes difficult if that list of creditors has to be split into postal creditors, facsimile creditors and email creditors.

I adopt the philosophy that the more simple the task, then the less chance of any error. One list is better than three lists.

Therefore, I hope these brief comments assist with your review and I hope to have sufficient time to make further contributions.

Yours sincerely

GEOFFREY MCDONALD
PARTNER
BARRISTER AT LAW

cc Insolvency Practitioners Association of Australia
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Submission to the

Corporations and Markets Advisory Committee

Issues in External Administration

Discussion Paper

Submission by

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&
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Introduction

This submission addresses the release of the Corporations and Markets Advisory Committee (CAMAC) discussion paper on *Issues in External Administration* (February 2008). Professor Michael Adams and Marina Nehme of the School of Law, University Western Sydney, wish to provide an informed debate on these critical issues. Some of the suggestions that have been provided in this submission are of a policy nature and observe the need to accept some of the recommendations of the CAMAC.

If any of the responses require further explanations, please contact Professor Michael Adams at the UWS School of Law at Michael.Adams@uws.edu.au

Staff involved in producing this response

The University of Western Sydney, School of Law, has a variety of staff from many different areas of the law. In respect of this submission, the substantive legal submissions have been prepared by Professor Michael Adams and Marina Nehme.

ADAMS; Michael is the Head of the School of Law and Professor of Law and Provost for Parramatta campus, University of Western Sydney. Previously he was the Perpetual Trustees Australia Chair of Financial Services Law and also Professor of Corporate Law in the Faculty of Law at the University of Technology, Sydney. He was the former Assistant Director of the UTS Centre for Corporate Governance and has been teaching and researching corporate law for over twenty years in Australia, UK, China, USA and Malaysia.

NEHME; Marina is a Lecturer in Law at the University of Western Sydney. She is a researcher in corporate law issues. Previously, she was a part time Lecturer in Corporate Law at the University of Technology, Sydney and a member of UTS Corporate Group. Marina is a doctoral candidate at UWS focussing on enforceable undertakings.

General Observations:

In principle, we believe that the various proposals included in the discussion paper for external administration are positive and practical. Throughout our submission, we have tried to give a clear rational as to why we support a particular proposal or why we disagree.

Issue 1: Access to creditor list

The Referred Proposal is that:

The administrator of a company should be required to provide access to a list of a company's known creditors as soon as practicable after their appointment.

Such a proposal has its merits. The arguments in favour of retaining the current position can be contested:

- *Some creditors may be concerned about the disclosure of commercially sensitive financial information to other persons:* The referred proposal will allow creditors to make informed decisions in creditors meeting. Furthermore, it also allows them to protect their interest. These advantages will outweigh any inconvenience the creditors may have in case of disclosure of sensitive information to other people.
- *The list may encourage proxy hunting by creditors*: We agree with CAMAC that proxy hunting is not a real concern. Proxy is a person who has the right to vote in the interest of the person who pointed him/her. However, the system protects the interest of creditors by noting that proxies can only be given with the consent of the persons entitled to vote. It is a normal and acceptable commercial practice for persons to solicit proxies on certain matters. Furthermore, solicitation in Australia for proxies is not as developed as in the US and is not really a problem.[1]

[1] Kathryn Watt, "Proxy Voting Trends: Fund Managers in the United States of America and Australia" (2003) 15(1) *Bond Law Review* 12, 17.

- *any requirement to mail the list may increase administrative costs:* Such a cost will be minimised by the use of electronic means of communication.
- *the list could in some circumstances make it easier for other insolvency practitioners to lobby creditors to replace the administrator*: The voluntary administrator may be removed in two ways: At the first creditors' meeting, the creditors who do not approve of the administrator may remove him/her by passing a resolution to that regard.[2] After the first creditors' meeting, the administrator may no longer be removed by resolution. The administrator may be removed by the court on application of the creditor or ASIC. However, the removal of the administrator through the first creditors' meeting can be hard to achieve due to the fact that the time for the creditors to be notified of and prepare themselves for the first creditors meeting is too short to allow them to lobby for the removal of the administrator (This is especially a problem since the creditors cannot remove the administrator after the first creditors' meeting except through court application).[3]

  Even though the period for calling a first creditors meeting has been extended (the first creditors' meeting now need to be called within eight business days of appointment and give notice for at least five business days[4]), sending a list of the name of the creditors will be very helpful to deal with the issue of removal of administrator through a resolution at the first creditors' meeting. Maximising the opportunity for the creditors to use this right of removing creditors can have two advantages: Firstly, it will promote creditors' confidence in the process of voluntary administration. Secondly, secured creditors with a charge over most or all of the assets of the company may refrain from appointing a receiver if they are allowed to be involved in the appointment of the administrator.[5]

Accordingly, we believe that administrator should provide a list of the company's known creditors.

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[2] *Corporations Act 2001* (Cth), s 436E(4).

[3] Andrew Keay, "Voluntary Administration: The Convening and Conducting of Meetings" (1996) 4 *Insolvency Law Journal* 9.

[4] *Corporations Act 2001* (Cth), s 436E.

[5] Michael Murray, *Keay's Insolvency: Personal and Corporate Law and Practice* (2005, 5th ed) 491.

Policy options on information to be disclosed:

We support Option 2: Name, Contact details and amount. This option allows the creditors to make informed decisions to protect their rights and interests. This may also foster confidence of creditors in the process of voluntary administration due to the transparency that will arise from this disclosure.

Policy options on timing of disclosure

We support Option 2: With the notice of the first meeting of the creditors.

Option 1 may cause some problem to administrators. What would be considered as 'as soon as practical'? It is important to keep in mind that administrators are still familiarising themselves with the affairs of the company.

Option 2 on the other hand will be a middle ground between the pressure put on administrators to perform and the interest of creditors. The administrators have a few days to put the list of creditors together and the creditors when receiving the notice to the first creditors' meeting with the list (at least five business days[6]) will have time to lobby for the removal of the administrator. They will also have time to take certain measures to protect their interests (by appointing proxies for instance). Furthermore, to make the job of the administrator slightly easier (especially when dealing with claims such as the one that arose from 2007 *Sons of Gwalia* case[7]), it may be preferable to identify the amount of each claim within designated bands, rather than disclosing an estimate of the specific amount due for each creditor.

Option 3 may not give as much freedom to creditors as Option 2 because creditors will not be able to use the information in the list of creditors during the first meeting. It may not also allow them to lobby for the removal of creditors during the first meeting.

Policy options on recipients of information

We support Option 2: The company creditors, other than creditors owed less than $1000. The reason we support such a provision is for the purpose of consistency with the winding up provisions, especially s 496(3) of the *Corporations Act 2001* (Cth).

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[6] *Corporations Act 2001* (Cth), s 436E.

[7] *Sons of Gwalia Ltd v Margaretic and Another* (2007) 232 ALR 232, 60 ACSR 291.

Option 3 may cause damage to certain creditors in relation to their financial position and this may lead to speculation on the market. Accordingly, we believe that disclosure should be targeted to the creditors' of the company only and not to the general public.

Issue 2: Administrator's notice to property owners

The Referred Proposal is that:

The administrator of a company should be required to provide details of the location of all equipment in the possession of the company owned by entities other than the company. These details might be included in the s 443B(3) notice that informs the owner or lessor that the company does not propose to exercise rights in relation to the property.

We agree with this proposal (PP2). Without such information, the lessors will have no idea where the property is located. The lessors may have to make their own enquiries in relation to this matter which can be impractical and costly to the lessor in certain cases. It is good business practice for the administrator to notify the lessor for the location of the property.

Issue 3: Chairing the major meeting of creditors

The Referred Proposal is that:

A nominee of an administrator should be allowed to chair the second [major] meeting in voluntary administration, where the administrator is sick or otherwise unable to attend in person.

We agree with the proposal PP3. Such a proposal is reasonable and desirable. It also introduces flexibility into the system of chairing meeting in the case of voluntary administration because it recognises that in certain instances it may be impractical for the administrator to chair a meeting. Furthermore, involving the court each time when an administrator needs to appoint a nominee may be onerous and may slow down the process of voluntary administration.

Another element that should also be taken into consideration is in relation to the requirement that the administrator should 'attend in person'. With globalisation today, creditors of the companies may live in different places and accordingly organising meetings may be problematic. In *Holzman v New Horizons Learning Centre (Canberra) Pty Ltd & Ors*,[8] the administrator of four related companies made an application under s 447A of the *Corporations Act* to permit him to attend the second creditors' meeting via video conference because the meeting was taking place in four different locations (Canberra, Brisbane, Adelaide and Perth) at the same time. The court granted such leave because the creditors where not disadvantage by the non-personal attendance of administrators. Going to court for such leave can be expensive and may result in the lengthening of the process of voluntary administration. This 'bodily attendance' requirement may need to be made more flexible. We propose that the administrator needs to attend in person the second creditors' meeting; however the use of video conference or other types of technology may be used when the administrator is unable to attend a meeting in person.

Issue 4: Notification of breach of deed of company arrangement

The Referred Proposal is that:

The deed administrator should be required to notify creditors of any breach of a deed of company arrangement.

There is a need for a statutory requirement for the deed administrator or the directors to inform creditors if there is a breach of the deed. However, s 445CA of the *Corporations Act* notes that creditors are entitled to terminate the deed if:

- there has been a breach of the deed; and
- the breach has not been rectified.

For this reason it serves no purpose to follow Option 1: Obligation to notify all breaches. Such a requirement is unduly burdensome especially due to the fact that certain breaches may be remedied.

We propose that the deed administrator or the directors (if in control of the company under the deed) have to inform the creditors for breaches that have

[8] *Holzman v New Horizons Learning Centre (Canberra) Pty Ltd & Ors* [2004] NSWSC 9.

not and will not be rectified. Creditors should be aware of such breaches because such breaches may lead to the termination of the deed.

Issue 5: Appointment of new person as liquidator

The Referred Proposal is that:

Directors and related party creditors should be prevented from voting on a proposal to appoint a different person as liquidator when a company proceeds from administration into liquidation.

We agree with proposal PP5 that there should be no change in the current position. There is no reason to stop directors and other related party creditors from voting to appoint a new liquidator for the following reasons:

- The referred proposal can be viewed as a tough regulation and can also be unreasonable. Stringent rules are usually designed to cope with the "bad apples" and the unusual hard cases, which in reality constitute a minority of all the problems in the domain of voluntary administration. Most of the directors, being "good apples" will accordingly be subjected to unreasonable rules. This is unacceptable for a modern corporate society with a strong commercial focus.
- If we imposed such a limitation then there will be a need to extend the limitation to every person who may be involved with a voidable transaction. This is impractical.
- The liquidator has a number of duties imposed on them that ensure that the interests of all parties are taken into consideration. If liquidators do not take action due to their relation to a certain creditors, they will be in breach of their duties.
- The liquidator is an independent person.[9] If the liquidator is being bias, the liquidator can be challenged on ground of impartiality.[10]
- Section 600A of *Corporations Act* provides further protection in relation to this matter. This is the middle ground: allowing all creditors to votes while protecting their interest in case of misuse of the rule that allows all creditors to vote.

[9] *Re National Safety Council of Australia* (Victoria Division) (1989) 15 ACLR 355.
[10] *Re Wes Australian Gem Explorers Pty Ltd* (1994) 13 ACSR 104. In *Re Nickel Mines Ltd* (1978) ACLR 686, the court removed a liquidator whose independence has been compromised.

Issue 6: Administrator's remuneration

The Referred Proposal is that:

Where a company is put into liquidation after an administration (or deed of company arrangement) then the remuneration of the administrator (or deed administrator) should be provided a priority over that of any replacement liquidator.

We agree with this proposal. It is only fair for administrator to be protected and to claim their remuneration in priority to liquidators. Furthermore, there may be an inconsistency between the lien that an administrator has on the asset of the company and the lower priority that administrators have to recover their remuneration in case of winding up of the company.[11]

Issue 7: Provisional liquidator's remuneration

The Referred Proposal is that:

Creditors should be able to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation.

To ensure consistency of the treatment of court appointed liquidators and provisional liquidator in relation to remuneration, similar provision to s 473(3) and (6) should be adopted in relation to the remuneration of provisional liquidators.

[11] Geoff McDonald Submission to Treasury (June 1997).

Issue 8: Postal voting by creditors

The Referred Proposal is that:

A new mechanism should be introduced to allow for voting by post on proposals relating to remuneration [of a liquidator], compromise of debts under s 477(2A) of the Corporations Act 2001 (Corporations Act) and liquidators entering into agreements on the company's behalf under s 477(2B) of the Corporations Act.

We agree with proposal PP8.

Issues arising from PP8

Should postal voting, if introduced, be permitted beyond the three matters set out in the Referred Proposal?

Yes, we believe so.

Should electronic voting be permitter in addition to postal voting?

Yes, it should. We need to take advantage of the technology available to us and use it.

Issue 9: Assumed solvency defence for officer-initiated transactions

The Referred Proposal is that:

The defences to the voidable transaction provisions should be amended, such that the insolvency defence [that is, the assumed solvency defence] under s 588FG does not apply to the new provisions relating to transactions entered into while a company was under administration (given that insolvency is not a condition for those provisions).

We agree with proposal PP9 that the defence should not be removed.

Issue 10: Replacing a liquidator

The Referred Proposal is that:

ASIC should be able to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.

In relation to ss 437(7) and 502 of the Corporations Act, the *Federal Court (Corporations) Rules 2000* at 7.2 notes that:

> *"(1) If, for any reason, there is no liquidator acting in a winding up, the Court may:*
>
> *(a) in the case of a winding up by the Court — appoint another official liquidator whose written consent in accordance with Form 8 has been filed; and*
>
> *(b) in the case of a voluntary winding up — appoint another registered liquidator whose written consent in accordance with Form 8 has been filed.*
>
> *(2) The Court may make the appointment:*
>
> *(a) in any case — on application by ASIC, a creditor or a contributory; or*
>
> *(b) in the case of a winding up by the Court — on its own initiative."*

Accordingly, there is no need to amend the legislation since ASIC has sufficient powers in relation to this matter.

Issue 11: Taking possession of and transferring books

The Referred Proposal is that:

ASIC should be able to take possession of books relating to a company in external administration, and transfer those books to another liquidator, if a liquidator dies or is no longer registered.

No particular opinion on this proposal

Issue 12: Exemption from classification as controller

The Referred Proposal is that:

The definition of 'controller' should be revised such that enforcing a security over a single asset, or an asset with a value of less than $100,000, does not involve a controllership and the requirements of the Corporations Act dealing with controllers are not applicable.

We agree with proposal PP 12. The exemption should not be introduced into the system for the following reasons:

- Prescribing by regulation or law a certain value ($100,000) is not practical. This amount may fluctuate due to inflation or quickly become inappropriate.
- The value or one asset assessment does not take into consideration the size of the company and the assets it has at its disposal. What may be considered as a small amount for one company may be a considered a considerable amount for another company.

Issue 13: Exemption from voidable transaction provisions

The Referred Proposal is that:

Transactions conducted under the authority of a receiver or [other] controller should be exempted from the voidable transaction provisions.

We support Option 1 for the reasons outlined on page 57 of the Discussion Paper.

Issue 14: Publication of external administration notices

The Referred Proposal is that:

The requirement to publish insolvency notices in a newspaper should be limited, such that it requires only a summary statement with additional details to be published on a website to be maintained by ASIC or a professional body. An alternative proposal would move all notices to a website to be maintained by ASIC or a professional body.

There is a need to rely more and more on the technology that is easily available to society. While doing so it is also important to be aware of the people who have access to such technology. The Australian Bureau of Statistic gathered the following information:[12]

Business Use of Information Technology, Summary Indicators - 2002-03 to 2005-06

	2002-03	2003-04	2004-05	2005-06
Computer use (%)	83.0	85.2	88.6	88.8
Internet use (%)	71.4	74.2	76.8	81.3
Web presence (%)	23.0	25.1	26.7	29.8

As it can be noted, the level of use of information technology is rising over time. In 2005-2006, 81.3% of the businesses are using the internet in one form or other. This number is bound to increase in the coming years. This empirical data supports the authors' anecdotal evidence of the use of the internet in the commercial world. For this reason we support the option of gradual increase of the use of internet disclosure. We believe that at this moment Option 2 should be introduced in the system. Abbreviate the print disclosure requirement and add an internet disclosure requirement. This will:

- Inform the public about the external administration through print
- If people would like more information, they can access the web
- The use of the internet will allow the information to be available to the public for a period of time.

[12] Australian Bureau of Statistics, "Business Use of Information Technology 2005-2006".

When people become familiar with this process, it may be a good idea to move to Option 3 and discontinue the print document requirement and rely on internet disclosure. This will reduce cost of disclosure.

Issue 15: Exemption from publication

The Referred Proposal is that:

The rule allowing a deed administrator to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents should be extended to all other types of external administration.

We agree with this proposal to ensure consistency of the system.

Issue 16: Electronic communication with creditors

The Referred Proposal is that:

The new mechanism for electronic communication with creditors should be extended, to allow for electronic means to be used except if the creditor requests a hard copy of documents. One suggested approach would provide for a single page to be sent to creditors directing them to documents available on a website and providing a telephone number to call if a hard copy is required. An alternative proposal would provide for a creditor being 'deemed' to have consented to electronic communication where a company has communicated with a creditor by that means at any time prior to the commencement of the external administration.

We support this proposal. As it can be seen from the table illustrated in issue 14, most businesses have access to the internet. Electronic communication should be encouraged either through email facility or fax or notices on a website. This will increase efficiency and save both time and cost.

Professor Michael Adams & Marina Nehme
School of Law, University of Western Sydney
14th May 2008

16 May 2008

John Kluver
Executive Director
Corporations and Markets Advisory Committee
By email: john.kluver@camac.gov.au

Dear John

ASIC submission on CAMAC's discussion paper: *Issues in External Administration*

1. ASIC welcomes the opportunity to provide this submission to CAMAC in response to its February 2008 discussion paper on *Issues in External Administration* (the Paper).
2. In this submission, we set out our views only on the issues that directly affect ASIC, being:
   (a) powers for ASIC to appoint a replacement liquidator and take possession of, and transfer, books; and
   (b) publication of external administration notices and electronic communication with creditors.

Issue 10: Replacing a liquidator

ASIC recommendation:

ASIC should be granted the administrative power to appoint a replacement liquidator in circumstances where: (a) a liquidator dies; or (b) a liquidator's registration is suspended or cancelled, and there are no appointed liquidators left to administer the company being wound up.

3. Applying to the court for a new liquidator to be appointed is costly and time-consuming.
4. An administrative process would be quicker, more convenient, less costly and, therefore, in the interests of creditors. An administrative process would also complement the new s1290A operationally.

Issue 11: Taking possession of and transferring books

ASIC recommendation:

ASIC should have the power itself to transfer the books relating to an externally administered body corporate if: (a) the external administrator dies; (b) the external administrator's registration is suspended or cancelled; or (c) the external administrator fails to comply with the new s1298A.

5. Unlike the referred proposal, our recommendation is not limited to the situation when the liquidator dies or 'is no longer registered'. Our broader recommendation would enable ASIC to take possession of books relating to a company in external administration and arrange the transfer of those books in the event that the external administrator had not complied with the proposed new s1298A or was not in a position to comply with s1298A. In this context, we intend the 'books' to mean the company's books and records, and the working files of the external administrator.

6. Under the more limited referred proposal, if the external administrator has not complied with their obligations in s1298 to transfer books (as opposed to being unable to do so by virtue of intervening death, or non- or de-registration) ASIC would be unable to take action to ensure that the books are transferred to another insolvency practitioner so that the due administration of the insolvent company could continue. Our proposal would make the process more efficient and practical, and would reduce unnecessary inconvenience to creditors.

7. The mischief that the referred proposal was intended to address (i.e. the situation where books are not transferred to another insolvency practitioner) is the same regardless of whether the reason for the failure to transfer books is legal default or physical incapacity.

Additional ASIC suggestion:

8. The new s1298A(1)(d) should be amended so that the time limit within which the liquidator whose registration is cancelled or suspended must transfer the books is an objective one of, say, 5 business days from the date on which the cancellation or suspension takes effect, instead of using the indefinite wording 'as soon as practicable'.

Issue 14: Publication of external administration notices

ASIC recommendation:

We support an amended form of the provisional position: ASIC should set up and administer a publicly accessible electronic corporate insolvency register.

9. We consider that it would be in the best interests of creditors and the broader commercial community for ASIC to introduce and operate a corporate insolvency register accessible through the current ASIC website. The register would integrate the corporate information available on our existing public registers with public insolvency notices lodged by external administrators in respect of individual insolvent companies. Such a register would be more useful than a centrally designated website for public insolvency notices alone.

10. We would be happy to provide more detail about the features of such a register and how it would operate.

11. Ideally, access to public information on ASIC's public registers and searching would be available free of charge. However, the Corporations (Fees) Regulations

2001 prescribe fees for access to documents in certain circumstances. Whether the prescribed fees should be amended or removed is a matter for Government.

Transitional regime:

12. It would be preferable for any staged introduction to start by abbreviating the print disclosure requirements and then adding the internet disclosure option (Option 2 on p.61 of the Paper) and then discontinue the print disclosure requirements (Option 3) after an appropriate review.

13. Instead of requiring publication of abbreviated print disclosure requirements, with the consequent costs, there could simply be a standard statement published daily in the public notices section of all major Australian newspapers during the Option 2 period to the effect of (for example): '*For public insolvency notices, refer to www.asic.gov.au/insolvencynotices*'.

14. This approach would easily enable interested persons to get information currently found in the public notices printed in newspapers.

Issue 16: Electronic communication with creditors

ASIC recommendation:

We support the provisional position and the use of electronic communication generally. However, external administrators should be permitted to restrict access to confidential external administration documents, which are currently only provided to creditors. This could be done by publishing the confidential information either on a restricted-access (e.g. password-protected) website of the insolvent company or of the external administrator's firm, or by delivering them by email or traditional post.

15. External administrators may justifiably be reluctant to publish non-public documents, e.g. their s439A(4) report to creditors or the list of creditor details, on an ASIC website or register that can be accessed by the public at large. A possible way around this would be to enable administrators to password-restrict access to confidential documents on their own website or deliver them by email, rather than post them on the ASIC public website.

If you would like to discuss these issues further, please feel free to contact me or Joanna Bird on 02 9911 2384.

Yours sincerely

Jeremy Cooper
DEPUTY CHAIRMAN

16 May 2008

Mr John Kluver
Executive Director
CAMAC

By email: john.kluver@camac.gov.au

Our ref: 002 Submission.doc

Dear Mr Kluver

Issues in External Administration – Discussion Paper

We refer to your request for submissions on the issues raised in the CAMAC Discussion Paper on Issues in External Administration ("the Discussion Paper"). We appreciate the opportunity to comment.

The IPA is a strong supporter of reforms to improve the conduct of corporate insolvency administrations and it is on this basis that the IPA provides this submission. The IPA also sees merit in trying to ensure consistency between corporate and personal insolvency; for that reason we have drawn comparisons with bankruptcy law where these are relevant.

To assist with the readability of this paper, we have included the Advisory Committee's provisional positions, shown in bold, and any associated questions before making comment.

PP1 – To assist creditors in their collective decision-making in a voluntary administration, an administrator should publish on a designated website the name, contact details and estimated amount due in relation to each creditor of a company in voluntary administration no later than the time of distribution to creditors of the notice of the first meeting.

The IPA supports the provision of this information to creditors. The Practice Note on Creditors' Meetings, which is part of the IPA's Code of Professional Conduct, states[1]:

> "Apart from the statutory requirement to provide a list of creditors, a schedule of creditors (name and amount) should also be made available on the request of any creditor. The information is publicly available from the Report as to Affairs lodged with ASIC or Statement of Affairs filed with ITSA.
>
> To minimise costs, where possible the schedule should be provided electronically (PDF recommended). Hard copy should only be provided where the creditor does not have electronic access."

[1] Paragraph 21.4.1

The IPA is strongly supportive of providing information to creditors via the internet (refer to PP14 for further discussion on this point).

We would however, make the following comments in respect of this provisional position:

- The provision of this information should be the same for both voluntary administrations ("VA") and creditors' voluntary liquidations ("CVL"). This is not to say that the requirements for VAs should be written to reflect that currently prescribed for CVLs, but rather, if a different requirement is recommended for VAs, then the same requirements should apply to CVLs.

- The information to be provided by the voluntary administrator should be to the best of his or her knowledge. There is very limited time available to provide the notice of the first meeting, and as such there is insufficient time for the administrator to undertake any investigations into creditors and the amounts outstanding. The administrator is totally reliant on the company's books and records at this point in time; and

- The timeframe of "no later than the time of distribution to creditors of the notice of the first meeting" is very short (meeting to be held within 8 business days and at least 5 business days notice to be provided). On large administrations where there are many creditors, this timeframe may be difficult to achieve depending on the state of the company's books and records and the ability to migrate information into the web based format.

The IPA sees disclosure of creditor information as a fundamental issue for creditors in all insolvencies. In that respect, there is no restriction in the *Bankruptcy Act* on publicising all creditors' claims. In Part X agreements, all creditors have a right of inspection of the debtor's statement of affairs: s 188B.

In bankruptcy, section 101(2) of the *Bankruptcy Act* says that:

> "the trustee shall, upon request in writing by a creditor who has a provable debt, supply the creditor with a statement in writing containing the names of the creditors who have lodged proofs of debt, the amount claimed by each such creditor and the amount admitted by the trustee in respect of each such creditor".

Among other purposes, this provision supports the right of a creditor to challenge another creditor's proof of debt.

Issue arising from PP1 – Would it be preferable to identify the amount of each claim within designated bands, rather than having to disclose an estimate of the specific amount due?

The IPA would prefer that banding not be used. We are concerned that banding may result in additional work for the administrator in the short timeframe available before the notice of the first meeting is required to be sent to creditors. In very large administrations, there are hundreds, or possibly thousands, of creditors that will need to be allocated to the correct band, which would mean substantial additional work.

PP2 – An administrator issuing a s 443B notice should be required to disclose in the notice the location of the relevant equipment to the extent that this information is reasonable available to the administrator. In addition, the administrator should have a general obligation to facilitate efforts by owners to locate property that the administrator will not be using.

It is not proposed that there by a specific penalty or other sanction on the administrator for failure to comply with either requirement. Rather, the intent is that ASIC or any other interested party could take judicial proceedings to enforce either requirement.

The IPA does not object to this provisional position.

PP3 – The general expectation should be that the administrator will chair the major meeting of creditors, given that it decides the future course of action for the company. However, an administrator should have a discretion to nominate another person to chair the major meeting of creditors where:

- **the administrator cannot attend that meeting because of illness or some other good reason, and**
- **the creditors have resolved that the nominee should chair the meeting.**

The administrator should be required to provide to the meeting a statement of the reason for his or her inability to attend.

Any nominee should be a registered liquidator. Also, before creditors vote on whether the nominee should chair the meeting, the administrator should:

- **disclose relevant information concerning the nominee's experience and knowledge of the administration, and**
- **certify to creditors that the nominee is in a position to answer questions about the administration.**

The meeting should be automatically adjourned for a short period (no more than a week) if the creditors do not approve the nominee presiding.

The IPA included commentary on this issue in its submission on the Exposure Draft of the Corporations Amendment (Insolvency) Bill 2007 ("Exposure Draft"). The IPA strongly supports this provisional position.

We add that this issue arose in corporate insolvency in the decision in *Re Tarpam Pty Limited (in Liq)* [2006] FCA 776. In that case, the administrator had to apply to court to validate a s 439A meeting. Medical issues arose on the day of the meeting, and continued in relation to a subsequent meeting. The administrator had delegated the chairing of the meetings to his senior manager, who, according to the court, "was familiar with the affairs of the Company and had had a considerable hand in the drafting of the report to creditors" and who properly addressed issues raised at the meetings. The creditors raised no issue about this. While the Court validated the meetings, the administrator had to go to the

expense of making an application. The position suggested by CAMAC would properly allow this sort of circumstance to be dealt with without involving the court.

As to bankruptcy law, we point out that a trustee can appoint someone to represent the trustee at a meeting under s 63B of the *Bankruptcy Act*. This can apply to a Part X second meeting of creditors.

PP4 – The deed administrator or the directors (if in control of the company under the deed) should be required to notify creditors of any information regarding a breach, or a combination of breaches, that could reasonably be expected to have a material effect on the purpose or outcome of the deed.

The IPA agrees with this provisional position, particularly the limiting of notifiable events to those expected to have a material effect on the purpose or outcome of the deed.

However, we would make the following suggestions in respect of this provisional position:

- although the directors may in control of the company under the deed, it is the deed administrator that is responsible for the actual deed and as such the directors should be required to notify the deed administrator of the breach and it should be the deed administrator's obligation to notify the creditors; and

- it would be useful to provide guidance on what constitutes a breach that could reasonably be expected to have a material effect on the purpose or outcome of the deed.

We mention that there is in effect a regime in Part X of the *Bankruptcy Act* whereby creditors are notified of a breach of a personal insolvency agreement, which may lead to the sequestration of the debtor's estate.

PP5 – There should be no change to the current position under which all creditors, including creditors who are directors or related parties of those directors, have the right to vote on a resolution to appoint a different person as liquidator when a company proceeds from administration into liquidation.

The IPA disagrees with this provisional position. It was the IPA in its submission on the Exposure Draft which suggested that directors or related parties creditors should not be entitled to vote on a resolution regarding the appointment of a different person as liquidator[2].

The IPA is of the opinion that where directors have chosen an administrator to act, they should be required to be bound by that decision, and it should be left to independent creditors to make a decision regarding the appointment of a different liquidator.

[2] Paragraph 10.1.1 on page 17

Issue arising from PP5 – Should anyone, in addition to a creditor, have a right to challenge a resolution appointment a new person as liquidator? If so, what type of remedy should be available?

The former administrator should be able to apply, at his or her own cost, to challenge the resolution with the remedy being reinstatement as liquidator.

PP6 – Where a company is put into liquidation after an administration (or deed of company arrangement), the remuneration of the administrator (or deed administrator) should have priority over that of any replacement liquidator.

Whilst the IPA agrees with this provisional position, [3] to ensure a balanced consideration of what is a complex issue, we raise the following additional matters:

- The provisional position may result in situations where an administrator is removed by creditors for poor performance or a perceived lack of independence, but is "rewarded" by payment of his/her remuneration in priority to the replacement liquidator. However, the right of creditors to refuse approval of the administrator's remuneration counterbalances this. There is a residual risk that related parties might sway the vote in respect of the remuneration approval request, however there is provision for the Court review of the remuneration of administrators (s 449E(2)).

- Is it reasonable that an administrator should benefit from the work done by the liquidator by obtaining priority over the realisations made by that liquidator? Arguably, the liquidator will also have obtained some level of benefit from the administrator, for example:

  - the investigations that the administrator has already conducted for the preparation of the s 439A report may form the basis of successful recovery actions undertaken by the liquidator; and

  - where the administrator makes a decision to trade on the business but the business is actually realised by the liquidator; the liquidator may not have had a business to sell if the administrator had not taken the risk of trading the business on.

We point out that a rationale for the present position, where the voluntary administrator has not been fully paid at the time of the liquidation, and ranks only *pari passu* with the liquidator, is explained in *ASIC* v *McKenney Consulting P/L* (2003) 21 ACLC 314. In that case, the funds were insufficient funds to pay both the administrators' and liquidators' remuneration costs. The court concluded that the administrators were only entitled to be paid remuneration in relation to those assets of the administration companies that were realised under their administration in accordance with their equitable lien. The court said, in that case, that *"it would be unconscionable for the administrators to benefit from the fruits of the liquidator's labour"*.

The *Bankruptcy Act* in fact gives priority to the bankruptcy trustee over the remuneration of the controlling trustee – see section 109(1)(b). The controlling trustee has a statutory lien – under s 189AC – in respect of his or her remuneration and costs; however this lien ceases to have effect on bankruptcy of the debtor: s 189AC(3). Next in priority comes the costs and remuneration of the trustee of the agreement, if the bankruptcy occurs within 2 months

[3] Paragraph 10.1.1 on page 17

after the termination of the agreement: s 109(1)(c). The situation in Part Xs can be differentiated from Voluntary Administrations on a number of points:

- From a practical perspective, controlling trustees usually request up-front payment of fees. This is more usual in controlling trusteeships due to the fact that the appointments do not usually involve trading businesses, are generally smaller in size and an up-front payment of a fee is more readily determinable;

- A voluntary administration often involves a business with asset and trade-on issues;

- When creditors vote for a debtor to go bankrupt in a Part X, the bankruptcy is not automatic. The bankrupt must present his or her own petition for the bankruptcy to commence. This allows a period for the controlling trustee to exercise the statutory lien. In a voluntary administration, the liquidation commences immediately on the passing of the resolution by creditors. Therefore there would be no opportunity for the enforcement of a lien if it were in the same terms as that under the Bankruptcy Act.

In our opinion, when consideration is given to the wide range of voluntary administrations conducted each year, there will be situations where is it fair to give administrator's priority and there will be situations where it may not appear reasonable. Ultimately, the decision has to be made on what will be the fairest position in the majority of cases.

PP7 - Creditors, in addition to the court, should have the power to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation. To assist them in making this decision, creditors should be given similar information to that provided to creditors in other forms of external administration.

The court should have the power to confirm, increase or reduce the remuneration determined by the creditors.

The IPA agrees with this provisional position. The IPA included commentary on this issue in its submission on the Exposure Draft [4].

PP8 – A liquidator should have the option to conduct a postal vote on a proposal relating to remuneration, compromise of debts under s 477(2A) and agreements under s 477(2B), with a requirement that a physical meeting be held if a threshold objection level to a postal vote is reached (say, 5% by number or value of creditors).

The IPA agrees with this provisional position. The IPA included commentary on this issue in its submission on the Exposure Draft [5].

[4] Paragraph 20.2 on page 30

[5] Paragraph 4.1.2 on page 8

However, we suggest the postal vote be limited to dealing with one issue at a time. This is in line with the "flying minute" provision under s 64ZBA of the *Bankruptcy Act* (see also s 185EC) and will be more likely to prevent confusion that may be associated with creditors being requested to deal with multiple resolutions.

Issue arising from PP8 – Should postal voting, if introduced, be permitted beyond the three matters set out in the Referred Proposal?

Yes. A liquidator should be able to put any single proposal to creditors via a postal vote. The same pros and cons apply to any proposal as are discussed in the Discussion Paper.

Issue arising from PP8 – Should electronic voting be permitted in addition to postal voting?

Yes. Allowing electronic voting is in line with other provisional proposals regarding electronic communication and electronic advertising. The IPA is supportive of any reforms that provide for the streamlined flow of information in insolvency administrations.

PP9 – The assumed insolvency defence should remain for transactions entered into by officers of a company while a company is under a deed of company arrangement.

The IPA does not disagree with the provisional position. It would be a significant change in the law to remove the defence. A company trading under a DOCA is released from its former liabilities and is trading afresh as any other solvent company. It will incur new liabilities and it may become insolvent in respect of those liabilities. There is no sound policy reason to apply different laws to a company under a DOCA in relation to those creditors dealing with it. It could also act as a undue deterrent for those creditors to deal with the company, thereby inhibiting the viability of the company.

PP10 – It is unnecessary to give ASIC a statutory right to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.

The IPA does not disagree with the provisional position. The Courts' Corporations Rules are adequate for this purpose.

PP11 – Any interested party should have the right to apply to the court for directions about the temporary holding of books.

The IPA is of the opinion that the issue of ASIC being able to take possession of books in the event that an external administrator dies or is no longer registered, goes beyond a mere jeopardy where there is a temporary vacancy in the office of administrator or liquidator. We see the real issue as being where books and records are at risk due to the behaviour of the administrator or liquidator. For example, where a liquidators registration is removed due to the practitioner no longer being a fit and proper person.

The IPA is supportive of ASIC having the power to take possession of books relating to a company in external administration to facilitate their transfer to another liquidator or administrator, if a liquidator dies or is no longer registered.

PP12 – There should be no amendment to exempt from the definition of controller a person enforcing a security over a single asset or an asset with a value of less than $100,000.

The IPA does not disagree with this provisional position.

PP13 – Transactions conducted under the authority of a receiver or other controller should be exempted from the voidable transaction provisions.

The IPA agrees with this provisional position.

PP14 – There should be a staged move from print media to internet disclosure of all public notices on a designated website to be operated by ASIC.

The IPA strongly supports the use of the internet for advertising in insolvency administrations. The IPA included commentary on this issue in its submission on the Exposure Draft [6].

The IPA has the following comments in respect of the provisional proposal:

- ASIC may not be the appropriate body to host such a website, and consideration should be given to a tender process for this project; and
- Clear steps and timeframes need to be established for the transition from print media to the internet.

The IPA has given in depth consideration to the structure and operation of such a website and would be prepared to discuss this further if required.

PP15 – Administrators, receivers and other controllers and liquidators, as well as deed administrators, should have the right to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents. In exercising its discretion whether to grant an application, the court could take into account the possible prejudice to relevant parties, including past creditors and persons who may have to deal with the company in the future.

The IPA agrees with this provisional position. The IPA included commentary on this issue in its submission on the Exposure Draft [7].

[6] Paragraph 21.1 on page 33

PP16 – External administrators should be permitted to advise in their first notification to each creditor that all further notices to creditors and other documents relevant to the external administration will be published on one or more websites (which must include the designated ASIC website for public documents, as discussed in Issue 14).

That first notification should also state that any creditor may choose to register:

- **to receive an electronic notification that new material has appeared on the website(s), or**

- **to receive by mail, free of charge, a printed copy of these further notices and other documents.**

Creditors who so register will continue to receive information in the specified manner unless they subsequently notify the company that they no longer wish to do so.

The IPA agrees that external administrators should be able to provide creditors with information via the internet. The IPA included commentary on this issue in its submission on the Exposure Draft[8].

However, the IPA is concerned that the provisional position may possible result in confusion with external administrators having to maintain different lists of creditors that do not want notification, want notification via email or want the actual report sent to them.

Our preferred approach is that set out in our submission on the Exposure Draft:

> "The IPAA prefers a system such as that approved for use in the Ansett Administration. This would provide for reports to be available online and for the external administrator to send a one page notification to creditors regarding the availability of the document online. Creditors would also be provided with a phone number that they could call if they required a paper version of the report to be sent to them. Creditors would have to be notified each time a document was available online. The use of this process would be elective and external administrators would have to decide whether it was appropriate to use this process each time they communicate with creditors. If there were concerns about sensitivity of the information contained in the report, or the report was only short, then the external administrator may decide to send the full version of the report to creditors."

The reason our approached is preferred is that all creditors are treated consistently for every document that is released. This allows for simplicity in processes as the external administrator will not need to maintain separate lists of creditors depending on how they wish to be notified. Furthermore, it ensures that every known creditor is notified of the availability of a document online.

We would recommend that all notices and reports to creditors are made available through the website discussed at PP14.

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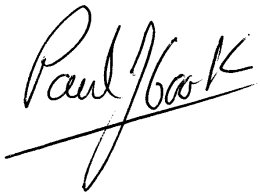
[7] Paragraph 14.1 on page 23

[8] Paragraph 21.3 on page 33

Finally, we mention that from recent discussions with ITSA, we understand that ITSA is well advanced on website notifications in personal insolvency, including electronic lodgements and on-line provision of information. ITSA's Online Action Plan and Electronic Lodgement Policy are explained on its website.

Should you wish to discuss any aspect of this submission further, please do not hesitate to contact Ms Kim Arnold on 02 4283 2402.

Yours sincerely
Insolvency Practitioners Association



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16th May 2008

Corporations and Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001

john.kluver@camac.gov.au

Dear Sir

Issues in External Administration – Discussion Paper – February 2008

I am a Director of the Australian Institute of Credit Management and on their behalf I wish to make a submission on your Discussion Paper "Issues in External Administration". This paper deals with issues which are of great interest to me, my fellow Directors and the members of the Australian Institute of Credit Management.

The Australian Institute of Credit Management is the professional body representing Australia's Credit professionals. It was founded in 1937 and incorporated in 1967. It is recognized as the professional body providing for the career needs and interests of all who work in the credit profession. We have more than 2,500 members and operate in all states of Australia. Our members include the employees of companies across every industry segment, the National Credit Managers of the largest Australian companies and some of the largest multi national companies in the world. In addition it includes many Insolvency Practitioners, Lawyers and other professionals.

We have drawn on extensive personal experience, circulated our members and held discussion groups on your paper. On the basis of these discussions and our review of the paper we would like to place before you our opinions and thoughts on the paper and ask you to seriously consider this submission in your review of "Issues in External Administration".

Generally speaking we support any changes which provide better and further information to creditors however we are also mindful of the costs to the administration both as an expense and also in terms of time which not only adds to the running time of an administration but also to the costs of the administrator and by default a reduced return to the creditor.

Please consider our comments on the various provisional positions as follows:

PP1

To assist creditors in their collective decision-making in a voluntary administration, an administrator should publish on a designated website the name, contact details and estimated amount due in relation to each creditor of a company in voluntary administration no later than the time of distribution to creditors of the notice of the first meeting.

We support the provisional position as we believe it is in the best interest of creditors to know

- The names of other creditors to
    - facilitate the appointment of like minded or friendly proxies where creditors are unable to attend a meeting themselves (the notice period is short and the appointment of an Administrator is often unexpected)
    - garner support for the voting on any matters eg the appointment of the Administrator and/or a committee of inspection or creditors.
- The likely debt levels of other creditors to
    - assist with the garnering of support for like minded creditors on various resolutions
    - provide a quick assessment of the likely creditor support in a trade on situation ie deed of company arrangement
    - assess the “collateral damage” as it is likely that many creditors will also be cross trading.

We are also mindful of the cost associated not only in disseminating this information but also in the time and therefore cost of the Administrator compiling the information. We further support the fact that the information

- be made available on a website, and that the website address and access be included in the formal advice to each creditor

and respectfully request the site and information

- be available within 24 hours of the dispatch of the initial meeting advice or alternatively 2 working days before the appointed time for the first meeting of creditors
- represents the best endeavours of the Administrator in terms of accuracy of both creditor name and amount of debt, and
- be routinely updated to reflect changes to creditors names and debt amounts as determined by the Administrator and where this is not finally determined by the Administrator then both the Administrator’s findings and the amount specified in any proof of debt be jointly shown. we do not prefer the display of amounts in bands.

PP2

An administrator issuing a s 443B notice should be required to disclose in the notice the location of the relevant equipment to the extent that this information is reasonably available to the administrator. In addition, the administrator should have a general obligation to facilitate efforts by owners to locate property that the administrator will not be using.

It is not proposed that there be a specific penalty or other sanction on the administrator for failure to comply with either requirement. Rather, the intent is that ASIC or any other interested party could take judicial proceedings to enforce either requirement.

we note this refers to the situation surrounding a 443B notice which has it's own special set of circumstances. We are supportive of the proposal in principal however do note we are also mindful of the burden which may be placed on an Administrator and agree it should be subject to this information being reasonably available to the Administrator.

PP3

The general expectation should be that the administrator will chair the major meeting of creditors, given that it decides the future course of action for the company. However, an administrator should have a discretion to nominate another person to chair the major meeting of creditors where:

- the administrator cannot attend that meeting because of illness or some other good reason, and

- the creditors have resolved that the nominee should chair the meeting.

The administrator should be required to provide to the meeting a statement of the reason for his or her inability to attend.

Any nominee should be a registered liquidator. Also, before creditors vote on whether the nominee should chair the meeting, the administrator should:

- disclose relevant information concerning the nominee's experience and knowledge of the administration, and
- certify to creditors that the nominee is in a position to answer questions about the administration.

The meeting should be automatically adjourned for a short period (no more than a week) if the creditors do not approve the nominee presiding.

We support the administrator having the discretion to nominate another person to chair the meeting where the administrator's absence is due to ill health. In all other circumstances we believe the administrator should chair the meeting. In making these comments we have had regard to the fact that many administrations have joint administrators. We do however submit that the administrator should be allowed to attend and chair the meeting by electronic means as is the case with creditors ie video conference or loud speaker telephone. This could result in significant cost savings to an administration where there are occasions that an administrator may need to travel some distance (perhaps interstate) to attend a meeting which may only run a matter of minutes or be largely procedural only eg no deed of company arrangement, no significant assets etc and liquidation is almost a formality. As an aside we believe all paperwork to be tabled at the meeting should be available at the meeting in hard copy for any attendees.

Should it be deemed appropriate for a substitute chair to be appointed we would respectfully suggest this appointment should be ratified by a committee of inspection or creditors.

PP4

The deed administrator or the directors (if in control of the company under the deed) should be required to notify creditors of any information regarding a breach, or a combination of breaches, that could reasonably be expected to have a material effect on the purpose or outcome of the deed.

We believe that the requirement to only report material breaches reduces the likelihood of an undue administrative burden on the deed administrator and hence unnecessary costs to the administration. As such we support this proposal

PP5

There should be no change to the current position under which all creditors, including creditors who are directors or related parties of those directors, have the right to vote on a resolution to appoint a different person as liquidator when a company proceeds from administration into liquidation.

We do not believe there should be any class distinction amongst creditors and believe any genuine creditor should have the right to vote on a resolution to appoint a different person as liquidator.

PP6

Where a company is put into liquidation after an administration (or deed of company arrangement), the remuneration of the administrator (or deed administrator) should have priority over that of any replacement liquidator.

We support this proposal as we are concerned an administrator may act in a considerably more cautious manner in deciding on such issues as to whether to continue to trade a business, to hold assets for an orderly sale rather than quickly turn them into cash etc. The administrator's legitimate fees should be protected in each case.

PP7

Creditors, in addition to the court, should have the power to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation. To assist them in making this decision, creditors should be given similar information to that provided to creditors in other forms of external administration.

The court should have the power to confirm, increase or reduce the remuneration determined by the creditors.

This proposal may reduce costs to the administration and is supported.

PP8

A liquidator should have the option to conduct a postal vote on a proposal relating to remuneration, compromise of debts under s 477(2A) and agreements under s 477(2B), with a requirement that a physical meeting be held if a threshold objection level to a postal vote is reached (say, 5% by number or value of creditors).

Our underlying feeling is that any proposal which makes the administration not only more transparent and open but reduces not only the burden on the administrator but also the cost is supported by us. We support this proposal however feel it should be limited and restricted to those specific issues raised ie matters relating to remuneration, compromise of debts and agreements running less than 3 months.

Issues arising from PP8

- Should postal voting, if introduced, be permitted beyond the three matters set out in the Referred Proposal?

- Should electronic voting be permitted in addition to postal voting?[68]

As stated above we do not support a widening of the postal voting rights beyond the three matters set out above.

We fully support electronic voting.

PP9

The assumed solvency defence should remain for transactions entered into by officers of a company while a company is under a deed of company arrangement.

We see that it should be the same after as before and support this proposal.

PP10

It is unnecessary to give ASIC a statutory right to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.

We are supportive in this case as we agree the power of ASIC to apply under the current court rules appears to be sufficient.

PP11

Any interested party should have the right to apply to the court for directions about the temporary holding of books.

We agree the courts should have the discretion to make directions in this case particularly as it relates to the temporary holding of books by an interested party, including ASIC

PP12

There should be no amendment to exempt from the definition of controller a person enforcing a security over a single asset or an asset with a value of less than $100,000.

In our experience an asset with a value less than $100,000 may be significant in any administration while the proposed limit of $100,000 would most likely be significant in a small administration. As such we support that there should be no amendment in this case.

PP13

Transactions conducted under the authority of a receiver or other controller should be exempted from the voidable transaction provisions.

To assist with the administration and potential ongoing trading of the business a creditor should be able to conduct business with a controller (or Receiver) without fear of monies being subsequently recalled. We support this proposal.

PP14

There should be a staged move from print media to Internet disclosure of all public notices on a designated website to be operated by ASIC.

We believe the benefits are many in moving to internet disclosure of all public notices not the least being the improvement in speed of notification and awareness, the reduced possibility of misplaced notices (post, workplace etc) and the reduction in administration costs. We support this movement and preceding initiatives and comments regarding the increase in electronic communication.

PP15

Administrators, receivers and other controllers and liquidators, as well as deed administrators, should have the right to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents. In exercising its discretion whether to grant an application, the court could take into account the possible prejudice to relevant parties, including past creditors and persons who may have to deal with the company in the future.

We understand the reasons for this proposal including the ability to preserve the good name and increase marketability and support the court having the discretion in this case.

PP16

External administrators should be permitted to advise in their first notification to each creditor that all further notices to creditors and other documents relevant to the external administration will be published on one or more websites (which must include the designated ASIC website for public documents, as discussed in Issue 14).

That first notification should also state that any creditor may choose to register:

- to receive an electronic notification that new material has appeared on the website(s), or
- to receive by mail, free of charge, a printed copy of these further notices and other documents.

Creditors who so register will continue to receive information in the specified manner unless they subsequently notify the company that they no longer wish to do so.

We believe this is a sensible approach which will see faster dissemination of information at a reduced cost to the administration and support it.

We thank you for the opportunity to present our thoughts and trust our submission assists the committee.

Yours faithfully

Grant Morris

UNSW

SCHOOL OF BUSINESS
LAW AND TAXATION
Australian School of Business

16 May 2008

John Kluver
Corporations and Markets Advisory Committee
GPO Box 3967
Sydney NSW 2001

Dear Mr Kluver

Re: Issues in External Administration (Discussion Paper- February 2008)

Further to the Advisory Committee's invitation for submission on any aspect of the matters covered in the Discussion Paper referred to above, I am please to submit law reform recommendations dealing exclusively with Issue 13 [Receivers and other controllers' exemption from voidable transaction provisions] and comment on the Advisory Committee's provisional position [PP 13].

If any of the comments require further explanations, I am available to respond and can be contacted at a.hargovan@unsw.edu.au

Yours Sincerely

Anil Hargovan
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Executive Summary

Issue 13: Exemption from Voidable Transaction Provisions

This submission is confined to the issue of whether transactions conducted under the authority of a receiver or other controller should be exempted from the voidable transaction provisions [5.3.2 of the Discussion Paper].

1. Issue Option 1 [and PP 13 of the Discussion Paper], which exempts all transactions by receivers or other controllers from the voidable transaction provisions, is supported subject to the following qualifications aimed at bolstering safeguards:

(1) s 9 (and its relationship with Pt 2D.1) be redrafted to provide in clear terms that receivers are indeed an 'officer' and therefore subject to ss 180-184 of the Corporations Act 2001 (Cth); and
(2) s 420A, dealing with the receivers and other controllers power of sale, be redrafted in clear terms to remove ambiguities concerning its ambit – it is unclear whether that section vests an independent new cause of action; nor it is clear what the consequences are for failure to comply. Due to the 'Delphic simplicity' of the statutory wording,[1] the proper approach to construction and the legal principles derived from this provision are far from settled. Although a fairly heavily litigated area of insolvency law, the success rate for corporate debtors has been remarkably low.

The remedial measures advocated above are necessary to effect adequate protection for stakeholders during the exercise of the receivers' powers of management and sale of company property.

2. Options 2 and 3 are rejected, subject to the remedial action advocated above being implemented, also on the basis of their incompatibility with the aims of attempting efficient and effective corporate rescue.[2]

3. Viewed from a general standpoint, due to the difficulty in identifying a dominant rationale for Part 5.7B of the Corporations Act,[3] the voidable transaction provisions are ordinarily aimed at preventing disreputable debtor behaviour by directors and other officers. Subject to the caveats expressed above (under Option 1), there are sufficient safeguards under statute law to ensure that receivers and other controllers are held accountable.

4. The pari passu principle does not present an insurmountable obstacle to law reform in the manner proposed in [5.3.2] of the Discussion Paper. The receiver's paramount duty is to the secured creditor. There is an inherent tension arising from the nature and purpose of receiverships, and its role as a corporate rescue mechanism, which could

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[1] Bryson J in *GE Capital Australia v Davis* [2002] NSWSC 1146 ;(2002) 180 FLR 250.
[2] Query, however, if receivership is well suited as an effective corporate rescue mechanism. It is disappointing that CAMAC's terms of reference did not include consideration of this wider issue. Cf White Paper, *Productivity and Enterprise – Insolvency: A Second Chance* (HMSO, London, 2001); The Enterprise Act 2002.
[3] *BP Australia Ltd v Brown* (2003) 58 NSWLR 322; 46 ACSR 677

plausibly justify negation of the pari passu principle in appropriate circumstances to satisfy broader social ends.

Introduction

A response to the above issue [5.3.2] calls for consideration to be given as to whether current statutory regime under the Corporations Act offers adequate protection against abuse of powers by receivers and other controllers when managing the company or selling company property. In particular, as an additional argument for not subjecting transactions by receivers or other controllers to the voidable transactions, the Discussion Paper makes repeated references to the fact that such persons are subject to statutory and general law duties in exercising the power of sale.[4]

Indeed, such protections exist but the crucial question is whether they offer adequate protection or need to be enhanced or strengthened to overcome current defects? For reasons discussed below, it is submitted that current statutory provisions in ss 9 (and its relationship with Pt 2D.1) and 420A are clouded and in need of repair. The current operation of these provisions suggests that protection is more apparent than real. The case for law reform in both of these areas is heightened by CAMAC's provisional proposal to exempt receivers and other controllers from the voidable transactions provisions.

Receivers Duties in Disposing of Assets:

The receiver's duty of care when selling company property arises in general law and in statute. The vexed position at general law, dealing with the precise nature of a receiver's obligation when selling company assets, appears to be settled through statutory reform via the introduction of s 420A, operative on 23 June 1993.

Prior to law reform, Australian and English legal authorities diverged on the standard of care required when a receiver exercised the power of sale.[5] In England, the courts favoured a higher standard and held that a receiver when exercising a power of sale owes a duty to the mortgagor to take reasonable care to obtain a proper price for the true market value of the property.[6] In contrast, despite differing opinions in Australian courts, Australia accepted the general law as being that the relevant duty is one to act in good faith: that is, without fraud and without wilfully or recklessly sacrificing the interests of the mortgagor, but stopping short of exposing the receiver to liability for mere negligence or carelessness.[7] That the balance of Australian judicial opinion favours the latter approach was affirmed (if affirmation was still

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[4] Corporations and Markets Advisory Committee, *Issues in External Administration* (Discussion Paper, February 2008) 5.3.2 at pp 54-55 and p 57.

[5] The divergent strands of authority are referred to in *Forsyth v Blundell* (1973) 129 CLR 477.

[6] *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949. For discussion on the English formulation of the receivers duty of care, see *Medforth v Blake* [1999] 3 WLR 922 at 932-935 per Sir Richard Scott VC.

[7] *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676; *Expo International Pty Ltd v Chant* [1979] 2 NSWLR 820; *Commercial & General Acceptance Ltd v Nixon* (1983) 152 CLR 491.

required) by the Full Court of the Supreme Court of West Australia in *Inkhorn Pty Ltd v Herbert*.[8]

Judicial authority suggests that the effect of s 420A (discussed below) is to substitute a statutory test of liability (a higher standard) for the traditional test (a lower standard) when determining whether a receiver has breached its general law duty in the exercise of a power of sale.[9] This, however, is a moot point.[10] If the former view is correct, it represents a positive development that imposes a more stringent discipline and higher level of accountability that the traditional standard at general law.[11] The modern position on the receivers duty of care is captured in the following judicial observation by Justice Dodds-Streeton:[12]

> The enactment of s 420A ... further diminished the practical consequences of any difference between the *Cuckmere* test and the general law duty of good faith in the case of sale by the receiver of the property of a corporation. Section 420A introduced a statutory duty ... which echoes the *Cuckmere* test.

Arising from judicial interpretation, this much about s 420A appears to be clear and well established. The duty imposed by s 420A is a more rigorous duty than that imposed by the general principles of equity. Whilst the introduction of s 420A appears to have resolved the tension that existed at general law, its ambit and operation is uncertain. The following discussion highlights the need for further law reform to accompany the exemption of the voidable transactions provisions to receivers and other controllers.

Navigating the Fog under Section 420A

Since the introduction of s 420A in 1993,[13] much ink has been spilt, for good reason, on deciphering the ambit and the nature of remedies available under this provision.[14] It is 'disarmingly simple'[15] in its wording. It pays to analyse section 420A of the Corporations Act which provides:

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[8] [2000] WASCA 333 at [14] – [15] per Miller J; BC200006874

[9] *GE Capital Australia v Davis* [2002] NSWSC 1146 ;(2002) 180 FLR 250. *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646. Recently, Justice Branson of the Federal Court in *Deangrove Pty Ltd v Buckby* [2006] FCA 212; (2006) 56 ACSR 630 inclined to agree with this approach but did not express a concluded view on this issue.

[10] Cf *Florgale Uniforms Pty Ltd v Orders* (2004) 11 VR 54; 51 ACSR 699 at 747: 'Section 420A is neither a codification of pre-existing law nor designed to displace it. The requirements of good faith as constructed in Pendlebury ... co-exist with both the general of duty in ss 180-184 ... and the more rigorous statutory duty imposed by s 420A ...'

[11] The inadequacy of the general law principles were expressly recognised by the Australian Law Reform Commission, *General Insolvency Enquiry (Harmer Report)*, Report 45, AGPS, Canberra, 1988. The Harmer Report favoured the English approach.

[12] *Florgale Uniforms Pty Ltd v Orders* (2004) 11 VR 54; 51 ACSR 699 at 747.

[13] For detailed discussion on the legislative history of s 420A, and the influence of the New Zealand *Companies Act 1955* in its drafting, see judgment of Young CJ in *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646 at 654-656.

[14] For example, see L Aitken, 'The Receiver's Duty in Equity: The Impact of Statue and the Privy Council' (1993) 1 Insolv LJ 118; J O' Donovan, 'Receivers Duties in Carrying on the Business: Good Faith or Due Diligence?' (1999) 17 *C&SLJ* 528.

[15] Young CJ in *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646 at 654.

> In exercising a power of sale in respect of property of a corporation, a controller (defined in s 9 to include a receiver) must take all reasonable care to sell the property for:
>
> (a) if, and when it is sold, it has a market value – not less than that market value; or
> (b) otherwise – the best price that is reasonably obtainable having regard to the circumstances existing when the property is sold

Bryson J in *GE Capital Australia v Davis* observed that s 420A(1) spoke with 'Delphic simplicity' by specifying what a controller must do but no reference to the consequence of a failure to comply with the statutory duty. [16]

Young CJ in Equity was equally critical of the lack of clarity in the overall aim of s 420A with these candid remarks in *Ultimate Property Group Pty Ltd v Lord*:[17]

> The Corporations Act is odd in that it provides various remedies in various parts of the statute, but contains no overall provision for the enforcement of duties ...[s 420A] is not a civil liability provision; it is not a criminal provision, except for a very minor extent[18] and there is no other way in which it can be enforced. The legislature could not have meant a solemn farce.

The scope of s 420A is unclear and is subjected to conflicting judicial authorities – to whom is the cause of action available? Does it confer any rights upon guarantors and providers of third party security?

In attempting to discern legislative intent of s 420A, Young CJ in Equity concluded that the legislature intended to give some protection to borrowers and therefore private action and equitable damages was available. This approach to construction is in sharp contrast with the judicial approach in *GE Capital Australia v Davis* where Bryson J held that s 420A only applied to pre-existing rights of action.[19] Similarly, Justice Dodds-Streeton in *Florgale Uniforms Pty Ltd v Orders* found Justice Bryson's analysis of s 420A persuasive and held that this section did not vest an independent new cause of action.[20] These cases demonstrate uncertainty on this key issue. In navigating the fog under s 420A, the meaning of the expression 'market value' has, appropriately, also been characterised as a 'difficult' question.[21]

The discussion above highlights the shortcomings in s 420A and demonstrates the need for clarity in its operation.

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[16] [2002] NSWSC 1146; (2002) 180 FLR 250. For similar judicial observation, see Young CJ in Equity in *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646 at 654.

[17] (2004) 60 NSWLR 646 at 658-659. Similarly, Dodds-Streeton J in *Florgale Uniforms Pty Ltd v Orders* (2004) 11 VR 54; 51 ACSR 699 at 748 held: '[s 420A] itself does not set out remedies, liabilities or penalties. It does not identify any party on whom a cause of action for breach of the duty is conferred. No general provision of the ... Corporations Act creates a right of action or an entitlement to damages, and no substantive provision relates to s 420A.'

[18] A breach of s 420A can attract a penalty under s 1311.

[19] Bryson J in *GE Capital Australia v Davis* [2002] NSWSC 1146; (2002) 180 FLR 250.

[20] (2004) 11 VR 54; 51 ACSR 699 at 752.

[21] *Deangrove v Buckby* [2006] FCA 212; (2006) 56 ACSR 630 at 639.

Interaction between s 420A and ss 180-184[22]

Unless further remedial action is taken to clarify which statutory duties of 'officers' apply to receivers, a regulatory gap may exist in the protective provisions designed as a counterbalance to the receiver's wide powers of management and sale.

Academic[23] and judicial authority[24] has recognised the potential weakness in this area of law arising from the Corporate Law Economic Reform (CLERP) Act. Prior to these reforms on officers' duties, former s 232 of the Corporations Law clearly applied to receivers. The subsequent enactment of Pt 2D.1 (ss 180-184) may have created a lacuna in the law due to the absence of the definition of 'officer' for the purposes of ss 180-184.

The potential problem arises in the following way. Section 9 of the Corporations Act incorporates receivers in the definition of 'officer' for purposes of the Act generally. The issue is whether Pt 2D.1, which houses directors and other officers' duties, demonstrates a contrary intention by confining the application of 'officers' duties to receivers? Explanatory Memorandum to the CLERP Bill 1998, in conjunction with a reading of s 179(2), suggests that only receivers who managed the business fall within the scope of ss 180-184. Arguably, receivers who do not manage the company's business, but are only involved in exercising the power of sale, are excluded from the ambit of Pt 2D.1. This outcome, however, may not be the case due to interplay between s 420A(2) and ss 180-184. Section 420(A)(2) expressly refers to the application of ss 180-184 to 'controllers' which is widely defined in s 9 to include, inter alia, receivers and receivers and managers.

Depending on the facts of each case, and whether a receiver is partaking in management or not, it is conceivable for the s 180 duty of care and the s 181 duty of good faith to be inapplicable. Significantly, if this is the case, the civil penalty provisions which provides for a range of orders (compensation, pecuniary penalty and banning orders) will be unavailable as a deterrent and accountability mechanism under statue law. Nor will the criminal sanctions for breach of ss 181-183 be available if a receiver acted recklessly or with dishonest intent.

Significantly, should a receiver have acted negligently, and falls outside the ambit of the s 180 duty of care, but is in breach of s 420A, no statutory remedies will be applicable in such instances. As demonstrated earlier, unlike s 180, a breach of s 420A is neither a civil nor a criminal penalty provision (save for minor penalties applying under s 1311). The general law will need to be relied upon, instead, for remedial action. In such circumstances, it is legitimate to query the efficacy of the statutory protections currently available under Pt. 2D.1.

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[22] Section 180 deals with the officer's duty of care and diligence; section 181 deals with the officer's duty to act in good faith and to use powers for a proper purpose. Sections 182 and 183 prohibit officers from making improper use of their positions and information to gain an advantage or to cause detriment to the company. Section 184 imposes criminal penalties, save for a breach of the duty of care under s 180.

[23] Ford's Principles of Corporations Law, LexisNexis Loose-leaf Service, para [25.121]

[24] *Florgale Uniforms Pty Ltd v Orders* (2004) 11 VR 54; 51 ACSR 699 at 747.

Pari Passu Principle: A Sacred Cow?

In exempting receivers and other controllers from the voidable transaction provisions, it may enable some unsecured creditors to negotiate a more favourable arrangement for payment of outstanding debts, contrary to the pari passu principle which expects all creditors to be treated on an equal footing and share in insolvency assets pro rata according to their pre-insolvency entitlements.

The Pari passu principle is said to lie at the very core of the administration of insolvency law.[25] The application of the pari passu principle, however, is not absolute; nor does it achieve its aim with any degree of spectacular success as noted by the Cork Report in the UK[26]. Modern insolvency law recognises that some exceptions to pari passu are necessary and permits of exceptions, as illustrated by Justice Finkelstein in discussing the following significant exception under voluntary administration:[27]

> There will be circumstances when ordinary commercial commonsense will demand, in the case of priority creditors, a loss of priority and, in the case of unsecured creditors, some degree of discrimination. This much is evident from the structure of Pt. 5.3A ... it [Pt 5.3A] makes no assumption that the creditors will be treated equally ...[28]

Can this sacred cow (pari passu), representing the foremost principle in the law of insolvency, be slain in the context of receiverships?

A brief overview on the true purpose and role of receivership assists in making the case for exemption from the pari passu principle in the context of receiverships. Such an approach assists and informs the debate on the relevance of the pari passu rule in contemporary insolvency law – a significant issue raised in the Discussion Paper[29] and by CAMAC's provisional position to exempt transactions by receivers and other controllers from the voidable transaction provisions, even if this reduces the possible returns to general unsecured creditors.[30]

The true purpose of receivership is best captured in *In re B Johnston & Co (Builders) Ltd*[31] in a passage approved by the Privy Council in *Downsview Nominees Ltd v First City Corporation Ltd*[32]and sanctioned by the Australian courts:[33]

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[25] Justice Kirby in *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 463-463; More recently, His Honour reinforced this observation in the context of Pt 5.3A of the Corporations Act dealing with voluntary administration in *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3 at [159]. For a critique of this approach, see J Harris and A Hargovan, 'The Scope of the Pari Passu Rule' 2008 (20) Australian *Insolvency Journal* (Jan-March) 16.

[26] The Cork Report noted that rateable distribution among creditors is rarely achieved. See further, *Insolvency Law and Practice* (Cmnd. 8558, 1982) at para 13396. For trenchant criticism of the pari passu principle, see R Mokal, 'Priority as Pathology: The Pari Passu Myth' 2001 (60) *Cambridge Law Journal* 581.

[27] (2005) 145 FCR 220; (2005) 23 ACLC 1328; [2005} FCA 902 at [30].

[28] Cf discussion in footnote 25.

[29]Corporations and Markets Advisory Committee, *Issues in External Administration* (Discussion Paper, February 2008) 5.3.2 at p 55.

[30] Ibid at pp 57-58.

[31] [1955] Ch 634 at 661.

[32] [1993] AC 295 at 313-314.

> ...a receiver and manager for debenture holders is a person appointed by the debenture holders to whom the company has given powers of management pursuant to a contract of loan constituted by the debenture, and , as a condition of obtaining the loan, to enable him to preserve and realise the assets comprised in the security for the benefit of the debenture holders ... the primary duty of the receive is to the debenture holders and not to the company. He is receiver and manager of the property of the company for the debenture holders, not manager of the company. The company is entitled to any surplus of assets ... but the whole purpose of the receivers and manager's appoint would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors and managers.

The passage above is instructive. It reinforces, relevantly for this discussion, the receiver's paramount duty is to the secured creditor. In *Gomba Holdings Uk Ltd v Homan*,[34] Hoffman J held that although nominally the agent of the company, the primary duty of the receiver is to realise the assets in the interests of the debenture holder. These legal principles underscore the primary aim and purpose of receivers appointed out of court and the paramount status enjoyed by secured creditors.

The insistence of upholding the pari passu principle, when there is an opportunity to save an ailing company, may well be objectionable. This relates to the fact that receivership has another objective, albeit an ancillary one,[35] that of corporate rescue. Receivership can, though not always, rescue the ailing the company by keeping it afloat. The achievement of this object would be thwarted by the existing constraints placed on the receiver under the voidable transaction provisions. It can frustrate the task of reviving a distressed but viable company. Should the company collapse, the social and economic implications of liquidation are substantial. It impacts on the employees, suppliers, manufactures, the families and beyond.

Viewed in this context, the expense of inflicting damage on other unsecured creditors through the operation of the exemption of the voidable transactions provisions on receivers' actions is tolerable.

There is an inherent tension, arising from the nature and purpose of receiverships and its role as a corporate rescue mechanism, which could plausibly justify negation of the pari passu principle in such circumstances. In order to maximise the chance of a company surviving, it may well be appropriate for the receiver to engage in transactions that may impact on the voidable transaction provisions. The tolerance of

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[33] For example, see Federal Court decisions in *Carter v Gartner, in the matter of Gartner Wines Pty Ltd and the Corporations Act 2001* [2003] FCA 653; *Fraser v ASIC, In the matter of Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed)* [2007] FCAFC 85.

[34] [1986] 3 All ER 94 at 97; cited with approval by Justice Gummow in *Re Just Juice Corporation Pty Ltd* (1992) 109 ALR 334

[35] Fletcher notes that the concept of 'corporate rescue' formed no part of the original blueprint for receivership but has recently evolved to take on this role. See further, I Fletcher 'UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements – The Insolvency Act 2002, The White Paper 2001, and the Enterprise Act 2002' (2004) 5 *European Business Organization Law Review* 119 at 123. Whether receiverships are best suited to achieve or to cultivate a culture of corporate rescue is a broader but valid question deserving of attention. See earlier comments in footnote 2.

some degree of discrimination by unsecured creditors, to facilitate corporate rescue, is not in conflict with wider societal goals.

Of course, this concession is subject to there being adequate and effective safeguards to prevent exploitation and to ensure the honest exercise of the receiver's wide powers. It is for these reasons that the author supports Option 1 [5.3.2 of the Discussion Paper] in the manner qualified earlier.

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Dear Mr Kluver,

CAMAC Discussion Paper: Issues in External Administration

I have pleasure in enclosing a submission in response to CAMAC's Discussion Paper: Issues in External Administration.

The submission has been prepared by the Insolvency and Reconstruction Law Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints it has not been reviewed by the Council of the Law Council of Australia.

Yours sincerely,

Bill Grant
Secretary-General

19 May 2008

Enc.

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CAMAC Discussion Paper: Issues in External Administration
BLS – LCA Insolvency & Reconstruction Committee Response

No	Issue	Provisional Position	Comment/Submission
Voluntary administration			
1.	The administrator of a company should be required to provide access to a list of a company's known creditors as soon as practicable after their appointment.	To assist creditors in their collective decision-making in a voluntary administration, an administrator should publish on a designated website the name, contact details and estimated amount due in relation to each creditor of a company in voluntary administration no later than the time of distribution to creditors of the notice of the first meeting.	The necessity for legislative change to require provision of a creditors' list is accepted (although the Committee had a significant minority view that, concerned with the prospect for mischief, the information on any list should be limited to the name of the creditor and the amount of the debt). However, there are significant privacy concerns in having a creditors' list generally accessible on a designated website. Many creditors would find this offensive. A better means of provision of such information would be by it being provided by the administrator on written request. Further, there should be a limit on: • The persons who can request such a list. For example, it should be limited to directors, secured creditors, unsecured creditors, other external administrators and persons who have a genuine intent to make a proposal that the company execute a deed of company arrangement proposal. • The purposes that may be made of the list. See e.g. s 177 as concerns the use that can be made of shareholders' registers. The purposes should be consistent with the

No	Issue	Provisional Position	Comment/Submission
			objects of Part 5.3A. Also, on informing creditors of his or her appointment, the administrator ought to be obliged to inform creditors of this possibility that their identities may be disclosed by provision of the creditors' list. Creditors ought to be provided with a window to inform the administrator that the creditor's contact details are not to be provided. Thereupon that creditor would be listed only by amount of debt on any list provided following application. This would mean that provision of the list would be deferred (but still be provided within the 8 business days for the 1st meeting.)
		Issue: Would it be preferable to identify the amount of each claim within designated bands, rather than having to disclose an estimate of the specific amount due?	No. There are limited privacy advantages in doing so, but considerable cost to the detriment of creditors generally in having to separately classify each creditor. A better means of catering for privacy concerns would be to: • not publish on a designated website – but make available on request; and • permit creditors to "opt out"; as suggested above.
2.	The administrator of a company should be required to provide details of the location of all equipment in the possession of the company owned by entities other than the company. These details might be included in the s 443B(3) notice that informs the owner or lessor that the company	An administrator issuing a s 443B notice should be required to disclose in the notice the location of the relevant equipment to the extent that this information is reasonably available to the administrator. In addition, the administrator should have a general obligation to facilitate efforts by	Agreed provided that limited to equipment and locations that are known to the administrator. In other words there would be no obligation to provide a notice if the administrator is not personally aware of:

No	Issue	Provisional Position	Comment/Submission
	does not propose to exercise rights in relation to the property.	owners to locate property that the administrator will not be using. It is not proposed that there be a specific penalty or other sanction on the administrator for failure to comply with either requirement. Rather, the intent is that ASIC or any other interested party could take judicial proceedings to enforce either requirement.	• the item of equipment; • the location of the equipment (other than to inform the owner that the equipment cannot be located.)
3.	A nominee of an administrator should be allowed to chair the second [major] meeting in voluntary administration, where the administrator is sick or otherwise unable to attend in person.	The general expectation should be that the administrator will chair the major meeting of creditors, given that it decides the future course of action for the company. However, an administrator should have a discretion to nominate another person to chair the major meeting of creditors where: • the administrator cannot attend that meeting because of illness or • some other good reason, and • the creditors have resolved that the nominee should chair the meeting. The administrator should be required to provide to the meeting a statement of the reason for his or her inability to attend. Any nominee should be a registered liquidator. Also, before creditors vote on whether the nominee should chair the meeting, the administrator should: • disclose relevant information concerning the nominee's experience and knowledge of the administration, and • certify to creditors that the nominee is in a position to answer questions about the administration. The meeting should be automatically adjourned for a short period (no more than a week) if the creditors	Agreed. There is a risk that creation of this exception may see administrators delegating what is an important statutory function. That said, the present prescriptive requirement can create difficulties in the case of genuine incapacitation or other inability to chair for reasons beyond an administrator's control. The suggested change reflects an appropriate balance. An additional safeguard would be to impose a requirement that the administrator must inform ASIC within 2 days afterwards that he or she had not been able to chair the meeting (and hence it had been delegated). Potential after the fact policing would see administrators only take up the exception in cases of genuine need. And if there was a pattern of consistent delegation ASIC could investigate.

No	Issue	Provisional Position	Comment/Submission
		do not approve the nominee presiding.	
4.	The deed administrator should be required to notify creditors of any breach of a deed of company arrangement.	The deed administrator or the directors (if in control of the company under the deed) should be required to notify creditors of any information regarding a breach, or a combination of breaches, that could reasonably be expected to have a material effect on the purpose or outcome of the deed.	Agreed. The further suggestion is that the change be worded in terms that deed administrators have an obligation to notify creditors of any **material** contravention of a DOCA as soon as practicable and in any case within 21 days after the breach. (The term "material contravention" mirrors the terminology in s 445D(1)(d) – a provision empowering the court to set aside a DOCA for material contravention.) At that time the deed administrator should also be required to: • convene a meeting of creditors to vary/terminate the DOCA – providing his or her opinion as to what is in creditors' interests and the reasons for that opinion; or • set out his or her reasons for not convening a meeting, informing creditors of their rights under s 445F(1)(b) to request one, and otherwise explain the deed administrator's proposed course of action. Section 444A(4) should be amended so that all DOCAs are required to specify what terms will be material for the purposes of such a provision. The Act should further provide that there is a “material contravention” where a breach, or a combination of breaches, could reasonably be expected to have a material effect on the purpose or outcome of the deed.
5.	Directors and related party creditors should be prevented from voting on a proposal to appoint a	There should be no change to the current position under which all creditors, including creditors who	Agreed.

No	Issue	Provisional Position	Comment/Submission
	different person as liquidator when a company proceeds from administration into liquidation.	are directors or related parties of those directors, have the right to vote on a resolution to appoint a different person as liquidator when a company proceeds from administration into liquidation.	However, there should be consideration of importing ss 64D(aa) & 64ZB(8) of the *Bankruptcy Act* 1966 (Cth). Where a creditor is voting in respect of an assigned debt the value for voting purposes ought to be worked out by taking the value of the assigned debt to be equal to the value of the consideration that the creditor gave for the assignment of the debt. Also, following a poll the Chair ought to be required to declare whether the resolution would have passed/failed had the related party creditors not been permitted to vote. The Chair should then be required to inform those present of the rights under s 600A.
		Issue: Should anyone, in addition to a creditor, have a right to challenge a resolution appointing a new person as liquidator? If so, what type of remedy should be available?	The existing law works adequately and does not require further amendment.
6.	Where a company is put into liquidation after an administration (or deed of company arrangement) then the remuneration of the administrator (or deed administrator) should be provided a priority over that of any replacement liquidator.	Where a company is put into liquidation after an administration (or deed of company arrangement), the remuneration of the administrator (or deed administrator) should have priority over that of any replacement liquidator.	Not agreed. This would see a significant disincentive for an insolvency practitioner to consent to appointment as replacement liquidator on a move from voluntary administration to liquidation. Existing s 556(1)(de), as read with s 559, operates equitably. The principles of incontrovertible benefit will also protect a deserving administrator. Conversely the suggested amendment would see a reversal of accepted equitable principle to the disadvantage of the replacement liquidator. There is also a residual power in the Court (s 485(3) as applied to a creditors' voluntary liquidation by s 511(1)(b), or alternatively, s 447A) to alter

No	Issue	Provisional Position	Comment/Submission
			priorities as the Court thinks just if the property recovered is insufficient to satisfy all costs, charges and expenses of the winding up in full. The above position represents the majority view of the Committee. However, the Sydney members of the Committee agree with the provisional position, namely that an administrator's remuneration have priority in the circumstances described. There is a risk ,in their view, that when creditors lose interest or are becoming restless, the original administrator could be replaced at the instigation of a less reputable liquidator who rallies creditors or relies on creditor complacency to bring about a change at the cost of the original administrator who could have been doing a good job. This is particularly the case in long administrations.
Liquidation			
7.	Creditors should be able to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation.	Creditors, in addition to the court, should have the power to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation. To assist them in making this decision, creditors should be given similar information to that provided to creditors in other forms of external administration. The court should have the power to confirm, increase or reduce the remuneration determined by the creditors.	Agreed in the case of a winding up in insolvency: in such cases there should not be different rules for a provisional liquidator and a liquidator. However, where the winding up is not in insolvency, i.e. it is a solvent winding up, court approval should remain. Here creditors have no economic interest in approval of liquidator remuneration.
8.	A new mechanism should be introduced to allow for voting by post on proposals relating to remuneration, compromise of debts under s	A liquidator should have the option to conduct a postal vote on a proposal relating to remuneration, compromise of debts under s 477(2A) and	No. A new mechanism is not required. Creditors may already vote by proxy: Reg. 5.6.28; and may do so by special proxy specifying how the proxy is to

No	Issue	Provisional Position	Comment/Submission
	477(2A) and liquidators entering into agreements on the company's behalf under s 477(2B).	agreements under s 477(2B), with a requirement that a physical meeting be held if a threshold objection level to a postal vote is reached (say, 5% by number or value of creditors).	vote, in which case the direction must be observed: Reg.5.6.30. Voting by post is already *de facto* permitted; whether to do so is at the election of the individual creditor. The new Regulations permitting electronic lodgement of proxy appointments will further facilitate proxy voting. If the new mechanism is sought to avoid the necessity of a creditors' meeting it should be rejected. The holding of a creditors' meeting to deal with such matters is an important feature of the winding up regime. Creditors will commonly wish to present argument at a meeting in favour of or against a proposal. The ability to influence other creditors will be lost if creditors' meetings become a thing of the past. Also, creditors' meetings on such matters are important in holding liquidators accountable. In the absence of a meeting it would be expected that most postal elections would be a *fait accompli*: hearing only what if put forward by the liquidator, creditors would endorse his or her recommendation. This would render nugatory the policy objective that creditors provide authorisation for such matters.
		Issue: Should postal voting, if introduced, be permitted beyond the three matters set out in the Referred Proposal?	No.
		Issue: Should electronic voting be permitted in addition to postal voting?	Electronic voting is already *de facto* permissible given the new Regulations permitting proxies to be lodged electronically.

No	Issue	Provisional Position	Comment/Submission
9.	The defences to the voidable transaction provisions should be amended, such that the insolvency defence under section 588FG does not apply to the new provisions relating to transactions entered into while a company was under administration (given that insolvency is not a condition for those provisions).	The assumed solvency defence should remain for transactions entered into by officers of a company while a company is under a deed of company arrangement.	Agreed.
10.	ASIC should be able to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.	It is unnecessary to give ASIC a statutory right to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.	Agreed.
11.	ASIC should be able to take possession of books relating to a company in external administration, and transfer those books to another liquidator, if a liquidator dies or is no longer registered.	Any interested party should have the right to apply to the court for directions about the temporary holding of books.	Agreed.
Receiverships and other controllerships			
12.	The definition of 'controller' should be revised such that enforcing a security over a single asset, or an asset with a value of less than $100,000, does not involve a controllership and the requirements of the Corporations Act dealing with controllers are not applicable.	There should be no amendment to exempt from the definition of controller a person enforcing a security over a single asset or an asset with a value of less than $100,000.	The majority view of the Committee was agreement that there should be no amendment as suggested, i.e. agreement with CAMAC's provisional position. However, there was a divergence of views. There was a significant alternative view that supported the suggested amendment. That view was based on the cost of compliance with the controllership provisions in smaller matters. The $100,000 figure was seen as a not unreasonable cut off point. On a separate note it is suggested that the definition of "charge" in the *Corporations Act 2001* should exclude freehold mortgages. Under the current definition, a bank that enforces a freehold mortgage has to comply with the controllership provisions, including the requirement to maintain a relevant

No	Issue	Provisional Position	Comment/Submission
			bank account. This imposes an unnecessary burden and cost for questionable practical purpose.
13.	Transactions conducted under the authority of a receiver or controller should be exempted from the voidable transaction provisions.	Transactions conducted under the authority of a receiver or other controller should be exempted from the voidable transaction provisions.	Not agreed. There is no need for change. The reasoning in cases such as *Sheahan v Carrier Air Conditioning Pty Ltd & Campbell* (1997) 189 CLR 407 will operate in rspect of unfair preferences. And as to other forms of voidable transactions, e.g. uncommercial transactions/unfair loans/unreasonable director related transactions, it is difficult to see why exemption should apply. The above position represents the majority view of the Committee. However, the Sydney members of the Committee agree with the provisional position namely that transactions be exempted. The reasons set out by CAMAC in its report in support of its provisional position are in their view sound.
Communication in external administrations			
14.	The requirement to publish insolvency notices in a newspaper should be limited, such that it requires only a summary statement with additional details to be published on a website to be maintained by ASIC or a professional body. An alternative proposal would move all notices to a website to be maintained by ASIC or a professional body.	There should be a staged move from print media to Internet disclosure of all public notices on a designated website to be operated by ASIC.	Agreed.
15.	The rule allowing a deed administrator to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents should be extended to all other types of	Administrators, receivers and other controllers and liquidators, as well as deed administrators, should have the right to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents. In exercising its	Not agreed - subject to a confined exception, namely, receivership or controllership. It is plainly inappropriate that a company that is under administration or being wound up should not

No	Issue	Provisional Position	Comment/Submission
	external administration.	discretion whether to grant an application, the court could take into account the possible prejudice to relevant parties, including past creditors and persons who may have to deal with the company in the future.	designate its status and any former name on all public documents. The suggestion that this be countenanced is difficult to understand. If a company is subject to a DOCA the Court may be approached for an order to relieve the company from the disclosure requirements. That ought to be continued and perhaps streamlined. With receivership and controllership similar concerns will, on occasions, arise. In such circumstances, provided third parties are adequately protected, ASIC ought to be empowered to modify the requirement, provided good reason for doing so is shown. It would be preferable for the power to rest with ASIC rather than the Court for reasons of cost and speed. The decision ought to be reviewable by the AAT. The above position represents the majority view of the Committee. However, the Sydney members of the Committee takes the view that in every case a Court application should be made and that ASIC be notified of the application.
16.	The new mechanism for electronic communication with creditors should be extended, to allow for electronic means to be used except if the creditor requests a hard copy of documents. One suggested approach would provide for a single page to be sent to creditors directing them to documents available on a website and providing a telephone number to call if a hard copy is required. An	External administrators should be permitted to advise in their first notification to each creditor that all further notices to creditors and other documents relevant to the external administration will be published on one or more websites (which must include the designated ASIC website for public documents, as discussed in Issue 14). That first notification should also state that any	No. The new mechanism to permit electronic communication should be "opt in" as provided for in the new s 600G. Any move to an "opt out" regime should be deferred until there has been consideration of how the new provisions are working in practice. The above position represents the majority view of

No	Issue	Provisional Position	Comment/Submission
	alternative proposal would provide for a creditor being 'deemed' to have consented to electronic communication where a company has communicated with a creditor by that means at any time prior to the commencement of the external administration.	creditor may choose to register: • to receive an electronic notification that new material has appeared on the website(s), or • to receive by mail, free of charge, a printed copy of these further notices and other documents. Creditors who so register will continue to receive information in the specified manner unless they subsequently notify the company that they no longer wish to do so.	the Committee. However, the Sydney members of the Committee consider that external administrators should be able to provide information via the internet. They consider that the methodology set out in the IPA's draft submission (a copy of which has been provided to them) is appropriate. The reason that approach is preferred is that all creditors are treated consistently for every document that is released. This allows for simplicity in processes as the external administrator will not need to maintain separate lists of creditors depending on how they wish to be notified. Furthermore, it ensures that every known creditor is notified of the availability of a document online.

CORPORATIONS AND MARKETS ADVISORY COMMITTEE
ISSUES IN EXTERNAL ADMINISTRATION DISCUSSION PAPER

RESPONSE BY THE LEGISLATIVE REVIEW TASKFORCE OF THE COMMERCIAL LAW ASSOCIATION

ISSUE 1: ACCESS TO CREDITOR LIST

> ***The Referred Proposal is that:*** *The administrator of a company should be required to provide access to a list of a company's known creditors as soon as practicable after their appointment.*
>
> ***The Advisory Committee provisional position*** *is that: To assist creditors in their collective decision-making in a voluntary administration, an administrator should publish on a designated website the name, contact details and estimated amount due in relation to each creditor of a company in voluntary administration no later than the time of distribution to creditors of the notice of the first meeting.*

We support the Advisory Committee provisional position, save that a creditor should have the ability to limit the amount of private information which is published to other creditors.

ISSUE 2: ADMINISTRATOR'S NOTICE TO PROPERTY OWNERS

> ***The Referred Proposal is that:*** *The administrator of a company should be required to provide details of the location of all equipment in the possession of the company owned by entities other than the company. These details might be included in the s 443B(3) notice that informs the owner or lessor that the company does not propose to exercise rights in relation to the property.*
>
> ***The Advisory Committee provisional position*** *is that: An administrator issuing a s 443B notice should be required to disclose in the notice the location of the relevant equipment to the extent that this information is reasonably available to the administrator. In addition, the administrator should have a general obligation to facilitate efforts by owners to locate property that the administrator will not be using. It is not proposed that there be a specific penalty or other sanction on the administrator for failure to comply with either requirement. Rather, the intent is that ASIC or any other interested party could take judicial proceedings to enforce either requirement.*

We support the Advisory Committee provisional position, save that we urge some caution in the imposition of positive duties on administrators of a general type such as to facilitate efforts by owners to locate property. Administrators have numerous tasks which are required to be completed (in the absence of court relief) within short timeframes.

ISSUE 3: CHAIRING THE MAJOR MEETING OF CREDITORS

> ***The Referred Proposal is that:*** *A nominee of an administrator should be allowed to chair the second [major] meeting in voluntary administration, where the administrator is sick or otherwise unable to attend in person.*

The Advisory Committee provisional position is that: *The general expectation should be that the administrator will chair the major meeting of creditors, given that it decides the future course of action for the company. However, an administrator should have a discretion to nominate another person to chair the major meeting of creditors where: ● the administrator cannot attend that meeting because of illness or some other good reason, and ● the creditors have resolved that the nominee should chair the meeting. The administrator should be required to provide to the meeting a statement of the reason for his or her inability to attend. Any nominee should be a registered liquidator. Also, before creditors vote on whether the nominee should chair the meeting, the administrator should: ● disclose relevant information concerning the nominee's experience and knowledge of the administration, and ● certify to creditors that the nominee is in a position to answer questions about the administration. The meeting should be automatically adjourned for a short period (no more than a week) if the creditors do not approve the nominee presiding.*

In our view, It is sensible that an administrator should be able to nominate another person in cases where the administrator is unable to attend the meeting because of illness or for some other good reason.

However, there should be no requirement that the creditors pass a resolution permit this to occur, provided that the nominee is an employee, partner or principal of the firm of which the administrator is an employee, partner or principal. A nominee should also be subject to the same disqualification provisions as an administrator. Further, a nominee should be required to advise the meeting of the reason for the administrator's unavailability.

Requirements that

- the nominee be a registered liquidator,
- the nominee not be a person who would be disqualified from acting as administrator of the particular company,
- the nominee be a person nominated by the liquidator, and
- and the nominee be from the same firm as the liquidator,

are sufficient protections for the creditors in respect of a person standing in for the administrator.

ISSUE 4: NOTIFICATION OF BREACH OF DEED OF COMPANY ARRANGEMENT

The Referred Proposal is that: *The deed administrator should be required to notify creditors of any breach of a deed of company arrangement.*

The Advisory Committee provisional position *is that: The deed administrator or the directors (if in control of the company under the deed) should be required to notify creditors of any information regarding a breach, or a combination of breaches, that could reasonably be expected to have a material effect on the purpose or outcome of the deed.*

We do not support the proposal that the deed administrator should be required to notify creditors of any breach of a deed of company arrangement.

If the directors are in control of the company following execution of a deed of company arrangement, the deed administrator remains in place until effectuation or termination of the deed, and has various duties and powers, including the power to call a meeting to resolve to wind up the company.

We do not see any strong reason to require deed administrators to advise creditors of breaches, other than in situations where they consider that some action should be taken, such as a meeting to decide whether the company should be wound up, or an application to the court.

However, there is merit in requiring directors, where the company is in their control, to advise deed administrators of
(a) likely breaches of the deed;
(b) actual breaches of the deed; and
(c) actual or likely insolvency of the company.

Such a requirement would assist deed administrators in carrying out their functions without imposing unnecessary costs.

ISSUE 5: APPOINTMENT OF NEW PERSON AS LIQUIDATOR

> ***The Referred Proposal is that:*** *Directors and related party creditors should be prevented from voting on a proposal to appoint a different person as liquidator when a company proceeds from administration into liquidation.*
>
> ***The Advisory Committee provisional position*** *is that: There should be no change to the current position under which all creditors, including creditors who are directors or related parties of those directors, have the right to vote on a resolution to appoint a different person as liquidator when a company proceeds from administration into liquidation.*

This is a difficult issue. On the one hand, directors and related parties have an interest and should not be automatically disenfranchised, and further, some protection from abuse is provided by section 600A of the Corporations Act. On the other hand, an application under section 600A is expensive, and will only succeed in extreme situations – that is, where it can be shown that the outcome of the vote is contrary to the interests of creditors as a whole or prejudicial to the outvoted creditors.

It is appropriate that there be safeguards to ensure that the process of administration is not misused by related party creditors to the detriment of creditors generally. However, there are several safeguards in the legislation, including safeguards introduced by the reforms of 2007.

We do not consider that there is any justification for the general removal of voting power from directors and related parties in relation to the question of appointing a different person as liquidator when a company in administration is wound up.

ISSUE 6: ADMINISTRATOR'S REMUNERATION

The Referred Proposal is that: *Where a company is put into liquidation after an administration (or deed of company arrangement) then the remuneration of the administrator (or deed administrator) should be provided a priority over that of any replacement liquidator.*

The Advisory Committee provisional position is that*: Where a company is put into liquidation after an administration (or deed of company arrangement), the remuneration of the administrator (or deed administrator) should have priority over that of any replacement liquidator.*

We support the referred proposal.

It is true that the proposal makes it less attractive for a person to be appointed as a replacement liquidator, in comparison with the alternative of equal priority with the prior administrator. However, priorities will only be a problem in cases where the pool of assets is relatively small. In such cases, it is appropriate that the incentives, in general, favour the retention of the person initially appointed, given the additional cost involved in appointing a replacement.

ISSUE 7: PROVISIONAL LIQUIDATOR'S REMUNERATION

The Referred Proposal is that: *Creditors should be able to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation.*

The Advisory Committee provisional position is that: *Creditors, in addition to the court, should have the power to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation. To assist them in making this decision, creditors should be given similar information to that provided to creditors in other forms of external administration. The court should have the power to confirm, increase or reduce the remuneration determined by the creditors.*

We note that substantial amendments were introduced in 2007 in relation to the information which must be given to creditors. We support the Advisory Committee provisional position.

ISSUE 8: POSTAL VOTING BY CREDITORS

The Referred Proposal is that: *A new mechanism should be introduced to allow for voting by post on proposals relating to remuneration [of a liquidator], compromise of debts under s 477(2A) of the Corporations Act 2001 (Corporations Act) and liquidators entering into agreements on the company's behalf under s 477(2B) of the Corporations Act.*

The Advisory Committee provisional position is that: *A liquidator should have the option to conduct a postal vote on a proposal relating to remuneration, compromise of debts under s 477(2A) and agreements under s 477(2B), with a requirement that a physical meeting be held if a threshold objection level to a postal vote is reached (say, 5% by number or value of creditors).*

Our view is that remuneration should be treated differently than compromises under s477(2A) and agreements under s 477(2B).

The present requirement to obtain court or creditor approval for a compromise (s 477(2A)) or agreement (s 477(2B)) is concerned with ensuring that no impropriety is involved in matters which (subject to consent or leave being given were required) are otherwise within the powers and functions normally exercised by liquidators on behalf of the company. Normally, a compromise or agreement falling within those provisions does not involve personal interest on the part of Liquidator or any reason to perceive that the liquidator may have any conflict of interest.

However, remuneration is an area where the liquidator's personal interest is necessarily involved.

We do not oppose postal votes for the purposes of section 477 (2A) and section 477 (2B) approval. However, we consider that the greater scrutiny which is brought about by a physical meeting (with the prospect of creditors reaching a view after discussing the matter with each other) is appropriate to a question of remuneration.

ISSUE 9: ASSUMED SOLVENCY DEFENCE FOR OFFICER-INITIATED TRANSACTIONS

> ***The Referred Proposal is that:*** *The defences to the voidable transaction provisions should be amended, such that the insolvency defence [that is, the assumed solvency defence] under s 588FG does not apply to the new provisions relating to transactions entered into while a company was under administration (given that insolvency is not a condition for those provisions).*
>
> ***The Advisory Committee provisional position is that:*** *The assumed solvency defence should remain for transactions entered into by officers of a company while a company is under a deed of company arrangement.*

We note that the Advisory Committee does not support the referred proposal. We agree with the Advisory Committee.

Part 5.7 B. of the Corporations Act can be harsh in its effects. The assumed solvency defence is an important safeguard. We support its retention.

ISSUE 10: REPLACING A LIQUIDATOR

> ***The Referred Proposal is that:*** *ASIC should be able to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.*
>
> ***The Advisory Committee provisional position is that:*** *It is unnecessary to give ASIC a statutory right to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.*

We agree with the Advisory Committee.

ISSUE 11: TAKING POSSESSION OF AND TRANSFERRING BOOKS

The Referred Proposal is that: *ASIC should be able to take possession of books relating to a company in external administration, and transfer those books to another liquidator, if a liquidator dies or is no longer registered.*

The Advisory Committee provisional position is that: *Any interested party should have the right to apply to the court for directions about the temporary holding of books.*

It seems to us that both the referred proposal and the Advisory Committee provisional position have merit.

In relation to the referred proposal, there is much to be said for ASIC having power to take possession of books temporarily in the event of a vacancy in office of a liquidator or administrator, without the need for a court order. It should be borne in mind that ASIC has an interest in such property, because, upon deregistration following winding up, the property of a company vests in ASIC: Corporations Act, s. 601AD.

ISSUE 12: EXEMPTION FROM CLASSIFICATION AS CONTROLLER

The Referred Proposal is that: *The definition of 'controller' should be revised such that enforcing a security over a single asset, or an asset with a value of less than $100,000, does not involve a controllership and the requirements of the Corporations Act dealing with controllers are not applicable.*

The Advisory Committee provisional position is that: *There should be no amendment to exempt from the definition of controller a person enforcing a security over a single asset or an asset with a value of less than $100,000.*

We see no strong reason to change the law in this regard. We agree with the Advisory Committee and do not support the referred proposal.

ISSUE 13: EXEMPTION FROM VOIDABLE TRANSACTION PROVISIONS

The Referred Proposal is that: *Transactions conducted under the authority of a receiver or [other] controller should be exempted from the voidable transaction provisions.*

The Advisory Committee provisional position is that: *Transactions conducted under the authority of a receiver or other controller should be exempted from the voidable transaction provisions.*

We consider that some care should be taken in this area.

First, it should be noted that there are essentially 2 types of voidable transaction in Part 5.7B, namely, preferences, and uncommercial transactions. A preference is a payment that is set aside, notwithstanding that the company was justly indebted to the creditor, on the basis that the creditor should not get an advantage over other creditors of an insolvent company. Uncommercial transactions in the broad sense (including unfair loans and director benefit transactions) are set aside because their terms are

unfair: they are a fraud on the company and its creditors should not be bound by them.

The proposal is to exempt controller transactions from all avoidance provisions. It must be asked whether the argument for such exemption is as strong in the case of uncommercial / fraudulent transactions as in the case of preferences. We would suggest it is not. We note that this point is recognised in "Policy Option 2".

Second, ordinary unsecured creditors do have a real interest in many cases where controllers are appointed. Their interests are deserving of some protection, notwithstanding the superior legal position of a secured creditor.

Third, insofar as Part 5.7B may, in theory at least, reduce the value of the security by reducing the controller's options and/or causing delay, this may constitute an incentive in some cases for a secured creditor to appoint an administrator under s 436C rather than a receiver and manager. Arguably this should be encouraged.

We are of the view that this proposal needs to be given careful and detailed consideration, and that such consideration should take into account matters of principle as well as any evidence which might be available as to the practical effects of the current regime for all interested parties, that is secured creditors, unsecured creditors and third parties. In accordance with this view (and particularly as we have not yet seen the evidence relevant to this issue), we can neither agree nor disagree with the referred proposal at this stage.

ISSUE 14: PUBLICATION OF EXTERNAL ADMINISTRATION NOTICES

> ***The Referred Proposal is that:*** *The requirement to publish insolvency notices in a newspaper should be limited, such that it requires only a summary statement with additional details to be published on a website to be maintained by ASIC or a professional body. An alternative proposal would move all notices to a website to be maintained by ASIC or a professional body.*
>
> ***The Advisory Committee provisional position is that:*** *There should be a staged move from print media to Internet disclosure of all public notices on a designated website to be operated by ASIC.*

We support the Advisory Committee provisional position.

ISSUE 15: EXEMPTION FROM PUBLICATION

> ***The Referred Proposal is that:*** *The rule allowing a deed administrator to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents should be extended to all other types of external administration.*
>
> ***The Advisory Committee provisional position is that:*** *Administrators, receivers and other controllers and liquidators, as well as deed administrators, should have the right to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents. In exercising its discretion whether to grant an application, the*

court could take into account the possible prejudice to relevant parties, including past creditors and persons who may have to deal with the company in the future.

Whilst there is clearly good reason for former names to be published, we consider that there may be reasons why the requirement should not apply in all cases. A role for the courts ensures that the public interest will be considered. We support the Advisory Committed provisional position.

ISSUE 16: ELECTRONIC COMMUNICATION WITH CREDITORS

The Referred Proposal is that: *The new mechanism for electronic communication with creditors should be extended, to allow for electronic means to be used except if the creditor requests a hard copy of documents. One suggested approach would provide for a single page to be sent to creditors directing them to documents available on a website and providing a telephone number to call if a hard copy is required. An alternative proposal would provide for a creditor being 'deemed' to have consented to electronic communication where a company has communicated with a creditor by that means at any time prior to the commencement of the external administration.*

The Advisory Committee provisional position is that: *External administrators should be permitted to advise in their first notification to each creditor that all further notices to creditors and other documents relevant to the external administration will be published on one or more websites (which must include the designated ASIC website for public documents, as discussed in Issue 14).*

That first notification should also state that any creditor may choose to register:

- to receive an electronic notification that new material has appeared on the website(s), or

- to receive by mail, free of charge, a printed copy of these further notices and other documents. Creditors who so register will continue to receive information in the specified manner unless they subsequently notify the company that they no longer wish to do so.

We support the Advisory Committee provisional position.

Australian Credit Forum

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22nd May 2008

CAMAC
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Dear Sir

Current Discussion Paper – Issues in External Administration

This Forum wishes to make a submission to your body regarding the current discussion paper – "Issues in External Administration".

The Australian Credit Forum is a not for profit organisation formed in the 1970's by a group of credit professionals who in addition to wanting to build and strengthen existing credit standards, reviewed and discussed legislation, suggesting changes that may affect the credit industry.

Since its inception, one of the major strengths of the Forum has been its dedication to select the membership of individuals from as many industries as possible ensuring a cross section of knowledge and experience in all credit related areas.

This has been combined with the granting of membership to individuals within various service providing roles including debt collections firms, insolvency practitioners, legal firms, accountancy, insurance and business information providers.

Please refer to the attached website for further information:
http://www.australiancreditForum.com.au/

In respect of the 16 issues identified in your discussion paper, we wish to express our opinion on your proposals and, if they are material, make comments as to the reasons for those opinions.

As a general comment, we support any initiative that provides additional or better information to the creditors of an insolvent company. However, we are mindful of the costs of receiving that information, both by way of disbursements and by way of additional obligations upon Administrators (and therefore time cost charges of the Administrator).

> ***Advisory Committee provisional position*** **PP1**
> To assist creditors in their collective decision-making in a voluntary administration, an administrator should publish on a designated website the name, contact details and estimated amount due in relation to each creditor of a company in voluntary administration no later than the time of distribution to creditors of the notice of the first meeting. The concept of a designated website is discussed at Section 6.1.2.

In respect of PP1, the Forum notes that in all insolvency appointments the director must prepare, sign and file a Report as to Affairs which contains a list of creditors. Therefore there shall be information on the public register as to the existence and entitlement of creditors. This information includes the name, address and amount owed.

The Forum queries the benefit from enacting laws that force an Administrator to, immediately upon their appointment, supply to all of the creditors a list of the creditors. The IPAA Draft Code of Professional Practice No.2, which seeks to incorporate the previous Best Practice Statements, requires the following to occur:

> ***21.4.1 List of Creditors***
> *Apart from the statutory requirements to provide a list of creditors4, a schedule of creditors 590 (name and amount) should also be made available on the request of any creditor. The information is publicly available from the Report as to Affairs lodged with ASIC or Statement of Affairs filed with ITSA.*

*To minimise costs, where possible the schedule **should** be provided electronically (PDF recommended). Hard copy **should** be provided only where the creditor does not have electronic access.*

The Forum recognizes that there needs to be a cost benefit analysis in respect of this issue. The benefit of obtaining the information on a statutory basis within the time frame nominated, needs to be balanced against the cost imposed upon an administrator in supplying that information.

In line with our previous comment regarding the provision of additional better information to creditors, the Forum supports any move which requires the maximum amount of information being disclosed.

PP2

An administrator issuing a s 443B notice should be required to disclose in the notice the location of the relevant equipment to the extent that this information is reasonably available to the administrator. In addition, the administrator should have a general obligation to facilitate efforts by owners to locate property that the administrator will not be using.

It is not proposed that there be a specific penalty or other sanction on the administrator for failure to comply with either requirement. Rather, the intent is that ASIC or any other interested party could take judicial proceedings to enforce either requirement.

In respect of PP2, the Forum notes that this issue relates to a section 443(B) notice, which in itself is restricted to special circumstances. The Forum queries how workable the proposal may be, having regard to the difficulty that may be encountered by an Administrator in locating some equipment which is the subject of the notice. However, the intention of the proposal is positive and as long as it does not result in significant administrative burden upon the Administrator, then the Forum is supportive of the proposal.

PP3

The general expectation should be that the administrator will chair the major meeting of creditors, given that it decides the future course of action for the company. However, an administrator should have a discretion to nominate another person to chair the major meeting of creditors where:

- the administrator cannot attend that meeting because of illness or some other good reason, and

- the creditors have resolved that the nominee should chair the meeting.

The administrator should be required to provide to the meeting a statement of the reason for his or her inability to attend.

Any nominee should be a registered liquidator. Also, before creditors vote on whether the nominee should chair the meeting, the administrator should:

- disclose relevant information concerning the nominee's experience and knowledge of the administration, and

- certify to creditors that the nominee is in a position to answer questions about the administration.

The meeting should be automatically adjourned for a short period (no more than a week) if the creditors do not approve the nominee presiding.

In respect of PP3, it is the opinion of the Forum that it is unreasonable for an administrator to have to personally and physically chair every major meeting of creditors. There will be instances where there is no proposed Deed of Company Arrangement and the future of the company has already somewhat been determined. Also, there will be unforeseen circumstances which detain the Administrator, and by virtue of their definition, the Administrator will not be able to plan for those unforeseen circumstances.

The Forum suggests that an Administrator should be entitled to attend and Chair the meeting using an electronic means such as video link or loud speaker telephone. The present legislation allows creditors to attend a meeting by telephone and in those exceptional

circumstances where an Administrator can not physically attend, an Administrator should be entitled to chair the meeting in that same electronic manner. Apart from the above suggestion of allowing the administrator to chair the meeting using electronic means, the Forum supports the proposal.

PP4

The deed administrator or the directors (if in control of the company under the deed) should be required to notify creditors of any information regarding a breach, or a combination of breaches, that could reasonably be expected to have a material effect on the purpose or outcome of the deed.

In respect of PP4, the Forum sees some difficulties with the proposal, in that the definition of a breach will become important in determining compliance with the legislation. Furthermore, the Forum would not like to see the administrator burdened with onerous tasks, such as monitoring the minutia of conduct, if that is going to result in additional costs being imposed on the creditors.

The Forum also queries the need for this proposal if a properly drafted Deed of Company Arrangement, possibly in response to the requests of creditors, requires the Deed Administrator to call a meeting of creditors immediately upon the company breaching the deed.

Regardless of the foregoing, the Forum supports anything that provides creditors with additional information and this proposal is another example of extra information for the creditors.

PP5

There should be no change to the current position under which all creditors, including creditors who are directors or related parties of those directors, have the right to vote on a resolution to appoint a different person as liquidator when a company proceeds from administration into liquidation.

In respect of PP5, the Forum supports the recommendation that there be no change to the current voting arrangements. The Forum accepts that there is some entitlement of related parties who have

genuinely advanced funds to the company to exercise a vote on this issue.

PP6

Where a company is put into liquidation after an administration (or deed of company arrangement), the remuneration of the administrator (or deed administrator) should have priority over that of any replacement liquidator.

In respect of PP6, the Forum supports this proposal and accepts that as a matter of equity and fairness the remuneration of the Administrator, who has an obligation to maximize the benefit to creditors generally, should have a priority over the remuneration of the liquidator. The Forum queries whether the law currently acts in that manner anyway.

PP7

Creditors, in addition to the court, should have the power to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation. To assist them in making this decision, creditors should be given similar information to that provided to creditors in other forms of external administration.

The court should have the power to confirm, increase or reduce the remuneration determined by the creditors.

The Forum supports proposal PP7.

PP8

A liquidator should have the option to conduct a postal vote on a proposal relating to remuneration, compromise of debts under s 477(2A) and agreements under s 477(2B), with a requirement that a physical meeting be held if a threshold objection level to a postal vote is reached (say, 5% by number or value of creditors).

The Forum has some concern with this proposal.

The Forum agrees with any method of communication that efficiently resolves matters. The use of a postal vote (subject to a threshold objection level) is an efficient way of resolving matters.

However, the Forum is concerned that the matters be limited to those noted in proposal 8, being remuneration, the compromise of debts, and the acceptance of agreements lasting more than 3 months.

Issues arising from PP8

- Should postal voting, if introduced, be permitted beyond the three matters set out in the Referred Proposal?

- Should electronic voting be permitted in addition to postal voting?[68]

As noted above, the Forum is against any introduction of additional matters for resolution by creditors by way of a postal vote.

The Forum is in favor of electronic voting or any other efficient means of communication.

PP9

The assumed solvency defence should remain for transactions entered into by officers of a company while a company is under a deed of company arrangement.

The Forum agrees with proposal PP9, albeit one of a technical nature.

PP10

It is unnecessary to give ASIC a statutory right to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.

The Forum agrees with proposal PP10, but is of the opinion that it is not a significant issue.

PP11

Any interested party should have the right to apply to the court for directions about the temporary holding of books.

The Forum agrees with proposal PP11, particularly as it relates to a temporary state of affairs and gives the court the overriding discretion to make appropriate orders.

PP12

There should be no amendment to exempt from the definition of controller a person enforcing a security over a single asset or an asset with a value of less than $100,000.

The Forum agrees that there should be no amendment to exempt controllers in the circumstances noted above.

PP13

Transactions conducted under the authority of a receiver or other controller should be exempted from the voidable transaction provisions.

The Forum agrees with proposal PP13 and strongly supports the notion that a creditor should be able to transact with a Receiver without any threat or concern that the transaction may be "attacked" by a liquidator as being a voidable transaction.

PP14

There should be a staged move from print media to Internet disclosure of all public notices on a designated website to be operated by ASIC.

The Forum debated this proposal in great detail.

It concluded that PP14 had substantial merit.

However, at least for the foreseeable future, initial communication from the appointed External Administrator to the creditors should remain in hard copy. This includes the advertisement which is currently placed in the newspaper.

We agree that all subsequent notices and reports may be issued via electronic form, such as posting on a secure web-site, unless a creditor formally requested the receipt of hard copy notices. In other words, the creditors would have to make a positive election to obtain hard copy notices after at least one notice has been given in writing and by newspaper advertisement.

PP15

Administrators, receivers and other controllers and liquidators, as well as deed administrators, should have the right to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents. In exercising its discretion whether to grant an application, the court could take into account the possible prejudice to relevant parties, including past creditors and persons who may have to deal with the company in the future.

The Forum agrees with Proposal PP15, particularly on the basis that the court has an overriding discretion to make the decision.

PP16

External administrators should be permitted to advise in their first notification to each creditor that all further notices to creditors and other documents relevant to the external administration will be published on one or more websites (which must include the designated ASIC website for public documents, as discussed in Issue 14).

That first notification should also state that any creditor may choose to register:

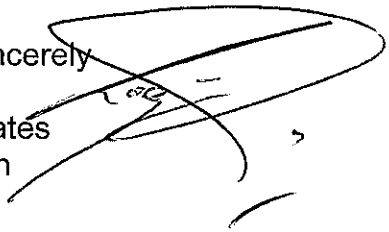
- to receive an electronic notification that new material has appeared on the website(s), or
- to receive by mail, free of charge, a printed copy of these further notices and other documents.

Creditors who so register will continue to receive information in the specified manner unless they subsequently notify the company that they no longer wish to do so.

The Forum agrees with Proposal PP16

We trust this information is of assistance to your Committee.

Yours sincerely



Roger Bates
Chairman

Robert Cole
Robert M H Cole & Co

The requirement for a registered liquidator to be the nominated Chairman at meetings of creditors in the absence of the Appointee is impractical and will be unworkable for many small insolvency firms.

Sole practitioners who are registered liquidators do not necessarily have a registered liquidator on their support staff although they invariably have staff conversant with administrations which they conduct.

Why should a sole practitioner have to call upon his opposition to share the remuneration in one of his own jobs?

Why should the creditors have to pay for another practitioner to acquaint himself with an administration?

This requirement appears to be designed by large firms for large firms with a total disregard for creditors or indeed for smaller firms who, after all, conduct the bulk of insolvency work and historically have always done so.

Other practitioners comments are as follows:

"Other insolvency practitioners get sick and need a holiday on occasions."

"The CAMAC proposal to have to pay another practitioner is false economy because a locum style chairman will not be familiar with the intricacies of the job. A Senior Manager is a better alternative because they are likely to be familiar with the job."

"The legislation does not allow for any unforseen circumstances that occur close to the meeting date. How could one obtain the services of a registered liquidator, put him or her into a position of being able to answer questions when the Administration is incapacitated within 24 hours of the meeting?

When Courts, ASIC and other interested parties recognise that in all insolvency administrations people other than the appointee have a major role in an administration, why not let the 'director/manager' who I'm sure has the majority of information that creditors would be enquiring about. Perhaps the Director/Manager has to be as a minimum, a qualified accountant, 8 years experience in the insolvency industry etc.

If the creditors are not happy with the situation they could adjourn he meeting as is contemplated. Perhaps the administrator not only has to give creditors a statement about his absence but also lodge such a statement with ASIC. This would stop administrations 'cherry picking' as is suggested.

The other aspect of this is cost. Would it cost less to 'hire' a registered liquidator, bring him or her up to speed, attend the meeting (and then find out creditors want to adjourn) then

apply to Court? In a large administration I suggest that a Court application would be cheaper. While creditor's interests are important, cost is also in the interest of creditors. An economical alternative needs to be considered where there is a balance between cost, delay, creditors being able to make informed decisions and providing a degree of flexibility.

Clearly the nomination of the staff member (experienced) in the unusual circumstances of an administrator being unable to attend, with written reason for the absence being given to creditors and ASIC and automatic adjournment if creditors do not approve the nominee is the appropriate way. Lets not forget that the IPAA has now issued a Practice Note on S439A reports so that creditors will receive improved information which has already been authorised by the Administrator (by his signature).

Also creditors have a right to appoint another Administrator, Deed Administrator or Liquidator and would do so if an Administrator started to abuse such a provision. No doubt ASIC would also be looking at the registration of the person if the flexibility provided was being abused.

Would the need for a Registered Liquidator result in unhealthy, anti-competitive arrangements between liquidators? While I agree that it is healthy for our industry to assist one another in times of need, the very nature of stepping into the shoes for a meeting with the obligations envisaged in the discussion paper may lead to arrangements being made in our industry that may not be in the best interests of creditors."

Yours faithfully,

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CAMAC Discussion Paper: Issues in External Administration
Response by the Business Law Committee of the Law Society of New South Wales

No	Issue	CAMC Provisional Position	Comment/Submission
Voluntary administration			
1.	The administrator of a company should be required to provide access to a list of a company's known creditors as soon as practicable after their appointment.	To assist creditors in their collective decision-making in a voluntary administration, an administrator should publish on a designated website the name, contact details and estimated amount due in relation to each creditor of a company in voluntary administration no later than the time of distribution to creditors of the notice of the first meeting.	Agreed. The website should be password protected. The notice to creditors should include a password by which creditors can get access to the website. Creditors should also have the option of having their contact details removed from the list. This can be by written instruction to the administrator for this particular administration or a standing instruction
		Issue: Would it be preferable to identify the amount of each claim within designated bands, rather than having to disclose an estimate of the specific amount due?	No. There are limited privacy advantages in doing so, but considerable cost to the detriment of creditors generally in having to separately classify each creditor.
2.	The administrator of a company should be required to provide details of the location of all equipment in the possession of the company owned by entities	An administrator issuing a s443B notice should be required to disclose in the notice the location of the relevant equipment to the extent that this information is reasonably available to the administrator. In addition, the administrator should have a general	Agreed provided that limited to equipment and locations that are known to the administrator. In other words there would be no obligation to provide a notice if the administrator is not personally aware of: • the item of equipment;

No	Issue	CAMC Provisional Position	Comment/Submission
	other than the company. These details might be included in the s 443B(3) notice that informs the owner or lessor that the company does not propose to exercise rights in relation to the property.	obligation to facilitate efforts by owners to locate property that the administrator will not be using. It is not proposed that there be a specific penalty or other sanction on the administrator for failure to comply with either requirement. Rather, the intent is that ASIC or any other interested party could take judicial proceedings to enforce either requirement.	• the location of the equipment (other than to inform the owner that the equipment cannot be located.)
3.	A nominee of an administrator should be allowed to chair the second [major] meeting in voluntary administration, where the administrator is sick or otherwise unable to attend in person.	The general expectation should be that the administrator will chair the major meeting of creditors, given that it decides the future course of action for the company. However, an administrator should have a discretion to nominate another person to chair the major meeting of creditors where: • the administrator cannot attend that meeting because of illness or • some other good reason, and • the creditors have resolved that the nominee should chair the meeting. The administrator should be required to provide to the meeting a statement of the reason for his or her inability to	Agreed.

No	Issue	CAMC Provisional Position	Comment/Submission
		attend. Any nominee should be a registered liquidator. Also, before creditors vote on whether the nominee should chair the meeting, the administrator should: • disclose relevant information concerning the nominee's experience and knowledge of the administration, and • certify to creditors that the nominee is in a position to answer questions about the administration. The meeting should be automatically adjourned for a short period (no more than a week) if the creditors do not approve the nominee presiding.	
4.	The deed administrator should be required to notify creditors of any breach of a deed of company arrangement.	The deed administrator or the directors (if in control of the company under the deed) should be required to notify creditors of any information regarding a breach, or a combination of breaches, that could reasonably be expected to have a material effect on the purpose or outcome of the deed.	Agreed and also agree with the further suggestion of the Law Council in so far as that the change be worded in terms that deed administrators have an obligation to notify creditors of any **material** contravention of a DOCA within 21 days after the breach. (The term "material contravention" mirrors the terminology in s 445D(1)(d) – a provision empowering the court to set aside a DOCA for material contravention.) At that time the deed administrator should also be required to set out his or her reasons for not convening a meeting, informing creditors of their rights under s 445F(1)(b) to request one, and otherwise explain the deed administrator's proposed course of

No	Issue	CAMC Provisional Position	Comment/Submission
			action.
5.	Directors and related party creditors should be prevented from voting on a proposal to appoint a different person as liquidator when a company proceeds from administration into liquidation.	There should be no change to the current position under which all creditors, including creditors who are directors or related parties of those directors, have the right to vote on a resolution to appoint a different person as liquidator when a company proceeds from administration into liquidation.	Agreed and also agree with the Law Council in so far as following a poll the Chair ought to be required to declare whether the resolution would have passed/failed had the related party creditors not been permitted to vote. The Chair should then be required to inform those present of the rights under s 600A.
		Issue: Should anyone, in addition to a creditor, have a right to challenge a resolution appointing a new person as liquidator? If so, what type of remedy should be available?	The existing law works adequately and does not require further amendment.
6.	Where a company is put into liquidation after an administration (or deed of company arrangement) then the remuneration of the administrator (or deed administrator) should be provided a priority over that of any replacement liquidator.	Where a company is put into liquidation after an administration (or deed of company arrangement), the remuneration of the administrator (or deed administrator) should have priority over that of any replacement liquidator.	Not agreed and concur with the Law Council submission that states: This would see a significant disincentive for an insolvency practitioner to consent to appointment as replacement liquidator on a move from voluntary administration to liquidation. Existing s 556(1)(de), as read with s 559, operates equitably. The principles of salvage/incontrovertible benefit will also protect a deserving administrator. Conversely the suggested amendment would see a reversal of accepted equitable principle to the disadvantage of the replacement liquidator. There is also a residual power in the Court (s 485(3) as applied to

No	Issue	CAMC Provisional Position	Comment/Submission
			a creditors' voluntary liquidation by s 511(1)(b), or alternatively, s 447A) to alter priorities as the Court thinks just if the property recovered is insufficient to satisfy all costs, charges and expenses of the winding up in full.
Liquidation			
7.	Creditors should be able to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation.	Creditors, in addition to the court, should have the power to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation. To assist them in making this decision, creditors should be given similar information to that provided to creditors in other forms of external administration. The court should have the power to confirm, increase or reduce the remuneration determined by the creditors.	Agreed and concur with the Law Council submission which stated in the case of a winding up in insolvency there should not be different rules for a provisional liquidator and a liquidator. However, where the winding up is not in insolvency, i.e. it is a solvent winding up, court approval should remain. Here creditors have no economic interest in approval of liquidator remuneration.
8.	A new mechanism should be introduced to allow for voting by post on proposals relating to remuneration, compromise of debts under s 477(2A) and liquidators entering into agreements on the company's behalf under s 477(2B).	A liquidator should have the option to conduct a postal vote on a proposal relating to remuneration, compromise of debts under s 477(2A) and agreements under s 477(2B), with a requirement that a physical meeting be held if a threshold objection level to a postal vote is reached (say, 5% by number or value of creditors).	Agreed. The low threshold objection level will force liquidators to consider carefully using a postal vote if it is likely to be objected to within the specified time due to the cost and delay in obtaining the approval of creditors. The system for passing resolutions without a meeting under Section 64ZBA of the Bankruptcy Act 1966 has shown to have worked effectively in the administration of bankrupt estates. That section requires only 1 creditor to object to the postal ballot. Also

No	Issue	CAMC Provisional Position	Comment/Submission
			it restricts the postal ballot to one resolution per postal ballot.
		Issue: Should postal voting, if introduced, be permitted beyond the three matters set out in the Referred Proposal?	Yes.
		Issue: Should electronic voting be permitted in addition to postal voting?	Yes and as noted in the Law Council submission electronic voting is already *de facto* permissible given the new Regulations permitting proxies to be lodged electronically.
9.	The defences to the voidable transaction provisions should be amended, such that the insolvency defence under section 588FG does not apply to the new provisions relating to transactions entered into while a company was under administration (given that insolvency is not a condition for those provisions).	The assumed solvency defence should remain for transactions entered into by officers of a company while a company is under a deed of company arrangement.	Agreed.
10.	ASIC should be able to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.	It is unnecessary to give ASIC a statutory right to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.	Agreed.
11.	ASIC should be able to take possession of books relating to a company in external administration, and transfer	Any interested party should have the right to apply to the court for directions about the temporary holding of books.	Agreed.

No	Issue	CAMC Provisional Position	Comment/Submission
	those books to another liquidator, if a liquidator dies or is no longer registered.		
Receiverships and other controllerships			
12.	The definition of 'controller' should be revised such that enforcing a security over a single asset, or an asset with a value of less than $100,000, does not involve a controllership and the requirements of the Corporations Act dealing with controllers are not applicable.	There should be no amendment to exempt from the definition of controller a person enforcing a security over a single asset or an asset with a value of less than $100,000.	Agreed subject to the threshold applying to the cumulative value of assets subject to enforcement action within any one calendar month. This is to minimise the scope for avoiding the threshold by taking separate acts of enforcement. Also the threshold should not apply to any enforcement action taken by an associated entity.
13.	Transactions conducted under the authority of a receiver or controller should be exempted from the voidable transaction provisions.	Transactions conducted under the authority of a receiver or other controller should be exempted from the voidable transaction provisions.	Agreed
Communication in external administrations			
14.	The requirement to publish insolvency notices in a newspaper should be limited, such that it requires only a summary statement with	There should be a staged move from print media to Internet disclosure of all public notices on a designated website to be operated by ASIC.	Agreed.

No	Issue	CAMC Provisional Position	Comment/Submission
	additional details to be published on a website to be maintained by ASIC or a professional body. An alternative proposal would move all notices to a website to be maintained by ASIC or a professional body.		
15.	The rule allowing a deed administrator to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents should be extended to all other types of external administration.	Administrators, receivers and other controllers and liquidators, as well as deed administrators, should have the right to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents. In exercising its discretion whether to grant an application, the court could take into account the possible prejudice to relevant parties, including past creditors and persons who may have to deal with the company in the future.	Not agreed If a company is subject to a DOCA the Court may be approached for an order to relieve the company from the disclosure requirements. That ought to be continued and perhaps streamlined. It should be a requirement that ASIC be notified of any such application.
16.	The new mechanism for electronic communication with creditors should be extended, to allow for electronic means to be used except if the creditor requests a hard copy of documents. One suggested approach would provide for a single page to be sent to creditors directing	External administrators should be permitted to advise in their first notification to each creditor that all further notices to creditors and other documents relevant to the external administration will be published on one or more websites (which must include the designated ASIC website for public documents, as discussed in Issue 14).	Not agreed and concur with the Law Council submission which stated the new mechanism to permit electronic communication should be "opt in" as provided for in the new s 600G. Any move to an "opt out" regime should be deferred until there has been consideration of how the new provisions are working in practice.

No	Issue	CAMC Provisional Position	Comment/Submission
	them to documents available on a website and providing a telephone number to call if a hard copy is required. An alternative proposal would provide for a creditor being 'deemed' to have consented to electronic communication where a company has communicated with a creditor by that means at any time prior to the commencement of the external administration.	That first notification should also state that any creditor may choose to register: • to receive an electronic notification that new material has appeared on the website(s), or • to receive by mail, free of charge, a printed copy of these further notices and other documents. Creditors who so register will continue to receive information in the specified manner unless they subsequently notify the company that they no longer wish to do so.	

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1 August 2008

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001 *via e-mail:* *john.kluver@camac.gov.au*

Dear Mr Kluver,

ISSUES IN EXTERNAL ADMINISTRATION – DISCUSSION PAPER (FEB 2008) – CONTROLLER

This submission is provided on behalf of the Australian Finance Conference (AFC) and the Australian Equipment Lessors Association (AELA) which together represent more than 100 financial service organisations. The AFC is the national finance industry association. AELA is the national association for the equipment leasing and financing industry. Current member lists are attached. Our Members include finance companies, banks, building societies and leasing companies providing various types of finance to both consumer and corporate customers.

Controller Definition

An area of particular relevance to our Members, dealt with in Chapter 5 of the Committee's External Administration - Discussion Paper (the Paper), relates to chattel mortgage products offered by our Members to assist corporate customers finance equipment and the definition of controller. The AFC and AELA have used a number of reviews and inquiries on reform of the insolvency provisions conducted by Government over the years to propose amendments to the controller provisions, most recently in our submission on the Exposure Draft of the Corporations Amendment (Insolvency) Act 2007. Our objective has been to amend the provisions so that they achieve an appropriate level of transparency, accountability and protection without imposing unduly onerous and costly compliance obligations on the controller of a single-asset secured by a chattel mortgage.

We welcomed the 2007 amendments which saw a number of the requirements imposed on "controllers" quarantined to "managing controllers," and the omission of obligations to Gazette the fact of taking control. These relatively minor amendments should enable compliance streamlining with the appropriate cost-savings. However, in our view, they did not go far enough. We therefore appreciate the opportunity to provide comment on this issue for the Committee's consideration and final recommendations and the extension provided to enable us to do so.

Equipment Financiers – Chattel Mortgages – Impact of Controller Definition

By way of background, our Members utilise three products to enable corporate customers to finance equipment; namely, equipment lease, hire-purchase or chattel mortgage. The selection of one of those three as most suitable will depend on a range of factors. Often the impact of other laws influences customer choice. For example, since the introduction of the GST in July 2001 corporate customers have favoured chattel mortgages over the lease and hire-purchase products. As a consequence, the chattel mortgage product represents a substantial portion of our Members' equipment finance business.

Under the terms of the equipment lease and hire-purchase products, our Members remain the owners of the equipment. In the case of chattel mortgages, however, the corporate customer generally takes ownership subject to a charge or mortgage over the financed equipment taken by our Member to secure the amount financed.

As noted in the Paper, in the event of a default by a corporate customer, should our Member move to protect their interests by taking possession or control of property to enforce their chattel mortgage they may be construed to be "controllers." Consequently, notification, financial reporting and other requirements contained in Part 5.2 of the Corporations Act may be triggered. Compliance with these obligations add cost to our Members' recovery processes. As an aside, we note that had the equipment been financed under an equipment lease or hire-purchase, these costs would not have been incurred.

We understand the policy basis for inclusion of the controller obligations and see merit in circumstances where the control being exercised is over a significant, or substantial, portion of the company's assets. However, where security over a single asset (eg a car, truck or piece of mining equipment) is involved and the amount realised on sale of the secured asset does not meet what is owed (which is generally the experience of our Members), we question the value of the process and justification for additional cost which merely increases the debt to be recovered from the corporate customer. In this regard, we also note comments made by the Australian Law Reform Commission in the Report on the General Insolvency Inquiry (the Harmer Report – 45/1988), the recommendations of which, as we understand, provided the basis for the inclusion of the controller provisions in the Corporations Act. In considering whether a mortgagee in possession should have the responsibility of a receiver, the Commission noted (at para 186):

> *As a preliminary and general matter, the Commission takes the view that the provisions of the companies legislation should only seek to regulate receivers of the whole, or substantially the whole, of the property of a company. The existing legislation covers receivers or persons who enter into possession or assume control of any of the property of a company. It appears unnecessarily burdensome to require a receiver who, for example, has taken control of a single item of property constituting only a small part of the total property of a company to comply with the reporting requirements under s 328.*

However, the Commission concluded that as this was a matter that fell outside the Terms of the Insolvency Reference and, while expressing some criticism, they accepted the current policy evident in the legislation and framed the recommendations accordingly. In this regard we also note, however, that the focus of the Commission and recommendations they made on this issue related to the position of a floating charge-holder rather than the holder of a fixed charge over a single asset. The latter category of charge-holder, which is the subject of the concern of AFC and AELA Members, would not appear to have been considered or, in our view, intended to be captured by the amendments recommended by the Commission.

Proposed Solution

As noted in the Paper, one means of addressing the concern of our Members is to revise the definition of controller to carve out persons enforcing a security over a single asset, or an asset with a value of less than a specified monetary threshold (eg $100,000). We note the arguments considered by the Committee in this regard.

In looking at the broader regulatory reform occurring at the Commonwealth level, we query whether another solution may be appropriate. In particular, as you are no doubt aware, the Commonwealth Attorney-General's Department with the backing of the Council of Australian Governments is in the process of reforming the law in relation to personal property securities. The reform proposes a legislative framework to establish a single national online register of personal property securities, and addresses the creation and extinguishment of these interests and rules for determining priority among competing interests in personal property (ie equipment and other non-land property). A draft Bill (the PPS Bill) has been released and comment invited by 15 August.

Part 9 of the PPS Bill proposes an enforcement regime. It includes notification and financial accounting obligations on holders of security interests (eg mortgagees) in personal property and imposes duties in relation to the sale and handling of the property. In large measure, these are similar to those imposed on a controller under the Corporations Act. The relationship between Part 9 and Part 5.2 of the Corporations Act has been clarified in the draft (Clause 164). We understand that Part 9 is not intended to apply in relation to property while a person is appointed as a receiver or receiver and manager under Part 5.2. We note, however, that the position of a person who is a controller because they have taken possession or control of property of a corporation for the purpose of enforcing a charge is less clear (Corporations Act s.9 Definition of controller para (b)). We suggest that there is an opportunity to clarify this matter which resolves both the existing and any potential operational or compliance issues for our Members as holders of secured interests in single-assets. In our submission in response to the PPS Bill we propose to generally support the enforcement framework proposed in Part 9 and suggest a consequential amendment to Corporations Act or Clause 164 of the PPS Bill to ensure our Members in the circumstances outlined are only subject to a single compliance reporting and accounting regime, namely that proposed in the PPS law. We therefore suggest that the Committee defers any decision in relation to the controller definition to enable the PPS Bill to be finalised. We anticipate that this will be before the end of this year, given the proposed commencement date of the PPS Scheme from May 2010.

We would be happy to discuss this proposal in more detail, as required, and would be pleased to meet with you or the Committee at your convenience.

However, should the Committee wish to progress the issue irrespective of the PPS developments, we suggest consideration of an alternate recommendation for amendment to Part 5.2 to resolve the issue. In looking at the compliance framework for controllers, the obligation to prepare and lodge statements of account utilising the ASIC form potentially presents the most time-consuming and costly component. Our Members have a commercial practice of reconciling the outcome of repossession and sale of secured assets and advising customers (or external administrators etc), usually by way of letter, of that process and outcome. Could we therefore suggest amending the financial reporting obligation to reflect

this process. Rather than imposing a statutory obligation to report in every case, instead require it only on request of a relevant party (eg external administrator, other creditor) where the repossession involves a single-asset security. In our view, this would reduce compliance costs for our Members and their customers, while meeting the public policy or interest in enabling other creditors and interested parties to become informed of action and outcomes with corporate property.

Thank you for your consideration of our submission. Please feel to contact me or Helen Gordon, Corporate Lawyer, through 02 9231 5877 should you require further information.

Kind Regards.

Yours truly,

Ron Hardaker
Executive Director

Attachment:


AFC

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25 September 2008

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
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SYDNEY NSW 2001

By e-mail: john.kluver@camac.gov.au

Dear Mr Kluver,

ISSUES IN EXTERNAL ADMINISTRATION – DISCUSSION PAPER (FEB 2008) – LOCATION OF FINANCED PROPERTY

We understand that the Committee is in the process of considering submissions in response to the above-named discussion paper and thank you, again, for the opportunity to provide our comments on the controller provisions.

A separate issue (Issue 2) raised in the Paper arises from a concern identified by our Members in relation to the difficulty they have as owners in the location of leased or hired property disclaimed by external administrators. On behalf of the Australian Finance Conference (AFC) and the Australian Equipment Lessors Association (AELA) we express our support for the provisional recommendation proposed by the Committee which would see an obligation imposed on the administrator to notify and facilitate efforts of our Members to locate property which they own. We would appreciate if you would extend out thanks to the Committee members for their consideration of the issue.

Kind regards.

Yours sincerely,

RON HARDAKER
Executive Director