

CORPORATE INSOLVENCY - PROPOSALS FOR REFORM**Appendix to Paper by RW Harmer****DRAFT LEGISLATION REFERRED TO IN TEXT OF PAPER****Purpose of Part**

"VA1. The purpose of this Part is to provide for the voluntary administration of the affairs of a company either -

- (a) by the company making an arrangement with its creditors for the satisfaction of the debts of the company, in full or in part, and, if in part, for the release of the company from the amounts unpaid; or
- (b) to facilitate an orderly winding up of the affairs of the company under Part XIIB.

Application of Part

"VA2. (1) This part applies to a company that is unable, or is likely to become unable, to pay its debts.

"(2) Sub-section (1) has effect in relation to a company notwithstanding that the company may become able in the future to pay its debts.

Commencement of proceedings

"VA5. (1) A company may make a declaration, in accordance with the prescribed form, to the effect that it is an insolvent company and desires that its affairs be administered under this Part.

"(2) The declaration may be under the seal of the company or may be signed by a director of the company who is authorised to do so by a resolution of the directors of the company. If the company is being wound up, the declaration may be signed by the liquidator.

"(3) A Person who is entitled to enforce a floating charge on property of a company may, if the company is not already under administration or is not being wound up in insolvency, make a declaration, in accordance with the prescribed form, to the effect that the money for which the charge is security is due and

owing, that the company is in default under the terms of the charge and that the person desires that the affairs of the company be administered under this Part.

"(4) Where a declaration under this section is made, the company shall be taken to be a company to which this Part applies.

Contents of declarations

"VA6. The declaration -

- (a) shall contain the name of a registered insolvency practitioner who has consented in writing endorsed on the declaration to administer the affairs of the company;
- (b) where appropriate, shall specify the authority under which the person signed the declaration;
- (c) shall be lodged with the Commission forthwith; and
- (d) takes effect from the day on which it is made.

Statements by administrator

"VA10. (1) A person who consents to being appointed the administrator of a company shall forthwith lodge with the Commission a statement in accordance with the prescribed form.

"(2) The statement shall -

- (a) declare any prior or present professional or other association that the person, or that a partner or employee of the person, has or has had with the company or with a member, officer or creditor of the company in respect of the affairs of the company so far as they are known to the person and disclose fully and truly the circumstances of the association; and
- (b) declare that there are no circumstances (other than any such association) known to the person that may make it difficult for the person to act impartially as the administrator of the company.

Effect of declaration

"VA12. (1) From and including the effective day in relation to a company, the business, property and affairs of the company shall be under the control of the administrator and they shall continue to be under that control until -

- (a) the creditors of the company resolve at a meeting called under this Part that the company cease to be a company under administration;

- (b) an arrangement under this Part is made by the company;
- (c) the company commences to be wound up; or
- (d) the Court orders that the company cease to be a company under administration,

whichever first happens.

"(2) Division 3 of Part XII does not apply, or continue to apply, to a company that is a company under administration.

General powers of administrator

"VA17. (1) The administrator of a company under administration has power to carry on its business and manage its affairs and property and for that purpose may exercise all the powers of the directors.

"(2) The powers of the administrator include the following:

- (a) to remove a director from office;
- (b) to appoint a person to be a director, whether to fill a vacant office or not;
- (c) to call a meeting of the members or creditors of the company;
- (d) to apply to the Court for directions as to a matter arising in connection with the exercise of the powers of the administrator;
- (e) to make inquiries or investigations with respect to the business, property or affairs of the company;
- (f) the same powers as a receiver of property of a company has under this Act;
- (g) to terminate all or any of the business of the company; and
- (h) to do all such other things as are necessary for the purposes of this Part.

"(3) Subject to this Part, in exercising a power, the administrator shall be deemed to be acting as agent of the company.

"(4) A person dealing with the administrator in good faith and for valuable consideration is not concerned to inquire whether the administrator is acting within the administrator's powers.

Effect of appointment of administrator

"VA18. (1) On or after the effective day in relation to a company -

- (a) except with the leave of the Court or with the consent of the administrator, a chargee may not take steps to enforce a charge over property of the company;
- (b) except with the leave of the Court or with the consent of the administrator, a person who is the owner or lessor of property possessed, used or occupied by the company may not take steps to take possession of or recover that property;
- (c) except with the leave of the Court or with the consent of the administrator, an action or other civil proceeding against the company or with respect to property of the company shall not be brought or proceeded with; and
- (d) except with the leave of the Court, execution or other legal process with respect to property of the company shall not be commenced or proceeded with.

"(2) The leave of the Court may be given subject to conditions.

"(3) Unless the Court otherwise orders, paragraph (1)(a) does not apply to particular property where, before the effective day, the chargee has, in exercise of the rights of the chargee -

- (a) agreed to sell the property;
- (b) caused the property to be offered for sale by public auction to be held not more than 28 days after the effective day.

"(4) The leave of the Court or the consent of the administrator is not required -

- (a) for the making of an application for the winding up of the company under an order of the Court or for anything done under such an order;
- (b) for the giving of notice in consequence of a default under a charge over property of the company (other than the giving of a notice under paragraph 204A(1)(d)) or under an agreement by the company; or
- (c) for the exercise or carrying out by a receiver appointed in respect of property of the company before the effective day of any of the receiver's powers or functions.

"(5) Where a receiver or other person, whether under a floating charge or not -

- (a) has entered into possession of property of a company under administration; or
- (b) has assumed the control of the property of such a company or has exercised a power with respect to the realisation of property of such a company for the purpose of enforcing a charge over, or a right to possession of, property owned, possessed, used or occupied by the company,

the administrator may apply to the Court for a stay of the exercise of all or any powers of the receiver or person in relation to the property.

"(6) The Court may grant the application subject to conditions.

"(7) This section ceases to have effect with respect to a company -

- (a) when the company ceases to be a company under administration; or
- (b) at the expiration of 35 days after the effective day or after the expiration of such extended period as the Court, on application made within that period of 35 days, orders,

whichever is the earlier.

Personal liability of administrator

"VA19. (1) The administrator of a company under administration is liable to a contract or other transaction made or entered into by the company in the course of the administration and with the authority of the administrator to the extent that the company has received a benefit as a result of the contract or transaction.

"(2) Where the company continues in possession of, occupies or uses property the legal title to which belongs to some other person under an agreement made before and subsisting at the effective day, the administrator is liable for the rent or other payments payable under the agreement with respect to any period during which the company continues to possess, occupy or use the property while the company remains a company under administration.

"(3) Where a company continues in possession of, occupies or uses property as mentioned in sub-section (2) during part only of a period in respect of which rent or other payment is payable, the rent or payment shall be apportioned according to the proportion that that part bears to the whole of the period and

the administrator is liable for so much only of the rent or payment as is attributable to that part.

"(4) Sub-section (2) does not operate so as to -

- (a) provide that the administrator is to be deemed to have adopted the agreement; or
- (b) make the administrator liable for the performance of any provision of the agreement otherwise than as mentioned.

"(5) Sub-section (2) does not have effect with respect to the period of 7 days immediately after the effective day.

"(6) Except as mentioned in sub-section (1) or (2), the administrator is not liable for the debts of the company.

"(7) the administrator has a right to be indemnified out of the property of the company with respect to a debt or liability mentioned to in sub-section (1) or (2) in priority to all other debts or liabilities of the company, including debts or liabilities under a law in force in the Territory, but not including secured debts or liabilities except as provided by sub-section (9).

"(8) In relation to an indemnity mentioned in sub-section (7), the administrator has a lien over the property of the company to which the indemnity applies.

"(9) The priority given by the right of indemnity mentioned in sub-section (7) extends to property of the company that is subject to a floating charge except where a receiver was appointed under the terms of the charge before the effective day and the receiver has continued in office. In that event, except with the agreement of the chargee, there is no priority.

"(10) Where a receiver is appointed under the terms of the charge after the effective day, the priority of the administrator -

- (a) extends to the property comprised in the floating charge with respect to a debt or liability mentioned in sub-section (1) or (2) incurred before the appointment of the receiver; and
- (b) does not apply, except with the agreement of the chargee, in respect of a debt or liability incurred after the appointment of the receiver.

Duties of administrator

"VA25. It is the duty of the administrator of a company, as soon as practicable after being appointed, to investigate the business

property, affairs and financial circumstances of the company and to form an opinion whether the company should be wound up or an arrangement with its creditors should be proposed.

Meetings of creditors

"VA26. (1) The administrator shall, within 14 days after the effective day -

- (a) convene a meeting of the creditors of the company to be held within 28 days after the effective day; and
- (b) send with the notice convening the meeting -
 - (i) a report as to the business, property, affairs and financial circumstances of the company; and
 - (ii) the opinion of the administrator whether the company should be wound up or make a deed of arrangement and, if the latter, particulars of the proposed arrangement.

"(2) At the meeting, the creditors may -

- (a) resolve that the company be no longer subject to administration;
- (b) resolve that the company execute a deed of arrangement as proposed by the administrator or with modifications and additions approved by the administrator; or
- (c) resolve that the company be wound up.

"(3) A meeting convened under sub-section (1) may be adjourned from time to time.

"(4) The administrator shall preside at a meeting convened under sub-section (1).

"(5) The Court may extend the period of 14 days mentioned in sub-section (1) on application made before the expiration of that period and, in that case, the period of 28 days so mentioned is correspondingly extended.

Winding up

"VA27. (1) Where the creditors resolve that the company be wound up as mentioned in paragraph VA26(2)(c), the following provisions of this section have effect.

"(2) The creditors shall appoint a registered insolvency practitioner (who may be the administrator) to be the liquidator of the company.

"(3) The provisions of Part XII with respect to the winding up of a company have effect.

"(4) The administrator shall, forthwith after the making of the resolution -

- (a) lodge with the Commission a notice, in accordance with the prescribed form of the resolution; and
- (b) cause notice of the resolution to be published as prescribed.

Provisions as to deeds of arrangement

"VA29. (1) Where the creditors resolve that the company execute a deed of arrangement, the following provisions of this section have effect.

"(2) The creditors shall appoint a registered insolvency practitioner (who may be the administrator) to be the administrator of the deed.

"(3) The terms of the proposed deed shall be incorporated in an instrument, which shall specify -

- (a) the identity of the administrator;
- (b) the assets available for the payment of claims of creditors;
- (c) the class or classes of creditors to be bound by the deed;
- (d) the extent of any moratorium period;
- (e) any extent to which the company is to be released from its debts;
- (f) the conditions, if any, precedent to the commencement of the operation of the deed; and
- (g) the conditions, if any, precedent to the continued operation of the deed,

and shall be deemed to include the provisions contained in Schedule (??) subject to such modifications or additions as are specified in the deed.

"(4) The company and the administrator of the deed shall execute the deed within 21 days after the conclusion of the meeting of creditors.

"(5) The administrator of the deed shall, forthwith after the execution of the deed -

- (a) send notice of that fact to each creditor of the company;
- (b) cause notice of that fact to be published as prescribed; and
- (c) lodge a copy of the deed with the Commission.

Effect of deed

"VA30. (1) Subject to sub-sections (2) and (3), a deed of company arrangement is binding on all the creditors, including secured creditors, of the company as at the effective day.

"(2) It is not competent for a person bound by such a deed -

- (a) to make an application to the Court for the winding up of the company or to proceed with such an application made before the deed became binding; or
- (b) except with the leave of the Court and subject to any conditions that the Court imposes -
 - (i) to enforce a remedy against property of the company or against property possessed, used or occupied by the company; or
 - (ii) to commence a legal proceeding against the company or to take a step in such a proceeding.

"(3) This section does not affect the right of a secured creditor to realise or otherwise deal with the security except to the extent that the creditor has otherwise agreed or the Court orders.

"(4) A deed of company arrangement is binding on a person who is the owner or lessor of property possessed, used or occupied by the company only to the extent that the person has agreed to be bound or as the Court orders.

"(5) Where -

- (a) it is proposed that a company execute a deed of company arrangement, or a company has executed such a deed, under this Part;
- (b) notwithstanding the execution of the deed a person as mentioned in sub-section (3) or (4) is entitled to enforce a charge over property of the company or to take possession of or recover property owned, possessed, used or occupied by the company; and
- (c) the enforcement of the charge or the taking of possession or recovery of property would defeat or

materially prejudice the purpose and object of the deed,

the company may apply to the Court for an order that sub-section (2) apply to the person.

"(6) On the hearing of the application, the Court may have regard to -

- (a) the conduct of the parties, including the performance of any agreement between the person and the company relating to the charge or the property;
- (b) the proposals of the company for the continued performance of the agreement while the deed of arrangement remains in force; and
- (c) any prejudice likely to be suffered by the company and its creditors and the person.

"(7) The Court may make an order on the application on such terms (if any) as to costs, expenses, damages, compensation or otherwise and upon such conditions (if any) as to the period of restraint, further default or breach on the part of the company as, in the circumstances, are just.

"(8) An application under sub-section (5) may be made by the company in any proceedings brought in any court by the person by which the charge or right to possession or recovery of property is sought to be enforced.

Avoidance of deed

"VA33. (1) Where there is a doubt, on a specific ground, whether a deed of company arrangement was entered into in accordance with this Part or complies with a provision of this Part, the administrator of the deed, a creditor of the company, a member of the company or the Commission may apply to the Court for an order under this section.

"(2) Upon the hearing of the application, the Court may make an order declaring the deed, or a provision of the deed, to be void or not to be void on the ground specified in the application.

"(3) The Court shall not make an order declaring the deed to be void on the ground that it does not comply with a provision of this Part if the deed complies substantially with the provision.

Termination of deed by Court

"VA34. Where, on the application of the administrator of a deed of company arrangement, a creditor of the company or the Commission, the Court is satisfied that -

- (a) false or misleading information in respect to the business, trade dealings, property or affairs of the company was given to the administrator or to the creditors of the company, being information that was material to the acceptance of the proposal at the meeting referred to in section VA26;
- (b) there was omitted from the report referred to in that section a material particular or there was included in the statement a material particular that was incorrect;
- (c) a party to the deed has failed to carry out or comply with a provision of the deed;
- (d) arrangements under the deed cannot be carried out without injustice or undue delay; or
- (e) for some other sufficient reason, the deed ought to be terminated,

the Court may make an order terminating the deed or make such other order as is just.

Variation or modification of deed

"VA36. (1) Where a deed of company arrangement has become effective and the administrator proposes that a provision of the deed be varied or omitted, the administrator shall -

- (a) send to all creditors and other person bound by the deed a report in accordance with the prescribed form together with a statement of the proposals; and
- (b) convene a meeting of the creditors.

"(2) If the creditors so approve, a provision of the deed may be varied or omitted in accordance with the proposals.

"(3) A creditor may apply to the Court for an order to avoid a variation of or omission from the deed and the Court may, on the application, make such order as is just.