RECENT DEVELOPMENTS UPDATE

REVIEW OF THE VOLUNTARY ADMINISTRATION PROCEDURE UNDER THE CORPORATIONS LAW

BRUCE HAMBRETT

Minter Ellison Morris Fletcher, Solicitors, Sydney

INTRODUCTION

The *Corporate Law Reform Act,* 1992 ("the CLRA") received Royal Assent on 24 December 1992. Part 4 of this Act inserted Part 5.3A into the *Corporations Law* which sets out a new scheme of voluntary administration. Part 5.3A came into operation on 23 June 1993, almost 12 months ago.

Is the new procedure being used? Is it meeting expectations? Have any problems emerged in its operation? The purpose of this paper is to review the operation of the new procedure, since its inception, and to answer these questions.

BACKGROUND TO NEW PROCEDURE

The *CLRA* adopted the recommendation of the Australian Law Reform Commission ("ALRC") for a new procedure to deal with the affairs of an insolvent company.[1] The ALRC recognised that the four methods until then available namely scheme of arrangement, creditors' voluntary winding up, court winding up and official management, did not provide a satisfactory range of alternatives by which an insolvent company could deal with its affairs. As the ALRC recorded in its report, no one procedure provided an orderly method of dealing with the company's affairs that was sufficiently swift, cost effective and flexible.

The explanatory paper to the *Corporate Law Reform Bill,* 1992, issued in February 1992,[2] stated that Part 5.3A was intended to provide for:

"• speed, and ease of commencement, of administration;

• minimisation of expensive and time-consuming court involvement and formal meeting procedures;

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1 See ALRC's Discussion Paper No 32, August 1987 and paragraph 56 of Report No 45 of the ALRC, September 1988.

2 Paragraph 627 of explanatory paper to *Corporate Law Reform Bill* 1992.

- flexibility of action at key stages in the administration process; and
- ease of transition to other insolvency solutions where an administration does not by itself offer all the answers."

The object of the new procedure is set out in section 435A of the *Corporations Law* as follows:

> "Section 435A
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> The object of [Part 5.3A] is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
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> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
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> (b) if it is not possible for the company or its business to continue in existence — results in a better return for the company's creditors and members than would result from an immediate winding up of the company."

Clearly, the ALRC and the legislators, as expressed in sub-section 435A(b), appreciated that not all companies in financial difficulties are capable of rescue and it is inevitable that the majority will end up in liquidation. The intention of the new voluntary administration procedure, in these circumstances, is to provide a mechanism by which the company's creditors and members receive, if possible, a better return than would result from "an immediate winding up of the company". The evident policy of the legislation is to encourage speedy action by directors which of itself may enhance the prospect of return to the company's creditors and members.

OUTLINE OF NEW PROCEDURE

The new procedure is a neat combination of the best elements of similar arrangements in the United Kingdom and the United States of America with some elements from arrangements under Part X of the *Bankruptcy Act,* 1966 (Cth).[3] In essence, the new procedure is as follows,

1. Where a company is insolvent, or is likely to become insolvent in the future, an administrator may be appointed.

2. He or she may be appointed by the company[4] (following a resolution of the company's directors) or by a liquidator or provisional liquidator[5] or by the holder of a charge over "the whole or substantially the whole of the company's property".[6]

3. The administrator takes control of the company's business, property and affairs and may carry on that business and manage the company's property and affairs to the exclusion of the directors. In so doing, he or she may perform any function and

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3 In the United Kingdom, the *Insolvency Act* 1986 and in the United States of America, Chapter 11 of the *Bankruptcy Code*.

4 Section 436A.

5 Section 436B.

6 Section 436C.

exercise any power that the company or any of its officers could perform or exercise if the company were not under administration.[7]

4. During the administration, there is a moratorium on the rights of creditors, lessors and owners of property in the possession of the company, with limited exceptions.[8]

5. The administrator will be obliged to call a meeting which "decides the company's future", generally speaking, within 21 days of the date on which he or she was appointed (or 28 days if the appointment occurred in December or in the month preceding Easter).[9] The notice convening the meeting must be accompanied by a report by the administrator on the company's financial position, a statement of the administrator's opinion about what creditors should do and if an arrangement is proposed, a statement setting out the details of that arrangement.[10]

6. At the meeting, creditors will vote on any proposed deed of company arrangement. They may also resolve that the administration should end or that the company be wound up.[11]

7. Where the creditors resolve that the company be wound up, the administrator becomes the liquidator and the company is deemed to be wound up.[12]

IS THE NEW PROCEDURE BEING USED?

Statistics on appointments

Is the new voluntary procedure being used? The answer to this question can be found in statistics which are published by the Australian Securities Commission ("ASC"), on a regular basis. The ASC's statistics are provisional and unverified. They are obtained from documents lodged with the ASC and, of course, it is possible that, when the statistics are issued, documents relating to the appointment of an external administrator, during the relevant period, may still be outstanding. Nevertheless, they are a very useful guide.

Attachment 1 shows details of all external administrations which gave rise to appointments during the month ending 30 June 1993. Attachment 2 shows the same information in relation

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7 Section 437A(1).

8 Division 6 is entitled "Protection of Company's Property During Administration". A company cannot be wound up voluntarily during an administration (section 440A). The court is to adjourn the hearing of an application for an order to wind up the company if the company is under administration and the court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up (section 440A(2)) except with the administrator's written consent or with the leave of the court, a chargeholder cannot enforce a charge (section 440B), the owner or lessor of a property cannot retake possession (section 440C) and a proceeding in a court cannot be begun or proceeded with (section 440D). No enforcement process can be begun or proceeded with except with the leave of the court and in accordance with any terms (section 440F).

9 Section 439A(1).

10 Section 439A(4).

11 Section 439C.

12 Division 12, which is entitled "Transition to Creditors' Voluntary Winding Up", sets out what occurs if the creditors of a company under administration resolve that the company be wound up.

to the month ending 31 March 1994. Attachment 3 is a summary of the appointment of all external administrators in the period 30 June 1993 to 31 March 1994.

From these statistics a number of conclusions can be drawn:

(a) In the period 23 June 1993 to 31 March 1994, 519 administrators were appointed.

(b) About 36% proceeded to a deed of company arrangement.

(c) In the same period, administrations (both pre and post deed of company arrangement) represented 11% of all external administrations.

(d) In July 1993, after the first full month of operation of the new procedure, 43 administrators (both pre and post deed of company arrangement) were appointed, representing about 6% of all external appointments. By March 1994, that percentage had climbed to 19%.

(e) Surprisingly, creditors' voluntary liquidations have not reduced at the same rate voluntary administrations have increased; in fact, they have increased. In June 1993, creditors' voluntary liquidations represented about 6% of all external administrations. By March 1994, that percentage had increased to about 9%.

(f) However, in June 1993, court liquidations represented about 23% of all external appointments. By March 1994, they represented only about 13%.

The new procedure, therefore, is being used and increasingly so, it would seem at the expense of court liquidations.

IS THE NEW PROCEDURE MEETING EXPECTATIONS?

The community's expectations must be founded on the statements of intention and purpose referred to in the explanatory paper to the *Corporate Law Reform Bill,* 1992 and the *Corporations Law* itself (in section 435A). In essence, the procedure was to provide a new method which, when compared to its predecessors, was quicker and cheaper to implement and more flexible. How does the new procedure measure up against these standards of speed, costs and flexibility? Are there any barriers to its use?

The simple architecture of the procedure ensures that its instigation is speedy and inexpensive. There is no need for the company to instruct legal advisers to make any application to the court prior to the appointment. Flexibility is also present, in different ways. For example, an administrator has the power to remove from office a director of the company and to appoint a person as a director. The deed of company arrangement can provide for a simple compromise or a more complicated arrangement between the company and its creditors.

Australian Society of Certified Practising Accountants Centre of Excellence for Insolvency and Reconstruction Survey[13]

Apart from the Commission's statistics, the Australian Society of Certified Practising Accountants ("ASCPA"), Centre of Excellence for Insolvency and Reconstruction, has conducted two surveys. The initial ASCPA survey is the first of an ongoing one and involves the despatch of questionnaires, on a regular basis, to administrator appointees, as they are appointed. The results of this survey are continually updated and the information will be made available to the relevant authorities as and when required.

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[13] The details of surveys are reproduced with the kind permission of ASCPA.

The second survey was a one-off survey of 60 insolvency practitioners nationally and covered similar areas to the first survey.

Copies of the two questionnaires, together with summaries of the responses, are attachments 4 and 5. The trends which have emerged from these surveys, which are expected to be confirmed by subsequent surveys are as follows:

(a) A very high proportion of administrators (about 81% in the second survey) believe that the five day period allowed for the first meeting of creditors is too short.

(b) Further, a very high proportion of administrators (about 69% in the second survey) believe that the time period for the meeting of creditors which decides the company's future is also too short.

(c) A significant number of companies that enter into deeds of company arrangement trade on.

(d) The prospect of personal liability weighed heavily in the minds of administrators. A significant proportion (about 27% in the second survey) of administrators surveyed declined to take an appointment because of the risk of personal liability.

(e) Of the administrations surveyed (and, it must be said, the sample is small), it was indicated that an increase in estimated dividends was likely to creditors when compared with the likely dividend in a liquidation (6.81¢ in liquidation compared with 19.82¢ in administration according to the first survey).

(f) The second survey stated that, where a secured creditor was involved, 57% supported the appointment of the administrator, 11% of secured creditors appointed their own (presumably receivers) while 18% remained **"passive"**.

First meeting of creditors

It should be recalled that the ALRC did not recommend the first meeting of creditors. The introduction of the first meeting of creditors, in the *Corporate Law Reform Bill,* 1992, attracted criticism from a number of quarters. That criticism centred on the fact that the time before the first meeting of creditors was too short.

None of the critics of the first meeting of creditors would be surprised at the result of the ASCPA survey in relation to the first meeting of creditors. If the legislators required a first meeting of creditors, it was suggested that an administrator should have been required to declare associations with the company and any circumstances which may make it difficult for the administrator to act impartially in much the same way as a potential provisional liquidator is obliged to do (*Re Davidson Beggs Insurance Pty Limited* (1984) 2 ACLC 735).[14] The suggestion was also made that there should be a penalty on persons who do not make a true disclosure or who make false declarations and the declarations should cover a larger group of associations, including related companies. None of these suggestions was adopted.

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[14] In *Re Davidson Beggs Insurances Pty Limited* (1984) 2 ACLC 735, McLelland J said that on an application for the appointment of a provisional liquidator, "There should be evidence from the proposed provisional liquidator, or some other appropriate person, to the effect that to the best of the deponent's knowledge, information and belief, neither the proposed provisional liquidator, nor any member or employee of his firm, has had any social or professional association with the company or any of its present or past officers other than as disclosed in the evidence presented to the court."

Meeting to decide company's future

The ALRC recommended that the administrator be required within 21 days of appointment to convene a meeting of creditors to be held within 28 days of his appointment. Following the ALRC's report, several submissions argued that 28 days was too short. The ALRC's response to these criticisms was to state that:

> "However, the procedure should be expeditious and the period during which the moratorium may apply to creditors without leave of the court should not be extended further than is recommended by the Commission."[15]

The length of time before the critical meeting to decide the company's future involves a balancing, on the one hand, of the duty of the administrator to perform his tasks satisfactorily and the interests of creditors who are affected by the moratorium. It is probable that, with more time, companies and administrators will react still earlier. This will be a good thing and a better result than extending the period before the first meeting of creditors, except in complex cases.

Deeds of company arrangement — trade on situations

The fact that a significant number of companies that enter into deeds of company arrangement trade on is very encouraging, indeed. It means that the procedure is achieving the first objective set out in section 435A, namely the maximisation of the chances of the company continuing in existence.

Personal liability of an administrator

Personal liability of an administrator is understandably at the forefront of the minds of insolvency administrators.

One of the criticisms made of official management (which was jettisoned by the *Corporate Law Reform Act,* 1992) and, in some cases, of schemes of arrangement was that there was little assurance that creditors of the administration would be paid. A priority, resulting from a transaction with such an administrator, was not always valuable. To encourage prospective creditors to trade with a company under administration, personal liability has been visited upon administrators. The ALRC took into account the competence and experience of insolvency practitioners and that fact, coupled with the likelihood that the administrator would usually be afforded an opportunity to make a preliminary assessment of the financial position of the company before consenting to take the appointment, drove the ALRC to recommend that it was essential that administrators accept personal liability.[16] In so doing, the *Corporate Law Reform Act,* 1992 provided some checks and balances. For example, the administrator will only be liable for so much rent or other amounts payable by the company under an agreement as is attributable to a relevant period which begins more than seven days after the administration begins (section 443B). An administrator will also have the right to an indemnity out of the property or assets of the company and priority over all of the company's unsecured debts and the debts of the company secured by a **floating** charge (sections 443E(1) and (2)).

Increase in dividends

The evidence to date, albeit limited, that dividends will increase under administrations, compared with the likely dividend in a liquidation, is also encouraging and indicative that the second object, in section 435A(b), will be met.

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15 See paragraph 108 of the ALRC's Report No 45, September 1988.

16 See paragraph 88 of the ALRC's Report No 45, September 1988.

HAVE ANY PROBLEMS EMERGED?

Following the introduction of any new legislative scheme, problems will surface either through litigation or through debate amongst those who use the new scheme.

Consideration by the courts

In the period since the voluntary administration procedure began operation, there have been a number of court decisions (reported and unreported) dealing with various aspects of the administration. The most significant topics adjudicated on have been:

- the position of the Commissioner in relation to group tax;
- extensions of time;
- meeting irregularities;
- the curing of meeting irregularities;
- setting aside a deed;
- meaning of **"owner"** and **"lessor"** in section 440C.

In the course of the judgments in each of those cases, some helpful remarks have been made about the new procedure and the approach which is likely to be taken by the courts in relation to it. Those cases are dealt with as below.

The position of the Deputy Commissioner of Taxation

Two unreported decisions, both of Brownie J of the Supreme Court of New South Wales, have examined the position of the Deputy Commissioner of Taxation and the priority afforded to him in the context of the new procedure.

In the first decision, *Deputy Commissioner of Taxation v Dollymore Pty Limited* ((1993) 93 ATC 5212), Brownie J held that the effect of the *Insolvency (Tax Priorities) Legislation Amendment Act* 1993 did not include the retrospective removal of the priority which had previously been afforded debts under section 221P of the *Income Tax Assessment Act*. The amendments remove the Commissioner's existing priority for unremitted group tax in respect of amounts due which become payable **after** 30 June 1993. Of course, while the Commissioner lost priority in respect of unremitted tax, he gained a faster and more efficient recovery procedure.

In the second decision, *Deputy Commissioner of Taxation v Winterburn Trading Pty Limited* (15 December 1993, unreported), Brownie J was faced with an application by an administrator for an order extending the time fixed by section 444B for the execution of a deed of company arrangement.

The Deputy Commissioner of Taxation was owed amounts representing unremitted group tax instalments and unremitted prescribed payments deductions, both of which had accrued prior to 30 June 1993.

Under the proposed deed, each creditor of the company, including the Deputy Commissioner, would have been treated as an ordinary unsecured creditor, and not a priority creditor. The Deputy Commissioner opposed the proposal on the ground that it involved the deprivation of the Deputy Commissioner's priority which he had under the provisions of the *Income Tax Assessment Act*.

His Honour upheld the submission of the Deputy Commissioner on the basis that the court ought, at least generally, to treat creditors as having the same priorities as in the case of a winding up, in circumstances where the Deputy Commissioner's priority has not been removed (*Re V&M Diagnostic Services Pty Limited; Re Northern Newcastle Constructions Pty Limited* (1985) 9 ACLR 663 at 668 and *Re Sessions Video Distributors Pty Limited* (1993) 10 ACSR 421 at 426).

Extensions of time

Predictably, the court has been called upon to consider the provisions in the *Corporations Law* which govern applications for extension of time under section 439A for convening meetings of creditors. Young J of the Supreme Court of New South Wales in *Mann v Abruzzi Sports Club Limited* ((1994) 12 ACSR 611) has helpfully set out the principles applicable on these applications.

The case was concerned with an application made *ex parte* by an administrator on 20 January 1994. The administrator was obliged, by 10 February 1994, to convene a meeting of creditors (sub-section 439A(1)). The convening period may be extended on an application made within the convening period (sub-section 439A(5)).

Young J observed that sub-section 439A(6) "gives no guidance to the court as to the grounds on which such an extension may be granted".

Young J referred to the explanatory memorandum to the Bill and made the following observation:

> "Paragraph 449 of that memorandum indicates that it is of the essence of the new Part that there be speed of administration and 'minimisation of expensive and time-consuming court involvement and formal meeting procedures'. Paragraph 507 of the statement says of section 439A that:
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> > 'The court will be given a power to extend these periods...though it is not expected that this power would be exercised frequently, since it is an important objective of the new provisions for creditors to be fully informed about the company's position as early as possible and to have an opportunity to vote on its future as soon as possible.'
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> Indeed, there is much in Part 5.3A, and particularly in Division 6 of that Part, to underline the necessity of an administration proceeding very speedily. Whilst the administration is in place no winding up can be commenced or enforcement of process carried out and thus it would be quite contrary to the whole spirit of the Part to allow administration to be unduly extended or, indeed, to over-encourage administrators to apply to the court...The spirit and object of the Division is set out in section 435A, that is to maximise the chances of the company continuing in existence or, alternatively, terminating its existence in the most appropriate way. Accordingly, the powers given to the court under the Division should be exercised with that object firmly in mind."

Young J made a number of other observations. His Honour, no doubt, would have welcomed submissions from the Commission but, unfortunately, the Commission was not represented, despite having received notice of the application.

Young J found that the administrator, on the evidence, was:

> "doing the best he [can] to deal speedily with negotiations to enable the company to go back into survival mode and it would seem that there is no prejudice to creditors or to members in extending the time. Furthermore, if a meeting of creditors was convened now the administrator would not have sufficient material to be able to give a meaningful account of his administration to the creditors."

Although, on the facts of the case, Young J ultimately acceded to the application to extend the convening period, his Honour sounded a warning:

> "I am a little reluctant to do so because I do not wish to invite a spate of these applications whenever administrators find that they run out of time to comply with the Act. On the other hand, I do not want it thought that administrators can only apply where they have special grounds. In all cases one must keep in mind the object of the Division."

Meeting irregularities

In *Re Ballan Pty Limited* ((1993) 12 ACSR 605), French J reviewed the procedures and rulings at a first meeting of creditors.

The administrator of a company, Mr Putnin, chaired the first meeting of the company's creditors. A motion was put that the administrator be changed. The administrator proposed in the motion, Mr Levi, had earlier provided Mr Putnin with a number of proxies in favour of the proposed change. Mr Putnin ruled that Mr Levi was ineligible to act as an administrator of the company because a company of which Mr Levi was a director was a secured creditor of the company under administration. He also ruled that the proxies had been improperly completed or executed. Mr Levi had requested an adjournment in order to obtain legal advice and cure any defects in the proxies. Mr Putnin ruled that he had no power to adjourn a first meeting of creditors. Subsequently, proceedings were commenced for the removal of Mr Putnin and the appointment of Mr Levi, as administrator. The case was decided in favour of the incumbent administrator because the applicant had not discharged the onus of showing that he was appropriately qualified and that the administrator, in essence, made an error in his determination on that threshold issue. The material put in evidence did not satisfactorily explain that Mr Levi was appropriately qualified.

In the course of his judgment, French J made some observations about regulation 5.6.17 which is in the following terms:

> "5.6.17
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> (1) If a meeting is convened by:
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> (a) a liquidator; or
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> (b) a provisional liquidator; or
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> (c) an administrator of the company under administration or of a deed of company arrangement;
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> that person, or a person nominated by that person must chair the meeting.
>
> (2) In any other case, the persons present and entitled to vote at a meeting must elect one of their number to be chairperson of the meeting."

French J expressed the view that this regulation is inconsistent with the application of a rule of procedural fairness that, when a motion as to his continuance as administrator is raised, the proposed administrator must vacate the chair. His Honour did not think that the position was enhanced by the appointment of a nominee in the circumstances. But that is the only option to an administrator in the position of Mr Putnin.

Corporations Regulation 5.6.17(1), on its face, is clear. A meeting convened by, amongst others, an administrator of the company under administration or of a deed of company arrangement can only be chaired by that person or a person nominated by that person. The

meeting cannot be chaired by a person elected by those present and entitled to vote at a meeting (contrast *Corporations Regulation* 5.6.17(2)).

A chairman who has been **elected** by a meeting can be removed by the meeting (*Catesby v Burnett* [1916] 2 Ch 325). The usual procedure is for a person attending the meeting, who is entitled to be present and to vote, to propose a vote of no confidence in the chair, and for this to be seconded. In normal events, the chairman has a right of reply. If he or she loses the vote, he or she must relinquish the chair.

The first meeting of creditors, convened under section 436E, has, a twofold purpose. First, the meeting will provide the company's creditors with the opportunity to determine whether to appoint a committee of creditors and, if so, who are to be the members of that committee (sub-section 436E(1)). Secondly, the meeting enables the company's creditors to remove the administrator from office and to appoint someone else as administrator of the company (sub-section 436E(4)).

The *Corporations Regulations* will require amendment to clarify the position of the administrator who is faced with a challenge to his continuation in office at the first meeting of creditors because *Corporations Regulation* 5.6.17 is not very satisfactory. That regulation should be amended so that it provides that, in the event of a challenge to an administrator at a first meeting of creditors, the administrator must step aside as chairman of that meeting and creditors must elect one of their number to be the chairman of the meeting in place of the administrator.

Can meeting irregularities be cured?

Sub-section 439A(6) provides that the court may extend the convening period "on an application made within the period referred to in paragraph 5(a) or (b), as the case requires."

The period referred to in paragraph 5(a) and (b) are, if the administration begins on a day that it is in December, or is less than 28 days before Good Friday — the period of 28 days beginning on that day; otherwise, the period of 21 days beginning on the day when the administration begins is the convening period.

There are conflicting authorities on the question of whether a breach of sub-section 439A(6) can be cured by section 1322(4) of the *Corporations Law* which gives the court the power to declare that any act or proceeding purporting to have been done or taken "is not invalid by reason of any contravention of a provision of this Law..." provided that the criteria set out in sub-section 1322(6) are satisfied. Those criteria are firstly, that the act, matter, thing or the proceeding, is essentially of a procedural nature, secondly, that the person concerned in the contravention acted honestly, thirdly, that it is in the public interest that the order be made and finally, that no substantial injustice has been or is likely to be caused to any person.

The first decision is that of Davies J of the Federal Court in *Watson v Uniframes Limited* (27 January 1994, unreported).

In this case, an administrator was appointed administrator to Uniframes Holdings Pty Limited and of Uniframes Australia Pty Limited on 17 December 1993. On 24 December 1993, meetings of the creditors of each of the companies confirmed his appointments. On 14 January 1994, the administrator sent notices convening meetings of the creditors of the companies. The meetings were called for 21 January 1994. Shortly prior to the meeting, solicitors on behalf of the companies, a shareholder and a director, wrote to the administrator asserting that the notices had been given out of time and that, by virtue of sub-section 435C(3)(b), the administration of the companies had come to an end. The administrator filed an application seeking a declaration that the administrations had not ended or, alternatively, orders under sections 447A(1) or 1322 extending the period within which he may convene the meetings and deeming the administrations to have continued despite the failure to convene the meetings before 13 January 1994.

In relation to section 1322, Davies J said:

> "I am of the view that section 1322 does empower the court to correct irregularities which may arise under section 439A. I do not regard the provisions with respect to administration as constituting an entire code which excludes other provisions such as sections 105 and 1322...However, by section 439A(6) and 435C(3)(b), the Legislature has expressed its intention that time shall not be extended for the purposes of section 439A unless application for extension was made within the period. It follows that, as no application was made within the period, no extension of time may be granted. This is not a case where there was an irregularity in compliance within the period. Mr Watson did not give any notice of the meetings until after the period had expired. The legislative intent is expressed in 439A(6) and 435C(3)(b) must be given effect."

The second decision is that of Thomas J of the Supreme Court of Queensland *In re Vanfox Pty Limited* (18 April 1994, unreported) in which the court was faced with a challenge to a deed of company arrangement which had been overwhelmingly supported by the company's creditors at a meting and under which the priority debt of the Deputy Commissioner would be paid in full and all ordinary creditors (including the Deputy Commissioner in respect of some other claims) be paid 30¢ in the dollar. The only person who opposed the scheme was the Deputy Commissioner.

The opposition to the deed of company arrangement was mounted on the basis of a series of irregularities in the calling of the meetings including:

- no newspaper advertisement appeared in relation to the first meeting of creditors (in breach of section 436E(3)(b));
- the second meeting of creditors was convened eight days (or six business days) later than the time prescribed by section 439A;
- the notice convening the second meeting erroneously stated that it would be held on "Monday, 1 March 1994" when, in fact, 1 March 1994 was a Tuesday;
- when the Deputy Commissioner's representatives arrived at the second meeting, they were told that the meeting was at a venue other than the venue stipulated in the notice (those creditors already at the second meeting were fetched back to the original venue).

In relation to sub-section 1322(4) Thomas J said:

> "For those who do not regularly practise in the courts it may be difficult to grasp the notion that an invalid act should in some circumstances be treated as if it were valid (or not invalid), but it is an essential power long exercised by the courts to prevent senseless results, mindless inefficiency and in a word, injustice."

After reviewing the authorities (which did not include the *Uniframes* decision), his Honour concluded that the weight of authority regarded the steps of the kind which the administrator in the case had failed to take properly as essentially of a procedural nature. In particular, his Honour relied upon a decision which held that a total failure to give notice of a general meeting to a shareholder was regarded as an irregularity in procedure and to be curable under the predecessor of section 1322 (*Re Broadway Motors Holdings Pty Limited (in liquidation)* (1986) 4 ACLC 598).

In the course of his judgment, his Honour had to deal with a conflict of authority between, on the one hand, a Western Australian decision which held that a power under section 1322(4)(a) is not intended to breathe life into something which has been rendered void by another provision of the *Corporations Law* (*Harmon v Energy Research Group Australia*

Limited (1985) 3 ACLC 536) and, on the other, a number of New South Wales decisions which have held that section 1322 grants power "to validate something which otherwise would be completely and utterly void" (*Sydney Aussie Rules Social Club Limited v Superintendent of Licences* (1989) 7 ACLC 991, 992 and *Abalcheck Pty Ltd v Pullen and Ors* (1990) 8 ACLC 1078). After discussing those conflicting authorities, his Honour decided to follow the New South Wales decisions.

His Honour had no difficulty in holding that the administrator had acted honestly and that it would be in the public interest that an order be made. On the latter point, his Honour noted that the dispute involved essentially a difference of view between one creditor and the others:

> "It would not in my view be in the public interest that the majority view be defeated by omissions of this nature."

As to the final criterion, his Honour held that there was no injustice. The only possible injustice was that someone may have missed a meeting or have been denied an opportunity to be heard on any aspect of the deed of company arrangement. The Deputy Commissioner did not assert that he had been prevented from conveying his views to any of the meetings or to the creditors.

The conflict between the decisions of Davies J and Thomas J will ultimately have to be resolved by an appellate court.

Setting aside a deed

In *Re Nova Corp Limited (administrator appointed) and Re Bartlett Researched Securities Pty Limited (administrator appointed)* ((1994) 12 ACSR 707), Derrington J of the Supreme Court of Queensland was concerned with an application by a creditor to set aside a deed of company arrangement on the basis that it was unfairly discriminated against and prejudiced by the scheme. In the course of his reasons, Derrington J made some remarks about the principles upon the basis of which the court would review a deed of company arrangement, if challenged.

The case concerned a publicly listed company which carried on the business of property development on the Gold Coast until its financial collapse in 1990. The company appointed an administrator who conducted an investigation and reported to a meeting of creditors in November 1993, recommending an arrangement. The major creditor was owed $27M and the remaining creditors were owed, although significant, much smaller sums. At the meeting, the majority of creditors supported the scheme while the major creditor, holding the majority of the debt, opposed the scheme. The administrator used his casting vote to support the deed and the motion was carried.

To promote the settlement, the major shareholder proposed to inject into the company about $205,000 which, it was proposed, would be distributed to the company's creditors in a way that led to the major creditor receiving less than its proportionate share of the injected sum. In order to induce the smaller creditors to support the settlement, they were offered more than they would have received on a liquidation and the major creditor would have received $80,000 more than it would have otherwise received, albeit that the sum was less than a proportionate share.

The case raised two issues: first, was the major creditor unfairly discriminated against because, in proportion to the amount of its debt, the share of the distribution which it was to receive was less than that to be received by each of the other creditors? Secondly, was the investigation by the administrator insufficient so as not to justify his exercise of his casting vote against the wish of such a substantial creditor?

On the first issue, his Honour made the following remarks:

> "Moreover, in circumstances such as this, where every party is to benefit from the proposed arrangements, the court would not be obliged to discountenance an administrator's overriding of the dissent of a major creditor simply because there is disproportion in the spread of the benefit. The purpose of the statutory scheme is to enlarge, as far as possible, the benefits to the creditors while at the same time providing for a method of avoiding obstruction to a beneficial scheme by particular creditors who may wish to improve their position by threat of defeating the whole scheme. When such a case comes before the court for review, the criteria that will guard it are the fairness and practicality of the scheme as a whole rather than its adherence to strict technical entitlements, although they too must be considered in assessing the quality of fairness."

As to the second issue, his Honour found that the evidence advanced for the administrator and, particularly his own evidence under cross examination, was unsatisfactory and insufficient to establish that adequate inquiry had been undertaken, upon the basis of which the administrator was justified to exercise his casting vote against the wish of the major creditor. The matters to which, it was alleged, the administrator did not pay sufficient regard included an inquiry into the major shareholder's reason for contribution towards the arrangement, the possibly related question as to whether the tax loss benefit remaining to the company (to the ultimate benefit of the shareholder) was such as to render the contribution inadequate when compared with the benefit which the shareholder would derive by avoiding the liquidation of the company, the sale of certain substantial assets in the company to the shareholder, the sufficiency of the consideration for the sale of shares in related companies that had substantial tax loss benefits and, in one case, the value of the equity in a substantial asset which was subject to security for loans.

The message from this case is fairly clear. If an administrator is minded to recommend an arrangement between the company and creditors, the administrator must have made due enquiry of every material matter which bore upon his decision to make that recommendation, particularly if he casts a casting vote, in the face of a vote from a major creditor, in favour of an arrangement. That enquiry should extend to the advantages to be derived by any proponent of the arrangement including, for example, a shareholder in the same position as the shareholder in the case.

Meaning of "owner" and "lessor" in section 440C

A key part of the new voluntary administration procedure is the moratorium. It is not surprising that, in the early part of the history of the procedure, the court has been called upon to examine the meaning of certain words which appear in the moratorium provisions. In *Tymray Pty Limited v Mercantile Mutual Life Insurance Co Limited* (21 March 1994, unreported), McLelland CJ in Equity of the Supreme Court of New South Wales was called upon to rule on the meaning of the words **"owner"** and **"lessor"** in section 440C.

In this case, the company was in possession of certain shop premises under a monthly tenancy. The shopping centre property of which the premises formed part was subject to a registered mortgage. On 10 February 1993 the mortgagee had given notice to the company of the lessor's default and the mortgagee claimed possession of the premises under the *Real Property Act* 1900. The company began to pay rent to the mortgagee after that date.

By January 1994, arrears of rent had accumulated and the mortgagee's solicitors wrote to the company demanding payment and threatening eviction. On 11 March 1994, at 7.00 am, the mortgagee took physical possession of the premises by purportedly exercising its right of re-entry.

At 5.00 pm on 10 March 1994, an administrator had been appointed by the company.

On 14 March 1994, an interim injunction was granted to restore the company's possession. It applied for continuation of that injunction for the duration of the administration.

McLelland CJ in Equity held that the mortgagee had become the **"owner or lessor"** of the premises, within the meaning of those words in section 440C, after the notice of 10 February 1993. His Honour said:

> "The giving by the mortgagee of the notice of 10 February 1993 triggered the operation of section 63 of the *Real Property Act*, and in accordance with that section transferred to the mortgagee 'all the powers and remedies of the [lessors] in regard to receipt and recovery of, and giving discharges for...[rents and profits]'. In my opinion the subsequent payment and receipt of rent as between the company and the mortgagee constituted an attornment by the company to the mortgagee giving rise to the relationship of lessor and lessee between those parties and constituting the mortgagee as 'lessor' of the premises for the purposes of section 440C."

His Honour rejected the mortgagee's argument that the notice of 10 February 1993, and the subsequent notice of demand, constituted the exercise of a power in relation to the premises within the meaning of section 441F which, relevantly, is in the following terms:

> "If, before the beginning of the administration of a company, a receiver or other person:
>
> (a) entered into possession, or assumed control, of property used or occupied by, or in the possession of, the company; or
>
> (b) exercised any other power in relation to such property;
>
> for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it."

His Honour found that the letters of demand had

> "no legal effect under the terms of the lease or otherwise. No demand was required to trigger a right of re-entry, and the letters were not written in exercise of any 'power'."

Further, his Honour rejected the proposition that the notice of 10 February 1993 was sufficient to cause section 441F to apply. His Honour held that the notice was not given

> "for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it, because, at the time of that notice, the mortgagee was neither the owner nor the lessor of the property and the notice was not given for the purpose of enforcing a right of the then owners or lessors to take possession of or recover, the property."

McLelland CJ in Equity granted the continuation of the interim injunction because the mortgagee was adequately protected in the meantime by the undertaking as to damages and the personal liability of the administrator.

COMMENTATORS

The new procedure has generated much in the way of writing by those engaged in the insolvency industry. Those writings have themselves offered up some anomalies.

Can an administrator sell the company's shares?[17]

One of the most interesting questions which has been raised in the early days of the new voluntary administration procedure is whether an administrator can dispose of shares in the company under the provisions of a deed of company arrangement. Obviously, if such a power in an administrator did exist, it would assist an administrator to realise, for the benefit of the company's creditors, any tax losses.

Logically, because shares in a company are not the property of the company itself but rather the property of the members of the company, it would be surprising if an administrator did have such a power. The basis of the argument for the administrator having such a power commences with an analysis of section 444A(5), which provides that a deed of company arrangement is taken to include the prescribed provisions which are set out in Schedule 8A of the *Corporations Regulations*, except so far as the deed otherwise provides. Paragraph 2 of Schedule 8A provides that for the purpose only of administering this deed, the administrator has the following powers:

> "(zc) To enter into and complete any contract for the sale of shares in the company."

On their face, these words appear to give the administrator the power to enter into and complete any contract for the sale of the shares in the company as distinct from the power merely to procure the shareholders of the company to enter into such a contract. However, paragraph 1 of Schedule 8A provides:

> "1. In exercising the powers conferred by this deed and carrying out the duties arising under this deed, the administrator is taken to act as agent for and on behalf of the company."

However, the administrator, as agent for the company, can have no greater power than his principal, the company itself. The picture is further confused by section 444G(b) which provides that a deed of company arrangement binds, amongst others, the company's members. However, in the absence of an express power in the *Corporations Law*, the administrator can have no power to sell the company's shares. Views differ, however, on this point.

Tax loss companies

Concern has been expressed that the new voluntary administration procedure may give rise to the trafficking in tax losses.

The New South Wales Court of Appeal in *Re Data Homes Pty Limited (in liquidation)* ([1972] 2 NSWLR 22), when asked to exercise its discretionary power under section 181 of the *Companies Act,* 1961, to grant approval to a scheme of arrangement involving the disposition of tax losses, declined to do so on public policy grounds. As a general rule, the court held that it should not stay a winding up, as an incident of approving a scheme of arrangement which implemented a tax loss sale, in circumstances where the stay of the winding up would have the consequence of permitting an insolvent company to return to the business community.

In *Data Homes Pty Limited and the Companies Act* ([1971] 1 NSWLR 338), at first instance, Street J held that the only schemes involving the tax loss companies, in the course of being wound up, which would be given the benefit of approval by the court were those where the purchaser of the tax losses was prepared to subscribe the sum required by way of capital or

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[17] See "Teething Problems with the Insolvency Laws" by Tim Greenall, *Law Institute Journal*, April 1994, page 273.

where the purchaser was prepared to pay money directly to the trustee under the scheme for distribution amongst the creditors in satisfaction of their claims.

The new voluntary administration procedure, facilitating compromises between companies and their creditors, as it does, without the intervention of the court, has rekindled the interest of shareholders in tax losses which their companies may have. Without the intervention of the court, to oversee any public policy considerations, the Deputy Commissioner of Taxation may also, understandably, be taking a keener interest in this area.

Voluntary winding up after failure of administration and commencement of winding up

There is an inconsistency between sections 446A and 490, when creditors resolve to wind up the company, which is under administration. Section 446A, in certain circumstances, deems a company under administration to have resolved that it be wound up voluntarily, as if it were a special resolution. However, section 490 provides that a company cannot be wound up voluntarily if a creditor's application to wind up the company has been filed (except with the leave of the court). This conflict must be resolved by Parliament.

CONCLUSION

The new voluntary administration procedure has been in operation for almost 12 months. On the evidence available, it is clearly being used and increasingly so. This must be very satisfying to its architects. Generally speaking, it would appear to be meeting the expectations of the business community and, significantly, it appears to have received the support of the banking community. The continued success of the procedure will depend upon whether the confidence of the business community is maintained. That confidence can only be assured by proper conduct on the part of those most closely involved in the procedure, the administrators themselves.

Attachment 1 to Paper by Bruce Hambrett

EXTERNAL ADMINISTRATION STATISTICS FOR MONTH ENDING 30 JUNE 1993
(Based on statistics issued by the Australian Securities Commission)

State or Territory	Provisional wind-up	Court wind-up	Creditors wind-up	Members wind-up	Receiver appointed	Controller (other than receiver or managing controller)	Receiver manager appointed	Scheme administrator appointed	Administrators of Co. under administration	Official manager appointed	Foreign /RAB* wind-up	Total
NSW	29	103	27	306	2	1	18	1	0	0	0	487
VIC	0	67	27	89	0	4	13	0	0	0	0	200
QLD	11	40	5	68	1	0	5	0	1	0	0	131
SA	5	14	2	64	1	1	28	0	0	0	0	115
WA	2	5	4	33	0	3	7	2	1	0	0	57
TAS	0	0	0	13	0	1	0	0	1	0	0	15
NT	3	1	0	8	0	0	0	0	0	0	0	12
ACT	3	4	1	31	0	0	3	0	0	0	0	42
TOTAL	53	234	66	612	4	10	74	3	3	0	0	1059
%	5%	23%	6%	58%	0%	1%	7%	0%	0%	0%	0%	100%

* Registrable Australian Body

Attachment 2 to Paper by Bruce Hambrett

INSOLVENCIES AND TERMINATIONS FOR THE MONTH ENDING 31 MARCH 1994
(Based on statistics issued by the Australian Securities Commission)

State or Territory	Provisional wind-up	Court wind-up	Creditors wind-up	Members wind-up	Receiver appointed	Controller (other than receiver or managing controller)	Managing controller (other than receiver & manager	Receiver manager appointed	Scheme administrator appointed	Administrators of Co. under administration	Administrators of deed of Co. arrangement	Foreign /RAB* wind-up	Total
NSW	8	35	18	93	2	11	0	15	0	37	5	0	224
VIC	9	20	22	63	2	14	3	15	1	23	4	0	176
QLD	11	10	2	13	1	2	0	7	0	8	5	0	59
SA	1	5	2	16	1	2	0	4	0	5	11	0	47
WA	3	1	4	13	2	3	0	1	0	6	1	0	34
TAS	0	0	1	6	0	1	0	3	0	0	1	0	12
NT	0	0	0	0	0	0	0	0	0	1	0	0	1
ACT	0	1	0	11	0	0	0	0	0	1	1	0	14
TOTAL	32	72	49	215	8	33	3	45	1	81	28	0	567
%	6%	13%	9%	38%	1%	6%	1%	8%	0%	14%	5%	0%	100%

* Registrable Australian Body

Attachment 3 to Paper by Bruce Hambrett

EXTERNAL ADMINISTRATIONS IN THE PERIOD 23 JUNE 1993 TO 31 MARCH 1994
(Based on statistics issued by the Australian Securities Commission)

State or Territory	Provisional wind-up	Court wind-up	Creditors wind-up	Members wind-up	Receiver appointed	Controller (other than receiver or managing controller)	Managing controller (other than receiver & manager	Receiver manager appointed	Scheme administrator appointed	Administrators of Co. under administration	Administrators of deed of Co. arrangement	Foreign /RAB* wind-up	Total
NSW	101	608	172	1177	26	79	2	158	11	218	54	0	2606
VIC	33	437	199	505	20	191	7	170	18	151	53	1	1785
QLD	67	264	31	267	7	44	1	78	4	72	30	0	865
SA	32	117	16	192	5	35	1	65	0	26	31	0	520
WA	32	46	40	128	3	29	0	26	3	34	16	0	357
TAS	0	5	4	46	0	5	0	6	2	10	3	0	81
NT	5	6	1	16	1	1	0	2	0	3	0	0	35
ACT	18	20	17	111	1	8	0	11	0	5	1	0	192
TOTAL	288	1503	480	2442	63	392	11	516	38	519	188	1	6441
%	4%	23%	7%	39%	1%	6%	0%	8%	1%	8%	3%	0%	100%

* Registrable Australian Body

Attachment 4 to Paper by Bruce Hambrett

AUSTRALIAN SOCIETY OF CERTIFIED PRACTISING ACCOUNTANTS

CENTRE OF EXCELLENCE FOR INSOLVENCY AND RECONSTRUCTION

QUESTIONNAIRE FOR ADMINISTRATOR (for each appointment):
(Individual Appointments to Companies)

FIRST SURVEY RESULTS

- ❑ Responses received = 86 out of about 150 = 57%
- ❑ Concluded to Deeds = 31 out of 86 = 36%
- ❑ Outcome of others:

Deeds	= 31
Liquidations	= Not Known
Unknown	= Not Known

1. Was the decision to make the appointment from:

		No.	%
❑	Secured Creditor	7	8%
❑	Directors	78	90%
❑	Liquidator	1	1%
❑	Other: Prospective Purchaser	1	1%
		88	**100%**

2. Did the Australian Tax Office influence the appointment pursuant to the new section 222 Provisions of the Income Tax Assessment Act?

		No.	%
❑	Yes	6	7%
❑	No	80	93%
		86	**100%**

3. Was any other type of appointment considered?

Out of 86 responses:

		No.	%
❑	Considered Receivership	14	15%
❑	Considered Liquidation	38	40%
❑	Considered Informal	7	7%
❑	Considered Scheme of Arrangement	1	2%
❑	Considered None	34	36%
		94	**100%**

4. What length of time was involved between your first contact regarding the matter and formal appointment?

		No.	%
❑	5 days or less	47	55%
❑	6 - 15 days	16	19%
❑	16 - 25 days	7	8%
❑	26 days and over	14	16%
❑	Not Specified	1	1%
❑	Not Applicable	1	1%
		86	**100%**

REASONS THAT PRECLUDED IMMEDIATE ACCEPTANCE WERE:

		No.	%
o	Company was unable to trade as no trading funds available.	1	
o	Investigation.	6	17%
o	Secured Creditor negotiation.	6	17%
o	Directors were seeking re-finance.	2	
o	Examinations of options realistically available.	5	15%
o	Reluctance of Directors to make decision.	4	14%
o	Provisional Liquidator applied to have himself appointed as Administrator.	1	
o	Directors needed to clarify position re: their personal guarantees.	1	
o	Distance between Practitioners/Solicitor/Company.	1	
o	Preparation of documentation.	1	
o	Directors deliberately overstated figures in accounts.	1	
o	Identifying basic financial position.	1	
o	Negotiations with ATO to effect informal repayment plan.	1	
o	Creditors petition.	1	
o	ATO Priority.	2	
o	Repayment of Secured Creditor by Receiver.	1	
o	Company had application for winding up pending.	1	
o	Familiarisation with new legislation.	1	
		37	

4 major matters account for 63% of reasons given

5. If there were any Secured Creditors involved, what was their attitude to the appointment?

		No.	%
❑	Support Administrator	42	48%
❑	Made own appointment	3	3%
❑	Passive	20	23%
❑	No Secured Creditor	20	23%
❑	No reply to question	2	3%
		87	**100%**

6. Estimated return to Unsecured Creditors in administration?

Cents in Dollar	No.	%
0 - 10	46	53%
11 - 20	4	5%
21 - 30	5	6%
31 - 40	2	2%
41 - 50	5	6%
51 - 60	2	2%
61 - 70	2	2%
71 - 80	1	1%
81 - 90	1	1%
91 - 100	3	4%
N/A	8	9%
Unknown	7	9%
	86	**100%**

Mean average return is **19.82** cents in dollar (excludes N/A and Unknowns)

7. Estimated return to Unsecured Creditors if winding up occurred?

Cents in Dollar	No.	%
zero	48	56%
1 - 10	13	15%
11 - 20	4	5%
21 - 30	6	7%
31 - 40	3	3%
41 - 50	1	1%
51 - 60	0	
61 - 70	0	
71 - 80	0	
81 - 90	1	1%
91 - 100	0	
N/A	5	6%
Unknown	5	6%
	86	**100%**

Mean average return is **6.81** cents in dollar (excludes N/A and Unknowns)

The mean has also been adjusted to take account of the 48 'zero' dividends anticipated.

Estimated dividend on winding up is approximately 1/3rd of that on administration 6.81/19.82 cents in the dollar.

8. Will the Company's Business continue to trade?

		No.	%
❑	Yes	28	33%
❑	No	55	64%
❑	Not Known	1	1%
❑	N/A	2	2%
		86	**100%**

Note: 31 of the Administrations were concluded to Deeds.
28 of these were at present continuing to trade.

9. If not, will the administration improve the return to Creditors?

		No.	%
❑	Yes	26	50%
❑	No	26	50%
		52	**100%**

10. Is the 21 days for convening the second meeting sufficient time?

		No.	%
❑	Yes	53	63%
❑	No	31	37%
		84	**100%**

Two respondents did not answer the question

Of the 'No's', it was asked what time period should be allowed.

	No.	%
25 days	1	3%
28 days	6	20%
30 days	6	20%
35 days	10	33%
45 days	2	7%
60 days	5	17%
	30	**100%**

- One 'No' did not supply suggested time frame but said "will vary".
- Many respondents' time limits "in this case" may need to be extended in certain circumstances
- One respondent applied to Court to have time extended and was successful.

11. Is the Statutory period between the first meeting and the second meeting sufficient?

		No.	%
❑	Yes	49	57%
❑	No	34	40%
❑	No Reply	3	3%
		86	**100%**

Suggested time frame by the 'No's' was as follows:

	No.	%
10 days	8	26%
12 days	2	6%
14 days	2	6%
21 days	4	13%
28 days	4	13%
30 days	6	19%
35 days	4	13%
45 days	1	4%
	31	**100%**

Three respondents did not supply an alternative number of days

Attachment 5 to Paper by Bruce Hambrett

AUSTRALIAN SOCIETY OF CERTIFIED PRACTISING ACCOUNTANTS

CENTRE OF EXCELLENCE FOR INSOLVENCY AND RECONSTRUCTION

QUESTIONNAIRE FOR INSOLVENCY PRACTITIONERS

REGARDING THE NEW ADMINISTRATION PROCEDURE

SECOND SURVEY RESULTS

60 Practitioners at random — Australia wide

Out of 60 Questionnaires mailed 8/11/93, 26 have replied

60	Sent	**100%**
26	Replied	43%
34	No Response	57%

1. What was the average number of days between the first approach to taking an appointment and you actually being appointed as Administrator?

26 responses received

	No.	%
0 - 5 days	10	38%
6 - 10 days	6	23%
11 - 15 days	3	12%
16 - 20 days		
21 - 25 days	1	4%
26 - 30 days	3	12%
No appointment yet	3	11%
	26	**100%**

2. What are the major causes of any delay in taking an Appointment?

Reasons given:	No. of Responses	%
o Ascertaining Secured Creditors position/attitude.	9	20%
o Directors meeting/indecision by Directors.	6	13%
o Assessing likelihood of being able to successfully restructure Company's affairs to achieve proposed arrangement.	7	16%
o Assessing downside to taking an appointment.	2	4%
o General care on part of Administrator.	1	2%
o Preliminary discussions with Directors.	2	4%
o Ascertaining if sufficient funds available to pay fees.	4	9%
o Signing of documentation.	1	2%
o Meetings with key Creditors.	1	2%
o Nil.	1	2%
o Gathering together relevant information.	8	18%
o Did not experience any factors which caused delay.	1	3%
o No appointment as Administrator yet.	2	5%
	45	**100%**

3. Do you believe the 5 day period for convening the first meeting sufficient?

26 responses received

	No.	%
❑ Yes	5	19%
❑ No	21	81%
	26	**100%**

4. If not, what time scale do you believe is appropriate?

21 responses received (see 'No's' above at Question 3)

	No.	%
❑ 5 - 10 days	8	38%
❑ 10 - 20 days	10	48%
❑ 20+ days	3	14%
	21	**100%**

5. Do you believe 21 days is sufficient time for convening the second meeting?

26 responses received

	No.	%
❑ Yes	8	31%
❑ No	18	69%
	26	**100%**

If not, what time scale do you believe is appropriate?

18 responses received (see 'No's' above)

	No.	%
❑ 21 - 30 days	4	22%
❑ 30 - 40 days	11	61%
❑ 40+ days	3	17%
	18	**100%**

6. Have you been appointed Administrator to any Company since June 1993?

26 responses received

	No.	%
❑ Yes	**22	85%
❑ No*	4	15%
	26	**100%**

No. of Administrators/No. of Appointments	**%**
7 Administrators had 1 appointment	32%
7 Administrators had 2 appointments	32%
1 Administrator had 3 appointments	4%
1 Administrator had 4 appointments	4%
1 Administrator had 5 appointments	4%
5 Administrators had 6 or more appointments	24%
** **22**	**100%**

* Of the 34 Questionnaires not returned, a higher percentage of these would probably have been NO; and therefore did not bother to return Questionnaire.

How many proceeded to a Deed of Company Arrangement?

Out of 78 appointments:

	No.	%
❑ Proceeded	42	54%
❑ Were terminated	13	17%
❑ Presumably 'in limbo'	22	28%
❑ Into liquidation	1	1%
	78	**100%**

7. If an Administration did not proceed to a Deed, please state reasons why Creditors did not wish to accept a Deed.

	No.	%
o Lack of faith in Directors.	2	7%
o Further investigation required.	1	3%
o No achievable proposal/No basis for a Deed.	5	18%
o Quantum of Creditors (Unsecured).	1	4%
o Existence of ATO debt (priority).	1	3%
o No reasons offered for rejection.	1	4%
o Planned to be liquidations from outset.	3	11%
o Emotional reasons (of Creditors).	1	3%
o Secured Creditors decided on liquidation.	2	7%
o Creditors felt position would not be improved.	3	12%
o Doubts as to information provided by Directors.	1	4%
o Lack of provisions Re: voidable transactions.	2	7%
o ATO would not compromise their position.	1	3%
o Administrator advised liquidation preferable.	2	7%
o Risk of trading losses.	1	4%
o Court appointed provisional Liquidator.	1	3%
	28	**100%**

8. If an Administration did not proceed to a Deed, please state reasons, if appropriate, why Administrator did not recommend a Deed.

	No.	%
o No ability to improve return to Creditors compared to winding up.	8	31%
o No basis for a Deed.	3	12%
o Quantum of Creditors (Unsecured).	1	4%
o ATO debt (priority).	1	4%
o No reasons offered.	1	4%
o Company hopelessly insolvent.	2	7%
o Proceeds of sale of business would not discharge debenture holder.	1	4%
o No voidable recoveries possible.	2	7%
o ATO would not compromise debt.	1	4%
o More investigation required.	1	4%
o Obvious that best and cheapest way to get a company into liquidation is via Administration procedure.	1	4%
o Short cut to liquidation.	1	4%
o Not a profitable business.	3	11%
	26	**100%**

9. Do you agree with the personal liability aspect of Administrator?

26 responses received

	No.	%
❑ Yes	17	65%
❑ No	9	35%
	26	**100%**

10. Does the personal liability aspect hinder the appointment of Administrators?

26 responses received

	No.	%
❑ Yes	14	54%
❑ No	12	46%
	26	**100%**

11. Have you refused to take an appointment as an Administrator because of the personal liability aspect?

26 responses received

	No.	%
❑ Yes	*7	27%
❑ No	19	73%
	26	**100%**

* 7 Administrators out of 26 responses have refused to take one or more appointments because of the personal liability aspect.

How many appointments in total have been refused?

10 were declined.

		%
❑ From Q6.	78 appointments made	89%
❑ From Q11.	10 declined	11%
	88	**100%**

12. What has been Secured Creditors' attitude in general to any appointments you have had?

26 responses received

	No.	%
❑ Supported Administrator	16	57%
❑ Made own appointment	3	11%
❑ Passive	5	18%
❑ Not applicable	4	14%
	28	**100%**

13. Has the Australian Taxation Office influenced any appointment you have undertaken (new section 222 Income Tax Assessment Act)?

26 responses received

	No.	%
❑ Yes	2	8%
❑ No	19	73%
❑ N/A	5	19%
	26	**100%**

14. Do you see any potential abuses in the Administration procedure?

	No.	%
❑ Yes	8	31%
❑ No	17	65%
❑ N/A	1	4%
	26	**100%**

LIST OF POSSIBLE ABUSES GIVEN:

	No.	%
o Creditors omitted from list for first meeting.	3	16%
o Directors engaging "friendly" Administrators.	2	10%
o No penalty for non holding of first meeting. Therefore could lead to possible abuse.	1	5%
o Short cut to liquidation.	4	21%
o Poor voting procedures.	1	5%
o Inability to check related party transactions in time for first meeting.	2	10%
o Directors' use of Administrator to opt out of their responsibilities.	1	5%
o Artificial creation of "write off" position in a liquidation to ensure administration proceeds.	1	6%
o Avoidance of investigation by liquidator.	1	5%
o Failure to properly advise banks.	1	6%
o Use as a stalling tactic.	1	5%
o Similar to Part X's; Directors to "get off" with minimum cost.	1	6%
	19	**100%**

15. In what ways can the new Administration procedure be improved?

SUMMARY OF REASONS/IMPROVEMENTS NOTED:

	No.	%
o Extend timing for initial meetings.	11	33%
o No personal liability for leased assets used in excess of 7 days.	1	3%
o Extending terms of guarantee to form part of the Deed.	1	3%
o Capital reconstruction, forfeiture should be allowed.	1	3%
o Longer than 60 day period of adjustment.	1	3%
o Restriction to Official Liquidators only.	1	3%
o Creditors to have the opportunity to remove Administrator at second meeting and appoint alternate Liquidator/Administrator.	1	3%
o Clarify S.221P position Re: Administrators' remuneration priority.	1	2%
o Make first meeting more informative.	1	3%
o Secured Creditor has option to increase decision period.	1	3%
o Remove personal liability generally.	3	9%
o Abolish first meeting of Creditors.	1	3%
o Stop procedure abuse of using Administrators as short cut to liquidation.	1	3%

o Company's nominee should not automatically be appointed Administrator.	1	2%
o Delete requirement to submit R & P account.	1	3%
o Circulate list of Creditors before first meeting.	1	3%
o Obtain acknowledgment of service from secured lender.	1	3%
o Give Administrator "claw back" powers.	1	6%
o Remove requirement to advertise nationally.	1	3%
o Allow use of telephone for meeting per Bankruptcy Act.	1	3%
o Join Company shareholders as personally liable as is the Administrator (to ensure co-operation).	1	3%
	33	**100%**

16. Did the position with the inability to recover preferences cause:

a) You to refuse taking an appointment

26 responses received

	No.	%
❑ Yes	0	
❑ No	22	85%
❑ N/A	4	15%
	26	**100%**

b) Creditors to reject an Administration?

26 responses received

	No.	%
❑ Yes	3	12%
❑ No	17	65%
❑ N/A	6	23%
	26	**100%**

5 Administrations have been rejected out of 83 total companies in Questionnaire (see Question 6)

	No.	%
❑ Rejected	5	6%
❑ Accepted appointment	78	94%
	83	**100%**

17. Given the public perception of Part X's being a soft option, do you see similar problems arising with administrations?

25 responses received

	No.	%
❑ Yes	11	44%
❑ No	14	56%
	25	**100%**

COMMENTS RECEIVED RE: QUESTION 17:

	No.	%
○ Deed will generally be best option but public may believe "forced through".	1	11%
○ If Administrators put forward proposals with no commercial credibility.	1	11%
○ Must always be a compromise between Owners, Creditors and Administrator because capital cannot be dealt with.	1	11%
○ If related party Creditors are not fully investigated, outcome of meeting(s) may be controlled.	1	11%
○ Greater ethical rules needed.	1	11%
○ Because quick way to liquidation.	1	11%
○ May be used to avoid investigation	1	11%
○ Part X has not been used as designed since 1966. Likely this will occur with Administration procedure.	1	11%
○ Liquidators should use the "tool" of Administration correctly.	1	12%
	9	**100%**