



White Paper

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Voluntary Administration and the Insolvency Provisions of the Corporations Act

Abstract

The voluntary administration scheme under Corporations Act 2001, Pt 5.3A is nestled in with the external administration provisions under Chapter 5. In the context of the insolvency provisions in particular, it would be conceivable to propose that the voluntary administration scheme would not operate separately but in conjunction with the overall insolvency provisions.

The matters identified in this paper show that the voluntary administration scheme generally operates separately. However, on some matters it relies on the general insolvency law for interpretation and determination of issues concerning a voluntary administration process.

The relationship between the voluntary administration provisions and the insolvency provisions can be seen in recent developments that are expressed in this paper.

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Introduction

The voluntary administration scheme under *Corporations Act 2001*, Pt 5.3A is nestled in with the external administration provisions under Chapter 5. In the context of the insolvency provisions in particular, it would be conceivable to propose that the voluntary administration scheme would not operate separately but in conjunction with the overall insolvency provisions. A description of this collection of provisions dealing with corporate insolvency and external management more broadly was given in the *Corporate Insolvency Laws: A Stocktake*²:

“The provisions of the Corporations Act that deal with corporate insolvency are primarily concerned with efficient procedures for the winding up of companies, the orderly realisation of the available assets of those companies and the equitable distribution of the proceeds to creditors (including employees) and shareholders. They include procedures governing corporate rescue or reorganisation (as an alternative to liquidation) set out in Part 5.3A of the Corporations Act. There are also provisions governing the appointment of receivers or other persons who are entitled to assume control over particular assets of the company, the reconstruction of companies, arrangements and compromises with creditors and the voluntary winding up of companies.”

The matters identified in this paper show that the voluntary administration scheme generally operates separately³. However, on some matters it relies on the general insolvency law for interpretation and determination of issues concerning a voluntary administration process. This can be seen in the scenario where the administrator becomes the liquidator in a transition to a creditors' voluntary winding up under *Corporations Act 2001*, Pt 5.3A Div 12. The statutory reference to insolvency law in Division 12 of Part 5.3A does not create an “apparent inter-contextual connection” between Part 5.3A and other parts of Chapter 5⁴.

The relationship between the voluntary administration provisions and the insolvency provisions can be seen in recent developments that are expressed in this paper.

What is the nature of Part 5.3A?

Corporations Act 2001, Pt 5.3A operates as a type of code providing procedures for the voluntary administration of insolvent companies or companies that are likely to become insolvent. Its purpose is described as⁵:

“The primary purpose of the voluntary administration (VA) procedure is to provide a flexible, easily initiated and relatively inexpensive procedure that gives a company the benefit of a debt moratorium. This allows the company to attempt a compromise or arrangement with its creditors aimed at saving the company or the business and maximising the return to creditors. If creditors agree to the arrangement, it will be set out in a deed of company arrangement which binds the company and its creditors. If these attempts fail, the legislation facilitates the transition to winding up.”

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² Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake*, June 2004 para 2.4

³ Support for the separate nature of the voluntary administration provisions under *Corporations Act 2001*, Pt 5.3A is available under section 447A where the court can make orders on how Part 5.3A is to operate for a particular company. This provision provides an all encompassing mechanism to apply the voluntary administration provisions to particular companies without resort to other provisions under Chapter 5 dealing with insolvent companies.

⁴ *Wainter Pty Ltd, in the matter of New Tel Limited (in liq)* [2004] FCA 1154

⁵ Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake*, June 2004 para 2.19

The scene before the introduction of *Corporations Act 2001*, Pt 5.3A involved four separate methods to deal with insolvent companies⁶:

- schemes of arrangement
- official management
- voluntary winding up
- winding up by the court.

These procedures had their own particular advantages and disadvantages but they tended to be cumbersome and costly for companies that were insolvent. This was particularly the case for schemes of arrangement. The advent of *Corporations Act 2001*, Pt 5.3A provided a better mechanism to deal not only with insolvent companies but also with companies that were likely to become insolvent at some time in the future. The nature of *Corporations Act 2001*, Pt 5.3A has been explained in a number of cases. A more recent statement is given in *Downey v Crawford* [2004] FCA 1264:

“The introduction of Pt 5.3A into the *Corporations Law* in June 1993 created a new procedure. A company that was, or might be, insolvent could henceforth be subjected to control by an administrator for a strictly limited period during which the affairs of the company could be closely monitored. That enabled consideration to be given to which of three courses should be adopted, namely, the execution of a deed of company arrangement, winding up, or simply a cessation of the administration without either of the foregoing. The idea was that at the end of the period of administration, the creditors themselves would decide which of these three courses should be followed. In the meantime, there would be a moratorium on actions or proceedings against the company. See generally *Brash Holdings Ltd v Katile Pty Ltd* [1996] 1 VR 24 at 28-29.”

The significance of the moratorium is essential to the operation of the procedures under *Corporations Act 2001*, Pt 5.3A. However, for the procedures to be effective it was necessary to provide objectives that could be achieved. These are detailed in *Corporations Act 2001*, s 435A. They concern the administration of the insolvent company’s business, property and affairs to:

- maximise the chances of the company, or as much as possible of its business, to continuing in existence
- result in a better return for the creditors and members than would occur from an immediate winding up of the company if the company or its business cannot continue to exist.

The experience of voluntary administrations since the commencement of *Corporations Act 2001*, Pt 5.3A in 1993 shows that the first of these objectives requires commercial acumen and knowledge by the administrator about the industry in which the company conducts its business. Absence of relevant knowledge and commercial ability to conduct the business means that the company and its business cannot continue to exist. This means that the second objective would dominate the procedures under *Corporations Act 2001*, Pt 5.3A.⁷

Those voluntary administrations that attempt to achieve the first objective tended to use company staff to continue the operations of the company. Their knowledge and experience in the company would be used to advance the strengths of the company’s business while the

⁶ *Downey v Crawford* [2004] FCA 1264

⁷ The comparatively low percentage of voluntary administrations achieving the first objective was expected when the scheme under *Corporations Act 2001*, Pt 5.3A was introduced. See comments in Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake*, June 2004 para 5.13

administrator dealt with arrangements to discontinue unprofitable business activities. This would involve recovering funds from the sale of assets and prior commitments given by persons to the company.

In order for the provisions of *Corporations Act 2001*, Pt 5.3A to operate, it is necessary that the processes and procedures required are followed precisely. This is necessary for the administration to begin and continue in a commercial manner without direct intervention by the court.

What is required for an administrator to be appointed to a company?

For a company that is not being wound up the company can appoint an administrator. Administrators are mostly appointed by company directors⁸. There are benefits for the company, directors and creditors to proceed to appoint an administrator to the company for the purpose of the company entering into a deed of company arrangement⁹.

The exact procedure is given in *Corporations Act 2001*, 436A. It requires a resolution in writing to appoint an administrator of the company where the board has the opinion that the company is insolvent, or is likely to become insolvent at some future time. The directors forming this opinion are those voting for the resolution.

Other persons can also appoint an administrator such as a liquidator and a chargee¹⁰. However, this discussion concentrates on the company appointed administrator and the processes that the directors must undertake in making the appointment. The two requirements of *Corporations Act 2001*, 436A by the company's directors are two conditions that must be met in order for the administrator's appointment to be valid¹¹.

The court in *In Wagner v International Health Promotions* (1994) 15 ACSR 419 refused to grant an order to validate a resolution of directors that only resolved to appoint an administrator. It did not contain the opinion of the directors that the company was insolvent or likely to become insolvent at some time in the future. In this case the directors had a telephone meeting in which there was some discussion about the company's state of insolvency. The court found that the administrator's appointment was invalid. The court also stated that while it is not necessarily a requirement that the resolution be expressed by a minute in the records, it is necessary that a resolution be made about the two conditions of *Corporations Act 2001*, 436A in order for the appointment of the administrator to be valid.

Directors of companies that are insolvent need to be careful to ensure they do exactly as required by *Corporations Act 2001*, 436A to appoint an administrator. Failure to do so may present a cause of action of "wrongful unofficial administration". This action was raised by the Full Court of the South Australian Supreme Court in *Russell v Westpac Banking Corporation* (1994) 61 SASR 583. This action was described by the court in *Downey v Crawford* [2004] FCA 1264 as:

⁸ Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake*, June 2004 para 2.21

⁹ A benefit for directors was expressed by the Australian Bankers' Association, *Submission by the Australian Bankers' Association to the Joint Parliamentary Committee on Corporations and Financial Services: Inquiry into Australia's Insolvency Laws*, June 2003:

"ABA notes that unless it appears to the voluntary administrator that conduct of the directors or other relevant persons involved with the company constitutes a breach of the certain laws, particularly in respect of insolvent trading and antecedent transactions of the company, there is possibly little incentive for the administrator to actively investigate such matters where the creditors may be prepared to accept a deed of company arrangement. This may be despite section 439A(4).

In the absence of liquidation, it may be easier for directors to avoid subsequent investigations into their conduct by utilising the voluntary administration option. Therefore a deed of company arrangement that could provide a marginally better return than under liquidation could be supported by creditors but without their full knowledge of how the director's had discharged their duties to the company in the past."

¹⁰ *Corporations Act 2001*, ss 436B, 436C

¹¹ *Downey v Crawford* [2004] FCA 1264

“a cause of action for unlawful and negligent acts which wasted the company’s assets is available to the company or its liquidator, or a shareholder or creditor. Moreover, any of these persons may sue in the company’s name if the liquidator refuses to commence the action: *Worthley v Australian Securities Commission* (1994) 13 ACSR 532 at 539.”

Can funds from third parties be taken into account by directors in forming an opinion about the company’s insolvency?

Corporations Act 2001, s 95A states that “A person is solvent if, and only if, the person is able to pay all the person’s debts, as and when they become due and payable.”¹² This provision appears to apply in determining the company’s solvency retrospectively and prospectively¹³ and the court is “free to determine insolvency, whether retrospective or prospective, as a question of commercial reality having regard to the particular facts of the case.”¹⁴ In *Lewis v Doran* [2004] NSWSC 608 the court found *Corporations Act 2001, s 95A*:

- has changed the pre-existing law as to the definition of insolvency as stated in cases such as the High Court decision in *Sandell v Porter* (1966) 115 CLR 666, and that it is no longer necessary in order to assess solvency to ascertain whether the company is able to pay all of its debts “from its own monies”, in the sense discussed in those cases
- requires the Court to decide whether the company is able, as at the alleged date of insolvency, to pay all its debts as they become payable by reference to the commercial realities.

The court needs to be “satisfied that as a matter of commercial reality the company has a resource available to pay all its debts as they become payable”. Having been so satisfied it does not matter to the court “that the resource is an unsecured borrowing or a voluntary extension of credit by another party.”¹⁵

In examining the state of a company’s financial position to determine insolvency the court can look at the commercial reality where there is retrospective insolvency or prospective insolvency.

In the case of retrospective insolvency the court would take account of¹⁶:

- payments actually made by the company to pay all its debts as they fell due because a third party made funds available to it without security as at and after the alleged date of insolvency
- arrangements which were actually made rather than artificially excluding them from consideration because the arrangements did not fall within the definition of payments from the debtor’s “own monies”.

By observing what actually happened avoids the court concluding “that, as a matter of law, a company could not pay all its relevant debts when, as a matter of fact, the company clearly did pay those debts.”¹⁷

¹² Guidance on determining company insolvency is given in Australian Securities and Investments Commission, *Practice Note 22: Directors’ statement as to solvency*, Issued 15/6/1992

¹³ *Lewis v Doran* [2004] NSWSC 608

¹⁴ *Lewis v Doran* [2004] NSWSC 608

¹⁵ *Lewis v Doran* [2004] NSWSC 608

¹⁶ *Lewis v Doran* [2004] NSWSC 608

¹⁷ *Lewis v Doran* [2004] NSWSC 608

In the case of prospective insolvency the court needs to have cogently demonstrated that funds to be advanced by a third party to the company is at least a matter of commercial reality if it is not a matter of legal obligation¹⁸.

Directors forming an opinion about the solvency of the company for purposes of making a resolution to for an opinion about the company's insolvency or prospective insolvency can incorporate third party funds in this consideration. Third party funds can include an unsecured bank facility¹⁹.

Can an insolvent company seek to reduce a penalty imposed by law where the penalty may cause the company to be wound up?

Under *Corporations Act 2001*, s 553B(1) penalties or fines except for pecuniary penalty order or an interstate pecuniary penalty order²⁰ "imposed by a court in respect of an offence against a law are not admissible to proof against an insolvent company." However, for an insolvent company or a company that is likely to become insolvent it may be possible to reduce the penalty ordered by a court.

In *Australian Competition & Consumer Commission v Fila Sport Oceania Pty Ltd (Administrators Appointed)* [2004] FCA 376, the court considered the situation where the burden of a penalty may adversely affect a company:

"It may be that where what would otherwise be an appropriate penalty may have the effect of putting a corporation out of business. The potential effect of such a result on innocent parties such as employees and creditors, and indeed of the lessening of competition, might provide grounds for some reduction: *Schneider Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission* [2003] 196 ALR 611 at [8]. However different considerations apply when it seems that when the practical reality is that the corporation is going out of business anyway."

For an insolvent company in the process of being wound up the court is keen to see that a warning is given for offences of the nature committed by the company²¹. This attitude of the court prevails even though it is known that the penalty may not be recovered under *Corporations Act 2001*, s 553B. The emphasis is on sending a message of compliance. It is particularly the case for breaches of the *Trade Practices Act 1974* where warnings are needed to companies within an industry contemplating anti-competitive practices.

Can creditors who fund an administrator obtain a priority for distribution of property by a liquidator in a subsequent winding up of the company?

Creditors funding an administrator cannot seek priority over other creditors in a subsequent winding up of the company. Only those creditors who fund a liquidator in a winding up can receive a priority over other creditors in the distribution of property by the liquidator.

The court has the power to make orders under *Corporations Act 2001*, s 564 to give certain creditors an advantage over other persons in relation to the distribution of property and recovered amounts for expenses. It recognises that some creditors have contributed to the enhancement of the liquidator's fund by an indemnity or payment for the benefit of all creditors. The court in *Tolcher v National Australia Bank* [2004] NSWSC 6 expressed it as:

"Implicit in s.564 is a concept of reward to those creditors who are seen to have taken a financial risk with a view to enhancing the fund available for application by the liquidator for the benefit of all creditors. As Spigelman CJ said in *State Bank of New South Wales v Brown* [(2001) 38 ACSR 715]:

¹⁸ *Lewis v Doran* [2004] NSWSC 608

¹⁹ *Geraldton Building Co Pty Ltd v Woodmore* (1992) 8 ACSR 585; *Lewis v Doran* [2004] NSWSC 608

²⁰ For purposes of the *Proceeds of Crime Act 1987*

²¹ *Australian Competition and Consumer Commission v The Vales Wine Company Pty Ltd* (1996) ATPR 41-528; *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (2003) ATPR 41-937

‘The prospect of reward is, of course, the incentive to give the indemnity which, potentially, will result in benefits to all creditors.’”

An example of a creditor taking a financial risk to enhance the liquidator's fund is where a secured creditor funds an examination undertaken by a receiver under *Corporations Act 2001*, Pt 5.9²². The enhancement of the fund occurs where the liquidator obtains information from the examinations. The financial contribution is the funding by the creditor of the receiver undertaking examinations. The result would benefit the general body of creditors and not only the secured creditor.

All of the property that the liquidator has or can obtain for the winding up of the company has been recovered under an indemnity for costs of litigation given by the creditors. Alternatively, it has been protected or preserved by the payment of money or the giving of indemnity by creditors. The expenses are those that a creditor has indemnified a liquidator.

The court can make such an order in any winding up.

Corporations Act 2001, s 564 operates when a liquidator has been appointed for purposes of certain creditors' indemnity for expenses under paragraph (b). However, paragraph (a) has no such reference to a liquidator. It refers to activity about the property of a company such as recovery, protection and preservation. It was observed in *Tolcher v National Australia Bank* [2004] NSWSC 6 that these activities are normally associated with a liquidator and not with an administrator. The activities of recovery, protection and preservation of the company's property at large do not directly concern an administrator²³. This is the case despite their being to some extent incidental to due performance for purposes of *Corporations Act 2001*, s 437A. An administrator does certain things to facilitate the investigation required by *Corporations Act 2001*, s 438A(a) and the assessment required by *Corporations Act 2001*, s 438A(b). The administrator is required to guide creditors to assist them in making a decision about the fate of the company. One of these can be the winding up of the company.

The liquidator has the duty of collecting assets of the company in the case of a voluntary winding up. The duty is part of the function of the liquidator to assemble a fund from which debts are paid. The duty is part of a wider public interest in proceedings to make all assets available to creditors of the company (*State Bank of New South Wales v Brown* (2001) 38 ACSR 715). An implicit process under the *Corporations Act 2001* that the liquidator has the duty of collecting assets of the company in the case of a voluntary winding up. In *Tolcher v National Australia Bank* [2004] NSWSC 6 the court considered the words, “in any winding up” in *Corporations Act 2001*, s 564 to mean that a liquidator must be in office performing the statutory functions in a winding up. *Corporations Act 2001*, Pt 5.6 Div 1A determines the time for the commencement of a winding up. It does not refer to the time a voluntary administration occurs before a winding up. To do so would, according to *Tolcher v National Australia Bank* [2004] NSWSC 6 as causing anomalous results to emerge:

“Had there been, at the time of the introduction of Part 5.3A in 1993, a legislative intention to extend the established operation of the long standing provision that is now s.564 so as to make it apply, in a subsequent winding up, to assistance given to an administrator in recovering, protecting or preserving property, it is reasonable to think that the intention would have been manifested by some means more explicit than an arguable effect of provisions defining the point of commencement of a winding up following on from such administration.”

²² *Tolcher v National Australia Bank* [2004] NSWSC 6.

²³ The purpose for placing an insolvent company into administration is to enable its creditors to decide whether it would be in their interest for the company to execute a deed of company, for the company to be wound up or for the administration to end and the company returned to the control of its directors (*Corporations Act 2001*, ss 435A, 439C).

What factors does the court consider when making an order under Corporations Act 2001, s 564?

The court may make such orders under *Corporations Act 2001*, s 564 as it deems just with respect to:

- the distribution of that property
- the amount of those expenses so recovered
- with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

In addition, the court is required to look at all relevant factors including:

- the sum recovered (or the value of the property recovered)
- the failure of other creditors to provide the indemnity
- the proportions between the debts of the indemnifying creditors and the other debts
- the public interest in encouraging creditors to provide indemnities so as to enable assets to be recovered
- the totality of the circumstances.

These factors are not exhaustive and the particular circumstances of individual cases raising other matters for consideration would be taken into account by a court. In considering these factors, the courts have tended in recent times “to adopt a more liberal approach, in favour of indemnifying creditors.”²⁴

Can an extension for an extraordinary long time be obtained for holding the second meeting of creditors?

Generally, the courts are reluctant to extend the convening period for holding the second meeting of creditors for a lengthy time²⁵. *Corporations Act 2001*, Pt 5.3A and in particular *Corporations Act 2001*, s 439A do not give guidance for the grounds that should be used by the court to grant an extension of time²⁶.

Despite the reluctance to grant an extension of time the courts have granted long periods of time:

Herbert v Exuma Pty Ltd (Administrators Appt'd) [2003] WASC 167	120 days
Port Kennedy Resorts Pty Ltd (2001) 19 ACLC 328	90 days
Re AFG Insurances Ltd (Voluntary Administrators Appt'd) [2002] NSWSC 803	5 months
Cawthorn v Keira Constructions Pty Ltd (1994) 33 NSWLR 607	5 months

²⁴ *Tolcher v National Australia Bank* [2004] NSWSC 6 referring to See *Re Bavistock* (1946) 14 ABC 30; *Re Ivermee; Ex parte Official Receiver* (1974) 36 FLR 187; *Re Passmore; Ex parte Official Receiver (in liq)* (1984) 56 ALR 181 at 186; *Re Kyra Nominees Pty Ltd (in liq)* (1987) 11 ACLR 767; 5 ACLC 811 at 819; *Re Ken Godfrey Pty Ltd (in liq)* (1994) 14 ACSR 610; 12 ACLC 1071

²⁵ *Herbert v Exuma Pty Ltd (Administrators Appt'd)* [2003] WASC 167.

²⁶ *Mann v Abruzzi Sports Club Ltd* (1994) 12 ACSR 611

The court will entertain applications from administrators to extend the period of time for holding the second meeting of creditors. The reason for this is for the court to dispense justice to ensure the “spirit of the Division is carried out.”²⁷ The “spirit of the Division” is set out in *Corporations Act 2001*, s 435A. Despite this concern for justice the court is reluctant to grant extension of time in order not to “invite a spate of these applications whenever administrators find that they run out of time to comply with the Act.”²⁸

In order for an extension of time to be granted by a court for a lengthy period there must be “prevailing exceptional circumstances”. These circumstances need to be working at the time the application is made for an extension of time to hold the second meeting. An example of such circumstances is a colliery fire where it is uncertain if it will be reopened to resume its position as a valuable asset or if circumstances such as safety conditions would destroy the bulk of its value requiring permanent sealing of the colliery²⁹.

It is also possible to obtain an extension of time for the holding of a deferred second meeting of creditors³⁰. Where it is apparent to the court that “further time is needed to better enable the administrator to gather information, facilitate a proposal for deed of company arrangement and give a meaningful account of his administration to creditors” then an extension would be granted³¹. The basis for the granting of the extension of time is the fact that there is “a real prospect that, if a deed is proposed and accepted, the deed may provide a better outcome for unsecured creditors, including trade creditors and employees of [the company], than would be achieved by a winding-up. That objective would meet the purpose of Part 5.3A of the Act.”³² Also, there must be no person prejudiced by the action to extend the time of the deferred second creditors’ meeting³³.

The granting of an extension of time is subject to any interested person, creditor, receiver or controller of property and the Australian Securities Investment Commission to apply to the court to vary the orders given by the court to extend the time³⁴.

How is the administrator’s remuneration fixed or determined?

An administrator of a company is entitled under *Corporations Act 2001*, s 449E to “such remuneration as is fixed by a resolution of the company’s creditors” or, if they do not fix the remuneration then “such remuneration as the Court fixes”. If the remuneration is fixed by the company’s creditors then this decision can be reviewed by the court³⁵.

Corporations Act 2001, s 449E requires that the administrator’s remuneration be fixed by a resolution of the creditors of the company or by the court. The remuneration is fixed under this provision for an administrator of a company or an administrator of a deed of company arrangement. If the creditors do not fix the administrator’s remuneration then the court can fix it on an application by the administrator³⁶. Unlike a trustee, an administrator is not expected to act gratuitously³⁷.

²⁷ This is *Corporations Act 2001*, Pt 5.3A Div 6

²⁸ *Mann v Abruzzi Sports Club Ltd* (1994) 12 ACSR 611. The court also said in *Mann v Abruzzi Sports Club Ltd* that it did “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.” This view must be balanced against the decisions of all courts when considering applications for extensions of time such as the case at footnote 29.

²⁹ *Gympie Gold Ltd (Administrators Appointed) (Receivers & Managers Appointed)* [2004] NSWSC 11

³⁰ *Askernish Pty Ltd* [2004] FCA 400

³¹ *Askernish Pty Ltd* [2004] FCA 400

³² *Askernish Pty Ltd* [2004] FCA 400

³³ *Askernish Pty Ltd* [2004] FCA 400

³⁴ *Askernish Pty Ltd* [2004] FCA 400

³⁵ *Corporations Act 2001*, s 449E(2)(a)

³⁶ *Corporations Act 2001*, s 449E(2)(b)

³⁷ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

The requirement for fixing the remuneration under *Corporations Act 2001*, s 449E does not include how the remuneration is to be fixed. The court in *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682 said that the remuneration “could be ‘fixed’ as a periodic salary, a lump sum, a percentage of some amount (such as the value of the company’s assets under the administrators’ control) or according to the amount of time spent by the administrator determined by reference to a scale or formula. The matter is simply left at large.”

The problem of fixing the administrator’s remuneration is not confined to how it is to be fixed but also the quantum. *Corporations Act 2001*, s 449E only implies that reasonable remuneration be determined and that this is the extent of the administrator’s entitlement³⁸. In determining the remuneration it is recognised by the courts that the administrator would have performed much of the work required and performed some of the duties before the remuneration is fixed. Consequently, there is contemplation in the law that the remuneration would be fixed retrospectively. Also, in the absence of express measures for fixing the remuneration, the courts recognise that the “statutory basis upon which an administrator must rely to receive his fees appears to be derived from the provisions dealing with liquidators.”³⁹

Can a committee of creditors fix the administrator’s remuneration?

The task of fixing the remuneration of an administrator could be more conveniently done by a committee of creditors. In the case for determining the remuneration of a liquidator, *Corporations Act 2001*, s 473(3)(a) allows the committee of inspection to enter into an agreement with the liquidator to determine the entitlement for remuneration. Alternatively, the creditor by resolution could determine the liquidator’s remuneration⁴⁰. For a committee of creditors to act similarly to a committee of inspection to determine the remuneration of the administrator would simplify the task in the case of complex administrations.

The issue was considered in *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682. A committee of creditors was established by the creditors at the first meeting to examine the administrator’s claims for remuneration. A dispute arose about whether the committee could examine the reasonableness of the fees claimed by the administrator. The court said that the committee could do so as it was charged with the duty to “review” the fees:

“In my view the obligation to “review” the fees was much more onerous than the administrators would have it. The committee was under a duty to examine each claim with a critical eye for the purpose of deciding whether the claimed amount was payable; the amount would only be payable if it was reasonable in all the circumstances.”

A committee of inspection was later established under the deed of company arrangement. One function of the committee was to “consider and, if appropriate, approve the Administrators’ remuneration from time to time in accordance with clause 6.6(a)”. The court observed that this provision was an attempt to fix the remuneration of the administrator saying:

“Clause 6.6(a)(ii) is an inelegant attempt to fix the administrators’ remuneration for the period the group is subject to the deed.”

The court also commented that “the administrators make the assumption that a resolution under s 439C that a company execute a deed of company arrangement which deed makes provision for the administrators’ remuneration is able to be characterised as a resolution fixing that remuneration under s 449E.”

³⁸ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

³⁹ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁴⁰ *Corporations Act 2001*, s 473(3)(b)

The court noted that there are likely to be difficulties with this assumption. However, in commercial terms it seemed to be reasonably based. The court observed that this assumption was not challenged by the Australian Securities and Investments Commission.

In relation to the ability of the committee of creditors and later the committee of inspection to fix the administrator's fees, the court referred to *Corporations Act 2001*, s 449E(1). The court commented that in its present form, this section does not allow for a committee of creditors to fix the administrator's remuneration. The effect of the resolutions by creditors was to delegate the power *Corporations Act 2001*, s 449E(1) to a committee of the creditors. The creditors have no power to do under this section to make such a delegation.

Despite the limitation under *Corporations Act 2001*, s 449E(1) to delegate the power to fix the remuneration of administrators, it is possible for such a delegation to a committee or tribunal other than the creditors or the court by using *Corporations Act 2001*, s 447A⁴¹. The court has the power under *Corporations Act 2001*, s 447A(1) to make an order as it thinks appropriate about how *Corporations Act 2001*, Pt 5.3A is to operate in relation to a particular company.

Can a rate or scale of charges be used for prospectively fixing the administrator's remuneration?

In large and complex administrations where work is done by the administrator and the administrator's staff, records of time would be recorded for charging against a set fee or scale of charges that are not used in an anti-competitive manner. The hourly rate set out in the scale of charges would be applied to the work done which would at the time of prospective approval be unquantified.

The court in *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682 made these observations:

- the natural meaning of the word "fix" in the context of an entitlement to "such remuneration as is fixed by a resolution of [creditors]" is to quantify that remuneration, that is to calculate or ascertain the amount of remuneration⁴²
- remuneration will be "fixed" if it is stated as a money sum, or is based on a formula which is capable of being applied according to some objective standard so the sum "can be calculated or ascertained definitely"⁴³
- in the case of a formula all the objective elements must be identified⁴⁴
- the early methods of fixing the fees of a liquidator conform to this meaning.

An approval to fix the hourly rate for charges made by the administrator merely fixes a rate that will be charged for the work done. This is a prospective approval for the administrator to use the agreed hourly rate or rates to calculate the amount of work done for the administrator's remuneration. It does not set the limit or quantify the amount for purposes of

⁴¹ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁴² *Mayne v Jaques* (1960) 101 CLR 169, 173, 174, 180; *In re Gallard; Ex parte Harris* [1892] 1 QB 532, 544

⁴³ *Fraser Henleins v Cody* (1945) 70 CLR 100, 128

⁴⁴ Other cases which support this approach in related contexts include, in Canada: *Hill v State* (1913) 14 DLR 158, 163; *Beuregard v The Queen in right of Canada* (1983) 148 DLR (3d) 205, 235; *Royal Bank of Canada v Bjorklund* (1985) 36 Man R (2d) 54, 59; and in the United States: *Zimmerman v Carfield* 42 Ohio St 463, 468 (1885); *Board of Supervisors of Yavapai County v Stephens* 177 P 261, 262 (1919); *Culberson v Watkins* 119 SE 319, 322 (1923); *Woodcock v Dick* 222 P 2d 667, 669 (1950); *Powers v Isley* 183 P 2d 880, 884 (1974)

fixing the remuneration. This issue was not resolved by the court in *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682⁴⁵.

Despite not resolving the issue, the court suggested that the administrator might overcome the problem of fixing the remuneration by fixing “interim remuneration while work is being performed”. The precise amount of the administrator’s remuneration would then be fixed when the work is complete.

In *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682 the court said that the remuneration of the administrator was not fixed according to *Corporations Act 2001*, s 449E. In making this judgment the court said:

“The resolutions purporting to fix the administrators’ remuneration did so by reference to the rates in the administrators’ report. According to those rates work performed by persons occupying the same position could attract a different hourly charge. There was no criteria by reference to which one could determine which hourly charge would be applied. In reality it was left to the administrators to decide what the rate would be. In this state of affairs it was the administrators and not the creditors who fixed their remuneration.”

The decision in *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682 is unnecessarily complicated by improper processes and procedures. The issue of whether an hourly rate could be used for fixing the administrator’s remuneration is coloured by activities of the administrator and creditors. It was compounded by the fact that the creditor’s committee did not carry out their tasks in a proper manner “to ‘review’ and ‘confirm’ the fees claimed by the administrators”. The problems in relation to the committee were:

- its task was made impossible as they were not provided with information which would enable them to determine whether the fees claimed were reasonable
- it had no information from which to determine whether the hours spent were excessive, redundant or otherwise unnecessary
- the task of “reviewing” and “confirming” was given to the committee, it was not given to the individual members of the committee.
- the members of the committee signified their assent to the fees by each signing and returning to the administrators a copy of their statement of fees without any discussion between them.

The court stated that “if the resolutions were otherwise lawful, the condition upon which the fees were payable had not been satisfied.” This means then that the court not only looks to the legality of resolutions of creditors but also to the process or procedure for giving effect to the resolutions.

The practice of an hourly rate in a scale of charges is seen to be irregular

The fixing of the administrator’s remuneration requires the fixing of a reasonable fee⁴⁶. By using hourly rates for charging the work of the administrator (including staff of the administrator) irregular circumstances arise. In particular, a scale of hourly rate charges raise the question about which rate is appropriate for the work to be done. It would be for the

⁴⁵ It was not resolved as the issue did not arise squarely on the facts and no submissions were directed to the question

⁴⁶ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

administrator and not the creditors to determine the amount of remuneration to be fixed by selecting the hourly rate charged⁴⁷.

The court in *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682 identified opposing views that are relevant to voluntary administrations under *Corporations Act 2001*, Pt 5.3A as identified in its objectives under *Corporations Act 2001*, s 435A. These views are contrasted by the need to conserve the fund in a winding up verses allowing market forces to operate to allow administrators charge competitive market rates for their work.

By insisting that administrators charge for purposes of conserving the fund by fixed fees or a percentage of the estate, the courts could be intervening to make external administration work less attractive compared with other work available. This would mean that administrations may not “operate smoothly, efficiently and expeditiously”⁴⁸.

Against this view is the view expressed by the courts in relation to hourly fees⁴⁹. Hourly fees appear to promote an incentive to “run up hours, to do too much work in relation to the stakes of the case.”⁵⁰ This basis of charging appears to the courts to have no connection with the complexity of the matter, the need for exceptional responsibilities, and the effectiveness of work performed. There is no relationship between the charging mechanism and the value and nature of the relevant property involved.⁵¹ The concern was expressed as⁵²:

“A moment’s thought will show that charging by reference only to time spent measured in units of whatever duration, whether minutes or hours or days, is capable of being exploited as virtually a licence to print money. The person charging has complete control over the amount of time spent. He can work at whatever rate he chooses or of which he is capable. He is subject to no control save that of his own conscience which ensures that the work done is proportionate to the difficulty or importance of the task in the context in which it needs to be performed. His charging rates are fixed by himself, subject only to such modest pressures as competition may bring to bear. And, best of all from his point of view, he can make sure that he achieves those rates for every hour actually worked, largely without regard to the value achieved for the client.”

These competing views were balanced by the court in *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682⁵³:

“The balance must achieve some moderation in fees to protect the fund so that creditors can achieve the largest possible return, but not be so moderate as to discourage competent practitioners from providing their important services. For this reason **the fees charged by an insolvency practitioner to his (best) private clients will be an important point of reference** but it should not be the sole criterion.”

The charging of fees on a time basis has become an accepted practice that has been recognised by the courts. However, this does not mean that the practice is readily accepted by the courts in every case. In *Mirror Group Newspapers plc v Maxwell* (No 2) [1988] 1 BCLC

⁴⁷ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁴⁸ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁴⁹ *In re Carlton, Limited* (1923) 39 TLR 194; *Kirchoff v Flynn* 786 F 2d 320 (7th Cir 1986); *Mirror Group Newspapers plc v Maxwell* (No 2) [1988] 1 BCLC 638; *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁵⁰ *Kirchoff v Flynn* 786 F 2d 320 (7th Cir 1986) 324

⁵¹ *Mirror Group Newspapers plc v Maxwell* (No 2) [1988] 1 BCLC 638; *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁵² Mr Justice Ferris, “Insolvency Remuneration – Translating Adjectives Into Action”, (1999) 2 *Insolvency Law Journal* at 48 referred to in *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁵³ Emphasis added.

the practice was seen as “one of the greatest sources of disquiet in relation to professional remuneration.”⁵⁴ Reasons for this view can be seen in the decision of *In re Carlton, Limited*:

“In my judgment it is vital to recognise three things in this field. First, time spent represents a measure not of the value of the service rendered but the cost of rendering it. Remuneration should be fixed so as to reward value, not so as to indemnify against cost. Second, time spent is only one of a number of relevant factors, the others being, as I have said, those which find expression in r 2.47 and similar rules. The giving of proper weight to these factors is an essential part of the process of assessing the value, as distinct from the cost, of what has been done. Third, it follows from the first two points that, as the task is to assess value rather than cost, the tribunal which fixes remuneration needs to be supplied with full information on all the factors which I have mentioned.”

It can be seen that a rate or scale of charges can be used for prospectively fixing the administrator’s remuneration. However, it appears that the courts will interrogate the method by which an administrator’s remuneration is calculated to ascertain reasonable remuneration taking into account the time charged for the work as one factor.

What approach is taken by the court to fix the administrator’s remuneration where work is performed on a time basis for charging?

The approach taken by the courts so far is to calculate the remuneration of the administrator based on a reasonable hourly rate times the number of hours reasonably spent on the work. This approach called the “lodestar” amount has its basis in United States law under the Bankruptcy Code and recognised by the courts⁵⁵. The lodestar amount is determined by⁵⁶:

- deciding whether the work performed was necessary to the administration
- deciding whether the work was performed within a reasonable time
- deciding whether the hourly rate is reasonable.

To decide if the hourly rate is reasonable, the court will examine the usual charge made by the administrator and other administrators.

When the lodestar amount is determined it is then adjusted to reflect other factors⁵⁷:

- quality of the work performed
- complexity in the administration over and above the normal complexity of such work
- novelty and difficulty of the issues that confronted the administrator
- ultimate result obtained by the administrator.

This list is not exhaustive but inclusive.

The quantity of detail required of an administrator to support a claim for remuneration based on time charges “must be proportionate to the size of the estate and the amount of time

⁵⁴ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁵⁵ *In re Boston and Maine Corporation v Moore* 776 F 2d 2, 7 (1st Circ 1985); *Copeland v Marshall* 641 F 2d 880, 891 (DC Circ 1980)

⁵⁶ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁵⁷ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

spent.”⁵⁸ Sufficient information is required for creditors to make an assessment about whether the total costs are reasonable to be fixed as the remuneration of the administrator⁵⁹. A guide to the information required is⁶⁰:

- statement of work undertaken during the administration
- account of expenditure containing itemised amounts for the charges against the work done
- brief explanation of the nature of each main task undertaken showing what time was devoted to these tasks
- brief statement of considerations leading to embarking on the tasks
- identify unexpected difficulties experience with particular tasks proving more difficult or expensive to perform than first expected
- appropriate charge-out rates for each person involved in the work of the administration
- other information to show that over-charging has not occurred.

The purpose of this type of information being presented is not necessarily that of proving time costs for fixing the administrator’s remuneration by creditors. Rather the purpose is explained to be for the court to perform its function⁶¹. However, the quantity and quality of information needed for creditors to fix the administrator’s remuneration may be more burdensome for the administrator:

“If the administrator is to ask the creditors to fix his fees then the information in support of that claim may need to be more detailed than in an application to the court.”

The reason for this view is the fear “that if the request is made to the creditors the fees will not be closely scrutinised.” This fear was identified as⁶²:

- in a large administration the task of scrutiny will be a difficult one
- creditors, or even a small committee of creditors, will often lack the knowledge to be able to mount a successful challenge to the practitioner’s claims
- creditors (even a committee of creditors) may not think that the effort is worthwhile.

Consequently, the court would prefer that the administrator provide greater detail for creditors to make their task easier. Despite the level of detail it may be necessary for creditors to seek assistance from a costs expert to fix the administrator’s remuneration.

⁵⁸ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁵⁹ *Re Metforce Healthcare Services Ltd (In Liquidation)* [2001] 3 NZLR 145; *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁶⁰ *Mirror Group Newspapers plc v Maxwell (No 2)* [1988] 1 BCLC 638; *Venetian Nominees Pty Ltd v Colan* (1998) 20 WAR 96; *Re Solfire Pty Ltd (in liq) No. 2* [1999] 2 Qd R 182; *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁶¹ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁶² *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

Are disbursements for expenses part of the administrator's remuneration?

An administrator of a company under administration is liable for debts incurred in performing or exercising of the functions and powers of office (or purporting to do so)⁶³. The debts relate to any of:

- services rendered
- goods bought
- property hired, leased, used or occupied.

Under *Corporations Act 2001*, s 443D the administrator is entitled to be "indemnified out of the company's property" for debts for which the administrator is liable. This includes responsibilities for remitting tax.

In relation to the costs of services rendered and the other activities, the administrator would incur legal costs. Legal costs are seen to be the largest component of the disbursements claimed by administrators⁶⁴.

The court is concerned that administrators do not incur legal costs unnecessarily. They need to act as other commercial persons do when considering actions including legal actions. If legal action is necessary⁶⁵:

"A prudent businessman will shop around to ensure that he obtains the services of good lawyers (solicitors and counsel) at the best possible rate. Personal relationships should not obscure the practitioner's duty. The sole selection criteria should be the benefit to him as a litigant. So he will avoid cosy relationships with solicitors and counsel. He will negotiate over fees with both solicitors and counsel. He will closely monitor the fees as they are incurred. (In some jurisdictions contingency fees are permitted and where they are they should be exploited). Overall, this approach is likely to cause disquiet among the profession."

The legal basis for requiring an administrator to act as a prudent business person would act in the circumstances is the fiduciary relationship between the administrator and creditors⁶⁶.

While an administrator is indemnified for costs incurred, those costs would be subject to interrogation to determine if the expenditures were necessary in the circumstances and whether the administrator shopped around for the best price before taking particular activities such as legal action. The legal fees (and other costs) need to be competitive and those legal practitioners acting for administrators need to justify the reasonableness of the fees charged and the work performed for the administrator. The guide given earlier in relation to administrators' remuneration should be applied to legal practitioners (and other professionals and service providers) in proving costs for work done.

Taking this approach to costs for disbursements in an administration is seen as an important step in restoring public confidence in external management⁶⁷.

⁶³ *Corporations Act 2001*, s 443A(1)

⁶⁴ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁶⁵ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁶⁶ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

⁶⁷ *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682

High Court decision pending

The High Court has reserved its judgment on 8 December 2004 in *Angas Law Services Pty Ltd (In Liquidation) v Carabelas*⁶⁸ involving monies lost by the company due to the misfeasance of the directors. The transaction involved a series of loans from a bank and used to raise funds of the benefit of other companies. The transaction was recorded as a debt of the company. The question is whether an act of the directors that resulted in a disadvantage to the creditors of the company and ultimately causing the insolvency of the company can be validly approved by the members of the company.

The matter involved former provisions of the current *Corporations Act 2001*, ss 180, 182 concerning the duties of care and diligence and use of position and unfair preference provisions under *Corporations Act 2001*, s 588FA(1) and hence voidable under *Corporations Act 2001*, s 588FE.

Federal Magistrates Court jurisdiction

The jurisdiction of the Federal Magistrates Court will be expanded by the *Jurisdiction of the Federal Magistrates Court Legislation Amendment Bill 2004* to allow the court to deal with external management matters under *Corporations Act 2001*, Ch 5. This will be effected by extending the definition of "court" in *Corporations Act 2001*, s 58AA(1) to include the Federal Magistrates Court. The legislation extends jurisdiction for the Federal Magistrates Court to deal with civil matters arising for receivers and controllers, voluntary administration and winding-up in insolvency. The relevant provision is proposed section 1337B(1A):

- (1A) Jurisdiction is conferred on the Federal Magistrates Court with respect to:
 - (a) civil matters arising under Part 5.2, 5.3A or 5.7 in a proceeding or application that:
 - (i) is transferred to the Federal Magistrates Court from the Federal Court; or
 - (ii) relates to a corporation or body that is the subject of a proceeding or application that concerns another civil matter arising under one of those Parts and that has been transferred to the Federal Magistrates Court from the Federal Court; and
 - (b) civil matters arising under Part 5.4 (except section 459B) or Part 5.5, 5.7B or 5.8A; and
 - (c) civil matters arising under Part 5.4B, 5.6 or 5.9 in a proceeding or application that:
 - (i) is a proceeding or application in which the Federal Magistrates Court is exercising jurisdiction under paragraph (a) or (b); or
 - (ii) relates to a corporation or body that is the subject of a proceeding or application in which the Federal Magistrates Court is exercising jurisdiction under paragraph (a) or (b).

In relation to voluntary administration matters, the Explanatory Memorandum states:

"Item 6 extends the definition of "Court" in s 58AA(1) of the Corporations Act to include the FMC for the purposes of Part 5.3A (Administration of a company's affairs with a view to executing a deed of company arrangement) of Chapter 5 of the Corporations Act. Note 2 in Item 6 refers to cl 1337B(1A)(a) (Item 25 of Schedule 3 to the Bill). That clause will confer jurisdiction on the FMC with respect to civil matters arising under Part 5.3A of the Act in a proceeding or application that is transferred to the FMC from the

⁶⁸ High Court of Australia, *Bulletin 2004 No. 10*, as at 24 December 2004 (A8/2004). The appeal is from *Carabelas v Scott* [2003] SASC 389

Federal Court, or that relates to a corporation or body that is the subject of a proceeding or application that concerns a civil matter arising under Part 5.2 that has been transferred to the FMC from the Federal Court.”

The Federal Magistrates Court will only exercise jurisdiction in relation to this item and other items “where the matter has first been filed in the Federal Court and the Federal Court considers that the matter is suitable for the FMC.” The reason given in the Explanatory Memorandum for this approach is that “matters arising under Part 5.3A of the Act are potentially complex or may otherwise be unsuitable for the FMC.”

The transfer of civil matter proceedings arising under *Corporations Act 2001*, Pts 5.2, 5.3A or 5.7 requires the Federal Court to have regard to each of the following factors⁶⁹:

- whether proceedings in respect of an associated matter are pending in the Federal Magistrates Court
- whether the resources of the Federal Magistrates Court are sufficient to hear and determine the appeal
- the interests of the administration of justice
- factors detailed in the regulations.

The Federal Magistrates Court’s jurisdiction is limited to awarding an amount of up to and including \$750,000⁷⁰ (or as specified in the regulations) for loss or damage. This is comparable with the jurisdiction of the New South Wales District Court.

The *Jurisdiction of the Federal Magistrates Court Legislation Amendment Bill 2004* does not appear to have priority in the legislative program. It is expected that consultations during 2005 will result in the Bill being passed for operation in 2006.

Proposed changes to the Corporations Act 2001

The report, Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake*, June 2004, made 63 recommendation on a range of external management matters including the voluntary administration scheme.

The Parliamentary Joint Committee on Corporations and Financial Services resolved to inquire into and report on the operation of Australia’s insolvency and voluntary administration laws. Its terms of reference were to consider:

- appointment, removal and functions of administrators and liquidators
- duties of directors
- rights of creditors
- cost of external administrations
- treatment of employee entitlements
- reporting and consequences of suspected breaches of the Corporations Act 2001
- compliance with, and effectiveness of, deeds of company arrangement
- whether special provision should be made regarding the use of phoenix companies.

According to the Joint Committee an “effective insolvency regime must achieve a careful balance of multiple and even conflicting policies and objectives. The foremost objective, in the

⁶⁹ Proposed section 1337HA.

⁷⁰ The legislation expresses the jurisdiction as “does not extend to awarding an amount for loss or damage that exceeds \$750,000”.

Committee's view, is to promote and maximise trust and confidence in the operation of insolvency law on the part of the community in general and the business and corporate sector in particular."

The Joint Committee placed importance on the following objectives and values:

- encouraging early intervention in the affairs of companies in financial difficulties and restoring companies to profitable trading where practicable
- **striking a balance between voluntary administration and liquidation**⁷¹
- protecting the interests of creditors and, in particular, employees in circumstances of financial difficulty and corporate malpractice
- maximising the value of an insolvent company's assets
- reducing the cost of credit
- encouraging the good management of companies and deterring malpractice and, in particular, abuses of the corporate form and insolvency procedures generally.

The Government is making further consultations in relation to the recommendations made in the report and legislation is intended to be drafted following these consultations.

⁷¹ Emphasis added.



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