CORPORATIONS AND MARKETS ADVISORY COMMITTEE
ISSUES IN EXTERNAL ADMINISTRATION DISCUSSION PAPER

RESPONSE BY THE LEGISLATIVE REVIEW TASKFORCE OF THE COMMERCIAL LAW ASSOCIATION

ISSUE 1: ACCESS TO CREDITOR LIST

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

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

ISSUE 2: ADMINISTRATOR'S NOTICE TO PROPERTY OWNERS

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

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

ISSUE 3: CHAIRING THE MAJOR MEETING OF CREDITORS

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

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

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

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

Requirements that

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

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

ISSUE 4: NOTIFICATION OF BREACH OF DEED OF COMPANY ARRANGEMENT

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

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

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

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

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

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

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

ISSUE 5: APPOINTMENT OF NEW PERSON AS LIQUIDATOR

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

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

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

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

ISSUE 6: ADMINISTRATOR'S REMUNERATION

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

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

We support the referred proposal.

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

ISSUE 7: PROVISIONAL LIQUIDATOR'S REMUNERATION

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

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

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

ISSUE 8: POSTAL VOTING BY CREDITORS

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

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

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

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

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

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

ISSUE 9: ASSUMED SOLVENCY DEFENCE FOR OFFICER-INITIATED TRANSACTIONS

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

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

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

ISSUE 10: REPLACING A LIQUIDATOR

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

We agree with the Advisory Committee.

ISSUE 11: TAKING POSSESSION OF AND TRANSFERRING BOOKS

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

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

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

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

ISSUE 12: EXEMPTION FROM CLASSIFICATION AS CONTROLLER

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

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

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

ISSUE 13: EXEMPTION FROM VOIDABLE TRANSACTION PROVISIONS

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

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

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

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

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

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

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

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

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

ISSUE 14: PUBLICATION OF EXTERNAL ADMINISTRATION NOTICES

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

We support the Advisory Committee provisional position.

ISSUE 15: EXEMPTION FROM PUBLICATION

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

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

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

ISSUE 16: ELECTRONIC COMMUNICATION WITH CREDITORS

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

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

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

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

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

We support the Advisory Committee provisional position.