# THE NEW ZEALAND STATUTORY MANAGEMENT REGIME: WHAT IS IT AND WHAT DOES IT MEAN FOR MY CLIENT?[‡]

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> In New Zealand the insolvency regime is broadly on the lines of the traditional English-based system. ....
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> [But] in the centre of this smooth-flowing river lies a rock which seeks to divert the strong current and throws up a mighty splashing in the process: the Corporations (Investigation and Management) Act 1989.
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> This legislation allows the executive to appoint a statutory manager of a New Zealand company in the public interest and has been used either because of suspected misdoings or because of a labyrinthine corporate structure or to protect the public, usually meaning public shareholders or public bondholders. Creditors have virtually no influence on the proceedings. The manager has very wide powers to run the company. The stay freezes proceedings, executions, winding-up petitions, enforcement by secured creditors, repossessions under retention of title, hire purchase agreements, leases or mortgages, forfeiture of land leases, landlord's distraint, set-offs, and acceleration by secured creditors. Apart from that, the stay apparently does not nullify ipso facto clauses in ordinary commercial contracts.
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> ... It is believed that the procedure has in practice usually been operated by statutory managers with proper attention to acquired rights, consistent with the New Zealand tradition of creditor protection. The procedure raises the question of whether it is right for the political executive to take strong-arm powers on the bankruptcy of ordinary commercial corporations.
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> Phillip R Wood *Principles of International Insolvency* (2007, 2ed) at p 119

## 1. INTRODUCTION

1.1 The New Zealand statutory management regime is a unique creature. While aspects of the regime are known to other forms of insolvency regimes in New Zealand and in other jurisdictions, the concoction formulated by the New Zealand Parliament when it enacted the New Zealand statutory management regime really has no equal.

1.2 The New Zealand statutory management regime has had some prominence in recent times. Having been used only once in the previous decade,[1] 2010 saw the statutory management regime used in two settings — each quite different. The first saw Aorangi Securities Limited, various charitable trusts, and Allan and Jean Hubbard placed into statutory management on 20 June 2010.[2] The Hubbards are the principal ultimate shareholders in South Canterbury Finance Limited ("**SCF**"), a then large mezzanine

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1 International Investment Unit Trust, Asset Protection, Timberland Trust, Donald Moris Rea, Catherine Linda Trenzona and Lisa Shirlee Talbolt were placed into statutory management on 3 July 2003 pursuant to the Corporations (Investigation and Management) Order (No 2) 2003.

2 Pursuant to the Corporations (Investigation and Management) Order 2010. Further related entities were placed into statutory management pursuant to the Corporations (Investigation and Management) Order (No 2) 2010 and the Corporations (Investigation and Management) Order (No 3) 2010. The author acts for Mr and Mrs Hubbard and it is therefore not appropriate for him to comment on this particular statutory management any further.

finance company. SCF was not placed into statutory management, but failed some 6 weeks later and was placed into receivership. The second use of statutory management in 2010 saw IDEA Services Limited and Timata Hou Limited placed into statutory management.[3] These companies are the service provider arms of IHC NZ Incorporated, a large charity directed at care and advocacy for people living with an intellectual disability. These settings are vastly different to the statutory managements of the past.[4]

1.3 The New Zealand statutory management regime is found in two Acts of Parliament: in Part 3 of the Corporations (Investigation and Management) Act 1989 ("**CIMA**") and in Part 5C of the Reserve Bank of New Zealand Act 1989 ("**RBNZ Act**"). The focus of this paper is the statutory management regime in the CIMA. The statutory management regime in the RBNZ Act — which can only apply to registered banks — is substantially similar to the regime in CIMA. For the sake of facilitating a discussion of the key points, this paper does not attempt to deal with the intricacies of the various differences between the two Acts.

1.4 This paper addresses:

(a) in part 2, the history of statutory management;

(b) in part 3, the key features of statutory management;

(c) in part 4, the circumstances in which statutory management can and has been used;

(d) in part 5, the practical implications and potential consequences of the statutory management regime;

(e) in part 6, criticisms of statutory management and arguments supporting retention of statutory management;

(f) in part 7, the future of statutory management and the prospects (or lack thereof) for reform.

1.5 The aims of the paper are fairly straightforward. The paper does not, for instance, seek to advance a particular theory of statutory management or advance a view on the merits or otherwise of retaining statutory management in its present or a modified form. Rather, the paper simply seeks to provide a broad overview of the statutory management regime in order to provide a foundation for further discussion and consideration.

## 2. HISTORY OF STATUTORY MANAGEMENT

2.1 Statutory management has a reasonably long history in New Zealand.[5]

### Companies (Special Investigation) Act 1934 and related legislation

2.2 It was first implemented in the early 1930s to address concerns as to the financial viability of certain investment companies. There were also allegations of fraud. As a consequence of a commission of inquiry into those companies the legislature passed the Companies (Special Investigation) Act 1934. The Act empowered the Governor-

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[3] Pursuant to the Corporations (Investigation and Management) Order (No 4) 2010. The author's firm acts for IHC and IDEA Services Limited and it is therefore not appropriate for him to comment on this particular statutory management any further.

[4] See section 4 below for a brief overview of past uses of statutory management.

[5] For a more detailed review of the history of statutory management in New Zealand, see Law Commission *Insolvency Law Reform: Promoting Trust and Confidence* (NZLC SP11, 2001) at pp 92 - 96.

General to appoint inspectors to investigate the affairs of these companies, but left the management of the companies in the hands of the directors.

2.3 Three months later, however, out of fears that the directors would dissipate remaining assets, the Companies (Temporary Receivership) Act 1934 was passed. This Act created a form of statutory management that bears some resemblance to what we have today. The Public Trustee was appointed as receiver and manager of the companies and their assets. Wide ranging powers were conferred on the Public Trustee. The Act required all persons having possession or control of any movable property belonging to one of the companies to deliver it to the Public Trust. The Act also imposed a moratorium that prevented proceedings being taken against the companies except by leave of the Court.

2.4 As a result of the inspectors' work, a web of questionable loan transactions was uncovered. Consequently, the Companies (Special Liquidations) Act 1934 was passed. That Act provided for the winding up of the companies by the Public Trust as liquidator. The Public Trust was subject to the control of the Court and depositors and creditors were able to apply to the Court in relation to the Public Trust's exercise of power.

**Companies Special Investigation Act 1958**

2.5 The next piece of legislation in this history is the Companies Special Investigations Act 1958. The Act was "rushed legislation" and was "passed through all stages in the House and enacted in one night".[6] The Act was intended to deal with the Intercity group of companies, and as enacted the Act only applied to the companies listed in the schedule. The Attorney-General said the legislation was necessary because of the complex, interlocked relationships of the companies, the strong suspicion of fraud, the need to act quickly to prevent the destruction of documents, the dispersal of assets, and the inadequacy of ordinary company law to deal with an interlocked group of companies in a swift manner.

2.6 The 1958 Act had similar features to the 1934 Acts. For example, the 1958 Act required all persons having possession or control of any movable property of one of the companies to deliver it to the receivers, even if they had a lien or charge over the property. A moratorium was also imposed: no action or proceeding could continued or be commenced against any of the companies or the receiver without the leave of the Court.

**1963 Amendment**

2.7 In 1963 the Act was amended so that it could apply to any company. The 1963 extension of the 1958 Act was made as a precaution to ensure that the mechanism would be available to address similar situations that may arise in the future without the need to pass urgent and specific legislation to deal with events requiring — or perceived to require — urgent intervention by the government. In order for that to occur, a new provision was inserted to provide for the circumstances in which a company could be declared by Order in Council to be subject to the Act:

> Where it is desirable for the protection of any of the shareholders or creditors (whether secured or unsecured) of any company or companies, or for the protection of any beneficiary under any trust administered by any company, or it is otherwise in the public interest, that the provisions of this Act should apply to any company or companies, and the said shareholders or creditors or beneficiaries or the public interest cannot be adequately protected under the Companies Act 1955 or in any other lawful way…

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[6] *Hawkins v Minister of Justice* [1991] 2 NZLR 530 (CA) at 536 per Richardson J.

2.8 As we shall see, s 4(b) CIMA, which sets out the very criterion for application of CIMA, bears a close resemblance to this provision.

**Cornish Companies Management Act 1974 and the Public Service Investment**

2.9 The hope of the legislature that it would not need to pass specific legislation dealing with particular circumstances did not play out as legislators may have liked. After the passing of the 1963 amendment, two further specific Acts were enacted to address commercial failures that did not fall under the 1958 Act. These Acts — the Cornish Companies Management Act 1974 and the Public Service Investment Society Management Acts of 1979 — were passed under urgency with support from both sides of the House. The Cornish Companies Management Act 1974 (on which the Public Service Investment Society Management Acts of 1979 were modelled) placed the management of the companies in the hands of the statutory manager. The statutory manager was given extensive powers to run the businesses. A moratorium was also imposed. The statutory management could be terminated by the Governor-General, by Order in Council.

2.10 CIMA bears a closer resemblance to these Acts than it does to the 1934 and 1958 Acts.

**Reserve Bank Amendment Act 1986**

2.11 The Reserve Bank Amendment Act 1986 introduced a system whereby the Reserve Bank supervises, on an ongoing basis, registered banks. The system included a disclosure regime, empowers the Reserve Bank to require information from registered banks and to investigate them. The system also allows the Reserve Bank to declare a registered bank to be at risk and to advise and direct such banks. The Reserve Bank Amendment Act 1986 also set up a statutory management regime for registered banks.

2.12 The aims of the Reserve Bank Act are directed at promoting the maintenance of a sound and efficient financial system and avoiding significant damage to the financial system that could result from the failure of a registered bank. As will be explored below, the aims in CIMA are different.

**Corporations (Investigation and Management) Act 1989**

2.13 CIMA repealed the Companies Special Investigations Act 1958 and was largely modelled on the Reserve Bank Amendment Act 1986.

2.14 The then Minister of Justice, introducing the Bill that lead to CIMA, said that it had two broad purposes:[7]

> The first is to enable action to be taken earlier in instances when a company is, or may be, operating fraudulently or recklessly. The second is to enable companies to be given a decent burial when ordinary remedies are inadequate.

2.15 The problem with the Companies Special Investigations Act 1958 indentified by the then Minister of Justice was that it could only be applied "when ordinary remedies are inadequate" so "statutory management can only be used in extreme cases".[8] As a result, "the position of the companies concerned must have deteriorated to the point at which the position is difficult or even impossible to repair".[9] In other words, "the position must have deteriorated to the point [where] the only option is to kill or bury the company".[10]

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[7] (13 September 1988) 492 NZPD 6494.
[8] (13 September 1988) 492 NZPD 6494.
[9] (13 September 1988) 492 NZPD 6494.
[10] (13 September 1988) 492 NZPD 6494.

## 3. KEY FEATURES OF STATUTORY MANAGEMENT UNDER CIMA

### Purpose

3.1 The long title to CIMA provides that it is "An Act to enable the Registrar of Companies and the Financial Markets Authority to determine whether corporations are at risk, to enable action to be taken in relation to such corporations in appropriate cases, and to repeal the Companies Special Investigations Act 1958". The "general objects" of CIMA are set out in s 5:

> (a) to confer powers on the Registrar of Companies to obtain information concerning, and to investigate the affairs of, corporations to which this Act applies:
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> (b) in the case of a corporation that is, or may be, operating fraudulently or recklessly, to limit or prevent—
>
> (i) the risk of further deterioration of the financial affairs of that corporation; and
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> (ii) the carrying out, or the effects of, any fraudulent act or activity:
>
> (c) in the case of a corporation referred to in section 4(b), to preserve the interests of its members or creditors or beneficiaries or the public interest:
>
> (d) to provide for the affairs of corporations to which this Act applies to be dealt with in a more orderly and expeditious way.

3.2 The purpose of CIMA has been explored in a number of cases. For example, in *McDonald v ACC (NZ) Ltd*,[11] Wallace J said:[12]

> the Act is specifically designed to deal with those situations where a company has been operating fraudulently or recklessly (s 4(a)) or, alternatively, where the ordinary law is inadequate (s 4(b)(iii)). The Act is intended to take over where the ordinary law cannot cope and stronger measures are needed. Situations where those measures are needed will include a major collapse of a large and interlocking group of companies with complex rights amongst creditors, shareholders and beneficiaries. A major collapse may also involve the public interest in a variety of ways and it is noteworthy that the references to public interest in ss 4 and 5 are carried through into s 41(1)(a).

3.3 A similar view was expressed in *Ararimu Farms and Investments Ltd v Stotter*:[13]

> the scheme of the Act is designed to deal with corporate collapses of such magnitude that the normal legal procedures available to a corporation, its members or creditors are totally inadequate.

3.4 Statutory management should not be seen as an alternative form of liquidation or other insolvency regime for at least three reasons. First, Part 3 of CIMA itself makes quite clear that it does not create an insolvency regime. In particular, a corporation under statutory management can only be liquidated in accordance with the usual procedures under the Companies Act 1993; in order for the liquidation procedures to operate, the statutory managers must make application under the Companies Act 1993 to place the corporation into liquidation.[14]

3.5 Second, as has been noted in the jurisprudence, the focus of Part 3 of CIMA is on the management of corporations to which it applies, not on the winding up of those

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[11] [1990] 1 NZLR 227; (1989) 4 NZCLC 65,365; 3 BCR 431; 11 NZTC 6304.
[12] At p 238; p 65,375; p 6313.
[13] [1993] MCLR 1 (CA) at p 6.
[14] CIMA, s 52(1).

corporations. So, for example, in *McDonald v AGC (NZ) Ltd*, Wallace J stated that on a full reading of the CIMA:[15]

> …the emphasis in Part III of the Act is on management of the corporation or corporations. That again is a reflection of the objectives of the Act: see s 41(1) which refers to the need to preserve the interests of members and creditors of the corporation and to protect the beneficiaries or the public interest. Section 41(1) also refers to the need to resolve the difficulties of the corporation and to preserve its business as far as practicable. Those preservatory and protective functions are in turn reflected in the moratorium and other provisions of Part III. There is no emphasis on the winding up of the corporation. That is simply one of the options open to the statutory manager (s 52) who clearly must consider whether it is appropriate to petition for winding up. I add that I am generally in agreement with what is said concerning the objects of the Act in Wilson v Aurora Group Ltd [1990] 1 NZLR 61 with the qualification that the statutory manager has a clear obligation to have regard to the need to preserve the business or undertaking of the company.

3.6 Third, critical to the practical operation of statutory management from the perspective of third party creditors are, as will be seen, the moratorium provisions in Part 3 of CIMA. A moratorium is quite a different scenario to a liquidation, receivership or personal insolvency. The moratorium provisions reinforce the notion that statutory management is principally about the efficient and effective management of a corporation; not about its winding-up.

**Other features**

3.7 The remainder of this section of the paper seeks to address the following questions:

(a) Who can be subject to statutory management?

(b) When and how is an entity placed into statutory management, and when does statutory management end?

(c) Why is an entity placed into statutory management?

(d) What are the consequences of being placed into statutory management?

**The "who": the entities that can be subject to statutory management**

3.8 Any "corporation" is potentially subject to the statutory management regime in CIMA. For the purposes of CIMA, a "corporation" means a body of persons, whether corporate or not, and whether incorporated or established in New Zealand or elsewhere. So unlike earlier regimes its scope is not confined to companies as such; it can apply to other forms of corporate bodies and to trusts. However, the scope of the Act is not expressed as applying to every entity that that falls within the definition of "corporation". Rather, s 4 is narrower in scope and provides that:

> [CIMA] applies to any corporation—
>
> (a) that is, or may be, operating fraudulently or recklessly; or
>
> (b) to which it is desirable that this Act should apply—
>
> (i) for the purpose of preserving the interests of the corporation's members or creditors; or
>
> (ii) for the purpose of protecting any beneficiary under any trust administered by the corporation; or

[15] *McDonald v AGC (NZ) Ltd* [1990] 1 NZLR 227.

(iii) for any other reason in the public interest,—

if those members or creditors or beneficiaries or the public interest cannot be adequately protected under the Companies Act 1955 or the Companies Act 1993 or in any other lawful way.

3.9 In addition to corporations, an "associated person" of a corporation is potentially subject to the statutory management regime in CIMA. For the purposes of CIMA, a person is an "associated person" of a corporation if:[16]

(a) that person directly or indirectly controls the management of the corporation; or

(b) that person owns directly or indirectly,—

(i) in the case of a corporation that is a company registered under the Companies Act 1955, 20% or more in nominal value of the equity share capital (as defined in section 158 of that Act) of the corporation; or

(ii) in all other cases, 20% of the issued shares of the corporation, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital:

(c) the corporation directly or indirectly controls that person; or

(d) the corporation owns directly or indirectly,—

(i) in the case of a person that is a company registered under the Companies Act 1955, 20% or more of the equity share capital (as defined in section 158 of the Companies Act 1955) of that person; or

(ii) in all other cases, 20% or more of the issued shares of that person, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital.

**The "when" and the "how": the commencement and termination of statutory management**

3.10 Statutory management commences for a corporation or an associated person of that corporation when the Governor-General, by Order in Council, declares the corporation or the associated person to be subject to statutory management.[17] CIMA sets out a process that is to be followed prior to the Governor-General making such an order. That process requires the Financial Markets Authority ("**FMA**") to make a recommendation to the Minister of Commerce ("**Minister**") that statutory management should be declared.[18] In order to make that recommendation, the FMA has to be satisfied of a number of specified criteria, which are set out in more detail in paragraphs 3.13 to 3.17 below.[19] Upon receiving the FMA's recommendation, the Minister can decide to ignore the recommendation, or follow it. If the Minister wishes to follow the FMA's recommendation, he or she advises the Governor-General to make the required Order-in-Council. There is no other way for statutory management to be commenced under CIMA. Moreover, there is no judicial involvement in this process.

3.11 Statutory management potentially has no end: there is no specified time period for the statutory management. CIMA sets out two ways that statutory management can cease for the corporation or the associated person:

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[17] CIMA, s 38(1)(a).
[18] CIMA, s 38(1)(a).
[19] CIMA, ss 39 and 40.

(a) when the Governor-General, by Order in Council, declares that the statutory management shall cease;[20]

(b) when the corporation or the associated person is put into liquidation on the application of the statutory manager.[21]

3.12 Other than through the mechanisms described above, there is no express provision in CIMA that gives anyone — for example, the corporation in statutory management, the associated person in statutory management, shareholders, secured creditors, unsecured creditors, even a statutory manager — an ability to seek to terminate the statutory management. Statutory management therefore commences in the context of an inherently political environment and — bar a statutory manager's successful application to liquidate — ends in one.

**The "why": the grounds for placing a corporation or an associated person of a corporation in statutory management**

3.13 In relation to a recommendation by the FMA to the Minister that a corporation should be placed into statutory management, s 39 CIMA provides:

> The FMA shall not make a recommendation under section 38 in respect of a corporation unless it is satisfied on reasonable grounds—
>
> (a) that the corporation is, or may be, a corporation to which this Act applies; and
>
> (b) that, in the case of a corporation that is, or may be, operating fraudulently or recklessly, it is desirable that the corporation be declared to be subject to statutory management for the purpose of—
>
> (i) limiting or preventing the risk of further deterioration of the financial affairs of the corporation; or
>
> (ii) limiting or preventing the carrying out, or the effects of, any fraudulent act or activity; or
>
> (iii) enabling the affairs of the corporation to be dealt with in a more orderly or expeditious way:
>
> (c) that, in the case of a corporation referred to in section 4(b), it is desirable that the corporation be declared to be subject to statutory management for the purpose of—
>
> (i) preserving the interests of its members or creditors or beneficiaries or the public interest; or
>
> (ii) enabling the affairs of the corporation to be dealt with in a more orderly or expeditious way.

3.14 When distilled to their bare essentials, these grounds are fairly light. By way of example, a close reader of the relevant provisions might observe that it is possible for statutory management to be imposed on a corporation where:

(a) it is desirable that CIMA apply to the corporation for any reason in the "public interest" and the "public interest" cannot be protected in any other lawful way (so the corporation is subject to CIMA under s 4(b)(iii)); and

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[20] CIMA, s 62(1).
[21] CIMA, s 62(2).

(b) the FMA is satisfied (on reasonable grounds) that it is desirable for the corporation to be subject to statutory management for preserving the "public interest" (so the requirement in s 39(c) is met).

3.15 In relation to a recommendation by the FMA to the Minister that an associated person of a corporation should be placed into statutory management, s 40 CIMA provides:

> The FMA shall not make a recommendation under section 38 in respect of an associated person of a corporation unless it is satisfied on reasonable grounds that—
>
> (a) an Order in Council could be made in respect of that associated person on any of the grounds specified in section 39; or
>
> (b) the business and affairs of the corporation are so closely connected with that associated person that the statutory manager or statutory managers would be unable to exercise effectively the powers conferred by this Act in relation to the corporation unless the statutory manager or statutory managers is or are appointed as statutory manager or statutory managers of the associated person.

3.16 CIMA does not provide any guidance to the FMA as to how it should approach these grounds for making a recommendation in respect of an associated person of a corporation. In particular, there is no explicit guidance in CIMA on what is meant by "so closely connected" or on what level of difficulty is sufficient to met the "unable to exercise effectively" standard.

3.17 The Securities Commission, the predecessor to the FMA, has said that the factors to be considered before recommending that companies be placed in statutory management include:[22]

- a complex group of companies linked by shareholdings or inter-company debts;
- many creditors, unsecured or holding a range of different securities, affecting different companies in the group;
- no security document enabling the timely appointment of a receiver or manager for the group as a whole;
- the prospects of protracted litigation and expense to trace rights through a complex group;
- vulnerable assets, such as work-in-progress, under construction or development contracts;
- the effect on a market of the possibility of uncoordinated and distressed sales; and
- the effects of intervention and non-intervention upon the credit standings of New Zealand companies.

**The "what": the consequences of being placed into statutory management**

3.18 There are two significant immediate consequences of being placed into statutory management:

[22] Securities Commission press release dated 3 August 1989 cited in Ross "Political Expediency and Misguided Insolvency Reform - The New Zealand Experience with the Corporations (Investigation and Management) Act 1989" Insolvency Law Journal (March 1994) 25 at 33. It is unclear whether the FMA still takes the same view.

(a) a wide-reaching moratorium is imposed preventing various proceedings or other enforcement action being taken or continued against the corporation by creditors and other claimants (including secured creditors);[23] and

(b) the management of the corporation is vested in the statutory managers.[24]

*Moratorium*

3.19 The moratorium in s 42 CIMA is wide-reaching. It prohibits:[25]

(a) any action or other proceedings in respect of any pre-statutory management contract or other obligation;[26]

(b) the enforcement of any judgment in respect of any pre-statutory management contract or other obligation;[27]

(c) the recovery of property in the possession of the corporation;[28]

(d) the termination of, or re-entry or distraint for rent in respect of, any tenancy;[29]

(e) the exercise of any right of set-off against the corporation;[30]

(f) the enforcement of securities;[31] and

(g) any application or resolution for liquidation.[32]

3.20 Notwithstanding the broad moratorium, there are a number of important carve-outs.

3.21 The principal carve-out is that the moratorium does not apply to post-statutory management contracts and obligations. In that regard, CIMA draws an important distinction between pre-statutory management contracts and obligations and post-statutory management contracts and obligations. As noted above, pre-statutory management obligations are covered by the moratorium. On the other hand, where the corporation under statutory management enters into a contract or incurs an obligation, the moratorium does not prevent a person from seeking to enforce such a contract of obligation.[33] The rationale for the moratorium can be readily discerned: why would anyone contract with a corporation in statutory management without being able to sue on the contract?

3.22 A second carve-out is that, except in the case of the prohibition against liquidation procedures, the statutory manager has waived the application of the moratorium.[34]

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[23] CIMA, s 42.
[24] CIMA, s 45.
[25] *Brookers Insolvency and Practice* (loose-leaf) at 6-14.
[26] CIMA, s 42(1)(a).
[27] CIMA, s 42(1)(b).
[28] CIMA, s 42(1)(f).
[29] CIMA, s 42(1)(g).
[30] CIMA, s 42(1)(h).
[31] CIMA, s 42(1)(e). Importantly, the moratorium does not affect "the existence of any security over the property of any corporation or its priority over other debts": CIMA, s 42(4). This aspect of the CIMA regime is discussed in more detail below.
[32] CIMA, s 42(1)(c).
[33] CIMA, s 42(5) and (6). See for a recent practical application of this principle *Re Application by Simpson & Ors* HC Timaru CIV-2010-476-581, 17 March 2011 (costs of legal representation incurred after imposition of statutory management on Mr and Mrs Hubbard not affected by the moratorium).
[34] CIMA, s 42(3).

3.23 Furthermore, the prohibition on brining / continuing proceedings does not apply to a proceeding brought for the purpose of determining whether any right or liability exists and for which leave has been obtained from the statutory manager or the High Court.[35] However, even if a party is able to obtain judgment *establishing* that a right or liability exists, the moratorium would prevent that party from seeking to *enforce* the judgment against the corporation.

*Management of the corporation*

3.24 The management of the corporation is vested in the statutory managers.[36] In doing so, CIMA gives the statutory managers wide powers (some of which are wider than what the corporation would ordinarily have). The statutory manager is given all of the powers, rights, and privileges of the corporation and generally all such powers, rights, and authorities as may be necessary to carry out "the powers" conferred by Part 3 of the Act.[37]. Additional or specific powers are provided by other provisions and include powers:

(a) to disclaim onerous property;[38]

(b) to suspend the discharge of any pre-statutory management obligation;[39]

(c) to carry on the business of the corporation;[40]

(d) to pay, or compromise with, any creditor or claimant;[41]

(e) to terminate any contract of service or agency;[42]

(f) to sell any part of the business undertaking of the corporation;[43]

(g) to apply to put the corporation into liquidation;[44]

(h) to trace property improperly disposed of;[45]

(i) to exercise certain powers of liquidators under the Companies Act 1993;[46]

(j) to apply to the Court for directions;[47] and

(k) to seek and be given additional powers by the Court.[48]

3.25 CIMA provides the statutory managers a non-exhaustive list of guiding principles to assist them in the exercise of their powers:[49]

> In the exercise of the powers conferred by this Part, a statutory manager of a corporation shall have regard to—

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35 CIMA, s 42(2).
36 CIMA, s 45.
37 CIMA, s 46.
38 CIMA, s 46(3).
39 CIMA, s 44.
40 CIMA, s 47.
41 CIMA, s 48.
42 CIMA, s 49.
43 CIMA, s 50.
44 CIMA, s 52.
45 CIMA, s 54.
46 CIMA, s 55.
47 CIMA, s 58.
48 CIMA, s 59.
49 CIMA, s 41(1).

(a) the need to preserve the interests of members and creditors of the corporation, or, where appropriate, the need to protect the beneficiaries under any trust administered by the corporation or the public interest:

(b) the need to resolve the difficulties of the corporation:

(c) as far as practicable, the need to preserve the business or undertaking of the corporation.

3.26 A statutory manager will be conscious that these considerations may conflict with each other. For example, the need to preserve the interest of members of the corporations might be inconsistent with the need to preserve the interests of creditors. It is also notable that the underlying legal position is not an explicit consideration for a statutory manager.

**Minimal Court involvement**

3.27 Under CIMA the role of the Court is very limited. Moreover, the other provisions of CIMA do not contemplate very much Court involvement. The action is, initially, in the hands of the FMA and the Minister, and, later, in the hands of the statutory manager. The Court's role is confined to:

(a) granting leave under s 42(2) for an action or proceeding to be commenced or continued against a corporation "for the purpose of determining whether any right or liability exists";

(b) awarding compensation under s 49 to persons who have had service or agency contracts terminated by the statutory manager;

(c) hearing applications by any person adversely affected by any sale under s 50;

(d) ordering under s 54 the return of property improperly disposed of or a payment of a sum for the value of such property;

(e) applying under s 55 the voidable transaction and other provisions of the Companies Act 1993;

(f) giving directions under s 58 to the statutory as to the exercise of his or her powers or conferring additional powers under s 59 on a statutory manager (on the application of the statutory manager); and

(g) considering applications for judicial review of the actions of the Governor-General, the Minister, the Securities Commission, or the statutory manager. Although there is no express power to review in the Act itself, basic administrative law principles imply a power to review.

3.28 Some might view the lack of Court involvement as concerning; others might say it demonstrates the flexibility of the regime, allows the statutory manager to get on with the job, and minimises legal expense for all involved.

**Summary of key features**

3.29 In short, the key features of the statutory management regime in CIMA are:

(a) the range of entities potentially subject to statutory management is broad;

(b) statutory management can only be initiated — and be terminated — by the executive;

(c) the grounds on which an entity can be placed in statutory management are incredibly broad;

(d) upon a corporation being placed in statutory management, a wide-reaching moratorium is imposed preventing creditors and other claimants from pursuing or enforcing pre-statutory management claims, contracts or other obligations;

(e) the management of the corporation vests in the statutory manager and the statutory manager is given very wide powers to manage the corporation;

(f) there is a very limited role for the Courts.

## 4. WHEN HAS STATUTORY MANAGEMENT BEEN USED?

4.1 The purpose of this section is to provide some practical context to the discussion of statutory management. Statutory management under CIMA has been used in a variety of different circumstances in respect of corporations and to limited extent (and somewhat controversially) natural persons. Examples are discussed below.

### Corporations

*Equiticorp*[50]

4.2 The size of the Equiticorp collapse was unprecedented in New Zealand experience. In January 1989 the Equiticorp Group announced that it was suspending business. An extensive memorandum addressed to the Securities Commission was prepared by professional advisers for the group and stated that the collapse was of such magnitude and so serious that Government intervention was necessary pursuant to the Companies Special Investigations Act 1958. The Securities Commission then recommended to the Minister of Commerce that the Governor-General make an Order in Council placing the companies in the Equiticorp Group under statutory management pursuant to that Act. The Order in Council was made on 22 January 1989 (and pursuant to the Corporations (Investigation and Management) Order 1989 the Equiticorp group was declared to be subject to statutory management under CIMA on 4 April 1989). The statutory management took some years to resolve.

*Richmond Smart*[51]

4.3 Richmond Smart Corporation was formed by a merger of Smart Group Limited and Richmond Development Corporation Limited and was a diverse group comprising 121 companies of which 93 were in New Zealand. Its principal divisions were a hotel division which owned and ran or had franchised nine hotels; an industrial division including series of industrial companies with diverse industries such as stainless steel manufacture and fabrication, timber processing and retailing, plumbing, roofing and conditioning contracting, alloy casting; a property division with a wide range of industrial, commerce, office properties of varying and often poor quality; an investment division with some investment in equities and an Australian division which was a diverse group involved in property development, shoe manufacture, tannery and fibreglass panels and products.

4.4 Immediately on merger the Group experienced financial problems and various bankers moved to improve their security position and reorganise their lending. This culminated in the Bank of New Zealand commissioning an investigating accountant's report which was followed by the formation of a working party of banks to speed up and control the

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[50] Aspects of this summary are taken from *Hawkins v Minister of Justice* [1991] 2 NZLR 530 (CA).

[51] Aspects of this summary are taken from the Securities Commission's 1992 Report on CIMA at appendix A.

sell down of assets. This was a two-tiered structure. The first tier was the five major banks whose representatives met weekly with Mr FN Watson of KPMG Peat Marwick as Chairman. The second tier was the remaining 12 banks whose representatives met monthly. Lending banks formed a working party which was in existence for a period of about four months, but failed to achieve its target because of increasing discontent among the banks themselves.

4.5 As part of the process to resolve the difficulties facing the Richmond Smart Group, it was proposed that the Group be brought under a scheme of arrangement under s 205 of the Companies Act 1955. This needed the unanimous consent of all banks but despite strenuous efforts by the major banks and the directors of the Group, such consent was never obtained.

4.6 The failure to achieve a s 205 scheme was critical and resulted in each bank moving to protect its own interests. The two major banks appointed receivers under debentures over part of the Group. Other banks and lending institutions took steps to appoint receivers of rents to properties over which they had security. One lender which had already issued winding up proceedings against Richmond Development Corporation Ltd set the proceedings down for hearing in the High Court.

4.7 There was no debenture over, or any lending to the holding company, Richmond Smart Corporation Ltd (although it had guaranteed a number of loans).

4.8 Two different receivers were appointed by different secured creditors over different parts of the Group, and indications were received from other lenders that they also would move to protect their interests. Notwithstanding all these formal appointments, there were still companies in the Group over which there were no debentures nor did the lenders hold securities enabling them to appoint receivers of rents of the properties affected. A number of companies continued to trade without "parental control".

4.9 Overall, there were 25 banks, 5,500 shareholders, 2,200 unsecured creditors, and 1,300 staff involved in the Group. There was also the effect on the general public and the tourist industry as local and overseas tourists would have lost their deposits on the hotel bookings when the hotels were forced to close.

4.10 It was recognised by the directors that individual receivers and managers of different segments of the Group might not respect other parts of the Group. In this critical situtation, the directors approached the Government and appointments were made on 3 March 1989 under the Companies and Special Investigations Act 1958 with KPMG Peat Marwick being appointed statutory receivers (with that process later transferred to the statutory management under CIMA).

4.11 It was very clear from the outset that the Group could not be traded out of its current predicament and that the best result for all parties would be an orderly sell down of all assets. A plan of realisation of assets was put into effect by the statutory managers and was substantially completed within a two and a half year period.

*International Investment Unit Trust*

4.12 In July 2003, the International Investment Unit Trust, related entities, and three natural persons were placed into statutory management pursuant to the Corporations (Investigation and Management) Order 2005. The International Investment Unit Trust is alleged to have been a vehicle for Donald Rea to run a ponzi scheme under which he received almost $29 million from investors who were promised yields of up to 72 per cent on investments in "private placement programmes" run by the top 25 European

banks.[52] More than 250 investors from throughout the country, but mostly in Taranaki and the Bay of Plenty, were involved. They ranged from wealthy farmers, through to individuals nearing retirement looking to invest their life savings, to charities.[53]

**Natural persons**

4.13 Natural persons have been placed into statutory management on three occasions. At best, CIMA deals with natural persons in a fairly "awkward" manner[54] and one view is that statutory management was never intended to deal with natural persons.

*John Baylis and Willard Amaru*

4.14 On 16 December 1999 John Baylis and Willard Amaru were placed into statutory management as associated persons of IMI Pacific Group Limited and Walakahai Pacific Corporation Limited. The pair was accused of financial wrongdoing after statutory managers were called in to retrieve $8 million in investors' money funnelled into a labyrinth of family trusts, property and other personal assets.[55] About 200 investors — mostly from Wellington and Nelson — were promised up to 14 per cent a month return on their investments, at seminars held by the men. Investors were since told they would get back just 15c in every dollar invested in the two companies. The statutory management of Messrs Baylis and Amaru was terminated on 25 November 2002 pursuant to an Order in Council.[56] By that time they had been declared bankrupt and had received a 5 year ban from being a director.[57]

*Donald Rea, Catherine Trezona and Lisa Talbolt:*

4.15 On 3 July 2003, Donald Rea, Catherine Trezona and Lisa Talbolt were placed into statutory management as associated persons of the International Investment Unit Trust (described above). Just over a year later, on 5 July 2004, the statutory management of Ms Talbot was terminated pursuant to an Order in Council,[58] and then a further year later, on 11 July 2005, the statutory management of Ms Trezona was terminated pursuant to a further Order in Council.[59] Mr Rea died (while in statutory management) on the evening of the second day of a trial for charges brought by the Serious Fraud Office.

*Allan and Jean Hubbard*

4.16 As previously noted, on 20 June 2010 Allan and Jean Hubbard were placed into statutory management as associated persons of Aorangi Securities Limited and various charitable trusts pursuant to the Corporations (Investigation and Management) Order 2010. As at the date of this paper, they remain in statutory management though there are extant judicial review proceedings challenging the decisions to place them in statutory management.

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[52] Geoff Cumming "Con or conspiracy - Don Rea's last stand" *The New Zealand Herald* 20 May 2006 <http://www.nzherald.co.nz/geoff-cumming/news/article.cfm?a_id=88&objectid=10382745>.

[53] Geoff Cumming "Con or conspiracy - Don Rea's last stand" *The New Zealand Herald* 20 May 2006 <http://www.nzherald.co.nz/geoff-cumming/news/article.cfm?a_id=88&objectid=10382745>.

[54] *Re Application by Simpson & Ors* HC Timaru CIV-2010-476-581, 17 March 2011 at [28].

[55] Dita de Boni "Ban on pair in IMI and Walakahai Pacific fraud inquiry" The New Zealand Herald (New Zealand, 28 March 2001) <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=179621>.

[56] Corporations (Investigation and Management) Order 2002.

[57] Dita de Boni "Ban on pair in IMI and Walakahai Pacific fraud inquiry" The New Zealand Herald (New Zealand, 28 March 2001) <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=179621>.

[58] Corporations (Investigation and Management) Order 2004.

[59] Corporations (Investigation and Management) Order 2005.

## 5. PRACTICAL IMPLICATIONS AND CONSEQUENCES FOR PARTIES DEALING WITH A CORPORATION IN STATUTORY MANAGEMENT

5.1 The purpose of this section is to outline the kinds of issues that parties dealing with a corporation in statutory management may face.

5.2 The most obvious and immediate practical implication is, as has already been discussed, that a moratorium is imposed that prevents creditors and other claimants from enforcing pre-statutory management contracts and obligations. That moratorium can be waived by the statutory manager.

5.3 Parties dealing with the corporation in statutory management will be interested to know about a number of other matters, including:

(a) their ability to contract with a corporation in statutory management, and the legal position governing their relationship;

(b) in the case of secured parties, how their security is affected by the corporation's placement into statutory management, and what, for example, happens if a statutory manager attempts to sell an asset over which a secured party has security;

(c) the prohibition on the transfer and removal from New Zealand of the corporation's property without the permission of the statutory manager;

(d) the requirement to deliver property of the corporation to the statutory manager; and

(e) cross border enforcement issues.

**Contracting with a corporation in statutory management**

5.4 For parties concerned about the moratorium, as noted above, the moratorium in s 42 CIMA does not apply to post-statutory management contracts or obligations incurred by the corporation.[60] Moreover, the statutory manager's power to suspend payments does not apply to post-statutory management contracts and obligations.[61] It is therefore possible to enter into an enforceable contract with a corporation in statutory management.

5.5 The effect of s 45 CIMA is that the management of the corporation vests in the statutory manager and only the statutory manager can be engaged in the management of business of that corporation (unless the statutory manager gives someone else permission to do so). Accordingly, during statutory management — to state what is probably obvious — the only way that a corporation in statutory management can validly enter into a contract or otherwise incur an obligation is through or with the consent of the statutory manager. It is therefore important for parties dealing with a corporation in statutory management to ensure that they deal with the statutory manager and not just the directors or other officers of the corporation.

5.6 The position of a party who contracted with the corporation pre-statutory management might give rise to some complexities. To illustrate those complexities, take a supplier of goods to a corporation that has supplied goods to the corporation for a period of time pre-statutory management and which is owed money by the corporation at the time of statutory management. An interesting question arises as to whether or not the supplier has to continue to provide goods to the corporation despite not being paid or risk being

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[60] *Re Application by Simpson & Ors* HC Timaru CIV-2010-476-581, 17 March 2011 at [31].
[61] *Re Application by Simpson & Ors* HC Timaru CIV-2010-476-581, 17 March 2011 at [33].

in breach of contract. On the one hand s 44(1) CIMA provides that the statutory manager of a corporation may, notwithstanding the terms of any contract, suspend in whole or in part the repayment of any deposit, or the payment of any debt, or the discharge of any obligation, to any person. Section 44(2) CIMA provides that the suspension by a statutory manager in whole or in part of the repayment of any deposit, or the payment of any debt, or the discharge of any obligation to any person shall not constitute a breach or repudiation of any contract entered into by the corporation with any person. No corresponding relief is given to the other party to the contract to cease provision under the supplier contract. So, prima facie, the supplier will have to continue to supply goods and face the possibility it will not receive payment for pre-statutory management debts.

5.7 The supplier's safeguard will in practice be to have ensured that statutory management constitutes an event of default under the relevant supply contract. What if the supply contract is silent on this point? It is arguable that the supplier will have to continue to supply the corporation with goods. On the positive side for the supplier, the moratorium and the power to suspend does not apply to post-statutory management obligations, so they can be assured of an entitlement to be paid for goods supplied post-statutory management (although when and whether payment occurs will depend on what assets the corporations actually has).

5.8 To take the example given a little further, it is possible for the supplier to bargain with the statutory manager and try and get the statutory manager to use his power under s 48(a) to pay any creditor or class of creditor of the corporation in whole or in part. That provision appears to allow the statutory manager an incredibly wide discretion to favour some creditors over others subject presumably to an unreasonableness restraint.

5.9 All in all, a party who has contracted, or is wishing to contract, with a corporation in statutory management will have to closely work through the provisions of CIMA in order to know where they lie. Even then, CIMA might not clearly provide for all situations and parties may find themselves in a position of uncertainty.

**Position of secured creditor**

5.10 Section 42(4) CIMA provides:

> Subject to the provisions of this Act, nothing in subsection (1) [ie the moratorium] affects the existence of any security over the property of any corporation or its priority over other debts.

5.11 What does this mean for secured creditors? Although it appears to say that a secured creditor's security interest remains intact, on a closer examination the position of secured creditors is significantly eroded when statutory management is imposed, particularly because of the potentially endless moratorium. In short, although a security interest remains in existence despite statutory management, a creditor's ability to take enforcement action based on the security is severely curtailed. Under CIMA the security is only of utility when the statutory manager chooses to sell the asset(s) that are subject to the security.

5.12 Section 50(1) CIMA empowers the statutory manager to sell or otherwise dispose of the whole or any part of the business undertaking of the corporation to such person, and upon such terms and conditions, as the statutory manager thinks fit. However, the plight of a secured creditor is not completely ignored in that s 51 CIMA sets out how the statutory manager is to apply proceeds of assets sold subject to security.

5.13 By way of illustration, if a statutory manager was to sell an asset that was subject to a security to a third party, s 51(2) CIMA requires the statutory manager to pay the person entitled to the security interest out of the proceeds of the sale or other disposition in

priority to all claims other than the costs of the statutory manager in selling or disposing of the property over assets and certain claims in respect of preferential payments made under s 312 of the Companies Act 1993. Some might see this process as an erosion of what the secured party is ordinarily entitled to under its security interest (although others might say a secured creditor should be thankful its priority is recognised, at least in this limited context), in particular, there is an erosion of the secured party's ability to control the enforcement of its security.[62]

**Prohibition on the transfer and removal from New Zealand of the corporation's property**

5.14 It is unlawful to transfer or remove from New Zealand any property or assets of a corporation in statutory management except with the consent of the statutory manager.[63] Section 43(2) CIMA provides for offences where this prohibited is breached.[64]

**The requirement to deliver property of the corporation to the statutory manager**

5.15 Section 67(1) CIMA provides:

> It shall be the duty of all persons having possession and control of any books or records or documents or other property belonging to any corporation subject to statutory management, forthwith after it becomes subject to statutory management, to deliver or yield up possession of those books, records, documents, or other property to the statutory manager in respect of the corporation.

5.16 Failure to comply can result in a fine being imposed[65] or the Court may punish an offender as if the offender had been guilty of contempt of Court.[66]

**Cross-border enforcement issues**

5.17 Where the corporation has assets in overseas jurisdictions, a statutory manager may face difficulties being recognised by a foreign court because statutory management is commenced by executive order rather than judicial order. For instance, the statutory manager may not be able to utilise the UNCITRAL Model Law that has now been adopted in many countries, including New Zealand (in the Cross-Border Insolvency Act 2006) and Australia (in the Cross-Border Insolvency Act 2008), because statutory management may not fall within the definition of "foreign proceeding". A "foreign proceeding" is defined in Article 2 as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation". Leaving UNCITRAL to one side, another challenge a statutory manager may face is that it is unclear whether under private international law a statutory manager will be recognised as a representative of the corporation.

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[62] Section 50(3) CIMA provides that the provisions of any agreement requiring any consent licence, permission or other authority shall not have any application in respect of any sale pursuant to the section, unless the Court, on application by any person who would be adversely affected, otherwise orders. In the author's view, the ability for a person adversely affected to make an application under s 50(3) CIMA is relatively narrow in that it is only triggered when the statutory manager takes steps to sell an asset; it cannot be used by, for example, a secured creditor to apply for an order forcing the statutory manager to sell an asset.

[63] CIMA, s 43(1).

[64] The penalties are significant: in the case of an individual, to imprisonment for a term not exceeding 3 years or to a fine not exceeding $50,000, and in the case of a corporation, to a fine not exceeding $250,000.

[65] CIMA, s 67(2).

[66] CIMA, s 67(3).

## 6. CRITICISMS OF STATUTORY MANAGEMENT AND ARGUMENTS SUPPORTING ITS RETENTION

### Criticisms

6.1 Numerous criticisms have been levelled at statutory management. For example, in its 2001 review of insolvency law, the Law Commission outlined a number of criticisms that have been levelled at the statutory management regime:[67]

(a) *The distortion of market signals*: Those who make bad investment decisions should not receive the benefit of government intervention and support. Rather, weak businesses should be allowed to fail. As the risk of loss is priced into investments, government intervention by way of statutory management may distort those price signals.

(b) *Moral hazard*: The presence of statutory management relaxes incentives for shareholders and creditors to closely analyse the actions of management and in turn reduces incentives for management to perform.

(c) *Interference with creditors' rights:* Statutory management undermines confidence among those in the business community, who expect that contracts they enter into will be enforced. Such confidence is crucial for economic growth. Statutory management imposes a moratorium which prevents secured creditors from enforcing their valid contractual rights.

(d) *Negative effect on credit*: The uncertainty created by CIMA results in creditors, particularly overseas ones, seeking an increased return for that uncertainty. This raises the cost of credit and the cost of conducting business in New Zealand.

(e) *Political involvement:* The process for placing a corporation in statutory management is inherently political. Overseas financiers have concern that the Government would try to influence the outcome of a statutory management.

(f) *Transparency and accountability*: Transparency and accountability are vital to establishing trust and confidence in the insolvency process. As an insolvency procedure, statutory management is neither transparent nor accountable. The decision making process leading to a corporation being placed into statutory management is confidential. There is no explicit right for interested parties — for instance a secured creditor — to be heard as of right and to, for example, put forward alternative proposals. In terms of accountability, the statutory managers receive the benefit of an incredibly generous indemnity from the Crown in s 63 CIMA. The statutory decision makers (other than the Minister, whose actions are in any event paid for by the public purse) also have the benefit of that same indemnity under s 63 CIMA.

### Benefits of statutory management

6.2 Against these criticisms, the Law Commission stated that statutory management has three potential benefits as an insolvency procedure:

(a) it provides an extraordinary procedure for business rehabilitation;

(b) it enables insolvencies involving groups of companies to be dealt with as a whole; and

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[67] *Insolvency Law Reform: Promoting Trust and Confidence* (NZLC SP11, 2001) at pp 90 - 91.

(c) it provides an emergency measure for ensuring the continuing supply of essential services if the companies which provide them are faced with collapse.

6.3 In its 1992 review, the Securities Commission did not articulate what it saw as the purpose of statutory management other than to address perceived deficiencies with the then corporate insolvency regime — particularly the lack of provision for the appointment of a single manger to take central control of a group in financial difficulty; timeliness; and the absence of any procedure by which a company in financial distress can obtain "breathing space" from creditor demands. That said, the Securities Commission's review notes that "in our view, the benefits of statutory management go beyond simply plugging the gaps that exist in our current corporate insolvency regime."[68] Those benefits are:

(a) *Statutory management allows a group of companies to be controlled by a single manager:*[69] A "mainstream administration regime" might be problematic in terms of determining which companies are members of a group, particularly where the "group" of companies was linked — from a legal perspective — fairly loosely, for example by nothing more than cross-directorships. The Securities Commission said that in such circumstances it is unlikely that regime would allow the appointment of a single manager ("particularly if there was any opposition to the application of the procedure" to a particular company). In addition, to do so "would seriously offend against the principle that each company is a separate legal entity". However, the Securities Commission saw substantial benefits in a "group" nonetheless being controlled by a single manager.

(b) *Statutory management imposes a moratorium that cannot be challenged:*[70] A "mainstream administration regime" would be likely to contain safeguards for claimants which would allow them to challenge the appointment and decisions of the administrator and the extent of any moratorium in place. In the vast majority of cases that is both necessary and appropriate. However, in some circumstances — the collapse of a large corporate group or where there is a great deal of acrimony between the various interested parties — it is unlikely to be in the interests of the majority of claimants to allow the insolvency process to become bogged down in litigation.

(c) *Statutory management can deal with a vehicle for carrying on business other than a company:*[71] The definitions of "corporation" and "associated person" are wide enough to cover a trust or partnership or unincorporated joint venture arrangement. CIMA also applies to the business of a body incorporated outside New Zealand to the extent that the body concerned has assets or business in New Zealand. The possibly wide net cast by the statutory management procedure has distinct advantages in addressing large scale or complex fraud affecting a group of interconnected companies, trusts, and other associations.

6.4 The broad reach of CIMA means that it is not necessarily confined to these objectives. Even though the there has been significant criticism levelled at statutory management, the prospects for reform seem slim.

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[68] At p 3.
[69] At p 22.
[70] At p 22.
[71] At p 23.

**Recommendations made by the Securities Commission and the Law Commission to improve the statutory management regime**

6.5 CIMA has been the subject of two fairly comprehensive reviews — first by the Securities Commission in 1992 (focused solely on CIMA) and then by Law Commission in 2001 (as part of a wider insolvency law review). These reviews have recommended reasonably substantial amendments to the statutory management regime. Despite this, CIMA has escaped any serious scrutiny by the legislature.

*Retention of statutory management*

6.6 Both the Securities Commission and the Law Commission recommended that statutory management be retained but in modified form. There were are number of other areas where the Securities Commission and the Law Commission were in broad agreement as to the work required to address CIMA's deficiencies.

*Purpose of statutory management*

6.7 The Law Commission's view was that statutory management should be used as a filter to determine which insolvency procedure should ultimately be used, or whether the corporation can be returned in a solvent state to its management. This view appears to have informed the Law Commission's approach to its review of CIMA in that the recommendations made by the Law Commission are generally aimed at confining the scope of the application of statutory management. The role for statutory management that the Securities Commission had in mind is described at paragraph 6.3 above.

6.8 Although the Securities Commission and the Law Commission might have viewed the purpose of statutory management slightly differently (the Securities Commission had wider designs in mind), as noted above, ultimately the recommendations each body made were broadly similar.

*Period of statutory management and extension to initial term*

6.9 Both the Securities Commission and the Law Commission recommended that statutory management be time limited. However, there was some divergence in the detail.

6.10 The Securities Commission recommended that the period of statutory management should be no more than six months. However, that period could be extended by the Securities Commission provided a reporting, notification, and consultation process was followed first.[72] As part of that process, the Securities Commission considered that any interested party should be entitled to apply to the Court for relief on the grounds that a corporation's affairs are being or have been managed in a manner which is oppressive and unfairly discriminatory to that party.

6.11 The Law Commission recommended the maximum period of statutory management should be three months. This timeframe is preferred because the object of statutory management is generally to bring order to a chaotic situation. The Law Commission considered that there should be provision for the statutory manager to apply to the Court for an extension of the statutory management for a period not exceeding a further three months. The application would be on notice to all affected parties, and a statutory manager would need to satisfy the Court that the extra time is needed to complete his/her investigation and to make a recommendation on the most appropriate way to deal with the corporation.

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[72] At p (i)-(ii).

*Commencement of statutory management*

6.12 In terms of the process for placement into statutory management, the Securities Commission and the Law Commission diverged about who should make the decisions:

(a) The Securities Commission considered that Courts should not be charged with the decision to place a corporation in statutory management and moreover considered that there should be no express right to apply to the Court for a review of the Commission's decision to place a corporation in statutory management. Rather, the Securities Commission considered that the initial application to place a corporation in statutory management should be made to the Registrar of Companies, who should then refer the application, together with a report on the corporation and the nomination of any persons for the proposed appointment as statutory managers, to the Securities Commission for its decision on whether or not the application should be granted and on what terms and conditions. In that regard, the Securities Commission recommended that the current responsibilities of the Minister under the Act be conferred upon the Securities Commission but that there otherwise be no general increase in the Commission's involvement in the statutory management process.

(b) The Law Commission's view was that a decision to invoke statutory management should be made by the High Court, because transparency and accountability are important when the legal rights of secured and unsecured creditors are to be severely restricted. Statutory management should be invoked by Court order on the application of the Registrar of Companies. The Court should be required to give reasons for any decision imposing statutory management which can be made available to all creditors on request. Prior to being appointed, statutory managers must satisfy the Court of their skill and competence before being appointed. The Law Commission recommended that both the Minister and the Securities Commission should be relieved of the decision-making and recommendatory functions respectively. However, the Securities Commission would retain a role in appointing (after consultation with interested parties) an advisory committee with whom the statutory manager can confer, and to whom the statutory manager can also report. Statutory management should be capable of termination on order from a Court, which can then determine whether to hand back control of the corporation to management, or place it into an appropriate insolvency regime.

*Moratorium*

6.13 Both the Securities Commission and the Law Commissions considered that the moratorium should be retained (indeed it is a crucial aspect of the statutory management regime):

(a) The Securities Commission recommended that the term of the moratorium should be co-extensive with the initial term of the statutory management set in the notice of appointment. Section 42 should be retained in its current form for the initial term of a statutory management, but subject to a standstill period of 28 days the statutory managers should be prevented from accessing funds subject to contractual rights of set-off, to a banker's right to combine accounts, and to rights of set-off on the part of a futures clearing house. If the term of a statutory management is extended, s 42 should continue in force, but secured creditors should be entitled to require the statutory manager to lift the moratorium in their favour under s 42(3) unless "good reason" exists for refusing to do so.

(b) The Law Commission did not make any detailed recommendations but saw the moratorium (taken together with a restricted timeframe for statutory

management) as, on balance, justified. In particular, as the statutory management regime would be targeted (except in public interest situations) at dishonest, reckless or incompetent management which has reduced a business to chaos, the primary object of the standstill period is to bring order to chaos, and then allow the Court to choose the most appropriate insolvency regime as quickly as possible. The use of statutory management as a filter in that way justifies the invasive nature of the moratorium in respect of secured creditors.

*Reporting requirements*

6.14 CIMA is almost silent on reporting requirements. In fact, the only explicit obligation on the statutory manager to report is contained in s 41(2), which provides that the statutory manager has an obligation to provide the Registrar with such reports as the Registrar may require as to the state of the affairs and business of the corporation. There is no requirement to, for example, report to creditors on the progress of the statutory management. The Securities Commission and the Law Commission both recommended that reporting requirements be enhanced. For example, the Securities Commission considered that the statutory manager should be required to report to an independent body summarising the results of his or her investigation and giving details concerning the conduct of the statutory management. Recommendations as to whether the statutory management should be continued or discontinued should be made. Those proposals should be discussed with the Advisory Committee and comments of the Advisory Committee should be contained in the report.

6.15 However, not a single recommendation on any of these matters — either from the Securities Commission or the Law Commission — has been taken up. CIMA as currently enacted is substantially the same as it looked in 1989.[73]

## 7. THE FUTURE OF STATUTORY MANAGEMENT

7.1 The statutory management regime appears to be here to stay, at least in the foreseeable future. There does not appear to be any legislative or other governmental appetite for reform. If the recent use of statutory management is anything to go by, the Government is quite prepared to use statutory management when it considers it necessary or desirable.

7.2 For registered banks, statutory management is certainly here to stay, if the recent messages from the Reserve Bank in relation to the open bank resolution policy ("**OBR Policy**") are indicative of the Reserve Bank's views on the future of statutory management. In short, the OBR Policy is premised on banks being open rather than closed following a stress event. Recently, the Reserve Bank released a discussion paper on "pre-positioning requirements" that registered banks would have to implement to give effect to the OBR Policy. By way of outline, compliance with the proposed pre-position requirements would require a registered bank to ensure its systems would allow the Reserve Bank to appoint statutory managers at, say, 5pm on the day of a stress event, at which time the bank would close. The bank's position would then be calculated and a certain portion of depositors' accounts would be frozen. The other portion will be available to depositors when the bank reopens the next day — but to prevent a run on the unfrozen portion, the Government will provide a guarantee (though as proposed there will be no mandatory requirement for the Government to provide such a guarantee).

[73] There have been very few amendments to CIMA. In fact, there has been four amendment Acts (in 1993, 1994, 1999, and 2007) but each of them has only covered fairly minor and technical matters.

7.3 There are many things that could be said about the efficacy of the OBR Policy or the efficiency of imposing a further compliance cost on registered banks for the remote possibility that statutory management may be imposed. However, for the purposes of this paper, it is sufficient to say that, at least as far as it applies to registered banks, there is a clear signal from Government that statutory management is here to stay.

7.4 Finally, in terms of the future of statutory management, the recent trend to the harmonisation of commercial laws between New Zealand and Australia could see New Zealand repeal CIMA or could see Australia adopt CIMA. Nothing has been said by regulators in either country on the place of statutory management in the harmonisation movement to date.

## 8. CONCLUSIONS

8.1 Statutory management has a long history in New Zealand. It has been used recently and as far as the author can tell, it will remain in the statute books for the foreseeable future.

8.2 The grounds on which a corporation can be placed into statutory management are broad indeed. The process by which a corporation is placed into statutory management is hardly transparent. Both of these give rise to criticisms levelled against statutory management; and that is before even considering the substantive aspects of the regime. Those substantive aspects are that the statutory managers are given almost limitless discretion and powers (the exercise of which invokes an indemnity from the Crown) — though the statutory managers are guided by considerations specified in the CIMA. These considerations are however difficult to reconcile and in practice incompatible. The moratorium freezes a creditor or other claimant's rights against the corporation and in doing so curtails contractually agreed rights and obligations. There is very little Court involvement; and where the Court is involved it is only in confined respects.

8.3 That said, two substantial reviews (one in 1992 and the other in 2001) have supported retention of the statutory management regime albeit in a modified form. Both reviews saw statutory management and in particular the moratorium and group provisions as providing a useful additional tool in New Zealand's corporate stress toolbox. Disappointingly, the modifications suggested by the two reviews have not been taken up by the legislature. So statutory management, it would appear, is here to stay (and in unmodified form) and the best that can be done for now is to become familiar with the implications it has for our clients.